No. 17-756

In the Supreme Court of the United States

PUBLIC SERVICE COMPANY OF NEW MEXICO,
PETITIONER

v.

LORRAINE BARBOAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 25 U.S.C. 357 authorizes condemnation of an easement across a parcel of allotted land held in trust by the United States in which an Indian tribe, pursuant to federal statute, has acquired fractional undivided interests.

2. If 25 U.S.C. 357 authorizes a condemnation action in those circumstances, whether the action can proceed if the Indian tribe invokes its sovereign immunity from suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 857 F.3d 1101. The decisions of the district court (Pet. App. 86a-128a, 38a-85a) are reported at 155 F. Supp. 3d 1151 and 167 F. Supp. 3d 1248.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2017. A petition for rehearing was denied on July 21, 2017 (Pet. App. 163a-164a). On September 15, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 20, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 357 of Title 25 of the U.S. Code provides:

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

STATEMENT

1. a. In the late 1800s, "the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually," with the objective of assimilation. *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992). Congress provided for the allotment of reservations under various reservation-specific statutes and treaties and under the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388. Congress also provided for the allotment of public lands for settlement by individual Indians, known as public domain allotments. See 25 U.S.C. 334, 336; *Morton* v. *Ruiz*, 415 U.S. 199, 226 n.22 (1974).

Those statutes generally provided for the allotted lands to be held in trust by the United States (and therefore restricted from alienation or encumbrance) for a period of time, typically 25 years. At the conclusion of that period (unless extended by statute), a fee patent would be issued to the individual Indian allottee, freeing the land of its restrictions. *County of Yakima*, 502 U.S. at 254. The "allotment era" ended with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq.*, which "halted further allotments and extended indefinitely the existing periods of trust

applicable to already allotted (but not yet fee-patented) Indian lands." *County of Yakima*, 502 U.S. at 255-256.

"[A]s successive generations came to hold the allotted lands," the parcels of land "splintered into multiple undivided interests." *Hodel* v. *Irving*, 481 U.S. 704, 707 (1987). In 1983, to address that problem, Congress enacted the Indian Land Consolidation Act (ILCA), Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (25 U.S.C. 2201 *et seq.*). ILCA provides numerous mechanisms for "eliminating undivided fractional interests in Indian trust or restricted lands" and for "consolidating * * * tribal landholdings." 25 U.S.C. 2203(a). An Indian tribe may acquire a fractional interest ("less than 5 percent of the entire undivided ownership of the parcel of [allotted] land") through intestate descent from an individual allottee. 25 U.S.C. 2206(a)(2)(D)(i). A tribe may also purchase an interest in a parcel of allotted land at probate, 25 U.S.C. 2206(*o*); "with the consent of the owner," 25 U.S.C. 2212(a)(1); or by making a fair market value or matching offer before the Secretary of the Interior (Secretary) terminates the trust or lifts the restriction on alienation, 25 U.S.C. 2216(f). The United States holds title to any acquired interest in trust on behalf of a tribe. 25 U.S.C. 2209.

b. Congress has enacted various statutes authorizing the Secretary to grant rights-of-way across Indian lands. Of relevance here, the first paragraph of Section 3 of the Act of March 3, 1901 (1901 Act), ch. 832, 31 Stat. 1058, authorized the Secretary to grant rights-of-way for telephone and telegraph lines through "any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or

through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation." § 3, 31 Stat. 1083-1084 (25 U.S.C. 319). Section 4 of that Act authorized the Secretary to permit "the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation." § 4, 31 Stat. 1084 (25 U.S.C. 311).

In the Act of February 5, 1948 (1948 Act), ch. 45, 62 Stat. 17 (25 U.S.C. 323-328), Congress authorized the Secretary "to grant rights-of-way for all purposes" across lands "held in trust by the United States for individual Indians or Indian tribes," 25 U.S.C. 323, provided that a majority of the individual interests consent with respect to lands of individual Indians and that the tribe consents with respect to lands belonging to a tribe, 25 U.S.C. 324. Pursuant to 25 U.S.C. 328, the Secretary has promulgated regulations implementing those statutory requirements. 25 C.F.R. Pt. 169. Under those regulations, "[t]ribal land means land or any interest therein, title to which is held by the United States in trust for a tribe," 25 C.F.R. 169.1(d) (2015), and "[i]ndividually owned land means land or any interest therein held in trust by the United States for the benefit of individual Indians," 25 C.F.R. 169.1(b) (2015).[1]

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[1] In the current version of the regulations, those definitions are located at 25 C.F.R. 169.2. "Tribal land" is defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status."

c. In addition to the above provisions giving the Secretary authority to grant rights-of-way, the statute at issue in this case authorizes the condemnation of "[l]ands allotted in severalty to Indians * * * for any public purpose under the laws of the State * * * where located in the same manner as land owned in fee may be condemned." 25 U.S.C. 357. Section 357 was enacted as the second paragraph of Section 3 of the 1901 Act, 31 Stat. 1083-1084, discussed at p. 3, *supra.*

2. In 1960, petitioner undertook to construct a 60-mile-long electric power line between substations in Grants and Gallup, New Mexico. Pet. App. 92a; Pet. 5. The proposed power line crossed parcels owned by non-Indians, parcels held by the United States in trust for the Navajo Nation (the Tribe), and 57 public domain allotments held by the United States in trust for individual Indians. Pet. App. 12a-13a. In 1960, the Bureau of Indian Affairs (BIA) granted petitioner a 50-foot-wide right-of-way for a 50-year term over all the parcels that it held in trust, and petitioner then constructed the power line. *Id.* at 12a-13a, 92a.

Before the 50-year period expired, petitioner sought to renew the right-of-way for an additional 20 years pursuant to the 1948 Act. Pet. App. 13a, 93a. The Tribe provided written consent for the parcels in which it held the entire beneficial interest. *Ibid.* The requisite number of individual beneficial owners of the 57 allotted parcels also consented. *Ibid.* But in 2014, some individual owners of five allotments revoked their consent, such that petitioner no longer had consent from a majority of

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Ibid. "Individually owned Indian land" is defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more individual Indians in trust or restricted status." *Ibid.*

the beneficial interests in those allotments. *Id.* at 13a-14a, 93a. In 2015, BIA renewed the right-of-way across the parcels for which consent had been provided, but it did not renew the right-of-way across the five allotments for which consent was not provided. *Id.* at 93a.

Of the five allotments for which consent was not provided, the Tribe as of 2015 had an undivided 13.6% interest in Allotment 1160 (a 160-acre parcel allotted to Hostine Sauce in 1919) and an undivided 0.14% interest in Allotment 1392 (a 160-acre parcel allotted to Wuala in 1921). Pet. App. 12a. The Nation had obtained both interests pursuant to ILCA. *Ibid.*

3. a. Petitioner filed this action in the district court under 25 U.S.C. 357, seeking to condemn a perpetual right-of-way across the five allotments. Pet. App. 14a. Petitioner relied on state law, N.M. Stat. Ann. § 62-1-4 (2015), for its condemnation authority. Compl. ¶ 4. As required by Federal Rule of Civil Procedure 71.1, petitioner named as defendants the United States and the beneficial owners, including the Tribe. Pet. App. 14a.

The Tribe moved to dismiss the action with respect to Allotments 1160 and 1392. Pet. App. 90a. The Tribe argued that it was not a proper defendant because of its sovereign immunity, and it further argued that the condemnation actions against Allotments 1160 and 1392 had to be dismissed in their entirety under Federal Rule of Civil Procedure 19 because the Tribe was a required party. Pet. App. 90a. The individual defendants joined the motion. *Ibid.*

b. The district court granted the Tribe's motion and dismissed the action as to Allotments 1160 and 1392. Pet. App. 86a-128a. The court rejected petitioner's argument that Section 357 authorizes condemnation of a parcel that had been previously allotted without regard

to the identity of the current beneficial owners. In the court's view, Section 357's plain language "only allows condemnation of allotted lands owned by individual tribal members" and "does not expressly apply to allotted lands acquired by Indian tribes." *Id.* at 106a. The court concluded that petitioner lacks the authority to condemn Allotments 1160 and 1392 because "when a tribe acquires an interest in allotted land, the land is no longer land 'allotted in severalty to Indians.'" *Id.* at 120a (citing *Nebraska Pub. Power Dist.* v. *100.95 Acres of Land in Cnty. of Thurston*, 719 F.2d 956, 961 (8th Cir. 1983)).

The district court further concluded that the Tribe's beneficial interest made it a required party under Rule 19(a), and that the condemnation action against Allotments 1160 and 1392 should not proceed without the Tribe based on the factors set forth in Rule 19(b). Pet. App. 124a-128a. The court dismissed without prejudice petitioner's action against Allotments 1160 and 1392, observing that petitioner "is not completely without a remedy" because it could still acquire a voluntary right-of-way under 25 U.S.C. 323-328. Pet. App. 128a.

c. Petitioner moved the district court to reconsider its decision and set aside the dismissal order or, in the alternative, to certify four questions for interlocutory appeal. C.A. App. 185-187. The court declined to set aside its dismissal order, Pet. App. 38a-85a, but it agreed to certify four questions for interlocutory review under 28 U.S.C. 1292(b), including the statutory question whether Section 357 authorizes condemnation of a right-of-way across a parcel of allotted land held in trust

by the United States when an Indian tribe holds a fractional beneficial interest. Pet. App. 82a- 83a.[2]

4. The court of appeals granted interlocutory appeal and affirmed. Pet. App. 1a-31a.

a. The court of appeals addressed only the statutory question and held that Section 357 does not authorize petitioner's condemnation of Allotments 1160 and 1392 in the circumstances of this case. Pet. App. 17a-28a.

The court of appeals concluded that petitioner could not condemn the Tribe's interests in the allotments. Pet. App. 17a-20a. The court explained that although the language of Section 357 "plainly authorizes" petitioner to "seek condemnation of any land parcel previously allotted and whose current beneficial owners are individual Indians," a similar authorization for tribal lands is "starkly absent" from Section 357. *Id.* at 18a. The court noted that 25 U.S.C. 319, which was enacted simultaneously with Section 357, authorizes the Secretary "to grant certain rights-of-way over reservations and other lands held by tribes, as well as allotted lands." Pet. App. 18a. Given that context, the court concluded that "[t]he statutory silence for condemnation of tribal lands [in Section 357] poses a serious obstacle for [petitioner]." *Id.* at 19a.

The court of appeals rejected petitioner's argument that Section 357 authorizes condemnation of all interests in land that has been allotted—even if a tribe subsequently acquired 100% of the interests—because the allotment remains "[l]ands allotted in severalty to Indians" within the meaning of Section 357. Pet. App. 19a-

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[2] The other three questions related to the Rule 19 question: whether the Tribe was a required party, whether it had sovereign immunity from suit, and whether the action should proceed in the Tribe's absence. Pet. App. 83a.

20a (citation omitted; brackets in original). The court acknowledged that the 1901 Congress might have expected the demise of tribes and reservations, but it concluded that "the historical record * * * provides * * * no license to disregard or slant [Section] 357's plain language." *Id.* at 19a. The court further stated that even if Section 357 were ambiguous, it would apply the Indian-law canon to rule "in favor of tribal sovereignty and against a permanent anti-tribal-land classification." *Id.* at 20a.

b. The court of appeals further concluded that when a tribe owns a fractional interest in an allotment, the land is tribal land that is not subject to condemnation under Section 357. Pet. App. 20a-23a. The court observed that the BIA's right-of-way regulations provide that tribal consent to a right-of-way is required for any parcel in which a tribe holds an interest, even if the tribal interest is not a majority interest. *Id.* at 21a-22a (citing 25 C.F.R. Pt. 169; 80 Fed. Reg. 72,492, 72,497 (Nov. 19, 2015)). The court acknowledged that those regulations "do not apply to condemnation actions," but it concluded that those regulations support the court's interpretation of Section 357's text. *Id.* at 22a-23a. The court noted that the Eighth Circuit reached a similar conclusion in *Nebraska Public Power*, *supra*. Pet. App. 21a, 23a-24a. In rejecting petitioner's policy arguments (*id.* at 23a-28a), the court observed that Congress has not amended Section 357 following the Eighth Circuit's 1983 decision in *Nebraska Public Power*, but has instead "acted to protect and strengthen tribal sovereignty" in various ways. *Id.* at 27a.

c. In the court of appeals, the United States argued that Section 357 does not permit condemnation of tribal interests in allotted land. Gov't C.A. Br. 19-32. But the

United States further argued that Section 357 could reasonably be interpreted to authorize condemnation of individually owned interests in a mixed-ownership allotment. *Id.* at 32-40. The United States noted that, under the BIA's regulations governing the authority of the Secretary to grant a right-of-way with consent, a mixed-ownership parcel is *both* "tribal land" (25 C.F.R. 169.1(d) (2015) ("land or any interest therein, title to which is held by the United States in trust for a tribe")) *and* "individually owned land" (25 C.F.R. 169.1(b) (2015) ("land or any interest therein held in trust by the United States for the benefit of individual Indians")), and that the BIA had explained that "[a] tract in which both a tribe and an individual own interests would be considered 'tribal land' for the purposes of requirements applicable to tribal land and would be considered 'individually owned Indian land' for the purposes of the interests owned by individuals" (80 Fed. Reg. at 72,496). Gov't C.A. Br. 34-35.

The United States acknowledged that the BIA's right-of-way regulations do not govern condemnation proceedings, but it argued that "Interior's interpretation of the 1948 Right-of-Way Act supports an interpretation of Section 357 that could allow a parallel result." Gov't C.A. Br. 35. Under that interpretation, individual tribal members could not obstruct a project by refusing to give consent. But a project proponent like petitioner would have to negotiate with a tribe with respect to its fractional interest in an allotment, just as petitioner had negotiated with respect to parcels in which the Tribe held the entire beneficial interest.

In apparent response to the United States' position, the court of appeals stated in a footnote, "Because we hold that the tribal interests make Allotments 1160 and

1392 tribal land for the purposes of [Section] 357, [petitioner] cannot proceed with a condemnation action against the individual interests in the parcels while leaving the tribal interests undisturbed." Pet. App. 23a n.5. "Holding otherwise," the court stated, "would accomplish little other than to waste judicial resources, and those of [petitioner], as [petitioner] would still need tribal consent before it could obtain a right-of-way" under Section 357. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 21-34) that 25 U.S.C. 357 authorizes condemnation of a right-of-way across a parcel of allotted land, even if an Indian tribe holds an undivided interest in the allotment and regardless of whether the tribe has given consent with respect to its interest. Section 357 does not authorize condemnation of tribal interests in land, and the court of appeals correctly rejected petitioner's argument. In the United States' view, Section 357 could reasonably be read to authorize condemnation of individual interests in a mixed-ownership allotment if the tribe consents to the right-of-way. But the court did not categorically foreclose the possibility that a project proponent could condemn individual interests in a mixed-ownership allotment after it obtains the tribe's consent, which petitioner did not obtain in this case with respect to Allotments 1160 and 1392. Nor does the decision below conflict with any decision of this Court or another court of appeals. The petition should therefore be denied.

1. a. Section 357 provides that "[l]ands allotted in severalty to Indians" may be condemned for a public purpose under the laws of the State where the property is located. 25 U.S.C. 357. When Congress enacted that provision, it understood that there were two categories

of Indian land: (1) land in which a tribe held the entire beneficial interest; and (2) land allotted to individual Indians. See pp. 2-3, *supra*. The text of Section 357 addresses only the second category of land; it does not specifically address mixed-ownership parcels. When read in context, Section 357 does not authorize the condemnation of tribal interests in an allotted parcel with mixed ownership.

Section 357 was enacted as part of Section 3 of the 1901 Act. In that same section, Congress also gave the Secretary authority to grant rights of way for telephone and telegraph lines "through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, * * * or through any lands which have been allotted in severalty to any individual Indian under any law or treaty." 1901 Act § 3, 31 Stat. 1083-1084. In the next paragraph (which became Section 357) Congress authorized condemnation only of "lands allotted in severalty to Indians," *ibid.*, not of lands (or interests in lands) held by the United States in trust for tribes.

b. The court of appeals correctly recognized that, given that statutory context, petitioner cannot condemn the Tribe's interests in mixed-ownership allotments. Pet. App. 18a-20a. The statute "plainly authorizes" condemnation of allotted land that is owned by individual Indians, but a similar authorization for land that is owned by an Indian tribe is absent from Section 357. *Id.* at 18a. Furthermore, the court properly concluded that the BIA's right-of-way regulations, although not directly applicable to Section 357 condemnation proceedings, support an interpretation of Section 357 as prohibiting the condemnation of tribal interests in a mixed-ownership allotment. *Id.* at 22a-23a. Those regulations

define tribal land as land "or any interest therein" held by the United States in trust for a tribe. 25 C.F.R. 169.1(d) (2015).

The court of appeals' decision is consistent with the decision of the only other court of appeals to have considered the issue. In *Nebraska Public Power District* v. *100.95 Acres of Land in County of Thurston*, 719 F.2d 956 (8th Cir. 1983), a power company sought to construct an electric transmission line across 29 allotments within the Winnebago Indian Reservation in Nebraska —a project opposed by the Winnebago Tribe. *Id.* at 957-958. Before the power company filed its Section 357 condemnation action, the individual Indian owners of undivided beneficial interests in 15 allotments deeded their interests to the Winnebago Tribe and reserved life estates for themselves. See *Nebraska Pub. Power Dist.* v. *100.95 Acres of Land in Cnty. of Thurston*, 540 F. Supp. 592, 595 (D. Neb. 1982), aff'd in part and rev'd in part, 719 F.2d 956 (8th Cir. 1983).

The Eighth Circuit held that the power company did not have authority under Section 357 to condemn land in which an Indian tribe holds an interest. *Nebraska Pub. Power*, 719 F.2d at 957. The court noted that the BIA's right-of-way regulations defined "[t]ribal land" as "land *or any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* at 962 (quoting 25 C.F.R. 169.1(d) (1982)).[3] The court relied on that regulation to conclude that the individual Indians' conveyances to the Winnebago Tribe "create[d] tribal land not subject to condemnation under section 357." *Ibid.*

c. Petitioner contends (Pet. 22-26) that the court of appeals' decision is incorrect because, in petitioner's

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[3] Before 1982, the regulations were codified at 25 C.F.R. Part 161. See 47 Fed. Reg. 13,326, 13,327 (Mar. 30, 1982).

view, "'condemnability' is an attribute of the land and runs with the land," regardless of who owns the land. Pet. 22 (capitalization omitted).

i. Petitioner contends that Section 357, by authorizing the condemnation of "lands in severalty allotted to Indians," authorizes the condemnation of any parcel that was allotted in severalty to Indians as a historical matter, without regard to whether a tribe currently has an ownership interest in the land. Pet. 22 (citation omitted). That reading is unsound given the statutory context. As the court of appeals correctly recognized, mixed-ownership parcels were not contemplated by Congress when it enacted Section 357, and the statute does not specifically address them. But statutory context indicates that Congress did not authorize condemnation of tribal interests in land. Pet. App. 18a-20a.

ii. Petitioner further contends (Pet. 22-23) that condemnation is an *in rem* action, which is "consistent with condemnability being a characteristic of the land, and not a personal attribute of the individual landowner." This Court has recognized, however, that "'jurisdiction over a thing'" (*i.e., in rem* jurisdiction) is a "customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Shaffer* v. *Heitner*, 433 U.S. 186, 207 (1977) (quoting Restatement (Second) of Conflict of Laws § 56, intro. note (1971)). The interests of the landowner cannot be separated from the land itself.

For the proposition that condemnation is permissible because it is an *in rem* proceeding, petitioner cites (Pet. 22) *United States* v. *Carmack*, 329 U.S. 230 (1946), but that case does not support petitioner's contention. In *Carmack*, the United States sought to condemn land in Cape Girardeau, Missouri that had been granted to the city in trust for public purposes. *Id.* at 232-233. The

city did not object to the condemnation for federal projects, but respondent Carmack (a descendant of the grantors) opposed the condemnation based on the trust. *Id.* at 234.

Before proceeding to the merits, the Court noted that it did not need to decide the United States' argument that Carmack did not have an interest permitting her to oppose the condemnation because "[t]he proceeding to condemn the land being *in rem*, the jurisdiction of the court does not turn upon her participation in the case." *Carmack*, 329 U.S. at 235 n.2. But that does not mean that the owners of property interests play no role in condemnation proceedings. Carmack was not prohibited from presenting her arguments against condemnation; the Court simply observed that the action could have proceeded without her participation. *Ibid.* Federal Rule of Civil Procedure 71.1 now recognizes the right of those claiming property interests to participate in federal-court condemnation proceedings if they so choose. Moreover, this Court expressly held in *Minnesota* v. *United States*, 305 U.S. 382 (1939), that the United States is an indispensable party in Section 357 condemnation proceedings. *Id.* at 386. For that reason, the court of appeals correctly stated that a Section 357 condemnation action "is not purely an *in rem* proceeding." Pet. App. 67a.

Petitioner also cites (Pet. 22-23) a federal district court case holding that tribal fee land was subject to state condemnation proceedings and argues that the same should be true of allotment land. See *Oneida Tribe of Indians* v. *Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008). That court's holding was limited to allotments of reservation lands for which fee patents had been issued to individual Indians under the Indian

General Allotment Act and which were later reacquired in fee by the Oneida Tribe. *Id.* at 911-912. In contrast, the parcels at issue in this case were allotted to individual Indians from public domain lands and have remained continuously in trust status. The district court correctly concluded that the federal statutes at issue in *Village of Hobart* do not apply to these trust allotments. Pet. App. 31a n.7. Petitioner's citation (Pet. 23-24) of two other cases involving fee-patented allotments later reacquired by tribes are similarly inapposite and do not involve condemnation under Section 357. See *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996) (permitting an action to partition a fee-patented allotment in which a tribe had reacquired a fractional interest based on an "in rem" exception to tribal sovereign immunity);[4] *Lummi Indian Tribe* v. *Whatcom Cnty.*, 5 F.3d 1355, 1359 (9th Cir. 1993) (addressing county's authority to tax fee-patented lands reacquired by a tribe), cert. denied, 512 U.S. 1228 (1994).

iii. Petitioner next contends (Pet. 24) that Congress could not have intended for the policy permitting condemnation of allotment land in Section 357 to be "frustrated" by tribal ownership of a fractional undivided interest in the allotment. That invocation of legislative intent is unsupported by any specific analysis of the 1901 Act. Although the Act was passed during the allotment period, the specific parameters of the policy behind Section 357 are not set out. The court of appeals correctly concluded that it is inappropriate to infer from

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[4] This Court is considering the propriety of the Washington Supreme Court's recognition of an "in rem" exception to tribal sovereign immunity in *Upper Skagit Indian Tribe* v. *Lundgren*, No. 17-387 (argued Mar. 21, 2018).

the general policy of allotment that the 1901 Congress intended *tribal* interests to be subject to condemnation under state law. Pet. App. 19a-20a.

iv. Finally, petitioner misplaces reliance (Pet. 25-26) on *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), for the proposition that federal right-of-way statutes should be interpreted to avoid "[c]omplications and confusion" that could arise from special treatment for Indian lands. Petitioner observes (Pet. 26) that tribes are continuing to acquire fractional interests in allotments, and it contends that declining to permit mixed-ownership parcels to be condemned under Section 357 would complicate the process of obtaining rights of way. Petitioner ignores, however, that Section 357 only permits condemnation of allotted lands; Indian lands that were never allotted are not subject to condemnation. Petitioner's power line crosses both tribal trust lands (unallotted) and allotted lands, so renewal of the right-of-way cannot be accomplished by a single procedure regardless of how Section 357 is interpreted.

2. Petitioner contends (Pet. 12-20) that the court of appeals' decision poses a substantial risk to national infrastructure. But the potential effects of the decision are speculative, even as to petitioner. Petitioner's inability to obtain renewal for its right-of-way is attributable in large part to its litigation strategy, and it is far from clear that petitioner cannot obtain renewal absent this Court's intervention.

a. In 2009, petitioner successfully negotiated with the Tribe for renewal of the right-of-way across parcels held by the United States in trust for the Tribe. Pet. App. 13a. For the mixed-ownership allotments, the proper course would be for the utility to negotiate with

the tribe with respect to its interests in those allotments.[5] But petitioner took the position that it could condemn a mixed-ownership allotment under Section 357 without tribal consent and named the Tribe as a defendant in a condemnation action along with the individual owners. The Tribe moved to dismiss based on its sovereign immunity from suit.[6]

In the court of appeals, the United States argued that Section 357 could reasonably be interpreted to authorize condemnation of individually owned interests in a mixed-ownership allotment, even though the Tribe's interests could not be condemned. Gov't C.A. Br. 32-40. The court of appeals rejected the possibility of condemning the individual interests "while leaving the tribal interests undisturbed," because petitioner "would still need tribal consent before it could obtain a right-of-way under [Section] 324." Pet. App. 23a n.5. The court stated that condemning the individual interests in those circumstances "would accomplish little other than to waste judicial resources, and those of [petitioner]." *Ibid.* But the court did not categorically foreclose condemnation of individual interests in a mixed-ownership parcel where the entity seeking the right-of-way has already obtained the tribe's consent.

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[5] The New Mexico statute that authorizes condemnation requires negotiation prior to filing a condemnation action. N.M. Stat. Ann. § 62-1-4 (2015) ("If a corporation cannot agree with the owners as to a right-of-way or the compensation for a right-of-way, the corporation may proceed to obtain the right-of-way in the manner provided by law for condemnation of such property.").

[6] The Tribe had already given its consent to the right-of-way for the parcels in which it held the entire beneficial interest. Pet. App. 13a, 93a.

If petitioner obtained the Tribe's consent with respect to its fractional undivided interests in Allotments 1160 and 1392, as it had already done regarding other tribal lands, it could file a new condemnation action against the United States and the individual owners. If the individual owners continued to argue that Section 357 does not authorize condemnation of their interests in a mixed-ownership parcel, even where the Tribe had consented to the right-of-way, the district court would need to decide that question, and the court of appeals could address whether condemnation of individual interests is authorized by Section 357 in that further-developed context.

Although petitioner continues to argue that neither tribes nor individuals can prevent the condemnation of mixed-ownership parcels (Pet. 24-25), petitioner's amici acknowledge that their ability to condemn tribal interests in mixed-ownership parcels is far less important than their need for Section 357 condemnation authority for individual Indian interests. Edison Elec. Inst., Ass'n of Oil Pipe Lines, & Am. Gas Ass'n Amici Br. 5 (explaining that the Tribe's consent to renew the right-of-way over land it wholly owned "reflect[s] the reality that utility companies often work cooperatively with tribes and with proper sensitivity to tribal interests, and that petitioner's infrastructure is equally critical to the tribe's own membership"); see N.M. Oil & Gas Ass'n Amicus Br. 20 n.12 (acknowledging the interpretation advanced by the United States).

To be sure, it is possible that a tribe might refuse to consent to a right-of-way across a mixed-ownership parcel, just as a tribe might refuse with respect to a trust parcel that was never allotted. But tribal governments must consider the interests of all tribal members, not

just those with a beneficial interest in the parcels at issue. It can therefore be expected that tribes will appreciate the needs of the surrounding community and be mindful of Congress's power to intervene where a tribe's refusal to consent to a right-of-way is contrary to the national interest.

b. Petitioner contends (Pet. 21) that the Eighth Circuit has "prohibited use of [Section] 357 where an Indian tribe has acquired an interest in the allotment land." But it is not clear how the Eighth Circuit would apply Section 357 in circumstances in which a tribe owns a partial interest and supports the right-of-way, because the Winnebago Tribe opposed the right-of-way in *Nebraska Public Power*. See 719 F.2d at 957. And there is room for development of the law in the Ninth Circuit (Pet. 21, 23 n.13), which has never applied Section 357 to a mixed-ownership parcel.[7] Petitioner contends (Pet. 17) that many previously granted rights-of-way over allotments, including mixed-ownership allotments, will be up for renewal over the upcoming years. The Court should allow the courts of appeals to weigh in on how Section 357 applies in different scenarios before deciding whether certiorari on this issue is warranted.

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[7] In *Southern California Edison Co.* v. *Rice*, 685 F.2d 354 (9th Cir. 1982), cert. denied, 460 U.S. 1051 (1983), the court held that Section 357 provides an alternative to obtaining a right-of-way under the Indian Right-of-Way Act. *Id.* at 357. In *United States* v. *Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir. 1994), an action by the United States to enjoin a public utility district from operating its dam in a way that flooded tribal land and individually owned allotments, the court observed that Section 357 "does not apply to land held in trust for the Tribe," but did not address mixed-ownership parcels. *Id.* at 1552.

c. Petitioner criticizes (Pet. 32-34) the court of appeals for rejecting two "midpoint" interpretations of Section 357. Petitioner did not present any midpoint argument to the court of appeals until its petition for rehearing, in which it contended that whether land could be condemned under Section 357 could be determined based on whether the tribe held a majority interest when the condemnation action began—an interpretation that finds no support in the statutory text. 16-2050 Docket entry 15 n.11 (July 7, 2017).[8]

Petitioner also offers a second midpoint interpretation for the first time in the petition. Petitioner contends (Pet. 32) that Section 357 could be interpreted to "allow the utility to condemn the interests of individuals, but without effect on the interests held by the tribe." That interpretation is different from the United States' approach and is based on a misunderstanding of co-tenancy. Under the United States' interpretation of the relevant statutes, a tribe's interest in a mixed-ownership parcel is addressed through negotiation. Under petitioner's alternative approach, the tribe's interest is ignored. Petitioner's premise that it could use the parcels for a right-of-way without negotiating for or condemning the tribe's interest so long as it did not "exclud[e] the tribe from the property" misconstrues the authorities it cites. Pet. 33.

In support of its new midpoint approach, petitioner cites (Pet. 32-33) a condemnation order entered in *WBI Energy Transmission, Inc.* v. *Easement & Right-of-Way Across: Twp. 2 S*, 14-cv-130 D. Ct. Doc. 62 (D.

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[8] The majority-interest option petitioner now proffers is less expansive than what it presented in the court of appeals. Petitioner now restricts the option to initial rights-of-way, excluding right-of-way renewals after infrastructure has been constructed. Pet. 33-34.

Mont. Feb. 8, 2017). In that case, an individual Indian owned an undivided beneficial interest in two allotments along with the Crow Tribe, and she also owned the entire beneficial interest in three additional allotments. *Id.* at 4-5. She refused the pipeline company access to its natural gas pipeline for inspection and maintenance. *Id.* at 5-6. Although the order did not discuss the terms of the arrangement between the Crow Tribe and the pipeline company, the Tribe was not blocking access to the pipeline.

The district court ordered condemnation of the individual Indian's interests needed for the easement. 14-cv-130 D. Ct. Doc. 62, at 9-14. Citing *Nebraska Public Power*, *supra*, the order stated that Section 357 "may not be employed to condemn an interest in allotted lands which is beneficially owned by an Indian tribe." 14-cv-130 D. Ct. Doc. 62, at 9-10. Accordingly, the order stated, "any condemnation or preliminary injunction order entered in this action is applicable only to the extent of [the individual's] interest in the allotments and has no force with respect to the Crow Tribe's interest in allotments 1901 and 2009." *Id.* at 10. That statement did not appear to mean that the Tribe's interest could be ignored, but rather that the Tribe's interest was to be addressed apart from the order.

Petitioner contends (Pet. 33) that the order in *WBI Energy* was based on a principle of co-tenancy that "[e]ach cotenant has a right to enter upon, explore and possess the entire premises, and to do so without the consent of his cotenants, though he may not do so to the exclusion of his cotenants to do likewise." *Ibid.* (quoting 2 Herbert Thorndike Tiffany, *The Law of Real Property* § 426, at 132 (3d ed. Supp. 2017) (Tiffany Real Property)) (brackets in original). That principle does not

support the argument that a cotenant could consent to an easement across the property to which another cotenant objects. Indeed, another section of the treatise cited by petitioner states that "[o]ne cotenant cannot, without the joinder of the others, grant an easement in the land." Tiffany Real Property § 456, at 273 (1939). That is because a "grant of an easement, made by one cotenant, * * * in an undivided interest in land is necessarily a nullity, so far as concerns the actual utilization of the land by the grantee. It involves an attempt by one cotenant * * * to enable a person, not a cotenant, to interfere, it may be perpetually, with the possession of the other cotenants." *Id.* at 274. Petitioner is thus incorrect to suggest that individual interests could be condemned without negotiating with the tribe.

3. Petitioner concedes that there is no circuit conflict on the question presented, but contends (Pet. 34-36) that this Court should grant the petition for a writ of certiorari to resolve a conflict in the courts of appeals on the scope of the Indian canon of construction. That canon, however, did not determine the outcome of petitioner's case. The court of appeals based its decision on Section 357's text and stated that it would apply the Indian canon to rule for the Tribe "[e]ven if [Section 357] were ambiguous." Pet. App. 20a. There is no need for this Court to review any purported split of authority on a canon of construction that did not affect the outcome of the case.

In any event, the court of appeals' invocation of the Indian canon is not inconsistent with statements by some courts that the canon applies only to statutes that were "passed for the benefit of dependent Indian tribes." See Pet. 35 (quoting *Alaska Pac. Fisheries* v.

United States, 248 U.S. 78, 89 (1918)). Although petitioner argues that Congress enacted Section 357 to favor the interests of the public, not tribal interests (Pet. 30), the condemnation provision was enacted as part of a statute primarily devoted to "[m]aking appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes." 1901 Act, ch. 832, 31 Stat. 1058.

4. The petition includes a second question presented that is contingent on the first question. Assuming the answer to the first question is that Section 357 authorizes the condemnation of a mixed-ownership allotment in which a tribe owns a fractional undivided interest, petitioner asks the Court to further decide whether condemnation proceedings may proceed if the Tribe invokes its sovereign immunity from suit. In the court of appeals, the United States argued that a tribe would be a required party in a Section 357 proceeding to condemn a mixed-ownership parcel based on its interest in the property, Gov't C.A. Br. 41-42 (citing Fed. R. Civ. P. 71.1(c)(3)), but that if the tribe asserted its sovereign immunity from suit, the condemnation action could nevertheless proceed because the United States—as the titleholder to the allotted land—is the sole indispensable party, *id.* at 42-47.

Petitioner sets forth no independent basis for this Court to grant certiorari on that question. The court of appeals did not address it, and there is no reason for this Court to depart from its usual practice of refraining to review questions that were not passed upon below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Further review of the second question presented is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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