No. 17-756

In The
Supreme Court of the United States

PUBLIC SERVICE COMPANY
OF NEW MEXICO,
a New Mexico Corporation,
Petitioner,

v.

LORRAINE BARBOAN, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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November 20, 2017

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QUESTIONS PRESENTED

A common feature in the Eighth, Ninth and Tenth Circuits is "allotment land." This land was once part of an Indian reservation but was carved out and "allotted" to individual members of the tribe as their own property, held in trust by the United States. In 1901, Congress enacted 25 U.S.C. § 357, which allows States and state-authorized public utilities to condemn rights-of-way across allotment land for any public purpose, while paying fair market value to the allotment holders. The Tenth Circuit held that, when an Indian tribe acquires *any* interest in a parcel of allotment land – no matter how small that interest – the statute no longer applies and no part of the parcel may be condemned for any public purpose. The Questions Presented by the Tenth Circuit's decision are:

1. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which an Indian tribe has a fractional beneficial interest, especially where (a) the the tribe holds less than a majority interest, (b) the purpose of condemnation is to maintain a long-standing right-of-way for a public utility, and (c) the statute was not "passed for the benefit of dependent Indian tribes." *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918)?

2. If 25 U.S.C. § 357 authorizes such a condemnation action, may the action move forward if the Indian tribe invokes sovereign immunity and cannot be joined as a party to the action?

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LIST OF PARTIES

The parties to the proceeding below were as follows:

Petitioner Public Service Company of New Mexico was the Appellant in the court of appeals.

Respondents were Appellees in the court of appeals. They are:

Lorraine J. Barboan	Leonard Willie
Laura H. Chaco	Irene Willie
Benjamin A. House	Charley J. Johnson
Mary R. House	Elouise J. Smith
Annie H. Sorrell	Shawn Stevens
Dorothy W. House	The Navajo Nation
	The United States of America

Twenty-two individuals named as defendants in the district court were also named in the notice of appeal to the Tenth Circuit; however, only the eleven listed here have any interest in the two allotments of land that were the subject of that appeal. The other individual defendants hold interests in *other* allotments of land and did not participate in the appeal below. *See* Br. of Navajo Nation and Individual Allottees, at 1-2, n. 1, No. 16-2050 (filed Oct. 21, 2016).

CORPORATE DISCLOSURE STATEMENT

Public Service Company of New Mexico is a New Mexico corporation. PNM Resources, Inc., its parent corporation, is a publicly-traded New Mexico corporation. PNM Resources, Inc. owns 100 percent of the common stock of Public Service Company of New Mexico.

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PETITION FOR WRIT OF CERTIORARI

Public Service Company of New Mexico ("PNM") petitions the Court for a writ of *certiorari* to review a judgment of the U. S. Court of Appeals for the Tenth Circuit. At issue is a decision that, in effect, partially repeals a one hundred-year old federal eminent domain statute that allows utilities to acquire rights-of-way across "allotment land" when needed for a public purpose.

Under the Tenth Circuit's ruling, if an Indian tribe acquires *any interest* in a parcel of allotment land – no matter how minute the interest and no matter when acquired – that parcel is no longer subject to the federal statute, even where condemnation is needed to maintain a long-standing right-of-way critical to the operations of a public utility.

OPINIONS BELOW

The Tenth Circuit's opinion and order, dated May 26, 2017, are reported at 857 F.3d 1101, and reproduced in this petition's appendix at App. 1a.

The Tenth Circuit's order, dated March 31, 2016, granting leave for an interlocutory appeal, is unreported but reproduced at App. 32a.

The district court's opinion and order, dated March 2, 2016, expanding on its previous dismissal of PNM's condemnation action and certifying four questions for interlocutory appeal, is reported at 167 F. Supp. 3d 1248 and reproduced at App. 38a.

The district court's opinion and order, dated December 1, 2015, dismissing PNM's condemnation

action against two parcels in which the Navajo Nation holds an interest, are reported at 155 F. Supp. 3d 1151 and reproduced at App. 86a.

JURISDICTION

The Tenth Circuit issued its decision on May 26, 2017, and denied a timely petition for *en banc* review on July 21, 2017. On September 15, 2017, Justice Sotomayor extended the time for filing this petition to November 20, 2017. *See* No. 17A289. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Enacted in 1901, 25 U.S.C. § 357 states:

> 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

Overview

This case arises out of efforts by PNM, a public utility, to renew its right-of-way for a major high-voltage power transmission line which, for over 50 years, has carried electricity across a 60-mile stretch of northwestern New Mexico. The right-of-way crosses 57 parcels of "lands allotted in severalty to Indians," a category of property that Congress subjected to condemnation actions over a century ago when it enacted § 357. PNM obtained the

consents necessary to renew the right-of-way across 52 parcels, thus making condemnation there unnecessary. For the remaining five parcels, consents once given were revoked. Thus, PNM invoked § 357 in order to maintain its 50-foot wide right-of-way across those five parcels, following the same path used for its transmission line since 1960.

An issue arose because the Navajo Nation acquired small fractional interests in two of the five parcels. The district court ruled that, because fractional interests were now in tribal hands, a right-of-way across those two parcels could not be acquired by condemnation. The Tenth Circuit agreed.

As a result, PNM's long-established transmission line is in jeopardy of being stranded. The utility soon could be forced to abandon the current line and find a new route, at great expense, *if* one can be found. The expense of re-routing ultimately would be borne by PNM's customers and, if no alternative route is available, the burden would fall particularly hard on those families along the current route who would lose access to electricity. Moreover, as this petition will explain, the effects of the Tenth Circuit decision reach well beyond the current case and cumulatively pose a risk of substantial harm to the public interest nationwide.

Background

Beginning in the 1800's and continuing until 1934, federal policy called for moving land away from tribal reservations and into the hands of individual Indians through "allotments." The land thus transferred ceased to be part of a reservation

and became the property of individual Indians, who had the right to dispose of their allotments by sale, lease, will or intestate succession. The original idea was to replicate the fee ownership system that has traditionally characterized American property law. *See generally* App. 8a.

Congress soon modified this system in order to protect new Indian owners from exploitation. Under the modified system, the United States held legal title to allotment lands, in trust, for the benefit of allottees. Initially, the trust period lasted 25 years, after which the individual owner acquired legal title. Later, in 1934, when the creation of new allotments ended, Congress indefinitely extended the trusteeship for allotment lands still held in trust. App. 11a.

Even with this modified system, "[t]he land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The virtual fee is in the allottee, with certain restrictions on the right of alienation." *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959) (same).[1]

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[1] Notwithstanding these holdings by the Eighth and Ninth Circuits, there is a complex array of federal statutes affecting various Indian reservations; and, for purposes of federal or tribal jurisdiction, some allotment lands may still be treated as part of the reservation from which they were drawn. Even so, no party in this case has asserted that the subject allotments are within the exterior boundaries of the Navajo Reservation, and in any event § 357 applies broadly to all allotment lands without regard to whether they may be within or without the exterior boundaries of an Indian reservation.

Today, after generations of being repeatedly handed down to multiple descendants, many tracts of allotment land are held by multiple owners, each of whom holds a small beneficial interest, with the United States holding legal title as trustee. App. 9a. Individual owners are restricted in their ability to transfer their interests, but they can make transfers (in whole or in part) to an Indian tribe. 25 U.S.C. § 2212.

The Allotment Lands at Issue

For over 50 years, PNM has operated its "AY line," a 60-mile, high-voltage electric transmission line that uses a right-of-way, granted by the Bureau of Indian Affairs ("BIA") in 1960, authorizing the line to cross 57 parcels of allotment land. App. 12a-13a. The line is critically important, connecting PNM's Ambrosia substation near Grants to its Ya-Ta-Hey substation near Gallup (hence, the name "AY line"). In addition to serving a large population directly, including many members of the Navajo Nation, the AY line is part of the Western Interconnection and, in turn, the national power grid. *See infra* at 17-19. When PNM filed its condemnation action, the Navajo Nation held fractional interests in two parcels of allotment land crossed by the AY line, including a 13.6 percent interest in one 160-acre parcel, acquired in 2006, and a 0.14 percent interest in another 160-acre parcel, acquired in 2009 (the "Two Allotments"). App. 12a. Thus, the Navajo Nation acquired its fractional interests subject to the original BIA-granted easement and not long before 2010, when the easement needed to be renewed.

The BIA has authority to renew rights-of-way over allotment land, if the necessary landowner consents are obtained.[2] PNM acquired the necessary consents for all 57 parcels (for agreed compensation); however, after four years of BIA delay in completing the renewals, consents once given were revoked on five parcels – including two where the Navajo Nation acquired a share – leaving PNM without the needed majority. As a result, the BIA could not approve PNM's renewal application on those five parcels. App. 14a.

Even so, federal law allows PNM to acquire rights-of-way over allotment land through eminent domain.[3] Section 357 authorizes condemnation of allotment land "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." Under New Mexico law, PNM is authorized to condemn land owned in fee in order to construct and operate power transmission lines. Thus, PNM is likewise authorized by § 357 to condemn a right-of-way over allotment lands. PNM must pay fair market value for the easement, and the payment goes to the beneficial owners of the land, not to the United States as trustee.

Seeking to preserve its right-of-way and invoking § 357, PNM filed a condemnation action in

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[2] With certain exceptions, individual owners representing a majority of the fractional interests of a parcel must give consent. In addition, where the easement is obtained through the BIA, the tribe must consent if it holds an interest in the parcel. 25 U.S.C. § 324, 25 C.F.R. § 169.107(a).

[3] *See Yellowfish v. Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982) ("[C]ondemnation of allotted lands may proceed under section 357 without the Secretary's consent").

New Mexico federal district court in June 2015. App. 14a. The defendants included the acreage where the right-of-way would run ("Approximately 15.49 Acres of Land in McKinley County") and all parties holding any interest in that acreage, including the United States, as trustee, and the Navajo Nation. *Id.*

The district court issued two rulings pertinent to this appeal. First, in December 2015, the district court concluded that § 357 does not authorize condemnation of allotment land in which a tribe has acquired any fractional interest. Alternatively, the court concluded that the Navajo Nation, as partial owner of the Two Allotments, is an indispensable party, but cannot be joined due to sovereign immunity. Citing Fed. R. Civ. P. 19(b), the district court concluded that, "in equity and good conscience," the claims against the Two Allotments should be dismissed. App. 15a, n.1.

PNM sought reconsideration, asking the district court to change its decision. In the alternative, PNM asked the court to certify the case for interlocutory appeal to the Tenth Circuit. In response, the district court declined to change its decision, but granted the motion to certify in March 2017. App. 15a. Elaborating on its previous ruling, the district court rejected the alternative idea that a parcel of allotment land loses its condemnable status only if the tribe acquires a *majority* interest in the parcel. *Id.* The district court also said that "even if the Two Allotments were condemnable under § 357, [the district court] would dismiss this action against the [Navajo] Nation because it is an indispensable party that cannot be joined due to sovereign

immunity. Thus, the outcome would be the same." App. 58a-59a.

The district court concluded, however, that "an interlocutory appeal will materially advance the ultimate termination of this proceeding," 28 U.S.C. § 1292(b), and certified four questions to the Tenth Circuit:

> **I.** Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel?
>
> **II.** Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?
>
> **III.** Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?
>
> **IV.** If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

App. 82a-83a.

PNM's request for interlocutory appeal was unopposed, and the Tenth Circuit granted the request. App. 144a-146a. But, the panel that actually heard the case (a different panel from the one granting the appeal) reached only the first question and affirmed the district court's decision: "[B]ecause the tribe owns an interest in the disputed parcels, § 357's '[l]ands allotted in severalty to Indians' prerequisite is inapplicable and so the law gives PNM no authority to condemn. And that deprives us of federal jurisdiction under 28 U.S.C. § 1331." App. 26a.[4]

Denying PNM's petition for *en banc* review and its subsequent motion to stay the mandate, App. 163a, 142a, the Tenth Circuit remanded the case to the district court, which declined PNM's request for a stay. PNM proceeded with condemnation of the three remaining parcels (the parcels that were not at issue in the interlocutory appeal). Recently, however, PNM learned from BIA land records that, while the case was before the Tenth Circuit, the Navajo Nation acquired fractional interests in two of those three remaining parcels, further illustrating

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[4] In the Tenth Circuit, the United States supported the Navajo Nation on the first three questions presented, including its narrow view of § 357. But, on the fourth question, the United States agreed with PNM that, if § 357 authorizes condemnation of a parcel, then "[that] condemnation action can proceed in the absence of an Indian tribe that holds an undivided interest in [that] parcel." Br. of U.S. at 42, No. 16-2050 (filed Sept. 30, 2016). Even so, the Tenth Circuit indicated that, if it had reached the other questions, it would have ruled against PNM. *See* App.17a, n.2. Given this predisposition, the ultimate resolution of this case would be expedited by granting *certiorari* on both questions presented by this petition.

the problems created by the decision below.[5] In addition, PNM is facing trespass claims, based on the presence of its transmission lines on parcels where its right-of-way has expired. *See* Compl., *Barboan v. Pub. Serv. Co. of N.M.*, No. 1:15cv826 (filed Sept. 18, 2015); App. 151a (order consolidating condemnation and trespass cases).

REASONS FOR GRANTING THE PETITION

Summary

This case lies at the intersection of Indian affairs and the larger public interest, a consideration the Court has found to merit *certiorari*. *See, e.g.*, *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209 (1943) (dispute involving allotment land and utility right-of-way). *Certiorari* is warranted here. The Tenth Circuit decision is not only incorrect, it poses a risk of substantial damage to the public interest. The decision also continues the disarray among the circuits over the proper formulation of the "Indian canon" of statutory construction.

In addition to the PNM right-of-way at issue here, there are other long-established rights-of-way that will soon need renewal, and those rights-of-way are now in jeopardy, along with the power transmission lines they accommodate. The problem will affect power companies across the Tenth Circuit.

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[5] PNM, the United States, and the individual defendants called this development to the district court's attention in a joint motion to stay filed on October 23, 2017. App. 165a; *Barboan v. Pub. Serv. Co. of N.M.*, No-1:15cv826, Dkt. No. 149. The Court may take judicial notice of these government records. *Id.* Ex. A; Fed. R. Evid. 201(b)(2).

Indeed, given the national structure of the power grid, the cumulative impact could be felt far more broadly. And, it is not just power companies that sometimes need eminent domain to cross allotment lands. Other critical infrastructure, such as gas pipelines, oil pipelines, water pipelines, roads and bridges may depend on § 357 as well. The decision below largely nullifies that statute and creates a risk of significant harm to interstate commerce.

The decision below is simply wrong. In 1901, when Congress made allotment lands subject to condemnation for "any public purpose," it did not create an exception to its public purpose mandate where an Indian tribe acquires some interest in that land. Instead, Congress intended for the land's amenability to condemnation to be an attribute of the *land* and to run with the land, regardless of any change in ownership. This common-sense conclusion is supported by the text of § 357, which provides for no exceptions based on who is *holding* the allotment land at the time of condemnation, and by the well-recognized principle that condemnation is an *in rem* proceeding.

The Tenth Circuit erred by (i) taking to an extreme an already-erroneous decision by the Eighth Circuit limiting the use of § 357, (ii) applying BIA regulations that the BIA says do *not* apply, and (iii) misusing the "Indian canon" of statutory construction, again splitting from the circuits that limit the canon to statutes passed for the *benefit* of Indian tribes. The Tenth Circuit also insisted upon a false dichotomy, rejecting any resolution that would accommodate any legitimate tribal interests

while still allowing vital rights-of-way to be acquired and preserved.

In sum, with respect to § 357, this case involves "an important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c). With respect to the Indian canon of construction, this case involves a split among the circuits. S. Ct. R. 10(a). The case merits this Court's review.

A. Reasons for Granting the Petition on the First Question

1. The Tenth Circuit's Decision Poses a Risk of Harm to the National Power Grid and Interstate Commerce.

To demonstrate the importance of this case, PNM will first explain, on a granular level, how the Tenth Circuit's decision undermines eminent domain for public utilities. Second, PNM will show that the problems caused by the decision will soon increase. Third, PNM will demonstrate that, because the power grid is national in scope, any adverse impact on electric utilities in one area is a potential problem for all. Fourth, PNM will address the impact on interstate commerce in areas other than electric power transmission. Finally, PNM will discuss why this case is an appropriate vehicle to address the scope of § 357.

a. The Decision Below Largely Eliminates Congressionally-Authorized Exercise of Eminent Domain of Allotment Lands.

Under the decision below, if a tribe acquires *any* interest in a parcel of allotment land – no matter how minute and no matter when acquired – that parcel is no longer subject to condemnation. *See* App. 14a-15a ("Tribal interest in the land ends allotted-land status."). Here is what the decision means in practical terms:

- In any action under § 357, any fractional owner can now prevent the preservation of *existing* rights-of-way for critical infrastructure by raising as a defense the tribe's fractional ownership. (If no such tribal ownership exists, an individual owner can readily achieve the same objective by conveying some fractional interest to the tribe.) This will strand existing facilities, making them unusable and spawning trespass claims. Utilities will be required to seek new routes and build new facilities at great expense. And, there is no assurance that new routes can be found, especially given the prevalence of allotment land in areas such as northwestern New Mexico, thus jeopardizing the continued delivery of electricity to consumers.

- Any fractional owner can likewise block the acquisition of *new* rights-of-way.

- Without condemnation – and the judicial process to oversee it – there are no checks and balances on the amount that could be demanded for a right-of-way. Where they do not choose to exclude the infrastructure completely, fractional

owners of allotment land will be able to leverage enormous payment well above fair market value, thus impacting consumers.

- Under the decision below, as soon as the tribe acquires any interest in the land, § 357 becomes inapplicable and there is no federal jurisdiction for a condemnation action. Under that logic, condemnation of individual interests is foreclosed even if no one objects to the condemnation action.

This is not just a hypothetical list of problems. The problems have already begun. When PNM appealed to the Tenth Circuit, the Navajo Nation held fractional interests in only two of the five parcels PNM was seeking to condemn. But, while the case was pending there, the Navajo Nation acquired fractional interests in two more parcels. App. 166a-167a. Thus, under the decision below, four allotments crossed by the transmission line are now immune to condemnation; and PNM is facing trespass claims based on the presence of its transmission lines on parcels where its right-of-way has expired. App. 151a.

Similarly, another district court in the Tenth Circuit has ordered a pipeline company to dig up and remove a gas transmission line that has served the public for over thirty years. *See Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017). In *Davilla*, the gas company operated under a right-of-way obtained through the BIA. When the company sought to preserve the right-of-way by condemnation, it was blocked by individual Kiowa Indian allottees, who noted that, a few years

earlier, the Kiowa Tribe acquired a small fractional interest (1.1%) in their parcel. Using the same theory later followed by the Tenth Circuit, the district court held that this tribal acquisition prevented condemnation under § 357, and it ordered the pipeline removed. *Id.* at 1235, 1239.[6]

b. The Risks of Harm Will Increase.

The impact of the decision below is amplified by two trends, which threaten to converge in a way that could endanger the reliability of many transmission lines and other critical infrastructure across the Tenth Circuit.

First, the number of parcels of allotment land where an Indian tribe holds a fractional interest is likely to increase dramatically. Some of that increase will result from the accelerated use of customary transfer processes, as individual allottees seek to obtain the advantages of the Tenth Circuit's ruling. *See* 25 U.S.C. § 2212 (allowing tribe to obtain interest by purchase or gift). By giving the tribe a tiny fractional interest – an interest so small that it will never cause any diminution in the donor's enjoyment of the land – the donor can immunize the parcel against condemnation and force the utility off the land or exact a price far above fair market value.

In addition, the federal government has decided to spend $1.9 billion through 2022 to purchase fractional interests from individual

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[6] Enable has appealed. *See Davilla*, No. CIV-15-1262 (W.D. Okla.) at Dkt. No. 60 (filed Apr. 25, 2017). The district court later delayed removal of the pipeline pending settlement discussions. *See id.* at Dkt. No. 78 (entered Sept. 5, 2017).

allottees and transfer those interests to Indian tribes.[7] The BIA reports it has already committed over $1.25 billion to acquire the "equivalent" of 2,152,755 acres, which will be transferred to 48 tribes in at least thirteen States.[8] This acquisition is the "equivalent" of over 3,363 square miles, an area larger than Delaware and Rhode Island combined.

Those figures understate the impact. In determining "equivalent" acreage, the BIA only counts the fractional interests purchased. For example, if the BIA purchased a ten percent interest in a 60-acre parcel, it counts as the "equivalent" of six acres.[9] Under the Tenth Circuit ruling, however, the tribal acquisition of *any* fractional interest prevents the exercise of eminent domain over *any part* of the parcel. Thus, while no exact figures are available, the total acreage that would be rendered immune to condemnation by the Land Buy-Back Program, using the Tenth Circuit's rationale, is much higher than the 2.1 million "equivalent acres" in the BIA report. When the program ends in 2022, and the remaining millions are spent, the land

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[7] *See* U.S. Department of the Interior, *Land Buy-Back Program for Tribal Nations,* https://www.doi.gov/buybackprogram.

[8] *See* U.S. Department of the Interior, *Land Buy-Back Program for Tribal Nations Cumulative Sales through November 9, 2017,* https://www.doi.gov/sites/doi.gov/files/uploads/table_lbbtn_transactions_through_november_9_2017.pdf.

[9] *See* U.S. Dep't. of Interior, *Land Buy-Back Program for Tribal Nations,* Frequently Asked Questions ("What does *equivalent acres purchased* mean?"), https://www.doi.gov/buybackprogram/FAQ.

rendered immune to condemnation will be even greater than it is now.

Second, the near future will likely see an increased need for condemnation, not only because of the expanding need for power lines, pipelines and highways, but also because many *existing* lines cross allotment lands under rights-of-way that were granted by the BIA for a term of years. As those rights-of-way expire, they will need to be renewed, but public utilities will increasingly encounter the same problems encountered here by PNM and by Enable in *Davilla*. *See supra* at 14-15. This is no small matter.

In sum, the increasing *need* for condemnation to maintain and extend critical infrastructure will converge with the increasing *unavailability* of condemnation, and thus create a major problem for utilities and the public. It is a problem that a proper interpretation of § 357 can prevent.

c. The Power Grid Is National in Scope.

Our nation is served by a vast interstate power grid, rather than by a collection of isolated grids serving local areas. Gone are the days when "state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) ("*EPSA*"). Today "[t]hat is no longer so." *Id.*

Instead, the electric power system in the continental United States is comprised of three

major interconnected networks: the Eastern Interconnection, the Western Interconnection, and the Electric Reliability Council of Texas.[10] In decades past the nation's electric power infrastructure was "a largely patchwork system built to serve the needs of individual electric utility companies;" but, today it is "essentially a national interconnected system, accommodating massive transfers of electrical energy among regions of the United States." *New York v. FERC*, 535 U.S. 1, 7 (2002). Together, the grids form a network "of near-nationwide scope" such that "'electricity that enters the grid immediately becomes a vast pool of energy that is constantly moving in interstate commerce,' linking producers and users across the country." *Id.*[11]

Energy flowing into these grids, from whatever source, "*energizes the entire grid* [so that] . . . any activity on the interstate grid affects the rest of the grid." *New York*, 535 U.S. at 7 n.5 (emphasis in original). As a result, power companies are able "to transmit electric energy over long distances at a low cost," and are thus able to "operate more efficiently by transferring substantial amounts of electricity not only from plant to plant in one area, but also from region to region, as market conditions fluctuate." *Id.* at 8. Because the impact of any system event will ripple through the country,

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[10] *See* MIT, *The Future of the Electric Grid: An Interdisciplinary MIT Study* 3 (2011), http://energy.mit.edu/wp-content/uploads/2011/12/MITEI-The-Future-of-the-Electric-Grid.pdf.

[11] For geographic reasons, Hawaii and Alaska remain outside the national grid.

there are no longer any local issues when it comes to the electric power grid. All are national.

Infrastructure siting problems are already a concern. "Siting challenges, including a lack of coordination among States, impede the improvement of the electric system." S. Rep. No. 109-78, at 8 (2005). The coordination problems will be multiplied under the Tenth Circuit's decision, which allows the stranding of long-established transmission lines and the blockage of new ones when an Indian tribe acquires a tiny interest in allotment parcels lying along needed routes.

Thus, in its cumulative effects, the harm flowing from the Tenth Circuit's decision will not be limited to PNM, nor to the six States of the Tenth Circuit, where other power companies will face comparable problems in the exercise of eminent domain. Instead, the harm is potentially *nationwide*, a fact that underscores the importance of this case.

d. The Decision Below Risks Harm to Interstate Commerce Beyond the Electric Power Industry.

The harm from the Tenth Circuit's decision extends beyond the electric industry. This is true not only because of electricity's role in all aspects of the national economy, but also because of the decision's effects on other infrastructure dependent on eminent domain.

As this Court has noted, "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in

virtually every home and every commercial or manufacturing facility." *FERC v. Mississippi*, 456 U.S. 742, 757 (1982). Indeed, the electric industry ultimately affects "just about everything – the whole economy, as it were." *EPSA*, 136 S. Ct. at 774. As Congress has likewise recognized, the electric industry is uniquely critical to the nation. S. Rep. No. 112-34, at 11 (2011) ("Ensuring a resilient electric grid is particularly important since it is arguably the most complex and critical infrastructure that other sectors depend on to deliver services.").

Section 357 broadly grants federal condemnation authority over allotment lands to *any* public or private entity having condemnation authority under state law. Similarly, the Tenth Circuit decision broadly blocks the exercise of that authority wherever an Indian tribe has acquired any interest in such lands. Here, the electric industry is harmed. But, as shown by *Davilla*, *see supra at* 14-15, the decision also harms the natural gas industry, another area of national concern. *See* 15 U.S.C. § 717(a) ("declar[ing] that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."). Indeed, the decision below bodes harm to oil pipelines, water pipelines, roads, and all arteries of interstate commerce needing rights-of-way. As this Court said in an earlier case challenging eminent domain authority: "This cannot be." *Kohn v. United States*, 91 U.S. 367, 371 (1875).

e. This Petition Provides a Good Opportunity – and, Perhaps, the Last Opportunity – to Address the Issue.

Allotment lands lie almost entirely in the western States encompassed by the Eighth, Ninth and Tenth Circuits.[12] Two of those circuits – the Eighth and Tenth – have now prohibited use of § 357 where an Indian tribe has acquired an interest in the allotment land. Thus, this is not an issue on which the remaining circuits are likely ever to have occasion to rule (other than, perhaps, the Ninth Circuit, which has addressed the issue in *dictum, see infra* at n. 13). There is nothing to be gained by awaiting further percolation of the issue through the lower courts. If the Court does not take up this important issue now, it will not have another opportunity to do so before substantial damage is done and, indeed, it may not have another opportunity to do so at all.

2. The Tenth Circuit's Decision Is Erroneous.

There is a clear pathway to avoid the harms caused by the decision below. By enacting § 357, Congress made allotment lands subject to condemnation. The central issue here is whether that "condemnability" is an attribute of the land and

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[12] The BIA reports that 99.7 percent of allotment lands eligible for the Buy-Back Program lie within the States of these three circuits. U.S. Dep't of Interior, *2016 Status Report, Land Buy-Back Program for Tribal Nations,* p. 16 (November 1, 2016), https://www.doi.gov.sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf.

runs with the land, or whether condemnability is a personal attribute of the individual owner and terminates if the land is acquired by an Indian tribe. The Tenth Circuit ruled that Congress intended for condemnability to terminate if a tribe acquires even a miniscule interest in allotment land. That decision cannot withstand scrutiny.

a. "Condemnability" Is an Attribute of the Land.

Section 357 condemnation authority continues to apply to an allotment parcel even after a tribe acquires an interest in that parcel. This is shown by the following:

First, § 357 addresses "lands in severalty allotted to Indians," not "lands allotted to *and held by* Indians." Thus, it speaks of "land" with a history of having been removed from a reservation and "allotted... to Indians," without regard to the identity of the owner at the time of condemnation. The Tenth Circuit decision, in effect, reads into the statute words that are not there.

Second, land condemnation is an *in rem* proceeding. *United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946). This is consistent with condemnability being a characteristic of the land, and not a personal attribute of the individual owner.

Third, like anyone else, Indian tribes may acquire lands in fee, and those fee lands are subject to involuntary sales through *in rem* proceedings, including partition suits, tax sales and condemnation, on the same basis as lands belonging to non-Indians. *See, e.g., Oneida Tribe of Indians v.*

Vill. of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008) (holding that allotment parcel leaving Indian hands and reacquired by tribe in fee is subject to condemnation); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996) (holding that allotment parcel passing out of Indian hands and reacquired by the tribe in fee is subject to partition suit). Because § 357 treats allotment land like fee land for purposes of condemnation – and because tribally-held fee lands may be condemned – tribally-held allotment lands may be condemned as well.

Fourth, as the Ninth Circuit has recognized: "With respect to condemnation actions by state authorities, Congress explicitly afforded *no special protection to allotted lands beyond that which land owned in fee already received* under the state laws of eminent domain." *Southern California Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (citation omitted) (emphasis added). While the case made no mention of a tribe owning a fractional interest of the allotment land, the principle articulated there properly focuses on the *land* and not on the *landowner*.[13]

Fifth, "no court has held that Indian land approved for *alienation* by the federal government and then reacquired by a tribe again becomes

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[13] The Ninth Circuit later repeated, *in dictum* and without analysis, another circuit's view that § 357 does not apply to "land held in trust for the Tribe." *United States v. Pend Oreille Pub. Util. Dist. No.* 1, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983). Flaws in *Nebraska Public Power* are discussed *infra* at 27-29.

inalienable." *Lummi Indian Tribe v. Whatcom Cnty.*, 5 F.3d 1355, 1359 (9th Cir. 1993) (emphasis added). Likewise, it is inappropriate to hold that allotment land approved by Congress for *condemnation* and then reacquired by a tribe again becomes immune to condemnation.

Sixth, when seeking to understand legislative intent, what matters is the intent of the Congress that enacted the statute in question.[14] As the Tenth Circuit recognized, Congress was less sympathetic to the role of Indian tribes in 1901 than it is today. *See generally* App. 7a-8a. But, this history weighs against the Tenth Circuit's understanding of § 357. It is inconceivable that the 1901 Congress intended for the policy reflected in § 357 to be frustrated whenever a tribe acquired a fractional interest in land subject to that statute.

Seventh, as the Tenth Circuit previously recognized: "If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines." *Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (rejecting challenge by individual allottee to exercise of eminent domain under § 357). As a practical matter, it matters not at all whether the objection to the right-of-way comes

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[14] *E.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–118 (1980) (citing "the oft-repeated warning that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) ("Legislation dealing with Indian affairs cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted it.") (internal quotations omitted).

from an individual allottee or from the Indian tribe that has acquired some portion of the individual's interest. The unwarranted burden upon the condemning authority – and, thus, upon the public – is just the same. Both frustrate Congress' purpose in enacting § 357.

Finally, general principles recognized by this Court favor rights-of-way across allotments. In *Oklahoma Gas & Electric*, *supra*, the Court considered another statute involving rights-of-way across allotment land. Acting under 25 U.S.C. § 311, the Secretary of the Interior granted the State of Oklahoma the right to construct a highway across parcels allotted to individual Indians, and Oklahoma later granted an electric company the right to construct transmission lines alongside the highway within the State's right-of-way. The Secretary sued the utility to have its use of the right-of-way declared invalid, and this Court ruled in the utility's favor. While partially couched in terms that are overly paternalistic today, the outcome was guided by general principles that have analogous application here:

> The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect [Native Americans] ....
>
> * * * * *
>
> Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways

> crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

318 U.S. at 211.

Likewise, the Tenth Circuit's interpretation of § 357 is not necessary to protect the Navajo Nation or other Native American tribes, especially since condemnation actions assure allotment owners fair market value, as determined in a federal court. Because of the Land Buy-Back Program and other transfers, the western States are becoming increasingly spotted with allotments in which a tribe holds a fractional interest. Complications and confusions will follow if those allotment lands are subject to rules differing from those that apply to fee lands and allotment lands in which tribes hold no interest. There is nothing to suggest that Congress intended such an outcome.

b. The Tenth Circuit's Analysis Is Flawed.

The Tenth Circuit observed that "the United States government's treatment of the original inhabitants of this country has not been a model of justice." App. 7a. But, the court of appeals' desire to compensate for past injustices has led it into a thicket of faulty legal reasoning.

The Tenth Circuit based its decision on four grounds: (i) an Eighth Circuit decision, (ii) BIA regulations, (iii) a canon of construction favoring Indian tribes, and (iv) a false dichotomy in dealing

with tribal fractional interests. None of these grounds can withstand scrutiny.

The Eighth Circuit Decision: The Tenth Circuit relied heavily on *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (1983) ("*NPP*"). App. 21a-22a. In *NPP*, a group of individual Indian allottees transferred their interests in allotment parcels to the Winnebago Tribe, reserving to themselves only life estates. *Id.* at 958. The Eighth Circuit ruled that, by such action, the allottees successfully blocked the acquisition of a right-of-way for an electric transmission line by a power company seeking to invoke § 357. In so ruling, the Eighth Circuit implicitly assumed that all "tribal land" is immune to condemnation, and it concluded that, because of the transfer, the allotment land had become "tribal land" under the then-current BIA definition. Quoting 25 C.F.R. § 169.1(d), the Eighth Circuit said:

> ""Tribal land' means land or any interest therein, title to which is held by the United States in trust for a tribe....".
>
> We believe this regulation makes clear that it is the fact of tribal ownership which establishes the existence of tribal land, not the identity or title of the grantor.... Thus, we conclude that the conveyances... *create tribal land* not subject to condemnation under section 357.

719 F.2d at 962 (emphasis added). For an individual and an Indian tribe to "create" land immune to

condemnation by recording a deed – rather than leaving that decision to Congress – is problematic.

Moreover, whatever BIA regulations may say, the *statute* at issue, § 357, contains no mechanism for allotment lands to become "tribal land" in the sense of being immune to condemnation. Nor do BIA regulations justify the result. As the BIA recently explained, those regulations do not provide guidance on § 357. *See* 80 Fed. Reg. 72492, 72495 (Nov. 19, 2015) ("The final rule does not include the term 'eminent domain' or address eminent domain.... Statutory authority exists in 25 U.S.C. 357 for condemnation under certain circumstances, but *these regulations do not address or implement that authority*.") (emphasis added). Thus, allotment parcels that fall within the definition of "tribal land," as that term is used in BIA-administered programs, are not thereby excluded from condemnation under § 357.

Even if *NPP* were correctly decided under the facts of that case, the Tenth Circuit carried that precedent to an untenable extreme. First, in *NPP*, the land conveyances gave the tribe *full* beneficial ownership of the parcels, subject only to the passage of time as the grantors' life estates ran their course and expired. Such full ownership, even if delayed, presented a different case than where the tribe's interests are very small, as they are here.

Second, the land at issue in *NPP* was not subject to a pre-existing easement for an already-established power transmission line. Here, PNM's maintenance of a transmission line across the Two Allotments, for nearly 50 years before the Navajo

Nation acquired its interests, should carry considerable weight in the analysis. The Navajo Nation took its interests not only subject to an existing right-of-way, but subject to an expectation that PNM would seek to preserve that right-of-way, by condemnation if necessary, with the tribe receiving its share of judicially-determined fair market value. Thus, the *NPP* decision is a frail reed on which to base the decision below.

The BIA Regulations: The Tenth Circuit also based its decision on the current version of the same regulations on which the Eighth Circuit mistakenly relied. *See* App. 22a (citing 80 Fed. Reg. 72492, 72497). But, again, the BIA has explained that its regulations do not address § 357 condemnations. *See supra* at 28. Thus, those regulations furnish no basis for interpreting the statute. The Tenth Circuit erred by saying otherwise.

The Indian Canon: The Tenth Circuit said that "'statutes are to be construed liberally in favor of Indians and tribes, and that any ambiguities or doubtful expressions of legislative intent are to be resolved in their favor.'" App. 17a (quoting *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (*en banc*) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))). PNM believes that § 357 unambiguously authorizes the condemnation at issue; however, even if § 357 were ambiguous, the Tenth Circuit erred in using the "Indian canon" to govern the outcome.

The basic Indian canon of statutory construction has been formulated by this Court two

different ways. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), the Court stated the canon comprehensively: "[S]tatutes passed *for the benefit of dependent Indian tribes* or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." (Emphasis added.) The same formulation was used in *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific*) and *Negonsott v. Samuels*, 507 U.S. 99 (1993) (quoting *Alaska Pacific* and correcting litigant who stated the canon without limiting it to statutes passed for the benefit of tribes). Under this formulation, the Indian canon does not apply here because § 357 is not intended to favor *tribal* interests. It is intended to favor the broader *public* interest.[15]

At other times, the Court has used an abbreviated formulation, omitting the phrase limiting the canon to statutes passed for the *benefit* of Indian tribes. Such a formulation appears in *Blackfeet Tribe*, cited by the decision below. In *Blackfeet Tribe*, the Court said simply: "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 471 U.S. at 766. This same formulation is found in other decisions by this Court, including *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992), *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999) and, most recently,

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[15] The public includes, of course, Native Americans, who, like their non-Indian neighbors, benefit from utility services made possible through eminent domain.

Chickasaw Nation v. United States, 534 U.S. 84, 92 (2001) (all quoting *Blackfeet Tribe*).

PNM maintains that *Alaska Pacific* provides the preferred formulation of the canon. But, even if the *Blackfeet Tribe* formulation is used, the Indian canon would not govern the outcome here. "[C]anons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." *Scheidler v. NOW, Inc.*, 547 U.S. 9, 23 (2006). Moreover, "[s]pecific canons are often countered . . . by some maxim pointing in a different direction." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (internal quotation marks and citation omitted) (holding Indian canon "offset" by competing canon). Even if the Indian canon were relevant here, it would be overcome by a competing canon: "'All laws should receive a sensible construction... [so] as not to lead to injustice, oppression, or an absurd consequence.'" *Sorrells v. United States*, 287 U.S. 435, 446 (1932) (quoting *United States v. Kirby*, 7 Wall. 482, 486 (1868)). Given the consequences of the decision below, *see supra* at 13-14, the Tenth Circuit's construction of § 357 violates this principle.

Moreover, the Tenth Circuit's construction of § 357 does not actually favor Indians, a conclusion reinforced by the fact that landowner majorities in 52 of the 57 parcels consented to renewal of the right-of-way. Indeed, "Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land." *Yellowfish,* 691 F.2d at 931. *See Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 264 (8th Cir. 1994) (finding that

interpreting statute to favor Indians required, in that case, a result contrary to what the Indian tribes sought).

For these reasons, too, the Tenth Circuit erred.

The False Dichotomy: Finally, the Tenth Circuit said it had only "two choices":

> (1) concluding that all land ever allotted is subject to condemnation under § 357, even if a tribe reobtains *a majority or total interest* in it, or (2) concluding that even previously allotted land that a tribe reobtains *any interest* in becomes tribal land beyond condemnation under § 357.

App. 22a-23a (emphasis added). PNM believes the first result is correct; however, even if PNM were mistaken, that would not justify the Tenth Circuit in flying to the other extreme, disregarding any possible midpoint along the way.

One option would be to allow the utility to condemn the interests of individuals, but without effect on the interests held by the tribe. This approach was followed in *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way Across: Twp. 2 S.*, No. CV-14-130-BLG-SPW, 2017 U.S. Dist. LEXIS 17956 (D. Mont. 2017). In *WBI*, when negotiations over renewing an existing right-of-way failed, the gas transmission company sought to condemn an easement over allotment land, including two parcels where both an individual and the Crow Tribe held fractional interests. The court allowed the company

immediate possession of the parcels – and approved condemnation of the right-of-way – while explaining that its order "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 [the] allotments...." *Id.* at * 9-10.

The *WBI* approach is reminiscent of familiar principles of co-tenancy because (i) those who hold interests in the same allotment parcel are tenants in common;[16] and (ii) "[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." 2 Tiffany Real Property § 426 (3d ed.) (emphasis added). Thus, under the *WBI* approach, even if the interest held by the tribe cannot be condemned, the condemnor may use eminent domain to step into the shoes of the individual co-tenants, thus acquiring the right-of-way with respect to *their* interests and making use of the parcel without excluding the tribe from the property.

Another option would be for the character of the land – condemnable or not – to be determined based on who held a *majority* interest when the condemnation action began or when the

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[16] *See, e.g.*, 25 U.S.C. § 2212 (treating "an Indian tribe receiving a fractional interest" as "tenant in common with the other owners."). *See also, Haeker v. United States Gov't*, No. CV-14-20-BLG-SPW-CSO2014 U.S. Dist. LEXIS 113121 (D. Mont. Aug. 14, 2014) (holding that allotment-holders are "tenants in common with . . . other Indian owners.") (citing *Quiver v. Deputy Assistant Sec'y – Indian Affairs (Operations)*, IBIA 85-17-A, 85-18-A, 1985 I.D. LEXIS 63 (1985)).

infrastructure was constructed. Where individuals held a majority interest, the land would be condemnable; where the tribe held a majority interest, the land would not be. Such an approach would (i) avoid the absurdity and injustice of defeating condemnation – and stranding millions of dollars in infrastructure – by transferring to a tribe a minutely small, fractional interest, and (ii) respect any tribal interests that might arise where the tribe is the dominant beneficial owner of a parcel and there is no infrastructure already in place.

The Tenth Circuit rejected any such midpoints. This Court need not do so.

3. The Circuits Are Split on the Meaning of the Indian Canon.

As previously noted, the Court has stated the Indian canon in two different ways. Sometimes the Court has used the narrow formulation found in the *Alaska Pacific* line of cases; and sometimes it has used in the broader formulation found in the *Blackfeet Tribe* line of cases. *See supra* at 29-30. This tension between these two lines of cases is reflected in a split among the circuits as to the proper formulation of the canon.

The split is best demonstrated by the contrast between the **Tenth Circuit** and the **D.C. Circuit**. Using a very expansive formulation, the Tenth Circuit applies the canon to statutes "even where they *do not mention Indians at all*." *Pueblo of San Juan*, 276 F.3d at 1191-92. (emphasis added). The Tenth Circuit cited *Pueblo of San Juan* in ruling against PNM. App. 17a

On the other hand, the D.C. Circuit has emphatically endorsed the narrow approach, explaining that the canon "applies *only* to statutes 'passed for the benefit of dependent Indian tribes.'" *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) (quoting *Alaska Pacific*) (emphasis added).

Decisions in recent years show that other circuits are split between the *Alaska Pacific* approach and the *Blackfeet Tribe* approach, with some circuits fluctuating between the two:

- The **First** and **Eighth Circuits** have used the narrow formulation. *See Penobscot Nation v. Mills*, 861 F.3d 324, 333 (1st Cir. 2017) (citing *Alaska Pacific*); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547-548 (8th Cir. 1996) (citing *Alaska Pacific*).

- The **Sixth Circuit** has applied the broad formulation. *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (2009) (citing *Blackfeet Tribe*).

- The **Second Ninth** and **Eleventh Circuits** have fluctuated:

    - *Compare Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 288 (2d Cir. 2015) (quoting *Alaska Pacific*) *with Connecticut v. U.S. Dep't. of Interior*, 228 F.3d 82, 92 (2d Cir. 2000) (quoting *Blackfeet Tribe*).

    - *Compare Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228-29 (9th Cir. 1999)

(quoting *Alaska Pacific*), *with Crow Tribal Hous. Auth. v. U.S. Dep't. of Hous. & Urban Dev.*, 781 F.3d 1095, 1103 (9th Cir. 2015) (quoting *Blackfeet Tribe*).

- *Compare Colbert v. United States*, 785 F.3d 1384, 1390 n. 8 (11th Cir. 2015) (quoting *Alaska Pacific*) *with Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012) (quoting *Blackfeet Tribe*).

The Indian canon is an important feature of American jurisprudence. *Alaska Pacific and Blackfeet Tribe* have been cited by federal and state courts over 200 times since 2000. Granting *certiorari* will enable the Court to definitively embrace either the *Alaska Pacific or Blackfeet Tribe* formulation and end the circuit disarray.

B. Reasons for Granting the Petition on the Second Question.

Although the Tenth Circuit indicated that it was only deciding whether § 357 authorizes a condemnation action against a parcel of allotment land once an Indian tribe has acquired a fractional interest in that land, it agreed with the district court that the tribe's sovereign immunity precludes any such condemnation action even if § 357 still applies. Specifically, the Tenth Circuit stated that "the district court's orders provide thorough and well-reasoned bases to affirm" and are "especially persuasive on the question of tribal immunity." App. 17a, n.2. Given the importance of preserving the flow of electricity in this portion of New Mexico, this Court should grant *certiorari* on both issues and resolve these questions simultaneously – rather than

resolving Question 1, remanding, and then resolving Question 2 in a subsequent petition for *certiorari*.

Moreover, the second question is very closely related to the first one. If the Court agrees with PNM that tribal ownership of a fractional interest in allotted land does not render § 357 inapplicable, then the Court should also hold that the condemnation action can proceed, even if the Indian tribe claims sovereign immunity and cannot be joined as a party to the action.

This is a small step to take, especially given this Court's *Carmack* decision, holding that the landowner need not participate in a condemnation action, *supra* at 22.[17] Indeed, in the Tenth Circuit, the United States *agreed* that, if § 357 authorizes condemnation of a parcel of allotment land, then "[that] condemnation action can proceed in the absence of an Indian tribe that holds an undivided interest in [that] parcel." U.S. Resp. Br, at 42 (filed Sept. 30, 2016). "[T]ribes... are not indispensable parties, without whom a condemnation action may not proceed." *Id.* at 46–47. Although the Navajo Nation and individual defendants took the opposite position in the Tenth Circuit, the agreement between the United States and PNM on this final point is another reason to grant *certiorari* on the second question presented.

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[17] Thus, while the question whether sovereign immunity was implicitly abrogated by § 357 is subsumed in the second question presented, the abrogation question need not be reached in order to find that the condemnation action can proceed in the absence of the tribe

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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