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

REPLY BRIEF OF PETITIONER

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April 5, 2018

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REPLY BRIEF OF PETITIONER

Public Service Company of New Mexico ("PNM") files this reply to the United States and to the Navajo Nation and individual allottee respondents (collectively, "Allottees").

Introduction

The Court's consideration of PNM's petition comes shortly after hearing argument on another case involving tribally-owned land, *Upper Skagit Indian Tribe v. Lundgren* (No. 17-387) (argued March 21, 2018). The Court's questions there reveal concerns similar to those raised by PNM's petition:

- The Court expressed concerns about condemnation, including a scenario where a landowner opposing condemnation could stop the project by transferring a small interest in the land to a tribe. Tr. 7-8, 10. PNM discusses the same scenario in its petition. Pet. 13, 24.

- The Court expressed concerns about situations where interacting with the tribe was not a matter of choice. Tr. 11 (citing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 n.8 (2014)). Here, PNM has no choice. It must deal with a tribal party that acquired its fractional allotment interests decades after PNM erected its infrastructure, and shortly before the right-of-way needed renewal. Pet. 5.

- The Court asked why shouldn't the tribe "step into the shoes" of the person from whom it acquires its interest. Tr. 13. Similarly, PNM argues that "condemnability" runs with the land and does not terminate when a tribe acquires an individual's interest. Pet. 21-22.

PNM's point is not that the *Upper Skagit* decision should govern here. The statute at issue here is not implicated there. The point is that concerns the Court identified in *Upper Skagit* are also implicated in PNM's case and counsel in favor of granting *certiorari*.

The United States Misreads the Decision Below.

The United States argues that 25 U.S.C. §357 "authorize[s] condemnation of *individual* interests in a mixed-ownership allotment if the tribe consents to the right-of-way." U.S. BIO at 11 (emphasis added). The government argued this position below. But, the Tenth Circuit rejected this view, just as it rejected PNM's more fulsome view of §357. The Tenth Circuit ruled that, once a tribe acquires *any* interest in an allotment parcel, that parcel loses its character as allotment land. Thus, the land is no longer subject to §357, and courts lose subject matter jurisdiction for *any* condemnation action regarding that parcel.

The United States says the Tenth Circuit "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." *Ibid.* The government is mistaken. Its optimism is based on a footnote suggesting that the condemnation of individual interests was dismissed for practical reasons, which would not apply if the tribe consented. U.S. BIO 11 (citing Pet. 23a n.5). But, the footnote is not the ruling.

Here is how the Tenth Circuit ruled:

> "When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; *that land* becomes "tribal land" *not subject to condemnation* under § 357."

Pet. 23a (quoting district court) (emphasis added). This means the *land* becomes immune to condemnation, not just the tribe's *interest* in the land. To continue:

> [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.

Id. at 26a (emphasis added). And, finally:

> [W]e affirm the district court's dismissal of the condemnation action for *lack of subject-matter jurisdiction* as to the *two land parcels* in which the Navajo Nation holds an interest.

Id. at 31a (emphasis added).

Parties cannot confer subject matter jurisdiction by agreement. *E.g., California v. La Rue*, 409 U.S. 109, 112 n.3 (1972). Thus, the decision below destroys §357 as a means to obtain rights-of-way across *any* allotment parcel where a tribe holds a fractional interest, regardless of tribal consent.

The government expressly relies upon its mistaken reading of the decision below for its recommendation that *certiorari* be denied. U.S. BIO

11. Just as the reading is wrong, so is the recommendation.

The Tenth Circuit Decision Creates a Gap in the Law.

The United States says that PNM "could still acquire a voluntary right-of-way" from the Bureau of Indian Affairs ("BIA"). U.S. BIO 7 (quoting Pet. 128a). This is unrealistic. Using BIA procedures, PNM would need consent from the very individuals whose revocation of consent forced PNM to seek condemnation. A remedy that depends on agreement from litigation adversaries is no remedy at all.

The Tenth's Circuit's decision creates a gap in the law, where utilities will be unable to obtain easements even where negotiations with tribes are successful. Consider a situation where a tribe and some individual landowners (but not a majority) favor granting a right-of-way across their allotment parcel. The utility will be blocked at the BIA because it does not have the requisite majority, and it will be unable to use condemnation due to lack of subject matter jurisdiction.[1] Surely, Congress did not intend such a gap, where the public interest is subordinated to the wishes of private parties. *See W. River Bridge Co. v. Dix*, 47 U.S. 507, 532 (1848) ("eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government …").

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[1] Indeed, by holding that the entire parcel has been transformed from allotment land to "tribal land," the decision below could preclude use of BIA's current allotment land procedures, regardless of majority consent.

Congressional Intent and Principles of Federalism

Respondents note that the 1901 Act also gave the Secretary authority to grant rights-of-way for telephone and telegraph lines "through any lands held by an Indian tribe … or … which have been allotted in severalty to any individual Indian …" 31 Stat. 1083-84 (now 25 U.S.C. 319). They say the comparison with §357, which omits the reference to tribal lands, is problematic for PNM. U.S. BIO 8, 12; Allottees BIO 24-25. But, any textual comparison actually favors PNM because §357 also omits "individual" and refers, instead, to "Indians," a term broad enough to include tribes. Moreover, as the government concedes, "mixed-ownership parcels were not contemplated by Congress when it enacted Section 357 …" U.S. BIO 14. Thus, Congress expected allotted lands to be *permanently* subject to state condemnation authority. This supports PNM's view that "condemnability" is an attribute of the land, and is not dependent on the identity of the beneficial owner.

Federalism principles support this result. When a utility brings a condemnation action, it is because the sovereign (typically, a State) has delegated that authority in order to advance the public interest. *E.g., Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) ("The power of eminent domain … is an attribute of sovereignty …"); *Olcott v. Supervisors*, 83 U.S. 678, 691 (1872) ("[B]uilding a railroad or a canal by an incorporated company was an act done for a public use, and thus the power of the legislature to delegate to such a company the State right of eminent domain was justified.").

As a general rule, a sovereign may exercise eminent domain over *any* property lying within its geographic boundaries. *Pollard v. Hagan*, 44 U.S. 212, 223 (1845). But, States cannot exercise eminent domain over lands held by the United States. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). In such circumstances, the sovereignty of the United States bars the State's exercise of eminent domain, unless Congress has consented. For allotment land, Congress consented by enacting §357.

At the date of enactment, all allotment land held in trust by the United States became subject to the eminent domain sovereignty of the States where the parcels were located. When additional allotments were made, those parcels likewise became subject to the eminent domain sovereignty of the States. Thus, §357 substantially changed the "sovereignty maps" of many States, placing under state sovereignty large areas where eminent domain was previously foreclosed. When Congress ended the creation of new allotments in 1934, it left §357 intact and, in so doing, left undisturbed the sovereignty maps of the States. This is the federal-state balance – the federalism *status quo* – against which any alleged change must be judged.

"Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotations and citations omitted). Those "historic powers" include the State's eminent domain sovereignty over allotment lands, resulting from the enactment of §357 over a century ago. Respondents point to no statute where Congress has spoken with the "unmistakably clear … language,"

id. at 460, needed to re-adjust that federal-state balance. And PNM knows of none.

Negotiation Is Not a Remedy.

The Allottees say condemnation would be unnecessary if utilities would negotiate with tribes. They also claim that PNM failed to negotiate in good faith. Allottees BIO 21. But, the district court found that "PNM attempted in good faith, though unsuccessfully, to obtain the necessary consents to renew the Original Easement." Pet. 44a, 93a. And, even that statement overlooks what actually happened. As all parties agree, PNM obtained the necessary consents, but some landowners then revoked. Pet. 6; U.S. BIO 5-6; Allottees BIO 7. Given these uncontested facts, it is inexplicable that the government would blame the inability to renew the right-of-way on PNM's "litigation strategy." U.S. BIO 17.

Negotiation can often resolve conflicts; but, negotiation is not a viable alternative to reversing the Tenth Circuit decision. Even without the gap in the law, *see supra* at 4, the success of any negotiation is greatly affected by the consequences of reaching impasse. Where eminent domain is the alternative to agreement, both sides have an incentive to compromise. But, if eminent domain is not available, landowners will have an incentive to demand payment just below what it would cost the utility to find an alternative route. And, where the issue is right-of-way *renewal*, the costs of impasse include demolishing existing infrastructure and re-building elsewhere, a massive expense to the public. Moreover, PNM is legally required to provide the public with electric power. It does not have the option

of walking away. Without §357, landowners have enormously unfair leverage.

Despite suggesting compromise, the Allottees object to PNM's mention of potential "mid-points" in interpreting §357. Allottees BIO 29-30. The objection is misplaced. When interpreting a statute, this Court is not required to choose between the opposite positions staked out by the parties. It is free to decide that Congress meant something else. PNM continues to press its view that §357 authorizes condemnation of allotment parcels regardless of *any* beneficial interest acquired by a tribe. But, the Court need not accept that view in order to reject the Tenth Circuit's decision. In noting possible mid-points (including the government's suggested interpretation), PNM simply underscores the extreme nature of the decision below and shows the Court a variety of ways to avoid such a troublesome result.

The Circuit Split on the Indian Canon Should Be Resolved.

The United States does not deny the circuit split on the Indian canon of construction. *See* Pet. 34-36 (discussing split). Nor does the government deny that the proper formulation is found in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), which limits the canon to statutes "passed for the benefit of dependent Indian tribes." Instead, the government says the decision below is consistent with *Alaska Pacific*. U.S. BIO 23. But, that is wrong.

The Tenth Circuit did not cite *Alaska Pacific*. It cited the competing formulation found in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985), which omits the key limitation. Pet. 17a. The United States also misses the mark by suggesting that the purpose

of the 1901 Act was favorable to Indians. U.S. BIO 24. The "appropriations" to which the government alludes included expenses of moving certain tribes off their existing lands, while other provisions limited tribal legislative authority. 1901 Act, ch. 832, 31 Stat. 1058 at 1070-71, 1077. Moreover, the *only* statute at issue here, §357, clearly favors public interests, not tribal interests. Thus, the *Alaska Pacific* formulation does not apply.

The Allottees contend there is no split and note this Court's use of both the *Alaska Pacific* and *Blackfeet Tribe* formulations and the "common ancestry" of the two. Allottees BIO 18. But, the fact that two lines of cases stem from the same source does not mean they have not diverged, and this Court's own use of competing formulations underscores the need to resolve the conflict.

Respondents also say that, because the Tenth Circuit did not use the Indian canon as the primary basis for its ruling, there is no need to resolve the circuit split. U.S. BIO 23; Allottees BIO 17. But, answering the first question presented may require deciding what the canon means and whether it applies. Moreover, the circuit split – and the Tenth Circuit's choice of a side – pre-existed this case. The split should be resolved, and this case presents a good vehicle for doing so.

The Court Should Hear the Second Question.

In opposing *certiorari* on the second question, Respondents did not address the key reason why *certiorari* is requested: the second question is so very closely related to the first. Pet. 37. It would be incongruous to answer the first question by holding that §357 *authorizes* condemnation of a mixed-

ownership parcel, as PNM advocates, only to rule later that the same condemnation is *blocked* by tribal immunity. If PNM is correct about what §357 authorizes, then surely the condemnation must be allowed to proceed despite invocations of tribal immunity. In reaching that result, the Court could conclude either that (i) tribal immunity regarding land held in trust by the United States is coterminous with – and dependent upon – the immunity of the United States, which §357 has waived,[2] or (ii) sovereign immunity protects the tribe from being brought into court, but the condemnation can still proceed because the tribe is not an indispensable party.[3]

Thus, the two questions presented may be fairly described as interlocking. Presenting them in the same petition avoids the potential pitfall of having framed the issue too narrowly, and it allows the Court the flexibility to frame as comprehensive an answer as the merits of the case may require. The Court should grant *certiorari* on both.

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[2] *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) ("It is as though the immunity which was [tribes'] as sovereigns passed to the United States for their benefit ...."); *Minnesota v. United States*, 305 U.S. 382, 388 (1939) (recognizing waiver of federal sovereignty for condemnation of allotment land). Although not supported by its citation, the United States says the two parcels at issue are "public domain" allotments (U.S. BIO 5), *i.e.*, allotted from public lands (U.S. BIO 2, authorities cited), not from reservations. If anything, this further argues against immunity.

[3] *See* U.S. BIO 24 (explaining that, while the tribe is a "required" party, "the condemnation action could nevertheless proceed [in tribe's absence] because the United States—as the titleholder to the allotment land—is the sole indispensable party.").

The Case Is Important to the Nation.

Although there is no circuit split on the meaning of §357, the issue has been well-percolated through the courts below (Pet. 21), and *certiorari* is warranted because the case presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). That importance is underscored by the array of *amicus* briefs from energy sector trade associations – electricity, oil and gas – in support of *certiorari*.

The government misconstrues the position of those *amici* when it suggests they would be content for the Court to adopt the position of the United States. *See* U.S. BIO 19. The *amici* are fully supportive of PNM's position.[4] It is also true that the *amici* – and, indeed, PNM – would prefer the position of the government over the extreme position taken by the Tenth Circuit. But, the Tenth Circuit's decision, which found a lack of subject matter jurisdiction, leaves no room for the United States' preferred approach.

The Allottees claim that allotment land condemnation disputes are rare and that the consequences forecast by PNM have not occurred. But, they are forced to concede two such cases in just the past two years, Allottees BIO 16, including one in Oklahoma. There, tribal ownership of a 1.1 percent

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[4] Edison Elec. Inst., *et al. Amici* Br. 9 (arguing that allotment lands may be condemned "regardless of who owns those lands today"), N.M. Oil & Gas Ass'n *Amicus* Br. 20, n. 12 (agreeing that PNM's position is correct); Interstate Natural Gas Ass'n of America, *et al. Amici* Br. 8 (agreeing that §357 allows PNM to condemn easements over parcels at issue).

interest blocked renewal of a decades-old right-of-way, leading the court to order the pipeline removed. Pet. 14-15.

Moreover, no Respondent denies the accelerating convergence of two trends: (i) the increasing need for condemnation, especially given the wave of expirations of BIA-granted easements, and (ii) the vast increase in tribally-owned allotment interests, given the land buy-back program. *See* Pet. 15-17.[5] As several *amici* noted, the decision below:

> stands to impact critical infrastructure with rapidly increasing frequency over the coming years. Accordingly, the time has come for this Court to decide whether private parties really can fundamentally disrupt the provision of public-utility services throughout the United States through the simple expedient of conveying infinitesimal fractional interests in allotted lands to Indian tribes.

Edison Elec. Inst., *et al. Amici* Br. 15.

Conclusion

The petition for *certiorari* should be granted.

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[5] *See* Allottees BIO 5 (celebrating buy-back program results).

Respectfully submitted,

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