No. 17-387

In The
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN, ET VIR,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* PUBLIC SERVICE COMPANY OF NEW MEXICO IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does a court's exercise of in rem jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

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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STATEMENT OF INTEREST[1]

Public Service Company of New Mexico ("PNM") is a public utility providing electric power to much of New Mexico. As such, PNM has been granted the power of eminent domain so that, if negotiations with landowners fail, the company may use condemnation to obtain rights-of-way needed to serve the public. Indeed, many utilities across the country routinely use eminent domain to construct and operate critical infrastructure, such as oil, gas, and water pipelines as well as electric transmission lines. In some cases, the right-of-way at issue may involve land in which an Indian tribe holds an interest, a circumstance that sometimes may implicate federal statutory issues as well as the doctrine of tribal sovereign immunity.

In the instant case, the Upper Skagit Indian Tribe (the "Tribe") seeks a very broad rule, arguing that tribal sovereign immunity *always* bars the exercise of *in rem* jurisdiction unless the tribe has waived sovereign immunity or Congress has unequivocally abrogated it. The outcome of this case potentially affects PNM – and many other public utilities – in at least three ways.

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[1] Pursuant to Sup. Ct. R. 37.6, PNM states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from PNM, made any monetary contribution toward the preparation or submission of this brief. Counsel for the parties have given their consent to the filing of this *amicus* brief.

1. First and foremost, PNM has filed a petition for *certiorari* in a separate case, and that petition is now pending before this Court. *See Pub. Serv. Co. of N.M. v. Barboan*, *petition for cert. filed* Nov. 20, 2017 (No. 17-756).[2] There is overlap between the question presented in *Upper Skagit*, as framed by the Tribe, and at least one of the two questions presented by PNM's petition. Depending on the outcome and breadth of the Court's opinion, the result here could effectively decide PNM's related question one way or the other, or it could leave that question for another day.

PNM's case involves a federal statute, 25 U.S.C. § 357,[3] which allows the condemnation of allotment land on the same basis that land owned in fee may be condemned.[4] The first question presented by PNM's petition asks, in a nutshell, whether the condemnation authority granted by § 357 includes authority to condemn a right-of-way across allotment land, where an Indian tribe has acquired a fractional beneficial interest in the allotment

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[2] The briefs of the United States and other respondents in PNM's case are now due on March 23, 2018.

[3] 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."

[4] The term "allotment land" refers to land was once part of an Indian reservation but was carved out and "allotted" to individual members of the tribe as their own property, but held in trust by the United States.

land.[5] The result in *Upper Skagit* need not affect *that* question because the issue here does not involve § 357 or allotment land. There is overlap, however, between *Upper Skagit* and PNM's second question, which asks:

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

Inasmuch as condemnation is an *in rem* action, *United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946), the answer to PNM's second question could be affected by the Court's answer to the broad *in rem* question presented by the Tribe in *Upper Skagit*.

2. Leaving aside the issue of allotment land, public utilities also find it necessary to file condemnation actions to obtain rights-of-way across land owned in fee. If the acquisition by an Indian tribe of an interest in fee land were to preclude any *in rem* action with respect to that land, as the Tribe asks

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[5] Stated in full, the first question presented by PNM asks:

> 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 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)?

the Court to rule, then the ability of such utilities – including PNM – to acquire needed rights-of-way could be seriously limited.

3. Even where the utility already has acquired the right-of-way, disputes can arise over right-of-way boundaries or over the exercise of maintenance rights or other ancillary rights. In such cases, a remedy can be found in an action to quiet title or, similarly, in an action for declaratory judgment; however, if sovereign immunity precludes a court from adjudicating such disputes where the fee interest is held by an Indian tribe, harm to the public interest will occur.

PNM submits this *amicus* brief in order to call to the Court's attention the broad implications of the relief sought by the Tribe, and to ask the Court to resolve the case in a way that does not prejudice the rights of PNM or other public utilities with respect to their use of condemnation or their own use of quiet title and similar actions.

SUMMARY OF ARGUMENT

Like Sharline and Ray Lundgren, and others who have land disputes with their neighbors, public utilities sometimes have disputes with landowners whose tracts are subject to rights-of-way for utility infrastructure. It is important for all parties to have access to courts so that those disputes can be resolved. It is especially important for utilities to have such access because of the public interest that they are charged with serving. The Court should affirm the decision of the Supreme Court of Washington. If it

does not, landowners and utilities will be left without a legal remedy.

In serving the public interest, utilities also need to obtain rights-of-way for critical infrastructure, including not just electric transmission lines, but also gas, oil and water pipelines. The broad rule sought by the Tribe – which the Tribe would make applicable to all *in rem* actions – would harm the public interest by foreclosing condemnations whenever a tribe asserts sovereign immunity. Such a result conflicts with this Court's holding in *Carmack*, 329 U.S. at 235 n.2, which said that the jurisdiction of a court to hear a condemnation action does not turn upon the owner's participation in the case.

The broad rule sought by the Tribe is not necessary to resolve the *Upper Skagit* case now before the Court. If the Court were to rule that tribal sovereign immunity bars a quiet title action, PNM would urge the Court to write its opinion narrowly so as to (i) avoid any suggestion that *Carmack* is no longer good law, and (ii) leave room to reach a result favorable to eminent domain in a case where condemnation is at issue.

The petition for *certiorari* that PNM has pending before the Court deals with condemnation of allotment land – a special sort of condemnation proceeding expressly authorized by federal statute, 25 U.S.C. § 357. The land at issue in the case at bar is not allotment land, nor does the case involve § 357. With PNM's petition for *certiorari* pending, PNM urges the Court to decide *Upper Skagit* in a way that

will not prematurely and adversely decide the § 357 and allotment land issues presented by that petition.

ARGUMENT

There are many public utilities across the country, and the decision handed down in this case will set the law nationwide for many years. PNM would be remiss in its role as an *amicus curiae* – a friend of the Court – if it did not call to the Court's attention the problems that it sees lying ahead if the Court were to reverse the decision below.

The dispute between the Tribe and the Lundgrens involves an action to quiet title, not condemnation. Thus, it may be helpful for PNM first to discuss actions to quiet title and similar proceedings before turning to the need to protect the right of eminent domain.

I. By Preventing Courts from Resolving Disputes Between Utilities and Indian Tribes, the Broad Rule Sought by the Upper Skagit Would Harm the Public Interest.

The Lundgrens are private landowners, not a public utility. But, the Tribe's immunity arguments in the instant quiet title action are not tied to the plaintiffs' status as purely private parties. If the Tribe were to prevail in its view that tribal sovereign immunity *always* bars an action to quiet title on tribally claimed land, absent tribal waiver or Congressional abrogation, public utilities would also

be unable to bring such lawsuits – with resulting harm to the public interest.

Consider a situation in which a utility has already obtained the right-of-way and installed its infrastructure. Even though some issues have been resolved, the potential for disputes still remains. Rights-of-way typically carry with them ancillary rights to take reasonable steps to maintain the infrastructure. As one treatise has explained,

> The constituent ingredients [of an easement] frequently include not only a primary right, such as a right to a way across the servient tenement, but also supplementary or secondary rights that serve to effectuate the primary right, such as the privilege of entering on a servient tenement for needed acts of repair or maintenance of the way.

4-34 POWELL ON REAL PROPERTY § 34.12 (2017).

Thus, if the utility is a power company, it may decide that trees close to the line need to be cut back, or that paths need to be cut or cleared in order to give ready access to transmission towers and lines, so as to avoid delay in the event of an emergency. But, landowners sometimes disagree with the utility on whether the utility enjoys such ancillary rights or whether they are being exercised reasonably. If the owner of the fee interest decides to block actions the utility believes are necessary, the normal course of action would be to resolve the dispute in a court of law through a utility-initiated quiet title action or other

action adjudicating the competing property right claims. *See, e.g., Garza v. Am. Transmission Co. LLC,* 893 N.W.2d 1, 5 (Wis. 2017) (utility company forced to file declaratory judgment action confirming its right under existing easement to enter property and remove trees endangering operation of transmission line). Under the rule proposed by the Tribe, such legal remedies would not be available.

This is not just a hypothetical issue, as shown by the recent case of *Hamaatsa*, *Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016).[6] In *Hamaatsa*, a private non-profit corporation (Hamaatsa) owned land adjacent to a tract owned in fee by a federally-recognized Indian tribe. The tribe had obtained the tract from the federal Bureau of Land Management through a quitclaim deed that reserved a public right-of-way for a long-established road connecting the Hamaatsa property to a state highway. Even so, the tribe claimed that Hamaatsa had no right to cross the tribe's tract and that, by using the road, Hamaatsa was committing trespass.

Confronted by these claims, Hamaatsa sued the tribe in a New Mexico court and, seeking relief akin to quieting title, asked for a declaratory judgment that it had the right to use the road at issue. In response, the tribe claimed that the matter could not be resolved by the court because the tribe had sovereign immunity and, thus, was immune from suit. Despite victories in the trial court and the

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[6] PNM takes no position on the merits of the underlying dispute between Hamaatsa and the tribe. The case is significant because it illustrates the use of sovereign immunity in the context of a right-of-way dispute.

intermediate appellate court, Hamaatsa ultimately lost. Guided by its view of federal law, the New Mexico Supreme Court ruled that, because the tribe invoked sovereign immunity, the suit must be dismissed for lack of subject matter jurisdiction. 388 P.3d at 985.

This is exactly the rule sought by the Upper Skagit in the case at bar; and, by preventing the adjudication of such disputes, such a result would undermine the rule of law. This Court should not follow such a path, and as Respondents have convincingly shown, there are overwhelming reasons for rejecting any invitation to do so.

II. By Barring Use of Eminent Domain to Acquire Rights-of-Way, the Broad Rule Sought by the Upper Skagit Would Harm the Public Interest.

Although the instant case does not involve condemnation, the Tribe has proposed a broad rule that, by its terms, would apply to *all* actions *in rem*, where an Indian tribe holds an interest in the property at issue. Condemnation is an *in rem* action, *see Carmack*, *supra*, and, thus, would fall under the proposed rule. *See* Resp. Br. at 35-37. As stated by the Tribe, "[t]ribal sovereign immunity mandates dismissal of *in rem* actions involving tribal property." Pet. Br. at 13. No exception is suggested for any subset of *in rem* actions. If adopted by the Court, such a rule could greatly limit the exercise of eminent domain, especially in States where Indian tribes, like

the Upper Skagit, are actively acquiring lands, including lands held in fee.

Suppose that a public utility or, for that matter, a local government, finds that the public interest requires the acquisition of a right-of-way along a route that crosses three tracts of land. One is owned in fee by the Jones family, another by Acme Corporation, and the third by an Indian tribe. Perhaps, the route is needed for an electric transmission line, or for a water, oil or gas pipeline. Or, perhaps, the route is needed to build a new road or to widen an existing one. In such a situation, the condemnation could proceed against the tracts owned by the Jones family and Acme Corporation, but when the utility or government reached the land owned in fee by the Indian tribe, the project could encounter problems. Under the rule proposed by the Tribe, condemnation could not proceed without tribal consent, even where the project is badly needed, even where no other route is feasible and even though the law – indeed, the Constitution – assures the Indian tribe of just compensation for any interest that would be acquired. (Condemnation of a right-of-way typically requires all of the affected property interests to be subject to the taking.[7] Thus, if no such tribal ownership existed, an individual owner could readily

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[7] *See, generally,* N.M. Stat. § 42A-1-17(D) (condemnation petition must, among other things, name as defendants "all the parties who own or occupy the property or have any interest therein as may be ascertained by a search of the county records"); Fed. R. Civ. P. 71.1 (in an eminent domain case, "before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records…").

achieve the same objective by conveying some fractional interest to a tribe.) Vesting such a veto power in any owner would be a drastic result, and would allow that owner either to frustrate the public interest by excluding the infrastructure or leveraging large payments well above fair market value, thereby impacting consumers.[8]

The problem is illustrated by *Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017), which involved a gas transmission line that had served the public for over thirty years. The original easement was granted by the Bureau of Indian Affairs ("BIA") for a term of years and, when it expired, the company sought to renew the right-of-way by condemnation. But, its efforts were 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. The district court held that this tribal acquisition prevented condemnation, found that the company was trespassing, and ordered the pipeline removed. *Id.* at 1235, 1239.[9]

The Upper Skagit have a close connection to the tract containing the strip at issue here. The tract

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[8] To suggest that an Indian tribe might make such demands is not meant as a criticism. If this Court were to recognize the rights sought here by the Upper Skagit, it would be perfectly reasonable to expect the tribes to exercise those rights.

[9] Enable has appealed to the Tenth Circuit. *See Davilla*, No. 5:15-cv-1262 (W. D. Okla.) at Dkt. No. 60 (filed Apr. 25, 2017), *appeal docketed*, No. 17-6088. The district court later delayed removal of the pipeline pending settlement discussions. *See id.* at Dkt. No. 78 (entered Sept. 5, 2017).

was once part of their ancestral lands, and it lies across the highway from land held in trust for the Tribe by the United States. U.S. Br. at 2. But, the broad rule the Tribe proposes does not require any such connection in order to prohibit an action *in rem* (nor could any rule feasibly do so). Instead, a tribe could acquire a fee interest in land anywhere in the United States, and the tribe's sovereign immunity would block any condemnation of that land. This, too, is problematic.

III. Condemnation Cases Should Be Allowed, Even If Quiet Title Cases Are Barred.

PNM supports the broad availability of state and federal courts to resolve differences over interests in land, including quiet title actions. But, even if the Court were to rule for the Tribe in the case at bar, based on tribal sovereign immunity, the Court should not adopt a rule so broad that condemnation actions are also foreclosed. There are significant differences that argue in favor of allowing condemnation cases to proceed, even if quiet title cases are barred.

In a quiet title case, the party bringing the action would typically be acting in a purely private capacity, as the Lundgrens are doing here. By contrast, when a utility brings a condemnation action, it is only because the sovereign (typically, a State) has *delegated* that power to the utility as a means of advancing 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 . . ."); *Pollard v. Hagan*, 44 U.S. 212, 223 (1845) (recognizing eminent domain as a "sovereign

power"); *Olcott v. Supervisors*, 83 U.S. 678, 691 (1872) (noting that "building 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."). Thus, in a quiet title case, such as the one here, the interests of a tribal sovereign are positioned against purely private interests. But, in a condemnation case, the interests of the *tribal* sovereign would be positioned against the interests of the *state* sovereign.[10]

Both cases would, of course, implicate the jurisdiction of the tribunal to hear the dispute, and that jurisdiction is obviously one aspect of sovereignty. But, in a condemnation action, more aspects of sovereignty are at stake than the power of the State to resolve disputes within its borders. As the words "eminent domain" imply, what is also at stake is the sovereign authority of the State to have ultimate control over its territory and to provide for the welfare of its residents. Thus, the calculus is different. Even if tribal sovereignty were to prevail in quiet title cases, the same result need not be reached in cases involving eminent domain.

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[10] Thus, condemnation cases brought against land where a tribe holds an interest are distinguishable from cases where purely private parties seek to sue a sovereign, which is the context in which sovereign immunity is most often discussed. *See, e.g., The Federalist* No. 81, at 548 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of *an individual* without its consent.") (emphasis added); *Sossaman v. Texas*, 563 U.S. 277, 283 (2011) ("Immunity from *private* suits has long been considered 'central to sovereign dignity.'") (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Indeed, the United States seems to agree – at least, implicitly – that this is not the case to decide the fate of condemnation actions brought against land in which an Indian tribe holds an interest. In filing an *amicus* brief in support of the Tribe, the United States felt compelled to reframe and narrow the question presented. Instead of following the lead of the Tribe and addressing *all* actions *in rem*, the question presented by the United States *only* addresses actions to quiet title.[11]

Taking into account considerations of "equity and good conscience," the Supreme Court of Washington determined that the Tribe was not an indispensable party whose absence would require dismissal of the action. J.A. 113-15 (applying Wash. CR 19, the state counterpart to Fed. R. Civ. P. 19). In a condemnation action, considerations of equity and good conscience argue even more strongly in favor of allowing the action to proceed. Whatever interest in land the landowner may lose will be matched by payment of the constitutionally-required "just compensation." U.S. Const. amend. V. This is so whether the landowner comes to court or not. And, on the other side of the ledger, the benefits from the condemnation will flow to the public at large, including the tribe and its individual members. *See, e.g., Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (finding that individual Indians "benefit as

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[11] As reframed by the United States, the question presented reads: "Whether the sovereign immunity of a federally recognized Indian tribe bars an action against the Tribe *to quiet title* to property purchased by the Tribe outside of its reservation, where the Tribe has not waived its immunity and Congress has not unequivocally abrogated the Tribe's immunity." U.S. Br. at i (emphasis added).

much from public projects as do . . . non-Indian property owners"). Finally, as this Court held in *Carmack*, the jurisdiction of a court to hear a condemnation action does not turn upon the owner's participation in the case. 329 U.S. at 235 n.2 (citing *United States v. Dunnington*, 146 U.S. 338, 352 (1892); *In re Condemnation Suits by United States*, 234 F. 443, 445 (D. Tenn. 1916)). Thus, the inability to join an Indian tribe as a party, due to the tribe's assertion of sovereign immunity, should not preclude the condemnation action from moving forward.

In sum, whatever the Court may decide about quiet title actions where a tribe abstains from participating (and, again, PNM believes such actions should be allowed to proceed), there is a clear basis for allowing condemnation actions to proceed. The Court's decision here should not suggest otherwise.

IV. Condemnation of "Allotment Land" Should Not Be Foreclosed.

As noted at the beginning, PNM has a pending petition for *certiorari* that presents questions that overlap with the question presented here and that deal specifically with the condemnation of rights-of-way across allotment land. Whether the Court addresses the broad "*in rem*" question posed by the Tribe or the narrower "quiet title" question posed by the United States, the rationale used by the Court could affect PNM's case. In asking the Court to avoid any premature or unintended consequences from its *Upper Skagit* decision, PNM believes strongly that the condemnation of rights-of-way, whether across fee land or allotment land, should not be foreclosed by

tribal sovereign immunity; however, should the Court apply its decision to a range of cases broader than quiet title actions, then there are special considerations that favor condemnation of rights of way across allotment land that do not apply to condemnation of rights of way across tribally-owned fee land. In support of this point, PNM believes it may be helpful to highlight some key distinctions between the condemnation of *allotment* land and the condemnation of *fee* land:

- First, while individual Indians and Indian tribes can and do hold *beneficial* interests in allotment land, the *legal title* is held by the United States as trustee.[12] The United States has waived its sovereignty for condemnation of allotment land.[13]

- Second, a federal statute, 25 U.S.C. § 357, specifically provides for condemnation of allotment land. *See supra*, n.3 (text of statute).

- Third, condemnation of fee land owned by a tribe typically does not require the joining of the United States as a defendant; however, condemnation of allotment land always requires joining the United States as a defendant,[14] thus providing the Indian

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[12] *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (explaining that, in 1934, Congress "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands.").

[13] *Minnesota v. United States*, 305 U.S. 382, 388 (1939); *Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011).

[14] *Minnesota*, 305 U.S. at 386.

tribe with a voice to represents its interests even if the tribe chooses not to participate on its own.

- Fourth, while condemnation of land held in fee typically occurs in state courts, condemnation of allotment land can only take place in courts of the United States,[15] the sovereign under whose umbrella Indian tribes exercise their special legal status. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014).

- Fifth, there are many parcels of allotment land now crossed by expensive utility infrastructure using rights-of-way granted by the BIA years ago. These BIA-granted rights-of-way are granted for a term of years and, as they expire, they will need to be renewed. If the requisite landowner consents cannot be obtained, the BIA cannot renew the easement, and the utility will need to seek renewal by condemnation. But, under the broad rule sought by the Tribe, an Indian tribe's acquisition of any interest in an allotment parcel would stop the condemnation. The problem is magnified by the BIA's "buy-back" program under which the agency is spending $1.9 billion through 2022 to buy small fractional beneficial interests from individual allotment owners in order to convey those interests to tribes.[16]

In short, there are special considerations that come into play to favor the condemnation of rights-of-way across allotment land that do not apply in all *in*

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[15] *Minnesota*, 305 U.S. at 386.

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

rem cases or, indeed, in condemnation cases involving tribally-owned fee land. While this is not the time to decide the merits of PNM's case, PNM urges the Court not to embrace a rule or rationale in *Upper Skagit* that will foreclose or prejudice PNM's position when it comes time for the Court to consider this public utility's petition for *certiorari*.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed. If, however, the Court rules for the Tribe in this quiet title case, the Court should leave for another day whether tribal sovereign immunity bars condemnation actions against tribally-owned land, including allotment land in which a tribe holds some beneficial interest.

Respectfully submitted, February 28, 2018

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