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

BRIEF FOR *AMICUS CURIAE* NEW MEXICO OIL AND GAS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus, the New Mexico Oil and Gas Association ("NMOGA"), is a non-profit industry association with over 250 members, representing oil and gas exploration and production companies, oil and petroleum products refineries, gas and electric utility and transmission companies, logistics and transportation companies, and others with an interest in transportation for oil and gas production in New Mexico and other states. NMOGA's members are involved in all aspects of energy production and delivery, and pipelines and transmission lines they operate are a vital link in the chain of intrastate and interstate commerce. In New Mexico, oil and gas operations provide significant public benefits, including revenues for the State and public education, job creation and overall economic growth. Successfully producing and delivering oil and

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[1] Pursuant to Supreme Court Rule 37.6, NMOGA states that undersigned counsel represent Transwestern Pipeline Company, LLC ("Transwestern"), in the action filed in the district court below. Petitioner named Transwestern as a defendant because Transwestern also has a Bureau of Indian Affairs-granted right-of-way across one of the allotments at issue in this case. Transwestern filed a notice disclaiming any interest in the action after determining that Transwestern's right-of-way did not conflict with the lands Petitioner sought to condemn. Undersigned counsel represented Transwestern in the Tenth Circuit, which denied Transwestern's request to participate as a party or an intervenor, but granted Transwestern's request to participate as an *amicus curiae*. Counsel for NMOGA further states that no entity or person, aside from NMOGA and its members, made any monetary contribution toward the preparation or submission of this brief, and Transwestern specifically did not. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

gas requires reliable infrastructure. NMOGA works to ensure that regulation of oil and gas production, transportation, and delivery is fair, efficient, and does not pose unwarranted hurdles to the effective development of New Mexico's vital public resources.

NMOGA's members have facilities or operations which rely on existing rights-of-way across "lands allotted in severalty to Indians," 25 U.S.C. § 357 ("Section 357"), lands allotted to members of the Navajo Nation in Northwestern New Mexico, as well as lands allotted to members of other Tribes both within and outside New Mexico. NMOGA's members have thousands of miles of pipelines that traverse tribal and allotted lands, lands that are interspersed with state, federal, and private lands. The ability to renew such existing rights-of-way to support continued use of critical facilities and pipelines, and to acquire new rights-of-way to develop further infrastructure, is essential to NMOGA's members.

Congress has authorized two alternative methods to obtain rights-of-way across allotted lands. *See, e.g.*, *Yellowfish v. City of Stillwater*, 691 F.2d 926, 929-30 (10th Cir. 1982). Rights-of-way can be acquired through negotiation with the consent of allotted landowners and the approval of the Bureau of Indian Affairs ("BIA") under regulations compiled at 25 C.F.R. Part 169. Alternatively, in Section 357, Congress authorized the use of federal eminent domain authority for rights-of-way for "any public purpose" across "lands allotted in severalty to Indians . . . in the same manner as land owned in fee may be condemned. . . ." Although NMOGA's members negotiate in good faith for landowners' consent, the availability of condemnation under Section 357 facilitates acquisition of rights-of-

ways over allotted lands on commercially reasonable terms similar to those applicable to private lands.

NMOGA and its members have a critical interest in this case because the Tenth Circuit's decision holding Section 357 inapplicable whenever a Tribe has acquired a fractional interest in an allotment both eliminates NMOGA members' ability to invoke Section 357 to facilitate negotiations with landowners *and* forecloses the congressionally authorized alternative, right-of-way acquisition through eminent domain. To protect those member interests, NMOGA files this brief in support of the petition for certiorari.

INTRODUCTION

The decision below defeats Congress' intent in Section 357 to ensure that the millions of acres of lands "allotted in severalty to Indians" be available by condemnation for public utility and public transportation uses "in the same manner as land owned in fee may be condemned" by holding Section 357 inapplicable whenever a Tribe has acquired any interest whatsoever in an allotment. The decision ignores Congress' compelling reasons for that policy choice. In the late Nineteenth and early Twentieth Centuries, Congress enacted a series of "allotment acts" that broke up the solid tribal reservation lands, creating new landholding and jurisdictional patterns that transformed the legal character of "Indian country," requiring enactment of Section 357:

> This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West. As a result of these combined

> pressures, Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.

Solem v. Bartlett, 465 U.S. 463, 466-67 (1984). The allotment acts "allotted" approximately 41 million acres of formerly tribal lands to individual Indian landowners.[2] Those allotments were "checkerboarded" with millions of acres of newly patented non-Indian lands.

In contemporaneously enacting Section 357, Congress unquestionably responded to the need for access for essential transportation and utility services to Indian and non-Indian communities on and across the interspersed fee and allotted lands within areas "opened" under the allotment acts. Section 357 required that the lands allotted in severalty be available for public uses to serve such communities under the same reasonable state eminent domain authority as non-Indian lands. Highways, roads, water infrastructure, pipelines, and power lines now serve such communities by virtue of Section 357, and critical infrastructure intended for long-term use via renewals is in place, based on expectations that it could remain there upon reasonable compensation assured under Section 357.

Let us be clear about the effect of the decision on present and future infrastructure, in place to serve current, or required for future, legislatively declared common needs of the community. Under the decision's terms, a Tribe's acquisition, by any means, of any

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[2] *See* Cohen's Handbook of Federal Indian Law § 16.03[2][b], at 1073-74 (Nell Jessup Newton ed., 2012) ("Cohen's").

interest of any proportion in an allotment completely forecloses eminent domain acquisition of any interest in the allotment. That effect obtains if any one of the tens, or hundreds, or thousands of owners with interests in the allotment transfers any portion of their interest to a Tribe—or if any such owner dies intestate owning less than 5% interest in an allotment without heirs.[3] The decision does not affect just a few isolated tracts. Under recent federal programs, fractional interests in millions of acres of allotted lands have been transferred to Tribes. Condemnation is foreclosed even if the Tribe agrees to continued utility use—if the individual owners withhold consent, because they no longer desire their land to be subject to the road, electric or water line, pipeline or other infrastructure—or because they desire to extract whatever compensation they may demand to forestall removal, rerouting and replacement of public service facilities. The same calculus affecting siting and compensation applies to new facilities, threatening a new and virile version of the "not in my backyard" virus.

Allotted landowners, learning of the decision below, already have sought compensation many times greater than that applicable under condemnation standards—if they agree the infrastructure may remain at all. As a recent example, a federal district court applied the same rationale as the district court below in holding a Tribe's acquisition of a 1.1% interest in an allotment precluded condemnation and ordered the pipeline company to immediately cease operations and remove its pipeline within 6 months. *See Davilla v. Enable Midstream Partners, L.P.*, No.

[3] *See* 25 U.S.C. § 2206(a)(2)(D)(iii); *see also* note 11, *infra*.

CIV-15-1262-M, 2016 WL 4402064 (W.D. Okla. Aug. 18, 2016); *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017). Tribal advisors have recommended transfers to Tribes as a negotiating tactic, stating: "It may be possible, and worthwhile, for an individual Native American landowner with a potentially significant trespass claim to consider transferring an interest in the land to a tribe to insulate it from condemnation."[4] Congress did not contemplate its intent being confounded by such facile or inadvertent means.

Although the decision below made light of these concerns, Pet.App.26a-27a ("the argument has no force"), its fundamental error was to disregard Congress' clear expressions and evident intent. Section 357 unambiguously subjected "lands allotted in severalty" to condemnation. The statute imposed that condition on ownership of allotted lands. It did not expressly or impliedly limit that condition upon ownership only to lands held by any specified categories of landowners. A land-based intent was required because access across the *lands* was necessary to serve the interspersed Indian and non-Indian communities the allotment acts created. Though the decision recognized it addressed a "condemnation action against the two land parcels," Pet.App.7a, the court dismissed *in rem* concepts this Court has applied to allotment-era statutes affecting tribal interests. Contrary to *in rem* precepts, the Tenth Circuit found current ownership

[4] *See* Catherine Munson & Mark Reeves, *Dealing with Expired Rights-of-Way in Indian Country*, Law360 (Feb. 1, 2016), *available at* http://www.kilpatricktownsend.com/~/media/Files/articles/2016/Dealing%20With%20Expired%20Rights-Of-Way%20In%20Indian%20Country.ashx (citing *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty.*, 719 F.2d 956, 961-62 (8th Cir. 1983), and the district court's decision in the case below).

interests in lands to be condemned dispositive of a condemnation statute's reach. Both the significant impact to utility and public transportation access across millions of acres of land and the importance of interpretation responsive to Congress' intent warrant this Court's review.

REASONS TO GRANT THE PETITION

I. THE DECISION BELOW CONTRAVENES THE INTENT OF 25 U.S.C. § 357.

A. The Tenth Circuit Misread the Allotment-Era Congress' Intent.

The court below incorrectly required express statutory reference to tribal ownership as a prerequisite to extending condemnation authority to "lands allotted in severalty to Indians" in which a Tribe later acquires an interest. *See* Pet.App.18a. Section 357 provides:

> [l]ands 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.

Section 357 is not silent as to its reach—it subjected to condemnation a class of lands, those "allotted in severalty to Indians." The lands in dispute here unquestionably fit that description, because both parcels were "allotted in severalty," issued as allotments, to an original "allottee," an Indian member of the Navajo Nation. *See* Pet.App.12a. Section 357 concerned itself with 1) the *process* effecting transfer, that is, the lands must be "allotted in severalty," and 2) the identity of the original grantees, "Indians."

The court of appeals read too much into Section 357's "silence" regarding its application to tribal lands. Pet.App.19a. First, no reference to categories of landowners is necessary in a statute authorizing condemnation of categories of lands because a condemnation statute acts upon the lands, irrespective of ownership. Second, silence as to future owners' identities in a statute authorizing condemnation does not impliedly limit the categories of subsequent owners subject to condemnation; to the contrary, silence here confirms Congress did not exempt any category of future owners, including Tribes, from Section 357's reach.

The Tenth Circuit lost sight of Congress' goals effected by Section 357 as informed by conditions surrounding its enactment. Allotment created new landholding patterns: "Reservations became checkerboards as the sale of surplus land to whites isolated individual Indian allotments."[5] In enacting Section 357, Congress intended both to ensure utility services and public transportation could access "allotted and opened" areas—and to allow access across such areas without regard to landowner consent.[6] Moreover,

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[5] Cohen's § 1.04, at 73; *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415 (1989) (describing the fee land created by the surplus lands act at issue in that case as being "scattered throughout the reservation in a 'checkerboard' pattern"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 (1978) (describing the reservation as "a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County").

[6] That does not mean efforts to secure consent are unnecessary: New Mexico, like most other states, conditions authority to condemn on pre-filing "reasonable and diligent efforts to acquire

"[o]ne of the goals of [allotment-era] assimilation policy was to have the same law applied to Indians as applied to whites."[7] Consistent with that goal, the 1901 Congress authorized condemnation of "lands allotted in severalty . . . *in the same manner as land owned in fee may be condemned* . . . ." Section 357 (emphasis added). Given those goals, the 1901 Congress need not have addressed every type of party that might obtain an interest in lands once "allotted." Its intent in Section 357 was to subject "lands allotted in severalty" to condemnation "in the same manner as *land owned in fee*," regardless of what statute authorized the allotment, or who might eventually receive an interest in the lands.

Congress surely recognized new parties would acquire allotment interests because allotment-era acts authorized allottee transfers by intestacy, Act of Feb. 8, 1887, ch. 119, § 5, 25 U.S.C. § 348[8] (law of descent of State or Territory applies), or, for some Tribes, by conveyance approved by the Secretary of the Interior ("Secretary"), *see, e.g.,* Act of July 1, 1902, ch. 1361, § 11, 32 Stat. 636, 640 (Kaw Tribe allottees or their heirs may convey with Secretarial approval), or by other Tribes, by will, *see, e.g.,* Act of April 26, 1906, ch. 1876, § 23, 34 Stat. 137, 145. Indeed the court below recognized interest ownership by a non-Indian, non-allottee would not defeat Section 357 jurisdiction. *See* Pet.App.20a (citing *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977)). Yet Section 357

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property by negotiation." *See* N.M. Stat. Ann. §§ 42A-1-4, 42A-1-6 (1978).

[7] Cohen's § 1.04, at 76.

[8] 25 U.S.C. § 348 is contained within the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, et seq. ("GAA").

provides no indication the 1901 Congress intended tribal, or any other person's or entity's, acquisition of an interest in lands "allotted in severalty" would defeat Section 357's condemnation authorization. The court below ignored Congress' instrumental intent and interpreted the effect of statutory silence as to Tribes exactly backward. Those errors led the Tenth Circuit to subject Congress' intent, which was to impose on allotted lands the same duties under State law to reasonably accommodate public utilities and transportation as the surrounding non-Indian lands, to the self-interested transfer or accident of intestacy affecting any allotted owner's small fractional interest in the allotment.

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]." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Ignoring this tenet, the Tenth Circuit's misunderstanding of the historical context surrounding the statute it interpreted led to interpretive errors. It misunderstood the import of an earlier section of the 1901 Act authorizing the Secretary to grant rights for telephone and telegraph lines. Pet.App.10a, 18a (citing 25 U.S.C. § 319). That Congress listed specifically the several categories of Indian lands, including tribal land, for which it authorized such Secretarial grants does not imply a limitation in a subsequent provision that pertains to only one such category—"lands allotted in severalty." That is so because allotment-era Congresses, which created the distinctions between tribal and allotted lands, contemplated very different legal regimes for the two: tribal lands were specifically reserved for a Tribe and would remain subject to tribal or federal law for the communal use of tribal members; allotted lands

were specifically allocated to an individual and would be subject, largely, to state law for the purpose of the allotted owner's use, in the interest of individual owners' assimilation into the non-Indian community in the surrounding lands. That Congress authorized condemnation of allotments, and not tribal lands, does not imply that it intended a Tribe's acquisition of fractional interests would remove the allotment from Section 357's reach and thereby contravene its statutory design. The courts below ignored Congressional intent, instead investing any fractional tribal interest with talismanic power to transmute lands Congress intended to serve allotment-era policies into "tribal lands," immune from the statutory conditions imposed on those lands over a century ago. This Court's intervention is required to correct a fundamental, pernicious, and instrumentally significant misinterpretation of a statute with continuing importance to Indian country and commerce.

The Tenth Circuit compounded this fundamental interpretive error by allowing contemporary policies to override allotment-era intent. The court's reference to *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County*, 719 F.2d 956, 961-62 (8th Cir. 1983) ("*NPPD*"), and regulations in 25 C.F.R. Part 169 lend no support for its conclusion. The Tenth Circuit references BIA's regulations, Pet.App.21a-22a, including an extended exegesis of policy preferences the BIA articulated in the preamble to revised regulations in 2015, which pertain only to the Secretary's authority to grant rights-of-way under statutes and regulations governing such grants. The court's lip-service acknowledgment that the regulations themselves state "they do not apply to condemnation actions," and that the regulations had only "limited impact" on its conclusion, Pet.App.22a, is

undermined by the court's substantial reliance on *NPPD*, which relied *exclusively* on the then-compiled, and equally inapplicable, Part 169 regulations. *See NPPD*, 719 F.2d at 961-62 (citing the then-current regulation defining "Tribal land" in support of its holding that "this regulation makes clear that it is the fact of tribal ownership which establishes the existence of tribal land," and therefore the lands are "tribal land not subject to condemnation"). Citing *NPPD*, the opinion below concluded: "We side with the Eighth Circuit and agree with the district court's conclusion: '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.App.23a. Ignoring the historic context influencing Congressional intent and relying on contemporary policies, the Tenth Circuit has created a vehicle to allow an allottee's personal financial interests to defeat Congress' intent to allow utility and public transportation access across thousands of allotments across the Nation. The decision warrants this Court's review of an important issue over which this Court has supplied dispositive guidance.

B. The Tenth Circuit Decision Conflicts with *In Rem* Principles and this Court's Opinion in *Yakima*.

It has long been established that a condemnation action is one against a property itself, not against the owners of the property. Section 357 unambiguously invokes *in rem* jurisdiction: it authorizes condemnation and it specifies the class of property subject to the actions it authorizes, "lands allotted in severalty to Indians." Consequently, a Tribe acquires a fractional interest in an allotment subject to federal statutory

eminent domain authority. The land statutorily specified is subject to condemnation without regard to the identities of its owners. As we have shown, the phrase "lands allotted in severalty to Indians" does not expressly or impliedly exclude lands originally allotted to individual Indians in which a Tribe acquires an interest because it speaks to the category of persons to whom the lands were "allotted" in issuance of the original patent.

Without serious analysis, the Tenth Circuit summarily dismissed the import of the *in rem* character of a Section 357 condemnation action, stating a bald conclusion that "a § 357 proceeding is not a pure *in rem* proceeding . . ." and "because the tribe owns an interest in the disputed parcels, § 357's '[l]ands allotted in severalty to Indians' prerequisite is inapplicable. . . ." Pet.App.26a. To the extent the opinion posits that reference to "Indians" in the statute does not include a Tribe, that conclusion is flawed in two fundamental respects. First, Section 357 speaks to the class of persons to whom the lands were "allotted" in issuance of the allotment; but, even if, contrary to logic and contemporaneous allotment-era understandings, the phrase "allotted in severalty to Indians" refers to ownership at the time the action is filed, "Tribes" fits well within the term, "Indians." *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 627 (2d Cir. 1981) ("Indeed, the term 'Indians' standing alone in the [relevant acts] has generally been interpreted to include both individual Indians as well as Indian tribes."); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665-66 (1979).

Equally important is the Tenth Circuit's misunderstanding of this Court's decision in *County of Yakima v. Confederated Tribe and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"). In *Yakima*,

the Confederated Tribes filed suit to invalidate two Washington state taxes as applied to formerly allotted lands the Tribes reacquired in fee within their Reservation: an *ad valorem* property tax and an excise tax on sales of such lands. *Yakima*'s holding unquestionably rests on Section 6 of the GAA, 25 U.S.C. § 349, which subjected lands patented in fee under Section 5 of the GAA, 25 U.S.C. § 348, to state *ad valorem* property taxation. *Yakima* holds that the state *ad valorem* property tax remained applicable to the lands after they were patented in fee to the allottees and later reacquired in fee by the Tribes, but Justice Scalia's opinion invalidated "*in personam*" taxation of excise tax on the Tribes' sales of such lands. 502 U.S. at 265-70. The *in rem* effect of GAA § 6 controlled even though "'[a]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians." *Yakima*, 502 U.S. at 258 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). *Yakima* unequivocally holds that result obtained precisely because the statute operated *in rem* to allow state property taxation of all *lands* patented in fee: "[B]ecause the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned;[9] and it is not impracticable either." 502 U.S. at 265. The Tenth Circuit was flatly wrong that *Yakima* "turned on . . . fee simple status." Pet.App.30a-31a n.7.

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[9] The state property tax was not "*Moe*-condemned" under *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478 (1976), which invalidated application of state sales-related taxes to the Tribes, because GAA § 6 authorized state taxation of lands patented under the GAA, even as applied to a tribal purchaser from the original patentee.

Here, Section 357 operates *in rem* because it applies to a statutorily-defined category of land, those "allotted in severalty to Indians." Congress' expression of intent, in prototypical eminent domain terms, with respect to such lands mandates that they remain subject to condemnation without regard to changes in subsequent ownership, including tribal ownership. *Yakima* establishes that tribal, or others', acquisition of interests in "land allotted in severalty" does not insulate that interest from actions given the *in rem* character of Section 357.

Moreover, in other contexts, a sovereign's ownership interest in land does not preclude an *in rem* proceeding to condemn the land. It is well established that the United States' eminent domain authority extends to condemnation of property owned by sovereign state and local governments, without those governments' consent. *See, e.g.*, *United States v. Carmack*, 329 U.S. 230, 240-42 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) ("The fact that land is owned by a state is no barrier to its condemnation by the United States."). This is true because eminent domain is a necessary feature of government that does not "grow[] out of . . . the tenure by which lands are held." *See Carmack*, 329 U.S. at 237-38; *Kohl v. United States*, 91 U.S. 367, 371 (1875) ("If the right to acquire property for [public] uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.").

Other federal courts have rejected the contention below, with respect to state and municipal authorities, that the United States' *in rem* exercise of eminent domain powers cannot extend to authorize effects on "sovereignty." In *Minnesota v. United States*, 125 F.2d 636 (8th Cir. 1942), the United States filed an action to condemn land owned by Minnesota and used for a conservation project. The district court granted the petition for condemnation. *Id.* at 638. On appeal, Minnesota challenged the district court's jurisdiction, arguing that the condemnation order infringed on its sovereignty. The Eighth Circuit rejected those arguments. *Id.* at 640 ("There is no interference with the State's sovereignty by the United States if the taking of the lands represents a valid exercise of congressional power."). The district court had jurisdiction because a condemnation action "is local in character, is *in rem* against the land, and is only incidentally concerned with questions of title." *Id.* at 639.

Reinforcing federal power over other sovereign's interests, in *United States v. 32.42 Acres of Land*, 683 F.3d 1030 (9th Cir. 2012), the United States exercised eminent domain over land owned by the San Diego Port District, subject to a public tidelands trust held by California. The Ninth Circuit rejected California's argument that federal eminent domain could not apply to its public trust rights in tidelands acquired "as an attribute of its sovereignty upon admission to the Union" in 1850. *Id.* at 1033-34 ("Through eminent domain, the United States takes not just the rights of designated persons in the property, but the property itself, establishing a new title and obliterating previous interests not specifically excepted. The United States' power of eminent domain is supreme when exercised within its constitutional powers.").

Under *in rem* principles, the sovereignty of a state or municipal landowner does not preclude eminent domain, because the *in rem* proceeding acts on the land itself. Congress' plenary powers over Tribes' property and sovereignty interests, *see United States v. Lara*, 541 U.S. 193, 200 (2004), provide unquestioned authority for Section 357 with respect to allotted lands and any successor to interests in the lands, including a Tribe.[10]

C. Congress Has Spoken Directly to the "Present Status" of Lands in which a Tribe Acquires an Interest—They Remain "Allotted Lands."

The Tenth Circuit posed the issue before it as follows: "The issue is not how the tribe acquired the land, but instead what is the land's present status now that the tribe has acquired it." Pet.App.25a. Congress, in the present-day enactments by which Tribes recently have acquired interests in thousands of allotments, and in those authorizing the Navajo Nation's acquisition of the interests in the allotments here, addressed that issue in a manner that unqualifiedly contradicts the Tenth Circuit's premise: Lands "allotted in severalty" in which a Tribe acquires an interest remain "allotted lands," subject to statutes and regulations which govern the allotted interests.

The Navajo Nation obtained its minority undivided interests in Allotments 1160 and 1392 by virtue of the

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[10] This Court's recent grant of the Upper Skagit Indian Tribe's petition for certiorari demonstrates the importance, and relevance, of this Court's review of *in rem* jurisdiction over a Tribe, and the proper interpretation of *Yakima*. *See Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017), *cert. granted*, No. 17-387, 2017 WL 4075456 (Dec. 8, 2017).

Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 ("ILCA"), and its included 2004 amendment by the American Indian Probate Reform Act, 25 U.S.C. § 2206 ("AIPRA") (ILCA and AIPRA collectively referred to herein as "ILCA").[11] Significantly, ILCA's provisions describe a tribal interest in an allotment as an "undivided interest *in allotted land* held . . . in trust for a tribe," *see* 25 U.S.C. § 2218(d)(2) (emphasis added); 25 U.S.C. § 2213(c)(1) (same). Congress' recent characterization of lands in which a Tribe acquires an interest as "allotted land," contradicts the Tenth Circuit's conclusion that tribal acquisition of an interest in land transforms that land into tribal land.

ILCA also demonstrates that Congress intended for a Tribe that acquires an interest in an allotment to be treated similarly to an allottee successor-in-interest. In ILCA, Congress authorized leases or agreements on allotted lands in which a Tribe has an ILCA-derived interest without tribal consent, so long as the required majority of owners consent. ILCA specifies an acquiring Tribe becomes a "*tenant in common* with the other owners," 25 U.S.C. § 2213(a) (emphasis added), and provides that an approved lease or agreement applies to a Tribe's undivided interest in the allotment, even if the Tribe did not consent to the lease or agreement, *id.* § 2213(c)(1). Section 2213(c)(2) entitles the Tribe to proportional payment under the lease or agreement, while acknowledging that the Tribe shall not be treated as a party to the lease or

[11] The Tenth Circuit noted the Navajo Nation acquired a 13.6% interest in Allotment 1160 by conveyance under ILCA, and a less than 1% interest (0.14%) in Allotment 1392 escheated to the Navajo Nation by virtue of the AIPRA "single heir rule." 25 U.S.C. § 2206(a)(2)(D)(iii) (providing for escheat to Tribe of interests less than 5% if no other eligible heirs).

agreement. *See also* 25 U.S.C. § 2218(d)(2)(B) (same). The opinion below confounds Congress' specific direction to accord to the tribal interests at issue here no more weight than that accorded to the interest of any other fractional interest holder.

Also directly applicable to the lands involved here, Congress, in an uncodified 2000 amendment to the ILCA, specifically addressed administration of "Navajo Indian allotted land" when a Tribe acquires an interest in such lands. *See* Pub. L. No. 106-462, § 201, 114 Stat. 1991, 2007-09 (2000). In that amendment, Congress referred to Navajo allotments in which a Tribe acquires an interest as "Navajo Indian *allotted land*." *Id.* § 201(b)(4) (emphasis added). Again, the amendment authorizes the Secretary to approve leases on allotted lands in which a Tribe holds a fractional interest, even without tribal consent. *Id.*

Contradicting the Tenth Circuit's focus on current ownership, the 2000 ILCA amendments define "Navajo Indian allotted land" by reference to the means of issuance of the allotment, not its current ownership: a "single parcel of land . . . located within the jurisdiction of the Navajo Nation" that "is held in trust or restricted status by the United States for the benefit of *Navajo Indians*" and "*was allotted* to a Navajo Indian or [*was*] taken into trust or restricted status by the United States for a Navajo Indian." Pub. L. No. 106-462 § 201(a)(4) (emphasis added). By defining the allotted lands specifically at issue here in which a Tribe acquires an interest as "Navajo Indian allotted lands," and by reference to the act of issuance of the allotment, Public Law 106-462 directly contradicts the Tenth Circuit's erroneous conclusion that tribal acquisition of an undivided fractional

interest in an allotment transforms "lands allotted in severalty" into "tribal lands."[12]

II. THE DECISION BELOW WILL IMPAIR PUBLIC-UTILITY AND PUBLIC-TRANSPORTATION ACCESS FOR CRITICAL BUSINESSES AND COMMUNITIES.

Given the number of allotments and the areal extent of allotted lands nationally, the Tenth Circuit's decision severely threatens the ability of public utilities, pipeline companies, and others to operate effectively. New Mexico affords a useful example. As of 1934, there were approximately 3900 Navajo allotments, covering approximately 694,374 acres in New Mexico.[13] According to the most recent publications on the Land Buy-Back Program, the total

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[12] The Petition is correct that the Tenth Circuit created a false dichotomy in asserting it had only two choices—either conclude all land ever allotted is subject to Section 357, even if a Tribe obtains a majority or total interest in the allotment, or conclude even previously allotted lands in which a Tribe obtains any interest, no matter how small, becomes tribal land beyond Section 357's reach. Pet.App.22a-23a. NMOGA concurs that the first result is correct, but acknowledges other options. As the United States advanced in its Response Brief below, a condemnor could be allowed to condemn less than the total of all interests, *i.e.*, condemn the undivided fractional interest of individual Indians, but not interests held by a Tribe. Or, when a Tribe obtains a majority of the undivided interests in an allotment, the allotment could be deemed under tribal control, and only then the equivalent of tribal land. *See* Pet.33-34. While NMOGA questions whether this approach comports with Section 357's *in rem* character, it arguably would be consistent with "majority" ownership requirement in statutes governing consent to rights-of-way across allotted lands.

[13] Land Tenure Foundation, *Allotment Information for Navajo BIA Region*, referenced in https://iltf.org/land-issues/history/ and attached as Exhibit A.

equivalent acres purchased through December 8, 2017, for Navajo allotments is 155,503 acres.[14] But New Mexico reflects only a microcosm of the national scope of the decision's effect.

Condemnation for public purpose for the common good weaves through the fabric of our society. Congress intended in Section 357 for allotted lands to be part of that fabric. It has never acted to revise that intent. The decision below unravels that intent by subjecting utilities, states, municipalities, and others vested under State law with eminent domain authority and needing the continued or future use of allotted lands to the whim of any fractional owner or the effect of intestate succession.

That outcome is flatly inconsistent with this Court's admonition in *Kohl*, 91 U.S. at 371, that the federal government's power to authorize the acquisition of public property cannot be dependent upon the will of an individual or even a sovereign State. A Tribe's sovereignty is equally subject to federal authority. If the decision below stands, it will be the first of many.

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[14] *See* U.S. Dep't of Interior, Land Buy-Back Program for Tribal Nations Cumulative Sales through December 8, 2017, at 1, https://www.doi.gov/sites/doi.gov/files/uploads/table_lbbtn_transactions_through_december_8_2017.pdf. The total "equivalent acres" purchased under the Land Buy-Back Program through December 8, 2017, nationwide is 2,161,034. *Id.* at 2. The amount of "equivalent acres" purchased underestimates the total amount of acres that the Tenth Circuit's decision impacts, because "equivalent acres" represent only the percentage attributable to tribal ownership, not the entire allotment's acreage. *See* U.S. Dep't of Interior, 2016 Status Report, Land Buy-Back Program for Tribal Nations, at 9 (Nov. 2016), https://www.doi.gov/sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf (noting that if a tribe acquires a 60% undivided interest in a 200-acre tract, the equivalent purchased acres is 120 acres).

This Court should issue its writ to address whether Congress' goal of ensuring access across "lands allotted in severalty" for public purposes can be dismantled by such individual, even unintentional, action. The consequences for public access in "Indian country," and for this Court's jurisprudence defining allotment-era statutes' effects, warrant this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

Allotment Information for Navajo BIA Region

The Navajo Nation was allotted under the General Allotment Act as amended. Additionally, 94,000 acres were set aside temporarily for allotment by Executive Order of May 7, 1917.

The sources used for this information broke down the land status information for the Navajo according to US state and regions within the Navajo Nation.

		Major Dates of Allotment	Total # Allotments to 1919	Acreage of Allotments to 1919	Total # Allotments to 1935	Acreage of Allotments to 1935
AZ	Northern				0	0
	Leupp					55,740
	Southern	1919,1929			67	10,542
	Western	1905			38	3,830
	Total for Navajo in AZ		**60**	**9,600**	**105**	**70,112**
NM	Eastern	1908			3,900	600,000
	Northern				0	0
	Southern					94,374
	Total for Navajo in NM		**2,004**	**319,363**	**3,900**	**694,374**
UT			0	0	0	0
Total			**2,064**	**328,963**	**4,005**	**764,486**

Exhibit A.
Available at **https://iltf.org/land-issues/history/ (scroll down to find United States map; then select light blue region in the northwest corner of New Mexico).**