

COMMENTS

Partially Tribal Land: The Case for Limiting State Eminent Domain Power under 25 USC § 357

Addison W. Bennett†

When a state utility wishes to cross land located within a Native American reservation, but the landowners refuse to allow it, the utility in most circumstances may exercise eminent domain over the land. Under the authority of a federal statute, 25 USC § 357, states may generally condemn allotments, plots owned by individuals that lie within the sovereign boundaries of a tribal reservation. Courts have long recognized that the state authority to condemn these allotments under § 357 arises from the principle that individually owned allotments are no longer “tribal” land and, as a result, they are not protected by tribal sovereignty.

Congress’s failure to transition away from the allotment system has resulted in an ownership structure for certain plots of reservation land that it did not anticipate when it enacted § 357. Today, not all allotments are held entirely by individuals, and many now contain fractional, undivided interests that belong to tribes themselves. This status of joint ownership between individuals and tribes, which this Comment refers to as “partially tribal,” leads to considerable complications with respect to the scope of § 357. Courts have routinely held that land owned by a sovereign Native American tribe is not subject to state condemnation and that this principle protects tribal interests in allotments. Unresolved, however, is whether a tribal interest in an allotment—which can be as small as a fraction of 1 percent—should immunize even the nontribal interest in the plot from state condemnation proceedings. In other words, should a fractional tribal interest place an entire parcel out of the state’s reach?

This Comment argues that it should. The courts that have attempted to allow condemnations to proceed against partially tribal allotments run into the problem that all ownership interests in an allotment are undivided; each owner holds an undivided share of the whole parcel. This means there is no way to divide the tribal interests from the nontribal ones without effecting some kind of incursion on a tribal land interest without the tribe’s or Congress’s consent, a result that principles of tribal sovereignty squarely reject. This Comment recognizes that Congress’s intent when it passed § 357 was to eliminate tribal landholdings, but it argues that Congress has since changed course such that courts should disregard that original intent. This Comment also concedes that diminishing eminent domain power may lead to holdout problems, though it argues that protecting tribal sovereignty is the

† BA 2016, Skidmore College; JD Candidate 2020, The University of Chicago Law School.

more important interest. Consistent with the principle that states may not diminish any tribal sovereignty without Congress’s consent, this Comment concludes that a state utility has multiple avenues for seeking access to a partially tribal allotment, including opportunities for negotiation with the tribe and the federal government. Courts should not permit states to use § 357 unilaterally to divest a nonconsenting tribe from its interest in land.

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INTRODUCTION

When a state government pursues a utility project, utility lines must often cross land owned by private individuals. Though the state’s power to condemn property is ordinarily sufficient to allow the government to construct such a line through the property, special difficulty emerges when the utility lines are to cross tribal lands. What, in such circumstances, ought to occur when tribal landowners—invoking principles of tribal sovereignty—refuse to allow condemnation? Or, more commonly, what ought to

result when a public utility's temporary right-of-way expires and the present tribal landowners withhold their consent to renew the right-of-way?

Congress has authorized the condemnation of tribal lands allotted to individual landowners but not of lands held by a tribal entity. Left unclear, however, is whether plots held in common ownership between a tribe and various individuals can be condemned for this purpose. This Comment refers to such plots as "partially tribal," a status that implicates complicated questions about the scope of laws that apply to tribes but not to individuals, and vice versa. In this case, does the tribe's undivided, fractional share in an allotment immunize the entire parcel from condemnation? Or may the condemnation action proceed against only the shares held by the individuals?

Because reservation land is "subject to *plenary control* by Congress,"¹ answering these questions is an exercise in statutory interpretation.² But courts have struggled to interpret and apply 25 USC § 357,³ the statute governing state condemnation actions concerning tribal lands allotted to tribes and individuals. Through § 357, Congress has permitted the state's condemnation power to extend to allotments, parcels that are contained within tribal reservations but usually held by individual landowners instead of the tribal entity itself.⁴ This statute permits state condemnations of "[l]ands allotted in severalty to Indians . . . 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."⁵ As the Ninth Circuit has noted, § 357 was not designed to provide "special protection" from condemnations of allotments

¹ *Michigan v Bay Mills Indian Community*, 134 S Ct 2024, 2030 (2014) (emphasis added) (defining "plenary" as the exclusive right to legislate with respect to Native American tribes), citing *United States v Lara*, 541 US 193, 200, 124 (2004).

² The Supreme Court has clarified that Congress has the power to authorize condemnations of tribal lands by passing a statute that explicitly permits the exercise of eminent domain power. See, for example, *Cherokee Nation v S Kansas Railway Co*, 135 US 641, 656–57 (1890). See also *United States v Clarke*, 445 US 253, 255 (1980) (condemnation under § 357 may proceed only through judicial proceedings to acquire title, not through an "inverse condemnation" by which a government action occupies land, creating a right of action for damages ex post).

³ Act of Mar 3, 1901, ch 832, § 3, 31 Stat 1058, 1084.

⁴ The allotment creates a trust relationship, under which the federal government is required to "hold the land 'in trust for the sole use and benefit of the Indian' allottees for a 25-year-period." *Poafpybitty v Skelly Oil Co*, 390 US 365, 368 (1968), citing 25 USC § 348.

⁵ 25 USC § 357.

held entirely by individuals.⁶ Parcels owned entirely by individuals are unquestionably within a state's condemnation authority.

But certain statutory mechanisms have enabled tribal entities themselves to acquire undivided interests in allotted parcels over time. In *Public Service Co of New Mexico v Barboan*,⁷ for example, the Navajo Nation claimed respective interests of 13.6 percent and 0.14 percent in two allotted plots.⁸ The question presented was whether these allotments, in each of which the tribe itself owned a small fractional interest, remained plots "allotted in severalty to Indians" within the scope of § 357.⁹

The three federal circuit courts that have addressed this question—the Eighth,¹⁰ Ninth,¹¹ and Tenth¹² Circuits—have held that, when a tribe holds an undivided fractional interest in an allotment, the *tribal* interest cannot be condemned. District courts in these circuits have adopted a more nuanced approach with respect to the *nontribal* interest, asking whether a court, a public utility, or a tribal entity can separate the tribal interest in the allotted plot from the nontribal interest. At least one district court has carried out the condemnability analysis for the individually owned, nontribal "portion" of an allotment jointly held between individuals and a tribe.¹³ Another court has reached a different conclusion, holding that principles of tribal sovereignty and immunity from suit prevent the fragmentation of the plot and prevent the court from forcing the tribe to litigate the matter.¹⁴

Interpreting § 357 brings into tension the plain text of the statute, traditional interpretive canons, congressional purpose, economic efficiency concerns, and historic principles of tribal sovereignty. Courts addressing this issue often face a delicate balancing act: principles of tribal sovereignty dictate that plots held even fractionally by a tribe should remain uncondemnable, but holding entirely in favor of the tribe allows landowners to extract

⁶ *S California Edison Co v Rice*, 685 F2d 354, 356 (9th Cir 1982).

⁷ 857 F3d 1101 (10th Cir 2017), cert denied, 138 S Ct 1695 (2018).

⁸ *Id* at 1106.

⁹ *Id* at 1105.

¹⁰ *Nebraska Public Power District v 100.95 Acres of Land in County of Thurston, Hiram Grant*, 719 F2d 956, 961 (8th Cir 1983).

¹¹ *United States v Pend Oreille Public Utility District No. 1*, 28 F3d 1544, 1551–52 (9th Cir 1994).

¹² *Barboan*, 857 F3d at 1105.

¹³ *WBI Energy Transmission, Inc v Easement & Right-of-Way*, 2017 WL 532281, *4 (D Mont).

¹⁴ *Enable Oklahoma Intrastate Transmission, LLC v A 25 Foot Wide Easement*, 2016 WL 4402061, *3 (WD Okla).

disproportionate payment or entirely veto a project in the course of land negotiations.¹⁵ This particular form of holdout problem—in which a party with disproportionate bargaining power refuses to reach a land agreement absent a high payout—is particularly troublesome because the result of these negotiations can dramatically affect the public’s or the tribe’s receipt of important utilities, such as drinking water or electricity.

This Comment argues that the best reading of § 357 permits state authorities to condemn *only* allotments in which the tribal entity claims zero undivided interest. In other words, the condemnation power should extend only to plots held entirely by individuals. Any other reading has the effect of allowing a partition, often against the tribe’s wishes, that runs against principles of tribal sovereignty. Even requiring the tribe to litigate the matter is often a violation of its sovereignty interest.¹⁶

Settling this area of law would provide clarity to three highly interested constituencies: tribes, individual allotment holders, and public utilities. This is particularly true when utilities have already constructed power lines and other projects under authority from the Bureau of Indian Affairs (BIA) right-of-way process, as losing a condemnation action after failing to receive consent to renew easements means that the utility suddenly can be subject to massive liability for trespass.¹⁷ Whether this typically leads to bargaining or an actual shutdown of the project is not clear.¹⁸ Any answer to this unresolved question, of course, must consider not only the cost of moving utility lines and the purpose of § 357 (which both seem to militate in favor of allowing some way to condemn the nontribal interest) but also the “extremely compelling interest”¹⁹ in tribal sovereignty that courts are inclined to respect.

¹⁵ See, for example, Richard A. Posner, *Economic Analysis of Law* § 3.6, 55–56 (Aspen 9th ed 2014) (arguing that eminent domain is an antimonopoly solution to holdout problems). See also, for example, Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 Harv J L & Pub Pol 491, 535–36 (2006).

¹⁶ See note 34–35 and accompanying text.

¹⁷ See, for example, *WBI Energy*, 2017 WL 523381 at *6 (“If WBI fails to pay the just compensation awarded to Mrs. Plainbull following a trial on the merits, WBI will become a trespasser.”); *Davilla v Enable Midstream Partners LP*, 913 F3d 959, 970–71 (10th Cir 2019).

¹⁸ Given that *WBI Energy* does not have any public documents available related to appellate proceedings, a reasonable assumption is that the utilities and the tribes tend to negotiate in the shadow of a district court order denying a condemnation, as opposed to the assumption that the utility simply accepted the loss and abandoned its power line after exhausting all appeals.

¹⁹ *Enable Oklahoma*, 2016 WL 4402061 at *5 (finding the tribe’s sovereign immunity to be an “extremely compelling interest favoring dismissal”).

This Comment proceeds in three Parts. Part I discusses the history of congressional land policy with respect to Native Americans. Initially motivated by a desire to expand available areas for white settlement, Congress eventually changed course and enacted policies that gave increasing deference to tribal sovereignty. Part II describes the division of authority: district courts have not uniformly determined whether they should refuse to partition the nontribal portion of a tribal land parcel. Part III concludes that the best reading of the statute requires courts to dismiss condemnation actions against entire plots in which a tribe claims any fractional interest. The Conclusion summarizes this Comment's contribution and discusses some implications for more complicated or invasive public works that cross and use partially tribal land.

I. HISTORY OF TRIBAL LAND AND THE CONDEMNATION POWER

Tribes are “separate sovereigns pre-existing the Constitution” and are generally unconstrained by constitutional provisions intended to limit federal or state authority.²⁰ They retain their sovereignty unless Congress modifies it by altering the “substantive law applicable to the tribe.”²¹ All “aspect[s] of tribal sovereignty” therefore are “subject to *plenary federal control* and definition” and are subject to diminution by a state only with federal authorization.²² The Supreme Court has justified tribal immunity by explaining that tribes are “‘domestic dependent nations’ that exercise ‘inherent sovereign authority,’”²³ and retain their “pre-existing” sovereignty over their territory “unless and until Congress acts” to the contrary.²⁴

Various overlapping congressional acts, amended and reamended over time, have created the often-uncertain interest in parcels allotted to tribes. This Part explains that a cohesive congressional strategy for allotted parcels never fully materialized or lasted for more than a few decades. As a result, there is confusion about the proper status of allotted parcels splintered

²⁰ *Santa Clara Pueblo v Martinez*, 436 US 49, 56 (1978).

²¹ *Id.* at 58.

²² *Three Affiliated Tribes of the Fort Berthold Reservation v Wold Engineering*, 476 US 877, 891 (1986) (emphasis added).

²³ *Michigan v Bay Mills Indian Community*, 134 S Ct 2024, 2030 (2014), quoting *Cherokee Nation v Georgia*, 30 US 1, 17 (1831). See also *Santa Clara Pueblo*, 436 US at 56.

²⁴ *Bay Mills Indian Community*, 134 S Ct at 2030 (quotation marks and citations omitted).

between coexisting undivided interests belonging to individuals and to a tribe.

A. Congressional Approaches to Tribal Land and Sovereignty

1. Tribal sovereignty.

The sovereign authority of Native American tribes is expansive but not without limitation. The Supreme Court has established that, as a background assumption, tribes retain the constitutional features of self-governance and immunity that attach to independent and sovereign nations. Tribes are generally exempt from “constitutional provisions framed specifically as limitations on federal or state authority.”²⁵ Expounding on this historical principle, federal courts have recognized tribes’ rights to govern the affairs of tribal members within tribal territory, free from interference by state and federal authorities or the limitations on state power contained in the Constitution.²⁶ Tribes “have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers.”²⁷ In *United States v United States Fidelity & Guaranty Co.*,²⁸ for instance, the “sovereign immunity of Indian tribes was equated with that of the United States, [meaning] neither tribal governments, nor tribal officials acting within the scope of their authority, are subject to nonconsensual suit.”²⁹

Despite the Supreme Court’s deference to principles of tribal independence, tribal sovereignty extends only as far as Congress permits. Courts have interpreted the Constitution to mean that federal authority expressed by Congress is “superior and plenary”

²⁵ *Santa Clara Pueblo*, 436 US at 56. See also *id.* (“[T]he Fifth Amendment did not ‘operat[e] upon’ ‘the powers of local self-government enjoyed’ by the tribes.”), citing *Talton v Mayes*, 163 US 376, 384 (1889). But see Alvin J. Ziontz, *After Martinez: Civil Rights under Tribal Government*, 12 UC Davis L Rev 1, 2 & n 2 (1979) (discussing a federal statute, the Indian Civil Rights Acts of 1968, which requires tribes to honor most of the individual rights and liberties secured in the US Constitution, including the freedom of speech and religion, the right against self-incrimination, the right to just compensation when land is taken for public use, and more).

²⁶ See *Santa Clara Pueblo*, 436 US at 55–56.

²⁷ *Id.* at 58.

²⁸ 309 US 506 (1940).

²⁹ William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz L Rev 169, 172 (1994) (citations omitted).

with respect to tribal rights to self-governance.³⁰ When Congress enacts legislation that constitutes an “unequivocal[] express[ion]” of its intent to waive a tribe’s sovereign rights, courts defer entirely to Congress’s determination of the tribe’s right to self-governance.³¹ Congress may even dissolve tribal governments and reservations entirely.³² The inquiry into whether a particular tribe retains sovereignty over a particular area of the law or within a physical territory, then, depends on the scope of congressional action and the interpretation of the statute diminishing tribal power. Preexisting sovereignty yields when a court determines that Congress has deprived a tribe of those historical rights.³³ As a result, tribes are sovereign, but courts consider that sovereignty to be dependent on Congress’s actions.

Recent Supreme Court jurisprudence has clarified the scope of tribal sovereignty. Although federal power over tribes is plenary, courts should exercise extreme deference to tribal sovereign interests. For example, in *Michigan v Bay Mills Indian Community*,³⁴ the Court stressed that requiring a tribe to defend a suit—absent explicit congressional authorization, tribal consent, or a waiver—violated its sovereign rights.³⁵ In *Solem v Bartlett*,³⁶ the Court held that Congress may terminate tribal governments and reservation land status only through explicit language effecting the termination.³⁷

³⁰ *Santa Clara Pueblo*, 436 US at 58. But see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U Pa L Rev 195, 196 (1984) (noting that the “judiciary’s frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant” it).

³¹ *United States v Testan*, 424 US 392, 399 (1976), quoting *United States v King*, 395 US 1, 4 (1969).

³² See, for example, *Solem v Bartlett*, 465 US 463, 470–72 (1984) (holding that reservations are terminated only when Congress enacts text explicitly effectuating termination).

³³ See *Bay Mills Indian Community*, 134 S Ct at 2030 (“Thus, unless and until Congress acts, the tribes retain their historic sovereign authority.”) (quotation marks omitted).

³⁴ 134 S Ct 2024 (2014).

³⁵ *Id.* at 788.

³⁶ 465 US 463 (1984).

³⁷ See *id.* at 470–72. The *Solem* line of cases has solidified a strict plain statement rule that requires explicit language from Congress to terminate reservations, giving little regard to the subsequent history of the land, including cases in which there are zero remaining tribal residents on land once set aside as a reservation. See, for example, *Nebraska v Parker*, 136 S Ct 1072, 1081–82 (2016) (holding that a tribe’s absence “from the disputed territory” cannot “overcome the statutory text, which is devoid of any language indicative of Congress’ intent to diminish” the reservation). In *Parker*, the Court clarified that while a court may use the subsequent demographic history of a land’s occupants in considering whether a reservation has been terminated, “the Court has never

Courts continue to recognize that tribal sovereignty is an “extremely compelling interest,” permitting incursions only when there is clear evidence of congressional intent or a tribe’s waiver of its immunity.³⁸ Such cases include matters in which a state government, a public utility, or the federal government seeks to condemn tribal land for a public interest. Therefore, against a backdrop principle of preexisting tribal sovereignty, two questions emerge in cases in which a tribe seeks to avoid the jurisdiction of a state or federal court. First, courts ask whether a tribe’s sovereign immunity is at issue at all.³⁹ When courts do find that the case implicates tribal sovereignty, they ask whether Congress has altered the background assumption that a tribe may refuse to have its interest adjudicated against its wishes in federal and state courts.⁴⁰

relied solely on this [] consideration to find diminishment” in the absence of supporting evidence from the statutory text. *Id.* at 1081.

³⁸ *Enable Oklahoma Intrastate Transmission, LLC v A 25 Foot Wide Easement*, 2016 WL 4402061, *5 (WD Okla).

³⁹ Courts do not always find that tribal sovereignty is implicated at this first stage. See, for example, *National Labor Relations Board v Little River Band of Ottawa Indians Tribal Government*, 788 F3d 537, 555 (6th Cir 2015) (finding that the National Labor Relations Act applies to Native American tribes because the law applies to all employers, including tribal entities). But see *id.* at 556 (McKeague dissenting) (noting that the court created a circuit split, contrary to Congress’s instructions, by applying the Act to tribes in the absence of clear statutory language). See also *Harrison v PCI Gaming Authority*, 251 S3d 24, 26–34 (Ala 2017) (ruling that the Poarch Band of Creek Indians were not entitled to sovereign immunity to avoid tort liability under Alabama’s Dram Shop Act, and sharply criticizing the Supreme Court’s jurisprudence favoring sovereign immunity).

⁴⁰ A recent bankruptcy appeal in the Sixth Circuit Court of Appeals highlights the special caution with which courts treat claims that Congress has abrogated tribal sovereignty or that a tribe has waived it. See *In re Greektown Holdings, LLC*, 917 F3d 451, 456–67 (6th Cir 2019). In the case, a tribe asserted a sovereign immunity defense to a fraudulent transfer action, which otherwise might have resulted in the tribe needing to return certain funds it had acquired from the debtor. The court clarified that immunity from suit is a “baseline position” that lies within the “core” of tribal sovereignty until Congress expressly abrogates it. *Id.* at 456 (quotation marks and citations omitted). It determined that Congress had not abrogated tribal sovereignty, even by including the phrase “other foreign or domestic government” in the relevant statute, because that phrase did not unequivocally include tribes. *Id.* at 460. Further, the court was unwilling to find the tribe had waived its immunity. Even though the debtor was entirely owned by the very same tribe that sought to avoid the court’s jurisdiction in this appeal, the court found that even filing for bankruptcy in federal court had not waived the tribe’s immunity from the fraudulent transfer action, which is a separate legal action from the bankruptcy petition. *Id.* at 463–67.

2. Shifting congressional approaches to tribal lands.

Congressional action with respect to Native American land has generally resulted in massive deprivations of tribal sovereignty and land. Notably, though, the mechanisms by which Congress effectuated and then eventually partially rolled back this land loss have evolved significantly over time. The District of Nebraska recently described Congress's "shifting policy goals" with respect to allotments as "at most inconsistent and at times irreconcilable."⁴¹ Scholars and courts have divided shifting congressional policies into distinct eras that tend to summarize the federal government's treatment of Native American land.

The first era of note, almost certainly the darkest chapter of US history with respect to Native American land holdings, was the Forced Relocation Era of the early nineteenth century. During this time, Congress sanctioned pushing Native American tribes west into "Indian Country" with the purpose of "segregat[ing] [them]—both territorially and politically—from the rest of society."⁴² As Professor Stacy Leeds has noted, the "history of federal Indian policy is replete with examples of land taken from" Native Americans with the purpose of redistributing it to others who would "presumably make better use of the land."⁴³

Prior to the Forced Relocation Era, land could leave Native American hands only through purchase, acquisition, or "as the spoils of a 'just war.'"⁴⁴ As "ownership conflicts arose" and white settlement crept westward, however, the Supreme Court eventually ruled in *Johnson and Graham's Lessee v M'Intosh*⁴⁵ that Native Americans held merely a right of occupancy in their land that was subject to the state and federal governments' "exclusive power to extinguish that right."⁴⁶ There are "literally thousands

⁴¹ *N Natural Gas Co v 80 Acres of Land in Thurston County*, 2018 WL 3586527, *2 (D Neb).

⁴² *Id.*, citing *Williams v Lee*, 358 US 217, 221–23 (1959).

⁴³ Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 *Tulsa L Rev* 51, 59 (2005). See also *id.* at 52 (noting that in many federal cases concerning takings of Native American land, "the underlying rationale for the taking was the belief that Indians were not using the land as efficiently as another owner would," leading to the conclusion that "the 'public good' necessitated the taking of land from the Indians").

⁴⁴ *Id.* at 60 (cited in note 43), quoting *Cohen's Handbook of Federal Indian Law* § 15.04[2] at 970–71 (LexisNexis 2005).

⁴⁵ 21 US (8 Wheat) 543 (1823).

⁴⁶ *Id.* at 585.

of stories” of forced removal at the hands of the federal government that followed.⁴⁷ The Forced Relocation Era reveals a dying justification for the tribal land laws drafted during this time.

Following the Forced Relocation Era came the Allotment Era, in which Congress largely changed course from its explicit policy of forced relocation. During this time, whites had settled across the western United States, including over areas Congress had initially designated as Indian Country. Congress began to terminate tribal collective ownership in reservations, replacing the segregation of Native Americans through the reservation system with a policy of “allotting those lands to tribe members individually.”⁴⁸ The General Allotment Act of 1887,⁴⁹ among others,⁵⁰ created allotments by leaving in place the outer boundaries of the affected reservations but transferring the ownership of individual plots from title held collectively by the tribe to subdivided plots held individually by Native American allottees.⁵¹ The stated purpose of the allotment policy was to achieve integration between tribes and the rest of the United States, with the eventual goal of dissolving the tribal government entirely and “assimilating” its members into majoritarian society through a system of private land ownership.⁵²

This allotment process granted specific quantities of land to each head of a Native American family. Smaller parcels were doled out to Native Americans aged eighteen and older and orphans younger than eighteen.⁵³ In the event that there were lands leftover from the allotment process, the federal government retained the surplus and offered it for sale on behalf of the tribes.⁵⁴

⁴⁷ Leeds, 41 Tulsa L Rev at 63 (cited in note 43).

⁴⁸ *County of Yakima v Confederated Tribes and Bands of the Yakima Indian Nation*, 502 US 251, 253–54 (1992).

⁴⁹ General Allotment Act (Dawes Act), 24 Stat 388 (1887), repealed by the Indian Law Consolidation Act Amendments of 2000, Pub L No 106-462, 114 Stat 1991.

⁵⁰ See, for example, Curtis Act, 30 Stat 495 (1898); Burke Act, 34 Stat 182 (1906).

⁵¹ See Judith V. Royster, *The Legacy of Allotment*, 27 Ariz St L J 1, 9 (1995) (“In the General Allotment . . . Act of 1887, Congress authorized the break up of the reservations,” bringing about “the replacement of tribal communal ownership of land with private property.”); *Babbitt v Youpee*, 519 US 234, 237 (1997).

⁵² See *Barboan*, 857 F3d at 1105 (10th Cir 2017) (suggesting that this strange land ownership system might be due to the fact that Congress “anticipated the imminent demise” of the reservation at the time and therefore thought there would soon be no tribal lands that might fall under § 357), quoting *Solem*, 465 US at 468.

⁵³ See *Oneida Tribe of Indians of Wisconsin v Village of Hobart*, 542 F Supp 2d 908, 911 (ED Wis 2008).

⁵⁴ Royster, 27 Ariz St L J at 9 (cited in note 51) (“Indians were to receive allotments of land in severalty, and the remaining surplus lands were to be opened to settlement.”).

Given that the stated congressional goal of the allotment process was the assimilation of tribal members, it is unsurprising that this policy resulted in massive losses of land for tribes and members. The Allotment Era policy of selling off lands through “surplus land” acts resulted in a loss of roughly ninety million acres of Native American landholdings between 1887 and 1934.⁵⁵

The policy also imposed strict limitations on the alienability of allotments, limitations that remain in place today.⁵⁶ When a parcel is allotted to a tribe, the United States retains the fee title and holds the land in trust. The land cannot be sold or partitioned, and it can be alienated only according to the intestate succession laws of the state or territory in which the parcel is located.⁵⁷ This might not have been especially difficult to manage at the time of the allotment acts: after twenty-five years, the fee title was intended to pass to individual allotment holders and out of the trust relationship with the United States. Congress anticipated that, through this scheme, allotted plots would eventually “assimilate” into the ordinary real property laws of the various states.⁵⁸ Indeed, Congress specifically designed the allotment system to assimilate tribal land holdings into nontribal systems of individual land ownership.

As the deadline for tribal dissolution approached, the initial congressional plans to terminate tribal governments entirely and fold tribal members and landholdings into the general laws of the states surrounding them proved to be costlier than anticipated. The transfers also garnered less congressional support than they had initially. For some tribes, the process of completing the allotment transfers to individuals took longer than Congress had planned; this required Congress to extend the tribal government,

See also *Babbitt*, 519 US at 237; *Montana v United States*, 450 US 544, 547–48 (1981) (explaining how the ownership of the Crow reservation was broken down, with 52 percent of the reservation being allotted to members of the tribe and held in trust by the United States, 17 percent held in trust for the tribe itself, and about 28 percent held in fee simple absolute by non-Native American individuals).

⁵⁵ Royster, 27 Ariz St L J at 12 (cited in note 51).

⁵⁶ Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U Kan L Rev 383, 385 n 8 (2015) (“Most trust property today still cannot be transferred, alienated, or leased without the approval of the Secretary of Interior. . . . Some new exceptions for tribal leases of tribal lands now exist, but these do not apply to individually owned trust allotments.”).

⁵⁷ *N Natural Gas Co*, 2018 WL 3586527 at *2, citing *Hodel v Irving*, 481 US 704, 707 (1987).

⁵⁸ See *Barboan*, 857 F3d at 1104.

along with the trust relationship Congress maintained over allotted plots, on a case-by-case basis.⁵⁹ For example, in *Murphy v Royal*,⁶⁰ Congress's initial allotment act with respect to the Muskogee (Creek) reservation had planned for the trust relationship to end and for the tribal entity to be terminated in March 1906.⁶¹ When Congress could neither complete the allotment process nor resolve how to terminate the tribal government, however, it passed a resolution temporarily extending the tribal government and delaying the termination of the trust relationship of the allotted parcels.⁶²

This is just one example of how tribal allotment, which Congress intended only as a temporary measure, resulted in allotment status continuing to exist for large swaths of tribal land. As a result, Congress left the reservation boundaries intact and continued the system of allotting reservation lands to individuals. The Creek tribe provides an example of how impactful this decision may turn out to be for the present allotment status of these lands. In 2017, the Tenth Circuit held that the initially temporary 1906 extension of the Muskogee (Creek) reservation was still in effect.⁶³ The Tenth Circuit noted that Congress had failed to complete its mission to terminate the tribal government that it had set out to dissolve in 1906. The Creek reservation is just one of many reservations in the western United States that still are subject to the century-old allotment policy.⁶⁴

⁵⁹ Courts have noted that during this period, the reason for extending the existence of the tribe as a separate legal entity was often to complete the process of deeding allotment interests to individuals and winding down the business of the tribe. As a result, while Congress extended the existence of tribes, this likely reflected its desire to continue the work of winding them down rather than rebuilding what had already been lost. See, for example, *Murphy v Royal*, 875 F3d 896, 935 (10th Cir 2017), cert granted, *Carpenter v Murphy*, 138 S Ct 2026 (2018) (noting that “[a]s the termination date approached [for the Five Tribes of Oklahoma], much remained to be done . . . [and] [i]t was apparent that the affairs of the tribe could not be wound up by the date set”) (quotation marks and citations omitted), citing *Harjo v Kleppe*, 420 F Supp 1110, 1126 (DDC 1976). As of publication, this case is pending in the Supreme Court, but the question presented does not call into doubt this historical observation in the courts below.

⁶⁰ 875 F3d 896 (10th Cir 2017), cert granted, *Carpenter v Murphy*, 138 S Ct 2026 (2018).

⁶¹ *Murphy*, 875 F3d at 935, citing the Creek Allotment Agreement § 46, 31 Stat 872.

⁶² Act of March 2, 1906, 59th Cong, 1st Sess, 34 Stat 822 (1906).

⁶³ *Murphy*, 875 F3d at 966.

⁶⁴ The BIA and Bureau of Labor Management (BLM) still retain the ability to issue allotments, although it is no longer the prevailing policy goal of the federal government to transfer tribal land holdings to individual allottees. Indeed, this policy is considerably more controversial in the twenty-first century. See, for example, US Government Accountability Office, *Report to the Senate Committee on Appropriations concerning Indian Issues: BLM's Program for Issuing Individual Indian Allotments on Public Lands*

Extending the trust relationship—and its resulting severe restraints on alienability—beyond the twenty-five-year period resulted in a “splinter[ing]” of “multiple undivided interests with some parcels having hundreds, and many parcels having dozens, of owners” over generations of intestate succession.⁶⁵ Because the Allotment Era statutes imposed severe restraints on alienation over allotted plots, individual holdings in allotments could be alienated only through intestate succession,⁶⁶ a restriction that survived long after the initially intended completion of the allotment process. Multiple heirs might end up claiming dozens, or even hundreds, of undivided interests in the same parcel, depending on the applicable intestate succession laws of the state in which the reservation was located. And this all occurred well after Congress had anticipated terminating the allotment system. In 1934, Congress officially ceased its allotment transfers of title with the Indian Reorganization Act of 1934.⁶⁷ While the Allotment Era that began in 1887 ended with the passage of this statute, and Congress largely no longer explicitly intended to terminate reservations, the allotments themselves—including their restraints on alienation—remained.

As the Allotment Era gave way to the contemporary system of general territorial tribal sovereignty, vestiges of the restrictive system of alienation and succession remained. Interests in allotments continued to splinter into dozens or hundreds of undivided interests through generations of intestate succession, and many parcels risked becoming mired in questions about ownership and manageability.⁶⁸ When hundreds of cotenants claim undivided interests in the same plot, the potential for uncertainty and conflict arising from unequal contributions to the plot’s maintenance are likely to deprive the owners of the economic benefits of the land, not to mention their ability to pursue the quiet enjoyment of their property.⁶⁹

Is No Longer Viable *2 (Oct 20, 2006), archived at <http://perma.cc/H7LR-HXBC> (“Almost 120 years after the 1887 General Allotment Act, BLM still retains [allotment] authority and questions have been raised about the continued need for it.”).

⁶⁵ *N Natural Gas Co*, 2018 WL 3586527 at *2.

⁶⁶ *Id.*

⁶⁷ Pub L No 73-383, 48 Stat 984, codified at 25 USC § 5101.

⁶⁸ See *Hodel*, 481 US at 708–09.

⁶⁹ See Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis L Rev 331, 349 (discussing economic disproportionality problems that arise when a cotenant either fails to contribute her portion of expenses or when one cotenant receives a disproportionate share of the benefits).

To resolve some of the potential uncertainty and conflict, Congress eventually granted tribal entities the power to acquire small, fractional, undivided interests in highly fragmented allotted plots through the Indian Land Consolidation Act of 1983.⁷⁰ Tribes may acquire interests that constitute small percentages of the plot as a whole, which generally are so splintered that individual owners would have little use for them.⁷¹ While this system has returned some land to the tribes, it has also resulted in a “checkerboard of tribal, individual Indian, and individual non-Indian land interests.”⁷² Many allotments today are held jointly by tribes and individuals, some of whom have no tribal affiliation. The federal government estimates that the allotment process issued “millions” of acres of tribal lands to individuals between 1887 and 1934, and many allotments remain mired in this status today.⁷³

Tribes can still acquire undivided interests in allotments to consolidate holdings in lands that once belonged entirely to tribal entities. In addition to the Land Consolidation Act, Congress created other vehicles through which tribes can collect fractional interests in allotted plots. These options arose in response to a major class action brought by various Native American representatives against the Departments of Interior and Treasury. In *Cobell v Salazar*,⁷⁴ the DC Circuit approved a class action settlement in a land-loss dispute, which created a \$1.9 billion “Trust Land Consolidation Fund for the purchase of fractional interests from willing sellers to consolidate property rights in Indian tribes.”⁷⁵ In 2010, Congress “ratified that settlement in

⁷⁰ Pub L No 97-459, 96 Stat 2517, codified at 25 USC § 2201 et seq. See also *Babbitt*, 519 US at 243 (holding that, when a fractional interest of any size escheats to the tribe upon an owner’s death under § 207 as amended, the Takings Clause requires just compensation).

⁷¹ This is how, for example, the Navajo Nation was able to acquire its interest in the disputed plots at issue in *Barboan*. 857 F3d at 1106.

⁷² *Id* at 1105.

⁷³ See *Report concerning Indian Issues* at *1 (cited in note 64).

⁷⁴ 679 F3d 909 (DC Cir 2012).

⁷⁵ *Cohen’s Handbook of Federal Indian Law* § 15.07[2] n 45 (cited in note 44). See also *Cobell*, 679 F3d at 916, 924. The *Cobell* settlement arose out of a class action alleging that the Secretary of the Interior had breached his duty to account for the funds held in trust for individual Native Americans through federal land management programs. *Id* at 912. The trust proceeds in that case came from transactions relating to land allotted to individuals under the General Allotment Act of 1887, the act that deprived tribes of millions of acres of land as the plots were allotted to individuals. The proposed settlement, which the DC Circuit eventually upheld, provided for the billions of dollars to go toward “Indian Education Scholarship” funds; tax exempt status for settlement funds flowing to

the Claims Resolution Act of 2010.”⁷⁶ As of April 2017, through the “Cobell land buy-back program,” more than \$1.1 billion has been paid to landowners to consolidate more than 680,000 fractional interests, transferring almost 2.1 million acres of land to tribal governments.⁷⁷

A tribe’s ability to buy back land through the acquisition of fractional interests is almost certainly a benefit: the various buy-back systems allow tribes to consolidate the smallest fractional interests that generate essentially no utility for individual holders while also permitting tribes to regain some of their lost property interests. But the status of plots held by individual and tribal owners brings the scope of § 357 into some doubt. The statute clearly gives state authorities the power to bring eminent domain actions against allotments “in severalty to Indians.” But once a tribe claims an interest, the statute runs into the problem of tribal sovereignty, which covers immunity from any suit “absent congressional authorization (or a waiver).”⁷⁸ The question then becomes whether § 357 provides congressional authorization for states to condemn parcels in which the tribe holds a fractional, undivided interest, or whether the statute functions only to allow state condemnation against allotments as they stood before these land buyback programs permitted tribes to repurchase certain fractional holdings.

B. 25 USC § 357 and State Condemnation Authority

The above history provides necessary context for an examination of federally enabled takings by a state utility of tribally and individually owned parcels, and it informs this Section’s examination of a state’s power to take tribal lands for public purposes. The state’s power of eminent domain is often necessary to solve the holdout problems that result when providers of public goods must negotiate with individual landholders for access to land. A broad grant of authority to state utilities to condemn tribal land means that state decisionmakers may have too much

the class members; and other benefits, including attorneys’ fees and incentive payments for class representatives. *Id.* at 915.

⁷⁶ Pub L No 111-291 § 101(e), 124 Stat 3064, 3067. Brief in Opposition of the Navajo Nation, *Public Service Co of New Mexico v Barboan*, No 17-756, *5 (10th Cir filed Mar 23, 2018) (Navajo Brief).

⁷⁷ Navajo Brief at *5 (cited in note 76), citing Land Buy-Back Program for Tribal Nations under Cobell Settlement, 82 Fed Reg 17681, 17681 (Apr 12, 2017).

⁷⁸ *Bay Mills Indian Community*, 134 S Ct at 2031.

power to decide what constitutes the public interest regarding tribal land.

When Congress enacted § 357 in 1901, it did not intend to grant allotted plots any “special protection.”⁷⁹ Since then, Congress has changed course and become far more solicitous of tribal rights and sovereignty. This change makes the utilities’ preferred interpretation of § 357—one that creates an unrestricted condemnation power—less obvious.

Public utilities typically do not rely initially on their condemning authority to access “tribal lands.”⁸⁰ They instead turn to a separate statutory scheme under 25 USC § 323⁸¹ that authorizes the BIA to grant time-limited rights-of-way over tribal land. Under 25 CFR § 169, the BIA may transfer interests in tribal property while acting pursuant to the federal government’s trust relationship with the tribe (maintaining the lands in the tribe’s best interests and holding funds for the benefit of the tribe). In 2015, the BIA substantially updated § 169 to “better support[] tribal self-determination,” imposing additional deadlines on the BIA to act on requests for rights-of-way and requiring the consent of a majority of landowners to grant certain rights of access.⁸² Additionally, construction for service lines no longer requires a formal right-of-way but does require a “service line agreement” that first obtains the consent of the landowner(s) and is then filed with the BIA.⁸³

At issue in *Barboan*, for example, was a fifty-year right-of-way over allotted land within the Navajo Nation, which the BIA had granted to a utility to construct a high-voltage electric line.⁸⁴ While the right-of-way had been the utility’s preferred method of

⁷⁹ *S California Edison Co v Rice*, 685 F2d 354, 356 (9th Cir 1982).

⁸⁰ The federal government’s current definition of “tribal land” can be found in 25 CFR § 169.2:

Tribal land means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status. The term also includes the surface estates of lands held in trust for a tribe but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of 1934.

(emphasis added).

⁸¹ Act of February 5, 1948, 62 Stat 17, codified at 25 USC § 323 et seq.

⁸² Rights-of-Way on Indian Land, 80 Fed Reg 72491, 72492 (Nov 19, 2015).

⁸³ See Jeremy A. Lite, *Indian Law Alert: New Right-of-Way Rules for Indian Country Finalized by BIA* (Quarles & Brady LLP, Nov 19, 2015), archived at <http://perma.cc/82EP-Q2M7>.

⁸⁴ *Barboan*, 857 F3d at 1104.

using the allotted parcels because it did not require costly or politically fraught condemnation proceedings, the process required the consent of a majority of the individual holders and the tribe itself.⁸⁵

Courts generally view § 323 and § 357 as alternate means of obtaining easements across Native American land.⁸⁶ When, as was the case in *Barboan*, the tribe revokes its consent to renew the right-of-way, utilities may be subject to high damages in subsequent trespass actions brought against the existing utility projects constructed under the revoked right-of-way. Utility companies placed in this position typically argue that the state is left with no choice but to exercise its authority to condemn the utility's way across the plot. But when the tribe itself holds a fractional, undivided interest in the plot at issue, this generally uncontroversial assertion of power becomes far more complicated: it is unclear whether, under § 357, the tribe may use its small interest to veto any state-enabled taking of the entire plot.

The Eighth, Ninth, and Tenth Circuits have all held that a public utility has the authority to condemn land that is allotted to individual Native Americans but not land allotted to tribes.⁸⁷ In 1983, the Eighth Circuit held in *Nebraska Public Power District v 100.95 Acres of Land in Thurston County, Hiram Grant*⁸⁸ that even when a tribe's fractional interest is limited to a future reversionary interest⁸⁹ in the plot, it is no longer within the scope of § 357, which reaches lands allotted to individuals.⁹⁰

⁸⁵ See 25 USC § 324. The BIA considers the tribe's consent, regardless of its percentage of ownership, to be necessary to grant a right-of-way over tribal land. As a result, an undivided interest of any size seems to give a tribe veto power. Rights of Way on Indian Land, 80 Fed Reg 72492, 72509 (Nov 19, 2015), codified at 25 CFR § 169.101(b).

⁸⁶ See, for example, *Nicodemus v Washington Water Power Co*, 264 F2d 614, 618 (9th Cir 1959) ("In our opinion Section 323 and Section 357 offer two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line."); *Nebraska Public Power District v 100.95 Acres of Land in County of Thurston, Hiram Grant*, 719 F2d 956, 960 (8th Cir 1983).

⁸⁷ While these three cases announced the same principle of law (that § 357 does not reach tribal interests), they discussed property interests differently. *Nebraska Public Power* involved a future interest belonging to the tribe, *Pend Oreille* involved land presently held in trust by the federal government, and *Barboan* discussed a tribal interest in the easement using more explicit lines of tribal sovereignty.

⁸⁸ 719 F2d 956, 960 (8th Cir 1983).

⁸⁹ A reversionary interest is nonpossessory, meaning it does not permit the tribe to actually enter, cross, or use the land at the time of the conveyance. Rather, the tribe may obtain the remainder in a life estate, by which an individual landowner holds the plot for the remainder of his life, and the tribe obtains the fee simple interest in the land upon the individual's death. Restatement (First) of Property § 154 (1936).

⁹⁰ *Nebraska Public Power*, 719 F2d at 961.

Tribal land, the court held, includes “land or any interest therein, title to which is held by the United States in trust for a tribe.”⁹¹ Eleven years later, in *United States v Pend Orielle Public Utility District No 1*,⁹² the Ninth Circuit held that a “[u]tility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees under 25 USC § 357, but this statute does not apply to land held in trust for the Tribe.”⁹³ Recently in *Barboan*, the Tenth Circuit relied on principles of tribal sovereignty to conclude that the utility lacked the authority to condemn two allotments because they were owned by the Navajo Nation and considered “tribal land.”⁹⁴ The court upheld the lower court’s decision without much discussion.⁹⁵ The district court found that the Navajo Nation was an indispensable party to the action because of its immunity from state condemnation actions; therefore, its “interest in adequate compensation [could not] be adequately protected” unless it participated in the suit, but the district court dismissed the entire action under principles of tribal sovereign immunity.⁹⁶

The unsuccessful petition for certiorari in *Barboan*⁹⁷ identifies the tensions between tribal sovereignty and condemnation of tribal land for public utilities. Tribal land can arguably be “created” when an allotment holder transfers some small, undivided, and potentially nonpossessory interest to a tribal entity. Simply by “recording a deed—rather than leaving that decision to Congress”—the tribes may be able to effectively declare large swaths of land held by individuals immune from condemnations for necessary public-utility projects.⁹⁸ A simple transfer of some interest to the tribe then creates an entirely new “tribal” land status in the absence of authorization by Congress, which retains plenary control over tribal land. Allowing this result, the utilities argue, makes negotiations over necessary public works vulnerable to holdouts.⁹⁹ Generally, the process of eminent domain is

⁹¹ Id at 961–62.

⁹² 28 F3d 1544 (9th Cir 1994).

⁹³ Id at 1551–52, citing *Nebraska Public Power*, 719 F2d at 961.

⁹⁴ *Barboan*, 857 F3d at 1110–11, citing *Nebraska Public Power*, 719 F2d at 961–62.

⁹⁵ *Barboan*, 857 F3d at 1111–12, affg *Public Service Co of New Mexico v Approximately 15.49 Acres of Land in McKinley County*, 155 F Supp 3d 1151 (D NM 2015).

⁹⁶ *Public Service Co of New Mexico*, 155 F Supp 3d at 1169–70.

⁹⁷ Petition for Certiorari, *Public Service Co of New Mexico v Barboan*, No 17-756, *27–28 (US filed Nov 20, 2017) (PNM Petition), cert denied, 138 S Ct 1695 (2018).

⁹⁸ PNM Petition at *28 (cited in note 97).

⁹⁹ See id at *13–15. See also Richard A. Posner, *Foreword: A Political Court*, 119 Harv L Rev at 93–94 (discussing the problem of holdouts).

thought to be an efficient—and often necessary—solution to this particular problem, as it revokes veto power from the nonconsenting party.¹⁰⁰

The principle underlying the Eighth, Ninth, and Tenth Circuit opinions introduces an entirely new set of questions: When the tribe holds an undivided interest in the surface estate of an allotment, has the previously nontribal allotment been transformed into tribal land? Does the land become tribal even though the allocation of possessory interests does not differ at all from a plot allotted entirely to individuals? How much of an interest must the tribe claim in order to transform a plot that is, in effect, allotted to individuals and perhaps intended to be within the scope of § 357, into tribal land?

II. THE TENSION AMONG DISTRICT COURTS: DOES § 357 PERMIT CONDEMNATION OF THE NONTRIBAL INTEREST?

Barboan, *Pend Oreille*, and *Nebraska Public Power* all stand for the proposition that allotments held in part by a Native American tribe cannot be condemned under § 357. That clear rule, however, has not resolved whether a fractional tribal interest in an allotment immunizes the entire plot from state condemnation. District courts within the Ninth and Tenth Circuits disagree over how courts must treat nontribal interests in plots jointly held by tribes and individuals. These courts have yet to clearly articulate a rule with respect to the nontribal interests in a partially tribal allotment.

District courts' divergent approaches might be explained in one of two ways. On the one hand, it may be that circuit courts simply have not reached the question whether a nontribal interest must receive immunity from condemnation when there is a tribal interest in the same allotment. On the other, it is possible that circuit courts intended to foreclose that possibility, but lower courts have not applied that precedent and instead have carved out methods by which certain interests in partially tribal parcels may be condemned. This Comment argues that, at the very least,

¹⁰⁰ See Barak Atiram, *The Wretched of Eminent Domain: Holdouts, Free-Riding, and the Overshadowed Problem of Blind-Riders*, 18 *Berkeley J Afr Am L & Pol* 52, 53–54 (2016) (noting that “collective action[s]” that require the crossing of multiple properties are “unlikely to take place without government’s intervention” in the form of eminent domain).

questions of tribal sovereignty create some disagreement regarding the condemnability of nontribal interests in these plots, which remains an open question among district courts.

This Comment considers district courts' approaches and argues that allowing a partition and condemnation constitutes an unacceptable infringement on tribal sovereignty through the creation of a de facto partition against the tribe's wishes.

A. The *WBI Energy* Approach: Condemn the Interests of Private Allottees in Partially Tribal Plots

At first glance, it appears that the Ninth Circuit adopted the Eighth Circuit's reasoning and held that an entire allotment subject to a § 357 dispute is immune from condemnation when the tribe claims any undivided interest in the plot.¹⁰¹ The District of Montana, however, seems to disagree with that conclusion. In *WBI Energy Transmission Inc v Easement & Right-of-Way*,¹⁰² the district court concluded that § 357 protects only the tribe's interest in the allotted parcel, permitting condemnation actions to proceed against the private allottees' interests.¹⁰³ In *WBI Energy*, the United States held undivided, fractional ownership shares in the allotted parcel on behalf of an individual member of the Crow tribe and the Crow tribe.¹⁰⁴ WBI operated a public pipeline on this parcel under authority of a right-of-way granted by the BIA.¹⁰⁵ When the allottee refused to renew her consent at the expiration of the right-of-way period, the pipeline operator sought the ability to continue operation of the pipeline through a condemnation action under § 357.¹⁰⁶

The court ruled that any § 357 condemnation would have “no force with respect to the Crow Tribe's interest” in the allotments because the Crow tribe held an undivided interest in the contested parcels.¹⁰⁷ But WBI nevertheless had a right to enter, cross,

¹⁰¹ See *Pend Oreille*, 28 F3d at 1551–52 (“The Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees under 25 U.S.C. § 357, but this statute does not apply to land held in trust for the Tribe.”), citing *Nebraska Public Power*, 719 F2d at 961. See also notes 92–93 and accompanying text.

¹⁰² 2017 WL 532281 (D Mont).

¹⁰³ *Id.* at *4.

¹⁰⁴ *Id.* at *2.

¹⁰⁵ *Id.* at *1.

¹⁰⁶ *WBI Energy*, 2017 WL 532281 at *2–3.

¹⁰⁷ *Id.* at *4.

and use the property because it had “established its right to condemn the Subject Property,”¹⁰⁸ but the condemnation had force and effect “only to the extent of [the private allotment holder’s] interest.”¹⁰⁹ The district court cited to *Pend Oreille*, but only for the proposition that the law does not permit condemnation over “tribal trust lands.”¹¹⁰

The court granted WBI an easement to continue operating its pipeline, concluding that a preliminary injunction allowing the condemnation to proceed was justified.¹¹¹ Despite noting the tribe’s immunity from any litigation over the plot, the court went on to describe, in detail, the legal description of the easement it granted to permit continued operation of the pipeline over the allotment holder’s objection.¹¹² The court’s description of that easement specifically established WBI’s ability to cross the entire plot and run the pipeline without the allottee’s consent.

Given that the definition of “tribal land” includes any “undivided interest in the surface estate,”¹¹³ and the court made no attempt to partition the parcel into tribal and nontribal portions, the court in effect authorized § 357 to extend over the tribe’s undivided interest in the parcel. By doing so, the court permitted a condemnation of the nontribal interest without requiring any sort of partition or meaningful carve-out for the tribal interest. Because the tribal interest was an undivided stake in the whole plot, the court’s order cannot be reasonably interpreted as having no force or effect with respect to the tribe’s interest. The *WBI Energy* court thus permitted a condemnation of nontribal interests in a plot in which the tribe held an undivided interest in the surface estate.¹¹⁴

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Id.* at *4.

¹¹⁰ *WBI Energy*, 2017 WL 532281 at *4.

¹¹¹ See *id.* at *4–5, citing *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v United States Department of Agriculture*, 415 F3d 1078, 1092 (9th Cir 2005).

¹¹² *WBI Energy*, 2017 WL 532281 at *6–7.

¹¹³ 25 CFR § 169.2.

¹¹⁴ The court did not specify what kind of legal relationship between allotment holders its order would create, except that its decision would have no force or effect with respect to the tribe’s fractional interest. In the *Barboan* petition, the utility categorized the relationship in *WBI Energy* as similar to a cotenancy relationship, in which (1) “those who hold interests in the same allotment parcel are tenants in common”; and (2) each cotenant has “a right to enter upon, explore and possess the entire premises” with or without the consent of the other cotenants as long as he does not do so “to the exclusion” of other cotenants. PNM Petition at *33, citing 2 *Tiffany Real Property* § 426 (Callaghan 3d ed 1947).

B. The *Enable Oklahoma* Approach: Hold the Entire Plot Immune When the Tribal Entity Claims Any Interest

In *Enable Oklahoma Intrastate Transmission, LLC v 25 Foot Wide Easement*,¹¹⁵ the Western District of Oklahoma took a different approach from the District of Montana. At the heart of the dispute was an allotment in which the Kiowa tribe held a 1.1 percent undivided interest. At the expiration of a right-of-way in 2000, a public utility initiated a condemnation action to continue operation of a twenty-five-foot-wide natural gas pipeline. The tribe asserted that the action should be dismissed because of its sovereign immunity.¹¹⁶ But the court noted that it “[c]learly [] would have subject matter jurisdiction over a condemnation action regarding lands that are allotted in severalty to Indians.”¹¹⁷ The court used that reading of the statute to interpret § 357 as authorizing a state diminution of tribal land holdings, following Congress’s instructions, only when the tribal interest is zero. The court rejected the utility’s § 357 condemnation of the *entire* plot because the tribe’s 1.1 percent undivided interests removed *all* of the interests from the scope of § 357.¹¹⁸

The court broke from the *WBI Energy* court by holding that it could not exercise subject matter jurisdiction over any part of the plot because the tribe would have been a required party¹¹⁹ to the case, and the court would be powerless to adjudicate the tribe’s interests without its consent.¹²⁰ While the court noted it would have had subject matter jurisdiction under § 357 if the land were completely owned by individuals, the small tribal interest deprived the court of jurisdiction over the entire plot.

The court relied in part on the definition of tribal land in 25 CFR § 169.2.¹²¹ Lacking any ability to partition the already-allocated allotment interests in the disputed plots, the court found itself compelled to dismiss the entire action, effectively allowing the private allotment-holders to stop a condemnation action because of the tribe’s small, fractional interest.

¹¹⁵ 2016 WL 4402061 (WD Okla).

¹¹⁶ *Enable Oklahoma*, 2016 WL 4402061 at *2–3.

¹¹⁷ *Id.* at *2.

¹¹⁸ *Id.* at *4.

¹¹⁹ *Id.* at *3–4, citing FRCP 19(1)(1), 71.1(c)(3).

¹²⁰ *Enable Oklahoma*, 2016 WL 4402061 at *3–4.

¹²¹ See note 80.

The *WBI* court allowed the condemnation despite the tribe's interest, but the *Enable Oklahoma* court failed to reach the merits of the decision and held only that § 357, as informed by principles of sovereign immunity, served as an absolute bar to its subject matter jurisdiction.¹²² Ultimately, the *Enable Oklahoma* court found "that equity and good conscience mandate" dismissal, for "sovereign immunity is an extremely compelling interest."¹²³

C. The Implication of This Division of Authority for Nontribal Interests

There is a clear lack of uniformity in how courts weigh and analyze the plain text of § 357, principles of tribal sovereignty, and the arguments put forward by state utilities regarding the economic importance of maintaining established public-utility projects. Without some ability to exercise condemnation authority after the consent-based right-of-way process has failed, bargaining will likely fail or be heavily lopsided when a court denies condemnation and permits holdouts to determine the fate of the entire project.¹²⁴ An owner who withheld consent to construct a right-of-way would seem highly unlikely to engage in productive bargaining. Following this reasoning, the utilities state that the only way to construct necessary projects—or to maintain those that already exist—is through condemnation. Condemning the land both serves § 357's purpose of opening allotments to state condemnation and provides the public writ large with beneficial public goods that need to cross private lands.

Interestingly, both the *WBI Energy* and *Enable Oklahoma* courts cited *Nebraska Public Power*, out-of-circuit precedent, to support their different conclusions. There are two possible explanations for this. First, perhaps both courts superficially agree on the proper interpretation of § 357 even though their holdings with respect to the proper partition of undivided interests indicate otherwise. Second, the courts might disagree on the proper interpretation of § 357—perhaps one court believes that § 357 permits condemnation of the nontribal interest, while the other finds the statute to be a jurisdictional bar to state condemnation actions over partially tribal land. The *Enable Oklahoma* court refused to

¹²² Compare *WBI Energy*, 2017 WL 532281 at *4 (allowing condemnation), with *Enable Oklahoma*, 2016 WL 4402061 at *3 (dismissing the § 357 action on sovereign immunity grounds).

¹²³ *Enable Oklahoma*, 2016 WL 4402061 at *5.

¹²⁴ See Atriam, 18 Berkeley J Afr Am L & Pol at 53 (cited in note 100).

adjudicate the question at all, but the *WBI Energy* court permitted condemnation of a portion of the allotment to proceed against the tribe's wishes. The latter approach, while nominally lacking force or effect with respect to the tribe's interest, permitted the utility to cross and utilize land in which the tribe holds an undivided interest.

This does not appear to be district courts simply misapplying precedent. Instead, it appears that the scope of the settled law regarding § 357 is rather narrow, and courts have simply left open the issue whether condemnation actions may proceed against the interests of the private interest-holders. Neither *Barboan* in the Tenth Circuit nor *Pend Oreille* in the Ninth clearly requires courts to rule in either direction on this particular question of nontribal land condemnability.

The stakes of this question are high. Depending on the form of the state's desired taking, the resulting liability from a successful trespass action could be substantial. For example, in *Pend Oreille*, the project was a hydroelectric dam that trespassed on allotments by flooding the plots. If the land had been considered partially tribal and immune from § 357 takings, the state would be subject to significant liability (in addition to its ex ante obligation not to flood the land).

Additionally, the three circuits that have faced this question are located in areas where nearly all tribal land disputes concerning § 357 take place. As a technical matter, this question remains unresolved in many circuits, although it seems especially important to seek uniformity across district courts in these three western circuits. There are more than fifty million acres of Native American trust lands in the United States, the majority of which are located in the western half of the country.¹²⁵ The western United States is, of course, overseen by the three circuits that have addressed these questions about the scope of § 357.¹²⁶ Other circuits have, albeit rarely, confronted tribal land takings issues

¹²⁵ Todd Miller, Comment, *Easements on Tribal Sovereignty*, 26 Am Indian L Rev 105, 105 (2001).

¹²⁶ A § 357 condemnation action is not the only type of dispute that occurs almost entirely in the western portion of the country. See, for example, *Solem v Bartlett*, 465 US 463, 466–67 (1984) (regarding tribal disestablishment on appeal from the Eighth Circuit); *Murphy*, 875 F3d at 896 (regarding tribal sovereignty in the context of a habeas corpus appeal under the Major Crimes Act and applying the *Solem* factors).

raised by allotments, including § 357 questions.¹²⁷ Those other circuits have not addressed whether courts may permit a condemnation of the nontribal interest under § 357.

III. THE HOLDOUT “PROBLEM” THAT ISN’T A PROBLEM: RESOLVING THE AMBIGUITY THROUGH DEFERENCE TO TRIBAL SOVEREIGNTY

The text of § 357 leaves ambiguous whether tribal land in which tribes hold an undivided, fractional interest can be condemned. This Part first briefly discusses the text of § 357. It then considers other methods of interpretation that courts have deemed relevant and argues that the best interpretation prohibits state utilities from advancing condemnation proceedings when a tribe holds *any* undivided interest in an allotment.

Reading the statute in this way upholds tribal sovereignty and permits the tribe to assert its own condemnation powers in the appropriate case. While there may be cases in which the equities weigh so heavily in favor of condemnation that immunizing an entire allotment appears absurd, a narrow reading of a state’s § 357 power still permits takings by both the federal government and the tribe.

A. Ambiguous Language in § 357 Exacerbates Courts’ Problems with Statutory Interpretation

Courts have often addressed questions related to the status of tribal land by engaging in traditional modes of statutory interpretation. The reasons that scrutinizing the words enacted by Congress matters so much in this area are at least twofold. First, because congressional control over tribal land is plenary, the words enacted by Congress may often be the only sources of authority concerning whether certain land may be considered tribal. Courts simply must determine precisely what Congress meant when it took actions related to tribal land status. Second, when a relevant statute is unclear, modes of interpretation assist in resolving any potential ambiguity. For example, the *Solem* line of

¹²⁷ See, for example, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Federal Power Commission*, 510 F2d 198, 208–09 (DC Cir 1975) (holding that § 15 of the Federal Power Act permits the issuance of an interim annual license on reservation land); *Tuscarora Nation of Indians v Power Authority of the State of New York*, 257 F2d 885, 891–92 (2d Cir 1958) (holding that Congress had implied power to take tribal land by eminent domain).

cases explicitly engages with a plain text view of the relevant statute, requiring a clear statement from Congress effecting a diminishment of tribal land before a court may hold that reservation territory has been shrunk or eliminated.¹²⁸ In the context of partially tribal allotments, a court's view of the status of the contested land—whether it is sufficiently “tribal” to be outside the scope of § 357—also depends on statutory interpretation. This Comment therefore assesses the statute through the lens of some modes of interpretation that courts commonly apply to issues of tribal land, including § 357 in particular.

As courts do in nearly every case, it is prudent to begin with the statute's plain meaning, especially as the Supreme Court has made clear that the “plain meaning” rule applies to § 357.¹²⁹ In relevant part, the statute provides: “Lands allotted in severalty to Indians *may be condemned for any public purpose* under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.”¹³⁰ This text alone almost certainly has animated the Eighth, Ninth, and Tenth Circuits' decisions to prohibit state condemnations of land that is clearly tribal. The phrase “allotted in severalty to Indians” on its face does not include the “allotment interest of a tribal entity.” An interest “allotted in severalty *to Indians*” does not plainly include the tribal interest, a separate category of interest holder from the individual “Indians” who held allotments at the time of the statute's enactment. If courts are to draw the conclusion that the parcel may be condemned under the statute, that conclusion does not flow from the statute's plain text.

But does the statute also abrogate tribal sovereignty by applying § 357 condemnation to *all allotted plots* as some utilities have argued? As the Ninth Circuit has indicated, the statute may appear to favor the utilities' interpretation by providing these

¹²⁸ See, for example, *Nebraska v Parker*, 136 S Ct 1072, 1079–89 (2016) (affirming and applying the *Solem* test, which reads the relevant statute for plain language effecting a diminishment, considers the circumstances surrounding the act's passage, and, least importantly, reviews the subsequent demographic history and treatment by government officials); *Wyoming v EPA*, 875 F3d 505, 512–25 (10th Cir 2017) (holding that the reservation was diminished by utilizing the three-part *Solem* test). See also Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 Seattle U L Rev 805, 881–86 & 882 n 56 (2018) (describing four Supreme Court cases in the last three decades that have had to determine whether a reservation was diminished).

¹²⁹ *United States v Clarke*, 445 US 253, 254 (1980).

¹³⁰ 25 USC § 357 (emphasis added).

partially tribal allotments “no special protection” from a state’s ordinary condemnation power.¹³¹ Is it consistent with the “plain meaning” to hold that a state may not act against a plot at all because there is a small, undivided tribal interest that removes the entire plot from condemnability under the statute? Alternatively, could the utilities be correct that this result is absurd and undermines the statute’s function? Such interpretations surely cannot be gleaned from the statute’s plain text. Whatever conclusions one may draw about the equivalency between the statute’s reference to “Indians” and its reach to tribal interests, courts must look beyond the statute’s plain meaning to resolve that ambiguity.

B. The Utilities’ Standard Arguments in Favor of
Condemnation: Statutory Purpose and the “Indian Canon”

Because the text of § 357 is ambiguous, the next question is whether courts have aligned on any particular statutory canon of interpretation to determine the boundary line at which Congress has abrogated tribal sovereignty with respect to allotments. In other words, do any interpretive tools provide special assistance in determining the precise scope of § 357 with respect to partially tribal allotments? No standard canon of interpretation proves particularly dispositive. But in light of the relevant history and the specific arguments made by utilities, two particular methods of interpretation must be considered initially and rejected: purposivism and the “Indian canon.”

Utilities seeking condemnation of partially tribal allotments have argued that Congress’s purpose in enacting § 357 was to abrogate *all* tribal sovereignty in the precise way that the Court in *Bay Mills Indian Community* explained: tribal sovereignty extends only as far as Congress expresses no unequivocal intent to abrogate it.¹³² Under this reading, Congress has already waived the tribe’s sovereignty, and as a result, the plots could be condemned irrespective of any tribal interest because § 357 extends to all allotments. While important to consider in the face of ambiguous text, purposivism¹³³ does little to solve this problem because, through intervening legislation, Congress has renounced

¹³¹ *S California Edison Co v Rice*, 685 F2d 354, 356 (9th Cir 1982).

¹³² *Bay Mills Indian Community*, 134 S Ct at 1031–32.

¹³³ John F. Manning, *The New Purposivism*, 2011 S Ct Rev 113, 141–46 (discussing contemporary trends in statutory interpretation, which look first to a statute’s plain text

the original reason for the allotment acts: the termination of tribal land holdings altogether.

As stated in Part I and noted by the Ninth Circuit, the fifty-sixth Congress intended to provide allotted plots “no special protection” from condemnation actions by states.¹³⁴ But the seventy-third Congress changed course entirely with the 1934 Indian Reorganization Act. By terminating the allotment policy but leaving already-allotted parcels frozen in their Allotment Era status, Congress brought confusion to the status of a state’s § 357 power. The fifty-sixth Congress clearly intended to terminate tribal land-holdings, which would make a purposivist inquiry in 1901 rather easy. But Congress’s intent at the time would almost certainly be rejected today, and it was repudiated by Congress itself nearly seventy-five years ago. Section 357 remains good law, but Congress’s later attitudes and a general increase in societal and judicial respect for tribal self-determination muddy any inquiry into whether adherence to statutory purpose remains a wise course.

Not only has Congress changed course, but, as a normative matter, relying on the purpose of Congress in 1901 would only serve to reinforce a now-rejected regime of treatment of Native Americans. A view of statutory purpose informed by history necessarily requires rejecting any reading that relies on the vestiges of a dark history of explicit subjugation and deprivation of Native American land at the hands of the federal government. As discussed in Part I, throughout both the Forced Relocation Era and the Allotment Era, which brought about the passage of § 357, Congress’s intentions involved a bald desire to strip tribes of land in order to make room for other uses. The obvious repugnance of this purpose makes it an especially inappropriate basis for interpreting § 357.

Another method of interpretation is the so-called “Indian canon,” which provides that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to

but generally permit consideration of legislative history and purpose “in cases of statutory ambiguity”).

¹³⁴ *S California Edison Co*, 685 F2d at 356.

their benefit.”¹³⁵ Analogous in its application to the contract principle of *contra proferentem*,¹³⁶ the motivation behind this canon is the history of systematic disadvantages that characterize Native American interactions with the federal government. When ambiguities arise, a court may resolve them in a tribe’s favor.¹³⁷

Interestingly, both parties in a § 357 dispute may invoke this canon: either side may appeal to the tribe’s “best interests.” In the cert petition filed in *Barboan*, the utility argued that the beneficiaries of power lines through Native American lands are often tribe members who would otherwise be without power.¹³⁸ Because the utility had both tribal and nontribal customers, they argued, allowing a single holdout to shut down the project or extract large side payments is not only inefficient but ultimately harmful to the tribe. Whether the utility is correct about the application of this particular canon, however, should not weigh heavily on the analysis. For one, there is an emerging consensus that the best judge of the tribe’s interest is the tribe itself, and a paternalistic justification for condemnation when the tribe itself does not consent to the taking is dubious.¹³⁹

It is also not clear that the canon should apply to this statute at all. Courts and parties to these cases have debated and questioned the actual reach of this particular interpretive tool. The Supreme Court has stated that the canon applies to statutes “passed for the benefit of dependent Indian tribes.”¹⁴⁰ Congress

¹³⁵ *National Labor Relations Board v Pueblo of San Juan*, 276 F3d 1186, 1191 (10th Cir 2002), quoting *Montana v Blackfeet Tribe of Indians*, 471 US 759, 766 (1985).

¹³⁶ See Philip L. Bruner and Patrick J. O’Connor Jr., *Bruner and O’Connor on Construction Law* § 3:59 (2016) (“[A]s a last resort, [courts] will construe the ambiguity [of a contract] against the drafter.”).

¹³⁷ See Conference of Western Attorneys General, *American Indian Law Deskbook* § 1:6 (May 2018 Update) (“Indian canons . . . derive from the disadvantage labored under by tribes in making treaties and agreements with the Executive Branch.”). These canons take into consideration the government’s trust relationship with tribes, and other considerations might include intentional deception by the government, language barriers, and special advantage-taking of legal technicalities.

¹³⁸ PNM Petition at *29–32 (cited in note 97). See also *Shakopee Mdewakanton Sioux Community v Hope*, 16 F3d 262, 264–65 (8th Cir 1994) (interpreting a gaming statute in the tribe’s interests does not require accepting the tribe’s legal arguments or requested result).

¹³⁹ See Angela R. Hoelt, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 L & Ineq 203, 267–70 (1995) (reviewing existing literature in support of tribal self-determination and arguing for a restructuring of the Indian canons in light of the fact that courts have generally interpreted tribal best interests from the perspectives of “non-natives narrat[ing] their history, articulat[ing] their understandings, and determin[ing] their best interests”).

¹⁴⁰ *Alaska Pacific Fisheries v United States*, 248 US 78, 89 (1918).

clearly did not pass § 357 for the benefit of Native American tribes. The utility in *Barboan* requested a more permissive reading, calling it merely “abbreviated”¹⁴¹ and omitting the phrase “for the benefit of [] Indian tribes.” This reading arguably suggests that the canon might be applied to all statutes that govern tribes.¹⁴²

But it is not clear whether the fact that the statute may not have been passed for the benefit of affected tribes matters because, as stated above, one should presume that a tribe is well equipped to look out for its own interests and would consent to beneficial utility projects. While the utility in *Barboan* was able to cite a handful of cases in which a court applied the “Indian canon” and ruled against the tribe,¹⁴³ presuming otherwise is highly paternalistic and especially inappropriate in a § 357 dispute, in which the tribe is able to exercise bargaining power during the necessarily prior and consent-based right-of-way process.

As the tribe is well equipped to represent its own interest and hold out against a taking if it deems that action necessary, a court overriding a tribe’s determination of its own best interests is especially out of place in the context of § 357. While there may be reasons to permit a condemnation to proceed anyway,¹⁴⁴ as the court did in *WBI Energy*, those reasons should not be based on a nontribal determination of the tribe’s best interests, despite the utility’s arguments about the beneficiaries of its business operations.

The application of these canons of interpretation does not, therefore, entirely resolve the question whether § 357 permits a state to condemn any part of an allotment in which a tribe holds an undivided interest.

C. The Undivided Tribal Interest as a Blocking Interest

The *WBI Energy* court inferred that an individual interest in a jointly held allotment can be condemned because § 357 does not extend to the tribal interest. But this inference was misplaced for two reasons. First, the statute does not plainly give rise to that

¹⁴¹ PNM Petition at *30 (cited in note 97).

¹⁴² See *Blackfeet Tribe*, 471 US at 766.

¹⁴³ See PNM Petition at *31 (cited in note 97), citing *Yellowfish v City of Stillwater*, 691 F2d 926, 931 (10th Cir 1982), and *Shakopee Mdewakanton Sioux Community*, 16 F3d at 264.

¹⁴⁴ See, for example, *WBI Energy*, 2017 WL 532281 at *2 (characterizing the project that sought to cross tribal land as “necessary”).

inference. As discussed in Part III.A, the plain text of the statute neither proves nor disproves the utilities' proposition that § 357 opened all allotment territory to state condemnation. The statute merely establishes that allotments held entirely by individuals cannot claim a tribal immunity defense to condemnation. Second, if courts are to hold the tribal interest immune from condemnation under § 357, they have yet to articulate a workable partition-based solution that allows these interests to be divided from each other, and it would not be possible without divesting a tribe of an interest in property against its consent. Third, the potential gap in condemnation authority left by a narrower reading of § 357 can be filled by other schemes. A broad reading of § 357 runs the risk of ignoring the tribe's important sovereignty interest against incursions by state governments. Considering these factors, this Comment concludes that the best reading of § 357 limits state condemnation power to allotments in which the tribe claims zero interest, particularly in light of statutory regimes that have explicitly recognized a tribe's right to self-determination. This includes the ability to negotiate for and to provide social services and public works to a tribe's members.

One principle informing this conclusion is the long history of tribal land deprivation that Part II describes. As scholars have chronicled, state and federal court actions have generally resulted in massive land losses for tribes, as government entities prioritized white settlement over tribal sovereignty.¹⁴⁵ Any taking of Native American land by a state government requires a discussion of whether such a scheme would be in the interest of justice considering the history of tribal lands.¹⁴⁶ If a particular power line or utility project were in the tribe's interest, one should presume that a tribe would not surrender the benefits of that project merely to assert its own sovereignty.¹⁴⁷

As was the case in *Barboan*, utilities commonly argue that a narrow reading of state condemnation authority defeats the purpose of eminent domain and exposes utilities with costly existing

¹⁴⁵ See, for example, Leeds, 41 Tulsa L Rev at 52 (cited in note 43) ("For centuries, American Indians have seen their lands taken by federal and state governments without consent, and at times, without compensation."), citing *Tee-Hit-Ton Indians v United States*, 348 US 272, 288–91 (1955) (holding that compensation is not available to the tribe when the United States does not recognize aboriginal title); *Sioux Tribe of Indians v United States*, 316 US 317, 331 (1942) (holding that the federal government does not owe compensation for taking lands that were set aside to Indians by executive order).

¹⁴⁶ See Part I.

¹⁴⁷ See note 139.

projects to massive waste, loss of capital, or liability for trespass.¹⁴⁸ The utility will incur substantial costs when the tribe claims any interest. It therefore might seem inefficient to permit the tribe to veto a taking by a public utility or hold out for excessive payments using its position in the bilateral monopoly. This problem is amplified when, as was the case in *Barboan*, the tribe is able to shut down (or greatly inconvenience) a project using only a 0.14 percent undivided fractional interest in a single allotment. From a utility's perspective, the current circuit law and its related inferences blocking condemnation create an "anticommons"¹⁴⁹ problem, in which multiple interest-holders have veto power over the project but none alone can grant access. A condemning authority working on a utility project that requires crossing multiple plots can usually force a sale if negotiations fail.¹⁵⁰ But in the current context of a parcel of land exempted by § 357, the utility must reroute, cease entirely, or negotiate with an interest-holder who might refuse for any reason at no cost. Allowing a tribe to acquire a small, fractional interest well after the Allotment Era and then proceed to shut down an existing project after the right-of-way expires seems ripe for manipulation.¹⁵¹ For example, in *Nebraska Public Power*, the tribal members who successfully immunized their plot from state condemnation transferred a future interest to the tribe while reserving for themselves only a life estate. The Eighth Circuit thought this was sufficient to deny the state utility the power to condemn the parcel.¹⁵² The petition for certiorari in *Barboan* referred to this as manipulation in the form of creating tribal land "by recording a deed—rather than leaving that decision to Congress."¹⁵³

But potential waste resulting from a single holdout to a utility project over tribal land after an adverse § 357 ruling is not a

¹⁴⁸ See PNM Petition at *13–15 (cited in note 97).

¹⁴⁹ See, for example, Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv L Rev 621, 623–24, 673–79 (1998) (discussing the "tragedy of the anticommons," a problem that emerges when multiple owners are "endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use").

¹⁵⁰ See generally, for example, Thomas J. Miceli and Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 Am L & Econ Rev 160 (2007).

¹⁵¹ There is little doubt that western settlement depended on the construction of telegraph and electric lines over tribal land. When the right-of-ways expire and the parcels are immune from condemnation, utilities can be suddenly exposed to massive liability for trespass. See *Barboan*, 857 F3d at 1105.

¹⁵² See *Nebraska Public Power*, 719 F2d at 961–62.

¹⁵³ PNM Petition at *28 (cited in note 97).

serious concern because § 357 is not the only avenue by which a utility can acquire the right to condemn allotted lands. Tribes themselves also have the power to condemn lands within their own territory for public use.¹⁵⁴ Exercising sovereign authority within the boundaries of reservations, the tribal entity's power to condemn is the proper filler to the gap left by § 357. While it would, on its own, be somewhat absurd and certainly inefficient to say that a miniscule tribal interest in a single allotment could stop or shutdown an entire utility, the tribes will generally continue to look out for their own interests, including access to power and water.¹⁵⁵

When a utility serves tribal customers, or when the tribe sees an opportunity for productive negotiations, it will have the ability to both negotiate with the individual allotment-holders for a right-of-way and (if negotiations fail) seek a condemnation in conjunction with the tribal authority. In light of more recent developments in Native American law, scholars have begun to question any interpretation of tribal authority that deprives a tribe of the determination of its own best interests.¹⁵⁶ Here too, one should be hesitant about a regime that excludes from the process a sovereign tribe with the ability to negotiate during multiple stages of the right-of-way and potential condemnation process.

Recognizing certain rights to tribal self-determination—the idea that a “nation freely governs itself”—as encompassing the ability to participate in negotiations with utility providers and other governments has received widespread regulatory and scholarly acceptance.¹⁵⁷ Since at least 1975, the federal government has

¹⁵⁴ See, for example, Leeds, 41 *Tulsa L Rev* at 69 (cited in note 43) (“Tribal codes and constitutions have been amended to provide for the power to acquire lands within their political and territorial boundaries without the consent of the individual landowners.”), citing, among others, Sisseton-Wahpeton Sioux Tribal codes § 47-01-01 (“[The] Tribe shall have authority . . . to condemn trust or restricted land . . . for public uses, including the elimination of fractional heirship interests.”), and Eastern Band of Cherokee Indians Code at § 40-1 (permitting condemnation by the tribe when its Council deems it “appropriate”).

¹⁵⁵ See Hoeft, 14 *Law & Ineq* at 267 (cited in note 139) (advocating a “reanchoring” of the Indian canons to foreground tribes’ own interpretations of “their best interests”).

¹⁵⁶ See, for example, *id.* See also Russel Lawrence Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 *Am Indian L Rev* 1, 28–33 (1977) (discussing “benefit-burden” calculations that tribal governments make when providing certain services to their members and the nontribal persons who live inside and near reservations).

¹⁵⁷ Geoffrey D. Strommer and Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 *Am Indian L Rev* 1, 3 (2014). See also *id.* at 3 & nn 2–3, 16–18 (citing examples and defending the underlying rationale of tribal self-determination as a “human right”).

explicitly devolved certain powers to tribes that it “would otherwise be obliged to provide to Indians . . . includ[ing] healthcare, education, road construction, and social services.”¹⁵⁸ Today, the federal government’s empowerment of tribes to explicitly act on behalf of the general welfare of tribe members, including through the provision of useful social services and public works, provides another justification to safely presume the tribe will negotiate in good faith on behalf of its members’ interests in the receipt of those services.

D. The Unworkability of a Partition Solution

Despite some compelling economic efficiency arguments made by utilities that have lost § 357 condemnation actions, a nontribal interest in allotted plots should still be held immune from any condemnation under § 357 for multiple reasons. First, any partition action or access to the parcel against the tribe’s consent necessarily injures the tribe’s undivided interest, and to adjudicate even the tribe’s tiny fractional interest after it asserts ownership would be a violation of its “extremely compelling” interest in sovereign immunity. Second, immunity from condemnation is not necessarily as inefficient as the utilities suggest because tribes will likely look out for their own interests and not arbitrarily or spitefully withhold their consent when the project benefits its members. Third, tribal condemnation power supplies an additional safeguard for the interests of the tribe generally against the holdout problem created by a potential individual holder of an allotment who frustrates a utility’s attempt to condemn.

There simply is no way to partition an allotment with a tribal interest that does not fundamentally reduce the extent of the tribe’s sovereignty and rights with respect to that undivided parcel even if the deprivation occurs against a small and undivided interest. Any kind of partition similar to the *WBI* court’s order either gives the tribe a blocking interest (thus rendering the partition useless), entirely surrenders tribal control over the plot to the state’s desires, or results in a “permanent physical occupation”¹⁵⁹ on land over which the tribe *asserts* ownership. This would clearly be a taking under § 357 against tribal interests even if the court holds that the interests have somehow been severed.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 420, 426 (1982).

A solution that advocates for partitioning an allotment does not address the economic inefficiencies inherent in a § 357 dispute, nor does it adequately take account of tribal sovereignty. For one, partitions generally must be initiated by someone with an interest in the plot, and a utility is not in that position; courts in this context would theoretically be required to initiate a partition *sua sponte*.¹⁶⁰ Second, because generations of intestate succession have created a situation in which most allotted plots have dozens or hundreds of owners of undivided interests, there may be too many parties with which to negotiate and divide interests. Certain states have enacted solutions to this problem in the context of nontribal land, such as the Uniform Partition of Heirs Property Act.¹⁶¹ When many heirs have inherited undivided interests and cannot agree on a partition or consolidation solution, these statutes permit any cotenant other than the one seeking a partition to buy out the cotenant seeking a partition at a fair market value.¹⁶²

But this solution likely would not work in the context of a § 357 dispute. First, when a tribe is a cotenant in an allotted property, courts have been clear that it can assert its rights both as an interest holder and as a sovereign entitled to have its interest protected with extreme caution.¹⁶³ Second, partitions and buyouts are likely to result in a further loss of tribal land if portions of plots can be forcibly bought out, especially outside of the trust relationship and restraints on alienation with respect to certain allotted plots created by federal law. Third, a partition in kind

¹⁶⁰ Courts have rarely engaged with this question whether they have the authority to issue partition orders *sua sponte*. A review of state court decisions indicates that the practice is not supported by any rule of procedure, and the practice is nearly universally disallowed. See, for example, *Lysaght v Krekstein*, 2017 WL 588391, *1 (Pa Sup); *Guo v Guo*, 137 AD3d 974, 975 (NY App 2016). Even in both of these cases, unlike the theoretical partition in the case of a partially tribal allotment, at least one party in *Guo* and *Lysaght* sought a judicial partition, and the issue was whether the court could issue such an order on its own motion. In both cases, appeals courts determined that the power to order a partition *sua sponte* does not exist.

¹⁶¹ See, for example, Uniform Partition of Heirs Property Act, Mont Code Ann § 70-29-401 et seq.

¹⁶² See Mont Code Ann § 70-29-411 (2013).

¹⁶³ See generally, for example, *Enable Oklahoma*, 2016 WL 4402061. As courts have stressed, deprivations of tribal sovereignty must be treated with extreme caution, and any partition action necessarily injures the tribal interest. See also, for example, *Solem*, 465 US at 472 (“When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are *bound by our traditional solicitude* for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived.”) (emphasis added).

might still create an interest that breaks up tribal land (by restricting the tribe's interest to a stretch of physical land proportionate to its previous undivided percentage interest) or still blocks the project (if the tribe retains a 1 percent interest, does it hold the edge of the plot and retain the ability to block the power line that intends to cross it?). Finally, the sovereign interest of the tribe is still important to consider: while the *WBI* court intended to hold the tribe's interest separate from its order permitting the utility to cross and take the land for its project because § 357 could not reach the tribe, merely stating that an order does not apply to the tribe could not actually divide the land because the tribe held an undivided interest in the entire plot.

Thus, a partition solution would result in a loss of tribal landholdings and sovereign interest. While Congress could, of course, amend or replace the allotment system by statute, in the absence of that decision, courts should not interpret § 357 to provide a right to a nonconsensual partition of partially tribal allotments.

E. Defending the Sovereignty-Oriented Solution Even When the Tribe Is Not a Significant Beneficiary

There remains a significant objection that a tribe's interest may not lead to productive bargaining when a project benefits the public writ large but not the tribe or its members. For example, when a power line crosses tribal land but does not serve any tribal customers, the tribe might enter negotiations as a holdout with little incentive to cede an easement or initiate a taking.

While this is a serious consideration, § 357 is not the only way to take tribal land when necessary; it is simply the only way for a *state* to unilaterally divest tribal property interests. Importantly, the federal government retains the power to diminish tribal land holdings.¹⁶⁴ And unlike the states, the federal government is bound by its trust relationship with the tribes. The Supreme Court has held that the federal government owes a “duty of protection” to tribes under a “ward-guardian” principle.¹⁶⁵ Courts require the executive branch to adhere to a “strict” fiduciary relationship with dependent tribes while remaining more deferential

¹⁶⁴ See *Bay Mills Indian Community*, 134 S Ct at 1030.

¹⁶⁵ Joel A. Holt, *Treat All Men Alike: An Analysis of United States v. White Mountain Apache Tribe and Suggestions for True Reparation*, 38 Akron L Rev 413, 417–18 & n 28 (2005), citing *Worcester v Georgia*, 31 US (6 Peters) 515, 556 (1832).

to Congress's plenary control over tribal land.¹⁶⁶ Applying these principles, courts have recognized Fifth Amendment takings claims by tribes against the federal government. In 1980, the Supreme Court held that an 1877 statute ceding portions of the Great Sioux Reservation to the United States effected a taking and affirmed an award of \$105 million.¹⁶⁷ In sum, the federal government is able to cede portions of tribal land to necessary utilities, bound by both its "ward-guardian" obligations and the Fifth Amendment's just compensation requirements. Permitting utility projects that benefit large swaths of the public writ large is well within federal power.

Additionally, courts have been quite comfortable affording Native American law a more liberal standard of review. Creating a higher burden for state takings of partially tribal land is consistent with this principle, even in the absence of a flawless economic rationale. In the Pacific Northwest, for example, federal law guarantees to a small native population the right to take one-half of all harvestable salmon.¹⁶⁸ The BIA is also permitted to employ hiring practices that explicitly prefer Native Americans over other applicants.¹⁶⁹ Despite some scholarly concerns that legal preferences such as these might violate the Equal Protection or Due Process Clauses, no compelling case has been made to this effect.¹⁷⁰ Requiring states to show that the taking does not implicate a tribal property interest is consistent with the idea that the semisovereign status of tribes permits a special legal regime.

Narrowly interpreting § 357 to permit condemnations only when the tribal interest is zero still leaves the utility with *three* options to pursue its project when the tribe asserts an undivided fractional interest. First, it may negotiate with allottees through the normal consent-based right-of-way process. Second, when the project is in the interests of the tribe, the tribe itself may condemn

¹⁶⁶ See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *Stan L Rev* 1213, 1221–22 (1975).

¹⁶⁷ See generally *United States v Sioux Nation of Indians*, 448 US 371 (1980). Applying what is known as the *Fort Berthold* test, the Court reasoned that when Congress acts against tribal land, it wears "two hats," the first as a trustee with fiduciary responsibilities and the other as a sovereign exercising eminent domain power. Congress may wear either, but not both simultaneously. *Id.* at 408–09, citing *The Three Affiliated Tribes of the Fort Berthold Reservation v United States*, 390 F2d 686, 691 (Ct Cl 1968).

¹⁶⁸ See *Washington v Washington State Commercial Passenger Fishing Vessel Association*, 443 US 658, 684 (1979).

¹⁶⁹ See *Morton v Mancari*, 417 US 535, 547 (1974).

¹⁷⁰ See David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 *UCLA L Rev* 759, 761–62 (1991).

reservation land. Third, the utility may appeal to a federal interest. Because the federal government may take tribal land consistent with its trust obligations to tribes specifically, a coherent system for considering these options is already in place, so there is no need to expand state power to accomplish the same thing using § 357.

CONCLUSION

In a § 357 dispute, when a state utility attempts to exercise its condemnation authority against allotted parcels that contain fractional, undivided tribal interests, economic efficiencies may indeed point to permitting the condemnation at first glance. The utilities suggest that they need to keep online their existing projects that cross allotments, and their only way to do this is to condemn the allotments. The intent of the Congress that passed § 357 seems well aligned with this interpretation of the statute.

But subsequent history and principles of tribal sovereignty weigh heavily in favor of a more restrictive view of state condemnation authority. If a court were inclined to permit a taking, as one did in *WBI Energy*, such a decision would not comport with a proper conception of either efficiency or tribal sovereignty. To the extent the utility asserts—as it did in *Barboan*—that it is in the tribe's interest for the court to establish an easement across its allotted land without its consent, this argument likely misapplies¹⁷¹ the “Indian canon” and, as a more concerning matter, requires courts to engage in paternalistic assessments of the tribe's best interest that are counter to the tribe's own assessment.

Therefore, a solution to the holdout problem asserted by the utilities must also be consistent with the extremely compelling interest in maintaining the principles of tribal sovereignty. If there is no entirely consistent way to reconcile various interpretive principles, such as plain text, purpose, traditional canons, and economic implications, courts should err on the side of protecting tribal interests.

This problem does not necessarily end at simple power lines. A rule of law that interprets § 357 as a broad restriction of state power to act against these partially tribal allotments would protect against unacceptable losses of sovereignty, especially considering the potential implications of an alternative rule. If existing power lines can stand based on the state condemnation authority

¹⁷¹ See notes 135–39 and accompanying text.

of § 357 alone, there would be little to stop a state from interfering with tribal interests in allotted lands for larger and more invasive projects. In *Pend Oreille*, in the Ninth Circuit, for example, the project was not a power line but a hydroelectric dam that trespassed on allotments by flooding the plots. One could imagine large projects extending over allotted territory, such as major highways or even more invasive power projects, swallowing up whole plots in which the tribal entity itself claims an interest. It makes little sense for a utility to prevail on the argument that blocking these types of invasions of tribal sovereignty is wrong because it is “inefficient” from their perspective.¹⁷²

The most sensible solution is to leave the gap created by § 357 to be filled by actors other than the state, be that the tribe capable of looking out for its own best interests or the federal government bound by its ward-guardianship responsibilities. While such a project could not proceed without the tribe’s consent in most cases, this does not seem to be the doomsday scenario that the utilities predict because one should assume the tribe will not block a useful project out of spite or ignorance of the economics. Additionally, accepting the premise that takings are justified as a solution for holdouts,¹⁷³ the tribal condemnation solution solves the “anticommons”¹⁷⁴ problem of having multiple holders of the same allotted plots pursuing competing interests. This approach further respects the “extremely compelling”¹⁷⁵ interest in tribal sovereignty, which history teaches courts should not lightly ignore. To the extent that not extending the state condemnation power to plots that contain any fractional tribal interest creates a holdout problem, this is not actually a problem because there are other avenues to constructing a useful utility over these parcels. The solution to that “problem” should not be unilateral state condemnation against any interest, tribal or nontribal, under § 357 unless the tribe asserts no interest in the plot.

¹⁷² Nevertheless, this is an essential component of the utility’s argument. See PNM Petition at *31–32 (cited in note 97).

¹⁷³ See note 100 and accompanying text.

¹⁷⁴ See note 149 and accompanying text.

¹⁷⁵ *Enable Oklahoma* 2016 WL 4402061 at *5.