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Supreme Court Declines Review of Tenth Circuit Case Holding Tribal Acquisition of an Interest in an Allotment Defeats Eminent Domain Authority.

The Supreme Court recently denied a petition to review the Tenth Circuit's opinion in *Public Service Company of New Mexico v. Barboan*1. The Tenth Circuit affirmed the district's court ruling that tribal ownership of a fractional interest in an "allotment," land the United States holds in trust for individual Indians, bars condemnation of any interest in the allotment, despite 25 U.S.C. § 357 that authorizes condemnation of "lands allotted in severalty to Indians" under state law. The Tenth Circuit agreed that tribal ownership of a fractional undivided interest in an allotment converts an allotment from "lands allotted in severalty" to "tribal land," and so Section 357 no longer applied. The Supreme Court denied Public Service Company of New Mexico's petition for a writ of certiorari on May 3, 2018.2

The *PNM* decision could have significant effects on right-of-way acquisitions and negotiations with individual Indian allottees for both new rights-of-way and renewals. The decision ignores the very real consequences to entities providing necessary public commodities whose infrastructure is now or will be located on allotted lands. We have seen this play out in a federal district court in Oklahoma where that court recently found a pipeline company in trespass, after concluding that the pipeline company could not invoke Section 357 because of tribal ownership of fractional interests in allotments, and ordered the pipeline to cease operations immediately and remove the pipeline within six months.3 In our opinion, the Tenth Circuit's now final decision deprives utilities and other public entities of the ability to ensure access for fair market value without regard to allotment landowner consent, which in turn may negatively impact continued, reliable transportation of necessary public commodities—and the public—across allotted lands. The impacts of the Tenth Circuit's decision are significant geographically as well because tens of thousands of fractional interests in allotments have been transferred to, and will continue to be transferred to, Tribes nationally under recent federal statutes and federal policies.

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by Deana M. Bennett and Lynn H. Slade

Modrall Sperling

USA July 4 2018

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