Case No. 17-6188

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC,
a Delaware limited liability company,
Plaintiff/Appellant,

vs.

A 25 FOOT WIDE EASEMENT et al.,
Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE VICKI MILES-LAGRANGE, DISTRICT JUDGE
CIV-15-1250-M

PETITION FOR REHEARING EN BANC OF APPELLANT ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC

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Dated: November 29, 2018

REHEARING EN BANC REQUESTED

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INTRODUCTION

Obligated as it was to follow the three-judge panel ruling in *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101 (10th Cir. 2017), the Panel below affirmed the trial court's dismissal of Enable's claims. *Enable Oklahoma Intrastate Transmission, LLC v. 25 Foot Wide Easement*, ___ F.3d ___, 2018 WL 5993558 (10th Cir. 2018) (the "Panel Opinion" or "Panel Op."). The issue both in *Barboan* and here is whether the panels misconstrued 25 U.S. § 357 in holding it does not confer subject matter jurisdiction over claims for condemnation of certain lands previously allotted to Indians. As the Panel Opinion notes, Enable presented this error to the Panel to preserve its right to seek *en banc* review. *See* Panel Op., at 7-8.

QUESTION PRESENTED

Section 357 permits the condemnation of lands previously allotted to Indians. It contains no exceptions. The land here was previously allotted to Indians. Nevertheless, the Panel Opinion, citing *Barboan,* disallowed condemnation because an Indian tribe came to own a tiny portion of the land. The specific question presented in this case is whether, despite the plain language of Section 357, an exception exists when a tiny portion of previously allotted land comes to be owned by an Indian tribe. Contrary to several United States Supreme Court rulings, the Panel Opinion construed Section 357 to find that such an exception exists.

En banc consideration should be ordered because this proceeding involves a

question of exceptional importance. As stated in detail below, the Panel Opinion and *Barboan*, on which the Panel Opinion is based, conflict with several rulings of the United States Supreme Court. Moreover, this Court *en banc* may as a practical matter be the court of last resort not just in this litigation, but also as to this exceptionally important question. This is so because the matter at issue involves "[l]ands allotted in severalty to Indians," 25 U.S.C. § 357, and a disproportionately large portion of such land is located in the Tenth Circuit.

SUMMARY OF THE ARGUMENT

Section 357 Applies to Lands Previously Allotted to Indians

Section 357 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[.]

Applying *Barboan*, the Panel Opinion ruled the "lands allotted in severalty to Indians" in this case could not be condemned, despite the plain language of Section 357, because the Kiowa Tribe had acquired as much as 1.1% of those lands. Thus, the issue in this case is whether the Panel Opinion, relying on *Barboan*, improperly created and applied an extra-statutory exception to Section 357 for allotted lands that subsequently come to be owned by a tribe.

Supreme Court Cases with which the Panel Opinion and *Barboan* Conflict

Both *Barboan* and the Panel Opinion conflict with the following Supreme

Court determinations:

1. They conflict with *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-509 (2014). *EME Homer* held that, in applying a federal statute, a reviewing court's job is not to improve the statutory langue, but instead to apply the statute's text. *See also Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004).

2. They conflict with *Russello v. United States*, 464 U.S. 16, 23 (1983). *Russello* ruled that courts must assume Congress meant to use the language it used in one section but not another. Courts should presume Congress acts intentionally when it includes language in one section but excludes it from another. Congress could have used the excluded language in the statute had it so desired. *Barboan*, upon which the Panel Opinion relies, however, ruled that the failure to include in Section 357 language contained in 25 U.S.C. § 319 (which, unlike Section 357, concerns voluntary grants of easements in a broad category of property), was essentially an oversight, thus barring Enable from exercising eminent domain.

3. They conflict *United States v. Naftalin*, 441 U.S. 768, 773-774 (1979), that Congress wrote the statute as it did for a reason, and intended not to include the excluded language (here, the term "tribal lands").

4. They conflict with *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940), which warned against assuming Congress implied limitations of a power it expressly authorized.

ARGUMENT

I. Public Policy Reasons Support Reconsideration of the Panel Opinion and *Barboan*.

A. If allowed to stand, the Panel Opinion and *Barboan* will effectively allow a single allottee to render Section 357 meaningless by simply transferring an infinitesimally small portion of land to an Indian tribe.

The Panel Opinion and *Barboan* have a far-reaching, deleterious impact on consumers and numerous industry groups in two significant ways. With respect to existing pipelines that traverse lands allotted to individual Native Americans, the decision will all but eliminate a pipeline company's ability to obtain extensions of necessary rights-of-way before their expiration. A single allottee can prevent condemnation by simply transferring to a tribe even an infinitesimally tiny fractional interest in the allotted lands traversed by an existing pipeline, eliminating the ability to condemn the land and thereby wreaking havoc on the pipeline company who would then either have to relocate the pipeline before expiration of its right-of-way or have to pay whatever exorbitant amount is demanded of it to extend the necessary easements. Relocating an existing pipeline is not a realistic option because natural gas customers – individual consumers, local gas utilities, manufacturers and industrials, gas-fired generators – rely on the transportation service to meet their home heating, cooling, and manufacturing needs. Owners of existing natural gas pipeline easements that traverse allotted lands will have to choose between rerouting

the pipeline, an expensive proposition, or paying whatever inflated amount the owners wish to charge.

B. Despite the importance of condemnation rights under Section 357, the Panel Opinion and *Barboan* force pipelines, electric companies, and others to face a Hobson's choice of paying an arbitrarily exorbitant price or of engaging in an expensive reroute for a different easement.

As the nation's demand for natural gas continues to grow (as it is projected to do over the next decade), natural gas pipeline owners will have to expand the capacity of their infrastructure. Unless new pipelines avoid allotted lands altogether by routing along an inefficient path, they will face a similar Hobson's choice to the one existing pipelines confront when the easement expires. Under Bureau of Indian Affairs (the "BIA") regulations, right-of-way agreements for oil and gas purposes on individually owned Indian land are limited to 20-year terms. *See* 25 C.F.R. § 169.201(c). Accordingly, pipelines will continually and increasingly face this Hobson's choice if *Barboan* and the Panel Opinion stand.

Barboan already has caused, and together with the Panel Opinion will continue to cause, significant harm both to pipeline companies like Enable and to numerous other industries, such as electric utilities, whose operations depend upon right-of-way easements across allotted lands. *Cf. Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (discussing the importance of condemnation of rights-of-way under Section 357 "for necessary roads or water and power lines"). Industries

that must obtain right-of-way easements will be forced either to reroute their infrastructure to avoid paths that would traverse allotted lands or, where that is impossible, to pay artificially high prices to obtain such easements. Unless this Court grants *en banc* review and reconsiders the Panel Opinion, the extra burdens and expenses that would flow from electing either option will result in significant harm to Enable, the various impacted businesses and industries, and consumers generally.

C. This Court may be the only one with a realistic opportunity to review the question presented here, as much of the allotted lands are located in the states comprising the Tenth Circuit.

En banc reconsideration may be the only realistic opportunity to correct the Panel Opinion's formulaic[1] application of *Barboan*. This is so because the issue this case raises, regarding application of Section 357 to allotted lands that have become partially owned by a tribe, exists almost exclusively within the confines of the Tenth Circuit, thus making review via petition for writ of certiorari to the Supreme Court significantly less likely. *Cf.* Supreme Court Rule 10 (review on certiorari primarily occurs when a decision is "in conflict with the decision of another United States court of appeals on the same important matter").

Many of the allotted lands are located within the states that make up the Tenth Circuit. The BIA has determined that 99.7 percent of allotment lands eligible for its

[1] As stated above, the Panel here had no choice but to follow *Barboan*, as Tenth Circuit rules and precedent provide. *E.g.*, *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

Buy-Back Program are located within three federal circuits – the Eighth, Ninth and Tenth Circuits. *See* U.S. Dep't of Interior, 2016 Status Report, Land Buy-Back Program for Tribal Nations, p. 16 (Nov. 1, 2016). Moreover, under its Buy-Back program, the BIA has designated allotted lands located in New Mexico, Oklahoma, Utah, and Wyoming for priority implementation, based on the severity of the problem with fractional interests in the allotted lands identified for first priority, and other factors. U.S. Dep't. of Interior, Press Release (July 31, 2017).

D. While natural gas consumption continues to increase, more and more rights-of-way will continue to expire, thus exacerbating the public policy problems caused by the Panel Opinion and *Barboan*.

As is true here, existing terms for rights-of-way easements on allotted lands will continue to expire. Without a rehearing, the natural gas pipeline industry will face a growing crisis as it attempts to renegotiate easements for existing, in service, pipelines that are providing critical natural gas to existing customers who cannot afford to have the pipeline taken out of service. At the same time, the demand for natural gas is projected to rise by 35 percent through 2030. GAO, *supra*, note 3, at 1. To accommodate the increased demand, pipeline companies such as Enable will need to build significant miles of new and expanded pipelines in coming years. Many of the new or expanded pipelines will have to traverse allotted lands, unless the pipelines are rerouted entirely using a much less optimal path. Yet, under the Tenth Circuit's construction, a tribe could prevent condemnation of any of the necessary

rights-of-way across allotted lands simply by acquiring a tiny fractional interest in the parcels.

II. Under Section 357, Enable had the Right to Condemn these Previously Allotted Lands.

A. Under a proper construction of 25 U.S.C. § 357, the district court had subject matter jurisdiction over this action.

Enable's condemnation claim should not have been dismissed for an alleged lack of subject matter jurisdiction. The plain language of Section 357 authorizes condemnation of these lands. The court had jurisdiction.

The Kiowa 84 allotment is "land[] allotted in severalty to Indians." By its plain language, Section 357 applies to Kiowa 84. Nothing in Section 357 distinguishes allotted lands based on who currently owns the property, even if a Native American tribe owns an interest in those lands. Section 357 thus both created subject matter jurisdiction and constituted a waiver of the Tribe's sovereign immunity.

The Panel, applying *Barboan*, erroneously upheld dismissal of Enable's condemnation action, concluding that 25 U.S.C. § 357 does not permit condemnation of allotted lands if a Native American tribe later obtains some interest in the allotted lands.[2] Kiowa Allotment 84 lands are indisputably "allotted lands" in

[2] Unlike the utility in *Barboan*, Plaintiff's predecessor-in-interest had a clear right to condemn right-of-way easements in these allotted lands under 25 U.S.C. § 357 at the time it applied to the BIA for an easement and while it negotiated with the

which the Kiowa Tribe now has a small interest. The federal government continues to hold Kiowa Allotment 84 in trust. Kiowa Allotment 84 is a "land parcel previously allotted to Indians" and Section 357 permits condemnation of such land. *Barboan*, 857 F.3d at 1108. Properly construed, Section 357 gives Enable the right to exercise eminent domain powers to condemn a right-of-way easement over Kiowa Allotment 84 for its natural gas pipeline.

B. The Panel Opinion and *Barboan* improperly engrafted an exception to the plain language of Section 357.

Nevertheless, the Panel Opinion and *Barboan* engrafted an exception into Section 357, and concluded that the allotted lands at issue were not subject to state-law condemnation powers. Yet, as *Barboan* acknowledged, this exception is "unmentioned" in the plain text of the statute. 857 F.3d at 1108 ("Tribal lands go unmentioned"). Construed properly, Section 357 gives Enable and others the right to use state law eminent domain powers to condemn easements across the properties. On its face, Section 357 specifically allows condemnation of "lands," without exception or qualification, if they were allotted to individual owners: "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located[.]" 25 U.S.C. § 357.

Where a federal court can apply a statute's plain language, *it must do so*

individual allottees because the Kiowa Tribe indisputably did not own an interest in these lands at that time.

without resorting to other canons in aid of construction. *See*, *e.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). *Barboan*'s construction of Section 357, however, conflicts with Section 357's plain language. By creating an exception for "lands allotted ... to Indians" if a tribe ever reacquires any interest in those lands, as happened here, *Barboan* and the Panel Opinion improperly failed to apply Section 357's "plain language" and contravened Supreme Court precedent.

C. According to the Supreme Court, a reviewing Court's job is to apply the statutory text, not to improve upon it.

The Supreme Court has consistently rejected judicial policy-making, done under the guise of statutory construction, to create exceptions to Congressionally-authorized powers. *See, e.g., E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-509 (2014) ("However sensible the [] Circuit's exception to this [statutory prescription] may be, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it'"), *citing Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989)); *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result'").

In *Barboan*, this Court acknowledged that Section 357 "permits

condemnation of any land parcel previously allotted," but added a condition: only so long as its "current beneficial owners" are "individual Indians." 857 F.3d at 1108. Yet, while acknowledging this statutory authority to condemn, *Barboan* curiously paid no attention to the complete "statutory silence" regarding any transfers that may have occurred (whether by operation of an individual Indian's will or through the relevant laws of intestate succession), contrary to Supreme Court precedent.

D. Section 357 does not contain an exception for "tribal lands"; by creating such an exception, the Panel Opinion and *Barboan* failed to follow Supreme Court precedent regarding disparate inclusion and exclusion of a phrase in disparate sections of a statute.

The fact that the term "tribal lands" is unmentioned is significant, for the statute's plain language cannot support an exception based on the land's (partial) status as "tribal lands." Notwithstanding this omission, *Barboan* nevertheless concluded an exception for "tribal lands" should be implied. To accomplish this, the Court compared Section 357 to 25 U.S.C. § 319. But the comparison is uncalled for and unnecessary in light of the plain language of Section 357.

Where words appear in one statute but not another, courts must assume Congress meant to use the language where it did, but not where it did not: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472

F.2d 720, 722 (5th Cir. 1972)); *see also Sandoz Inc. v. Amgen Inc.*, __U.S. __, 137 S. Ct. 1664, 1677 (2017) (citing *Russello*). In determining the import of Congressional silence within another section of the same statutory scheme, the *Russello* Court further observed: "Had Congress intended to restrict [a section without the omitted language], **it presumably would have done so expressly as it did in the [other section.]**" *Id*. (emphasis added), citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *United States v. Naftalin*, 441 U.S. 768, 773–74 (1979).

The Supreme Court's observation in *Naftalin* is thus equally applicable with regard to *Barboan's* efforts to engraft language from Section 319 into Section 357. "The short answer is that **Congress did not write the statute that way for a reason so that Congress intended not to include such a limit in the latter by its omission**." 441 U.S. at 773-74 (emphasis added).

E. A court should not assume Congress implied a limitation of a power Congress expressly authorized.

In an older line of cases, the Supreme Court also similarly warned federal courts against assuming that Congress implied limitations of a power it had expressly authorized. Where Congress has enacted a statute expressly authorizing certain powers and duties, "it cannot be lightly assumed that restrictions on that authority are to be implied." *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940) (rejecting implied exceptions to FHA's power "to sue and be sued"). Instead,

if authority "is to be delimited by implied exceptions," then it "must be clearly shown that" certain exercises of the authority "are not consistent with the statutory ... scheme" among other possible exceptions not applicable here. *Id.*

F. There is no inconsistency between Section 357 and Section 319.

The Panel Opinion and the ruling in *Barboan* were hardly necessary to avoid an inconsistency between Section 357 and the rest of the statutory scheme Congress adopted in 1901. Sections 319 and 357 are readily harmonized without employing linguistic legerdemain. These sections serve entirely different purposes and govern different methods for acquiring a property interest in lands held in trust by the United States. *See S. California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982) (Section 357 provides "an alternative method for the acquisition of an easement across allotted Indian land"); *see also Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959); *Yellowfish v. Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982).

Section 357 governs *involuntary condemnation* of an interest in allotted lands under state law. In sharp contrast, Section 319 governs *voluntary grants* of a certain kind of property right (right-of-way easements) in lands held in trust by the United States (whether they are beneficially owned by a tribe or by individual Native Americans) under federal law. That Section 319 establishes procedures for the Secretary of the Interior's voluntary conveyance of an easement in a broader

category of properties in no way conflicts with Section 357's grant of condemnation authority over allotted lands.

Given that the sections can be read consistently, the Panel Opinion and *Barboan* erroneously engrafted an exception into Section 357 based on Section 319. Yet, only Congress has the power to create an exception in Section 357 for "tribal lands," not a federal court under the guise of statutory construction. To conform with Supreme Court precedent, this Court should grant *en banc* review, reconsider the erroneous construction of Section 357 in the Panel Opinion and *Barboan*, and reverse the district court's August 18, 2016 Judgment and its August 18, 2016 Order dismissing Enable's complaint below.

III. The Kiowa Tribe was not a necessary party and the United States waived any sovereign immunity the Kiowa Tribe may have had for these purposes by enacting 25 U.S.C. § 357. [3]

The Panel did not consider the district court's separate ruling "whether the tribe was a necessary party to the action." Panel Op., at 9. Enable briefly includes this section to show this portion of the district court's ruling is not a proper alternative justification for dismissal. As set forth below, the United States, in enacting Section 357, waived the Kiowa Tribe's immunity. Moreover, condemnation actions are *in rem* proceedings and the Kiowa Tribe was thus not a

[3] Neither *Barboan* nor the Panel Opinion here reached the question whether it was proper to dismiss for failure to join a necessary party, here the Kiowa Tribe. Enable includes this section here simply to show that failure to join a necessary party is not a proper alternative basis for dismissing Enable's claim.

necessary party to the action below.

A condemnation claim is *in rem* in nature. As a result, the Kiowa Tribe is not a necessary party to the action. Its sovereign immunity is thus no barrier to Enable's prosecution of the condemnation claim.

In *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), the Supreme Court established the "*in rem*" nature of condemnation claims. Because the condemnation claim is an *in rem* action, section 357 applies without regard to who owns an interest in the "lands." As such, the Kiowa Tribe was not a necessary party to that claim and its sovereign immunity is not a barrier to Enable's prosecution of its condemnation claim. Dismissing the action on this basis was error.

Native American tribes are *dependent* domestic sovereigns, and the United States Congress may waive their sovereign immunity. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263–64 (10th Cir. 1998) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Here, by its enactment of Section 357, Congress waived any sovereign immunity the Kiowa Tribe might otherwise have enjoyed from condemnation of these lands. Section 357 expressly and without qualification authorizes condemnation of allotted lands. Thus, if the Kiowa Tribe were a necessary party, it could be joined. Dismissal on this basis was improper.

CONCLUSION

This Court should grant Enable's petition for *en banc* review and should reverse the district court's dismissal of Enable's condemnation claim.

Respectfully Submitted,

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The undersigned certifies:

1. This document complies with the limitation of Fed. R. App. P. 35(b) because it contains 3,706 words.

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/s/ Andrew W. Lester
Attorney for Plaintiff/Appellant

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I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.

2. If required to file additional hard copies, this ECF submission is an exact copy of those documents.

3. The digital submissions have been scanned for viruses with the most recent version of Windows Defender Virus Definition Version 1.281.1073.0 with Virus Definitions File updated on November 29, 2018 at 1:50 p.m., and, according to that program, are free of viruses.

/s/ Andrew W. Lester
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, I electronically filed the foregoing **APPELLANTS' PETITION FOR REHEARING EN BANC** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

/s/ Andrew W. Lester
Andrew W. Lester