

MAINE STATE LEGISLATURE

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January 6, 1975

S. Glen Starbird, Deputy Comm'r.

Indian Affairs

Leon V. Walker, Jr., Assistant

Attorney General

Questions relating to Eminent Domain Powers of Indian Tribal Councils and Incompatibility of Employment and Council Memberships

1. You ask whether Tribal Councils of the Indian Reservations have the power of Eminent Domain on the Reservations, particularly the Penobscot.

Indian Tribal Councils do not possess the power of eminent domain.

Eminent Domain power, for the Passamaquoddy and Penobscot Reservations exists by virtue of 22 M.R.S.A. § 4739, which incorporates 30 M.R.S.A. § 4656 by reference, which section grants the right to acquire by eminent domain to housing authorities, and thus to Indian Housing Authorities.

The power of eminent domain cannot be implied and even when expressed by legislative grant, said statutory delegation of power must be strictly construed. See Clark v. Coburn, 108 Me. 26, 78A. 1107 (1911).

Only the State, or one to whom it has delegated the right, can take property without the consent of the owner. As you are well aware, such delegation of legislative authority is vested in Indian Housing Authorities. (22 M.R.S.A. § 4732 et seq.)

Confusion results sometimes in distinguishing between the exercise of the police power and eminent domain. Tribal Councils clearly may exercise police power on their respective reservations, through the enactment and enforcement of ordinances.

The distinction between exercising police power and power of eminent domain has been well summarized by the Federal District Court for Pennsylvania in the case of Cressy v. Stevens, 160 F. Supp. 404 (1958). The court held as follows:

"'Police power' should not be confused with that of 'eminent domain', in that the former controls the use of property by the owner for public good, its use otherwise being harmful, while the latter takes property for public use, and compensation is given for the property taken, damaged or destroyed, while, under the former, no payment is made for diminution in use, even though it amounts to an actual taking or destruction of the property."

2. You ask whether a Tribal Council member's employment as a member of VISTA is in conflict with his position on the Council so that he could not hold both positions.

Although we have several times requested further information concerning the nature of the work done by the VISTA worker in order to determine whether it is in conflict with the person's duties as a member of the tribal council, we still do not have enough facts with which to make a definite determination. We can, however, give you as a guideline, a statement from Howard v. Harrington, 114 Me. 443, that "two offices are incompatible when the holder cannot in every instance discharge the duties of each." If after using this statement as a guideline, you believe there may be a conflict between the two positions and desire the assistance of this office, please send us a memorandum containing a detailed statement of the pertinent facts.

LVWJr/mf