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Indian Policy in Tribal Elections
22 M.R.S.A. 4831

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

September 1, 1978

To: Charles Rynard, Commissioner of Indian Affairs
From: Kate Clark Flora, Assistant Attorney General
Re: Passamaquoddy Tribal Elections

This is in response to your request for an opinion concerning the validity of certain election requirements adopted by the Passamaquoddy Tribe at Indian Township in their caucus mandated by Title 22 M.R.S.A. § 4831. Specifically your question asked whether the requirements adopted violated the constitutional rights of certain off-reservation members of the Passamaquoddy tribe. Basically your opinion request poses two questions, first, whether the Tribes vote not to allow other Indians from other reservations to vote in the Indian Township elections violates the constitutional rights of other Passamaquoddy, and, second, whether the Tribes rule limiting the rights to vote in the Indian Township tribal elections to Passamaquoddy that lived on the reservation violates the constitutional rights of other Passamaquoddy. Because we interpret the statute to require that all Indians over the age of 18 who appear on the 1978 Indian Township Tribal census to be permitted to vote, we do not reach the constitutional question you have posed. I hope that the following discussion is helpful.

Title 22 M.R.S.A. § 4831 is the section of the Maine statutes dealing with Indian tribes which delegates to the Passamaquoddy Tribe the right to hold certain tribal elections. The second paragraph provides that on the first Tuesday of August biennially in the even numbered years, the Passamaquoddy Tribe of Indians shall hold a caucus for the purpose of nominating candidates to be elected for the officers of Governor and Lieutenant Governor of each reservation; an Indian representative to the Legislature; and a Tribal Council to consist of six members from said tribe from each reservation. On the first Tuesday in August, 1978, the Passamaquoddy of Indian Township held the statutorially mandated caucus. Pursuant to the authority given to them by § 4831, which provides that:

"Such caucus shall have the right to establish, by majority vote, rules for the conduct of the following tribal election, providing that such rules do not violate the constitutional rights of any person,"

The caucus at Indian Township established certain rules for the conduct of the tribal elections. Among the rules which were adopted were (1) that Indians from another reservation not be allowed to vote in Indian Township tribal elections; and (2) that only Passamaquoddies who live on the reservation be the only ones eligible to vote.

In addition to the language set out above, § 4831 provides that:

"Only certified Indian members of the tribe who are 18 years of age or older shall be eligible to vote."

Section 4832 describes what the qualifications are for tribal membership, and mandates that each tribal council on each reservation shall take a census of the Passamaquoddy Tribe in January of each year. The results of the census taken by the Tribal Council are to be certified to the Commissioner of Indian Affairs. Given these very specific statutory qualifications for establishing a record of the members of the Passamaquoddy Tribe, and the requirement that such a record must be certified as a true record of the Indian tribal membership, the requirement in § 4831 that only certified Indian members are eligible to vote must be referring to the eligibility, census and certification requirements of § 4832. For a prior opinion of this office in accordance with this conclusion, see the opinion dated October 20, 1966, from Deputy Attorney General George West for the Commissioner of Indian Affairs attached hereto.

Reading the requirements of §§ 4832 and 4831 together, it would appear that the statutory standard for eligibility to vote in the Indian Township Tribal election would be that all those Indian members of the Passamaquoddy Tribes who are reflected on the Indian Township Passamaquoddy Tribal census taken in January of 1978 may vote.

It is a well-accepted principle that while the regulation may explain and interpret the law, or "fill in the gaps that the law does not fill," a regulation cannot properly restrict a right which is granted by statute. Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d 786 (Me., 1972). In the case of eligibility to vote in the Passamaquoddy Tribal elections, the statute establishes that all Passamaquoddy Tribal members who are certified to be tribal members by appearing on the tribal census are eligible to vote in tribal elections. What the Tribe has attempted to do, by exercising its rulemaking authority granted to it in the same statute, is to limit the statutorily granted eligibility to only those members of the Passamaquoddy Tribe actually resident on the Indian Township Reservation. This is an improper use of the rulemaking authority granted to the Tribal caucus by the statute. The Tribal caucus does not possess the authority to limit

the eligibility to a narrower section of the Tribe than that established by the statute. While the Tribal caucus had the authority to set reasonable regulations for the conduct of the elections which did not conflict with the constitutional rights of Tribal voters, they are bound as a parameter of their authority by the requirement that voter eligibility is fixed by statute and cannot be limited by a rule which would have the effect of excluding some Tribal members who are statutorily eligible to vote.

Having concluded that the restrictive rule adopted by the Passamaquoddy Tribal caucus at Indian Township is invalid as it attempts to limit a statutorily fixed eligibility, it is not necessary to reach the constitutional question which you have posed. I conclude that eligibility to vote in the Passamaquoddy Tribal election to be held at Indian Township on Tuesday, September 5 should be determined solely by reference to which Tribal members appear on the certified 1978 Indian Township Tribal census list, subject to any such rules as the Tribes may have adopted which are not herein declared to be invalid.

I hope that this opinion has been of some assistance to you. If you wish further assistance, please feel free to call on me.

Kate Clark Flora
KATE CLARK FLORA
Assistant Attorney General

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