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Opinion No. 64-18-L
R-1C1
April 9, 1964

REQUESTED BY: BEN E. STANTON
Arizona Highway Department

OPINION BY: ROBERT W. PICKRELL
The Attorney General

- QUESTIONS:
1. Can the state condemn allotted lands of individual Indians within the Papago Indian Reservation for the purpose of constructing a highway that is part of the National System of Interstate and Defense Highways ?
 2. Can the state condemn lands of the Papago Indian Tribe for the purpose of constructing a highway that is part of the National System of Interstate and Defense Highways ?
 3. If the answer to questions 1 and/or 2 is No, is there a method by which the state can acquire land of the Papago Indian Tribe for the purpose of constructing a highway that is part of the National System of Interstate and Defense Highways without the consent of the proper tribal officials ?

- ANSWERS:
1. Yes.
 2. No.
 3. Yes, if the Secretary of Commerce is requested by the state to acquire such lands.

The state can condemn allotted lands of individual Indians within the Papago Indian Reservation for the purpose of constructing a highway which is part of the National System of Interstate and Defense Highways. Congress has specifically provided that such land may be condemned by the state. 25 U.S.C. §357 states:

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"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State of 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 "

Condemnation of allotted lands was upheld in U.S. v. State of Minn., 113 F.2d 770 (C.C.A. Minn. 1940) and Nicodemus v. Wash. Water & Power Co., 264 F. 2d 614 (C.A. Idaho 1959).

The suit must be commenced in the Federal District Court and the United States must be joined as a party defendant. State of Minn. v. U.S., 59 Sup. Ct. 292, 305 U.S. 382 (1939).

The state cannot condemn tribal lands of the Papago Indians for the purpose of constructing a highway that is part of the National System of Interstate and Defense Highways. The condemnation section, 25 U.S.C. §357 does not include tribal lands.

When Congress has intended to grant states the power to condemn certain tribal lands, it has specifically granted that power. This power was given over the tribal lands of the Pueblo Indians of New Mexico. See State of N.M. v. U.S., 140 F. Supp. 508 (D.C.N.M. 1957). The Supreme Court has confirmed the fact that Congress did not intend to grant a power to states to condemn tribal lands generally. "We think Congress employed this language in the act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Section 3 made allotted lands, but not reservations, subject to condemnation for any public purpose; Section 4 made both reservations and allotted lands subject to highway permits by the Section." United State v. Okla. Gas & Elec. Co., 63 Sup. Ct. 534, 318 U.S. 206 at 214 and 215.

The answer to question no. 3 is Yes. There is a method by which the state can acquire land of the Papago Indian Tribe for the purpose of constructing a highway that is part of the National System of Interstate and Defense Highways without the consent of the proper tribal officials. In 23 U.S.C. §107(a), Congress legislated that:

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"(a) In any case in which the Secretary is requested by a State to acquire lands or interests in lands (including within the term 'interest in lands,' the control of access thereto from adjoining lands) required by such state for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including the Act of February 26, 1931, 46 Stat. 1421), if --

(1) the Secretary has determined either that the State is unable to acquire necessary lands or interests in lands, or unable to acquire such lands or interests in lands with sufficient promptness; and

(2) the State has agreed with the Secretary to pay at such time as may be specified by the Secretary an amount equal to 10 per centum of the costs incurred by the Secretary, in acquiring such lands or interests in lands, or such lesser percentage which represents the State's pro rata share of the project costs as determined in accordance with subsection (c) of section 120 of this title"

After the land is acquired the Secretary of Commerce is authorized and directed to convey it to the state. 23 U.S.C. §107(c).

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The United States, when it receives a proper request and seeks to condemn land pursuant to 23 U.S.C. §1-7(a), quoted above, is not limited by the disability of the state to condemn such land. U.S. v. Certain Parcels of Land in Peoria County, Ill. 209 F. Supp. 483 (S.D. Ill. 1962).

If the Director of the Arizona Highway Department is authorized by a proper resolution of the Arizona Highway Commission to acquire land that includes Papago tribal land for the purpose of constructing a link in the National System of Interstate and Defense Highways, he is authorized to acquire such land by condemnation or by any other adequate means. A.R.S. §§18-154 and 155. See also A.R.S. §§26-401 through 404. (These sections provide for cooperation between the state and federal agency in the construction of national highways). The authority of the head of the California Highway Department to make a similar request was upheld by the California Supreme Court in Eden Memorial Park Ass'n. v. Dept. of Pub. Works, 29 Cal. 790, 380 P.2d 390 (1963)

Can the United States, however, condemn tribal lands without the consent of the Indian Tribe? Given proper authorization it is clear that the United States can. In Cherokee Nation v. So. Kan. Ry. Co., 135 U.S. 641, 10 Sup. Ct. 965 at 970 and 971, Justice Harlan stated the position of the United States:

" . . . In view of these authorities, the contention that the lands through which the defendant was authorized by congress to construct its railway are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee-simple under patents from the United States is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the

several states, for purposes necessary to the execution of the powers granted to the general government by the constitution . . . It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided only that they are not taken without just compensation being made to the owner."
(Emphasis supplied).

The General Condemnation Act, 40 U.S.C.A. §257, together with the appropriation of money directed to certain public programs have been held to be sufficient authorization for the United States to condemn Indian tribal lands. E.g. United States v. 5,677.94 Acres of Land, more or less, of the Crow Reservation, State of Mont., 152 Fed. Supp. 861 (D.C. Mont. 1957); United States v. 21,254 Acres of Land, more or less, Situate in Cattaraugus County, N.Y., 161 Fed. Supp. 376 (D.C.W.D.N.Y. 1957). Congress has stated that the national defense requires the construction of a network of interstate highways. 23 U.S.C. §101(b) and 103(d).

101. "(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions, thereof, are in fact inadequate to meet the needs of local and interstate

commerce, for the national and civil defense.

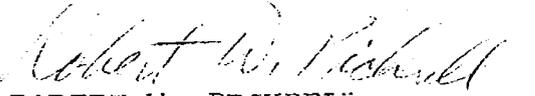
"It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the 'Interstate System,' is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1969, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. . . ." (Emphasis supplied)

103. "(d) The Interstate System shall be designated within the United States, including the District of Columbia, and it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. (The present route is the main arterial route to the west coast of the Republic of Mexico) The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States

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subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas."
(Emphasis supplied)

Appropriations amounting to more than three billion dollars are presently provided for the construction of Federal Aid Highways. Federal Aid Highways (Trust Fund) in U.S. Code Congress and Administrative News, p.3050, Dec. 30, 1963, P.L. 88-245. Consequently, the General Condemnation Act and the Federal Aid Highway Act, 23 U.S.C. §§ 101, 103 and 107 are sufficient authorization to condemn tribal lands for the purpose of constructing a nation-wide network of super highways in the interest of national defense.


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