

**LETTER OPINION
2002-L-20**

April 2, 2002

Ms. Mary K. O'Donnell
Rolette County State's Attorney
PO Box 1079
Rolla, ND 58367-1079

RE: County authority to condemn land for a tribal school

Dear Ms. O'Donnell:

The Turtle Mountain Band of Chippewa Indians is in the process of acquiring land for the purpose of constructing a new Ojibwa Indian School, a nonpublic elementary school. The tribe has identified a site within its reservation on which it wants to build the new school. The tract is owned by the United States in trust for the benefit of a number of tribal members. A non-Indian also owns an interest in the tract. The tribe is considering condemning the property and, your letter states, it has asked Rolette County to "join" in the condemnation. Your February 13, 2002, letter asks whether the proposal is within the county's eminent domain powers.

"The power of eminent domain . . . 'lies dormant in the state until the Legislature by specific enactment designates the occasions, modes, and agencies by which it may be placed in operation.'" Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 527-28 (N.D. 1987) (quoting City of Pryor Creek v. Public Service Co., 536 P.2d 343, 345-46 (Okla. 1975)). Thus, the question is whether the Legislature has given the county authority to condemn land for a tribal school.

Counties do have general condemnation authority. A county has the power to "acquire by . . . condemnation . . . and to hold in its name for use and control as provided by law, both real and personal property . . . for all purposes authorized by law or necessary to the exercise of any power granted." N.D.C.C. § 11-11-14(20).

The statute requires that property acquired is to be held by the county "for use and control as provided by law." Id. This means that the county must use land it condemns to satisfy one of its mandated powers. The statute reiterates this with its requirement that property condemned must be for "authorized" purposes, "or necessary" to exercise a "power granted." Id. Thus, the grant of condemnation authority in N.D.C.C. § 11-11-14(20) is not unlimited. It is tied to the particular responsibilities given counties by the Legislature. In a recent opinion I noted that while a home rule city's

condemnation powers may be broad, they are not unlimited. 2001 N.D. Op. Att'y Gen. L-12 at pp. L-54 to L-55. See also Walstad v. Dawson, 252 N.W. 64, 67 (N.D. 1934) (a county has only "such powers as are expressly conferred by statute or are necessarily implied in order to effectuate the purposes for which it was created").

This leads to the question whether counties have responsibilities for education. If so, they might be able to condemn land to further such a duty. But statutes governing counties confer on them only a limited educational role, and that role deals primarily with employing a county superintendent of schools. N.D.C.C. § 15.1-11-01. These officials do not have expansive powers. N.D.C.C. § 15.1-11-04. It is school districts, not counties, to which the Legislature has given the primary role in elementary and secondary education. E.g., N.D.C.C. ch. 15.1-09. In particular, school districts hold the express power to use eminent domain to acquire land for public schools. N.D.C.C. § 15.1-09-33(8).

Because counties have little responsibility for education, it is unlikely that the general condemnation power given counties in N.D.C.C. § 11-11-14(20) extends to condemning land for schools. This is particularly so where another political subdivision, as in this case a school district, has been expressly given that power. It is unlikely that the Legislature intended two political subdivisions to exercise the same power over the same geographic area. This conclusion is supported by a fundamental rule in eminent domain law: because the taking of private property is a significant governmental intrusion, the authority to condemn is "strictly construed." Bd. of Ed. of City of Minot v. Park District of City of Minot, 70 N.W.2d 899, 902 (N.D. 1955); Sheridan County v. Davis, 240 N.W. 867, 869 (N.D. 1932).

Therefore, it is my opinion that Rolette County cannot "join" with the Turtle Mountain Band and condemn land for school purposes.¹

Sincerely,

Wayne Stenehjem
Attorney General

cmc/pg

¹ Because school districts have the power to condemn land for school purposes, the Turtle Mountain Band may approach the local school district about a joint condemnation. Since school districts only have the authority to condemn land for public school purposes, the local school district would also not be able to cooperate with the tribe on this project for a nonpublic school.