



STATE OF MAINE
DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0016

Janet T. Mills
GOVERNOR

Bruce A. Van Note
COMMISSIONER

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**Testimony of Meghan Russo
Maine Department of Transportation
132nd Legislature, Joint Standing Committee on Judiciary**

In Opposition to LD 958

An Act to Prohibit Eminent Domain on Tribal Lands

Senator Carney, Representative Kuhn and distinguished members of the Joint Standing Committee on Judiciary, I am Meghan Russo, Director of Government Affairs at the Maine Department of Transportation (MaineDOT). MaineDOT submits this testimony on opposition to LD 958, *An Act to Prohibit Eminent Domain on Tribal Lands*.

LD 958 would amend the *Maine Implementing Act* (MIA) and the *Mi'kmaq Nation Restoration Act* (MNRA) by repealing language that could allow the State, under limited circumstances, to take land for public uses if that land is included within Penobscot or Passamaquoddy Indian Territory, or the Trust Lands of the Houlton Band of Maliseet Indians or the Mi'kmaq Nation (hereafter "Tribal Lands").

Binding Future Legislatures

It is important to note at the outset that if this bill were enacted and ratified by the four Tribes, it would be a permanent and irrevocable change to current law. This is the case because federal law authorizes the Maine Legislature to make changes to MIA and MNRA, but only with the consent of the affected Tribes. When the Legislature amends these statutes, and the Tribes consent to those amendments, the Legislature cannot unilaterally repeal or amend the new language in the future, even if problems with that language become obvious later. The Committee should understand that this bill would permanently deny the State the ability to take even small portions of Tribal Lands for public uses like road and bridge projects no matter what circumstances may arise many years into the future.

Uncertainty over Future Location of Tribal Trust Lands

The problem with permanently foreclosing any and all use of state eminent domain authority on Tribal Lands is underscored by the fact that the Wabanaki Nations have authority to establish tens of thousands of acres of additional Tribal Trust lands within Maine in future years, but there is no way to know for sure where all these lands might be located. MIA places some geographic limitations on where these lands may be located as to the Passamaquoddy Tribe and Penobscot Nation, but those limitations do not apply to the Houlton Band of Maliseet Indians or the Mi'kmaq Nation. Collectively, this could amount to more than 50,000 acres of additional Tribal Trust lands in Maine. It is impossible to know how the eventual location of these lands could impact public transportation needs in coming years, and certainly not decades into the future.

Current and Past Practice

MaineDOT currently has the eminent domain authority to take property for transportation purposes. As to Tribal Lands, which includes both reservation land and non-reservation Trust Lands, this authority is governed – and limited – by 30 M.R.S.A. §§ 6205(3)(A) and (B), 6205-A & 7204. This authority is strictly limited to ensure the necessity of the taking, and that there is no net loss in lands to the affected Tribe. In addition, the provisions of the *Maine Indian Claims Settlement Act* require in some circumstances that the United States be made a necessary party in the eminent domain process by involving the Secretary of the Interior, who requires project plans and other documents in reviewing the proposed taking of reservation land. 25 U.S.C. §1724(i).

MaineDOT has never exercised eminent domain authority under any of these statutes since they were enacted without the Tribal government's agreement and consent to the acquisition. When MaineDOT intends to acquire Tribal Lands for public use, it works closely with the Tribal government, and the Department of the Interior as necessary, to reach agreement on the land or rights in land to be taken, the fair market value for the taking, and mitigation measures needed to minimize impacts to Tribal Lands resulting from the taking to the extent possible.

MaineDOT has had a positive relationship with the Tribal governments due to its commitment to working to reach an agreement when a transportation project affects Tribal Lands. We are firmly committed to this consensus-based approach, which has successfully avoided the need to use eminent domain to take Tribal Lands for transportation uses without the agreement of the Tribal governments.

Problems with LD 958

LD 958 would create an absolute prohibition on the taking of Tribal Lands "for public uses under the laws of the State." This strict prohibition would take away the ability of MaineDOT to secure property rights for transportation uses by eminent domain by removing the Department's

ability to exercise its right of eminent domain regardless of whether a consensus agreement is reached.

While agreement with Tribal governments has been reached to date when Tribal Lands have been needed for transportation projects, there is no guarantee that MaineDOT would be able reach agreement with a Tribal government on every future acquisition of property or rights in property (such as an easement) that may be proposed for a transportation project without relying on its eminent domain authority notwithstanding good faith negotiations between MaineDOT and a Tribal government. By creating a total prohibition on the taking of property from Tribal Lands for transportation uses under MaineDOT's eminent domain authority, even by consensus agreement with a Tribal government, LD 958, if enacted, could compromise public safety and welfare by preventing important improvements to the transportation system on which Maine people rely.

It is impossible at this time to identify all possible circumstances where the exercise of MaineDOT's eminent domain authority may be needed for critical transportation infrastructure. This concern is heightened by the fact that the Wabanaki Nations have authority to establish more than 50,000 acres of additional Trust lands in locations that cannot be identified today. Against this background, we believe it would be imprudent to tie the hands of future Legislatures and irrevocably give up this authority.

For these reasons, we respectfully request that the committee vote Ought Not to Pass on LD 958. Thank you for your consideration.

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