October 7, 1964

The Honorable John H. Reed
Governor of Maine
and
Members of the Executive Council
State House
Augusta, Maine

Gentlemen:

This Office has been asked to rule on the request to the Governor and Council by Don Cotesworth Gellers, Esquire, for money from the Passamaquoddy Trust Fund, to pursue causes of action on behalf of the Passamaquoddies. Brother Gellers, by letters received by this Office on September 21, 1964, and September 28, 1964, complied with the request of the Council to provide information concerning the causes of action.

In his September 21, 1964 correspondence Brother Gellers indicated that at this time three actions are necessary. We quote in part from his letter:

> ". . . that is, one against Massachusetts for the land divestitures, both prior to the 1794 Treaty (i.e., the Bingham grant) and subsequent to the Treaty (the grants to non-Indians by the State of Maine) against which divestitures the Commonwealth of Massachusetts failed to make the Indians secure; also a proceeding involving the State of Maine, requiring an accounting for certain Indian moneys and rights of action had and received; and the third matter, concerning the claim before the Indian Land Claims Commission. . . ."

It must be borne in mind that Mr. Gellers has spent three months studying this matter. This Office has spent such time as it can spare from other matters to consider the problems. In its consideration this Office has been forced to "hit the high spots," so-called.

It has reached a conclusion that there does appear to be a semblance of justiciable issue. The extent of the merit of the justiciable issue is the bone of contention. Mr. Gellers believes there is great merit. This Office believes there is little, if any, merit.

This Office believes that because the question of who owns the lands described in the so-called 1794 Treaty between the Passamaquoddy Indians and the Commonwealth of Massachusetts has been a recurring question since 1820, something ought to be done about it. But how? Mr. Gellers wants to handle the proceedings at considerable cost to the Indians at the expense of their Trust Fund.

In respect to the first and second causes of action contemplated by Mr. Gellers, there is one over-riding principle of law that must be taken into consideation, the principle of sovereign immunity. Stated simply, this principle is that a sovereign state cannot be sued, except by its own consent. Our Court has said: "The application of the well settled principle that the sovereign cannot be sued is, of course, necessarily predicated upon the condition that the sovereign has not consented to be sued, which it may do." Brooks Hardward Co. v. Greer, 111 Me. 78 @ 82 (1913)

Any action against the Commonwealth of Massa chusetts would require the consent by the General Court of Massachusetts, and any action against the State of Maine would require the consent of the Maine Legislature.

The Commonwealth of Massachusetts has a statute establishing jurisdiction in their Superior Court to entertain certain claims against the Commonwealth. This statute states in part: "The Superior Court, except as otherwise expressly provided, shall have jurisdiction of all claims at law or in equity against the Commonwealth. . . ." 9 Ann. Laws of Mass., c. 258, § 1. Although the quoted statute is broad in its terms, there

is reason to doubt that it would be construed as giving consent to a cause of action involving title to land under a 1794 Treaty between the Passamaquoddies and the Commonwealth of Massachusetts. In a recent case construing the statute which involved the title of the Commonwealth to certain real estate, the Massachusetts Supreme Judicial Court held that the Superior Court was not granted jurisdiction to try the Commonwealth's title to land under Chapter 258, Section 1. Executive Air Service, Inc. v. Division of Fisheries and Game, 342 Mass. 356 @ 359.

Until the present time at least, the State of Maine Legislature has not granted permission for the Passamaquoddies to bring actions trying title to land in which the State is a party defendant or to bring actions against the State of Maine for an accounting. Until there is legislative authority for the Passamaquoddies to present claims against the State of Maine, the causes of action encompassing these claims must of necessity fail.

It would appear from the foregoing that the Indians must have the consent of the General Court of Massachusetts and the Legislature of Maine to bring suits against these two states. It would seem the granting of funds for court action at this time would be premature.

It should be noted that as to the portion of an accounting which deals with the handling of Passamaquoddy tribal funds by different departments and agencies of the State--that such an accounting could be requested of an prepared by the various departments ad agencies without the necessity of a court action.

In regard to the third cause of action, our Office requested of and received from Brother Gellers an explanation of how he would bring a claim before the Indian Land Claims Commission against the United States, in view of the express language in the Indian Claims Commission Act of 1946, limiting the time when claims could be presented before that Commission. The pertinent provision is as follows:

> "The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will

such claim thereafter be entertained by the Congress. Aug. 13, 1946, c. 959, § 12, 60 Stat. 1053." 25 U.S.C.A., 70k.

Brother Gellers' explanation, received by this Office September 28, 1964, sets forth two reasons by which he could have the Indian Claims Commission entertain a claim on behalf of the Passamaquoddies.

The first reason is there was no notice to the Passamaquoddies, and Brother Gellers contends that since U.S.C.A., § 70 1 (a) requires such notice, without such notice the Indian Claims Commission would in effect waive the provisions of 25 U.S.C.A., § 70k, which is the section establishing the time limitation. We cannot accept this as a valid argument, nor, in our opinion, would the Indian Claims Commission accept this as a valid argument.

Assuming the facts are that the Passamaquoddies did not receive notice and that there was no valid reason for their not receiving notice, there is nothing in the Indian Claims Commission Act of 1946 which makes notice a condition precedent to the meeting of the requirement for presenting claims on or before August 13, 1951, established in 25 U.S.C.A., § 70k.

The second reason is that in cases of laches by a tribe, an individual member of a tribe has a right to file a petition on behalf of the tribe. 25 U.S.C.A., § 70i. Brother Gellers cites the Seneca Nation of Indians v. U. S., 122 Ct. Cl. 162 (1952) and indicates that this case is good precedent for allowing an individual member of the Passamaquoddy tribe to file a petition on behalf of the tribe before the Indian Claims Commission. A close reading of the Seneca Nation case indicates that a petition cannot be successfully brought after August 13, 1951. In the Seneca Nation case petitions were brought by an individual Indian as well as by the regularly appointed attorneys for the Seneca Nation. Both petitions were brought before August 13, 1951. The Court did indicate that if the tribe through its regularly appointed attorneys had not brought their petition before August 13, 1951, that the individual petition might have been allowed to stand. This was not a holding that a petition could be brought after August 13, 1951, by an individual member of a tribe.

It should be noted that all claims brought before the Indian Land Claims Commission are claims against the United States. 25 U.S.C.A., § 70a. This Office is still unaware of the nature of the claim against the United States, although it has requested information as to its nature.

Inasmuch as this Office is satisfied that the Indian Claims Commission under its present statutory authority would not entertain a claim filed at this time nor in the future on behalf of the Passamaquoddies against the United States, we advise that any expenditure of money to pursue such a claim would not be a prudent nor proper expenditure.

We trust that this letter will provide sufficient guidelines for the handling of this difficult matter.

Very truly yours,

Jerome S. Matus
Assistant Attorney General

JSM/eh