Indians: State Payment of Priests Salaries
Religious State Support - to Indians

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The Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine 04333

Re: Payment of Catholic Priests' Salaries on Indian Reservations

Dear Governor Longley:

This letter is written in response to your inquiry on whether the State of Maine is legally compelled to pay the salaries of Catholic priests assigned by the Catholic Church to the Indian Reservations located in the State of Maine.

FACTS:

As set forth in your letter of request, the State of Maine, through the Department of Indian Affairs, has until recently paid the salaries of Catholic priests located on the Indian Township Reservation for the purpose of serving the spiritual needs of those members of the Passamaquoddy Tribe who are members of the Catholic Church. Those payments have now been discontinued at your direction. We understand from correspondence you provided to us that the Catholic Diocese of Maine contends that the State payment of those salaries is a legal obligation of the State springing from treaties and agreements between Massachusetts and Maine and the tribes, and other unspecified traditions and oral agreements between the two States and the Tribes.

QUESTIONS AND ANSWERS:

The general question posed by you in your letter of request can be divided into three subquestions.

1. Has the State of Maine undertaken any obligation, by way of treaty or otherwise, to provide for the payment of the salary of priests on the reservations?

Answer: No.

2. Is there currently any statutory authority for the payments now being made by the State for the salary of priests on the reservations?

Answer: No. In any event, the payments in question have now been discontinued.

3. If the answer to either of the foregoing questions is in the affirmative, are such payment for the salary of priests consistent with the Constitution of the State of Maine and the United States?

Answer: Inasmuch as the previous two questions are answered in the negative, it is unnecessary to address these constitutional questions.

REASONING:

In beginning the analysis of the above questions, we start with the proposition that the States of Maine and Massachusetts could only undertake an obligation to pay money or provide services or other consideration to any person, including an Indian tribe, pursuant to a bilateral agreement in the nature of a contract or treaty. Any such obligation would have to have all of the essential elements of a contract in order to create a binding and enforceable contract with the State. 81A C.J.S., States, § 158. We also note at the outset that any such bilateral obligation undertaken between the State of Massachusetts and the Indians was assumed by the State of Maine pursuant to the Act of Separation and the Maine Constitution, Article X, Section 5, Part 5, which provides in part that:

> "The new state /of Maine/ shall . . . assume and perform all of the duties and obligations of this Commonwealth /of Massachusetts/, toward the Indians within said district of Maine, whether the same arise from treaties or otherwise . . . ."

Having set forth these initial premises the question then becomes whether either Maine or Massachusetts have undertaken a contractual agreement with any Maine Tribe for the payment of salaries of Catholic clergy. We have examined all of the agreements, contracts or treaties between the Penobscot and Passamaquoddy Tribes and the Commonwealth of Massachusetts and State of Maine, including agreements executed in 1794, 1796, 1818 and 1833 and find therein no such undertaking by either of said States. We know of no other contract or agreement between either State and either Tribe that would so bind the State of Maine, and none have been cited to us by you or the Catholic Diocese. We, therefore, conclude that the State is under no legal obligation to provide the services in issue.

Despite the foregoing, it might be argued, and we understand is now argued by the Catholic Diocese, that the many legislative appropriations by Massachusetts and Maine for support of Catholic clergy to the Tribes created an obligation of the State to continue to provide the services in perpetuity. We believe, however, that such an assertion does not withstand legal analysis. It is indeed true that beginning in 1760 and from time to time thereafter the Province of Massachusetts Bay and Commonwealth of Massachusetts did appropriate sums for this purpose. The Maine Legislature has also occasionally made similar appropriations. Nevertheless, we know of no legal precedent for the proposition that a State by engaging in a course of conduct of appropriating funds for any purpose thereby assumes a legal obligation binding it to appropriate such funds for the indefinite future. Each Legislature retains the full constitutional authority to decide how to spend the funds of the State and cannot be bound to appropriate or not appropriate monies based upon actions of prior Legislatures. Opinion of the Justices, 146 Me. 183 (1951). We know of no consideration that passed to the Commonwealth or the State in exchange for its annual payments to he Tribes that could be said to have created a contractual obligation running from the State to either of the Tribes. Therefore, the appropriations themselves do not constitute a commitment in the nature of a contract, but were only an act of legislative grace of each Maine Legislature.

It may be argued that the provisions of the Act of Separation, Maine Constitution, Article X, Section 5, Part 5, which specified that the State "assumed all the duties and obligations . . . toward the said Indians, whether the same arise from treaty or otherwise," elevated the gratitous practices of Massachusetts to a legal obligation of Maine. In fact, this argument is the same as the one urged by the Penobscot Tribe upon the Governor and Council of Maine in 1830 and 1831. In those years, representatives of the Tribe requested the Governor and Council to appropriate to the tribes monies for the salary of a priest arguing that since Massachusetts had always done so, Maine was obliged to continue that practice by virtue of the 5th provision of the Act of Separation cited above. On both occasions, the Governor and Council decided against the tribe, based upon a report of the Standing Committee on Indian Affairs of the Executive Council. See Reports of the Council, Volume 3, Page 241 (1830). The Committee's interpretation of the Act of Separation and the prior treaties makes it clear that they viewed the only obligations assumed by Maine under the Act of Separation as those set forth in the agreements of 1794, 1796 and 1818 in which there was no reference to money for tribal priests. The Tribes themselves appeared to have acquiesced to this interpretation. In subsequent years, beginning in 1838, the Penobscot Tribe petitioned the Governor and Council

for the support of a priest. Unlike the previous request, however, the Tribe did not invoke the argument that Maine was obliged to pay for the priests pursuant to the Act of Separation. Rather the Tribe specifically requested that the funds be drawn from the Tribal Trust Fund. See Petition of the Penobscot Tribe to the Governor and Council, Council Reports, No. 12, January 1838. It appears, therefore, that the settled historical interpretation of the terms of the Act of Separation, an interpretation apparently conceded by the Tribes in 1838, was that the State of Maine undertook no binding legal obligation to appropriate general revenues for the support of a priest for the Tribe. The fact that in subsequent years the Maine Legislature chose to make such appropriations did not in and of itself create a legal obligation where none had existed prior thereto.

The second question set forth above relates to whether, apart from the existence of any obligation, there is now any authority for the Department of Indian Affairs to spend money for Catholic clergy. Absent express authorization in any appropriation act for such expenditure, we must look to the statutes governing the Department to determine whether such payments are authorized. As a general rule of law, no State agency may spend state funds without statutory authorization therefor. 81A C.J.S., States, § 226. In this case, we find no such authority in the statutes and conclude that there is no current legal basis for the payments.[1/]

In conclusion, it is our opinion from examination of relevant historical documents that the State of Maine is under no obligation and currently lacks any legal authority to make the payments requested. For that reason, we have not undertaken a consideration of the complex constitutional question that would exist were the Legislature currently to contemplate such an appropriation. We think it would be inappropriate to render an opinion on that subject absent specific legislation to review. Nor does this opinion address the question of whether it would be a legally permissible application of Tribal Trust funds to use such funds for these purposes. Again, it would be more appropriate to respond to that question in the context of a specific fact situation.

Sincerely,

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Attorney General

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1/ It should be noted that even if authorized, such expenditure would need the approval of the Governor under the Department's work program. 5 M.R.S.A. §§ 1582 and 1667.