

MASHPEE EVIDENCE SUMMARY

The Mashpee Wampanoag Tribal Council, Inc., has presented what may arguably be the strongest overall evidence for Federal acknowledgment of any petitioner reviewed by the Department of the Interior (Department) to date. The petitioner's level of evidence is extraordinary for the key criteria of community (83.7(b), political influence (83.7(c), community, the criteria that most petitioners fail. The remarkable evidence of geographical concentration of the group in and near the town of Mashpee is more than sufficient in itself to meet criteria 83.7(b), community, and 83.7(c), political influence and authority, throughout history. In addition, the petitioner presented strong evidence for a variety of other categories. The overall evidence for criterion 83.7(a), external identification as a tribe, and criterion 83.7(e), descent from a historical tribe, is less spectacular but is nevertheless sufficient based on Department precedents. As is the case with most petitioners, criterion 83.7(d) and (f) and (g) was easily met by the Mashpee group.

The Mashpee evidence is such that the Department's evaluation is not in any way a marginally positive Proposed Finding (PF). Unlike the Eastern Pequot and Schaghticoke cases in Connecticut, these findings do not appear to be vulnerable to a challenge that could result in a negative Final Determination upon reconsideration. While the Department has indicated that the evidence could be strengthened in some areas, it has not concluded that the evidence is inadequate or insufficient to meet any of the mandatory criteria.

Criterion 83.7(a) External Identification as an American Indian Entity

This criterion is included among the seven mandatory criteria in Part 83 of Title 25 of the *Code of Federal Regulations* (25 CFR 83) to prove the continuous ethnic identity of a petitioner since the beginning of the 20th century. It demands continual identification of the group since 1900 by

external sources. The criterion is intended to exclude from Acknowledgment those groups that have only been identified as being Indian in recent times. It also is intended to exclude those groups whose “Indianess” is based solely on self-identification or, in other words, on documents or other evidence generated by the group itself.

The qualification that identification of the petitioner must be on a “substantially continuous basis” allows for certain gaps in time during which the group’s existence or activities may not have been documented. Many, if not most, petitioners find that they have such gaps. Criterion 83.7(a) evidence is supposed to focus on the identity of the tribe as an Indian entity rather than on the Indian identity of its individual members. The regulations state that the criterion may be met by using only one of the six kinds of evidence specified, ranging from Federal records to other tribal entities. However, most petitioners will not have continued identity from one source since 1900, and so are likely to have to show evidence of a number of kinds of identifications. The minimum standard for meeting this criterion is at least one external identification as a tribal entity for every decade since 1900.

The Proposed Finding concluded that the Mashpee petitioner met this criterion. The evidence demonstrated that the Mashpee were identified as a tribal entity on a substantially continuous basis by a variety of external sources since 1900. However, unlike some of the other criteria, the evidence presented for this criterion was not sufficient to rank Mashpee among the strongest cases. The Department noted that the petitioner only marginally met the criterion from 1900 to 1923 (p. 22) and encouraged the Mashpee to submit additional evidence for that period. There was only one identification for each of the first two decades of the 20th century. It is highly likely that the petitioner will be able to collect and submit additional

evidence. It also appears unlikely that the petitioner would fail to meet criterion 83.7(a) if it did not.

Criterion 83.7(b), Community

Criterion 83.7(b) requires that most of the members of the petitioning group have comprised a distinct community throughout history since the time of first sustained contact with non-Indians. In essence, community means the continued maintenance of tribal relations. This means that tribal members knew each other and interacted in various ways. Ideally, this interaction can be demonstrated by showing that there was intermarriage across tribal family lines and reasonable residential proximity of the tribal families within a defined geographic area. Community can also be shown, however, by evidence that tribal members visited each other, shared information, attended each other's life events, such as weddings and funerals, and/or discussed or even argued over issues of importance to the tribal membership. The settlement patterns and social relationships of the group need to be documented and interpreted within the context of strategies used by the tribal members to retain their distinct identity, social cohesion, and interaction. Actual interaction does not need to be evidenced if marriage and residential patterns can demonstrate that the families lived in close enough proximity to make interaction probable.

The intent of criterion 83.7(b) is to preclude from acknowledgment those petitioners whose members have not been familiar with each other and have not interacted within a distinct tribal community historically, even though they may share a common Indian ancestry.

Whereas the minimum standard for evidence for criterion 83.7(a) requires documentation for every decade since 1900, the evaluation standard for criteria 83.7(b) and 83.7(c) allows for certain periods during which little or no documentation may be available. The test for these gaps of evidence is whether the characteristics of the petitioner after the evidentiary gap is essentially the

same as what is known about the tribal group prior to the evidentiary gap. The Department has used the analogy of a train going into a tunnel to describe this standard. It is not known from the outside what a train (petitioner) looks like when it is in a tunnel [evidentiary gap], but if its characteristics when it emerges from the tunnel (gap) appear to be essentially the same as when it entered, then it may be assumed that it is the same train (petitioner) and that it has not changed significantly.

A striking feature of the Mashpee petition is that it has relatively few evidentiary gaps. If anything, the petitioner supplied much more evidence than it needed to for some criteria.

The acknowledgment regulations specify nine categories of evidence that may be used in combination to meet the community criterion. In addition, the regulations provide that one of five kinds of so-called “high” evidence of community may be used by itself to demonstrate sufficient evidence for both criteria 83.7(b), community, and 83.7(c), political influence or authority, for a given point in time. They likewise provide that one of four kinds of “high” evidence of political influence or authority may be used to meet criteria 83.7(b) and 83.7(c) for a given period. This means that the evidence for these criteria is conclusive at that time, even if there is no other evidence for criteria 83.7(b) and 83.7(c)

Geographical Concentration

The Mashpee may have maintained the closest geographical proximity of any previous Acknowledgment petitioner. The Proposed Finding indicates that up until the early 1930’s, as many as 87 percent of the tribal members lived in or near the town of Mashpee. A majority of the present membership continues to reside in this area. If the petitioner had submitted no other evidence than its residential patterning data, it would have been sufficient in itself to meet criteria 83.7(b) and 83.7(c) for every point in time from first

sustained contact to the present. Paragraph 83.7(b)(2)(i) of the Acknowledgment regulations provide that:

A petitioner shall be considered to have provided sufficient evidence of community at a given point in time is evidence is provided to demonstrate ...More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community.

Paragraph 83.7(c)(3) provides that “A group that has met the requirements in paragraph 83.7(b)(2) [such as a geographic concentration of more than 50 percent] at a given point in time shall be considered to have provided sufficient evidence to meet this [political influence or authority] criterion at this point in time.”

The significance of this geographical concentration is made apparent in comparison with other groups that presented strong evidence of community, such as Mohegan, Narragansett, and Grand Traverse Band. In the Mohegan case, the Department found that 34 percent of tribal membership lived within a ten-mile radius of the Mohegan Church in Uncasville, Connecticut. Approximately 44 percent of Mohegan members resided in southeastern Connecticut and 59 percent of the membership lived in the tri-state area of Connecticut, Rhode Island, and Massachusetts. The majority of Narragansett members were found to reside within Washington County, Rhode Island, the core area being the town of Charleston. The majority of the Grand Traverse Band was found to reside within the Grand Traverse Bay area of Michigan. A third of the membership was concentrated at Peshawbestown and other traditional areas on the Leelanau Peninsula.

The Mashpee have a much tighter concentration of their membership than do any of these other successful acknowledgment petitioners. The

Mashpee and the Gay Head group of Martha's Vineyard share many similar characteristics. These include the facts that they are both Wampanoag groups whose membership was concentrated in and around a Massachusetts town, the government of which group members controlled for many years. Yet, in 1986, only 15 percent of the Gay Head membership lived in the town of Gay Head and only 41 percent resided on the island of Martha's Vineyard.

Another extraordinary characteristic of the Mashpee residential pattern is the high rate of return migrations. Most petitioners present evidence of a geographical core area whose numbers are diminished over time by group members that leave, to find jobs, schooling, and/or spouses or are called to military service, and never return. However, the Mashpee evidence demonstrates that a significant number of group members that temporarily lived elsewhere returned to continue residency in the community. It also shows that many of those that permanently live elsewhere frequently return to Mashpee on weekends and vacations (PF, p. 53).

Marriage Patterns

The Mashpee petitioner claims that its evidence demonstrates an endogamy rate of more than 50 percent until the 1930's. Endogamy means the marriage of group members to other members of the same group or "in-marriage." It is the opposite of exogamy or "out-marriage." Similarly to evidence of geographical concentration, evidence of an endogamy rate of more than 50 percent is sufficient to meet criterion 83.7(b), community at a given point in time under the provisions of paragraph 83.7(b)(2)(ii). Such evidence can also be carried over to demonstrate political influence or authority under the provisions of paragraph 83.7(c)(3).

Due to its court-imposed deadline for issuing a Proposed Finding, the Department did not have an opportunity to determine whether the Mashpee evidence was sufficient to meet the 50 percent or more standard of paragraph 83.7(b)(2)(ii). However, the OFA did analyze enough evidence to determine that the group maintained significant rates of endogamy from 1860 to 1930, which contributes to its overall positive evidence of community. The Department promised to verify if the petitioner meets criterion 83.7(b)(2)(ii) in its Final Determination.

If the Mashpee do meet the high endogamy evidence standard of 50 percent or more it will doubly fortify the strength of its evidence of community. Few petitioners have met both the paragraph 83.7(b)(2)(i) (geographical concentration) and paragraph 83.7(c)(2)(ii) (endogamy) standards for such an extended period. The Jena Band of Choctaw of Louisiana, for example, met the endogamy standard from 1820 to 1959. However, the Proposed Finding for the group, issued in 1994, the same year that the Acknowledgment regulations were revised to include new high evidence” standards, did not evaluate its evidence under paragraph 83.7(b)(2)(i). Yet, the finding that 53 percent of the present membership resided within 20 miles of the town of Jena suggested that the group might have met the 50 percent or more standard for an extended period.

Carryover Provision of Paragraph 83.7(b)(2)(v)

The Mashpee petitioner’s strong evidence of political influence or authority also bolstered its evidence of community. The Department found that the evidence of consistent allocation of group resources and control of individual behavior by group leaders was enough by itself to meet criterion 83.7(c), political influence or authority, for the period 1834-1974. Paragraph 83.7(c)(2) of the regulations established the kinds of evidence that can stand alone to meet the criterion at any point in time. Consistent

allocation of group resources (i) and control of individual behavior (iii) are two of the four kinds of high evidence that can be demonstrated. Paragraph 83.7(b)(2)(v) provides that a petitioner can meet criterion 83.7(b) at any point in time by evidencing at least one the kinds of political activities described in paragraph 83.7(c)(2), which includes resource allocation and behavioral control. Thus, even if the petitioner did not have extraordinary evidence of geographical concentration and potentially high evidence of endogamy, the Department concluded that it would meet both criteria 83.7(b) and 83.7(c) for a 140-year period based on solely on evidence of its control of the political, legal, and economic affairs of the town of Mashpee.

Other Evidence of Community

It is likely that the Mashpee petitioner could have met criterion 83.7(b) without the “high evidence” it presented for geographical concentration, allocation of group resources, and control of individual behavior. The group provided plenty of examples of almost all of the nine kinds of evidence set forth in paragraph 83.7(b)(1). These included evidence of significant social relationships, shared religious, cultural, and economic activities, social and cultural distinction from others. One category of evidence that the petitioner apparently did not claim, but certainly would have met, is that set forth in paragraph 83.7(b)(1)(viii). This kind of evidence is “The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name. The Proposed Finding makes it clear that the Mashpee have been identified as being a distinct Native American group for at least 400 years.

Criterion 83.7(c), Political Influence or Authority

This criterion requires evidence that a petitioner has maintained political influence or authority over its members as an autonomous tribal entity since first sustained contact with non-Indians. The basic purpose of this requirement is to assure that a petitioning group has exercised political leadership historically. Because a tribe is a separate political body, it cannot be considered as such without showing that it exercises political influence. Since the purpose of the Department's acknowledgment process is to "acknowledge" a government-to-government relationship between the United State and a tribal entity, a petitioner must demonstrate that it has sustained a governing structure and processes at some significant level, no matter how basic or informal. The precedent of prior acknowledgment decisions also dictates that a bilateral political relationship must be shown to have existed historically between the tribal leadership and its membership. This means that the tribal group must demonstrate that it has had leaders recognized by the tribal members who are their followers, and who also influence the members or followers in significant ways. Evidence that the tribal group has made significant political decisions and maintained a consensus among its membership has likewise been persuasive in prior cases.

The Department has found political authority or influence in tribes that demonstrate an internal process for decision making that effectively resolves internal problems (see, for example, the Grand Traverse Band (1980) and Snoqualmie (1999) decisions). Further evidence of political influence has been the allocation of group resources, enforcement of group behavior, and the making of decisions that substantially affect tribal members (see, for example, the Jamestown Clallam (1981), Narragansett (1984), and Mohegan (1994) decisions).

As previously indicated, the evaluation standard for criterion 83.7(c), in common with that for criterion 83.7(c), allows for certain periods during which little or no documentation may be available.

The acknowledgment regulations specify five categories of evidence that may be used in combination to meet the political influence criterion. They also provide that one of four kinds of so-called “high” evidence may be used by itself to demonstrate sufficient evidence of political influence or authority at a given point in time. In addition, a provision allows that any of the five kinds of high evidence of community for criterion 83.7(b) may also be used to meet criterion 83.7(c) at the same point in time. This means that the evidence for these criteria is conclusive at that time, even if there is no other evidence for criteria 83.7(b) and 83.7(c).

One of the extraordinary features of the Mashpee evidence is that it demonstrated its tribal political influence or authority largely through showing its control of the civil government of a town for an extended period. This is not unique to the Acknowledgment experience, because the Gay Head Wampanoag also controlled the town of Gay Head for many years. In comparison, however, control of Mashpee is more significant because it was a larger town with more governmental functions.

The Department found that the evidence of Mashpee control of the Indian District and Town between 1834 and 1974 was sufficient in itself to demonstrate that the petitioner met criteria 83.7(c), political influence or authority, and 83.7(b), community for that 140-year period. Most of the residents of District and Town were Mashpee and they elected Mashpee officials to local government. These officials and their appointees managed the assets and resources of the District and Town to the advantage of fellow Mashpee tribal members. They also controlled the behavior of Mashpee members through their law enforcement functions.

Consistent allocation of group resources and control of individual behavior are two of the kinds of high evidence sufficient in themselves to meet criterion 83.7(c), political influence or authority. The crossover provision of paragraph 83.7(b)(2)(v) also permits high evidence of political

influence or authority to demonstrate high evidence of community at a given point in time.

The Gay Head Wampanoag on Martha's Vineyard were not evaluated under the high evidence standards because they were acknowledged in 1987 under provisions of the original 1978 regulations. The high evidence provisions were added to the regulations as part of the 1994 revisions. The Gay Head petitioner's evidence of control of the Town of Gay Head likely would have met the high evidence standard for criterion 83.7(c), and perhaps for a more extended period. The evidence presented showed that the Indian town of Gay Head was essentially self-governing between 1814 and 1862, and that it was an Indian district from 1862 to 1870, when it became a township. Unlike the Mashpee situation, however, Gay Head tribal members still controlled the town in 1987 when the Department acknowledged the group to be a tribe.

For the period prior to the American Revolution, the Mashpee presented much stronger evidence of political influence or authority than did other recent New England petitioners. The Mashpee had named leaders or proprietors and governing councils throughout the Colonial and American Revolution periods. The Mashpee proprietors regularly petitioned the General Court from 1746 to 1762 and sent a tribal envoy to petition the King of England.

In contrast, the Eastern Pequot had no acknowledged Indian political authority, tribal leader, or tribal governing body following the death of Momoho in 1695. Neither did Connecticut government appoint an overseer, counselor, guardian or supervisor for the residents the Stonington reservation for most of the 18th century. During the course of the 18th

century, the Eastern Pequots directly addressed the Connecticut government on only seven occasions, through petitions in 1722, 1723, 1749, 1750, 1764, 1766, and 1788.

The Hassanamisco Nipmuc (petitioner 69A) had even less direct evidence of political influence or authority for the period up through the American Revolution. However, the petitioner was able to meet criterion 83.7(c) for this period based on the carryover evidence of geographical concentration under paragraph 83.7(b)(2).

The Mashpee direct evidence of political influence or authority during the Colonial and Revolutionary War periods is not as strong as that presented by the Mohegan petitioner. Like the Gay Head Wampanoag petition, the Mohegan petition was evaluated under the 1978 regulations that lacked the high evidence standards and carryover provisions of the 1994 revisions. From first sustained contact until 1769, Mohegan political leadership was vested in a chief sachem, all of who are known by name for the colonial era and all of whom descended in the Uncas family line. The Tribe also had a sachem's council. The Mohegan allied with the English during the Pequot War and following the conflict entered peace covenants with both the Massachusetts Bay and Connecticut colonies. They continued a relationship of mutual fortification with the English during the Narragansett conflict of the 1640's and the King Philip's War of the 1670's. In 1678 the Mohegan entered into Articles of Mutual Friendship and Defense with the Connecticut government and in 1681 Mohegan leaders signed a League of Amity agreement with the Colony. The Mohegan leadership petitioned the colonial government on a regular basis and when

they did not receive satisfactory agreements regarding land claims the Mohegan petitioned the Queen directly in 1704.

Tribal representative Mohomet II traveled to England in 1736 to challenge the Colony's claims to Mohegan land. During the following year (1737), the Tribe requested and received the protection of the Colony against potentially hostile Indians. In 1738, 56 tribal members petitioned King George directly for a resolution of their land claims against the Colony. Samson Occum, the Mohegan's dynamic political and religious leader, also petitioned the King in 1769 to bring the Tribe under the Crown's direct protection. Following the death of Ben Uncas III in that same year, the Mohegan abandoned the position of chief sachem but continued its governance through a tribal council that made itself known to the Colony through petitions to the General Assembly.

The Mashpee petitioner demonstrated no high evidence of political influence or authority for the period since 1974. However, the evidence that it presented was sufficiently strong to meet criterion 83.7(c). The group no longer controls town government, but its council still mobilizes members and resources for group purposes. A bilateral political relationship continues to exist between group leaders and members. The level of political involvement and communication is comparatively high. Political issues are intense enough to generate factional conflicts and controversy.

Criterion 83.7(d) Governing Document

This criterion requires that a petitioner provide a copy of its governing document, including its membership criteria. In the absence of such a document, the petitioner must provide a written statement describing its membership criteria and current governing procedures. The purpose of this requirement is to provide

the Department with a framework within which it can evaluate a group's political processes and membership. The governing document or written statement requested is key to evaluating the petitioner's membership under criterion 83.7(e), inasmuch as the Department analyzes a group's membership to determine whether its members meet the group's own specified membership criteria. No acknowledgment petitioner has ever failed to meet this criterion, since it requires only that a governing document or explanatory statement be provided.

The Mashpee petitioner submitted its present governing document, adopted on June 28, 2004 and prior governing documents that describe its membership criteria and governing procedures. This was all that was necessary to meet criterion 83.7(d). As an academic exercise, the Department described the petitioner's enrollment procedures in detail and provided an analysis of differences in the governing documents.

The Mashpee membership criteria, as established in the 2004 constitution are more stringent than those of most acknowledgement petitioners. Not only does it require descent from the historical Mashpee tribe, it only requires active participation in the tribal community and residency in or near the town of Mashpee by an individual or their family members. These criteria are unique and may be influenced by the acknowledgment criteria that require evidence of close group interaction. Even most recognized tribes do not have residency and participation requirements for tribal membership.

The Department found that 90 percent of the current Mashpee members met these membership criteria and that 10 percent had yet to submit sufficient evidence to be evaluated (see criterion 83.7(e) below). However, even if a large percentage of members failed to meet the group's membership criteria, it would not necessarily prevent the group from being acknowledged. This is because the Department's focus is primarily on whether the group meets the

acknowledgment criteria and not on whether its members meet the group's own membership criteria.

Criterion 83.7(e) Descent from a Historical Tribe

This criterion requires genealogical evidence that a petitioner's membership descends from the historical Indian tribe (or tribes in the case where one or more merged to form a single entity) from which the petitioner claims linkage. The criterion also specifies five kinds of evidence that can be used to document descent, including "State, Federal, or other official records" that identify ancestors as being "descendants of a historical tribe." The obvious purpose of this requirement is to prevent the acknowledgment of an Indian group that claims tribal ancestry, succession, and continuity solely on the basis of self-identification or other unsubstantiated evidence. The criterion requires that a petitioner submit a detailed current membership list as well as each available former list of members. It also requires the submission of a substantial body of genealogical evidence, including primary documents such as birth, marriage, and death records, that demonstrates precisely how current members descend from individuals that were listed as being members of the tribe in some reliable historical record.

Acknowledgment petitioners are encouraged to develop a base roll. This is a historical list of group members from which the majority of present group members descend. This base roll may be an existing historical list or it may be developed from a variety of other historical documents, such as census records. The date of the base roll is dependent on the availability of the most comprehensive historical data. The Department has accepted base rolls compiled from census data as late as 1920, but most base rolls are dated much earlier than that.

The Mashpee petitioner used as its primary base roll the 1861 Milton Earle Report. Earle was commissioned by the Massachusetts legislature in 1859 to enumerate and describe all Indians in the Commonwealth. The 1861 base roll date is earlier than that used by other successful New England petitioners

In the Narragansett case, the Department did not trace the genealogy of the petitioner any further back than the so-called “detrribalization rolls” of 1880-1884. It did not need to do so, however, because a State of Rhode Island commission had conducted an exhaustive examination to determine the tribal membership at that time, based on evidence of long-standing contact with the Narragansett community. Individuals who did not maintain tribal relations, were found by the commission to not be entitled to tribal membership, even if they could claim Narragansett ancestry.

In the case of the Gay Head Wampanoag petitioner in Massachusetts, the tribal membership criteria required proof of descent from individuals listed as members on an 1871 census. The Department’s 1985 proposed finding, however, established the Wampanoag ancestry of the present members back to a 1792 list of tribal members through various primary documents. The Department genealogist also found evidence that several of the ancestors on the 1792 list were “descendants of aboriginal inhabitants of the area at the time of English colonization.”

Virtually all current Gay Head Wampanoag members easily documented their ancestry back to an 1871 ancestor. Of the 521 contemporary tribal members who were linked to the 1871 census, 513 were also traced back to an ancestor on the 1792 list. Approximately 53 per cent of the 521 current members were traced back to one of three ancestors. These three primary ancestors were also linked to 17th century Wampanoag family members. The proposed finding made it clear that the linkages

beyond the 1871 census were made by the Department genealogist and not by the petitioner.

The base roll for the Mohegan petitioner of Connecticut was an 1861 list of “Mohegan Indians and Their Descendants” prepared by Emma T. Baker, a tribal member from one of the primary families. The Department’s 1989 negative proposed finding concluded that 85 percent of the current Mohegan members could “demonstrate that their ancestors appeared on the 1861 or earlier lists. The petitioner subsequently denied membership to the 15 percent not found to be descendants of 1861 members. The Department’s technical report for the proposed finding indicated that the Department genealogist also looked at several other pre-1861 lists of Mohegan members and found that the primary families were consistently represented through time. These earlier records included tribal membership lists prepared in 1766, 1774, 1782, 1790, 1799, and 1827, reports of the Connecticut overseers, Federal population census schedules, and town vital records.

In the Mashpee proposed finding, the Department found that 90 percent of the current group membership met the membership criteria of tracing descent back to an individual listed as Indian in the Earle Report of 1861. The other 10 percent of present members had yet to submit sufficient evidence to be evaluated.