

Summary Under the Criteria and Evidence
for
Final Determination for Federal Acknowledgment
of the
Mashpee Wampanoag Indian Tribal Council, Inc.

Prepared in response to a petition submitted to the
Assistant Secretary - Indian Affairs for Federal
acknowledgment that this group exists as an Indian
tribe.

Approved: 2/15/07

James E Cason
Associate Deputy Secretary

Mashpee Wampanoag Final Determination

Final Determination
for the
Mashpee Wampanoag Indian Tribal Council, Inc.

TABLE OF CONTENTS

INTRODUCTION3
Administrative History of the Petition since the Proposed Finding4
SUMMARY UNDER THE CRITERIA (25 CFR 83.7).....6
 83.7(a)7
 83.7(b)9
 83.7(c)18
 83.7(d)25
 83.7(e)28
 83.7(f)36
 83.7(g)37
APPENDIX
Description and Analysis of the 1776, 1808, and 1832 Censuses38

Mashpee Wampanoag Final Determination

ABBREVIATIONS AND/OR ACRONYMS USED IN THIS REPORT

AG	Attorney General
ADS	Associate Deputy Secretary
AS-IA	Assistant Secretary - Indian Affairs
BAR	Branch of Acknowledgment and Research
BIA	Bureau of Indian Affairs
CFR	<i>Code of Federal Regulations</i>
FAIR	Federal Acknowledgment Information Resource
FD	Final Determination
FTM	Family Tree Maker™ genealogy software
IBIA	Interior Board of Indian Appeals
MWT	Mashpee Wampanoag Tribal Council, Incorporated
OFA	Office of Federal Acknowledgment, formerly BAR
PF	Proposed Finding
TA	Technical Assistance
U.S.	United States

Mashpee Wampanoag Final Determination

Summary under the Criteria

for the Final Determination of the

Mashpee Wampanoag Indian Tribal Council, Inc.

INTRODUCTION

The Office of the Assistant Secretary-Indian Affairs (Assistant Secretary or AS-IA) within the Department of the Interior (Department or DOI) issues this final determination (FD) in response to the petition received from a group known as the Mashpee Wampanoag Tribal Council, Inc. (MWT or Mashpee, Petitioner #15), located in the town of Mashpee, Massachusetts. The MWT petitioned for Federal acknowledgment as an Indian tribe under Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*.

By the Secretary of the Interior's Order 3259, dated February 8, 2005, amended August 11, 2005, and March 31, 2006, the Secretary re-delegated to the Associate Deputy Secretary (ADS) most of the duties formerly delegated to the Assistant Secretary. Among those re-delegated was the authority to "execute all documents, including regulations and other Federal Register (FR) notices, and perform all other duties relating to Federal recognition of Native American Tribes."

The acknowledgment regulations, 25 CFR Part 83, establish the procedures by which groups may seek Federal acknowledgment as Indian tribes entitled to government-to-government relationships with the United States. To be entitled to such a political relationship, the petitioner must submit documentary evidence that the group meets all seven mandatory criteria set forth in section 83.7 of the regulations. The Department shall acknowledge the existence of the petitioner as an Indian tribe when it determines that the group satisfies all of the criteria in 83.7(a-g). The Office of Federal Acknowledgment (OFA), within the Office of the AS-IA, has responsibility for petition review and analysis. This FD concludes that the petitioner meets all seven mandatory criteria and exists as an American Indian tribe.

Section 83.10 of the acknowledgment regulations establishes the timeframes for the evaluation of documented petitions. In this case, however, a July 22, 2005, Joint Settlement Agreement and Stipulated Dismissal (Agreement), which the petitioner and the Department entered in the United States District Court for the District of Columbia, superseded some of those regulatory time periods (District Court 2005).¹ The Agreement stated the Department would place the Mashpee petition on active consideration by October 1, 2005, and issue a proposed finding (PF) on it by March 31, 2006. The Department issued a PF on that date which concluded the petitioner met all

¹ Citations parallel the structure used to identify documents in the Federal Acknowledgment Information Resource (FAIR) database under the Short Cite Heading. For a discussion of the FAIR system, see the PF's administrative history.

Mashpee Wampanoag Final Determination

seven mandatory criteria and proposed to acknowledge the group existed as an American Indian tribe.

Publishing notice of the PF in the Federal Register on April 6, 2006, initiated a 180-day comment period during which time the petitioner, interested and informed parties, and the public could submit arguments and evidence to support or rebut the PF. The regulations at 25 CFR 83.10(k) provide the petitioner a minimum of 60 days to respond to any comments that interested and informed parties and the public submit on the PF during the 180-day comment period. The terms of the Agreement modified this timeframe, providing the petitioner a 30-day response period, unless it specifically requested the full 60 days.

The Agreement provided that the Department issue a FD on the Mashpee petition on or before March 30, 2007. The Department also agreed to exercise due diligence to publish notice of the FD in the Federal Register within five business days of its issuance. The Agreement did not modify the regulatory timeframes for the processing of the petition following the publication of the FD notice.

After the publication of the FD notice, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA), under the procedures specified in section 83.11 of the regulations. The IBIA must receive this request no later than 90 days after the FD's publication in the Federal Register. The FD will become effective as provided in the regulations 90 days from the publication unless the petitioner or any interested party files a request for reconsideration within that timeframe.

The Department bases this FD on an evaluation of materials the petitioner and a third party submitted in response to, and materials already in the record, for the PF. The FD also incorporates evidence Department researchers developed during their verification research. Therefore, this FD should be read and considered in conjunction with the PF.

Administrative History of the Petition since the Proposed Finding

The Department published a notice of the PF in the Federal Register on April 6, 2006, which proposed to acknowledge that the Mashpee petitioner existed as an Indian tribe (71 FR 17488). The Department found the petitioner met all seven mandatory criteria. See the PF for a detailed administrative history up to April 2006.

Neither the petitioner nor any third parties requested a formal on-the-record technical assistance (TA) meeting under section 83.10(j)(2). At the request of MWT, the OFA held an informal TA teleconference with the petitioner's researchers on April 27, 2006, to provide additional guidance, with a follow-up letter summarizing its main points (Fleming 5/4/2006).

Under the Agreement's terms, the 180-day deadline for all parties to submit comments was October 3, 2006. The OFA received comments on the PF from the petitioner on October 2, 2006, and from the Office of the Attorney General of the Commonwealth of Massachusetts (Massachusetts AG) one day later. The Massachusetts AG's comments were contained in a letter dated October 2, 2006, and a follow-up dated October 3, 2006. The OFA

Mashpee Wampanoag Final Determination

received the petitioner's response to the Massachusetts AG's comments on October 30, 2006, two days before the end of the 30-day response period established by the Agreement.

The petitioner's comments consisted of 1,799 pages of documents, largely genealogical materials, a few historical documents, and a letter from the group's counsel describing revised governing documents, mainly submitted in reply to requests for information as outlined in the PF and the informal TA teleconference of April 27, 2006.

The Massachusetts AG's comments, discussed under criteria 83.7(b) and (c), consisted of two brief letters. As its response to these letters, the petitioner's governing body submitted a 14-page document from its counsel and a 4-page document from one of its researchers.

The Department also received during the comment period 18 letters of support for the petitioner's pursuit of Federal acknowledgment as an Indian tribe. These letters showed support for the PF's decision but provided no substantive comment on the PF. The Department also received a letter pertaining to the petition from a former selectman of the Town of Mashpee. This letter offered no substantive comment on the PF, and the Department did not treat it as such, since the author was expressing concerns over negotiations between the Town of Mashpee and the petitioner that had no bearing on the PF.²

In addition, on March 14, 2006, before the issuance of the PF, but after the deadline for consideration of submissions for the PF, the Department received a set of copied documents from David Garner that included both a photocopy and a transcription (2 pages) of an original statement from a Mashpee woman named Mary Simon dated June 13, 1791. The Department treated this document as a late submission for the PF and reviewed it as part of the evidence for the FD.

² The Department was not part of these negotiations.

Mashpee Wampanoag Final Determination

SUMMARY EVALUATION UNDER THE CRITERIA

The following summary under the criteria for the FD is the Department's evaluation of all of the evidence in the administrative record to date. The evidence shows the petitioner satisfied all seven of the mandatory criteria, and the FD affirms the PF's conclusions. Therefore, the Department finds that the Mashpee Wampanoag Indian Tribal Council, Inc., exists as an Indian tribe.

Mashpee Wampanoag Final Determination

Criterion 83.7(a) requires that

the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.

Summary of the Proposed Finding

The PF concluded external observers identified the Mashpee petitioner as an American Indian entity on a substantially continuous basis since 1900, and it therefore met criterion 83.7(a). See Mashpee PF, 21-30, for a complete description of these identifications. However, for the period 1900 to 1923, the PF accepted identifications made in only three documents dated 1903, 1915, and 1923 (Mashpee PF, 22). Regarding this period the PF stated,

The available identifications of the Mashpee submitted for between 1900 and 1923 constitute minimal evidence for substantially continuous identification for that period. The sparseness of identifications for this period, however, appears to be only a fluctuation in that identifications of the Mashpee were made on a regular basis before 1900 and after 1923. Although identification before 1900 is not required under the regulations, in this case such identifications help establish the existence of a long-term pattern of regular identification. This apparent fluctuation in the number of identifications may also be the result of a minimal submission of evidence rather than the actual existence of minimal evidence of identification during these years. Therefore, the petitioner may wish to strengthen its evidence for criterion 83.7(a) by submitting additional identifications for the period from 1900 to 1923. (Mashpee PF, 22)

Summary of the Comments on the Proposed Finding

The Mashpee petitioner submitted three documents to supplement the evidence for 1900 to 1923. No third party submitted comments or evidence regarding criterion 83.7(a). The first document submitted by the petitioner included pages from the 1899 to 1921 *Annual Reports of the President and the Treasurer of Harvard College* (Harvard 1899-1921). These documents dealt with the accounts of the Daniel Williams Fund, established by Harvard University in the 18th century to support the religious needs of Mashpee Indians. The second document was a previously submitted newspaper article from 1907, written by an unidentified author, and entitled “Richard Bourne” (*Wareham Courier* 5/30/1907). The final item was an article describing the town of Mashpee, written by an author identified only as a “contented woman,” and entitled “A Trip of Interest.” It appeared in *Cape Cod Magazine* in January 1917.

Analysis of the Comments

The pages from the *Annual Reports of the President and the Treasurer of Harvard College* (Harvard 1899-1921) were not external identifications of the Mashpee group. While these documents noted the balance available in the Daniel Williams Fund from 1899 to 1921

Mashpee Wampanoag Final Determination

maintained “for the benefit” of the “Mashpee Indians,” they did not identify a contemporary Indian entity.

The 1917 article from the *Cape Cod Magazine* did not identify a contemporary Indian entity in the town of Mashpee. The article’s author provided a concise history of the historical Mashpee group and described a number of people of Indian ancestry in the town, but did not identify the existence of a contemporary Indian entity. Criterion 83.7(a) requires identification of an Indian entity, not just Indian individuals.

Department researchers did not discuss the 1907 article from the *Wareham Courier* in the PF, but did examine it at the time. The PF did not accept it as an external identification of a Mashpee entity because the article had some limitations in that it primarily discussed the colonial era and, in passing, mentioned a “petty remnant” of a historical group. In its comments, the petitioner, however, argued persuasively that the article did describe an entity that existed in 1907 because of its reference to a “petty remnant of the tribe” who were “still owners of the soil” (MWT Narrative Comment 10/2/2006, 9). A reevaluation of the article concludes that while the article mainly focused on the life and career of Reverend Richard Bourne, the founder of the Mashpee praying town in the 17th century, it also described a contemporary Indian entity in the town of Mashpee. The article linked Bourne’s establishment of the praying town with the “petty remnant of the tribe,” whose members were “still owners of the soil” in 1907 (*Wareham Courier* 5/30/1907). The author’s description of the members of this “tribe” as “still owners of this soil” demonstrates that he or she referred to this portion of the historical tribe in the present tense or existing in the present.

With the reevaluation of the document from 1907, the petitioner has strengthened its evidence needed for substantially continuous identification from 1900 to 1923. Accepting this article as identification of the Mashpee eliminates the 12-year interval of non-identification for the group between 1903 and 1915. Also included among the identifications discussed in the PF for this period are a 1903 article in the *Bourne Independent* (Rothery 1903, 227-228, 232); and articles from the *Cape Cod Magazine* in 1915 and 1923 (12/1915, 10/1923; see also *Cape Cod Magazine* 1923; reprint 1939).

Final Determination’s Conclusions on Criterion 83.7(a)

The evidence submitted for both the PF and the FD demonstrates external observers identified the Mashpee as an American Indian entity on a substantially continuous basis since 1900. Included among these external observers were officials of the Federal Government and the State of Massachusetts, local authors, journalists, as well as scholars and researchers. Therefore, the FD affirms the PF’s conclusions that the petitioner meets criterion 83.7(a).

Criterion 83.7(b) requires that

a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

Summary of the Proposed Finding

The Mashpee PF concluded that a predominant portion of the petitioner's members or ancestors maintained consistent interaction and significant social relationships since first sustained contact. See the Mashpee PF, 31-92, for a complete description of this evidence. The evidence also established that since first sustained contact to the present they comprised a distinct community from non-members in and around the town of Mashpee on Cape Cod in Massachusetts.

From 1665 to 1720, the Mashpee were part of a praying town, designed to convert its Indian inhabitants to Christianity. In 1720, the town became a proprietorship, in which the Mashpee Indians elected local officers, held regular town meetings, maintained public records, and owned their land in common. In 1746, the colony appointed guardians to oversee the group. In 1763, the colonial legislature gave the Mashpee self-rule once again, a form of government that lasted until 1788, when the State legislature once again assigned overseers.

The evidence shows the Mashpee maintained a distinct community during the colonial and Revolutionary eras. Good evidence exists for this period to show almost all of the Mashpee lived in a defined geographical area, the Town of Mashpee, almost exclusively composed of their members. This residential pattern provided evidence which, under 83.7(b)(2)(i), was sufficient by itself to demonstrate community during this period. Colonial officials also regularly described the distinct Indian character of Mashpee in reports and personal correspondence, providing good evidence of community. In addition, evidence of shared religious activities by the Mashpee showed the existence of a social community distinct from surrounding populations.

From 1788 to 1834, during the overseer period, the evidence showed the Mashpee group remained distinct from surrounding populations. The evidence showed that virtually all the Mashpee for most of this period lived in a defined geographical area composed almost exclusively of their members, while those who lived elsewhere usually did so only on a temporary basis, thereby retaining contact with the majority. This evidence was sufficient in itself to show community, under criterion 83.7(b)(2), for the period. Furthermore, State officials in extensive reports consistently described the distinct Indian character of the group during the overseer period, providing good evidence of community. About two-thirds of the Mashpee also shared religious practices through the Mashpee Baptist Church, which was composed almost exclusively of its members. The petitioner demonstrated additional evidence of community as well by providing significant evidence under 83.7(c) of political influence for the period 1788 to 1834.

From 1834 to 1870, when the Town of Mashpee was an Indian District, the evidence showed a large majority of the Mashpee lived in a defined geographical area composed almost exclusively

Mashpee Wampanoag Final Determination

of its members. As in the earlier period, those few who lived elsewhere were very close by in adjacent communities or doing so only temporarily, thereby maintaining social ties to the majority in the town. This evidence was sufficient in itself to show community during these years under criterion 83.7(b)(2)(i). Moreover, the petitioner demonstrated sufficient evidence of community from 1834 to 1870, under 83.7(b)(2)(v), by using evidence of political authority for that period described in 83.7(c)(2). This evidence shows Mashpee leaders using the district government to allocate group resources and to exert influence on the behavior of the Mashpee. During this period, the State also generated comprehensive studies of the group, particularly annual reports and the 1849 Briggs and the 1861 Earle Reports, which provided evidence the Mashpee Town was a distinct Indian community with significant social relationships and interactions. The Baptist church also maintained its position as an important social institution for a large portion of the Mashpee.

In 1870, the Mashpee Indian District became an incorporated town. From 1870 to 1930, the evidence showed a large majority of the Mashpee lived in a defined geographical area composed almost exclusively of their members. Those few Mashpee who lived outside of the town, often in adjacent towns or other areas on Cape Cod, maintained contact with those in the town as evidenced through a high rate of return migration. This evidence was sufficient in itself to show community during these years as stated in criterion 83.7(b)(2)(i). The Baptist Church and Parish Committee remained important social institutions for a great majority of the Mashpee from 1870 to 1930. There was also good evidence for this period of significantly high patterns of intra-group marriages, as described in 83.7(b)(1), for 1860 to 1930. These high rates of intra-group marriage resulted in extensive kinship ties among the Mashpee that have fostered social interaction and relationships within the Mashpee to this day.

During the remainder of the town period, 1930 to 1974, contemporary records, interviews, and other evidence provided evidence that the Mashpee were a distinct entity with significant social relationships and interactions among a predominant portion of the membership. The record showed evidence of concentrated residential patterns indicating that a significant part of the group still lived in an exclusive settlement in the Town of Mashpee from 1930 to 1974. These residency patterns were good evidence of community. Significant kinship ties through large, extended family networks facilitated social relationships and interactions within the group during this time. There was also good evidence of socials and other activities involving Mashpee from many family lines and multiple generations. The Parish Committee and Baptist Church also functioned as important social organizations for a significant portion of the group into the early 1970's.

The petitioner also demonstrated sufficient evidence of community from 1870 to 1965, under 83.7(b)(2)(v), by using evidence of political authority described in 83.7(c)(2) for that period. During this time, Mashpee selectmen and public officials used the town government to allocate group resources and exert political influence on the behavior of the Mashpee on a consistent basis. The Mashpee provided this leadership for a town in which they continued to make up the large majority of the year round population until 1965.

Mashpee Wampanoag Final Determination

For the period since 1974,³ the petitioner also presented good evidence of community. The land claim suit that the incorporated council initiated mobilized the support of a significant portion of the membership. The petition record contains evidence of social distinction by non-members towards the Mashpee because of the land claim suit and other controversial events that indicate the existence of a distinct community. During this period, residency patterns provide strong evidence of community with a significant number of members living within or very near the group's traditional location in the center of the Town of Mashpee. Kinship still provides a basis for group cohesion with large, extended families uniting members. The petitioner provided further evidence of community through the social activities sponsored by the incorporated council for members. Group involvement during this period found expression through a historically recognized political division within the membership of "traditionals" and "non-traditionals." The petitioner also provided significant evidence under 83.7(c) of political influence since the middle 1970's that demonstrates interaction and social ties and thus provides additional evidence of community.

The petitioner presented sufficient evidence to demonstrate it comprised a distinct community since first sustained contact in the 1620's with non-Indians to the present. Therefore, the petitioner met criterion 83.7(b) for the PF.

Summary and Analysis of the Petitioner's Comments on the Proposed Finding

The petitioner submitted one additional document related to criterion 83.7(b) in response to a specific request from the Department (Mashpee PF, 36, footnote 24, and Fleming 5/04/2006). This document was the 1776 Gideon Hawley census of Mashpee, copies of both the original handwritten document and a transcription, from the Massachusetts Historical Society. In an analysis of residential patterns of the Mashpee for the colonial and Revolutionary periods, the PF explained this document's details using descriptions of it from official State reports and secondary sources (Mashpee PF, 36, and footnote 24). At the time, the Department had only an incomplete transcription of the original document created by an unidentified source at an unknown date.

For the FD, Department researchers analyzed the newly submitted copy of the original 1776 census, and the State historical society's transcript, both provided by the petitioner, and found they confirmed the PF's description of its contents. The census supported the PF's conclusions in criterion 83.7(b) regarding the residential patterns of the group for the colonial and Revolutionary periods. The newly submitted copy of the original document confirmed the

³ Please note an error that occurs on page 17490 of the *Federal Register* notice as well as page 92 of the Proposed Finding. In both places under the section 1974 through present, it states, ". . . social relationship and informal social interactions within the community are facilitated by kinship patterns that include substantial rates of intra-group marriage among Mashpee members and a persistent and extensive network of extended family connections." As stated on page 73 in the body of the text of the PF, marriage rates remain relatively high until the 1950's. This error does not change the interpretation of the data or the final decision of the PF or FD, as other forms of evidence under criterion 83.7(b) (including features of kinship) demonstrated community for this period. The sentence should read, ". . . social relationship and informal social interactions within the community are facilitated by kinship patterns and an extensive network of extended family connections, which evolved in part from previously high rates of intra-group marriage."

Mashpee Wampanoag Final Determination

description in the PF that relied on secondary sources about the census. It also provided support to Benjamin Hallett's 1834 statement before a Massachusetts legislative committee, cited and validated by John Milton Earle in his 1861 Mashpee report, which traced the group's estimated population to the late 18th century (Address to Legislative Committee 3/7/1834, 28; Earle Report 3/1861, 47; see the Appendix to this FD for more discussion of the 1776 Hawley census).

No third party supplied any new documentary evidence concerning the PF's conclusions on criterion 83.7(b).

Summary and Analysis of the Comments of the Office of the Attorney General of Massachusetts and Petitioner's Response

In its two-page comment on the PF dated, October 2, 2006, the Chief of the Government Bureau of the Office of the Attorney General of Massachusetts expressed concern, after a review of the proposed finding and the trial record in *Mashpee Tribe v. New Seabury Corp., et al.*:

that the voluminous evidence contained in the trial record, particularly evidence that would appear to militate against a finding in favor of federal acknowledgment of the Mashpee group, may not have received adequate consideration in the Proposed Finding. (Kerrigan, David 10/2/2006)

The Massachusetts AG cited the specific testimony of two defense witnesses: Dr. Jean Guillemin in the trial transcript at Day 31, pages 113, 117, 124, and 158; and Day 33, page 134; and Dr. Francis Hutchins, Day 36, generally (Kerrigan, David 10/2/2006), as examples of such evidence.

The Massachusetts AG then urged that the "trial record of the district court case be given the fullest review prior to the issuance of any Final Determination" (Kerrigan, David 10/2/2006). On October 3, 2006, the Department received another letter by fax from the Chief of Staff of the Massachusetts AG, dated the same day, in which it stated the comment dated October 2, 2006, did "not take a position on the recognition issue but simply address[e] the issues stated within" (Kerrigan, Stephen 10/3/2006).

In its response of October 30, 2006, the petitioner countered,

The testimony and opinions that Mr. David Kerrigan was concerned did not receive "adequate consideration" were in fact "fully examined" by OFA. Moreover, those testimony and opinions were based on vastly different standards. Without the benefit of regulations defining the federal-tribal relationship Dr. Guillemin and Mr. Hutchins employed standards that reflect an archaic, anachronistic view of what an Indian tribe is. According to their definitions, tribes are geographically and culturally isolated; their members do not participate in the larger market economy or in state and federal political activities, and they have minimal interaction with non-members. Such an outdated definition completely fails to capture the reality of hundreds of tribes today, most of which live and interact with non-Indians, rely on federal funding to support culturally-

Mashpee Wampanoag Final Determination

specific education and language preservation, focus on modern economic development partnerships in order to support—not contradict—their sovereignty, and have members who participate in state and federal politics. In short, there is nothing in the cited transcript pages that contradicts or is inconsistent with the detailed findings and conclusions in the Proposed Finding. (MWT Response 10/30/2006, 14)

The petitioner’s researcher, Dr. Christine Grabowski, expressed a similar opinion in her response:

There are, in short, substantial differences between the *Mashpee v. New Seabury et al.* trial and the federal acknowledgment process. Not only are the criteria for evaluating the tribal continuity deliberately and appropriately distinct in the administrative procedure from that used in the trial, but what evidence is presented and how it is analyzed is also different. This allows for a more extensive and thorough evaluation of all of the evidence that bears upon tribal identity, function and continuity.

OFA explicitly stated that it had examined the trial transcript. All of the available evidence led OFA to conclude that the Mashpee Wampanoag Tribe had satisfied all seven mandatory criteria of the federal acknowledgment procedure. The administrative regulations, not the trial, are the standards that OFA should and did follow to make its positive Proposed Finding. (Grabowski 10/30/2006, 4)

Conclusion

The Mashpee group litigated its land claim suit in 1977-1978 without the participation of the Federal Government as a party. In January 1978, after a lengthy trial,⁴ a jury in Federal District Court determined that the Mashpee did not meet certain threshold requirements for being an Indian tribe within the meaning of the Indian Nonintercourse Act (*Mashpee Tribe v. the Town of Mashpee*, 447 F. Supp. 940, 942-43 (D. Mass. 1978) and *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979)). Both the plaintiff and the defendant presented expert testimony on whether the group had been and still was an Indian tribe. In response to several interrogatories in the judge’s instructions, the jury found that the Mashpee did not constitute an Indian tribe on July 22, 1790, but did constitute one on March 31, 1834 and March 3, 1842. It concluded also that the group did not constitute a tribe on June 23, 1869, May 28, 1870, and August 26, 1976. When asked if it found “that people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976 [and] . . . did they continuously exist as such a tribe or nation from such date or dates up to and including August 26, 1976,” the jury answered in the negative.

The Federal Government neither was a party to this suit nor bound by the decision (Walker 9/15/1977 and 1/16/1980). At the time of the trial, the Federal acknowledgment regulations, which employ different criteria to determine whether a group exists as an Indian tribe than those used in the land claim suit, had not been promulgated in final form. In contemporaneous and

⁴ Many sources describe the case as lasting 40 days; the actual court transcript indicates 41 days.

Mashpee Wampanoag Final Determination

subsequent correspondence regarding the land claim suit, the Department reserved the right to determine whether the Mashpee constituted an Indian tribe within the meaning of the Federal acknowledgment regulations, issued by the Department in 1978 (Walker 9/15/1977 and 1/16/1980).⁵

This FD finds that the Massachusetts AG's concern that the PF did not adequately consider the trial record of the land claim suit is unfounded. The Department gave the evidence from the trial record a thorough review. As stated in the PF, the Department examined all the daily transcripts of the testimony (over 7,300 pages), and two depositions (over 1,000 pages) which were submitted as evidence, as part of its evaluation of the Mashpee petition before the PF's issuance.

The Department also based the PF on considerably more evidence than that used in the trial. Although quality not quantity is critical, the Department had over 10,100 documents totaling about 54,000 pages in the petition record. In contrast, there were only about 274 exhibits before the Court, indicating that except for the testimony the evidence contained in the trial record was limited in scope. With the exception of the exhibits, the court did not have this information at the time of the trial. In response to the Massachusetts AG's comments, the Department again reviewed the evidence from the trial record, particularly the cited testimony of the two witnesses. This review did not change the findings in the PF.

The PF additionally examined the group's community and politics for the substantial period since the suit, approximately 30 years, as well as the earlier periods. The PF also incorporated more in-depth evaluations of the evidence under the regulatory criteria, including detailed marriage and residency analyses, and an analysis of 31 interviews conducted by the Department's anthropologist during an on-site investigation in 2006.

The PF addressed, as described below, the issues dealing with substantially continuous community that the defendants' witnesses raised in the trial transcript pages cited by the Massachusetts AG. In Day 31 transcript, page 158, Jean Guillemain, a sociologist who was dealing with the status of the contemporary group, claimed that she found "no evidence of economic autonomy in the sense of communal or kin-based economic activities" among the Mashpee. When asked to define "economic autonomy," she explained it meant some "degree of separate organization based on the principle of kinship, having to do with distribution of resources and labor." Rather, than being economically autonomous, Guillemain contended the group's members were part of the "market economy" and homeowners and, therefore, economically assimilated. Because of this economic assimilation, she maintained the group was not an Indian tribe in 1977 (see pages 159-160 of the transcript for context).

The acknowledgment regulations do not require a petitioner to be "economically autonomous" from the wider society to demonstrate community. While the regulations do provide for a significant degree of shared or cooperative labor or other economic activity among the membership as one form of evidence for community, they do not require it as specific evidence.⁶

⁵ The Department revised the regulations in 1994.

⁶ However, the Mashpee provided sufficient evidence to demonstrate the existence of political influence which included the allocation of resources from 1834 to 1965, using evidence described in 83.7(c)(2). Under 83.7(b)(2)(v),

Mashpee Wampanoag Final Determination

The regulations do not bar acknowledgment of groups whose members participate in mainstream economic practices such as home ownership. The regulations require a “distinct” community, but not an isolated one.

In Day 33 transcript, page 134, Guillemain argued that applications for Federal funding of some Mashpee educational programs, designed to teach cultural traditions and native language to Mashpee children, showed a lack of distinctive culture for the group.⁷ Owing to this lack of “cultural distinctiveness,” the Mashpee, she asserted, could not be an Indian tribe at that time (see also pages 133 and 135 for context).

In contrast, the acknowledgment regulations do not require a petitioner to maintain “cultural distinctiveness” to be an Indian tribe or community. Rather, the regulations require a petitioner be a socially distinct group of people within the wider society. The PF described at length the Mashpee group’s continued community cohesion and social distinction from non-Indian populations over the last 300 years, including within the local schools since the 1970’s (Mashpee PF, 43-45, 52-54, 56-57, 66-69, and 81-82). Under the regulations, a petitioner may be a socially distinct group without having a separate culture.

In his testimony, the historian Francis Hutchins claimed the Mashpee were not an Indian tribe in the years 1666, 1680, 1763, 1790, 1834, 1870, and 1970, or at anytime between 1666 and 1970 (Day 36, 130-140).⁸ In his opinion, an Indian tribe was “an entity composed of persons of American Indian descent, which entity possesses distinct political, legal, cultural attributes, which attributes have descended directly from aboriginal precursors” (Day 36, 124). Without accounting for cultural change, adaptation, and the effects of non-Indian society, Hutchins argued the Mashpee were not an Indian tribe historically because they adopted Christianity and non-Indian forms of dress and appearance, and chose to remain in Massachusetts as “second-class” citizens rather than emigrating westward to “resume tribal existence.” Hutchins also noted that they intermarried with non-Indians to create a “non-white,” or “colored,” community (Day 36, 130-140). Hutchins thus required unchanged culture, including maintenance of a traditional religion and essentially total social autonomy from non-Indian society.

None of these factors is a requirement of the regulations to demonstrate the continued existence of a distinct social and political community. Contrary to Hutchins’s reasoning, under the acknowledgment regulations, these aspects of acculturation are compatible with the existence of a community for a petitioner with significant social interactions and relationships. As long as the group continued to maintain a distinct social and political community, acculturation does not prevent it from demonstrating community. For example, a number of successful petitioners have

this political evidence was also sufficient evidence of community for that period.

⁷ Whereas Guillemain focused on these programs as evidence there was not an Indian tribe, the PF evaluated the Mashpee participation in and support for these programs, both in terms of attendance and volunteer activity, as evidence of community. Elsewhere in her testimony, upon cross-examination, Guillemain admitted that a social boundary existed between the Mashpee group and non-members based on ancestry and kinship (Day 31, 234). Her claim is consistent with the PF’s conclusions regarding the importance of kinship ties among the Mashpee as evidence of community (Mashpee PF, 50-54, 57-59, 61, 75-79).

⁸ The court in its instructions did not ask the jury to determine tribal existence before 1790.

Mashpee Wampanoag Final Determination

been very involved in the churches of several Christian denominations, and all have worn contemporary clothing and attended public school. Virtually all petitioners have displayed some characteristics of the mainstream society and culture. The Mashpee, in fact, used mainstream institutions, like the Baptist Church and the town government, to maintain community, and to foster social interaction and relationships among their members (Mashpee PF, 33-35, 37-39, 41-42, 46, 54-56, 60-61, and 94-107). Moreover, despite their acculturation, the Mashpee remained distinct from non-Indian populations in the surrounding area (Mashpee PF, 43-45, 52-54, 56-57, 66-69, and 81-82).

Additionally, the regulations do not view marriage with non-Indians as evidence that a group does not exist as a community. As long as the Indian spouses and their children maintained interaction with the Indian community, marriage outside the group does not present a problem in meeting the regulations. Mashpee out marriage did not prevent them from maintaining significant kinship ties, social interaction, and historically concentrated residence patterns in and around the town of Mashpee (Mashpee PF, 39-65, 68-89). Despite some historical out-marriage, the Mashpee actually maintained a high level of marriage within the group from 1860 to 1930. This high level of group marriages has fostered kinship ties and social interaction within the group to this day (Mashpee PF, 50-52, 61-65, 75-79).

In sum, neither the comments of the Massachusetts Attorney General nor the evidence in the trial transcript it referenced changed the PF's conclusions that the Mashpee were a distinct community (criterion 83.7(b)). The Massachusetts AG raised concerns that the Department may not have fully considered the evidence and issues raised in the trial transcript. The PF was thorough in its review of the materials in the trial transcript and a larger body of evidence that the court did not have in the land claim suit. This FD reevaluated the evidence in the trial testimony. In response to the comments submitted by the Massachusetts AG citing the testimony of the two defendants' witnesses, the FD reviewed this testimony and finds that the standards and definitions of a tribe used by these witnesses differ substantially from the requirements in the seven mandatory criteria of the regulations. The FD also finds that the trial testimony did not provide any evidence or arguments not already discussed in the PF, and did not merit a change in the evaluation of the evidence under criterion 83.7(b) in the PF.

Additional Analysis of Previously Submitted Documents

Just before the PF's completion, Department researchers found copies of the 1808 and the 1832 State censuses of the Mashpee in two ancestor files that the petitioner submitted for the PF. The Department researchers performed only a limited evaluation of these documents as part of their analysis of the Mashpee's residential patterns from 1802 to 1834 before the issuance of the PF (Mashpee PF, 39, footnote 34, and 40, footnote 37). A fuller analysis of these two censuses conducted for the FD confirms the PF's conclusions about the residential patterns of the Mashpee for those years (see the Appendix to this FD for more details on these censuses).

Final Determination's Conclusions on Criterion 83.7(b)

The FD affirms the PF's conclusions that the petitioner met the requirements of criterion 83.7(b). The petitioner presented sufficient evidence to demonstrate it has comprised a distinct

Mashpee Wampanoag Final Determination

community since first sustained contact with non-Indians in the 1620's to the present. Therefore, the petitioner meets criterion 83.7(b).

Criterion 83.7(c) requires that

the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

Summary of the Proposed Finding

The PF concluded the petitioner met criterion 83.7(c). See the Mashpee PF, 93-123, for details. The petitioner provided sufficient evidence to establish the group maintained political authority or influence over its members as an autonomous entity since first sustained contact. The evidence demonstrated the exercise of political authority took many forms, including political control of the Town of Mashpee by the group from 1870 until 1974, and by an incorporated council to the present.

The PF noted that a hereditary sachem provided leadership among the Wampanoag from the 1620's to the 1660's. The area around what is now the town of Mashpee, Massachusetts, had a number of these sachems, who ruled by consensus, controlling several villages joined in a loose confederacy. From 1665 to 1720, the community was a praying town designed to convert its Indian inhabitants to Christianity. During this period, the Mashpee exerted political influence through a six-member council formed at the group's insistence. In 1720, the town became a proprietorship, in which the Mashpee elected local officers, held regular town meetings, maintained public records, and owned their land in common. Native religious leaders also exercised important political influence during this period. After the Massachusetts colony appointed non-Indian guardians in 1746, the Mashpee proprietors, as the group's elected representatives, regularly petitioned the colonial authorities of Massachusetts for the next 16 years, demanding a change in government. In 1763, shortly after sending one of their members to petition the King of England and his ministers with a list of their grievances, they persuaded the colonial legislature to give them self-rule once again, a form of government that lasted until 1788. Therefore, the petitioner provided sufficient evidence to demonstrate that it met 83.7(c) for the colonial and Revolutionary periods. In addition, the group supplied evidence through the Mashpee's residential patterns during the same time to meet the requirements of paragraph 83.7(b)(2)(i), which was also sufficient to demonstrate political influence, under 83.7(c)(3).

Between 1788 and 1834, Massachusetts again appointed non-Indian overseers to supervise the group. The Mashpee proprietors frequently petitioned State authorities complaining about the activities of these overseers. State records acknowledged that despite the presence of overseers between 1788 and 1834, the Mashpee remained essentially autonomous and self-governing. Indeed, one State investigation report from 1827 stated that the Mashpee had been running their "municipal affairs" for the past hundred years. In 1834, the State, in response to their entreaties, gave the Mashpee greater self-government by establishing an "Indian District" in Mashpee, Massachusetts. Therefore, the petitioner provided good evidence to demonstrate that it met 83.7(c) for 1788 to 1834. In addition, the group supplied evidence through the Mashpee's residential patterns from 1802 to 1834, to meet the requirements of paragraph 83.7(b)(2)(i) that was also sufficient to demonstrate political influence, under 83.7(c)(3), during those years.

Mashpee Wampanoag Final Determination

The PF found that as part of an Indian District, between 1834 and 1870, the Mashpee gained complete control of political, legal, and economic affairs in the town once again. District status gave the Mashpee control over local government, justice, schools, roads, parish, and welfare. The Mashpee, through elected and appointed officials, allocated group resources by regulating common lands and waterways. They also controlled group behavior through law enforcement by the local constables, who were Mashpee as were other office holders. The consistent allocation of group resources and control of individual behavior were sufficient evidence in themselves, under 83.7(c)(2)(i) and (iii), of political influence.⁹ In addition, the group supplied evidence, through the Mashpee's residential patterns during the district period, to meet the requirements of paragraph 83.7(b)(2)(i) that was also sufficient to demonstrate political influence, under 83.7(c)(3) through 1870.

In 1870, Massachusetts incorporated the Indian district of Mashpee as a town. The evidence showed that from 1870 to 1974 the Mashpee adapted the principal elements of the town governmental system, which they overwhelmingly dominated and controlled, for their own political needs and advantage. The Mashpee employed the town government, through their elected selectmen and appointed officials, as the primary structure by which they maintained political influence or authority over members. The Department's FD for Federal acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., provided precedent for evaluating such a governmental form as meeting the requirements of criterion 83.7(c). This type of government also provided the Mashpee with the means to continue the allocation of group resources through the regulation of fisheries and the ability to control individual behavior of members through the local police department from 1870 to 1965, when they represented much more than a majority of the year-round population in the town. The consistent allocation of group resources and control of individual behavior were sufficient evidence, under 83.7(c)(2)(i) and (iii), of political influence for those years.¹⁰ In addition, the group supplied evidence through the Mashpee's residential patterns from 1870 to 1930 to meet the requirements of paragraph 83.7(b)(2)(i) that was also sufficient to demonstrate political influence during that period under 83.7(c)(3).

The PF found that since 1974, the petitioner has maintained political influence and authority over its members in the following ways. First, the incorporated council, formed in 1974, mobilizes significant numbers of members and resources to meet members' needs and group goals through ongoing events and activities. Second, although there was notable political divisions within the group, most members consider the actions taken by the incorporated council's leaders to be important to them. Within the incorporated council leadership is multifaceted, including both traditional and business positions. Informal leadership also exists along with the authority of the incorporated council. Third, there is widespread knowledge, communication, and involvement in political processes by most of the adult members as evidenced by issues brought forth at the "Second Sunday Meetings" sponsored by the incorporated council and disseminated through the group's newsletter. Extended family networks also play an important role in facilitating communication and political involvement among members. Fourth, there are intense intra-group

⁹ This evidence, under 83.7(b)(2)(v), was also sufficient to demonstrate community during this time as well.

¹⁰ This evidence, under 83.7(b)(2)(v), was also sufficient to demonstrate community during this time as well.

Mashpee Wampanoag Final Determination

conflicts that demonstrate controversy over valued group goals, policies, and decisions. Competition over the incorporated council's assets, the allocation of the group's resources, and the transformation of the governing body into a business structure have generated intense conflict within the group that increased during the group's 2000 elections. Therefore, the petitioner has provided sufficient evidence to demonstrate that its members maintain political influence within the group since 1974.

For the PF, the petitioner presented sufficient evidence to demonstrate it maintained political influence since first sustained contact in the 1620's with non-Indians to the present. Therefore, the petitioner met criterion 83.7(c) for the PF.

Summary and Analysis of the Petitioner's Comments on the Proposed Finding

The petitioner did not submit any new evidence directly related to the PF's conclusions regarding criterion 83.7(c).

No third party submitted any new evidence during the comment period related to criterion 83.7(c).

Department researchers also reviewed the documents from David Garner treated as a late submission for the PF. This 1791 statement by Mashpee Mary Simon to a State investigation commission provided evidence of the growing disenchantment among female members of the group towards the actions of missionary Gideon Hawley during that time. Thus, the material supplied additional support for the finding's description of the Mashpee's informal female leadership and its resistance to Hawley's attempts to control community behavior during the late 18th century (Mashpee PF, 97).

Summary and Analysis of the Comments of the Office of the Attorney General of Massachusetts

Several of the pages in the trial transcript of the 1977-1978 land claim suit that the Massachusetts AG cited in its comments dealt with issues related to criterion 83.7(c). In Day 31 transcript, page 113, Jean Guillemain claimed the Mashpee group was not an Indian tribe in 1977 because it was not "politically autonomous or independent." When asked to give her basis for this conclusion, she explained the group was not an "autonomous political organization as distinct from the state, as distinct from let's say, a more rational political organization as such as the township." In further explaining her opinion, Guillimen argued the group lacked political autonomy because its members were "politically assimilated," and participated in state and local elections (see pages 114-117 of the transcript for context).¹¹

Guillimen's view differs from the acknowledgment regulations, which define political autonomy as the exercise of political influence over a group's members on issues considered by them to be significant and as independent of any other federally recognized Indian governing entity (25 CFR Section 83.1). The regulations do not require the Indian group to be politically independent in all ways from Federal, State, and local governments. Using this definition,

¹¹ Guillemain also required that the dominant society must recognize the group's leaders (Day 31, 117). There is no regulatory requirement under 83.7(c) that the dominant society recognize the leaders.

Mashpee Wampanoag Final Determination

participation in the political process of the wider society is compatible with the existence of a political process within an Indian entity autonomous of other federally recognized Indian entities.

In Day 31 transcript, page 117, Guillemín, using her concept of political autonomy as a point of reference, testified she knew of no leaders in the Mashpee community who at any time had the power to make decisions affecting people's lives.

The Mashpee PF described evidence of political influence wielded by a long line of Mashpee leaders, which contradicts Guillemín's assertion (Mashpee PF, 93-121). Since the colonial period, the Mashpee group has had sachems, proprietors, ministers and spiritual leaders, informal male and female leaders, elected and appointed district and town officials, and council members who have influenced and been influenced by the members on political matters of importance. During and since the 1970's, the Mashpee leadership, formal and informal, played a key role in dealing with controversies involving outside groups, including the land claim suit, establishing community programs, defending herring and shell fishing rights and beachfront access, and resolving internal conflicts among the members. The PF also showed that the membership viewed these issues as important and was highly engaged in the political processes (Mashpee PF, 93-121).¹²

In Day 31 transcript, page 124, Guillemín testified that the leadership role of Earl Mills, then "chief" of the group since the 1950's, was "largely symbolic" or "ceremonial," and, therefore did not constitute a leadership role. She also claimed to have found no instances of "an act of leadership in the sense of decision making matters" affecting "people's lives" on the part of Earl Mills.

The PF acknowledged that the role of contemporary chief for the Mashpee, a position created in 1928 and elected by consensus vote of the members, was primarily, although not purely, ceremonial. The evidence showed the chief, along with the medicine man, handled cultural and social matters, and functioned as ceremonial leader for outsiders.¹³ Though the position lacked

¹² Elsewhere in her testimony, Guillemín claimed that only 20 to 60 people attended meetings of the incorporated council at the time, and that this level of attendance was "not an overwhelming degree of participation from the group" (Day 31, 144-145). The Mashpee PF gave and analyzed similar figures for the attendance at the incorporated council's meetings (Mashpee PF, 109, 114). The PF explained that except for the "Second Sunday Meetings" attendance at these meetings was not open to the general membership. It also showed that these meetings constituted only one aspect of the council's influence over the members (Mashpee PF, 109-115). Guillemín also alleged that non-Indian spouses served as non-voting members on the council (Day 31, 193). There is no available evidence in the petition record, including the council minutes, or in the petitioner's ratified governing documents to demonstrate this claim.

¹³ In another part of her testimony, Guillemín argued that some members were unaware of how Mills had become chief and that the medicine man was self-selected (Day 31, 135, 138). These claims were inaccurate. The membership elected both positions through a consensus vote, whenever they became vacant due to resignation, death, or dismissal (Mashpee PF, 108-109). Earl Mills assumed the chief's position in the 1950's, so it is possible some younger members of the group did not know how he had become chief (Mashpee PF, 106). Guillemín also testified that Mills "was not completely informed" about the "commencement" of the land claim suit, although she provided no specific evidence for this claim (Day 31, 124-125). While Mills may not have been fully aware of the council's decision to launch the suit in August 1976, he did participate in discussions regarding the suit with the defendants at a Mashpee council meeting on February 18, 1977. At this meeting, the opposing sides discussed the

Mashpee Wampanoag Final Determination

the legal authority of the incorporated council, it did command respect from and influence over the group (Mashpee PF, 102-103, 105-109, 115, and 120). Since at least the late 1970's, the chief also had a permanent voting seat on the Board of Directors, in existence since 1974. Therefore, the position provided some evidence of political influence. The Mashpee PF showed that Earl Mills engaged in political activities that proved more than ceremonial. In the 1950's and 1960's, for example, he spent considerable time raising money and organizing the effort to restore the group's Old Indian Meeting House.¹⁴ However, the chief's position constituted only one small component of the group's multifaceted political structure since the 1970's (Mashpee PF, 102, 105-106, 108-109, and 115).

The historian Francis Hutchins testified that in his opinion the Mashpee were not an Indian tribe in the years 1666, 1680, 1763, 1790, 1834, 1870, and 1970, or at anytime between 1666 and 1970 (Day 36, 130-140). In his view, an Indian tribe was "as an entity composed of persons of American Indian descent, which . . . possesses distinct political, legal, cultural attributes, which . . . have descended directly from aboriginal precursors" (Day 36, page 124).

When asked to define those distinct political, legal, and cultural attributes, Hutchins supplied a three-fold definition that touched on aspects of political influence related to criterion 83.7(c). By distinct political attributes, he meant "an entity, group of persons, which has a structure of decision making, which has leadership, which is acknowledged, which is recognized by members of the group, so that decisions be arrived at which will be acknowledged by members of the group to be binding on them" (Day 36, 125-126). At first glance, this definition appears to reflect the requirement in criterion 83.7(c) for political authority. Upon prompting, Hutchins expounded that his idea of political influence drew upon the treaty making process of the 19th century between Indian tribes and the Federal Government in which agreements between parties were "binding on . . . all the members of the respective groups," a more restrictive and limited notion of governmental control than in the regulations.

Indeed, previous acknowledgment findings have interpreted the regulations as requiring political influence that consists of a reciprocal relationship between leaders and followers. It may be in the form of a tribal council, internal process, or other mechanisms a group uses as methods of influencing or controlling the behavior of its members in significant respects, making decisions for the group that substantially affect its members, and/or representing the group in dealing with outsiders on matters of consequence (see 83.1). Leadership can be formal or informal. These processes also must be understood in the context of the group's history, geography, culture, and social organization. The Mashpee PF described (93-107) the group's multifaceted political

possibility of seeking either arbitration or Federal legislation to settle the case (MW Minutes 2/18/1977; see also *Mashpee v New Seabury* [Mills Deposition Part 2] 6/22/1977, 6-7). Nonetheless, the PF described Mill's growing lack of attention to the position's duties in the later years of his tenure. It further discussed how members criticized his behavior and finally took action to replace him (Mashpee PF, 109, 115-116). This reaction to Mill's lack of involvement was in itself a form of political influence by the group.

¹⁴ At another point in her testimony, Guillemain claimed that a majority of the members of the Old Indian Meeting House Authority (OIMH), formed in 1960, were non-Indian (Day 33, 178). This claim was inaccurate. All but one of the members was Mashpee. From 1955 to 1969, fund-raising occurred through member volunteer activity, dinners, powwows, and door-to-door solicitations. The Parish Committee, composed solely of Mashpee members, coordinated this activity before the creation of the OIMH (Mashpee PF, 46, 55, 60-61, 86).

Mashpee Wampanoag Final Determination

processes before the 1970's, which included sachems, proprietors, ministers and spiritual leaders, informal male and female leaders, and elected and appointed district and town officials. For the period since the 1970's, the PF showed the group had an incorporated council, a traditional "elders" council, and informal leadership that dealt with matters of consequence to the members. The members in turn understood, criticized, and participated in the political activities of their leaders (Mashpee PF, 107-121).

By distinct legal attributes, Hutchins meant there was "something distinctive about the way in which [a] group organizes its internal affairs, arrives at decisions, enforces preferences within the group, that these procedures are different in some way from those which are followed by the ordinary citizens of the United States" (Day 36, page 126). As stated before, the acknowledgment regulations do not require a political structure or procedures which are unique or "different in some way" from that of the wider society. They do not require a specific type of political structure, legal procedures, leaders, or constitution, only that the leaders be capable of exerting significant influence over their followers and vice versa. This leadership may be formal or informal.

By distinct cultural attributes, Hutchins meant "procedures [or] norms which are used by the group for governing their affairs, for resolving their disputes, are legitimated by reference to cultural values, to which they adhere, which they feel are ultimately important, which in a very real and sincere way makes it difficult for them to give unqualified allegiance to the government of the United States" (Day 36, 127). The acknowledgment regulations do not require that political influence within an Indian group be "legitimated by reference to cultural values." Nor do they require groups to exhibit less than "unqualified allegiance to the United States." Given that all American Indians have been full citizens of the United States at least since 1924, this strict definition would prevent almost all petitioning groups from being recognized and would not describe most federally recognized Indian tribes.¹⁵ Just as citizens can simultaneously give allegiance to Federal, state, and local governments, tribal members can concurrently give allegiance to tribal and Federal governments.

Under the regulatory criteria, the Mashpee, despite being full state citizens since 1870, were able to use mainstream forms of governmental authority to demonstrate political influence. From 1870 to 1974, the Mashpee adapted the principal elements of the town governmental system for their own political needs (Mashpee PF, 100-107). The Mashpee employed the town government as the primary structure by which they maintained political influence or authority over members. The Department's FD for Federal acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., provides precedent for evaluating such a governmental form as meeting 83.7(c).

In sum, the reevaluation of the evidence in the trial transcript referenced in the comments of the Massachusetts AG did not result in a modification of the PF's conclusions that the Mashpee demonstrated political influence (criterion 83.7(c)). The PF dealt with the issues raised in the trial testimony affecting the evaluation of evidence under criterion 83.7(c) in its review of the

¹⁵ Hutchins upon cross-examination admitted he had formulated this definition of a tribe in 1972 when he "was working as an historian" and "attempting to understand as an historian the way in which the term tribe had been used by persons such as Henry Knox and Thomas Jefferson." While he conceded that his definition of a tribe derived from the late 18th to early 19th centuries, he believed it still applied to the 1970's (Day 36, 148).

Mashpee Wampanoag Final Determination

materials in the trial transcript and a larger body of evidence that the court did not have in the land claim suit. This FD reevaluated the evidence in the trial testimony. In response to the comments submitted by the Massachusetts AG citing the testimony of the two defendants' witnesses, the FD reviewed this testimony and finds that the standards and definitions of a tribe used by these witnesses differ substantially from the requirements in the seven mandatory criteria of the regulations. The FD finds that this material did not provide any evidence or arguments not already discussed in the PF, and did not merit a change in the evaluation under criterion 83.7(c) that the Mashpee demonstrated political influence from first historical contact to the present.

Final Determination's Conclusions on Criterion 83.7(c)

The FD affirms the PF's conclusions that the petitioner meets the requirements of criterion 83.7(c). The petitioner presented sufficient evidence to demonstrate it maintained political influence or authority over its members as an autonomous entity from historical times until the present. Therefore, the petitioner meets criterion 83.7(c).

Criterion 83.7(d) requires

a copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

Summary of the PF

The Mashpee PF found that the petitioner met criterion 83.7(d) by submitting a copy of its governing document, a constitution certified by the governing body on June 28, 2004. That document described the group's membership criteria and current governing procedures (Mashpee PF, 124-131). However, the PF noted some minor discrepancies in the various copies submitted and suggested the group provide clarification. The PF also found that the petitioner had not submitted a copy of an ordinance referred to in Article III, Section 1(b) of the constitution. Article IX of the group's constitution implied that the membership and other ordinances would be developed after the adoption of the constitution.

Mashpee Comments on the PF

The petitioner submitted another copy of its 2004 constitution, printed in the booklet form distributed to the group's membership (Mashpee Comment Appendix E2). The petitioner also submitted a copy of an enrollment ordinance, which the governing body had enacted on September 7, 2006, and amended on September 21, 2006 (Mashpee Comment Narrative 10/2/2006, 10).

One of the comments submitted by the MWT was a letter from its attorney, William A. McDermott, Jr., dated September 28, 2006, which explained the discrepancies between two versions of the 2004 constitution were due to two different formats used for printing the document. The McDermott letter also outlined a series of events explaining why the petitioner did not submit the enrollment ordinance for the PF, but made it available for the FD.

Please be advised that the Tribe carefully examined the issues to be contained in an enrollment ordinance and as long as fifteen months ago after careful work by the Membership Committee and myself a document was submitted to a public hearing as required by the Constitution to members of the Tribe who attended the hearing. At the hearing, the Tribe did consider and recommend to the Tribal Council to adopt an Amendment to the Election Ordinance. At that meeting the proposed Enrollment Ordinance was thoroughly debated and it was determined that more work needed to be done on the Ordinance. Therefore, the Membership Committee and the Election Ordinance Committee meeting jointly determined not to submit the Enrollment Ordinance. (McDermott 9/28/2006, 2)

According to this letter, the petitioner began developing the membership ordinance after the adoption of the 2004 constitution and continued for almost a year and a half. The membership

Mashpee Wampanoag Final Determination

committee and the group's counsel made changes in the enrollment ordinance that were reviewed at a second public hearing [date not given] for the members, who then recommended that it be submitted to the Mashpee council for approval (McDermott 9/28/2006, 2).

The petitioner submitted a copy of the September 21, 2006, enrollment ordinance in its comments on the PF (Mashpee Comment Appendix E1).

Analysis for the FD

This FD finds the petitioner submitted comments and evidence that addressed the issues raised in the PF concerning the slight discrepancies between various copies of its governing document. The petitioner submitted a copy of the published booklet of the group's 2004 constitution that included a photocopy of the original certification signed by the governing body and dated September 28, 2004. Except for some minor changes due to formatting, the constitution appears to be identical to that certified by the council and submitted to the Department for the PF.

The petitioner also included copies of both the September 7, and September 21, 2006, versions of the enrollment ordinance, and two separate certifications, both signed by the members of the governing body. The first certification stated that a quorum of the MWT was present at the September 7, 2006, meeting and a two-thirds majority of those present adopted that enrollment ordinance. The second certification stated that at a regularly scheduled meeting on September 21, 2006, the group's council amended the enrollment ordinance to correct a misspelled word in one section, and to amend the language in "Section 5D3." The section now includes references to the Mashpee Indians identified on the 1861 Earle Report, and descendants of Georgiana Palmer-Charles Peters, and Leander Peters-Lydia DeGrasse as qualifying ancestors (Mashpee Ordinance 9/21/2006, 3), and therefore corresponds with the membership requirements stated elsewhere in the ordinance and in the constitution (Mashpee Ordinance 9/21/2006, 1).

The September 21, 2006, amended enrollment ordinance included a separate section of definitions that previously had been a part of Section 2 of the ordinance. This new Section 3 includes definitions of "attendance and participation" in the annual powwow, participation in "Mashpee Indian tribal activities," and evidence the individual is keeping his or her "vital records current," as possible examples for demonstrating "tribal community involvement" or "tribal community affairs." Section 3 also defines "family members" as "someone sharing a relationship by blood," and states that "near Mashpee" means having a residence "within 20 miles of Mashpee" (Mashpee Ordinance 9/21/2006, 1-2). Inserting the definitions as a separate section caused the renumbering of the subsequent sections; however, the language in the sections remained unchanged.

Because the petitioner has submitted a governing document that describes various procedures by which the group determines its membership and governs itself, and because it has submitted an ordinance that further describes various criteria by which it makes membership decisions, the petitioner has satisfied the requirements of this criterion.

Conclusion

The PF found the petitioner met the requirements of criterion 83.7(d) by submitting its present

Mashpee Wampanoag Final Determination

governing document: a constitution dated September 28, 2004, which described its membership criteria and the current governing procedures. For the FD, the petitioner submitted a membership enrollment ordinance dated September 21, 2006, which clarifies sections of the constitution and provides additional evidence concerning the group's membership criteria. This FD finds that for the purposes of criterion 83.7(d), the September 28, 2004, constitution and September 21, 2006, membership ordinance are the group's governing documents. The FD affirms the PF's conclusion. Therefore, the petitioner meets criterion 83.7(d).

Criterion 83.7(e) requires that

the petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

Summary of the PF

The PF found the petitioner met the requirements of criterion 83.7(e). The PF determined that the historical Indian tribe was “the Wampanoag Indians residing at Mashpee, Barnstable County, Massachusetts, at the time of first sustained historical contact in the 1620’s.” For purposes of calculating descent from the historical tribe, the PF used the “Marshpee” tribe portion of the 1861 Earle Report of Indians in Massachusetts as the membership list of the historical Indian tribe with the explanation that “Earle included in his report, without refutation, Benjamin F. Hallett’s 1834 statement made before a committee of the Massachusetts legislature which traces the group’s estimated population totals to 1767 (Earle Report 3/1861, 47)” (Mashpee PF, 133).¹⁶ The PF summarized some of the pre-1861 historical records that supported finding of continuity between the colonial Indian tribe and the 1861 Earle Report (Mashpee PF, 133, 140-145).

The Mashpee PF found that about 88 percent of the petitioner’s members (1,323 of 1,462) descended from the historical Mashpee tribe as defined by the 1861 Earle Report. Another 2 percent descended solely from the two Christiantown Wampanoag Indian brothers whose families integrated, socially and politically, within the Mashpee community after 1861, and whom the petitioner considers eligible ancestors under the provisions of its constitution. See Mashpee PF 54-55, 59-60 for details. The PF also found “a total of 139 individuals on the 2002 list (almost 10 percent, 139 of 1,462) have not provided the vital records or other evidence . . . to document their descent from the Earle Report ancestors” (Mashpee PF, 138.)¹⁷

Based on precedent, the PF found that a showing of 88 percent of the membership with descent from the historical Indian tribe was sufficient to meet criterion 83.7(e), but urged the petitioner to submit the necessary evidence to document the remaining 139 individuals (Mashpee PF, 138). The Department also advised the petitioner to update its membership list for the FD, documenting any changes.

The PF also found 398 instances in which adult members signed for adult children or relatives, a non-custodial parent or relative signed for minor children, or files were missing applications or consent forms (Mashpee PF, 136). Although criterion 83.7(e) makes no specific reference to the

¹⁶ The PF found significant evidence under criteria 83.7(b) and 83.7(c) that established the continued presence of the Mashpee Wampanoags through the 1800’s to the State-ordered Briggs and Earle reports in 1849 and 1861 (Mashpee PF, 132).

¹⁷ Department researchers copied the petitioner’s two genealogical databases, converted them into a combined database (BARMashpee2Combined.FTW) for the PF review (Mashpee PF, 132). Department researchers made additional annotations to the combined database for the FD, and renamed it “BARMashpee2Combined2006.”

Mashpee Wampanoag Final Determination

consent of members, the regulation's definition of "members of an Indian group" includes the requirement that the individual consents to being a member of that group (section 83.1). Thus, the PF advised the petitioner to address this concern.

Summary of Mashpee Comments on the PF

On October 2, 2006, the petitioner submitted a certified copy of the September 13, 2006, membership list identifying 1,453 members, and submitted comments and documentation that addressed the membership issues raised in the PF. The majority of the Mashpee's comments on the PF were genealogical in nature, including membership files for new members (Mashpee Comment Appendices C2, C3, and C4) and supplemental membership files for the 139 incomplete ones that were at issue in the PF (Mashpee Comment Appendices A1.1 and A1.2). The petitioner's submissions included photocopies of the 1920 and 1930 Federal censuses of Mashpee Town (Mashpee Comment Appendix B1) and photocopies of birth, death, or marriage records. Photocopies of membership application forms, consent forms, or "address change/name change/new registration" forms addressed most of the inconsistencies identified in the PF (Mashpee Comment Appendix A2). See the analysis below for details.

Analysis of Evidence for the FD

As stated above, the petitioner submitted a new membership list and evidence reflecting the changes in the group's membership, as well as evidence of ancestry and consent to be on the membership list for the individuals on the 2002 list and new members.

The New Membership List: September 21, 2006

The Mashpee petitioner submitted a copy of the membership list dated September 13, 2006, separately certified by the group's council on September 21, 2006.¹⁸ The membership list identified 1,453 members and included the information required under criterion 83.7(e): full names (including maiden names), dates of birth, and residential addresses. The membership list also included each individual's roll number, place of birth, and parents' names. The 2006 membership list is essentially the same as the 2002 MWT membership list analyzed for the PF, with the exception of the names of 25 infants born since 2002 added, the names of 13 new members added, the name of one individual removed,¹⁹ and the names of 47 deceased members removed.²⁰

¹⁸ The petitioner did not submit a copy of the membership list in electronic format for the FD. Since there were relatively few changes to the 2002 list, the Department annotated its electronic version of the petitioner's 2002 list to reflect the membership identified on the 2006 certified membership list in order to conduct more efficiently the analysis for the FD.

¹⁹ This individual sent a letter to the petitioner in 1999 requested removal of her name from the group's membership list because she was a member of the Wampanoag Tribe of Gay Head (Aquinnah) (Mashpee Comment Appendix C5).

²⁰ Page 4 of the October 2, 2006, Mashpee Comment Narrative erroneously stated that the petitioner had removed the names of 42 deceased members from the list. There were actually 47 names on the list.

Mashpee Wampanoag Final Determination

Descent from the Historical Indian Tribe

The petitioner submitted evidence for the FD that resolved almost all of the descent issues raised in the PF. The 10 percent (139 members) without sufficient evidence fell into two categories: Twenty-nine members who lacked a birth record or other evidence naming parents, which also affected their 38 children's or grandchildren's connections, and 72 members whose deceased or non-member progenitors (17) lacked a birth record or other evidence of parentage (Mashpee PF, 138).

The following discussion shows the petitioner submitted evidence that 97 percent of its members (1,403 of 1,453) descend from the historical tribe identified on the 1861 Earle Report. About 2 percent (41 of 1,453) descend from the Peters families, and less than 1 percent (9 members who claim Mashpee ancestors on the Earle Report) has not documented descent from the historical Indian tribe.

The petitioner submitted membership files that contained the necessary evidence for 25 of the 29 members described in the PF as lacking satisfactory evidence of their own parentage (Mashpee Comment Appendix A1.1). Four individuals identified in the PF still lack the required proof of parentage; three of these individuals have applied for, but not received, the "long form" birth certificates that include the parents' names (Mashpee Comment Narrative, 2-3). The fourth individual's birth certificate does not confirm the parents' names as claimed on that member's ancestry chart (Mashpee Comment Appendix A1.1). This member's lack of evidence in the membership files also affects the proof of descent from the historical Indian tribe for her three children.

The petitioner submitted file folders for each of the 17 progenitors who were missing evidence of parentage (Mashpee Comment Appendix A1.2). Sixteen files contained ancestry charts and a birth record, death certificate, or 1930 census image that identified the individual, and named his or her parents and allowed tracing the family to the Earle Report. According to the petition narrative (Mashpee Comment, 2-3), the 17th individual is a non-member, but is the father of two children on the 2006 list. This person has not documented the connection to his father who was a Mashpee Indian; therefore, his two children on the 2006 membership list (also on the 2002 list), have not documented their descent from the historical tribe.²¹ Nine members (less than 1 percent of the membership) have not yet documented their descent from the historical Indian tribe: four members with incomplete birth records and five members who have a parent lacking proof of their parentage. The Department expects that most of these issues will be resolved when the petitioner receives the "long form" birth record or other evidence confirming the claimed parentage.

The Mashpee comment included a 124-page report entitled the "Census Citations for Tribal Members and Ancestors." This report listed individuals (mostly ancestors, but some current

²¹ The file folder included documents to show non-Indians adopted this individual. Although the ancestry chart named the biological father, and identified him as a descendant of the documented Mashpee Indian family named Mye, neither the adoption record nor the legal name-change included evidence documenting the name of the biological father or mother. According to the petitioner's narrative, the individual submitted DNA to the MWT council as evidence, but the results were not yet available. The MWT's membership ordinance allows DNA evidence for determining paternity.

Mashpee Wampanoag Final Determination

members) alphabetically by first name followed by the “census” reference (either to a decennial Federal census, or a list such as the 1832 Proprietors List, 1842 Proprietors list, 1849 Briggs Report, or 1861 Earle Report) that was previously cited by year only on the ancestry charts (Mashpee Comment Appendix B2). The petitioner’s Appendix B2 lists the name of the individual, how he or she was identified on the census (such as daughter, resident, proprietor), and census type (such as “Fourteenth Census of the United States,” “Earle Report,” “1832 Proprietors List,” “1842 Briggs Report”). It also includes the census date, place (including references to towns and districts other than Mashpee), details (page and line number, age and gender), and, in some instances, a “Research Note” which included explanations of name changes due to multiple marriages, nicknames, or relationships to others in the household. The petitioner also submitted photocopies of the 1920 and 1930 Federal censuses of Mashpee Town, but not any other census images showing the families who were living in other towns in Massachusetts.

Department researchers checked a sampling of the citations in this report and found they referred to documents submitted for the FD that clarified family relationships and residences of the current group’s Mashpee ancestors. This additional evidence, together with the evidence submitted for the PF, confirmed the genealogical connections between generations recorded on the printed ancestry charts that previously had only brief, incomplete citations.

The petitioner noted that the infants added to the membership list had at least one parent who was on the 2002 Mashpee membership list and that the 13 “new members” were individuals who had been “included on the 1995 Tribal Roll but had been removed because of inadequate documentation” (Mashpee Comment Narrative, 4). As the petitioner explained, “[t]hey are, then, newly enrolled members, but not new to the Tribe” (Mashpee Comment Narrative, 4). The Department’s review of the evidence confirms this assessment of the new members’ relationships to members on the previous lists.

The petitioner included file folders for the infants and new members that included documentation necessary to document their descent (Mashpee Comment Appendices C2, C3, and C4). For example, the file folders included membership applications, signed by the adult parent where appropriate, ancestry charts outlining descent from the historical tribe, and birth certificates, death certificates, or Federal census entries that established parentage. Thus, all 38 of the new members on the 2006 membership list have documented descent from at least one ancestor who was identified as a Mashpee Indian on the 1861 Earle Report, or have documented their descent from the Peters-DeGrasse or Peters-Palmer marriages.

The petitioner’s 2004 constitution specifically mentioned that applicants who “trace direct lineal descent” from Charles Peters and Georgiana Palmer or from Leander Peters and Lydia DeGrasse were eligible for membership. Charles Peters and Leander Peters were the sons of Asa Peters, a Christiantown Wampanoag Indian (Earle 3/1861, vii). See the Mashpee PF 125-126 and 134-135 for additional details. At least four descendants of the two Peters marriages married Mashpee descendants; therefore, their descendants on the current membership list also have Mashpee ancestors listed on the Earle Report, used in this evaluation to calculate descent from the historical tribe. This leaves 41 individuals (about 2 percent of 1,453) in the 2006 membership who descend from the Peters-DeGrasse or Peters-Palmer marriages, and who do not

Mashpee Wampanoag Final Determination

have Mashpee ancestors on the Earle Report.

Although the Peters-Palmer and Peters-DeGrasse families became socially and politically part of the petitioner over time, this evaluation does not treat them as descendants of the historical Mashpee tribe enumerated in the 1861 Earle Report. The reasons are as follows. First, Charles H. Peters (1846-1924) first appeared in the town of Mashpee in 1865, after Earle's enumeration of the Mashpee Indians. Second, Leander Peters (1840-aft. 1876) and his son Lyman (1876-aft. 1920) never lived in Mashpee. Third, some of the grandsons of Leander Peters first appeared in Mashpee in the middle 1930's.²² Fourth, Earle identified Charles H. and Leander Peters as Christiantown Indians living in Christiantown, Massachusetts. Finally, their documented ancestors did not appear on any of the Mashpee lists between 1776 and 1861.²³

The evidence for the PF indicated that Charles H. Peters became socially and politically part of the Mashpee community beginning about 1865 when he married his first wife, Cordelia Amos, a Mashpee Indian. They had several children born in Mashpee between 1866 and 1876. After Cordelia Amos's death, Charles remained at Mashpee, where in 1882 he married Georgiana Palmer, a non-Indian, and had other children born in Mashpee between 1888 and 1896. Charles Peters and his second family continued to live in Mashpee where some of his children married Mashpee Indians, forming kinship ties with many of the Mashpee families, such as Amos, Quippish, Attaquin, Hicks, Babcock, and Tobias.

Additional research shows that the participation of this Peters family included holding political offices controlled by the tribe in the Town of Mashpee. Charles H. Peters held two town jobs in 1878,²⁴ was a "field driver" in 1895, a herring warden from as early as 1896 to at least 1909, on the parish committee as early as 1901, the cemetery commissioner in 1909, and on the school committee from 1912 to 1915. At least two of his sons from his first marriage, Joseph A. and Samuel Henry Peters, and a son-in-law, Cyrus Edwards, who married one of Charles's daughters from his non-Mashpee marriage, also held political appointments in this same timeframe (Mashpee Town Report 2/2/1898, 1-24). Nathan J. Peters, one of his non-Mashpee sons, was the Mashpee Town highway commissioner from 1917-1920. Thus, it appears the Charles H. Peters family (both the Mashpee and non-Mashpee branches) was part of the Mashpee community by the early 1900's (Mashpee Town Report 2/2/1898, 1-32).

²² Pascal DeGrasse (of Gay Head Indian and Portuguese descent) was married to a Mashpee Indian and living at Mashpee in 1808 and 1832. He was a great-uncle to Lydia DeGrasse who married Leander Peters, but there is no evidence that Lydia or her direct ancestors were Mashpee descendants or lived there, or that Lydia and Leander lived at Mashpee.

²³ There is some evidence that early Mashpee records may have identified some of the Keeter/Keetoh individuals as "Peters." The Department did not conduct additional genealogical research to verify ties between the colonial era Keeter/Keetoh or Peters names and the petitioner's Peters ancestors. Marriages between Christiantown, Gay Head, and Mashpee families and migrations between the towns in the colonial era records show connections between the Christiantown Peters family and the Mashpee Amos and Suncoah/families, indicating that Charles and Leander Peters may have had ancestors at Mashpee in the mid-1700's.

²⁴ The typed transcript of March 4, 1878, Mashpee Town minutes referred to "Charles R. Peters" as an assessor and "Charles W. Peters" for the school committee, but these appear to be typographical errors for "Charles H. Peters" since there is no other adult Peters in Mashpee at that time (Minutes 1878, 2 [page 400 in original]).

Mashpee Wampanoag Final Determination

The current record shows the petitioner's ancestors who were the descendants of Leander Peters began to marry into the Mashpee community by the 1930's, and were active participants in the political and social community by the 1950's. In the 1930's, two of his grandsons (Chester A. and Ellsworth F. Peters) married two of Charles H. Peters' granddaughters at Mashpee, and a third grandson, Frederick Putnam Peters, married a Mashpee Indian living in Barnstable. Ellsworth F. Peters was a forest deputy at Mashpee in 1949 and held various other tribally appointed or elected offices, such as fire chief and constable throughout the 1950's. Chester A. Peters held various political offices in Mashpee throughout the 1950's and 1960's, including firefighter, fire chief, forest fire warden, and deputy shellfish warden. Frederick Putnam Peters was a member of board of directors at Mashpee in the 1970's and 1980's. See the Individual Reports from FAIR for additional details. Thus, the evidence shows that the Peters-Palmer and Peters-DeGrasse descendants had become part of the Mashpee community over a period of several decades after the 1861 date used for calculating descent from the historical Indian tribe, and that many were a part of the Mashpee tribal community as it existed in the early 1900's. By the mid-20th century, both branches of the Peters families were part of the Mashpee community.

The petitioner submitted sufficient evidence to demonstrate that about 97 percent of the members (1,453 minus the 9 members who lack documented descent from Mashpee ancestors and minus 41 Peters descendants, for a total of 1,403 of 1,453) have documented their descent from the historical Mashpee tribe that was identified in the 1861 Earle Report on Indians in Massachusetts.

Applications and Consent Forms

The third issue raised in the PF concerned evidence of consent to be on the membership list. The petitioner comment included photocopies of 298 membership application forms, consent forms, or "address change/name change/new registration" forms, or about 75 percent of the 398 membership applications questioned in the PF (Mashpee PF, 137-138). The Mashpee comment identified another 77 members (about 19 percent of the 398) whose membership file was marked "pending," indicating the petitioner had asked the member for a consent form, but not yet received it. The petitioner made no specific comment on the remaining 23 applications, but noted that those files lacking applications were for individuals "whose genealogical documentation has long been accepted for tribal membership" (Mashpee Comment Narrative, 3).²⁵

The new information submitted for the FD, together with the evidence available for the PF, shows that about 95 percent (1,453 minus the 77 members "pending" consent forms) of the members have demonstrated their consent to be on the Mashpee membership list. The Department's review found that many of the newly submitted consent forms were signed in the early 2000's, but most were signed between March 2006 (after the PF was issued) and mid-September 2006 (when the petitioner's comments on the PF were due). It appears the Mashpee

²⁵ Department researchers found all of these individuals were on the 2002 list or earlier membership lists, and almost all of them had parents or grandparents who were on the 1979, 1989, 1995, or 2002 membership lists. All have documented descent from the historical Mashpee tribe or the Peters-Palmer or Peters-DeGrasse ancestors. Their names remain on the 2006 certified membership list.

Mashpee Wampanoag Final Determination

continues to gather consent or application and new registration forms for the individuals whose membership files are missing this evidence.

Potential Membership Growth

The Mashpee comments on the PF did not address the issue of membership growth or indicate that there are other applications for membership under review by the enrollment committee. The PF found there were children of members listed in the petitioner's genealogical database and on some of the consent forms who were not on the 2002 membership list (Mashpee PF, 157). The consent forms, which members or applicants signed showing their consent to be on Mashpee membership list, also provide space for the member to list his/her minor children. The Department identified about 110 children listed on these forms who are not on the 2006 membership list. Therefore, based on the current membership requirements, these children appear to be eligible for membership.

The acknowledgment regulations state:

Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of §83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition. (§83.12(b)) [Emphasis added.]

Thus, the Department expects any additions to the 2006 membership list, as the base roll, to be the children, grandchildren, or siblings of current members who have not yet submitted the necessary evidence demonstrating that they meet the group's membership requirements described in its constitution. Any other additions to the 2006 membership list should meet the requirements of criterion 83.7(e) and demonstrate that they have maintained "significant social and political ties with the tribe" (criteria 83.7(b) and (c)).

Conclusion

The petitioner submitted a properly certified membership list dated September 13, 2006, naming 1,453 members. The petitioner has provided evidence acceptable to the Secretary that about 97 percent of its members (1,403 of 1,453) descend from the historical Mashpee tribe. Based on precedent, this is sufficient to meet the requirements of criterion 83.7(e).

Forty-one of the remaining members (about 2 percent) descend from the two Christiantown Wampanoag Indian families (Peters-Palmer and Peters-DeGrasse), who became part of the Mashpee tribe over a period time, beginning just after the 1861 Earle Report, which is used to describe the membership of the historical tribe for this finding. The petitioner defines them as qualifying ancestors in its constitution. The PF included detailed evidence that descendants of these lines have been socially and politically part of the Mashpee community for many decades,

Mashpee Wampanoag Final Determination

up through the present. Nine of the remaining members (about 1 percent) are lacking complete birth records or other evidence that names parents, but likely will be able to provide the group with the proper evidence.

The new evidence submitted for the FD modifies the PF's conclusions by changing the number of members in the petitioning group from 1,462 to 1,453 and the percentage of members who have documented descent from the historical tribe from about 88 percent to approximately 97 percent. The evaluation of additional documentation submitted strengthens the conclusion in the PF that the Mashpee petitioner meets the requirements of criterion 83.7(e). This FD affirms the PF's conclusions. The petitioner meets criterion 83.7(e).

Mashpee Wampanoag Final Determination

Criterion 83.7(f) requires that

the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

A review of the available documentation for the PF and FD revealed that the membership is composed principally of persons who are not members of any acknowledged North American Indian tribe.

Conclusion

The petitioner meets criterion 83.7(f).

Mashpee Wampanoag Final Determination

Criterion 83.7(g) requires that

neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A review of the available documentation for the PF and FD revealed no evidence that the petitioning group was the subject of congressional legislation to terminate or prohibit a Federal relationship as an Indian tribe.

Conclusion

The petitioner meets the requirements of criterion 83.7(g).

Appendix

Description and Analysis of the 1776, 1808, and 1832 Censuses

The PF noted that Department researchers found three documents in the petitioner’s ancestral files too late in the review process to analyze them fully for the PF. They included the incomplete transcript of the 1776 Hawley census and the 1808 and 1832 lists of inhabitants of Mashpee (Mashpee PF, 36, footnote 24; 39 footnote 34).²⁶ The Mashpee’s comments on the PF included a photocopy of the original June 24, 1776, census and letter from Gideon Hawley, who was the Mashpee’s minister at the time. The petitioner also sent a typed, complete transcript, apparently created by the Massachusetts Historical Society some years ago. The petitioner did not submit a separate analysis of the census.²⁷

For the FD, Department researchers created a database in Microsoft Access™ listing all of the names from the 1808 list and 1832 State census.²⁸ Based on the ages recorded in 1832, they then sorted names to determine how many on the 1832 list were living in 1776 or 1808 or how many had parents or grandparents who were living in 1776 or 1808 and likely to be on those lists. The following description and analysis of these records follows the pattern of analysis of other pre-1861 records in the PF section on *Evidence from 1833 – 1861 that Demonstrates Descent from the Historical Tribe* under criterion 83.7(e). The Department’s analysis of the 1776, 1808, and 1832 lists provides additional evidence to support the PF’s finding that Earle’s 1861 Report identified the historical tribe that had been previously identified by Hallett in 1834, and that it traced to the Mashpee of the colonial era (Mashpee PF, 132-133).

The 1776 Hawley Census

Gideon Hawley’s letter to “Thos. Cushing, Esq.” described the attached “schedule taken this day according to my own knowledge & the best information I can obtain” of the inhabitants of “the district of Mashpee.” Hawley apparently compiled this census schedule in response to a request from the “General Court” for the condition and number of inhabitants at Mashpee. Hawley’s letter stated there were 327 inhabitants, including 14 African Americans married to Mashpee women (Hawley 6/24/1776); however, the review found 343. The census schedule listed 85 heads of household by name, followed by columns with headings to show the following: (1) whether the family lived in a shingled house or wigwam; (2) how many in the household were “Married Couples” [62 couples, or 124 married adults], “Minors and Unmarried,” [159], “Widows” [33], or “Negroes” [14]. The census also noted “vagrant Indians estimated at 8,” who

²⁶ The dates in the text on these pages are correct, but footnote 35 on page 40 of the PF misidentified the dates as 1788 and 1809.

²⁷ The copy of the 1776 census found in the ancestry files was a hand-written transcript, which, from the style of writing, was from a later period. The original included names not recorded on the incomplete transcript and some of the names did not match the names on the original. The Department based its interpretation for the FD on the original 1776 schedule.

²⁸ The Mashpee PF discussed the statistics from the 1832 State census on page 40.

Mashpee Wampanoag Final Determination

were not named, to account for the “Whole Number” [329] “belonging to Mashpee.”²⁹ Hawley added a postscript listing another “14 souls” [unnamed] who were living in 3 wigwams for 343 “belonging to Mashpee” on June 24, 1776.³⁰

Although no ages appeared for the heads or other household members, Department researchers used marital status to determine who was likely to be at least 18-21 years old in 1776, or who was likely to be much older, based on whether children were in the household, or the head of the house was a widow or widower. By comparing those estimated ages with information on individuals already in the annotated genealogical database, they were able to identify at least 17 individuals who were on the 1776 list.

At least four individuals on the 1776 list, (Betty Keetoh/Bethiah Keeter, Simon Ned, Job Squib, and Abram Squib³¹) were also on the 1808 list, and at least two individuals (Amos Babcock, and Samuel Moses) had children on the 1808 list. At least 23 women on the 1776 list were widows; some listed by their first names (Widow Amy, Widow Susana, and Widow Eunice), and others by their surnames (Widow Attaquin, Widow Keeter, Widow Simon, and Widow Moses). These widows cannot be “attached” to a spouse or children, but are likely to be the parent or grandparent of individuals on the later lists.

At least two of the 1776 Mashpee Indians have descendants identified as Mashpee on the 1861 Earle Report and have members in the current petitioning group. Samuel Moses (bef. 1752-aft. 1776) had at least nine descendants living in two different households in 1861 and Amos Babcock (bef. 1750-aft. 1776/1784) had at least eight descendants living in two households in 1861. Undoubtedly, other links could be documented; however, Department researchers did not conduct additional genealogical research to connect other individuals on the 1776 list, such as those named Sunkansin,³² Attaquin, Keetoh/Keeter, Wepquish, Pognit [*sic*: Pocknet, etc.], and Mye with individuals of the same names on 1808 list 1832 list, or the Earle Report. Such additional research is unnecessary since the PF concluded that the Earle Report identified the membership of the historical Indian tribe in 1861. However, this brief analysis on some of the names shows that the addition of the 1776 Hawley list to the petitioner’s documentation helps to support the finding of continuity between the Mashpee families living in the Indian District era (1763-1788) and those recorded as members of the historical Indian tribe

²⁹ It is not clear if “vagrants” referred to Mashpee Indians living away from Mashpee at that time, or Indians from other tribes residing at Mashpee in 1776. The 1776 schedule may not have included Mashpee Indians temporarily living elsewhere. Published compilations of Revolutionary War records show a few of the Mashpee Indians enlisted in the American forces at Sandwich, Barnstable, or Falmouth, but they do not show which towns they were residents of, or when they enlisted (NSDAR 2001).

³⁰ Hawley’s letter repeated his miscalculations for two columns of information on the list when he totaled 64 couples and 341 individuals rather than 62 couples and 343 individuals.

³¹ It may be that the “Sippio” with James Mye on the 1776 list was “Scipio Allen/Albee” in 1808.

³² Hannah Sunkasin (b. bef. 1770), wife of Amos Babcock, is identified as the daughter of “Daniel” and Mary Sunkasin, but there is no citation for the source naming her parents. Some handwriting appears to make the words “David” and “Daniel” the same, and they are sometimes mis-transcribed. There was an adult “Daniel Suncosoh” of Mashpee in 1736 (Silverman 2005, 167). An adult named “David Sunkasin” on the 1776 list, as well as James and “Wido. Sunkansin” were also likely close relatives to the child Hannah Sunkasin.

Mashpee Wampanoag Final Determination

on the Earle Report a century later.

The 1808 List of Mashpee Indians

The PF briefly referred to a State or overseer's census dated 1808 (page 39, footnote 34), but did not analyze it fully for the PF. For the FD, Department researchers reviewed the "List of the names of e [*sic*: the] Inhs [*sic*: Inhabitants or Indians?] of Mashpee 1808" in more detail to show the continuity between the earlier lists and the Earle Report. The list recorded information about 348 inhabitants, but listed only the 111 heads of household by name, and the total number in each household. For example, "W. Bathsheba Richard – 1" identified a widow living alone, and "Rd. Cowet & Wife – 8" identified 10 individuals in the Cowet household. Sixty-four men who were heads of household were listed with "& wife" for 175 adults identified on the 1808 list. The list identified twenty-seven individuals as widows or widowers. Thirty-six of either the widows/widowers or husband/wife households had "others" enumerated in the household (173 in all): most of whom were probably children, although some may have been other adults living with the family.³³

Department researchers verified family relationships and connected some of the individuals on the 1808 list to their ancestors on the 1776 list and their descendants on the 1832 list, as well as the 1861 Earle Report by comparing the names on 1808 list with the information in the annotated genealogical database. The list did not include ages or other identifiers, and did not arrange the names in any order that would imply family relationships between names.

Department researchers found 27 of the known adults on the 1808 list were also on the 1832 list. This includes named heads of household [13], the unnamed "& Wife" [14], when the available record provided evidence that the spouse living in 1808 was the same woman who was living in 1832. Another 10 adults on the 1808 list have children or grandchildren on the 1832 list. Therefore, about 33 percent of the households in 1808 (37 households) were represented on the 1832 list.

Department researchers also compared the list of descendants of the 1808 householders to the names on the 1861 Earle Report and found that eight adults in 1808, either the named male head of house, or the "& Wife" were also on 1861 lists. Another 22 adults in 1808 had children, grandchildren, or great-grandchildren identified as Mashpee Indians at Mashpee in 1861. Thus, about 31 percent of the 1808 Mashpee households (34 of 111) appeared on the 1861 Earle Report.³⁴

³³ One hundred and seventy five adults and 173 "others" equaled 348 individuals in 111 households. Department researchers did not try to determine who all of the "others" were in 1808, or whether they had descendants living in 1832. However, when the current genealogical record identified the names and birth dates of the children of the 1808 householders, it was reasonable to assume they were among the total number in the household if they were minors and still living in 1808.

³⁴ Rather than track the ancestry of all 391 Mashpee on the Earle Report, Department researchers identified 61 names of individuals who were over 50 years old in 1859, and likely to have been adults in 1808, or one of the children (identified as "others") in the 1808 households. This sampling of the 1859/1861 population found 8 individuals living in 1861 who were on the 1808 list (4 couples), 15 individuals who were the children of individuals on the 1808 list, and 2 who were the grandchildren of someone on the 1808 list.

Mashpee Wampanoag Final Determination

Department researchers did not count the actual number of 1859/1861 individuals who descended from the earlier lists because marriages between Mashpee families meant there were multiple descent lines. In addition, name changes due to marriage, re-marriage, or some other reason were not included in the “snapshot” of the household as it appeared on the 1808 or 1832 lists. The petitioner’s genealogical database often did not include the maiden names of mothers or make connections between the Earle Report individuals and their ancestors. Department researchers did not conduct additional research to “fill in the blanks,” but conducted this review to verify whether the PF’s conclusion that there was continuity between the families identified in the earlier records and the Earle Report was correct.

The 1832 Enumeration of Proprietors on Mashpee

The PF mentioned the 1832 State census, noting that there were 315 inhabitants of Mashpee (Mashpee PF, 40, footnote 37). For the FD, Department researchers looked at the census in more detail to verify whether the finding of continuity between the earlier lists or censuses and the 1861 Earle Report of Mashpee Indians was correct.

The heading on the 1832 list stated: “The following is an enumeration of the Proprietors on the Plantation of Marshpee together with their ages as taken November 1832 by the overseers of said Plantation” and was signed by “Charles Marston, Overseer of Marshpee” (Marston 1832). There are 231 names arranged in alphabetical groupings by surname on the 1832 list; however, 2 names (Cornelius Lawrence and John Williams³⁵) do not have ages and have little “x’s” before and after, implying they were not counted. Marston’s summary stated that there were 229 proprietors and 86 “coloured non-proprietors.” Although relationships between individuals are not stated, the list appears to arrange family groups by the order in which the names and ages appear. For example, Eben [*sic*] Attaquin age 50, is followed by Leah Attaquin 42, Elizabeth Attaquin 3, and Hepsah [*sic*] Attaquin 1, presumably his wife and children, or grandchildren. Lydia Coombs 61 is followed by Okes [*sic*] Coombs 23 and Mary Coombs 21, who when compared to the information in the genealogical database, appear to be the widow Lydia (nee Moses) Coombs, her son Oakes and his wife, Mary (nee Quippish) Coombs.

Department researchers identified 28 individuals on the 1832 list, who were also on the 1808 list, 45 individuals who were the children of individuals on the 1808 list, and 55 who were the grandchildren of individuals on the 1808 list.

Because the 1832 list included the names and ages of children as well as adults, Department researchers identified more names from the 1832 list on the Earle Report than names of the adult signers of the 1833 petition discussed in the PF (Mashpee PF, 140). There were 73 adults and children on the 1832 list (73 of 343, or about 21 percent of the 1832 population) who were also on the Earle Report in 1861 (73 of 391, or about 19 percent of the 1861 population). These 73 individuals also had numerous children and grandchildren listed on the Earle Report. For

³⁵ Cornelius Lawrence and John Williams were not on the 1842 Proprietor’s list or other lists of Mashpee from the middle 1800’s. Neither of these men is in the petitioner’s genealogical database, although there are other Williamses. The Lawrence surname is not in the record at all.

Mashpee Wampanoag Final Determination

example: Achsah (nee Amos) Jones had 5 children; Mathias Amos had 7 children and grandchildren; Israel and Polly Amos had 15 children and grandchildren; and Betsey (nee Attaquin) Ockry had 6 children on the 1861 Report. Thus, this analysis shows continuity between the 1832 list and the 1861 report on Mashpee Indians in Massachusetts.