INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

U·M·I

University Microfilms International
A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
313/761-4700 800/521-0600

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Order Number 9431359

Coiled intent: Federal Acknowledgment Policy and the Gay Head Wampanoags. (Volumes I and II)

Grabowski, Christine Tracey, Ph.D.

City University of New York, 1994

Copyright ©1994 by Grabowski, Christine Tracey. All rights reserved.

U·M·I
300 N. Zeeb Rd.
Ann Arbor, MI 48106

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

COILED INTENT: FEDERAL ACKNOWLEDGMENT POLICY AND THE GAY HEAD WAMPANOAGS

by

CHRISTINE GRABOWSKI

Volume I

A dissertation submitted to the Graduate Faculty in Anthropology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

1994

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

© 1994

CHRISTINE GRABOWSKI

All Rights Reserved

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

This manuscript has been read and accepted for the Graduate Faculty in Anthropology in satisfaction of the Dissertation requirement for the degree of Doctor of Philosophy.

April 26, 1994
Date

Chair of Examining Committee

April 26, 1994
Date

Executive Officer

Jane Schneider

May Ebihara

Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Abstract

COILED INTENT: FEDERAL ACKNOWLEDGMENT POLICY
AND THE GAY HEAD WAMPANOAGS

by

Christine Grabowski

Advisor: Professor Vincent Crapanzano

Federal Acknowledgment Policy (or FAP as it is commonly called) enables unrecognized American Indian tribes to petition the Bureau of Indian Affairs (BIA) for a change in their legal status, thereby becoming eligible for all of the protections, rights and immunities currently enjoyed by federally recognized tribes. Focusing primarily upon the experiences of one petitioning group, the Gay Head Wampanoags of Massachusetts, this dissertation critically examines the authority and power of the FAP process and the latter's impact upon tribal sovereignty. Analyzing FAP not merely as a legal text but as a process, the thesis explores the codification of the regulations (25 CFR 83), the evaluation of evidence by the BIA's Branch of Acknowledgment and Research (BAR) and the aftermath of the Gay Head "Final Determination." This includes the latter's immediate effect upon the Gay Head Indians and the long-term consequences for subsequent petitions and policy-making.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

FORWARD

To most Americans, "modern Indian" is a contradiction in terms. To be "Indian" is to be a member of a distinct race of people who inhabited the North American continent[1] prior to the advent of European explorers, missionaries, and settlers and to manifest cultural practices resonant of the pre-contact period. In contrast, to be "modern" is to participate in the technologically developed mainstream of contemporary western society. Inasmuch as "modern" and "Indian" are antithetical to one another, natives who function successfully in two worlds -- Indian reservations and American society -- are seen to strain the conceptual boundaries of each category.

Far more acceptable is the term "Native American" for it acknowledges an individual's genealogical and cultural 'roots' to pre-colonial America without indicating anything about his/her contemporary relations. Whereas "Native Americans" can take their place alongside other hyphenated Americans -- Chinese-Americans, Italian-Americans, Polish-Americans -- within a multicultural, multiethnic America,

---

[1] Although the term "Indian" has also been applied to the indigenous peoples of Central and South America and of the Caribbean islands prior to European colonization, in general, in the United States the term refers more specifically only to those inhabitants of North America. It is used interchangeably with "American Indian."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"Indians" are, by definition, separated by time and space[2] from contemporary American society.

Native peoples in the United States thus occupy an ambivalent position within our society. Non-Indians readily romanticize the Indians' pre-contact "ecological" use of resources and exoticize "traditional" tribal practices. Yet Americans have a difficult time reconciling the fact that, hundreds of years after their contact with non-Indians and notwithstanding the innumerable attempts to eradicate tribal forms, Indian peoples still find tribal identity and affiliation relevant to their life in the late twentieth century. Indeed, in 1993 there are more than 100 Indian groups who seek federal acknowledgment of their tribal status despite the fact that such recognition had been lacking either for all or else a good part of their history.[3] While Americans are willing to accord natives a past, they are unwilling to accord the latter a present and future as "Indians."

The reason for this peculiar state of affairs stems from the very definition of "Indians" and "Indian tribes" primarily in racial and cultural terms. Hence, when natives participate in the American mainstream and take on the

---

[2] Non-Indians typically view Indian reservations as enclaves where culturally anachronistic attitudes and behavior endure.

[3] This number does not include the more than 300 tribes which are currently supervised by the Bureau of Indian Affairs.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

accoutrements of a non-Indian life-style -- e.g., when they become wage laborers, live in nuclear households, practice institutionalized religion, adopt the consumer patterns of non-Indians and of course speak English fluently -- they are seen to become categorically different from their ancestors. They are said to have "acculturated" and are no longer classified as "Indian" but are now "Indian descendants" or "Native Americans." Similarly, tribal identity is viewed by non-Indians as a subcategory of a broader ethnic affiliation -- not unlike Italians defining themselves as Sicilian or Neopolitan.

Yet, for Americans to define tribal identity as an ethnic category is also to deny the political distinctions which have existed among Indian groups throughout history and to ignore their status as sovereign entities, a status which predated and survived the formation of the United States. Since American Independence, Indian tribes have had a government-to-government relationship with the United States which has been affirmed in myriad treaties, Supreme Court decisions, executive orders, legislative acts, not to mention the U.S. Constitution itself. Not only are most Americans completely unaware of this fact but, even those who are nominally familiar with it,[4] are by and large

---

[4] This is more apt to occur in states which have a high number of Indian tribes and where legal battles over jurisdiction of tribal members and reservation lands are frequent news items in the local media.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ignorant of its legal basis and multiplex implications. They do not understand that tribal sovereignty is inherent, not "given" to tribes by the federal government or that, like federal recognition of other sovereign entities (e.g. Canada, France, or Japan) that of Indian tribes has been historically based upon the latter's political, not cultural, configuration.[5] Why non-Indians are ignorant of such a fundamental and important feature of tribal life is itself a complex and puzzling issue.

The Importance of Categories

In the past 15 years numerous scholars have examined how non-Indians have viewed native peoples throughout American history. Axtell (1974, 1981), Berkhofer (1978) Jennings (1975), Martin (1987), Simmons (1988), Trigger (1986), are several of those who have added much to our knowledge and understanding of the various ways in which Americans have portrayed native peoples either as the primitive antecedents of European society or else as the embodiment of those attributes the latter lacked.[6]

---

[5] The rhetoric of nationalist movements notwithstanding, the cultural and political boundaries of nations have rarely if ever been coterminous in world history. If the United States only recognized culturally homogeneous and continuous polities then it would recognize virtually no modern nation state but instead thousands of regions, cities and population segments.

[6] This has been done in both positive and negative ways -- e.g., portraying Indians as living either in a state of childlike innocence or in one of savage anarchy.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

However, what is salient about the different classificatory schemes -- and what the above authors do not address -- is not merely that they cast Indian peoples as the antithesis of European and American society. Rather, it is that the categories were legally sanctioned, thereby serving as the justification and means for denying natives the same rights and privileges as enjoyed by American colonists and citizens. It is that the classification of Indians spawned governmental policies and that these in turn reified distinctions between Indian and non-Indians that is critical to understanding the persistence and substance of native otherness throughout U.S. history. Thus, it is not merely that Americans' cultural view of Indians sells films such as "Dances With Wolves," but that it permeates governmental policies regarding the exercise of tribal sovereignty which makes this paradigm so powerful and detrimental to America's native peoples. How the cultural classification of Indian tribes is infused with legal authority and power and the policy implications thereof, is the subject of this dissertation.

Anthropology, Law and American Indians

That I identify the cultural classification of Indian tribes as an "issue" may strike many as ironic, coming as it does from an anthropologist. After all, the development of the discipline was responsible for transforming the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

definition of "culture" from the high-low dichotomy which predominated before the mid nineteenth century to its present holistic definition which has gained currency among the general public. Furthermore, there can be little dispute that anthropological research has substantially furthered non-Indians' understanding and appreciation of the cultural integrity of individual Indian tribes. Yet, it is largely because American anthropology cut its teeth, so to speak, on American Indian ethnography that Americans' myopic focus upon Indian culture and cultures is a problem today.

Since the late nineteenth century, anthropologists have been responsible for a prodigious number of monographs on American Indians. These studies, each focusing upon a particular tribe, lent scholarly authority to the view that tribes were culturally distinct and that "Indians" and "Indian culture" were doomed to disappear in the wake of civilization. Decades later, when it was found that Indian tribes endured long after they were supposed to, American anthropologists then turned to the perplexing tenacity of native culture as a research "problem" (Foster 1991:7).

It is clear that anthropological writing has done much to promote the otherness of American Indians.[7] However, what makes this issue a pressing one is precisely that anthropological representations of Indians and Indian tribes

---

[7] See for example, Fabian (1983), Marcus and Fischer (1986), Clifford (1988).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

are currently being used as evidence in legal proceedings regarding tribal sovereignty. Indeed, the relationship between anthropology and law is an intimate one, dating back to the professionalization of anthropology in the latter half of the nineteenth century.

By the late 1800's, most tribes had been pacified and confined to reservations where governmental agents restricted tribal members' physical movements, inter-tribal relations, access to traditional resources, political organization and socio-cultural practices.[8] It was, in other words, not until tribal sovereignty was significantly undermined by Federal Indian law that professional anthropologists visited reservation enclaves and began to record what remained of each tribe's pre-reservation "culture."

If anthropological fieldwork was made possible by Federal Indian law, so too did anthropological principles and research fuel governmental policy-making. There developed, in other words, a reciprocal relationship between Federal Indian law and the anthropology of American Indians. Although an historical analysis of this relationship is well beyond the scope of the present study, it bears noting that anthropologists and their research have figured prominently

---

[8] Among the many changes missionaries and governmental agents imposed were conversion to Christianity, church-sanctioned monogamous marriage and boarding school education in which native dress, language and religious beliefs were strictly prohibited.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in two major policy initiatives of the twentieth century -- the Indian Reorganization Act (1934) and Indian Claims Commission Act (1946) as well as in scores of less extensive federal programs.[9] The relationship between anthropology and law is therefore not only of theoretical concern to those who reflexively ponder the mission of their discipline, but also has extensive concrete ramifications for native peoples. This is especially true regarding the administration of federal acknowledgment policy and the latter's effects upon tribal sovereignty.

Federal Acknowledgment Policy

Federal acknowledgment policy (or FAP as it is commonly called) was enacted in 1978 to resolve the legal status of "unrecognized" or "non-recognized" American Indian tribes. Until that date, the federal government had sustained a government-to-government relationship with some tribes' while declining or neglecting[10] to formally recognize

---

[9] As discussed in Chapter 4, both the Indian Reorganization Act (IRA) and Indian Claims Commission (ICC) had a substantial impact upon federal recognition of tribal sovereignty. As discussed in Chapter 10, these and other governmental policies later became evidence in the FAP process. The role of anthropology in governmental policy-making is thus reflexive and continuous and must be analyzed as such.

[10] Why more than 100 tribes were classified as unrecognized in 1978 depends upon diverse political and historical factors. For example, the BIA specifically declined to extend services and programs to the Gay Head Wampanoags of Massachusetts, believing the tribe to fall under state, rather than federal jurisdiction; in contrast,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

others. In 1977 the American Indian Policy Review Commission (AIPRC) concluded that the government's prior practices were not only inconsistent with regard to which tribes it recognized, but were also without legal justification. To avoid a litigative avalanche as Indians and non-Indians sought to resolve present and past claims tied to a tribe's legal status, the Bureau of Indian Affairs (BIA) devised an administrative procedure to determine which new tribes[11] it would federally acknowledge and which it would not. According to the FAP regulations, petitioning groups must establish that they have existed continuously as an American Indian tribe from initial contact with non-Indians until the present based upon an array of historical, anthropological and genealogical evidence.

On the one hand, the present study examines generally how federal acknowledgment policy has reinforced and fostered the definition of Indians and Indian tribes as cultural others and the policy implications thereof. On the other, it focuses upon one "unrecognized tribe" -- the Gay Head Wampanoags of Massachusetts -- in petitioning for federal acknowledgment. Inasmuch as my approach is processual, the study explores the political and legal

---

federal supervision of the Duwamish of Washington State lapsed for reasons which are unclear (Maxwell 1988).

[11] Tribes which already were receiving services from the Bureau would not have to submit FAP petitions. Rather, the process was only for those groups deemed unrecognized in 1978.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

origins of FAP, the evaluation of evidence by the BIA's Branch of Acknowledgment and Research and the aftermath of the Gay Head "Final Determination." This includes the latter's immediate effect upon the Gay Head Indians and the long-term consequences for subsequent petitions and policy-making. The aim is not to demonstrate a causal relationship between anthropology and law, but instead to explore their intersection in federal Indian policy and the ramifications thereof upon tribal sovereignty.

My analysis draws on several different types of research and experience with FAP spanning more than ten years. First, it utilizes data which I collected in 1982 while doing federal acknowledgment research on behalf of the Wamapanoag Tribal Council of Gay Head, Inc. This includes ethnohistorical, genealogical and ethnographic information gleaned from documentary sources and from interviews with tribal members and non-members. Second, it makes use of independent research which I conducted on Federal Indian law and upon the acknowledgment process, including a comparative study of petition findings. Third, my analysis of the Gay Head case was immeasurably enhanced by my work evaluating FAP petitions for the Branch of Acknowledgment and Research (BAR) as an employee of First Computer Concepts, Inc. In reviewing the data of seven different petitioners from all over the United States, I gained first-hand knowledge of the theoretical and practical issues involved in preparing and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

evaluating ethnohistorical and ethnographic evidence as well as of the administration of BAR and of the latter's decision-making process. My experiences working as a participant on opposite sides of the petitioning process -- for a tribe and for the government -- not only gave me an intimate appreciation of the inherent difficulties in turning "data" into "probative evidence" but also of determining the reliability of evidence obtained from written and oral sources.

The dissertation focuses upon the Gay Head Wampanoags for practical as well as theoretical reasons. Obviously, my experience working for the Tribal Council has given me an insider's view of the problems this group faced in satisfying the FAP regulations. Yet, as I demonstrate in Chapter 9, the Gay Head case is also particularly instructive because of the way in which BAR's reevaluation of data in the "Final Determination" has been viewed both by other petitioners and by BAR itself. Thus, although the Gay Head case is unique is certain regards, it also involves issues which are pivotal to the petitioning process.

Organization

The primary focus of this study is upon the authority and power of law. Anthropological theory and research are issues only insofar as FAP purports to rest on sound legal and anthropological principles and makes extensive use of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ethnographic and ethnohistorical data in determining whether or not a petitioning group has existed continuously as an Indian tribe. I am, in other words, more interested in the effects of lawmaking and lawfinding upon tribal sovereignty than I am in the history of anthropology as a discipline. That law and anthropology are so intertwined in the FAP process is, as I demonstrate in the following chapters, what accounts for the authority and power of the FAP regulations.

As is discussed more fully in Chapter 2, this study does not focus upon FAP as a text, but as a process. My aim is to show that the authority and power of FAP stem both from the codification of the regulations and from their administration these past 15 years. How certain concepts of right came to be included in the regulations and how these have been interpreted by petitioners, by governmental reviewers at the Bureau of Indian Affairs and by other interested parties is central to understanding what the seven FAP criteria prescribe, make possible and even conceivable. My concern is not so much with delineating the formal privileges that obtain (or not) under FAP as it is with studying the construction of meaning in this legal procedure and latter's power to shape consciousness and to influence behavior without overt coercive force. To paraphrase Gordon (1984:125), my goal is to understand how the legal classification of American Indians has been imbricated in and has helped to structure the most routine

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

practices of tribal life.

The organization of the dissertation is designed to enhance the processual analysis of FAP. Rather than presenting static descriptions of each stage of the petitioning process, each chapter examines a process within a process. Chapter 1 (Classification) begins by laying out why the legal classification of the Gay Head Wampanoags became an issue for these Indians in the 1970's. Chapter 2 (Codification) provides a theoretical and methological framework for studying the authority and power of FAP as a legal process. This is followed in Chapter 3 (Recognition in History) by an historical discussion of how the Gay Head Indians came to be administered by the State of Massachusetts. Chapter 4 (Recognition in Law) examines the process by which the federal government came to distinguish between recognized and "unrecognized tribes" generally and to classify the Gay Head Wampanoags as unrecognized. In Chapter 5 (Recognition in Politics) I explore the political impetus for the development of FAP in 1978 and in Chapter 6 ([Re]presentation), the theoretical and practical problems of presenting history for the purposes of federal acknowledgment. Chapter 7 (Interpretation) sets forth the legal and political considerations which led the Gay Head Tribal Council to submit a petition for federal acknowledgment and summarizes the major arguments set forth in the government's "Proposed Finding." Whereas Chapter 8

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(Negotiation) addresses how the Tribal Council and government reviewers respectively interpreted ethnographic and historical data, Chapter 9 (Settlement) discusses the short and long term ramifications of the Gay Head decision. Finally, Chapter 10 (Conclusion) reviews the authority and power of federal acknowledgment policy and its ramifications on tribal sovereignty.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ACKNOWLEDGMENTS

It is only with hindsight that one can describe a process. Even so, determining when a particular process began and what elements were salient is not unlike trying to identify which trickle of ground water is a river's source and all the environmental features which account for the latter's flow. Those who have contributed to the writing of this dissertation are many and, in some cases, did so long before I put pencil to paper. Due to considerations of space, I am able to mention only those who most directly influenced the realization of this project.

My interest in U.S. history and American Indians dates from childhood yet it was through Professor Ronald Waterbury that I first came to see anthropology as a career option while an undergraduate at Queens College. By coincidence, it was also through him some ten years later that I met Dr. Gloria Levitas and went to work for the Wampanoag Tribal Council of Gay Head, Inc. Dr. Levitas generously allowed me the use of her home in Gay Head on several occasions and proved a valued friend, confidant and informant during and after my field research on Martha's Vineyard.

On the island, the assistance and cooperation of Tribal Council officers and general members, of Gay Head town officials and of non-Indian Vineyard residents were all

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

indispensible to the contract work I performed for the Tribal Council and to the independent research which I conducted in Gay Head some years later. I particularly want to thank Gladys Widdiss, Pat Malonson, Donald Malonson and Tina Malonson (Washington) who gave to me personally and professionally in too many ways to enumerate. In addition, Betty Green offered me her home, her warmth and her friendship and in so doing, did much to alleviate the inevitable loneliness of fieldwork.

At the Bureau of Indian Affairs, I greatly appreciate the openness of the BAR staff, especially Bud Shapard, George Roth and Michael Lawson, from whom I learned much about the FAP process. I am indebted to Howard Valandra and John Fritz of First Computer Concepts, Inc. who gave me great insight into the politics of Indian affairs. I am very pleased to have met Dr. Karen Cantrell while working for FCCI. Having been trained in both anthropology and law, her perspective has proven especially enlightening.

There are many at the Graduate Center to whom I owe a great deal. Professor Vincent Crapanzano's epistemological probing did much to hone my analytic thinking and pushed me to develop my own stance and voice in anthropology. I am very grateful for his longstanding support and encouragement. Professor Eric Wolf was largely responsible for my studying at CUNY and, before retiring, gave me sage advice regarding the dissertation as well as throughout my

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

graduate school career. Professor Jane Schneider's meticulous review of the dissertation, her practical support of the writing process, as well as her guidance as Executive Officer of the Department of Anthropology were all crucial to completing the degree requirements. I would like to thank Professor May Ebihara for agreeing to serve as a member of my committee on relatively short notice and for her insightful comments in that capacity. Terry Vulcano deserves many thanks for coaching me over numerous administrative hurdles.

Several fellow students at the Graduate Center were also helpful in writing this dissertation. In the beginning, Carmen Ferradas, John Burdick and I hashed over problems of style, organization and theory. Later, Allessandro Scassellati and I regularly shared our work as well as the frustrations and anxieties of dissertation writing, making for an especially productive year at the Graduate Center.

Outside of academia, Robyn Wishengrad, Arthur Jussel and Ernesto Colon probably heard more than they ever wanted to know about federal acknowledgment policy. I drew from these wells of friendship many, many times.

Finally, as anyone who has gone through the process knows, writing a dissertation puts an enormous strain upon one's family. My husband, Larry Garment, and daughters, Victoria and Hayley, endured the peaks and valleys of my

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

progress as well as the many long hours I spent in front of the computer. The unfailing love and support of my parents, Aisha and Walter Grabowski, sustained me throughout.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

TABLE OF CONTENTS

VOLUME I

Forward..... v

Acknowledgments..... xix

1. Classification..... 1

2. Codification..... 53

3. Recognition in History..... 86

4. Recognition in Law.....142

5. Recognition in Politics.....207

VOLUME II

6. (Re)presentation.....265

7. The Politics of Participation.....337

8. Interpretation.....400

9. Settlement.....483

10. Conclusion.....553

Law Cases Cited.....594

Bibliography.....596

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 1

CLASSIFICATION

1972 was a volatile year for Gay Head. That year, the historic character of the second smallest town in Massachusetts[1] was challenged, its future jeopardized and the community torn by factionalism. Ostensibly the fissures that developed did so over the ownership of land -- not who owned what, but who had the right to own it and what was the nature of those rights, if any.

The spark came from legislation aimed at protecting wildlife in eastern Massachusetts. Sponsored by Senator Ted Kennedy, Senate bill S.1929 would appropriate lands on Cape Cod, Nantucket and Martha's Vineyard to form a national wildlife preserve. In an era of growing concern with environmental issues, the proposed legislation strove to use federal powers to safeguard natural resources. On the Cape, Nantucket and most of Martha's Vineyard, the lands under consideration were already within the public domain and did not threaten the extensive holdings of the rich and powerful who vacationed there. In Gay Head, however, the situation was different. Poised at the westernmost tip of Martha's Vineyard, the town's beaches, bogs and dune were the only privately held acreage to be included in the Nantucket Sound

---

[1] According to the U.S. Census (1973), the town's populations was 118 in 1970.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and Islands Trust.

On the one hand there were summer people who stood to lose vacation homes. A few had arrived in the late 1950's and early 60's, attracted by the remoteness of the town and the lack of amenities -- there were and indeed still are no year-round stores, not even a post office, in the town. Many more had bought beachfront property in the early 70's when real estate prices down island skyrocketed. For those without substantial means, Gay Head was one of the few places on the Vineyard where land remained affordable.

Regardless of when they came, these property owners were not about to turn over their vacation homes without a fight. As urban professionals primarily from New York and Boston, they included a disproportionate number of lawyers who were not only sophisticated in the use of law, but also skilled in raising money and mobilizing support in the political arena. They lost little time in organizing against the proposed takeover of their property.

For those who lived year-round in Gay Head, bill S. 1929 threatened more than the dollar value of their land; it chiselled at the bedrock of their identity. To begin with, Gay Headers did not merely own property in town but had ties to the land that antedated its ownership by private individuals. Their ancestors were part of a loose federation of American Indian sachemships that inhabited southeastern Massachusetts prior to European colonization.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Of the four Wampanoag groups on Martha's Vineyard, one used the Gay Head area on a seasonal basis; by the eighteenth century, this sachemship had been pressured into year-round settlement of the peninsula by the advent of European agriculture, missionization and whaling trade on the island. Until the Indian District of Gay Head was incorporated as a town in 1870, Gay Head Wampanoags held usufruct rights to communally held land; private property, in the sense of full and transferable title to the land, was not recognized among them.

Thus, to be a Gay Header was to be born a Gay Header. It was birth, not contract, that defined the individual. All were lineal descendants of the Indians listed in the 1871 Pease Report;[2] all were related to those allotted homesteads in the "set-off" of that year and it was on these family lots (or on segments thereof) that many resided in 1972. (Where homesteads had been sold or lost to taxes, descendants frequently rented from relatives.) The ties that Gay Headers had to the land were at once communal and

---

[2] In 1870, Massachusetts Commissioner Pease issued a report on the conditions of the Gay Head Wampanoags and the following year published a list of all residents of the Indian District. This list, along with one in a similar earlier report by Commissioner Earl in 1842, is used by the Wampanoag Tribal Council of Gay Head, Inc. as a baseline genealogical record of the tribe. Members trace their descent, matrilineally and/or patrilineally, to at least one of the Wampanoags listed in these reports. Although the Tribal Council refers to the list as the "1870 list," it was in fact published in 1871 and will be so referenced in this work.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

individual. Their collective identity as Wampanoag Indians was inextricably bound up with their historic occupation and use of the peninsula and, individually, each could trace his or her descent back to one or more of the original allottees of Gay Head land.

But in 1972, Gay Headers did not oppose Senate bill S.1929 because they were in immediate danger of losing their homes. Since the majority lived along State Road, which cut through the center of the peninsula, their private property was by and large unaffected by the proposed reserve. Instead, what mobilized Gay Headers was the prospect of losing the common lands, discontinuous acreage which included largely unimproved cliffs, beach, bog, creek and dune which they had always used, as the name implies, in common.

The lands were a source of pride and power for Gay Headers. The variegated clay cliffs at the western end of town were the aboriginal namesake of the peninsula and sachemship which claimed the land prior to European settlement of the island in 1642. "Aquinnah," meaning gaily colored, was the subject of various native legends including how the earliest Wampanoag inhabitants came to Gay Head and the origin of several of its prominent geographic features.

The cranberry bogs along the north shore were also infused with symbolism, with Gay Headers gathering at them every October to harvest cranberries in an annual ceremony.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Gay Head Indian children took off from school to attend Cranberry Day while non-Indians were traditionally prohibited from participating in the festivities. The Indian-only activities celebrated the Wampanoags' enduring control of the common lands and affirmed their historic land use practices.

Although Gay Headers were individually allotted parcels in 1870, they continued to permit each other to use their land for hunting, fishing, berrying or gaining access to other property. This contrasted sharply with the non-Indian practice on the island of peppering one's property with "No-Trespassing" signs to ward off the seasonal swarm of tourists. As Gloria Levitas (1980) has pointed out, open access to land between and among Gay Headers was a sort of ethnic marker which distinguished Indian from non-Indian on Martha's Vineyard -- in her words, "no boundary is a boundary."

To an outsider, then, the common lands may have appeared as little more than undeveloped, if not undevelopable,[3] eroding cliffs, scrubby moor and sandy beachfront, but to Gay Headers, they were a place where the present and past merged. In their natural state, the lands were testimony to "how things have always been" in Gay Head.

---

[3] Because of zoning laws on Martha's Vineyard which prohibit commercial and residential construction on wetlands (the water table being too close to the surface), most of the common lands are not suitable for construction.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

To permit the federal government to take them over as a wildlife preserve would have been to sever Gay Headers' historic ties to the peninsula. If Senate bill S. 1929 passed, shore birds and not Gay Head Indians would have had legitimate access to the common lands.

While Gay Head residents had varying reasons for opposing the Nantucket Sound and Islands Trust, they were nevertheless unified in their staunch resistance to its passage. Using their respective skills and influence to gain politicel support, Indians and non-Indians alike negotiated with congressional delegates and ultimately succeeded in having Gay Head lands excluded from the proposed legislation. It was a qualified victory, however. Summer homes stayed in the hands of their non-Indian owners and the common lands remained under Indian control but the latter's status was still problematic. Research, conducted on behalf of Gay Headers, had revealed a startlingly unpleasant fact -- the common lands did not belong to the Gay Head Wampanoags as they had always believed they did but rather belonged to the Town of Gay Head.

In 1870, when Massachusetts changed Gay Head from an Indian District to an incorporated town, the Wampanoags were granted American citizenship, their lands allotted in severalty. Each received a homestead, pasture and beachfront lot with several hundred acres being reserved for the Indians' collective use, primarily for the pasture of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

livestock, the cutting of wood, the digging of peat (which was used for fuel) and the harvesting of fish.[4] It was these commonly used lands which Gay Headers, as a group, claimed as theirs. Until the 1970's, who held title to these lands -- whether the Town of Gay Head or the Gay Head Indians -- was of little practical consequence, since the town's year round population was predominently Indian and they completely controlled town government. Even if Gay Headers did not formally own the common lands, they controlled them in practice and had done so after incorporation, as well as before.

By the early 1970's, however, the exclusively Indian character of Gay Head had begun to change due to the increase in non-Indian summer people in the community. Gay Headers continued to control town government, especially the powerful positions of selectmen[5], yet they came to realize that should they lose their historic tenure, they could also lose control over the common lands. It was a profoundly unsettling prospect and one which Gay Headers found unacceptable. To remedy the situation, several Indian leaders formed the Wampanoag Tribal Council of Gay Head, Inc., (WTCGH) in part to serve as a formal organization to

---

[4] A small creek located on the common lands historically provided Gay Head Indians with much herring, an item which figured prominently in the natives' diet.

[5] In Massachusetts an elected three-person board of selectmen governs a town.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

which title to the common lands could be transferred. They reasoned that once lawfully in the hands of Gay Headers, the common lands would remain more assuredly Indian, than if otherwise left to the ebb and flow of town politics.

The Indian leaders were prescient enough to see that their present political power could not guarantee future Indian control of the common lands. What they did not realize, however, was that the political threat was not somewhere down the road, but was already upon them. When the Indian selectmen voted in favor of transferring the common lands to the Tribal Council, they were prevented from doing so by a court injunction, obtained by a group of non-Indian summer people organized as the Taxpayers Association. The latter claimed that the selectmen were sworn to represent the interests of the entire town, Indian as well as non-Indian, and not just one segment. Transferring the common lands to the Tribal Council was tantamount to giving them to a private organization without the full consent of the town. According to the summer people, the selectmen were acting illegally on behalf of the latter's own Indian interests and were not fulfilling their elected obligations. Town counsel, in turn, advised the selectmen to abide by the injunction, thereby blocking the transfer of title.

The injunction caught Gay Headers by surprise but they were not completely stymied by it. Their efforts in fighting the Nantucket Sound and Islands Trust had served as

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

an educational first round for subsequent legal battles. The Wampanoags not only had made important contacts and negotiated with government officials, but also gained invaluable experience in party politics. Moreover, the Indians had benefited from the political activism of the late 60's and early 70's during which the rights of minorities were highlighted and championed. AIM -- the American Indian Movement -- which staged its first public demonstration in 1967 with the takeover of Alcatraz, had raised the political consciousness of many American Indian peoples and provided a much-needed pan-Indian support network. In 1972, Wampanoags realized that the problems they faced regarding the common lands were not unique but were shared by other Indian peoples on the eastern seaboard.[6]

Several contemporaneous court cases involving fellow New England Indian groups influenced Gay Headers' subsequent course of action; how the legal issues were resolved in two of these had a direct impact on the Indians' legal options. The first concerned a 10 year old land claim of the Passamaquoddy Indians in Maine; the second, one brought by the Mashpee Wampanoags, located across Nantucket Sound from the Gay Head Wampanaogs, on Cape Cod. In both cases, litigation turned on the Indians' legal relationship to the

---

[6] For a fuller discussion of the political arena of the 60's and 70's and its influence upon American Indian affairs generally, see Chapter 5.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

federal government.

Federal Jurisdiction: Premises

Under Federal Indian law, American Indian "tribes" are semi-sovereign nations whose relationship to the United States government is akin to that of a "ward" to its "guardian" (Worcester v. Georgia 1832).[7] Their legal status developed out of principles of international law operating among European powers in the seventeenth and eighteenth centuries. According to established doctrine, "discovery" of land did not in and of itself extinguish native title; rather it only "vested in the discoverer an exclusive or "preemptive" entitlement to deal with the natives as against other European crowns" (Barsh and Henderson 1980:42). In colonial America, tribal sovereignty was recognized and repeatedly affirmed through the European practice of treating with American Indians for land, trade agreements and political alliances.

With independence from England, the preemptive right of the United States to deal with American Indians within its borders was expanded to the right of conquest. Under this potent "fiction" (for the U.S. had in no way conquered all of the Indian nations on the continent), the new nation not

[7] Full citations for all legal cases are included in a separate listing in the appendix. In the body of the text, references note the name of the case, year and page number, where necessary, to conform with the anthropological form of citation used throughout.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

only reserved unto itself the "sole right to treat for native title; it had given the U.S. title itself (Barsh and Henderson 1980:47, original emphasis). As judicially interpreted, this meant that Indians retained the right of occupancy based upon aboriginal possession and use. Title to their land, however, was reserved to the federal government and could be extinguished by the latter (Fletcher v. Peck 1810, Johnson v.McIntosh 1823).

The legal maneuver was admittedly inconsistent with the contractual philosophy of government espoused by the founding fathers; nevertheless it was justified by Chief Justice John Marshall:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned (Johnson v. McIntosh 1823:591).

In this way the Supreme Court not only legitimized the federal government's power to dispose of Indian lands, it also foreclosed debate regarding its "right" to do so by observing: "the right of society to prescribe those rules by which property may be acquired and preserved is not and cannot be drawn into question" (Johnson v. McIntosh 1823:572). Might made, or in this case defined, "right." The United States judicially sanctioned its own actions by asserting that it had the right (and not just the power) to define how Indian lands may be acquired and conveyed.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Thus deprived of full sovereign rights, the Indians' legal status was unique.

> Under that system the Indians residing within the United States are so far <u>independent</u> that they live under their own customs, and not under the laws of the United States; that their rights upon the lands where they inhabit or hunt, are secured to them by boundaries defined in amicable and voluntary treaties between the United States and themselves; and that whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which they received from the United States ample compensation for every right they have to the lands ceded by them. They are so far <u>dependent</u> as not to have the right to dispose of their lands to any private persons, nor to any Power other than the United States, and to be under the protection alone, and not under that of any other Power (as quoted in Barsh and Henderson 1980:43, emphasis added).

In the more than 200 years since the American Revolution, innumerable treaties, laws and judicial decisions have struggled to define this relationship -- i.e. what are the extent and limitations of tribal sovereignty and what are the obligations of the federal government toward its "domestic dependent nations." It has not been a purely bilateral affair with the federal government on the one hand and Indian governments on the other, but instead a trilateral one in which states have, at times, proven significant players. At the fulcrum of many debates is the question of jurisdiction -- whether the federal government, states, or Indian governments themselves have the right to regulate native affairs. For the Passamaquoddy and Mashpee Indians, as indeed for the Indians of Gay Head as well, the question of jurisdiction necessarily was also one of classification, the two being interdependent.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Federal Jurisdiction: Reevaluation

Joint Tribal Council of the Passamaquoddy Tribe v. Morton (1975) concerned a claim by the Indians of Maine to some 12.5 million acres of land, aboriginally the territory of Penobscot and Passamaquoddy Indians and in the 1970's owned by private corporations (mostly lumber cartels), some individuals and the State of Maine itself. The Indians asserted that they had lost their lands through several treaties -- with the State of Massachusetts in 1796 and 1818,[8] and with the State of Maine in 1820 -- which, according to their legal counsel, was in violation of the 1790 Trade and Intercourse Act. That act prohibits states and private individuals from acquiring Indian lands without the express authorization of the United States government.

> And it be enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States (from the United States States at Large, 1:137-38, in Prucha 1975:15, original emphasis).

The act was a temporary measure, designed to uphold the treaty rights of Indians against unscrupulous whites. Substantially similar Trade and Intercourse Acts were also passed (reenacted) in 1793, 1896, 1799, 1802 with a final version codified in 1834 as 25 U.S.C. 5177 (1963).

---

[8] Until Maine was accepted into the Union in its own right in 1820, it formed part of the Commonwealth of Massachusetts.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Collectively known as the "Non-Intercourse Acts," these laws consistently extended federal jurisdiction over Indian affairs by reserving to the federal government the exclusive right (read power) to treat with American Indians and to alienate their lands.

Until Passamaquoddy v. Morton, the Non-Intercourse Acts were applied only west of the Mississippi, in "Indian Country."[9] Indian land claims in states which had developed from the original 13 colonies were believed to fall outside of the acts' jurisdiction. First, it was held that the preemptive right to purchase land from Indians in such states was vested in the states themselves and not in the federal government. Certainly the original 13 states had a long history of treating with Indians without federal consent or supervision, several doing so almost since the passage of the first Non-Intercourse Act.[10] Until the 1970's, this practice had not been successfully challenged

---

[9] The 1834 Act is the only version which specifically defines its jurisdiction in such terms. The prior acts merely refer to "any nation or tribe of Indians within the U.S."

[10] New York State purchased thousands of acres of Oneida land in 1795 without the consent of the US government. This act, along with other instances of alienation of Indian lands by states, became the bases of various lawsuits throughout New England in the 1970's, all alleging violation of the 1790 Non-Intercourse Act. See note 15 for citations of the cases.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in the courts.[11] Second, the administrative determination of the Department of Interior's Bureau of Indian Affairs (BIA) not to recognize most eastern Indians seemed to support the states' position that they were exempt from the acts (Wallace 1982:929).

Despite the long-standing practice of ignoring the Non-Intercourse Acts in the east, Passamaquoddy legal counsel Thomas Tureen chose to press his clients' land claims precisely on the question of jurisdiction. He argued that neither Massachsuetts nor Maine was empowered to treat with the Indians in 1796, 1818 and 1820 under the provisions of the 1790 Act since that right was explicitly reserved to the federal government. The United States had neither drawn up the treaties in question, otherwise given its consent to the land transfers, nor compensated the Indians for the acreage ceded.

Before Tureen could present this argument in court however he first had to clear another jurisdictional hurdle. Under the 11th Amendment, a state can only be sued by the federal government or by other states. Maine's refusal to

---

[11] In 1970 Oneida Indian Nation brought suit against two New York State counties, alleging violation of the 1790 Non-Intercourse Act. Once the Supreme Court decided that the Indian plaintiffs had jurisdiction, the case was remanded for a factual determination. The lower court ruled for the plaintiff in Oneida Indian Nation v. County of Oneida 1977 following the standard for "Indian tribe" set in Passamaquoddy v. Morton 1975. See discussion below. The Oneida case has only limited applicability for Gay Headers, however, since the Oneida Nation constitutes a "federally recognized tribe."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

waive its sovereign immunity effectively barred the Passamaquoddy Indians from seeking legal redress against the state. As Maine residents, the Indians could not sue the state inasmuch as there was no court which would hear the case. To get around this obstacle, Tureen filed suit against Secretary of the Interior James Morton[12] for having failed to act in a "fiduciary" or "trust" capacity toward the Maine Indians. Tureen was trying to force the United States government to become party to the suit -- that is, he wanted the federal government to sue the State of Maine on behalf of the Passamaquoddy Indians. His prior efforts[13] to involve the federal government as a plaintiff had failed

---

[12] The governmental agency responsible for handling issues concerning American Indians is the Department of the Interior Bureau of Indian Affairs. Commonly referred to the the "BIA," the latter, as of 1977, is headed by an assistant secretary--Indian Affairs. Prior to this date, the Bureau was headed by a Commissioner of Indian Affairs, who did not report directly to the Secretary of the Interior.

[13] On February 22, 1972 (Washington's Birthday), the Passamaquoddy set a letter to the Commissioner of Indian Affairs requesting that the BIA initiate a lawsuit on behalf of the tribe. In the months that followed, the BIA reviewed the case but took no action. With a statute of limitations on the Indians' land claim due on July 18, 1972, it was imperative that the Passamaquoddy get their claim into court before that date. On June 2, 1972, Tureen filed suit against Morton seeking a declaratory judgment that the Tribe was included under the jurisdiction of the 1790 Non-Intercourse Act and, very critically, "requesting a preliminary injunction ordering the defendants to file a protective action for monetary damages against the State of Maine before the statute of limitations expired" (Brodeur 1982:96). Two weeks later, Judge Gignoux ordered the Justice Department to file the protective action and the government complied. Once filed, the protective suits were held in abeyance pending the outcome of Passamaquoddy v. Morton.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with the Secretary of the Interior refusing to initiate a lawsuit. Interior's Acting Solicitor explained:

> [N]o treaty exists between the United States and the [Passamaquoddy] Tribe, and, except for isolated and inexplicable instances in the past, this Department, in its trust capacity, has had *no* dealings with the Tribe. On the contrary, it is the State of Maine and Massachusetts which have acted as trustees for the tribal property for almost 200 years (Passamaquoddy v. Morton 1975:370).

The BIA refused to get involved because it felt that the Non-Intercourse Act applied only to Indian tribes that had been granted federal recognition and the Passamaquoddies did not have such status.

"Federally recognized tribes" are American Indian groups whose sovereignty has been expressly "recognized" by the federal government through treaties, congressional legislation or executive orders. Since their special legal status entitles these tribes to the protection and services of the federal government, federal trust lands (i.e. reservations) and BIA programs have been viewed (however erroneously[14]) as indicative of a group's federally

---

[14] A report of the American Indian Policy Review Commission (AIPRC) (1976) notes:

> ...[T]he ongoing presence of "non-recognition" remains solely an administrative determination of the Department of the Interior within the Executive Branch. Yet, despite the complete lack of substantive legal foundations, "non-recognition" has effectively denied to so-called "non-federally recognized" Indians the fully expressed protections of the federal government to Indians and the participation in the range of federal services, programs and benefits which are available through the Department of the Interior, Bureau of Indian Affairs, and other

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

recognized status.

The Penobscots and Passamaquoddies admittedly lacked these accoutrements of recognition; they did not have a reservation, they did not receive BIA services nor was their tribal existence acknowledged in a federal treaty, legislative act or executive order. Accordingly, they were classified as an "unrecognized tribe"[15] and were thought to fall outside the jurisdiction of Federal Indian law in general and the Nonintercourse Act in particular.

By the time Passamaquoddy v. Morton was finally litigated, the State of Maine had joined the case as "Intervenor"[16] and the Indian plaintiffs had amended their suit, requesting a declaratory judgment on:

(1) whether the Nonintercourse Act applies to the Passamaquoddy Tribe;
(2) whether the Act establishes a trust relationship between the United states and the Tribe; and
(3) whether the United States may deny plaintiff's

Executive departments and agencies (1695, added emphasis).

[15] The salient issue was whether the tribal sovereignty of Maine Indians was recognized by the federal government. Recognition by Maine, or any other state, for that matter, does not invoke a fiduciary relationship on the part of the federal government. State recognition has no effect on the legal status of an Indian group under Federal Indian law. A group of Indians may be recognized by its state but be unrecognized by the federal government -- e.g. as are the Shinnecock Indians on Long Island. This text follows common usage whereby "recognition" refers only to federal recognition unless otherwise specified.

[16] In certain circumstances, a third party which is not originally involved in the suit may, with the permission of the court, come into the case ("intervene") to protect its interests.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> request for litigation on the sole ground that there is not a trust relationship" (Passamaquoddy v. Morton 1975:370).

The Indians' land claim was still outstanding, yet the court was asked to rule only on the jurisdictional questions set forth. All parties involved were well aware of the potential consequences of the case. A decision for the plaintiff would go a long way toward substantiating their land claim; if the Non-Intercourse Act had jurisdiction over the Passamaquoddy, then Maine's treating with these Indians could be in violation of that law. Although the merits of the land claim still would have to be determined in court, such a finding would be consonant with a ruling for the plaintiff. If, on the other hand, the court held for the defendant, then the Indians' land claims (based as they were upon the 1790 Act) would have little merit for the act would have no jurisdiction in the matter. Whether Indian legal counsel could find another basis on which to press his clients' interests remained speculative.[17] In

---

[17] Prior to Tureen's representation of the Passamaquoddy, the case was handled by Don Gellers who originally worked on a land claim based on the alleged violation of a 1794 treaty between Massachusetts and the Passmaquoddy tribe. On March 8, 1968, Gellers and another lawyer, John Bottomly, began a suit against Massachusetts, hoping that the latter would then sue Maine, thus circumventing Maine's sovereign immunity. Shortly thereafter, Gellers became involved in defending himself against an alleged marijuana possession charge and dropped out of the case. Tureen, who had clerked for Gellers during law school, returned to provide routine legal service for individual Indians after he graduated in 1969; in 1970 he began to research the tribal land claim (see Brodeur 1982:85). Tureen's strategy was quite different from

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

short, the court had to rule on the relationship between the Indians and the federal government, a decision which would immediately determine whether the state or federal government had jurisdiction over the Indians and which, in turn, would circumscribe the parameters for eventual settlement of the land claim.

Judge Gignoux ruled in federal district court for the plaintiff, a decision which was subsequently upheld on appeal and by the Supreme Court. The court was unequivocal on the federal government's obligations toward the Maine Indians:

> That the Non-Intercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of the tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion (Passamaquoddy v. Morton 1975:370).

It was a landmark decision for it extended federal guardianship to Indian "wards" who previously were classified as "unrecognized," thereby opening a legal door for many eastern Indians. No longer were the latter prevented, from the outset, from pursuing land claims under Federal Indian law in the original 13 states on jurisdictional grounds. No longer did these Indians have to have the indices of status recognition (e.g. treaties, trust lands, BIA programs) in order to sue for restitution as a

---

Gellers, as the discussion below details.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"tribe" under the Non-Intercourse Act. No longer were the land claims of "unrecognized tribes" a dead issue.

In 1974 when Gay Head Indians were confronted with the Taxpayers Association injunction, the Passamaquoddy case had not yet been decided by the Supreme Court. Thomas Tureen, Passamaquoddy legal counsel, had, however, already co-authored a law review article on the applicability of the Non-Intercourse Act to eastern Indian land claims and the case had received considerable regional and national press coverage. Accordingly, the Wampanoag Tribal Council of Gay Head filed suit for return of the common lands under the Non-Intercourse Act, claiming that Massachusetts had illegally changed the Indian District of Gay Head into an incorporated town in 1870, alloting the lands in severalty and turning over the lands to the newly created town government.

When the favorable decision in Morton was issued by the Supreme Court in 1975, the hopes of Gay Headers were buoyed considerably. Shortly thereafter, several other "unrecognized tribes" likewise filed suit under the 1790 Non-Intercourse Act for restitution of their aboriginal territory.[18] They were encouraged not only by the

---

[18] These include:
Mohegan Tribe v. Connecticut 1980
Mashpee Tribe v. New Seabury Corp. 1979
Catawba Tribe v. South Carolina (filed 1980)
Chitimacha Tribe v. Laws 1980
Narragansett Tribe v. Southern Rhode Island Development Corporation 1976

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

favorable declaratory judgment in the case, but also by the events that followed. Morton was instrumental in pushing the State of Maine into an out-of-court settlement with the Maine Indians, one which was ultimately mediated and partially financed by the federal government in its trust capacity. The Indians received a total of $81.5 million, of which $27 million constituted a settlement fund and $54.5 million was used for the purchase of 300,000 acres of timberland (Wallace 1982:932, note 68), an astonishing amount in the history of American Indian land claims. Moreover, as part of the settlement package, the Indians received status recognition -- formal acknowledgment of their (semi-)sovereign powers. Now they were an Indian "tribe" not only in name and practice but, very importantly, in law.

Passamaquoddy v. Morton was first filed in 1972,[19] the Supreme Court rendered its opinion in 1975 and a settlement agreement between the Indians and the State of Maine was signed into law in 1980. It was a long haul for the Indians, one fraught with statute of limitations anxieties,

---

Schaghticoke Tribe v. Kent School Corp. 1976
Epps v. Andrus 1979

[19] The case actually began much earlier, in 1964, when the Passamaquoddies staged a demonstration to prevent the construction of a roadway over land which the Indians claimed had been illegally acquired from them. Prior to that, tribal leaders found it difficult to obtain legal representation for their claim. In 1964, Don Gellers took on their case (see note 14 above), filing a court action in 1968. See Brodeur 1982:76-85.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

as well as legal setbacks.[20] And, however substantial the final settlement may be, at least to some, it could not be termed an unqualified victory.[21] While the experiences of the Passamaquoddy offered Gay Head Indians a possible legal strategy for obtaining control of the common lands, they in no way guaranteed success.

For one thing, Morton's relevance to the land claims of other "unrecognized tribes" was limited. The court determined only that the Passamaquoddy Indians were a "tribe" within the meaning of the 1790 Act and was very clear that its finding did not extend blanket status recognition to them. Rather, it established a trust relationship only insofar as land claims under the act were concerned.

> We emphasize what is obvious, that the "trust" relationship we affirm has as its source the Non-Intercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at a later time recognize the Tribe for other purposes wihtin their powers, creating a broader set of

---

[20] The Passamaquoddies almost did not get their case heard because of a statute of limitations which was due to expire on July 18, 1972. An eleventh hour protective action kept the case ongoing (see note 10 above). In addition, there was much anti-Indian backlash after the Morton decision, spawning legislation to extinguish Maine Indian land claims completely. The political climate was tense and a negotiated settlement hard won.

[21] Some Indian leaders thought that the Passamaquoddy had "sold out" to the state and should have pressed for return and/or restitutition of all of their aboriginal territory to which they were entitled.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> federal responsibilities; and we of course do not rule out the possibility that there are statutes or legal theories not now before us which might create duties and rights of unforeseen, broader dimension. But on the present record, only the Nonintercoruse Act is the source of the finding of a "trust relationship," and neither the decision below nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe (Passamaquoddy v. Morton 1975:370).

In effect, a group of Indians did not have to be recognized in order to sue for land under the Non-Intercourse Act, yet eligibility to do so did not in and of itself confer federal recognition upon them. The experiences of the Passamaquoddy bear this out -- they only obtained federal recognition as part of the out-of-court settlement package. An "unrecognized tribe" claiming land under the Non-Intercourse Act would not be barred from initiating such a suit, yet the merits of the case would still have to be litigated -- e.g., whether the treaties with the state were bona fide, whether the disputed land was tribal, and whether the petitioning group had "standing" to make the claim.

Morton's applicability was also limited because of another legal issue, this time salient in that it was not addressed. The court ruled that the Passamaquoddy Indians were a "tribe" within the meaning of the Non-Intercourse Act yet it did not determine exactly what a "tribe" was. Nor was it requested to do so. Because both the plaintiff and the defendant stipulated that the Indians "have constituted

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

an Indian tribe in both the racial and cultural sense since at least 1776" (Passamaquoddy v. Morton 1975:370), the issue did not warrant intense scrutiny by the court.

The federal government tried to claim that the Passamaquoddy were not a federally recognized tribe and thus not eligible for federal protection under the Non-Intercourse Act. The court, however, rejected this view, stating that the act's general reference to "any...tribe of Indians" (added emphasis), indicated that a broader interpretation was warranted. It explained:

> But while Congress' power to regulate commerce with the Indian tribes, U.S. Const. Art. I, ss 8, includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependant tribe under its guardianship, United States v. Sandoval, 231, U.S. 28,46,34 S. Ct. 1 58L.Ed107 (1913), Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Non-Intercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized (Passamaquoddy v. Morton 1975:370, added emphasis).

The court interpereted "tribe" not as a federally recognized tribe but rather in more general terms. In an important footnote to the above, it cited U.S. v. Candelaria (1926), stating that in that case, the Supreme Court read "Indian tribe" as used in the Non-Intercourse Act of 1834, 25 US CA ss 177, to mean "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory. The [Passamaquoddy] Tribe plainly

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

fits that definition" (Passamaquoddy v. Morton 1975:370, note 8). The court not only adopted a definition of "tribe" it believed legally relevant, it also foreclosed debate on whether the Passamaquoddy fit that definition. Very critically, the Maine Indians did not have to prove tribal existence in court.

The Morton decision thus resolved certain issues but not others. That the Passamaquoddies were unrecognized yet entitled to trust protection under the Non-Intercourse Act and that they were a "tribe" in certain circumstances and not others, opened a Pandora's box of questions having to do with the legal classification of "tribe" and the rights thereof. While these questions, insofar as the Passamaquoddy were concerned, were rendered moot by Congressional recognition of the tribe in 1980, there was still much room for interpretation and litigation on the issues.

Federal Jurisdiction: Defining Parameters

With the legal door partially opened as a result of Morton, the Mashpee Indians filed a suit in federal district court on August 26, 1976 for restitution of nearly 11,000 acres of undeveloped land -- approximately three fourths of the Town of Mashpee, Massachusetts and estimated to be worth

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

some 50 million dollars.[22]

The Mashpee Wampanoag Indian Tribal Council, the administrative, legal and business representative of the "Mashpee Tribe"[23] since 1974, was responsible for bringing the legal action. It was represented by the Native American Rights Fund (or NARF as it is commonly called),[24] specifically Thomas Tureen, the same lawyer who had successfully established a trust relationship between the Maine Indians and the federal government in Passamaquoddy v. Morton. Barry Margolin, a colleague who did preliminary investigative work to determine whether the Mashpees had a case, and Lawrence Shubow, an attorney hired by NARF as the trial attorney.

The defendants in the case were 146 named individuals who held title or interest (20 acres or more) in the disputed land. This was later amended, in the interest of a quick resolution, to a certified defendant class, with the New Seabury Corporation (a large real estate development company) named as representative (it was the largest

---

[22] The suit also claimed 200 acres in the neighboring town of Sandwich, Mass. but the owners of this property were never involved politically or financially in the suit (Mazer 1980:181).

[23] During the trial and afterwards, defense lawyers would repeatedy impugn this label, referring instead to "a group of persons claiming to be the "Mashpee Indian Tribe" (see St. Claire and Lee 1979:91, added emphasis).

[24] A non-profit law firm which handles Indian grievances.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

landholder, owning some 3,000 acres in the town).[25]

Before the trial began, a motion by the defense to dismiss the case on the grounds that the Mashpee Indians were not a federaly recognized tribe (and thus did not fall within the jurisdiction of the Non-Intercourse Act) was denied based on Passamaquoddy v. Morton. A motion by the plaintiff for a continuance, to allow the Bureau of Indian Affairs to determine if the Mashpees were eligible for federal recognition, was also denied. The court reasoned that since the case turned on what it felt were "adjudicative facts"[26] rather than policy issues, it did not have to defer to administrative processes.[27]

The case went to trial, before a jury, on October 17,

---

[25] New Seabury Corproation was also number one on the list of ten leading taxpayers in town. The other nine, also involved in the suit, were likewise involved in real estate, although to a lesser degree (see Mazer 1980:185).

[26] Whether tribal identity is adjudicative, however, can be disputed. At least one writer has noted:

> Both the parties and the courts [in Mashpee] assumed tribal existence was a justiciable issue, an assumption open to doubt under the political question doctrine (Anonymous 1979:155, note 12.1).

Under the political question doctrine, the Supreme Court may refuse to rule, holding either that extra-legal factors are relevant -- i.e. it is a question of politics and not law -- or that the Court is not competent to apply legal rules, as in certain cases involving international jurisdiction. With very few exceptions, the doctrine has been applied narrowly (1) in foreign relations law, (2) regarding power over Indians, (3) the amendment process and (4) in some questions regarding legislative processes (see Scharpf 1966:596).

[27] At the time, a procedure to grant federal recognition to "unrecognized tribes" was being drafted by the BIA (see Chapter 5).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

1977, hearing evidence on whether the Mashpee Indians were an "Indian tribe" within the meaning of the Nonintercourse Act. It was a necessary first step in validating their land claim.

> Plaintiff must prove that it meets the definition of "tribe of Indians" as that phrase is used in the Nonintercourse Act both in order to establish any right to recovery and to establish any standing to bring this suit (Mashpee Tribe v. New Seabury 1978:572).

If a favorable judgment was obtained in this trial, they would be eligible for a second, in which they would have to prove (1) that the disputed land was tribal; (2) that the land transfers occurred without the consent of Congress; and (3) that the trust relationship between the group and the United States had never been terminated or abandoned.

Like those of the Passamaquoddy, the merits of the Mashpee land claim were not directly addressed in the court cases that bore their names. Both Passamaquoddy v. Morton and Mashpee Tribe v. New Seabury Corporation et al. dealt with the meaning of "tribe" under the Non-Intercourse Act but whereas Morton did not question the tribal identity of the plaintiff (indeed, it was already stipulated), in the Mashpee case, tribal existence was the "threshold issue," with the burden of proof resting squarely on the plaintiff.[28]

---

[28] Before the trial began, Judge Skinner made it clear that this was appropriate not only on technical grounds, but also because of the substantive issues at stake. He told attornies for both sides: "It seems to me quite proper to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Following on Passamaquoddy v. Morton, the Mashpee court employed a definition of "Indian tribe" first articulated in Montoya v. United States (1901), and subsequently cited in United States v. Candelaria (1926) regarding the Non-Intercourse Act. Accordingly, the Mashpees had to prove (1) that they were a group of Indians of the "same or similar race"; (2) that they were "united in a community"; (3) that they were "under one leadership or government"; and (4) that they "inhabit[ed] a particular territory."

Tribal existence was framed for the jury in the form of special interrogatories, delivered by Judge Skinner. First and foremost, the jury had to decide whether the plaintiff constituted a "tribe" on the date the legal action commenced (August 26,, 1976) for "[I]t is indisputed that if plaintiff was not a tribe in 1976 it lacked standing to bring this suit..." (Mashpee Tribe v. New Seabury Corp. 1979:573. The special questions also identified several other dates when tribal existence was critical:

> (1) July 22, 1790 - when the first Non-Intercourse Act was enacted.
>
> (2) March 31,1834 - when the Indian plantation of Mashpee (Marshpee) was changed to an Indian District by the Commonwealth of Massachusetts. (The Indians had petitioned for the change because they rejected the exploitation of the apppointed white plantation guardians and instead wanted to govern themselves, as indeed they could under district organization since a district was governed in substantially the same way as

---

say that whoever seeks that remedy [the land claim] has got to show that they are in a radically different kind of status than other people" (as quoted in Brodeur 1982:46).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

a Massachusetts town.)

(3) March 3, 1842 - when the district lands were formally partitioned among the Mashpee Indian proprietors and their children by Massachusetts.

(4) June 23, 1869 - when all restraints on alienation of Indian land were removed by Massachusetts.

(5) May 28, 1870 - when Massachusetts changed the Indian District of Mashpee into an incorporated town.

These dates were deemed to be variously important by the plaintiff and defendants, according to their respective legal theories. Judge Skinner himself did not feel that all of them were significant (specifically he rejected 1790, 1834 and 1869), yet he included them "to preserve the widest possible scope of review of the legal issues" (Mashpee Tribe v. Town of Mashpee 1978:943). Finally, the jury was asked, if indeed they found that the Indians constituted a "tribe" at any of the above dates, "did they continuously exist as such a tribe or nation from such date or dates up to and including August 26, 1976?" (Mashpee Tribe v. Town of Mashpee 1978:943, added emphasis).

The jury's answers to these questions resulted in the judge's dismissal of the Mashpee's land suit, a decision which was upheld on appeal in May 1983 and denied writ of certiorari by the Supreme Court in October, 1983. The twelve citizens concluded that the Mahspee Indians we a "tribe" in 1834 and 1842 but were not in 1790, 1869, 1870 and 1976. Although the plaintiff filed a motion in opposition, claiming that the jury's answers were "fatally

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

inconsistent" and violated the court's instructions, the judge thought otherwise. Skinner admitted that there might be some ambiguity in their answers but asserted that they were "perfectly rational...and do not reflect such lack of understanding or lack of compliance with the instructions as to vitiate the remaining answers" (Mashpee Tribe v. Town of Mashpee 1978:). The case was dismissed on its merits, with the plaintiff having failed to establish standing as an "Indian tribe" to bring the suit.

The verdict was a bitter defeat for the Indians and a glorious victory for the whites and real estate interests named in the action, both sides remaining cautious until the appeal process was exhausted. For the Indians of Gay Head, the importance of the Mashpee case stems not only from the legal issues which were resolved (or not) by the trial court, but also from how they were resolved. Here, events leading up to the trial and occurring outside the courtroom prove relevant.

Although the the Passamaquoddy case began in began in 1964 without much fanfare, it gained media coverage and considerable political, economic and social importance in the course of its tortured development. By the time the case was finally resolved, it had reverberated at the state and national levels: the Maine gubernatorial race had been set afire by pro-Indian and anti-Indian rhetoric and President Carter had been boxed into the politically

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

embarrassing position of defending human rights in the international arena while the BIA attempted to ignore the claims of native minorities at home. Moreover, the case had made national headlines in January 1977 when an Interior Department report recommended that ejectment actions be filed on behalf of the Indians against the 350,000 people living on the disputed land and against the timber and paper companies which not only owned a good portion of it, but which were also major economic and political forces in the state.

The anti-Indian backlash was both vocal and organized. That March, the Maine congressional delegation introduced identical bills in the Senate and House to extinguish the Indians' aboriginal title and to severely limit any monetary damages which the Passamaquoddies and Penobscots might claim (Brodeur 1982). The following year, the American Land Title Association (ALTA) published a 134 page memorandum, stating that Congress had the "constitutional authority and civic responsibility" to deal with the Indian claims by approving the land transfers in question, thereby extinguishing Indian title and any claims for damages that might result (Vollman 1979:14-15). Both actions reflected the view of many property owners (both commercial and private), that the Morton decision constituted a serious attack on their land titles, one which they tried to counter by calling for the immediate extinguishment of Indian title generally.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

By 1977, then, eastern Indian land claims were provocative issues; on the one hand, "unrecognized tribes" who were buoyed by the Morton decision asserted their tribal identity, laying claim to thousands of acres of aboriginal territory; on the other, non-Indian opposition to such claims was vehement. These repercussions had a palpable effect upon the Mashpee case.

When the Mashpee Indians filed suit, the defendants hired James St. Claire, of the prestigious and resource-rich Boston firm of Hale & Dorr. St. Claire had defended Richard Nixon in the Watergate tapes case and was retained by the Town of Mashpee[29] for $65,000. By the time the case was over, he received over $300,000 in legal fees and disbursements (Brodeur 1985:40). Clearly, the Town and real estate developers, who also had a voice in choosing an attorney, took the Mashpee case very seriously. So too did several title insurance companies which, in protecting clients' property in Mashpee, retained Allan van Gestel, who

---

[29] Without consulting their constituents, the two white selectmen decided that the Town would assume the financial resonsibility of a defense -- i.e. tax revenues would be used to defray legal fees, etc. During the course of litigation (between 1976 and 1978), taxes totalling $811,584 remained unpaid, half of which were owed by the top ten real estate developers in town who were also party to the suit. As Mazer notes, "Ironically then although real estate developers were so dramatically affected by the Indian suit, it was these same individuals and corporation who were not paying their taxes to help support the defense" (1980:192, added emphasis). Moreover, since the taxes of Mashpee Indians were collected and disbursed by the Town, this meant that the Indians were, in effect, contributing to their opponents' defense, a bitter irony, indeed!

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

would later represent Jacqueline Kennedy Onassis and others in Gay Head.

Even before a word of testimony was heard, the Mashpee suit had an immediate and profound imapct. Relations between Indians and non-Indians in town, historically cordial but not friendly, since each tended to socialize with their own, were now overtly hostile. Anti-white slogans appeared on a building at a local golf course and a New Seabury tennis building was set on fire; both acts were attributed, by non-Indians, to Mashpee Indian vandals. At several selectmen-sponsored meetings, held to inform homeowners about the progress of the suit, anti-Indian remarks received boisterous support. Further, non-Indians who advocated negotiation rather than litigation, were deprecatingly called "Indian lovers."

The legal action also had the effect of clouding land titles in town, making it virtually impossible for anyone to buy or sell property since no mortgages or title insurance could be obtained. The Tribal Council made numerous public statements that it was not interested in displacing families from their homes, and it even voluntarily amended its suit to exclude private homes and accompanying property of one acre or less as a show of good faith. Nevertheless, the misconception that Indians were trying to kick white homeowners off their land -- that honest folk who had bought their homes in good faith could be displaced by an obscure

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

law -- prevailed and was deliberately propagated. At homeowners' meetings, the two white selectmen (one of whom was in the real estate business), "warned that Mashpee's residents would be living on a reservation if the Indians were successful in their claim and that the tribe would be a separate political entity with its own police force, for example" (Mazer 1980:221).

With a lis pendens[30] hanging over the majority of land in Mashpee, land sales dropped a precipitous 65 percent and construction 86 percent (Mazer 1980:184-85), about the only local industries which had been enjoying a boom in recent years. (Mashpee underwent rapid growth from 1965 to 1975, its population quadrupling from 665 mostly Indians to nearly 2,500 mostly whites, in large part on account of the real estate development at New Seabury.) Mazer also notes that the suit could not have occurred at a worse time since the real estate developers were just struggling back to their feet after a general building decline which ended in 1975.

The trial thus began in a highly charged setting; in fact, the unwillingness of the defense to agree to an out-of-court settlement proposed by Massachusetts legislators,

---

[30] A lis pendens is a notice of public record warning all persons of pending litigation regarding certain property. Since any interest in that property is subject to a decision by the court, title may be affected by an adverse judgment in the case.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

or to have the case heard by a government mediator,[31] resulted in the case proceeding to trial, something which the Mashpee Indians initially hoped to avoid and which the federal government had strongly opposed, as a matter of policy, following Passamaquoddy v. Morton. From the non-Indians, there was considerable pressure to clear land titles, stemming what was seen as a flood of eastern Indian land claims, and to assure that a racially mixed group of people such as the Mashpees not be classified as an "American Indian tribe." From the Mashpee Indians' point of view, the pressures were also great: to halt development in town and establish a tribal land base, to gain legal acknowledgment of their group as a tribal entity and to obtain legitimation as an American Indian community.

A jury was chosen (eight men, four women, all non-Indian) and the tribal commenced on October 17, 1977, lasting 40 days. Counsel for the defense and plaintiff both brought in expert witnesses -- anthropologists, historians, and a genealogist -- who testified to opposing theories and interpretations of the facts. The evidence regarding the four-pronged Montoya/Candelaria definition of "Indian tribe" was far from unequivocal for either side. A brief summary

---

[31] An Indian offer to drop their claim to all developed property in exchange for most of the Town's undeveloped land was rejected by town selectmen. Similarly, a suggestion by former Supreme Court Justice William B. Gunter that a federal mediator be appointed was also turned down by town officials (see Brodeur 1985:40-41).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of key issues illustrates some of the problems jurors faced in their deliberations.

The first criteria for "Indian tribe" was that the group be comprised of "Indians from the same or similar race." On behalf of the plaintiff, an historian and two anthropologists testified that the Mashpees were an "Indian tribe" based on their ancestry and social organization -- e.g., they had a closely knit and extensive kinship system, a concept of homeland, shared cultural identity and traditions, all consistent with their Wampanoag heritage. The defense in turn called to the stand its own social scientists who stated that the group was not an "Indian tribe" but rather a mixed group of Indians who had intermarried with whites and blacks after their conversion to Christianity in the eighteenth century. On cross-examination, St. Claire repeatedly hammered at the issue of miscegenation, referring to the Mashpees as "persons with a reputation for some Indian ancestry" (as quoted in Brodeur 1985:43). These pointed remarks reinforced what jurors themselves saw in court -- the skin of many Mashpee Indians was brown, their hair kinky. While the plaintiff countered with Indian lawyers and activist Vine Deloria (Oglala Sioux), who pointed out that blood quantum is not indicative of tribal status -- indeed, some federally recognized tribes had no "full-bloods" at all -- the defense counsel continued to focus upon the racial heritage of the plaintiffs.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

On the second criterion -- "united in a community" -- Shubow solicited testimony on the cultural boundedness of the Mashpee Indians -- adherence to Indian traditions and the dominance of kinship in Mashpee social and political interaction. In contrast, defense counsel discussed assimilation, arguing that, among other things, the Mashpees' conversion to Christianity, use of English and adoption of Massachusetts town political organization made them indistinguishable from others in the surrounding community. He dismissed examples of Mashpee Indian cultural identity -- e.g., cooking Indian foods, attending pow-wows -- as "last minute efforts to create the appearance of a tribe" (as quoted in Brodeur 1985:45).

The degree to which Mashpee Indians were distinct and separate from their non-Indian neighbors was also an issue with respect to the requirement that the natives be "under one leadership or government." The plaintiff argued that Indian leaders ran tribal affairs at given points in Mashpee's history -- e.g., in colonial days sachems served as tribal leaders; in the nineteenth century the natives rejected white plantation guardians and instated their own overseers; and in the twentieth century they elected Indian selectmen and chose tribal officials. The defense, on the other hand, stressed that an "Indian tribe" is not a voluntary association but a political entity with sovereign powers -- e.g., the power to enact laws, create and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

administer a criminal justice system, define membership, regulate use and dispose of members' property, etc. (see St. Claire and Lee 1979:103-104). Moreover, St. Claire and Van Gestel contended that a "tribe" must have an independent leadership with strong enough authority over its members to distinguish them from the rest of the population, and called several Indian witnesses who testified that they do not consider various tribal officials as their leaders. Chief Earl Mills himself stated that "I have no power over anybody. I carry out their will. We operate by consensus" (as quoted in Brodeur 1985:43).

The issues before the jury were therefore complex. Members had to decide which interpretation of "Indian tribe" -- that of the defense or that of the plaintiff -- was more persuasive and then, whether the evidence supported that interpretation. Further, they had to do this for each of the six dates identified -- 1790, 1834, 1842, 1869, 1870 and 1976. The judge's instructions to the jury, a three hour discourse in which he included his own views on the issues and evidence, proved crucial inasmuch as it offered them yet another interpretation of the Montoya/Candelaria definition of "Indian tribe," this one with all the weight of judicial authority.

Regarding the racial mix of the Mashpees, for example, Judge Skinner said that the classification of Indians in old census reports as "Negro" or "Mulatto" indicated little but

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the prevalent racism of the times. He also noted that intermarriage itself did not disqualify Mashpees as Indians. More importantly, he said, the jurors should ask themselves: "On the evidence, are you satisfied that tribal existence survived, and that the outsiders were incorporated into the tribe and became part of it?" (as quoted in Brodeur 1985:47).

On the issue of community, the judge stated that there had to be a cultural boundary which distinguished the Indians from others. It could be imposed by the outside, e.g., by discrimination of the whites against the Indians, but it had to be more than a territorial demarcation: "I suggest to you an Indian community is something different from a community of Indians" (Mashpee Tribe v. Town of Mashpee 1978:586).

Regarding the defense's contention that the Mashpee Indians had "abandoned" their tribal forms, Skinner noted that the critical issue was that of intent. When the Indians accepted proprietorship of the land (and attendant restrictions), for example, the jury had to decide were they "intending to give up their tribal organization and assume an English organization or...was [it] simply the tribal organization carrying on as owners of this plantation with a different label[?]" (Mashpee Tribe v. Town of Mashpee 1978:586). He also stressed that "abandonment of a right or status does not occur unless it is voluntary..."(Ibid).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

And, on the important issue of assimilation, he asserted:

> If you find that the group is assimilated, well, it doesn't have a distinct community, it's just blended in with everybody else, in all respects or in all significant respects. So assimilation is simply a way of expressing the reverse of the existence of any Indian community (Mashpee Tribe v. Town of Mashpee 1978:586).

Since the burden of proof rested with the plaintiff, the jurors were also instructed that if they had any doubts on a specific issue, they had to find for the defendants; given the verdict, they apparently did. In fact, their answers to the interrogatories left many with doubts of their own regarding the jurors' view of the evidence. Plaintiff's counsel, for example, observed after the trial: "We have a mystery...[w]e have a tribe that was in existence in 1834. What became of it? (as quoted in Brodeur 1985:6). One might also ask, where did it come from if the Mashpee Indians did not exist as a "tribe" in 1790?

On appeal, the plaintiff argued that the district court erred (1) in not granting a continuance, (2) in its instructions regarding the definition of "tribe," (3) in the allocation of the burden of proof, (4) in viewing the jury's answers as consistent with each other and with the court's instructions, and (5) in failing to investigate adequately the impact of an anonymous phone call to a juror. The appellate court rejected all of these claims citing case law that the lower court had not made any procedural errors regarding points 1,3 and 5. In examining 2, Skinner's

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

instructions to the jury, the appellate court stated that the issue was not whether the instructions were technically correct, but whether they conformed to the plaintiff's view of the law.

> We conclude that though a few isolated sentences of the charge may have been unclear or overstated, the instructions taken as a whole were largely consistent with the position plaintiff argued before us. Therefore we will not reverse on the basis of the court's instructions (Mashpee Tribe v. New Seabury Corporation 1979:587).

Regarding the plaintiff's claim that the jury's answers were fatally inconsistent and ambiguous (4), Judge Coffin went on to state that the jurors could reasonably find that the Mashpees voluntarily abandoned tribal forms in 1869 and added that the burden of persuasion rested with the plaintiff to show that this was involuntary. Further, he said that the plaintiff was obliged to object to any alleged ambiguity in the judge's instructions before the jury deliberated. Coffin admonished:

> The fact that this argument was not specifically made until the verdict had come in suggests that plaintiff did not consider this [ambiguity] a problem until it discovered its case badly needed some new source of life (Mashpee Tribe v. New Seabury Corporation 1979:592).

The lower court's ruling was thus upheld, with the case denied write of ceriorari by the Supreme Court in 1983.

The Mashpee trial and appeal process resolved few issues. Most importantly, they did not resolve the meaning of "tribe" except in general terms when citing the Montoya/Candelaria definition. In fact, the appellate court

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

specifically shied away from formulating an all purpose definition, stating:

> The court did a good job with a very difficult task. ...We think it appropriate that the definition of "tribe" remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions. That the Mashpees have lost this case represents not a failure of the law to protect Indians in changing time, but a failure of the evidence to show that this group was an object of the protective laws. In future cases, if the issue of tribal status is raised, the court, with the aid of the parties and expert witnesses, will be able to shape instructions responsive to the special problems presented at that time. For these reasons, we think it preferable not to adopt, word-for-word, the court's instructions as the "true" definition of "tribe." Unlike, for instance, explanations of "reasonable doubt", no explanation of the Montoya definition can adequately serve in all cases at all times (Mashpee Tribe v. New Seabury Corp. 1979:588).

The interpretation of the Montoya/Candelaria criteria remained as inconclusive as Judge Skinner's admittedly "ambiguous" instructions and the jury's equally "ambiguous" answers. Nevertheless, for the Indians of Gay Head and their legal counsel, many of whom attended the trial, the lessons of Mashpee were invaluable. They saw first how facts could be variously interpreted to serve opposing theories. Moreover, they saw the lives of their fellow Wampanoags put on trial, scrutinized and picked over for evidence of "tribal" or "assimilated Indian" characteristics. They saw too that expert witnesses could not always parry the thusts of a skilled cross-examiner. In short, they learned what most experienced litigators know:

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the outcome of a trial is dependant not only on the facts, but also on the skills of the respective counsel, the comportment of the judge, the testimony of the witnesses and upon the jurors themselves. As one lawyer put it, a jury trial is "anybody's horse race."

For the Mashpee Indians, their counsel and Gay Head Indian observers, the anti-Indian backlash leading up to the trial, the conduct of defense counsel during it, the judge's interpretation of the Montoya/Candelaria criteria, the jury's "ambiguous" answers to the interrogatories and the reluctance of the appellate court to overturn a jury determination in the absence of a clear technical error, all served to confirm that tribal existence could not be objectively determined by a jury trial. Indeed, with hindsight, some felt that it was a tactical error to even try to prove the Mashpees a "tribe" in such a setting. Prevalent stereotypes about "Indians" -- e.g., red skin, aboriginal Indian dress, elliptical speech, native religion -- and western conceptions about "leadership" and "government" -- e.g., coercive, binding authority, ordered succession, explicit rules and sanctions -- exerted a stranglehold on the definition of "tribe" employed by the court which no amount of social science theory could shake. If there were any way to avoid a similar debacle in Gay Head, the Vineyard Wampanoags would surely take it.

In short, the Passamaquoddy and Mashpee land claims

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(both the legal decisions and the processes by which these were obtained) had a profound impact upon Gay Headers and their legal options. The Passamaquoddy case enabled Gay Headers to sue for title to the common lands under the 1790 Nonintercourse Act, charging that Massachusetts illegally changed the Indian District of Gay Head into an incorproated town in 1870 and turned over title to the common lands to the Town of Gay Head. The prospect of a negotiated settlement package, like that of the Maine Indians, which included land, money and status recognition -- glowed brightly in the hopes of many Gay Headers. On the other hand, the anti-Indian backlash which the decision spawned, coupled with the long and difficult political process of reaching an actual settlement (one in which the Indians as well as the State of Maine "gave up something"), made it clear that a Non-Intercourse Act land claim was by no means a sure shot nor, for that matter, was it unaffected by extra-legal factors. Moreover, the precariousness of the entire legal action was underscored by the experiences of the Mashpee Indians in court where tribal existence proved difficult to interpret and demonstrate. While Passamaquoddy v. Morton established that Gay Headers were not automatically excluded from a Non-Intercourse Act claim on jurisdictional grounds, Mashpee v. New Seabury Corp. established that standing (or classification) as an "Indian tribe" remained a substantial test for "unrecognized tribes"

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to pass, one with rules which were "ambiguous" to say the least.

What, then, were Gay Headers' legal options? Given the results of the Mashpee case, it was clear that they could not follow the Passamaquoddy example. The non-Indians of Gay Head would never give away their "ace in the hole" and stipulate that Gay Head Wampanoags constituted a "tribe." Surely Allan Van Gestel, who successfully argued for the defense in Mashpee and was retained by some non-Indian property owners in Gay Head, would employ a similar strategy in the Vineyard case and contend that Gay Head tribal forms were lost through assimilation and voluntary abandonment.

The Mashpee example was, as we have seen, even more problematic. While Gay Headers could take their chances in court having learned some important lessons from the Mashpee trial, there was still great risk to such action. First, the historical similarities between the two cases were substantial. Both involved Indian communities whose members had intermarried with whites and blacks for many generations. The two communities had been administered as Indian plantations in colonial times, then as Indian districts in the nineteenth century and had been incorporated as towns by Massachusetts in the latter part of the century. For both groups, their social organization was kin-based, members spoke English, had long ago converted to Christianity, and did not organize a formal tribal council

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

until the 1970's. Politically, the groups were also similar with their leadership more or less informal and consensual. In short, there were many analogous Mashpee circumstances from which defense counsel could readily draw, serving as negative precedents for Gay Head.

Second, with the two communities located only a ferry ride away from each other in southeastern Massachusetts, they were subject to the same media coverage, reading the same newspapers, viewing the same TV news programs. People on the Vineyard and the Massachusetts mainland knew about both cases, the issues involved and the extra-legal factors that surrounded them. With the legal issues similar, the substantive facts similar and the Mashpee and Gay Head juries likely to be drawn from similar pools, what were the chances that Gay Head Indians could obtain a verdict different from that in Mashpee?

While a jury trial was a strategically risky means of demonstrating tribal existence, there were few alternatives. Remember, Indian plaintiffs must first demonstrate standing as an "Indian tribe" to even be eligible to sue for land, and/or damages under the Non-Intercourse Act. A suit brought by descendants of Chappaquiddick Indians (also in Massachusetts) in late December 1978 for recovery of land under the Non-Intercourse Act (Epps v. Andrus 1979) was dismissed precisely because the plaintiffs did not allege tribal status but instead sought restitution as individual

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

heirs. Therefore, without tribal status, or the stipulation of tribal status, Gay Head Indians could not sue for return of the common lands under the Non-Intercourse Act or reasonably negotiate toward an out-of-court settlement of their land claim, their classification as an "Indian tribe" being the threshold issue in determining jurisdiction of the Act. If Gay Headers were going to avoid the jury trial route, they had to find some way around the tribal existence roadblock.

In 1978 such a way was made possible by a new administrative policy which was signed into law on October 2nd. Codified as 25 CFR 54, the BIA's federal acknowledgment policy (or FAP as it is commonly called) provides a formal process by which "unrecognized tribes" can obtain status recognition -- i.e., they can become federally recognized tribes with all the privileges, obligations and immunities that such acknowledgment entails. If acknowledged, petitioners are eligible for BIA benefits and services as well as the trust protection of the federal government.

FAP is the same process which the Mashpee legal counsel had tried unsuccessfully to invoke when it filed for a continuance prior to the trial. A determination that the Mashpees were a "tribe" by the BIA would have automatically granted the group standing to proceed with its land claim, for a federally recognized tribe certainly qualifies as "any

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribe" within the meaning of the Non-Intercourse Act. A subsequent trial would have then dealt with the validity of that claim rather than with demonstrating standing to bring the claim in the first place. Put another way, a positive FAP ruling for the Mashpees would have enabled them to surmount the issue of tribal existence which ultimately hobbled them in court. Whether or not the group could meet the stringent FAP criteria, however, was never determined because, at the time, the regulations existed only in draft form and had not yet been enacted. As noted above, the court ruled that it was not obliged to wait for the FAP policy to go into effect and so the case proceeded to trial.

Though the Mashpee Indians narrowly missed availing themselves of FAP, the Gay Head Indians were and did. In February 1982 the Wampanoag Tribal Council of Gay Head, Inc. (WTCGH) hired two anthropologists[32] to help it prepare a federal acknowledgment petition in accordance with the BIA's published Guidelines. Work on the petition proceeded in order to satisfy the threshold issue of tribal existence. At this point in time it was not necessary that a petition in fact be submitted to the BIA and be accepted by it. Rather, for negotiation purposes -- that is, for the purposes of developing an out-of-court settlement between

---

[32] Jack Campisi was originally hired to prepare the historical documentation necessary for a FAP petition, while I was hired to prepare an ethnographic account of the Indians following incorporation of the town in 1870 and to supervise the collection of required genealogical data.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the Tribal Council, Taxpayers Association and town -- it was only necessary that the Wampanoags strengthen their bargaining position. If it appeared that the Gay Head Indians could attain status recognition through FAP, it would then be in the Taxpayers' best interests to settle the claim out of court.[33] A negotiated settlement would also enable the Indians to avoid spending unnecessary time and money on the preparation of a FAP petition. Although federal acknowledgment could resolve the issue of tribal standing, it could not resolve the Gay Head Indians' land claim -- that would still have to be determined on its merits or through subsequent negotiation. An out-of-court settlement was therefore preferable to all parties, if the Passamaquoddy and Mashpee experiences were any indication of how protracted and costly such claims could become. Moreover, it was encouraged by the federal government which stated as a matter of policy that litigation was not the preferred means of resolving land claims.

We see then that what began as a dispute over property ownership -- who had the right to own the Gay Head common lands -- turned into and on a more fundamental debate over classification. What legal rights and privileges Gay Headers could claim depended upon whether they were a

---

[33] This is similar to the resolution of the Passamaquoddy claim where the Morton decision played a major role in pushing the State of Maine toward a negotiated settlement.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

recognized tribe, any Indian tribe under the Non-Intercourse Act or a community of Indians.

But to say this is only part of the story, for the impact of legal classification on "unrecognized tribes" is not restricted to the formal rights and privileges which are denied these groups. Equally, if not more important, is the way in which legal classification constitutes these groups and shapes what members view as viable goals and strategies. As discussed above, the decision of the Tribal Council to prepare a FAP petition is best understood after considering the processes by which the Passamaquoddy obtained a land settlement and the Mashpees did not. Only by examining what went on inside and outside the courtrooms in these cases do we begin to see why Gay Headers chose the FAP route. The classificatory process not only affected what issues were salient (i.e., tribal existence became a threshold issue because Gay Headers were unrecognized), but also how Gay Headers perceived of their legal options (i.e., FAP was seen as a less risky means of establishing standing than a jury trial).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 2

CODIFICATION

The legal status of Gay Head Wampanaogs, like that of all other Indian peoples in the United States, is the product of an ongoing relationship between the federal government and its indigenous peoples, a relationship which has undergone continual negotiation and codification since colonial times. Numerous treaties, judicial decisions, legislative acts and executive orders have greatly influenced how Indians have been treated since contact and what courses of action were conceivable and possible for them. According to a recent report of the U.S. Commission on Civil Rights, legal status is the single most important factor affecting Indian peoples (1981). Federal Indian law has delimited the rights of Indians with respect to cultural practices, the exercise of tribal sovereignty, and the use and management of resources. Virtually no aspect of American indian life has escaped the impress of U.S. policy.[34]

---

[34] In its early years, federal Indian policy arrogated to itself the right to regulate Indians' external relations -- with the federal, state and local governments, with foreign nations and with American individuals. Over time, the power of the federal government has indeed become "plenary" as it has extended its fiduciary responsibilities over Indian education, religion, civil rights, healthcare, economic development, tribal political organization and law enforcement. See generally Barsh and Henderson 1980, Cohen 1972, Deloria and Lyttle 1983, Price 1972, Wilkinson 1987.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

For those who deal with Federal Indian law -- e.g., natives themselves, legal practitioners and some scholars -- this statement is an obvious one and warrants little elaboration. Nevertheless, I emphasize the point precisely because there are many studies, too numerous to list by name, which slough over or completely ignore the pervasive role of Federal Indian law in native life. These writers discuss various aspects of Indian ethnography or U.S.-Indian relations without addressing the ways in which law encourages, permits or makes possible certain actions while discouraging, disallowing or outlawing others.

This legal blindness has a long history, characterizing the research on American Indians in the 19th and early 20th centuries. Cast as national exotica, North American indigenous peoples were studied like the peoples of Africa, the Middle East or South America -- i.e., in relative isolation from the larger social, economic and political contexts in which such units functioned. Anthropological monographs from this period typically described discrete societal entities, each with its own social, political and economic practices and language or dialect (e.g., Morgan 1962, Eggan 1937, Fletcher and LaFlesche 1972, Radin 1970, Llewellyn and Hoebel 1941). Where change was the object of study, theorists did not so much investigate the factors which brought about transformations in native life as they did contrast the "past" with the "present," highlighting

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

which Indian traits endured, withered or continued in an altered form (e.g. Mead 1932, Ewers 1977).

After World War II the development of "ethnohistory," which utilized analytical and methodological tools from both history and anthropology, contributed an important dimension to the study of America's indigenous peoples: that of historical perspective (see the "Introduction" to Leacock 1971). Ethnohistorians now recorded the fact of change within Indian communities from "former times," and examined the multiplex transformations which natives continually experienced since European contact (e.g., Jennings 1975, Axtell 1981, Hauptman 1980, Brenner 1980, Venables 1980, Hickerson 1970, Perdue 1979, McLoughlin 1984, Hurtado 1982, Berthrong 1975, Trosper 1981).

In revealing that the past of American Indians is far more complex and varied than previously acknowledged, ethnohistorical research has highlighted the interconnectedness of U.S.-Indian relations -- i.e., that it is impossible to understand American Indian history without concomitantly investigating U.S. history. It has also produced many studies examining various U.S. policies and practices and their impact upon Indian peoples (e.g., Trelease 1969, Salisbury 1982, Johnson 1977, Green 1982, Trennert 1975, Hagan 1971, Otis 1973, Hoxie 1984, Szasz 1974, Taylor 1975, Hauptman 1981, Kopper 1977). Although this research has provided much valuable information

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regarding the social, economic and political embeddedness of various federal Indian policies, including the attitudes, interests and goals of those instrumental in effecting them, for the most part it has ignored the structure of the legal arena in which U.S.-Indian relations were and are negotiated. Without examining the legal rights, privileges, obligations and limitations accorded natives, however, one cannot understand why the United States was able to enact certain policies nor can one properly assess the latter's full impact upon American Indian peoples over time.

At one level, then, this work takes as axiomatic the important role of Federal Indian law in U.S.-Indian relations and expands on this theme with regard to unrecognized American Indian tribes. At another, this study is about the legal rationale which was used in the past to deny tribes such as the Gay Head Wampanoags federal recognition and which is currently being used to determine which Indian groups are to be recognized henceforth. It is about the concepts of right on which federal power rests and their ramifications upon tribal sovereignty.

The Power of Law

Previously I stated that Federal Indian law has played a critical role in U.S.-Indian relations but refrained from elaborating what that role has been. In the accompanying footnote, I listed many different areas of native life which

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

have been subject to federal regulation. Although federal policy did indeed have a profound impact upon American Indian peoples, nevertheless it would be wrong to infer what that impact was based upon the formal language of specific laws, acts, treaties or court decisions. Some of these forms had little immediate effect or ones different than those conceived or designed by those who drafted them. Still others produced the desired immediate results but obtained different ones in the long run.[35]

All of this is to say that the statement that Federal Indian law had an "effect" upon native peoples does not tell us very much about the way in which it affected them nor why -- i.e., what was it about the law that produced the results it did or did not, for that matter. Indeed, if there one dominant theme in the history of U.S.-Indian relations it is the gross ineffectiveness of Federal Indian law. Despite the United States' repeated efforts to extirpate tribal

---

[35] For example, the Dawes Act was designed to encourage self-sufficiency on the part of the individual American Indians. Accordingly, the latter were allotted fee simple title to parcels of land, ostensibly, to permit them to work on their own behalf and to reap the benefits of their own efforts. The results among many Western tribes were disastrous, however, as these allotments swiftly and decisively fell into white ownership. Indians became greatly impoverished and even more dependent upon handouts from the federal government.

In Gay Head, in contrast, allotment of Indian lands by the State of Massachusetts in 1870 had virtually no immediate effect upon the Wampanoags, economically, socially or politically and the group functioned much as it did before incorporation. In the long run, however, the effects of allotment were considerable (see Chapter 6).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

political, social and economic practices and to incorporate individual natives into mainstream American society, Indian tribes endure as distinct social, political and economic entities. Today there are more than one million American Indians living on or adjacent to 287 federal reservations.[36] The Bureau of Indian Affairs, which is charged with the administration of U.S.-Indian relations, has an annual budget (as of 1993) of some $1.5 billion dollars and services 317 federally recognized tribes in the lower 48 states and 197 Indian entities in Alaska. It is clear that in over 200 years of trying to make the Indians and their problems disappear, they are very much with us and, if anything, require an ever-increasing amount of energy and resources even to maintain the status quo, never mind solve any of the pressing issues throughout Indian Country.

There is, in other words, an apparent paradox that wants explaining. On the one hand, Federal policies have been held responsible for depriving native peoples of their aboriginal land base, for eroding tribal political organization, and for undermining native socio-cultural integrity. On the other, native peoples have demonstrated great tenacity, flexibility and creatively with respect to their political, economic and socio-cultural practices.

---

[36] According to the 1990 U.S. Census, almost two million Americans claim American Indian ancestry.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Today, there are no American Indians who live as their precontact ancestors did, yet natives continue to maintain identities, tribal affiliations and/or lifestyles which are demonstrably "Indian." What do I mean, then, when I say that Federal Indian law has had a profound impact upon natives peoples?

To answer this question, requires that we look more closely at the relationship of law to social interaction. However, a few qualifying remarks are necessary. The literature on law and society is immense and the following discussion necessarily cursory. My intent is not to provide an overview of the field or even to summarize the major theoretical debates. Rather, my aim here is only to highlight selected themes which illuminate my approach to legal processes. The following discussion explains what I mean when I refer to the power of law.

Autonomy, Authority and Substance

Theoretical approaches to law commonly address three issues: autonomy, that is, how law is defined in relation to other societal phenomena; authority, or the right of law to set behavioral/conceptual limits upon members of society; and substance, or what the law purportedly says as well as how it says it.[37] To a great extent, writers analyze the

---

[37] What the laws says may be viewed in several different ways. First, what does the written document state -- i.e., what is its literal meaning? Second, what is the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ability of law to effect (or not) specific outcomes based on how they deal with these themes.

As Robert Gordon observes, writers as diverse as Montesquieu, Adam Smith, Karl Marx, Max Weber, Oliver Wendell Holmes, Roscoe Pound, Karl Llewellyn, and Willard Hurst, all define law and society as separate but functionally interrelated realms. For those of the "dominant tradition" (as Gordon calls it),[38] "the big theoretical problem...is to work out the secret of that relationship.... Is everything about law -- norms, rules, processes, and institutions -- determined by society, or does law have "autonomous" internal structures or logic?" (1984:60). While these theorists differ as to whether law is a dependent or independent variable, they nevertheless analyze law as a distinct order or body of concepts, the relationship of law to society being the critical issue.

In one variation of this approach, often referred to as

---

intended meaning of the doctrine -- i.e., what did those that drafted it want it to say, what behavior did they want to encourage, discourage, permit, outlaw? The difference between the two meanings is not always clearcut; moreover, legal specialists dispute the significance and import of each in practice.

[38] Gordon includes in this umbrella category "of evolutionary functionalism" both of the great antagonistic parties of modern American legal thought, labelled ... for simplicity's sake "formalism" and realism." Each of these parties has, [he says,] ... worked out contrasting visions of what social development consists of and how law has adapted to that development without disturbing the fundamental assumption of progressive adaptation that they hold in common" (1984:66).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

legal realism, the effectiveness of legal doctrine is extrinsic to that order, i.e., it is an outgrowth of economic, political, or social relationships. In another variation, that of legal formalism, it inheres in the rule-making system itself, in the structure of legal reasoning. For realists, the authority (or acknowledged right) of law stems from its structural relationship to society, whereas for formalists, the substance of law is analyzed according to the purported logic of basic principles. In both cases, theorists tend to reify the power of law based upon how they define legal forms in relationship to society.

In recent years, the Critical Legal Studies (CLS) movement has challenged many of these assumptions of the "dominant legal tradition."[39] While there is some

---

[39] A keystone in both formalist and realist analyses is the assumption that law is functionally related to society and that this relationship has progressively changed or "evolved" over time. Western society appears at one end of the continuum and "primitive" society at the other. Within this framework, dominant writers generally hone their analyses of law as it is structured in Western societies -- i.e. as a separate realm of codified norms and practices, the purview of which is restricted to specially trained legal practitioners. Where non-Western societies are discussed, it is generally in contradistinction to developed/modern/industrialized/capitalist/Western social formations. While Critical writers take issue in general with the evolutionary premise of dominant theory, they have targeted their critiques at law in Western society and generally from an historical perspective -- e.g. Kennedy 1981 (often said to be the pioneering analysis in the Critical Legal Studies movement), Klare 1978, Olsen 1983, Tushnet 1981, Vandeveide 1980. The entire debate between dominant and critical writers regarding the relationship of law to social interaction therefore takes place over Western legal frameworks.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

variation among Critical scholars (as they call themselves), the latter generally take issue with the idea that a separate legal order exists in any society. They argue that (1) there is no autonomous and objective mode of legal reasoning; (2) legal doctrine does not provide a single coherent view of human relations; (3) law does not necessarily 'determine' social behavior; and (4) legal doctrine does not provide "determinant answers to questions nor cover all situations" (Trubek 1984:578).

In short, the CLS approachs questions the dominant view of law as a distinct system of rules, functionally related to society. Instead, they see law as part and parcel of society -- inextricably constitutive of social, economic and political relations. In this view, law is basically indeterminate. "Comparable social conditions (both within the same and across different societies) have generated contrary legal responses, and comparable legal forms have produced contrary social effects" (Gordon 1984:101). Accordingly, Critical writers are not interested in positing causal relations between changes in legal and social forms but seek instead to understand "world views [as they are] embedded in legal consciousness" (Trubek 1984:589).

Ever since its inception in the 1970's the CLS movement has generated much discussion regarding legal theory, with proponents of both dominant and critical theory vigorously defending/clarifying their respective assumptions and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

approaches.[40] There is much variation among theorists and some would object to the oversimplified dichotomy outlined here.[41] One should not infer from this discussion that all legal theorists fall into either the "dominant" or "critical" camp or that the frameworks themselves are as neatly differentiated as my summary makes them appear. For purposes of this discussion, however, the above categorization is useful because it highlights the very different ways in which theorists have approached the power of law and I confine my remarks to the implications of each framework in this regard.

In the dominant legal tradition, autonomy is a function of social structure (i.e., law is a dependent variable) or else is an essential quality of law itself -- that is, law is defined as a separate order with its own rationale or logic. In either case, autonomy is not so much explained as it is assumed. Yet, there is much left unaddressed. While legal forms and practices do not respond to every shift in political power, neither are they completely autonomous structures. How can we explain this apparent contradiction? How can doctrine reinforce what is already codified at the

---

[40] See, for example Kairys 1982, Kelman 1987, Unger 1986, Williams 1987, and the entire issue of the 1984 Stanford Law Review, volume 36.

[41] These terms are not mine but are prevalent in the literature where theorists have often placed themselves in the position of advocate or critic of the Critical approach. See note 6 above.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

same time that it can respond to and initiate societal change?

The CLS approach to this dilemma is to see autonomy, not as an either/or issue but as "relative." Critical writers argue that since legal forms "can't be explained completely by reference to external political/social/economic factors[,]...they require study elaborating their peculiar internal structures with the aim of finding out how those structures feed back upon social life" (Gordon 1984:10). Accordingly, such theorists tend to focus on legal doctrine itself, examining ways in which ideas about the social whole (i.e., what is or is not natural, possible and negotiable) influence behavior. They emphasize that legal forms are social constructs and analyze them as "ideologies" or "sentiments" (see Tushnet 1981) which are "omnipresent in the very marrow of society" (Gordon 1984:109). The Critical goal is to describe how these contructs not only make certain actions possible and even conceivable as options, but also how they reproduce the conditions for such categorizing.

The latter point is an especially important component of how Critical scholars explain the process by which legal forms change. In their view, inherent contradictions in legal forms prevent legal doctrine from (re)producing behaviorally what exists conceptually in law. That is, they see legal concepts as imperfect classifications about the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

social whole -- imperfect in that they cannot describe or account for every possible situation or variation thereof and imperfect because the concepts can and do change with their application/use/interpretation. As Mark Tushnet observes:

> Every legal rule imposes an artificial order upon social reality by ignoring the complexity of that reality and focusing instead on some elements that can be identified and manipulated without too much conceptual or practical difficulty. In the main, this artificiality is accepted as necessary, if sometimes regrettable side effect of having a system of law (1981:40).

To Critical scholars, law can act as a conservative force, reinforcing what is already codified and sanctioned but it is not a straight-jacket for behavior. Legal reasoning is not based upon some technically objective mode of thought. Weber, for example, characterized the way in which legal practitioners supposedly make use of "only unambiguous general characteristics of the facts of the case" to formulate and apply rules as "logical formalism" (Reinstein 1969:63). Weber's terminology implies that lawmaking and lawfinding are based upon rationally consistent abstract principles, that they stem from logical rules which transcend the particularities of each case. Tushnet points out, however, that

> [J]ust as a case becomes a precedent only when a judge chooses to treat it as one, so too are facts general and unambiguous only when we say so. Formal rationalization may then be seen as a process in which judges decide to identify more and more facts as the basis for particularized rules (1981:39).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

While Western jurisprudence explains its use of terms and principles on the basis of precedent, the process entails the selection of what legal principles apply in any given case and what facts are deemed relevant. Western law is therefore autonomous in that it is explicitly self-referential, using prior legal categories to explain current decision-making. However it is only "relatively autonomous" because the application of legal categories and the definition of "relevant facts" both involve interpretation. Legal reasoning does not follow unambiguous and purely technical rules, however much legal practitioners argue as if it did.

In the CLS approach contradictions are not anomalies to be explained on an individual basis, but are fundamental to what law can and cannot do. Legal forms are capable of reproducing (but not cloning)[42] the conditions of legal classification at the same time that they can respond to and

---

[42] In biological "reproduction," offspring are not exact copies of either parent. Instead, they inherit genetic material from both sides and are subject to genetic mutations which occur spontaneously and through environmental stimulus (e.g., as in the effects of radiation). Cloning, on the other hand, does entail replication of genetic material and results in offspring which are like the parent in every detail. In metaphorical usage, the changes which occur naturally and inevitably in reproduction are sloughed over and the term is often used to denote something more akin to cloned replication. The CLS approach, however, adheres more closely to the biological sense of reproduction in that legal forms encourage acts which share basic concepts (genetic material) with codified forms but do not necessarily clone the conditions for such legal classifications.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

stimulate social change. Legal categories not only define what behavior is permissible, possible and just, but also how acts are to be interpreted, what meaning society is to accord them. In defining what is just, law delimits (but does not determine) conceptual and behavioral options; interpretation of the latter, in turn, reaffirms the justness of legal categories themselves. Change is always possible (there being no necessary fit between legal and social interaction), but is tempered by the interpretive limitations of legal categories.

In addition to redefining autonomy, Critical theorists also take a different tact with respect to authority. As noted above, in the dominant tradition legal authority stems either from economic, political or social relations or else from the logic of its basic principles. In some versions of this approach, the right of law to set behavioral limits is all too often explained in terms of the power of legal forms to do so. Writers assert hegemonic or dominant control of the legal apparatus without explaining how the masses grant it legitimacy (if in fact they do), seemingly at their own expense. In the absence of complete and total coercion (physically, mentally and emotionally), it is difficult to understand how individuals and groups in vastly different and even structurally antagonistic positions come to understand legal authority in the same or complementary way. That is, how do non-elites accord legal forms the right (and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

not just the power) to define what is justiciable? While individuals need not agree with or support all legal doctrine, nevertheless they must acknowledge their authority or right in general or else resort to revolutionary action. (This presumes, of course, that modern states cannot productively function based upon the continuous and complete coercion of virtually its entire citizenry; the cost is simply too great to sustain in the long run. More effective is when, in the main, legal forms are perceived by the general populace as legitimate in some sense -- i.e., that they rest on the right to make certain decisions and are not merely overt expressions of power.[43]

This approach to authority is also at a loss to explain legal forms which seemingly are not in the best interests of elites but which nevertheless are enacted by them. For example, how does one analyze judicial decisions favorable to Indians, yet which are made by non-Indian (elite) judges? To resort to theoretical gymnastics in order to prove that these decisions are <u>really</u> beneficial to elites is to determinedly ignore the great attention paid by legal practitioners to the discursive process of lawmaking and lawfinding. Why do the categories that they employ matter so much? Why bother with the arcane language and voluminous

---

[43] Many writers of diverse theoretical persuasions have discussed the "need" for legitimating/authorizing structures in complex societies. See, for example, Habermas 1975, Foucoult 1983, Gramsci 1980, Weber 1968.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

citations of case law? Is it, as some theorists would argue, merely to render the underlying meaning of law more palatable?

To assert that all law is elite or bourgeois law, wearing the mask of legitimacy, tells us little about the process by which legitimacy or authority itself is defined. It posits absolute notions of what is just or unjust and uses these to analyze legal materials. Tushnet calls this the "moral evaluative approach" to law, and observes that it rests on the "questionable assumption that what is 'just' or 'fair' can be agreed upon" (1981:2?) and that such simplistic notions are adequate to describe the complex process of lawmaking and lawfinding.

In his provocative study of slave law in the American south, for example, Tushnet demonstrates that this approach does little to illuminate the use of precedent in legal decision-making or how judicial opinions manage to transcend the "parochial interests of any class or faction" (1981:29). He convincingly argues that slave law cases (that is, cases involving principles of the slave code and not any or all cases involving slaves[44]) cannot be analyzed without

---

[44] Tushnet points out that all cases that involve slaves are not necessarily disputes over principles of slave law. For example, a slave who was hired out by his master became injured while performing his duties. A subsequent lawsuit by the slaveowner for compensation dealt with principles of contract law, not slave law since under the contract, the lessor was not permitted to use the slave to perform hazardous work. The case therefore turned on whether or not the lessor had knowingly or unwittingly

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

understanding how slave law and southern slave-holding society defined proper notions about the social whole -- i.e., what categories guided judicial attitudes and behavior. He demonstrates that while slave codes were nominally based upon categorizations of race and status, these were inadequate to deal with the contradictions inherent in southern society. Free blacks and non-slave holding whites, for instance, were categorical anomalies in this system, and the entire logic of slavery (based as it was upon a master's unequivocal right to own black slaves as chattel), denied the relevance of law to that setting. In other words, legal constraints on the master-slave relationship were antithetical to an institution in which slaves by definition had no rights.

In short, to state that slave codes, or judicial decisions, for that matter, treated slaves fairly or unfairly is to slough over how the concept of right was defined in southern slave-holding society -- what categories were conceived as natural, just, and proper and how these were codified and interpreted by legal practitioners. It ignores the process by which certain concepts came to be perceived as having the authority to influence attitudes/behavior as well as how they did so.

In the main, Critical writers are less interested in

---

ordered the slave to perform dangerous (and therefore contractually prohibited) duties. The rights of the slave owner regarding his slave were not at issue.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the fact that the legal forms legitimate social, economic and political relations than they are in how legitimacy itself is defined, what legal forms make these ideas possible, permissible and even conceivable, and how they are interpreted within society. They see authority as a social construct and not as an unvarying quality of law itself.

Thus far I have discussed how the CLS framework differs from that of the dominant tradition with respect to the autonomy and authority of law. As one might surmise, Critical and dominant theorists hold divergent views on legal substance as well.

For formalists, legal theory is of primary concern. In their analyses of lawmaking and lawfinding, they concentrate on the meaning of underlying legal principles and examine how legal precedent determines the disposition of a case. In their view, formal (explicitly codified) doctrine provides objective criteria as to how individual cases are to be decided.

For legal realists, in contrast, what the law says is not, as it were, carved in stone. Legal codes provide guidelines for dealing with cases but legal decision-making depends ultimately on extra-legal considerations (be they economic, political, or social). Emphasis is upon how law is used in practice -- how legal practitioners in and out of the courtroom arrive at particular results. Legal realists take great care to embed their analyses within wider

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

historical, cultural, political contexts since they view law as an essentially dependent variable. They analyze legal substance not only in terms of how it reflects societal interests/needs, but also in terms of how its meaning varies in practice.

While, for the most part, formalists focus on legal theory and realists on legal practice or usage, both of these variations of the dominant tradition examine legal substance as explicit statements about behavior. In other words, the effectiveness of law is a function of its ability to prescribe or proscribe specific behavior and of other institutions to carry out what the law says.

It should be clear at this point that Critical writers take an entirely different approach to the power of law as do theorists of the dominant tradition. The former are not only interested in the law's overt expression of power -- i.e., what legal forms explicitly permit, encourage, disallow or discourage. Indeed, they are more concerned with the implicit assumptions of legal doctrine, those ideas not even conceived of as subject matter for negotiation, analysis and change. For these theorists, the effectiveness of legal doctrine stems from its authoritative expression of certain concepts, of ideas which are seemingly so natural, they are for the most part invisible (and hence unchallengeable) for the great majority of society. Accordingly, Critical scholars take as their object of study

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

basic categories in legal thought, describing how these ideas about the social whole (e.g. ideas about proper relations between citizens and the state (Unger 1982, between masters and slaves (Tushnet 1981), or among family members (Mensch 1981) delimit conceptual and behavioral alternatives. In addition to studying what legal doctrine expressly states, these theorists take into account the "pattern of silences, or arguments unmade and lines of precedent ignored" (Tushnet 1981:29).

Thus the Critical approach to power extends beyond what behavior is specifically sanctioned by coercive force or threat of coercive force to what attitudes and behavior are categorized as within or outside of the realm of conceptual and/or practical options.

> To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live (Gordon 1984:109).

Law is seen as an extremely potent force for its insinuates itself in what people think and do not think and in the actions they take and do not take. That is, it is constitutive of the very relationships that they conceive and do not conceive of forming.

The Process of Naturalizing Right

As I have outlined, Critical and dominant writers make

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

radically different assumptions about legal autonomy, authority and substance with concomitant ramifications for how they conceive of and address the power of law. Their respective positions also result in divergent views about what is to be explained and what problems they define as such. On the one hand, the Critical view of law as basic categories of right which delimit what is and is not permissible/conceivable makes an important contribution to the study of the power of law. The latter extends not only to what is expressly permitted, encouraged and sanctioned, but also to what does not happen, what alternatives are not perceived or acted upon. On the other hand, the movement has been less successful in explaining the processes by which certain basic ideas obtain legal authority -- exactly how do legal forms come to naturalize right? The problem is as much methodological as it is theoretical.

In the Critical framework, certain basic concepts or categories are authoritatively affirmed by legal forms. Writers tend to focus exclusively on the discursive structures of "mandarin" legal materials -- e.g., judicial decisions, treatise literature and case law -- with the unfortunate effect of appearing to sustain an excessively idealist view of law, not unlike that of staunch 19th century formalists. Gordon acknowledges that Critical scholars are themselves partly to blame for this state of affairs and goes on to note that they would do better to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"embed" their accounts so as "to show that it is human beings with reasons and motives, not disembodied Spirits, who drive the manufacture of legal concepts..." (1984:119).

The problem, however, is more than about appearances or style and is not so easily explained away. To begin with, Critical writers maintain that legal forms reaffirm basic concepts -- indeed, the naturalness of these concepts is the very key to their power. Critics examine "mandarin" legal materials precisely because these are highly rationalized and elaborated expressions of legal consciousness. That is, these documents provide access to the mode of reasoning employed by legal practitioners who must explain themselves "for the record."

> As public documents designed to convince, judicial opinions set out premises accepted quite widely and attempt to gain assent to a particular result by showing how that result can be derived from those premises (Tushnet 1981:19).

What Critical writers end up describing is a single ideology, meaning or concept of right as expressed in the legal materials they have examined. Admitting that they have looked only at what the high priests of lawmaking say, these scholars justify their analyses of elite thinking, stating that they are

> trying to describe something that partly transcends concrete interest because it helps create the conceptual universe shared by all parties to the struggle. What the parties are struggling over is the power to interpret and to have applied in their favor the (contradictory) implications of a common set of premises (Gordon 1984:118).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

But merely saying this does not make it so. Critical writers do not demonstrate that certain concepts or sentiments are in fact held by those in diverse structural positions or that the judicial decisions, however argued, are viewed as cogent, logical expositions of shared consciousness. One might ask, for example, what legal principles (categories) do attorneys for the defense and plaintiff use to argue their respective positions? What about cases which are disposed of in one way at the local district level yet which are overturned on principle by appellate or supreme courts? And, how are judicial decisions received, understood, viewed by various sectors of the population?

If there is a single, unvarying concept of right which pervades society at all levels, then it is necessary to illustrate its commonality. Methodologically it is extremely important to show that these categories are not merely expressed in legal materials but in fact pervade other discourses as well. How else are we to know that they are basic and not just peculiar to the realm of law? How else are we to know that they are not the unsubstantiated assertions of a particular theorist?

Critical writers undermine their own position by failing to carry out methodologically what they have posited theoretically. By concentrating on the highly structured and self-referential arguments found in legal documents,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

they do little to demonstrate the "relative" autonomy of legal forms. Rather, their accounts seem to confirm the absolute autonomy of legal materials.

Second, if law delimits conceptual and behavioral options, then one has to discuss exactly how, and to what extent, it does this. The Critical retort -- that law is indeterminate, that no necessary ramifications obtain and that therefore writers need not address this issue -- is simply not defensible in terms of Critical theory itself. While I agree that attitudes and behavior need not be "determined" by legal forms (i.e., there are no necessary effects of law), clearly they are affected by it in some way. Critical theorists themselves say that there are effects (i.e., the rightness of the categories is reaffirmed by law) but note that these can vary greatly, given the particulars of each case. This is why they are reluctant to discuss predictable, regular results of law.

But one need not see legal forms as determinant to discuss their ramifications. As Joan Williams notes, "[d]octrine ... describes the scope of the conversation, not its outcome" (1987:495). One can examine what kinds of options these basic categories make possible and permissible as well as those that are completely inconceivable. The idea is not to say that certain events were the only ones possible, but, since they did occur, to discuss the ways in which they fall within or outside the range of categorical

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

possibilities. One should also address circumstances which strain existing categories or concepts of right -- in what ways they so and how individuals inside and outside the legal profession deal with these cases. How can we see how law constitutes relations when theorists only discuss the reasoning about how relationships are constituted?

The exclusive focus on attitudes, on ideas, on concepts of right -- in short, on mental constructs -- is another troubling aspect of the Critical approach. According to the latter, certain basic ideas affect people's attitudes about what they can do and hence in fact do. While theorists aver that they are not interested in positing causal relationships between ideas and behavior, thereby becoming embroiled in the polemics about idea/material forces, they clearly do make such statements. They go on to qualify these, saying that these basic ideas often affect behavior which in turn affects ("reaffirms") the rightness of the original ideas. I suppose that they believe they have skirted the idealist/materialist quagmire simply because they have supplied a feedback loop to explain how behavior affects ideas. Have they, though?

By accepting the dominant view of law as a mental construct -- as ideas, concepts, sentiments, ideology -- they resurrect the stale debate regarding causality. With law delegated <u>a priori</u> to the conceptual realm, the problem inevitably is that of how to bridge the gap (or chasm)

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

between ideas and behavior; how do concepts of right, ideology, sentiments, etc. affect behavior?

Because Critical scholars are uncomfortable with such determinacy, they refrain from addressing the issue at all, sticking closely to their "mandarin" materials and do not discuss effects, ramifications, implications or behavior. This is not a solution to the problem, only an avoidance technique and one which makes them vulnerable to some of the same criticisms they have justifiably launched against dominant theorists.

If we are successfully to avoid the ideal/material polemics (and I, for one, would like to do so), we need to be more careful about terminology. Sentiments, ideology, concepts all connote mental functions and reify the dichotomy between theory and practice, ideas and behavior. In order to understand the ways in which law delimits options, we need to see law not as ideas about behavior or ideas about ideas about behavior but rather as ideas and behavior, together. It is, in other words, a chicken/egg issue and needs to be treated as one methodologically as well as theoretically. One cannot assert the constitutive role of law in social interaction at the theoretical level yet avoid discussion of actual social relationships.

The above does not mean that the CLS movement has nothing to offer, only that it has not proven to be quite as radical a departure from dominant legal theory as adherents

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and critics take it to be. In some ways -- how it deals with causality and the structure of legal discourse, for example -- Critical theory is uncomfortably similar to the dominant tradition and issues that need to be demonstrated, explicated, illustrated are left dangling as theoretical givens. Still, the movement does attempt to move beyond the law and society debate and does enable us to pose different questions regarding the relationship of law to social interaction. For the issue at hand -- the effect of Federal Indian law upon American Indian peoples -- the Critical framework casts several familiar themes in a somewhat different light.

Federal Indian Law

Historically, legal scholars and historians have studied Federal Indian law from both formalist and realist perspectives. Accordingly, legal formalists have focused on treaties, acts and judicial decisions, outlining major precedents and their effects upon the legal rights of American Indians. Emphasis is upon the formal entitlements of natives and we do not understand how certain legal forms are interpreted in practice and the ways in which they have and have not effected the changes policymakers originally envisioned.

Legal realists, on the other hand, often take as their object of study specific periods of policies of Federal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian law and discuss how they reflected the interests/needs of American society at the time they were drafted and enacted. In this scheme, Federal Indian law is a dependent variable, an outcome of interest group politics and we do not see the enduring import of certain legal concepts (e.g. "sovereignty," "aboriginal title") despite great swings in Federal Indian policy (i.e., from isolation to incorporation/assimilation to separate development, to termination to self-determination).

Moreover, since the overwhelming majority of realist accounts contextualize white motives and use of Federal Indian doctrine, we gain little insight into how Indians themselves have interpreted these legal forms. With Federal Indian law defined a priori as a separate order, its effectiveness is all too often reduced to the amount of coercive force exerted against Indian peoples.

Undeniably, the history of U.S.-Indian relations has been bloodied by the use of brute force but this has not been the sole means of structuring those relations. American Indians have also lost much by way of resources, sovereign powers and socio-cultural practices through peaceful means -- through treaties, acts, executive orders and judicial decisions. This does not mean that Indians agreed with these legal measures; rather, it only points out that Federal Indian law has mediated U.S. relations without military enforcement of every legal action.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Limiting the power of Federal Indian law to its coercive capacity also tends to slough over the variation and changes in post-contact native structures, affiliations and organization. That is, Indian cultures and American law are defined as discrete and separate realms and we do not see their interplay over time nor ramifications thereof. Yet, several recent studies have demonstrated that natives' response to white proscriptions are not simply to be seen as either adopting American ways or sticking with "traditional" native forms. Rather, the changes in American Indian social forms are far more complex than the Indian/American dichotomy allows. Loretta Fowler's account (1982) of modern Arapahoes, for example, points out that native leadership behavior is interpreted quite differently by those within and outside the tribe. This enables Arapaho leaders to maintain constituencies within the group yet prove effective among white bureaucrats. Similarly, Joseph Jorgensen's study (1972) of the Sun Dance among several western tribes indicates that its modern-day practice is not a remnant of the past, but is a new form, successfully interpreting "traditional" elements within modern Plains culture. In short, we need to look more closely at how Federal Indian law has been understood and interpreted by both Indians and whites and need to examine the complex ways in which legal forms have delimited the parameters of U.S.-Indian relations.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

One advantage of the Critical Legal Studies approach, then, is that, as discussed above, law is not a wholly dependent or independent variable but an integral component of social relations themselves. The autonomy of law is "relative." This focuses attention on the discursive structures of Federal Indian law and to what extent they limit the terms and substance of U.S.-Indian relations.

Second, in the Critical framework, the effectiveness of law is not only a function of the explicit behavior it prescribes or proscribes or of the coercive capacity of other societal institutions. Law's implicit assumptions about the social whole are also key components in how it is able to affect the course of social interaction. The power of Federal Indian law is therefore not to be construed narrowly in terms of what behavior it specifically sanctions or not but is to be conceived more broadly with regard to what kinds of options it encourages, makes feasible as well as those which it renders impractical, unthinkable.

While my approach to legal classification draws on several features of Critical theory, it also attempts to go beyond the methodological and theoretical deficiencies outlined above. Accordingly, I am not only interested in how law naturalizes right but am also interested in how it comes to naturalize right and the ramifications thereof. I take as my object of study the process(es) by which certain categories are infused with legal authority, are applied in

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

a specific case and delimit the behavioral/conceptual options of participating parties. Because I am concerned with how Federal Indian law constitutes U.S.-Indian relations (in theory and in practice), I do not focus exclusively on codified expressions of legal reasoning but also look at how extra-legal factors have influenced the codification and decision-making processes. This study deals not only with the structure of legal discourse but also with its interpretation and use by individuals within and outside legal arenas.

Specifically, the following chapters explore the complex ways in which the categories of Federal Indian law, as manifest in the federal acknowledgment rules and regulations (25 CFR 83),[45] acquired legal authority, were interpreted in the Gay Head case and affected the real and perceived options of this and other "unrecognized tribes." Inasmuch as I am interested in FAP as a legal process, I trace how events in and outside of law influenced the enactment of FAP, the decision of the Gay Head Wampanoags to submit a petition, the presentation of data by the Tribal Council, the evaluation of evidence by the BIA, the response of Gay Headers to the government's "Proposed Finding" and the aftermath of the "Final Determination" both in terms of

---

[45] The FAP process (25 CFR 54) was originally enacted in 1978. In 1982, Part 54 of Title 25 of the Code of Federal Regulations was officially redesignated Part 83. In this study, for the sake of consistency, all references to the regulations use the later citation -- 25 CFR 83.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the latter's effect upon Gay Head tribal organization and upon subsequent petitioners. In short, this study will explore the ways in which law defines parameters for what is possible, permissible and even conceivable. Its focus is upon the explicit and implicit power of the federal acknowledgment process.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 3

RECOGNITION IN HISTORY

When Gay Headers filed suit in 1974 to retain control of the common lands, their legal status was problematic. Because there was no evidence of a government-to-government relationship between the United States and the Gay Head Wampanoags from 1776-1974, the latter lacked tribal standing in order to pursue their land claim. Yet, if one looks beyond the facts themselves and asks why such a relationship did not develop, then the Indians' unrecognized tribal status is less clearcut, if not legally tenuous. Even a cursory overview of Gay Head's history reveals a stinging irony regarding that status.

At the same time that the Gay Head Wampanoags were disputing Massachusetts's transfer of the common lands to the Town of Gay Head, they were being legally hobbled by the very state action that they were challenging. Because Massachusetts and not the United States had administered Gay Head Indians historically, the group was, in 1974, deemed unrecognized and therefore forced to prove standing as a tribe before the merits of their land claim could be litigated.

To understand the full extent of the Indians' legal predicament in the 1970's it is necessary to examine why it

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

was that Massachusetts (as opposed to the federal government) came to administer these natives in the first place and how the group came to be classified as unrecognized. Only by examining the processes by which state and federal authority were each naturalized and codified, can we then analyse the "relative autonomy" of federal recognition as a legal concept and how the latter was interpreted in Federal Acknowledgment Policy.

Whereas Chapter 3 will focus upon why and how Massachusetts came to administer the Gay Indians, Chapter 4 will address the legal origins of recognition in Federal Indian law. The present chapter begins with a brief account of the factors influencing the legal status of native peoples generally in southern New England during the colonial period and of those pertaining specifically to the Gay Head Indians on Martha's Vineyard. Discussion then turns to state policy and practice toward the Gay Head Wampanoags from the late eighteenth through late nineteenth century. The goal is not merely to outline the legal forms which have affected Gay Head Indians over time, but to demonstrate the role that extra-legal factors have played in policymaking and administration.

First Encounters

The Wampanoag Indians are renowned in American history for having helped the Pilgrims through the latter's arduous

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

first year at Plymouth. But what most Americans do not know is that the celebrated encounter between Chief Massasoit and the Puritan fathers was preceded by more than a century of direct and indirect relations between whites and Indians in the region.

First contact between Wampanoags and Europeans is said to have occurred in 1524 when Giovanni da Verrazano explored the New England coast and documented the presence of (Maine) Penobscot, (Massachusetts) Wampanoag and (Connecticut) Narragansett Indians.[46] At the time, the English, French, Spanish and Portuguese were already engaged in fishing off Newfoundland and had begun trading with the northern Penobscot Indians for furs (Ritchie 1969:198). While intertribal trading later distributed European goods throughout the northeast, trade had not penetrated as far south as Cape Cod at this early date (Marten 1970). By 1602, however, this apparently had changed, for Bartholomew Gosnold reported of his encounter with the costal Wampanoags that

> Sixe Indians in a Baske Schallop with mast and sails, an iron grapple and a kettle of copper came boldly aboard us, one of them apparelled with a waistcoat and breeches of black serdge made after our sea fashion hose and chose on his feet; all the rest (saving the

---

[46] There is some speculation that Norsemen were the first non-Indians to have discovered Martha's Vineyard. Although it is quite possible that various 16th century explorers sighted the island, documentary evidence of contact with natives is reported only of da Verrazano and Gosnold, the latter being credited with the discovery of the Vineyard (see Levitas 1980:75-77).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> one that had a paire of breeches of blue cloth) were all naked (as quoted in Banks 1966(1):61).

The effects of European trade upon native relations are difficult to assess although available data are provocative.

Archeological remains indicate that Martha's Vineyard was first inhabited in 2270 B.C. (±160) by people culturally similar to those of southern New England. For the next 3,800 years or so the island was sparsely populated and used only on a seasonal basis, perhaps by groups paddling over from the mainland (Ritchie: 1969). Until the end of the late Eastern Woodlands period (1150 to 1565), natives lived in small hunting bands, migrating seasonally in accordance with fluctuations in game, with white tailed deer being a mainstay of their diet.

By the mid 16th century, Martha's Vineyard was inhabited year-round and several individual sites had developed into village settlements. Along with increased sedentism, there was a greater reliance on marine animals, corn and other domesticated plants. As on the mainland, a significant demographic expansion accompanied the rise of farming (Ritchie 1969:233) and by the end of the century there were between 1500 and 3000 natives estimated to be living on the island.[47]

---

[47] Population estimates vary considerably depending upon one's interpretation of colonial accounts, i.e., whether the latter indicate only adults (the lower number) or include children as well (the higher figure). Additionally, since the relationship between mainland and island Wampanaogs is unclear (see below), it is likewise

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In addition to these ecological changes in native life, it is evident that the Indians' political relations were undergoing change as well in the 16th century. Verrazano noted that Narragansett and Wampanoag Indians appeared mutually friendly in 1524 and without interest in trade yet, 100 years later, these groups had reportedly become traditional enemies (Levitas 1980:79-80) and familiar with European wares. Furthermore, whereas there are no indications of status differentials among the Wampanoags prior to the mid 16th century, there are numerous reports that the positions of chief, sachem and petty sachem were hereditary when the English arrived in 1620. By that time, Wampanoag Indians are also said to have been organized into a loose federation of territorial sachemships spreading over Nantucket, Martha's Vineyard, southern Cape Code and eastern Rhode Island with four divisions identified on the Vineyard: that of Aquinniuh (Gay Head) Chappaquiddick (Chappaquiddick), Nunnepaug (what is today Tisbury and Edgartown), and Takemmy (covering Chilmark, North Tisbury and West Tisbury).

It is possible that involvement in European trade intensified competition over fur-bearing animals, as it did elsewhere (see Leacock 1954, Snow 1981), resulting in

---

difficult to assess the extent to which Vineyard natives were affected by the plague which rampaged easternmost Massachusetts just before the arrival of the Pilgrims in 1620 (see Levitas 1980:89-92).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

greater territoriality between these groups. Since power and prestige often accrues to those who manage the distribution of goods (see White 1983), even indirect involvement in European trade could have encouraged the consolidation of political authority among the Wampanoags. It is also conceivable that the shift to horticulture hastened the development of hereditary sachemships among the Wampanoags since a more predictable means of political succession facilitates land management and defense (Levitas 1980:87).

Both theories remain speculative, however, given the archeological evidence. Although European manufactures appear on the mainland during the late Woodlands period (1150-1565 A.D.), they are conspicuously absent on the Vineyard with the exception of a single cylindrical bead dated at 1000 A.D. (Ritchie 1969:205). The significance of this finding or lack of finding. is puzzling. Does it mean that those who inhabited the island were neither involved in intertribal trade themselves nor had relations with mainland Wampanoags who were? If so, then when and how did Vineyard natives come to develop political ties with the mainland by the early seventeenth century?

In addition to indirect involvement in the fur trade, Wampanoags had several first-hand encounters with the English which were also to influence subsequent Indian-white relations. In 1611, two Wampanoags, Coneconam and Epanowe

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(or Appanowe), were taken captive by Captain Edward Harlow and the latter exhibited in Europe as a curiosity (Levitas 1980:81). When interest in the "savage" waned, he was put aboard an English boat bound for Martha's Vineyard from which he escaped. According to Banks, Epanowe later took revenge on a Captain Dermer and his party who had anchored near Gay Head to trade (1966:81). On another occasion, Thomas Hunt took captive some two dozen Wampanoags off the Massachusetts coast and on yet another, just before the arrival of the Pilgrims in 1620, a group of Wampanoag Indians were massacred in Narragansett Bay by some Englishmen (Levitas 1980:93). Native retaliative attacks further highlight less than cordial relations between Wampanoags and the English at the beginning of the seventeenth century.

Both incidents involve Wampanoags who later held important leadership positions. Banks (1966) notes that Epanowe was awarded the sachemship at Gay Head for his exploits against the Dermer party and remained understandably suspicious and reserved toward the English. Squanto (or Tiasquantum) was captured on the Hunt expedition in 1614 and later was reportedly instrumental in helping to forge the non-aggression pact between Wampanoag Chief Massasoit and the Pilgrims in 1620. Levitas suggests that Squanto's personal experiences (having spent several years in England) might have caused him to encourage neutrality

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with Puritan representatives of the English crown. She goes on to note that the mainland Wampanoags had suffered severe population losses due to disease just prior to the Pilgrim's arrival, exacerbating the natives' need for a strong ally against their neighboring enemies, the Narragansetts. Early diplomatic ties between Wampanoag Indians and the Pilgrims were thus, she says, a matter of political exigency. Both the Indians and English were considerably suspicious of one another based on past experiences but were in too precarious a position, militarily speaking, to engage in open hostilities (1980:94-95).

In short, intercourse between Europe and northeastern America had been ongoing for 100 years prior to the Puritans' arrival and influenced inter-Indian relations as well as those between Indians and whites. By the beginning of the seventeenth century, both sides were eager to trade with one another, Europeans being desirous of luxuriant furs which brought high prices in Europe, and Indians quickly adjusting to the advantages of metal knives, pots and other manufactures (dependence on guns and alcohol occurring somewhat later). In addition, the Wampanoags had developed territorial sachemships which played a major role in managing access to and distribution of resources against rival tribes as well as in mediating the tone and timbre of Indian-white relations. While the Indians did not conceive of real property as did Europeans, i.e., as a complex of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

rights in land which individuals could inherit and contractually alienate, nevertheless it appears that control over territory was an important corollary of political authority and economic subsistence.

On the one hand, then, the interaction between Wampanoags and Pilgrims in 1620 was influenced by prior relations between Indians and whites. On the other, the year marks a significant change in those relations insofar as the English arrived, not merely to trade with the Indians as they had done in the past, but to settle on what had been and what was recognized as having been Indian territory. The principles and practices underlying the colonization of southern New England were to substantially alter Indian-white relations in the region.

Colonization

Early European accounts of American natives are replete with references to "heathens," "infidels," and "savages." These terms did not merely denote the Indians' religious/cultural otherness but also had legal import. Up until the late 15th and early 16th centuries, what we now refer to as Europe was commonly termed "Christendom" by those who inhabited it. Christians viewed non-Christians not only as believers of another religion, but as outside the law of God. According to the (European) Law of Nations, lands occupied by non-Christians could be acquired through

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

just wars, purchases or mutual agreement (Lindley 1926:11). Accordingly, papal bulls, royal patents and charters in the fifteenth and sixteenth centuries all contain explicit language granting explorers the authority to extend dominion over lands not occupied or possessed by Christian kings or princes.[48]

In asserting that New World inhabitants were non-Christian, Europeans arrogated to themselves the power and authority to deal with native peoples as a separate category within Western law and founded European rights upon widely accepted religious and civil principles, a powerful authoritative mix.[49] But, at the same time the classification of Christians and non-Christians made the separate treatment of Indian peoples possible, it did not determine what policies Europeans chose to adopt to the New World. These varied widely from country to country as well as among the colonies administered by a each European

---

[48] In 1495 explorer John Cabot and his sons were empowered by King Henry VII to "seek out, discover and find any islands, countries, regions or provinces of any heathens and infidels in any part of the world which previously had been unknown to Christians, and to subdue, occupy, and possess them, getting unto the King the rule, title and jurisdiction thereof" (Lindley 1926:25). Cabot's subsequent "discovery" of America's eastern seaboard was the legal foundation of England's preemptive rights to that region, a claim it asserted against those of other European powers.

[49] As early as the 13th century, St. Thomas Aquinas stated that "the distinction between the faithful and infidel comes from divine law" (as quoted in Lindley 1926:11), in effect rendering the dichotomy itself a given and non-negotiable issue.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

monarch.[50]

In southern New England, the legal status of Indians and Indian tribes were greatly affected by the Puritanism of the first settlers. Pilgrims arrived in the New World (1,000 in 1630 and 20,000 in 1642), convinced that they had been sent on an "errand into the wilderness" to create a new society which would serve as an example to others (as quoted of Samuel Danforth in Hudson 1973:20).[51] Church and state were distinct yet mutually reinforcing entities, both being founded upon the idea of a covenant. In religious terms,

---

[50] The Spanish, French, Dutch and Portuguese all developed different legal relationships with America's native inhabitants in part in accordance with their respective goals, agendas and attitudes and in part as a result of the social, economic and political organization of the particular native peoples the Europeans encountered. For a discussion of the various approaches to colonization in the New World, see Peckam and Gipson (1969). Additionally, the English themselves had very different experiences with Indians in the respective colonies for England itself was not the colonizing agent. Rather, the crown granted patents or charters to individuals and corporations and these in turn were responsible for establishing their own relations with Indians. For example, although much blood was shed in Puritan New England in Indian-white conflict, peaceable relations prevailed between Quakers and Pennsylvania natives. Not until the late 17th century would the English crown be strong enough to develop a uniform policy for dealing with Indians throughout the 13 colonies and by that time much water (and blood) would have flowed.

[51] New social, political and economic relations were themselves part of God's overall design. As Puritan minister John Cotton asserted, God "promised a place for His people and a plantation at the place ... [and] they shall dwell there like freeholders in a place of their own ... [with] firm and durable possession ..." (in Heimert and Delbanco 1985:76). The only hierarchy was to be that of the "priesthood of believers," distinguished from the reprobate by God's grace.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

covenant theology preached that man was obligated to do God's bidding and God, in turn, was obligated to redeem His followers provided they believed in His grace and lived by good works (these being evidence of God's grace, not a prerequisite to salvation). In secular terms, Puritan communities were voluntary associations of believers or "gathered congregations" whose members decided for themselves secular and church rules.[52] A "priesthood of visible saints" decided church policy, elected community officials and determined who could participate with full voting privileges in both church and town affairs.

The dichotomy between the "saved" and "damned" not only pervaded Puritan society, but also structured the colonists' relations with the region's native peoples. As non-Christians, American Indians clearly did not qualify as members of the "priesthood of visible saints." Nevertheless, the natives were considered God's children (albeit inferior ones) and were capable, at least in theory, of salvation.[53]

---

[52] Only church members had the right to vote in community matters and they were exhorted to elect other church members as magistrates. In addition, church enrollment was limited to those capable of reason, that is adults, demonstrating "pure, certain, sure, distinct and particular knowledge of God's word" and "a full knowledge of and sorrow for [one's] ... sins [gained] through careful self-examination" (as quoted of William Perkins in Emerson 1977:22).

[53] According to Puritan theology, the capacity to believe was itself predestined, conversion more confirming an individual's ultimate fate than actually changing who was

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

There were, however, several practical impediments to native conversion. First, the stringent tests of orthodoxy which Puritans applied to all church members made it extremely difficult to attract converts, be they Indian or European, Christian or non-Christian. The emphasis on extensive religious education and upon constant re-examination of one's faith as requisite to "owning the covenant" were particularly onerous for Indians who spoke little or no English and had even less of an opportunity to learn to read the Bible (a native language translation did not appear until 1663). Since Puritan ministers were paid by their own congregations, there was little incentive to spend time converting natives and even fewer resources available for educational materials.[54] Second, the strong

---

to be saved and who was not. Those in the former category persevered in the conversion process and became believers, while those in the latter, resisted and were damned. Inasmuch as one never knew ahead of time who belonged to which category, God's word was preached to all with the expectation that evidence of His grace would manifest itself in an individual's behavior. How much religious education was necessary to reveal God's grace to an individual and what specific behavior indicated salvation were both, of course, a matter of interpretation.

[54] The lack of a central administrative church structure meant that Puritan communities had to tax themselves for educational materials such as Bibles and writing implements. This was not feasible insofar as Indians were concerned for they were generally outside of the money economy. Although the Massachusetts colonies imposed stiff fines on Indians for infractions of Puritan law, these did not generate revenues but were designed to force natives to work on public works projects (Sainsbury 1975) and to force them to sell land in payment of debts (Axtell 1974, Kawashima 1986). Moreover, such laws were successfully enforced only against those Indians already

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tie between church and community and belief and practice meant that native converts were pressured to adopt Puritan secular as well as religious practices. As James Axtell puts it, to the colonists:

> [c]onversion was tantamount to a complete transformation of cultural identity. To convert the Indians of America was to replace their native characters with European personae, to transmogrify their behavior by substituting predictable European modes of thinking and feeling for unpredictable native modes (1981:41).

Becoming Christianized not only meant giving up tribal traditions and practices, however. It also involved becoming subject to colonial law. In southern New England, Indian converts did not live in tribal societies but resided in "praying towns" which were modeled after Puritans' relatively autonomous and homogeneous communitites. The plantations, as the praying towns were also called, were specifically set aside for Indians and were administered by a colonial magistrate whose job it was to look after the natives' welfare. According to Daniel Gookin, the first such official for Massachusetts, his duties included:

> the making of orders, and giving instructions and directions, backed with penalties, for promoting and practicing morality, civility, industry and diligence in their particular callings: for idleness and improvidence are the Indians' sin and in a kind of second nature to them, which by good example and wholesome laws, gradually applied, with God's blessing, may be rooted out (1972:38).

---

living under Puritan law (e.g., praying Indians) and ineffective against those not already converted -- i.e., so called "foreign" natives (Kawashima 1986).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Legally, Christian Indians were neither fish nor fowl. Having given up the security and support of tribal society (which was by and large beyond the reach of colonial jurisdiction (see Kawashima 1986), the converts were also denied the legal prerogatives of their white counterparts. Praying Indians were subject to a host of legal restrictions which engendered physical isolation, social ostracism by both mainstream Indian and white societies and economic dependence upon the colonial economy (Brenner 1980:147-48). In Massachusetts Bay, for example, Christian Indians could not buy or sell land without the magistrate's approval, carry arms, sit on juries,[55] vote or otherwise participate in colonial government. And, in Rhode Island, conversion made it more likely for one to be impressed into servitude since praying Indians who could not pay off their debts or fines with the required cash or goods were frequently forced to labor on community projects as a result (Sainsbury 1975).

There were, then, from the Indians' point of view, few incentives to become Christian. Indeed, Brenner demonstrates that natives who maintained control over lands and resources by means of a strong sociopolitical organization were unlikely candidates for conversion. In contrast, those Indian groups who were physically decimated from disease and warfare and whose tribal resources were

---

[55] In some cases Indians could be jurors if the defendant was also an Indian and the crime did not affect Whites but other Indians (Kawashima 1986).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

depleted or encroached upon, were much more likely to become Christianized since missionaries were assured providers of shelter, subsistence, medical services and trade goods (1980:139).

These considerations help to explain the Puritans' poor missionary record in New England. Despite the plethora of Puritan rhetoric purporting "to propagate the true religion unto the Indians" (as quoted of the Massachusetts General Court in Gookin 1972:37), missionization proceeded at an extraordinarily slow pace. The first Indian praying town was founded in 1651, some 31 years after the arrival of the Pilgrims and admist great resistance on the part of the white residents.[56] According to Brenner, Puritan reports of Indian "backsliding" represent "recurrent and continuous 'nonobedient' behavior which may be classified as a coping mechanism of passive resistance on the part of the Indians" (1980:142).

Conversion of American Indians to Christianity was not only a difficult process for the natives and missionaries, but was also variously motivated and served concomitantly diverse functions. First, the plantations were established

---

[56] Even on Martha's Vineyard, where the missionary efforts of Thomas Mayhew Jr. are said to have been remarkably successful, there are doubts as to the effectiveness of the endeavor. Mayhew's father, Thomas Mayhew Sr., wrote in 1674 (32 years after the establishment of the first white settlements on the island) that the local congregation "holds forth the face of christianity [sic]: how sincere, I know not" (as quoted in Gookin 1972:65).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

by the English colonists in an attempt to resolve the numerous conflicts which arose between Indians and whites over land. It is significant, for instance, that the first praying town was founded at Natick which is located in eastern Massachusetts where competition for land was fierce following the tremendous influx of colonists in 1640. Designated exclusively for Indian use, plantation land could not be sold or otherwise alienated without the approval of government officials. It was hoped that these legal assurances would prevent the fraudulent takeover of Indian land which rendered the owners indigent and a burden on Puritan society (see Gookin 1972:39). Of course, allotting specific acreage for Indians also legally cleared the way for the English to claim and settle the vast tracts that remained.

Second, English administration of Indian communities provided natives with several government services such as a school, preacher and legal representation. In theory, these were to aid Indians in the civilizing process yet in practice the quality of these services varied considerably with some colonial officials exploiting rather than protecting the interests of their native charges. Furthermore, since Indians became subject to legal forms which they neither developed nor often understood very well, the "benefits" of colonial jurisdiction must be judged equivocal at best.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Third, Indian praying towns were communities in which natives purportedly could "cohabit together without which neither religion nor civility can well prosper" (Gookin 1972:39). This too cut both ways. The Indians' physical isolation did nothing to mitigate their low social status in Puritan society, but it did permit them a fair degree of freedom to maintain native cultural values, traditions and practices. As long as Indians adopted the accoutrements of an English lifestyle and the appearance of devout religiosity, active supervision by colonial magistrates remained minimal (Brenner 1980).

And finally, as Indian-white relations worsened, the plantations provided the English with potential allies against hostile Indians (see Salisbury 1974, Jennings 1975, Brenner 1980). The legal forms regulating praying towns -- e.g., the strict laws prohibiting Indians from owning or carrying firearms -- kept tabs on who the "friendlies" were and encouraged that they stay that way, security being of major concern to colonists in the region during most of the seventeenth century.[57]

---

[57] The first Englishmen to settle in southern New England were few in number and utilized land claimed, but not actively occupied, by Indians (see above p. 8). Subsequent hoards of newcomers appropriated land that the natives farmed, the extensive tracts needed by them for hunting and the territories claimed and controlled by tribal leaders. The result was severe disruption of native economic, political and social organization and concomitant friction between Indians and Whites. Although poor relations were instigated and exacerbated by colonists themselves (see Jennings 1975), they also posed substantial

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In short, the colonial record in Puritan New England is marked by ambivalence, contradiction and tension toward natives. The Christian/non-Christian dichotomy denied American Indians the sovereign rights accorded Christian (i.e., European) nations but did not resolve all of the prickly and complex issues insofar as the legal status of native peoples were concerned. Puritan theology enabled colonists to dismiss natives as unredeemable heathens or to missionize the latter and teach them some of the "civil arts." Native conversion proved a spanner in the classificatory works for although it held out the promise of moving from damnation to salvation, from "heathen savagery" to "Christian civilization," Indian converts were systematically denied the rights and privileges of their white counterparts. The legal forms which established and administered praying towns placed Indian converts in a legally subordinate position to which there were few alternatives or means of redress. Put another way, Christian Indians in southern New England were categorical anomalies whose status was exacerbated by the praying town structure.

---

security problems for White colonists. Not until well after King Philip's War (1675) when colonial hegemony was decisively established in southern New England, would Indians cease to be a military threat to whites in the region.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Colonial Administration of Gay Head

The colonial principles and practices which gave rise to Indian plantations on the New England mainland in the seventeenth century likewise had a profound impact upon Martha's Vineyard. At the same time, the experiences of the Gay Head Wampanoags differed in several important respects from that of their mainland counterparts during the same period.

The first colonists to settle on Martha's Vineyard (or Martin's Vineyard, as it was also called) arrived in 1642 and established a community near Great Harbor (Edgartown) at the eastern end of the island. They were recruited by Thomas Mayhew, an entrepreneur from Watertown, Massachusetts who had purchased a patent from Lord Stirling (who also had rights to Long Island) and from Ferdinando Gorges (who held rights to the province of Maine) which included Martha's Vineyard, Nantucket and the Elizabeth islands. That both Englishman laid claim to the same territory and were able to sell their interests to the same person reveals much about colonial land law.

In general, English settlement in America was authorized by means of a royal grant to a corporation or individual. Ultimate title was retained by the king with grantees receiving specific privileges outlined in their charter. Kings were under no legal obligation to recognize the grants made by their predecessors nor did a proprietor's

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

heirs necessarily inherit rights to foreign lands. In America as in England, one did not own land absolutely, but had rights to and in land which might crosscut those of other individuals in space and time[58] (Friedman 1985:58-59). Long distances, hazardous transportation and poor maps further added to the confusion regarding colonial land claims.

It was therefore not redundant of Mayhew to purchase rights to the island from several claimants in order to assure greater legal control over his holdings. He also purchased land from the island's Indian population in accordance with prevalent legal practices which recognized that the natives held some rights to land, even if these were restricted to the specific acreage they occupied, enclosed and otherwise "improved" (see Winthrop in Heimert and Delbanco 1985:71-73.[59]

---

[58] At its core, colonial law was English, drawing upon royal common law as well as the customary practices which varied throughout England. The complex laws governing the various "estates" or interests was itself a remnant of feudal times when rights to land were arranged hierarchically with the king superior and vassals and subvassals in accordingly subordinate positions (Friedman 1985:89).

[59] Like others of his day, Governor Winthrop of Massachusetts denied that Indians had any right to land not under active cultivation. He reasoned:

> [t]hat which lies common and hath never been replenished or subdued is free to any that will possess and improve it, for God hath given to the sons of men a double right to this earth: there is a natural right and a civil right; the first right was natural when men held the earth in common, every man sowing and feeding where he please, and then as men and the cattle

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

As the proprietor of certain rights, Mayhew exercised extensive legal authority over Martha's Vineyard, checked only by the legislative body of freemen which, by law, he was obligated to constitute (see Kellog 1971:7). His power was further enhanced by the island's remote geographic location, by a weak central government which exerted little direct control over the American colonies until the late seventeenth century, and by deft political maneuvering by which he eluded official interference and supervision (see Levitas 1980:101-29). He used this power to set up a government similar to that of Massachusetts Bay with himself as overseer or advisory.

Mayhew's personal ambitions greatly influenced the course of Indian-white relations on Martha's Vineyard. His repeated efforts to establish the island as a personal fiefdom led him to avoid actions which might have otherwise engendered the attention and/or interference of neighboring colonies or the English crown. For example, he could have cultivated ties with Maine, Massachusetts or New York (the latter briefly laid claim to the island from 1674 to 1691),

---

> increased, they appropriated certain parcels or ground by enclosing and peculiar manurance, and this in time gave them a civil right. ...The natives of New England they inclose no land neither have any settled habitation nor any tame cattle to improve the land by, and so have no other but a natural right to those countries. So as if we leave them sufficient for their use we may lawfully take the rest, there being more than enough for them and us (in Heimert and Delbanco 1985:71-73).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

yet he steadfastly ignored, rebuffed or eluded relations with these other colonial governments. At the same time, he was careful to maintain good relations with the local Indian population, at least in part because of the colonists' vulnerable position, i.e., being numerically outnumbered on the island and located far from English reinforcements. Mayhew's efforts to keep the Vineyard politically autonomous reflect both the great competition among New England colonies and the patriarch's demonstrable skills in governing the island's affairs without external assistance or support. It is noteworthy, for instance, that he did not engage in the political intrigue which precipitated the outbreak of King Philip's War in 1675, which devastated Narragansett, Niantic, Pequot, Mohegan, and mainland Wampanoag Indians and which also wrought havoc upon English colonists in southern New England (see Jennings 1975). Indeed, the Vineyard Wampanoags were the only Indians in the region who did not become embroiled in that conflict and who did not suffer as a result.

Mayhew's desire for absolute control over the island and need for peaceable relations with the local Indians very likely contributed to the diligent missionization of the Vineyard by his preacher son, Thomas Mayhew, Jr. As discussed, Puritan missionary efforts were often driven both by political exigency and by religious ardor and there is every reason to believe that the case was similar on

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Martha's Vineyard. Indeed, on the island, missionization was remarkably successful in large part because both Mayhews were politically astute in dealing with the local Wampanoags. Unlike most of their mainland counterparts (John Eliot being a notable exception), the Mayhews were able to convert large numbers of Wampanoags to Christianity within a comparatively short period of time. Several factors, some intentional, others inadvertent, aided their efforts.

First, although the island Wampanoags had several hostile encounters with the English in the early seventeenth century, they appeared to have been tolerant of Mayhew and his small group of settlers in 1642. Jennings suggests that the Indians were aware of the devastation wrought upon mainland natives by the English during the Pequot War (1636-37) and of their own precarious position on the distant island (1975:230). Yet it is also possible that the island's sachems were not adverse to the colonists' presence, believing it would afford them greater access to and control over European goods, thereby enhancing the Indian leaders' political authority and influence. By 1635 a precipitous decline in beaver in eastern Massachusetts caused the fur trade to move westward leaving eastern Indians dependent upon manufactures yet with diminished means to procure them. Historically, the Wampanoags had operated as middlemen in the fur trade but with that role

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

now superfluous, the island Indians may have sought more direct relations with the English in order to obtain necessary trade items.[60]

Second, Thomas Mayhew Sr. proved knowledgeable about the Indians' traditions and practices and used this information to gain the respect and cooperation of Indian leaders. Although he asserted his supreme authority over the island, he nevertheless reassured sachems that he would not interfere in their affairs and that he would respect their rights inland transactions. Very importantly, he upheld both promises. Mayhew

> then proposed a separation between political and religious authority which offered the sachems security in the promise of indirect rule and opened the way for his missionary son to challenge the symbolic basis of Indian culture (Simmons 1979:203).

In other words, he did not require converts to give up their political allegiance to tribal leaders and therefore did not alienate an influential and powerful sector of Wampanoag society. When pow-wows[61] and sachems later converted, they often brought many of their followers along with them, significantly swelling the number of new Christians.

---

[60] As Richard White (1983) demonstrates for the Choctaw, Indian leaders had come to depend on the flow of European trade items to buttress their authority. Without such manufactures to regulate and distribute as they did other resources and trade items during pre-contact times, native chiefs found it more difficult to gain and sustain loyal followers.

[61] Originally, "pow-wow" referred to Indian native religious leaders and not to the gatherings that these individuals hosted.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Third, Thomas, Jr. proved a skilled and tireless preacher who was proficient in several Algonkian languages. He gave sermons in Wampanoag and translated the Bible into the Indians' native tongue, thereby greatly improving the latter's access to religious education. Like his father, he learned about Indian culture and used the information to make friends among the natives, whom he subsequently converted.

Fourth, as Simmons (1979) demonstrates, Thomas Mayhew Jr. successfully undermined the shamans' authority and power as healers and sorcerers. His earliest convert, an Indian of apparently low status named Hiacoomes, failed to become sick with a mysterious illness in 1643 and 1645 as did other Indians nor did the new convert succumb to any of the spells the shamans placed on him. The English likewise proved immune to maladies and resistant to native witchcraft. On several occasions, Mayhew also prayed for and successfully restored to health Indians whom the pow-wows had given up for dead. Thomas, Jr. used these incidents to demonstrate the relative impotence of Indian curers and to point out the immunity and grace that awaited those who accepted the Christian God.

Thus, through a combination of political acumen, religious commitment, hard work, skillful oratory and chance, Thomas, Jr. was able to convince several Wampanoag leaders to convert to Christianity. Soon after, other

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribal members followed suit and by 1652 there were purportedly over 300 Indian men, women and children who had adopted Christianity on Martha's Vineyard (Simmons 1979:213).

Five years later, the boat on which Thomas, Jr. was sailing to England disappeared and he was presumed dead. The Vineyard Indians mourned him and erected a monument in his honor. Thereafter, his father, Thomas, Sr., took over the missionary programs on the island but was not as successful as his son in recruiting Indian converts. Whatever the elder Mayhew lacked in religious charisma, however, he did not in political shrewdness. Through deft politicking, he managed to convince several Indians to accept

> The Counsils of the Judicious Christians among themselves, and in cases of more than ordinary consequence of Jury for Tryal; when likewise he promised his assistance and direction with the [Indian] Prince; when notwithstanding the Princes assent was to be obtained, though he were no Christian. Thus within a few years there was a happy Government settled among them and Records kept of all Actions and Acts passed in their several Courts, by such who having learned to write fairly were appointed thereto. The Princes with their Sachims (or Nobles) made Publick acknowledgment of their Subjection to the King of England, being notwithstanding mindful to be understood as Subordinate Princes, to Govern according to the Laws of God and the King (as quoted of Mathew Mayhew, Thomas Jr.'s son, in Simmons 1979:215).

Mayhew cleverly extended colonial jurisdiction over the Indians without appearing to have usurped the native leaders' authority over internal affairs. While the move did not seriously undermine the sachems' power within their

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

own communities, it effectively did bring the island's Indian population into a socio-legal system in which they had no representative input and on which they were forced to depend to mediate relations with outsiders. The arena in which Indian-white relations on the island were negotiated was thereby drastically and definitively altered.

Initially, Thomas Mayhew, Sr. laid claim to Martha's Vineyard based upon concepts of sovereignty and property under English law yet he prudently did not impose those constructs upon the Wampanoags. The practical demands of peaceful coexistence somewhat mitigated Mayhew's control over the island's native inhabitants and caused him to refrain from interfering in the intra-tribal affairs of natives. When the sachems accepted colonial legal forms, however, they lost a good deal of their ability to negotiate with the colonists as equals, thereby laying the foundation for natives' legal subordination. Thereafter, colonial concepts of right defined the correct procedures for filing and defining legal claims, modes of redress, breaches in the law, and even the criteria for determining who was or was not a lawful entity and the rights thereof. Vineyard Wampanoags were now subject to laws they had no hand in drafting and few means of protesting.

The development of Indian praying towns on the Vineyard and their adoption of colonial legal forms also greatly altered relations between and among Wampanoags.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Administratively, each praying town was a distinct unit, the tribal affiliation of which was ignored or deliberately undermined by colonial officials. During King Philip's War, for example, the Vineyard sachemships were encouraged to turn over their mainland Wampanoag brethren to colonial officials for prosecution. As Indians became increasingly dependent on European manufacturers and farming plantation land as a means of earning a living, intertribal trade networks also decreased in importance, further widening the schism between mainland and Vineyard Wampanoags.

Thus, by the late seventeenth century, any power the Wampanoags might have exerted as a federation of territorial sachemships, had all but disappeared. In its place remained Wampanoag praying towns, officially subordinate to colonial law, economically dependent upon Puritan society and socially segregated from whites. On the Vineyard, as on the New England mainland, there was never any discussion (at least none on record) of integrating the Christian Indians into colonial society. Rather, the Mayhews' goal was to set up separate praying towns, modelled after Puritan communities or plantations, but geographically, politically, socially, economically and religiously distinct. These missionaries were neither more or less sanguine about their heathen neighbors than other Puritans. They appear, however, to have been intelligent and skilled preachers who successfully utilized ethnological information to political,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

economic as well as religious advantage and in this way distinguished themselves from most other missionaries of the time.

From 1671-1691 the Mayhews' control over Martha's Vineyard was challenged several times. Throughout, first Mayhew, Sr. and then his grandson, Matthew Mayhew, successfully negotiated with the various claimants, giving up little in the way of de facto control over the island and its Indian population. In 1671, Martha's Vineyard was officially taken over by New York with the Duke of York contesting the Gorges and Stirling patents. Mayhew, Sr. managed to get himself named governor of the island, however, with the right to collect and receive customs. As lord of the newly chartered towns of Tisbury and Edgartown, he paid quitrents to the grantee (the Duke of York) yet also could demand the same of his own tenants, be they Indian or white.

In 1673 the island was briefly administered by the Dutch when they took over New York but was subsequently returned to English jurisdiction the following year. After the senior Mayhew died in 1682, the grandson, Matthew Mayhew, took over, maneuvering to protect his patrimony and getting himself appoint "Lord of the Manor of Martha's Vineyard" by New York's governor, Thomas Dongan. Matthew then sold his title to land not already claimed on the island to Dongan and was appointed the governor's steward.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Under English law, these legal transactions were necessary for Dongan could not appoint himself lord of a manor within his own jurisdiction, yet they did little to detract from Mayhew's power. With the sale, Dongan gained only the lordship of the manor at Gay Head, all other land on the island being already claimed and therefore exempted, but it was Mayhew who actively supervised all transactions and dealings pertaining to it. Under Mayhew's stewardship, several Indians were allotted parcels of land which they soon lost to whites in payment of debts. As tenants, the Wampanoags also paid quitrents in ears of corn.

When Massachusetts took over administration of the island in 1691, the Indians of Gay Head took the opportunity to challenge Mayhew's title before the General Court. It is possible they waited to press their claim either because they were prevented from doing so by Mayhew and/or Dongan or because they did not feel they could get a fair hearing under New York's jurisdiction. In any case, the Indians protested that the land transaction was illegal based upon a will purportedly made by Sachem Mittark in 1681 in which he declared that all remaining land in Gay Head would be forever granted to the Indians and their heirs.

In 1703, following a brief investigation, the Court found against the Indians, denouncing the will as a forgery. Levitas suggests that it is quite possible that the document was authentic, drafted not in response to English attempts

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to purchase Indian lands, but to claims made in 1675 by a mainland Wampanoag named Ompohanut, Mittark's older brother whose claim to Gay Head was based upon kinship. (1980:149).

Whether or not the document was legitimate, the legal claim highlights important changes which had taken place during the Mayhew family's tenure on the island. By the end of the seventeenth century, the Vineyard Wampanoags were transformed from semi-sedentary horticulturalists to wholly sedentary agriculturalists whose claims to land were by and large restricted to the acreage they actively and demonstrable farmed, improved and otherwise utilized (e.g., as pasturage, etc.). Economically, the Indians had few options. They were prevented from acquiring trade skills which would have enabled them to successfully compete with whites and could not use plantation land as collateral to invest in other economic ventures. Lacking the means to amass a cash reserve, they also were effectively prevented from acquiring land not already allocated as part of a praying town. Greatly dependent upon plantation resources, it is hardly surprising that Gay Head Wampanoags sought to nullify any and all claims to their land by outsiders, be they English or Indian.

Additionally, although Mayhew, Sr. had previously convinced Gay Head Wampanoags to adopt several colonial practices and procedures, their acquiescence was not a renunciation of tribal sovereignty. Rather, the sachems

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

agreed to certain colonial structures only insofar as their relations with outsiders were concerned but did not agree to colonial supervision of their internal affairs. When Mathew Mayhew took over the administration of Gay Head's affairs as Dongan's steward, it no doubt became apparent to the Indians that their new legal status as tenants of Gay Head Manor represented a substantial loss of political and economic autonomy. The natives did not accept their legal subordination and took active steps to assert their sovereign rights.

That the Indians contested Mayhew's title on the basis of a will is interesting for it reveals the degree to which colonial legal forms had come to constrain native options. In offering the document in support of their claim, it is likely that Gay Head Indians believed it would uphold their collective right to the Gay Head peninsula. Yet, in ruling against the Indians, the Massachusetts General Court focused attention upon evidence of individual title -- whether or not the will was a forgery -- and sloughed over the Indians' repeated assertions that Mittark's purported conveyance of Gay Head to Mayhew in 1687 was itself illegal. It seems that the Indians did not accept that their sachem had the right to quitclaim tribal interests in land and were trying to demonstrate this by means of a convenant to Mittark's will by which he supposedly reserved most of Gay Head to the Wampanoags. The colonial court did not address Mittark's

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

right to alienate tribal land, however, and instead focused upon the authenticity of the will. In the absence of documentary proof of title (the will being declared a forgery), Mittark's claim was deemed unfounded and, in turn, that of his Indian heirs as well. Whatever the merits of the claim, colonial concepts of land ownership and conveyance decided disposition of the case.

Unable to gain legal redress, relations between Gay Head Indians and colonists deteriorated. In 1711, when the English Corporation for the Propagation of the Gospel offered to purchase Gay Head for the Indians' exclusive use, it was accepted as a convenient solution to a thorny problem. Indians would be assured the means to earn a living undisturbed and island officials would be relieved of mediating disputes between natives and their white neighbors. In practice, the Corporation's supervision of Gay Head differed little from Mayhew's; it continued to alienate Indian land, leasing tracts to whites and turning a handsome profit in the process.[62] Although the Corporation did not interfere in the day-to-day affairs of its Indian tenants, neither did it resolve tensions between whites and the natives of Gay Head.

By the beginning of the eighteenth century, the

---

[62] In 1727 the Corporation leased 800 acres to an individual from Chilmark for a period of 21 years, earning the company 645 pounds, considerably more than the 550 pounds it had paid for all of Gay Head (Levitas 1980:152).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indians' dissatisfaction with the colonists was great, as evidenced by their rejection of the Mayhews' Congregationalism and adoption of Anabaptism at a time when no other Vineyard community, Indian or white, did likewise.[63] According to Levitas, it is likely that the Anabaptists' egalitarianism appealed to Gay Head Indians first, because the latter had long chafed under the Puritans' theocratic administration and second, because it more closely approximated the existing social organization of their Wampanoag community. She goes on to note that the latter can be characterized as a "closed corporate community" (see Wolf 1954) whose members were extremely dependent upon one another for survival (1980:149). Within the tribe, status differentials were deemphasized and conflicts mediated through consensual, rather than autocratic, decision-making.[64]

Despite the establishment of a Baptist church in Gay Head, the Corporation for the Propagation of the Gospel continued to administer the Wampanoags' affairs until the

---

[63] Other Vineyard towns established Baptist churches considerably later: Vineyard Haven in 1780; Chilmark in 1803; West Tisbury in 1805; and Edgartown around 1823.

[64] Prior to European contact, Wampanoag sachems, like other Algonkian leaders, exercised little coercive power over tribal members. Rather their authority and influence obtained more through persuasion and exemplary behavior than it did from the position they held. Although the praying town structure eroded the sachems' ability to mediate their tribe's external affairs, in general it was less successful in altering traditional patterns of political authority and influence (see Brenner 1980).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

mid eighteenth century. During the American Revolution, interest in the Gay Head Manor waned and the Corporation withdrew its support. With Independence, the legal status of the manor remained unresolved. Perhaps believing that its rights were abrogated by American sovereignty,[65] the Corporation made no effort to assert control over the Gay Head Manor. Likewise, the newly formed federal government showed no interest in the Gay Head Indians. It issued no documentary acknowledgment that these Wampanoags existed, signing no treaties, passing no laws and enacting no policies specifically pertaining to them.

The lack of federal interest was a carryover from colonial times. During the seventeenth and eighteenth centuries, colonial law in New England distinguished between foreign or tribal Indians, individual natives living within white communities and Christian Indians living in praying towns (Kawashima 1988:21-36). Natives of the first category were beyond the scope of English jurisdiction and exercised de facto sovereign control over their territories and

---

[65] Since the Corporation was a creation of the English crown, it could be argued that "all rights to hold and manage property in the country ceased when the independence of the United States was recognized ..." (Banks 1966(III):14). On the other hand, not all English holdings in America were automatically forfeited to the new republic. That the Corporation did nothing about Gay Head probably indicates less about the law, than it does about the relative insignificance of the manor and its inhabitants to the religious organization.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

people. Individual Indians, whether servants, slaves[66] or free persons, were subject to the laws of their respective colonies and whatever classification system prevailed. (For example, in some cases Indians were distinguished from blacks yet in others they obtained the same minority legal status.) As discussed above, praying Indians in southern New England comprised a separate category under colonial law though natives did not knowingly, willingly or even necessarily follow all its proscriptions (see Brenner 1980). The relative concern or disinterest that the English government manifested in Indian affairs was itself a function of this classificatory scheme.

Until the latter part of the seventeenth century, when the Restoration placed a strong monarch upon the throne, the English government had little to say regarding the colonies' relations with Indians within their respective jurisdictions. Not only had the crown been too weak to exert much control from across the Atlantic, but under the charter system grantees were empowered to pass laws and ordinances provided "so always as the same be not contrary to the Laws and Statutes of the Realm of England" (as quoted of the Virginia Company's patent in Dargo 1974:54). Such

---

[66] Because security was such a burning issue for New England colonists throughout the 17th century (see above note 10), Indian slaves were routinely exported to Europe, the Caribbean and southern colonies (Lauber 1913). Black slaves, in contrast, posed less of a threat since they did not have nearby tribes and families to whom they could flee.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"conformity clauses" gave colonies significant latitude to deal with exigencies as they saw fit. Inasmuch as English law set no precedents in certain areas -- e.g., in Indian-white relations -- each colony could enact laws suited to its respective needs and ideological foundations.[67] As a result, the crown tended to focus upon foreign Indians who were seen as hostile and challenging England's claim to land in the New World. The monarchy took great care to supervise relations and treaty-making with tribal Indians in order to check the power of colonial governments and to assert its own preemptive rights against those of other European powers.

Administratively, there was a firm precedent for ignoring peaceable Indians who did not burden or threaten crown and colony. Throughout most of the seventeenth century, the Mayhews' political and religious endeavors gave the English government little reason to concern itself with the affairs of Gay Head Wampanoags. When the crown finally did express an interest in Christian Indians in the late 1600's, Matthew Mayhew managed to turn Gay Head into a manor, thereby exempting it from many of the laws imposed on other Indians in southern New England. In the long run, the legal maneuver would prove instrumental in helping Gay Head

---

[67] In Puritan Massachusetts, for example, legal forms were patterned after the Bible in accordance with interdependent church and state. In other colonies, for instance in Rhode Island, the latter were separate with laws conscientiously secular.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Wampanoags to preserve their tribal autonomy. While the manorial system did nothing to mitigate the Indians' low social status, legal disabilities and economic dependence, it did engender tribal cohesion and insularity.

The federal government's disinterest in Gay Head after the Revolution was in part, then, an outgrowth of colonial policy in which pacified or Christian Indians in New England were generally administered by respective colonial governments. Inasmuch as Gay Head was a manor, geographically remote, small in size,[68] and actively opposed to outside interference, it is no wonder that the new nation turned to more pressing concerns. The lack of formal acknowledgment of Gay Head Indians by the U.S. government more reflects the administrative practices of the Mayhews than it does the strength of the Indians' socio-political organization or affiliation.

State Administration of Gay Head

Some of the factors which caused Gay Head to be ignored by the new federal government also played a role in the lack of attention paid the tribe at the state level. The legal status of the Corporation's American holdings was unclear, the manor small and geographically removed, and the natives maintained a deliberately low profile, demanding little of

[68] A late 18th century census of the community listed 251 residents of Gay Head (see Howwaswee 1792). This number remained more or less stable over the next 100 years.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

overseers but to be left alone. For the new state, there were other, more important issues to be addressed in the years following Independence.

In 1781 Massachusetts passed the first of several acts designed to continue the guardian system of colonial days. Like the former Indian magistrates, the guardians were supposed to supervise the natives' education in the civil arts and self-government, yet they curtailed rather than enhanced the Indians' decision-making powers. Whereas in the seventeenth century, colonial legal forms greatly eroded the ability of Indian leaders to manage their tribe's external affairs, be they with other Indians or with whites, in the early 19th century, the state paternalistically sought to extend its control over intra-tribal affairs as well. According to the 1811 Guardian Act, overseers controlled tax collection, distribution of revenue, sale and allotment of land, individual rights to enter into binding contracts and one's ability to sue or be sued (Levitas 1980:173). The 1828 Act was even more intrusive, arrogating to guardians the power to manage an Indian family's income, to impose civil and criminal sanctions upon natives without judicial review and to oversee all contracts, purchases and debts between Indians and whites.

Unlike many of the Indians on the Massachusetts mainland, Gay Head successfully rebuffed attempts to impose these laws on their community. Down-island, the Indians of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Christiantown and Chappaquiddick succumbed to the provision of the 1828 Act but officials did not force compliance on the remote up-island peninsula. The long-standing reputation of Gay Head Wampanoags for being particularly uncooperative and resistant to white control perhaps discouraged state officials from pressing the issue. Inasmuch as the tribe was geographically remote and made no demands of the state, the latter probably believed that possible benefits did not justify the expenditure of time and energy. In general, the detailed provisions of the Guardian Acts were designed only to prevent Indians from becoming economic liabilities for the state. There were no provisions for helping Indians to gain the skills and resources to successfully compete with whites or to participate as equals within the democratic process. Since Gay Head Indians were largely self-contained and posed no burden or threat, it was convenient to let them be, for the time being.

For the next 20 years, it appears that Gay Head succeeded in guarding its autonomy. White accounts repeatedly note that the Indians kept to themselves, did not welcome outsiders and had "peculiar" ways (see Levitas 1980:183-86). As in the past, the Indians rejected supervision by non-Indian guardians for it threatened their own decision-making powers with respect to person and tribe. There were, however, two occasions of state intervention

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

during this period.

The first occurred in 1839 when Gay Head Wampanoags successfully petitioned the state for $400 in order to build their own grist mill. Until that point, the Indians had to go to neighboring (white) Chilmark to grind their corn, travelling by ox cart over an unmaintained road, opening and closing numerous gates which were erected to contain grazing livestock. Relations between the two communities were never very good and worsened with competition over pasturage for sheep and cattle. As Levitas points out, "[g]iven the choice between dependence on Chilmark and a petition to the state, the [Gay Head] community might have regarded the latter as less threatening to its sovereignty because it was more distant" (1980:188).

The second instance occurred in 1845 when the General Court of Massachusetts reserved Gay Head's cranberry beds for the Indians' exclusive use during the first 10 days of harvest. Afterwards, non-Indians could pick berries there without being fined by the state. There is no record of what precipitated the official action -- i.e., whether Gay Headers sought affirmation of their right to the berries or whether non-Indians wanted harvest privileges. The beds were located near the Gay Head-Chilmark boundary and would have been easily accessible to non-Indians coming by boat across Squibnocket Pond. Despite the lack of documentation, it is unlikely that the General Court would have issued such

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

a decree without provocation, that is, some conflict between Indians and whites over the right to harvest the cranberries. It is also unlikely, given their long-standing rejection of outsiders, that Gay Head Indians would have been happy with the court's decision granting non-Indians privileges, however limited, to the peninsula's resources.

Indeed, that the 1845 decree did not resolve tensions between Gay Headers and their white neighbors is evidenced by a boundary dispute between the two communities which was subsequently brought before the Massachusetts General Court in 1856. Both Chilmark and Gay Head claimed a piece of land at Nashawaquidsee and Squibnocket Necks, the Indians asserting that it was part of the original Aquinniuh sachemship and could not be sold with the entire tribe's consent and the whites stating that the land in question had been legitimately purchased by the Mayhew family in the eighteenth century. As in 1703, Anglo-American legal definitions of the proper procedures guiding purchases, transfer and alienation of property rights and of what constituted legal instruments determined disposition of the case. Mayhew's descendants were awarded the land.

In 1848, Massachusetts tried for a third time to supplant Indian leaders with state-appointed guardians yet once again Gay Head managed to receive an exemption. According to Commissioner Bird,

> The Indians are jealous of the whites with too good reason. They will allow no white man to gain a

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> foothold on their territory and will not lease a foot of land for manufacture of clay although tempting pecuniary advantages have been held out to tempt them to some temporary arrangement. The Gay Headers feel their political and civil disabilities, they feel they are under the ban of an unrelenting social proscription, but they see no exodus from this bondage and they only ask to be let alone and not by ill-advised legislation be constantly reminded of the vassalage (as quoted in Levitas 1980:190).

By 1859, the state would change its position, imposing Indian district status upon Gay Head. The Indians still made few demands of the state and offered scant justification for official supervision. In the intervening years, the natives had replaced the general meeting form of decision-making with three elected (Indian) overseers, a clerk, treasurer and school and land committee which superficially paralleled the political organization of other Vineyard towns (Levitas 1980:204). As state officials openly acknowledged, Indian leaders seemed to be functioning quite well in these roles. Likewise, the Wampanoags' system of communal land use caused no hardship for the tribe or state. In 1849 Commissioner Bird had described those practices as follows:

> None of the lands are held, as far as we could learn by any title depending for its validity upon statute law. The primitive title, possession to which has been added inclosure, is the only title recognized or required. The rule still exists ...[T]he most singular and most creditable fact in connection with this is that while one proprietor has not but half an acre and another has over a hundred acres, There is no heart aburning, so feeling that the latter had more than his share. This state of things is as happy as it is peculiar, how long it can continue is a problem yet to be solved (as quoted in Levitas 1980:202).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

A little over a decade later, things appeared to be operating smoothly in Gay Head; natives lived in comfortable frame dwellings and demonstrated by the "purity of their lives and conversation," their adoption of Christianity (Earle 1861:35-36). The Indians still adhered to their "peculiar" land use practices, but these were

> probably as well-adapted to their condition as any that can be devised. At any rate, they adhere to it with great tenacity and are fearful of many innovations upon it. This is probably a prominent reason of the jealousy of foreigners and of the rigorous exclusion of them from any footholds on their domain, except when intermarried with one of the tribe. the rule to "let well enough alone" is probably the one to adopt in this case and it is believed that no advantage will accrue either to the Indians or the State by any change or modification of the system, til some contingency shall arise that imperiously demands it ...(Earle 1862:84).

For state officials, the Indians' "progress" was measured by the adoption of white American values, traditions and practices. There was no question that the latter constituted the goal of the government's Indian policy. In the nineteenth century, the only dispute was how these results were to be attained.

In Massachusetts, the legal incorporation of natives had not gone smoothly; the Guardian Acts of 1811 and 1828 had given the state extensive powers to manage Indian affairs but on the mainland the result was too often impoverishment of the natives, the latter dependent on state handouts for survival. Allotment of individual parcels to Indians proved particularly disastrous for the land was invariably lost in payment of debts, through white chicanery

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and/or through native ignorance.

Anxious to avoid such a debacle from occurring in Gay Head, government officials were faced with a dilemma. The Gay Head system seemed to be well-suited to the Indians' needs yet did not conform with official ideas for productive citizens. Ideologically, allotment supposedly would remove the impediments to self-improvement -- i.e., communal land rights -- and would enable each Indian to reap the rewards of his own efforts. The trouble was, extensive experience revealed that these changes in land tenure were more costly to the state in the long run.

Massachusetts did not immediately move to alter the Gay Head Wampanoags' land practices, yet it did effect several changes which, although seemingly minor, nevertheless tore at the social, political and economic fabric of the tribe. In conferring district status upon the community in 1862, the state rendered Gay Head a legal corporate entity with all the rights, privileges and liabilities thereof. A scant four years later, the implications of that legal status became evident when a local merchant sued Gay Head for payment of goods allegedly ordered but not paid for by tribal officials (see Levitas 1980:211-12). Yet another suit against Gay Head claimed damages for individuals' unpaid medical expenses. The local court found against the Indians in the first case and for them in the second. Both actions highlight the legal constraints under which Gay

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Headers were forced to operate.

The tribe was now liable for debts contracted by Indian leaders and by individuals, however the former were not empowered to tax Gay Head residents nor to impose sanctions for non-payment. Making the community as a whole legally responsible for members' personal actions also greatly threatened individual autonomy and decision-making. Together, they caused friction within a community in which individual choice was greatly respected and leaders long exercised authority through persuasion rather than coercion. That is, the court's actions undermined intra-tribal relations, how Indian leaders acquired and exercised authority and influence within the community and the freedom with which members chose to support or not the decisions of others.

In addition, state officials undertook an investigation of property divisions among individual Indians with the aim of eventually applying legal sanctions to existing boundaries. This too threatened the tribe's ability to regulate access to and control over resources. Once acreage was assigned in perpetuity to individuals, the tribe would lose a powerful means of maintaining egalitarian social, economic, and political relations. Until that point, status differentials with Gay Head were minimal, for land was allocated according to use and need. Although some Indians had earned money in the whaling industry and used it to make

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

capital improvements -- to build and furnish frame houses, for example -- investment opportunities in Gay Head were limited since individuals held usufruct rights to land, not fee simple title.

A preliminary step in dismantling the communal land use system, the state census and boundary study of Gay Head exacerbated tensions over tribal membership and rights. As noted by state officials, Gay Headers had long been suspicious of and cool toward outsiders. Although some intermarriage with other Indians and non-Indians had occurred since the seventeenth century, necessitated by the group's small size (approximately 250 men, women and children), the communal land use system had effectively limited the power and influence of non-Gay Headers within the tribe. That is, land allocation had long depended on a general consensus of the tribe, proving a powerful means of enforcing and rewarding individual conformity with group norms and values. Those outsiders who were not accepted by the tribal community were not allotted land in Gay Head.

By the 1860's, however, there is evidence that tribal membership and rights were becoming an issue for the community. For some time, Gay Head men had gone off to sea on whaling expeditions, providing one of the few dependable sources of cash income for the tribe. Gone for years at a time, the men were nonetheless entitled to Gay Head land upon their return and accordingly received their due. In

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

contrast, Indian women who went off-island, married non-Gay Headers and returned, created problems for the community. Returnees and their families no doubt strained the community's meager resources (Levitas 1980:210) yet, more critically, it is likely that their non-Indian spouses posed a threat to the tribe. The latter may have enclosed more land than Gay Head men were wont to do and had economic, political and social ambitions which were at odds with tribal values. It is significant that the tribe tried, unsuccessfully, to limit only the rights of Indian women who returned to Gay Head with their families, not those of Indian men.

The state's efforts to document property relations in Gay Head only added to the friction among residents, most of whom were tribal members but some of whom were non-members. For example, if the interests of all kinsmen, those resident on and or temporarily off-island, were not recorded at the time of the commissioner's report, they could be lost forever. There was also a danger that the rights of Indians too poor to fence their land would be overlooked by state officials. Likewise, non-Indian spouses who were permitted to live in Gay Head but who were not accorded any privileges of tribal membership could, mistakenly, be allotted land in perpetuity, gaining rights which the tribe never intended that they receive.

By the time Gay Head was asked to vote on whether or

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

not to incorporate as a town in 1869, dissension over these issues had split the community. In Levitas's analysis of those favoring and rejecting the legal change, she demonstrates that the "push for incorporation came from the foreign-born or those with experience outside the community" (1980:219) -- i.e., those who stood most to gain legally from the change in status.

Although Massachusetts would state that the community voted in favor of incorporation, the vote must be viewed in light of the cumulative legal constraints imposed on the tribe since colonial times. That is, in order to understand what Gay Head Wampanoags did do in 1869, it is necessary to understand what they could not do. In their case, the options (or lack of) had deep historical roots.

As discussed above, the Mayhews' tenure left an enduring legacy for Gay Head Wampanoags. Rather more quickly than on the mainland and without conflict, Thomas Jr. and Sr. converted the island's natives to Puritan Congregationalism. Peaceful conversion was no doubt a great advantage when Thomas Sr. pushed Indian leaders to adopt certain colonial legal practices. Although the sachems did not formally abdicate their leadership, the long term effect of the move was a loss in native power since subsequent Indian claims would be adjudicated in terms of colonial legal constructs. When Matthew Mayhew later sold Gay Head Manor to Governor Dongan, the Indians' legal subordination

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

was formally established. Gay Head Wampanoags had not agreed to their vassalage, yet their options were legally constrained nonetheless.

To begin with, as Christian Indians, Gay Head Wampanoags had no representative voice in colonial government and therefore could not change laws or force a negotiation of terms more favorable to them. True, they could refuse to comply with English law, but would thereby risk a direct military confrontation with the colonial government. Such a move would have been extremely dangerous, however, given the military impotence of the Wamponoag federation and the demonstrable might of the colonists. In both the Pequot (1636) and King Philip's (1675) wars, colonial officials had touted Indian intransigence as justification for massacring native men, women and children (see Jennings 1975). These conflicts devastated mainland tribes and proved a grim lesson to other Indians of the response they too might expect from the English. Unless tribes were extremely powerful and/or had military support from other European powers (as was the case with the Iroquois nations), they stood to lose more than they would gain through armed resistance.

Another option for the Indians involved petitioning colonial courts for legal redress. In general, such claims were risky since natives were subject to laws they did not understand very well and against which they could not

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

adequately defend themselves. In court, Indians were hampered by their minority legal status which rendered them incapable of serving as jurors or judges and which diminished the weight of their testimony against that of whites. Although Gay Header Wampanoags chose this strategy in 1691, their lack of success and options to appeal the court's decision no doubt led them to adopt a third option, that of passive resistance.

Of all available strategies, this last proved the most effective for the Wampanoags of Gay Head. In ignoring laws or else complying only superficially with legal proscriptions, the Indians were able to maintain considerable tribal autonomy and cohesion. By maintaining a low profile and demanding little of government officials, natives gave outsiders little reason to interfere in tribal affairs. Of course, the tribe's remote geographic location and small size greatly contributed to the group's political, social and economic insularity.

By the time the State of Massachusetts took over the administration of Gay Head in the nineteenth century, Gay Head's passive resistance to outside interferences was entrenched and had served them well. Because of their historic intransigence, Gay Head Wampanoags managed, unlike other Indians on and off-island, to avoid complying with the paternalistic regulations of the 1811 and 1828 Guardian Acts. Although the Indians still successfully managed their

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

own affairs in 1862, their ability to do so was greatly threatened by state-imposed legal forms. As Levitas notes, it is doubtful that the tribe could have survived the legal disabilities of district status (1980:215).

As defined by state officials in 1869, the issue facing Gay Headers was whether or not to incorporate. The choices themselves were indicative of prevalent American attitudes and practices. By the mid nineteenth century, the Enlightenment had long eroded the Christian/non-Christian dichotomy as the dominant world view and replaced it with more scientific and secular approaches. There was, for example, considerable speculation as to the origins of American Indians -- i.e., whether they represented a biologically inferior race or could, indeed, become "civilized" given adequate education and means of self-improvement. As in colonial times, Americans did not question their own superiority vis-à-vis natives but were wont to express it more in racial and cultural terms than they were in spiritual/moral ones.

The change in classificatory schemes signalled concomitant shifts in Indian policy. Less attention was paid missionization as the primary means of civilizing natives and more paid to restructuring native economic, political and social organization. Although there was no specific agenda for turning Indians into productive American citizens, neither was there any question that this was the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

eventual goal of governmental policy. For Massachusetts, the central issued concerned whether or not Gay Head Indians were sufficiently "civilized" to live without the legal protection of wardship, laws which were to prevent their total impoverishment and hence dependence upon state handouts. Inasmuch as Gay Head Indians had elected officials similar to other towns, sought little in the way of economic assistance and socially had adopted the accoutrements of "civilized" life -- e.g., they spoke English, lived in frame houses, attended church and sent their children to school -- it appeared that the were ready to become legal citizens.

For state officials, the time had come to incorporate Gay Head. Politically, Indian-white disputes would be more easily adjudicated if all parties were subject to the same laws; economically, it was feasible that Gay Head could function as a town; and socially, with the state a strong supporter of abolition, it was increasingly difficult to justify the Indians' legal minority. As in the past, governmental officials continued to view Indians paternalistically as untutored children whose interests were best defined and served by state-appointed guardians. The latter neither envisioned nor proposed tribal self-determination as an option. Indeed, the state's authority to define the Indians' legal relationship toward their land, each other and the federal government was not questioned and would not

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

be for another 100 years (see Chapter 7).

Thus, in 1869, the only issue for Gay Head Indians to decide was whether to remain wards of the state, subject to laws which increasingly undermined tribal autonomy, or to take on the legal responsibilities and liabilities of town government. If they chose the latter, they would have a representative voice in local, state and federal governments and be able to govern themselves without paternalistic restrictions on persons and community. On the other hand, the community would be subject to the same regulations as governed other citizens and towns and have no legal recognition as an Indian tribe. For Gay Head Indians, these disabilities outweighed the legal privileges and caused them to reject incorporation. Of great concern to them was that they might lose their political integrity, becoming incorporated into neighboring Chilmark, toward which there was historical antipathy. Once state officials assured the Indians that they would be granted continued state support of their school and that they would constitute a town unto themselves, thereby guaranteeing them some political autonomy, natives withdrew their objections to incorporation.

In 1870 the Massachusetts changed the legal status of Gay Head from an Indian district to an incorporated town, its residents became American citizens with all the rights and privileges of that status. The state continued to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

acknowledge that Gay Head residents were ethnically "Indian" yet the tribe no longer had standing as such within the American legal system. Any claims the Indians might subsequently make, they now did as American citizens.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 4

RECOGNITION IN LAW

1870 was a watershed in the history of Gay Head. That year, its native residents became legally indistinguishable from other American citizens in the United States. Individually, the legal status of Gay Head Indians changed drastically and irrevocably. As a group, however, the Wampanoags did not suddenly become an "unrecognized tribe." To begin with, the extent to which the group's sovereignty was recognized by non-Indians prior to 1870 is itself somewhat problematic. On the one hand, the colonial government and the State of Massachusetts treated Gay Head as a distinct legal entity, subject to the laws which they applied only to "Indians." On the other, the federal government did not explicitly acknowledge the sovereign existence of Gay Head Indians in treaties, legislative acts, judicial decisions, executive orders or in other official documents.[69]

Whether or not Gay Head Indians were recognized prior to 1870 is therefore a complex issue, the data messy and equivocal. The facts do not speak for themselves but need to be interpreted and contextualized within the larger arena of U.S.-Indian relations. Only by investigating the social,

---

[69] The sole exception to this occurred in 1803 when the United States built a lighthouse on the Gay Head cliffs and noted the presence of Gay Head Wampanoags.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

economic and political pressures upon Gay Head from contact through incorporation, for example, do we understand why these Wampanoags did not develop a treaty relationship with the federal government. And only by examining U.S. policy toward Indians generally from 1776-1870 do we learn that it was accepted practice to leave the administration of peaceable natives within the original 13 states to the states themselves.[70]

Apart from these difficulties in the analysis of the data, there is, however, an even more fundamental reason why Gay Head Indians did not become an "unrecognized tribe" upon incorporation of the town. Quite simply, Federal Indian law did not distinguish between recognized and "unrecognized tribes" in 1870; indeed, no such classificatory scheme had ever existed.[71] Much of the difficulty in trying to determine to what extent Gay Head Indians were recognized in the past stems from trying to fit the historical facts into the present-day legal framework regarding federal recognition. Yet applying contemporary indices of recognition retroactively is extremely problematic.

---

[70] When the federal government did intervene during this period, it was often because state jurisdiction over Indians was directly challenged in court, forcing Supreme Court mediation as in the case of Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832).

[71] The Indian Reorganization Act (1934) ws the first to refer to "recognized tribes" as a specific category. Despite later judicial interpretation in Tee-Hit-Ton v. United States (1955), historically, the term recognition was not a legal classification, only an administrative one.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Current legal usage of recognition rests upon myriad assumptions about "tribes," "sovereignty," and "aboriginal rights" which have themselves developed over time. Contemporary distinctions between recognized and "unrecognized tribes" are built upon more than 200 years of legal interpretation and negotiation. Many concepts which are implicit in Federal Indian law today therefore did not exist in 1870 or were still in the process of being developed and codified. To ignore the origin and historical development of such legal constructs as recognized and "unrecognized tribes" is to assign them a privileged if not timeless authority. It is to accept unquestioningly that these constructs adequately represent historical relationships -- i.e., that Indian tribes were indeed recognized or not by the federal government and that the only problem is a methodological one, namely that of finding sufficient reliable data to document either status. How the quality and availability of data have been affected by past legal frameworks -- i.e., how the latter influenced what was recorded, how, by whom and to what end -- remains unexamined. In addition, such an approach ignores the role of legal processes in shaping the very course of history.

Legal classification is not an objective, apolitical process but is part and parcel of social relations. Certain concepts in Federal Indian law -- e.g., federal guardianship (Worcester v. Georgia (1832)) -- had a profound impact upon

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

U.S. policymaking and upon the legal options available to American Indians.[72] How can one determine whether or not a tribe was recognized historically without taking into consideration the profound changes in how tribal sovereignty was conceived which took place in the nineteenth century in the wake of Chief Justice Marshall's famous 1832 decision? How can one understand what Gay Head Indians did in relationship to the federal government before 1870 and after 1870 if we do not also know to what extent Federal Indian law delimited what options were viable or even conceivable for them?

Thus, while the incorporation of Gay Head in 1870 signalled a radical change in the Indians' legal status, it would be incorrect to interpret that change by means of contemporary legal frameworks. Rather, in order to understand why Gay Head came to be considered unrecognized in 1978, it is necessary to look at how recognition itself emerged as a legal construct within Federal Indian law. That is, we need to know more about the process by which recognition was imbued with legal authority and the extent to which it circumscribed American Indian options generally and those of Gay Head Wampanoags in particular.

---

[72] Defined as "domestic dependent nations," the rights of tribes were ever after, in theory and in practice, "impaired" and "diminished." Native options within the legal arena were drastically curtailed, especially after the United States' arrogation of "plenary power" in Indian affairs in the late nineteenth century.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

American Indians and the Law

Acknowledgment of native rights has been an enduring issue in Indian-white relations since contact. Not only does the general concept of recognition have deep historical roots, but these are also hopelessly enmeshed with the interpretation of such legal constructs as "tribe," "sovereignty" and "aboriginal title," each of which is a complex issue in its own right with its own tangled legal history.

What this means is that recognition is not a discrete and bounded issue but one which girds the structure of Federal Indian law. Indeed, the very concept of a special body of law dealing with U.S.-Indian relations rests upon acknowledgment that the rights of American Indians are in some way categorically different than those of all other Americans. To what extent these laws should or need to explain, protect or mediate these rights has of course been much disputed throughout American history.

While a comprehensive analysis of native rights is well beyond the scope of this work,[73] nevertheless a brief outline of the legal arena in which U.S.-Indian relations have been negotiated is critical to the present study.

---

[73] In addition to the textbook-like treatments of Federal Indian law of Felix Cohen (1973) and Monroe Price (1972), there are several overviews which discuss the political development of this body of law, some of which are Barsh and Henderson (1980), Prucha (1990), Washburn (1971), Wilkinson (1987), and Deloria and Lyttle (1983).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Without exploring how Federal Indian law defined and affirmed native rights historically, it is impossible to understand why Gay Head came to be categorized as unrecognized and how that classification impacted upon them over time. Only by investigating the origin and development of recognition as a legal construct can we then examine why the federal government enacted a special procedure to acknowledge Indian tribes 1978 and the authority and power of this legal procedure.

The following chapter thus explores the history of three concepts in Federal Indian law: tribal sovereignty, plenary power and recognition itself. Each had a profound impact upon the negotiation of U.S.-Indian relations and the definition of native rights. The aim is to provide a brief overview of the process by which federal authority vis-à-vis Indian tribes was codified and of the ways in which it has affected the very negotiation of U.S.-Indian relations. In short, discussion will examine the relative autonomy of Federal Indian law -- how certain concepts of right were introduced, affirmed legally, interpreted and reinterpreted over time.

The Colonial Legacy

Upon Independence, Americans did not enact a wholly new set of laws and call it "Federal Indian law." Rather, the legal forms that today are embodied in this term developed

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

slowly, if unsystematically, in response to myriad conflicts, many of which had surfaced in colonial times between Indians and English settlers. Not surprisingly, colonial principles and practices greatly influenced the development of American law.

In seventeenth and eighteenth century America, native rights were variously acknowledged and affirmed legally. While the English crown generally claimed a "preemptive right" to American soil, not all Englishmen felt that "discovery" automatically nullified tribal sovereignty and territorial claims. Some colonists held, as did Massachusetts Governor John Winthrop, that Indians' natural or possessory rights were superceded by the Europeans' civil rights to the land. Others questioned that Englishmen had any right to extend jurisdiction over Indians, be they Christian or non-Christian, civilized or savage.

There was, then, disagreement among colonists insofar as how Indian rights were defined and the extent to which European discovery, conquest and purchase affected tribal sovereignty. Given the relative autonomy of colonies under the charter system, it is little wonder that native rights were inconsistently defined and protected throughout the thirteen colonies during the first half of the seventeenth century.[74] Even after restoration of the English crown in

---

[74] In Pennyslvania, Delaware and Martha's Vineyard, for example, colonists took care to lawfully purchase land from Indians and to prosecute the latter's grievances, resulting

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

1660, when the latter consolidated its political authority over the colonies generally, Indian rights remained mediated to a great extent by local history and exigency. In some cases colonists nurtured military alliances with Indian tribes against rival Europeans[75], whereas in others English jurisdiction was hastily extended over natives too weak, dependent or naive to effectively protest (see Brenner 1980, Salisbury 1974).

The colonial period thus bequeathed an important if ambiguous legacy for Indian-white relations in America. From the very outset, American Indians comprised a separate legal category, though its exact parameters were variously defined and justified across space and time. Although the classification of Indians as non-Christians did not

---

in comparatively peaceful relations between Indians and Whites. In parts of Connecticut, Massachsuetts Bay, New York and Rhode Island, in contrast, laws barring fraudulent acquisition of Indian lands were not always diligently enforced, exacerbating tensions between natives and non-natives (see for example Jennings 1975, Axtell 1975, Kawashima 1986). This is not to say that law was the only factor influencing Indian-White relations in the 13 colonies. To be sure, there are many variables to be considered. William Penn's Quakerism, for exmaple, is especially important in understanding native experience in Pennsylvania as are the Mayhews' personal skills and ambitions in what transpired on Martha's Vineyard. Rather, it is only to point out that the legal status and treatment of Indians varied from colony to colony and that the lack of a uniform code or policy regulating Indian-White relations is itself significant.

[75] Compare Jennings's (1975) discussion of New England politicking by colonists with White's (1980) discussion of Choctaw maneuvers regarding Spanish, French and English traders.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"determine" the specifics of colonial practice, it nevertheless left an indelible imprint upon Indian-White relations generally.

The English crown based its claim to the thirteen colonies upon John Cabot's discovery of land not already occupied or claimed by Christian sovereigns. Other European powers would later dispute particularities of the claim, for example, how much land was included and which explorer had sited the land first, yet none would question its basic premise: that Indians were non-Christians and had different rights from those of Europeans. The legal distinction between Christian and non-Christian was extremely potent for it naturalized the social, economic and political otherness of Indians in terms of long held principles in European international and divine law. Over time, that otherness would be reinforced and reproduced by means of numerous colonial legal forms. Even native conversion to Christianity did not eliminate the legal dichotomy between Indians and non-Indians. As the experiences of praying town Indians well illustrates, it was quite possible for a group of natives to be brought under the jurisdiction of colonial law yet be denied the prerogatives of their white counterparts.[76]

---

[76] In New England, for example, natives were administered by specially appointed magistrates, denied the legal majority or due process of White colonists, prevented from buying and selling land without official approval and barred from apprenticeships which would have enabled them to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Throughout the colonial period, tribal sovereignty was not so much recognized or not as it was negotiated by each tribe of Indians with local colonial officials. Some native groups were sufficiently powerful and politically astute to rebuff white encroachment, their political autonomy largely unfettered by colonial law. Officials could not impose sanctions upon these foreign or tribal Indians but could only work out agreements with native leaders or else send in troops to enforce decision-making. The legal status of Christian Indians, in contrast, was less clearcut. Most, like Gay Head Indians, had not explicitly abrogated their political rights upon conversion yet found themselves increasingly hard pressed to exercise such autonomy in light of demographic, economic, social and political pressures exerted by white colonists. Still, many praying town Indians were able to maintain some political authority and influence over the tribe's internal affairs through passive resistance, geographic isolation and/or by deliberately keeping a low profile vis-à-vis colonial officials.

On the eve of the Revolution there was no single Indian policy to which all colonists or Indians adhered, yet firmly established over the past 150 years or so was a distinctly European discourse describing and documenting Indian and

---

eventually compete with Whites in varying trades. See Kawashima 1986.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

English powers and prerogatives. At first, that discourse was tempered by the colonists' precarious military position which served to discourage the latter from making arrogant demands of the natives. Increasingly, however, whether due to the Indians' physical decimation, economic dependence on European trade, social disintegration or political impotence, the balance of power tipped in the colonists' favor and it was the latter who were able to define the legal parameters of Indian-white interaction.

By 1776, most Indians in the 13 colonies were playing a diplomatic game not of their own making in a language which reflected and reinforced colonial, as opposed to native, concepts of right. For example, treaties dealt with Indian land as property (the rights to which were alienable) and bound tribal members to comply with written agreements signed by native signators.[77] When the legality of these documents was upheld by colonial courts, so too was the rightness of these assumptions regarding ownership and leadership, assumptions which were antithetical to native society prior to contact. Thus, even if tribal Indians were pratically speaking beyond the reach of colonial jurisdiction, they were nevertheless drawn into the web of

---

[77] In the treaties themselves these individuals are invariably designated as "chiefs" however in many cases they did not have the authority, right or power to represent the interests of the entire tribe. Moreover, colonial and federal negotiators often deliberately and self-consciously chose Indians who were "friendly" and "useful" to non-Indian goals, passing over the indigenous leaders of a group.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

colonial law through treatymaking and commercial agreements. Although tribal sovereignty was to some extent recognized by English colonists, it was also seriously undermined by legal processes which relied exclusively upon non-Indian cultural constructs. The soveriegnty that colonial law recognized was a distinctly European one characterized by leaders exercising control over persons and property to an extent generally not found among North American Indian tribes prior to and during the early stages of European settlement.

The Politics of Exclusion: Sovereignty

> We the People of the United Staes, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the Common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America...(Opening statement of the United States Constitution).

In 1776 Americans declared political independence from England. For the next 13 years, they struggled to establish a viable alternative to the constitutional monarchy which had evolved in England yet which the colonists had found seriously wanting. During this transitional period they devised and then replaced the Articles of Confederation with the U.S. Constitution. The differences between the two documents are great, as reflected in the heated debates preceding adoption of the Constitution and the close margin

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

by which the latter was ultimately ratified.[78] In general, the Constitution accorded greater powers to the federal executive, legislature and judiciary than existed under the confederation model and incorporated a system of checks and balances among the three branches of government. Founded upon the dual principles of federalism and democratic representation, the result was in theory, if not in practice, a government by the people and for the people, a truly radical experiment in government in the eighteenth century.

From the declaration of independence in 1776 until the ratification of the Constitution in 1789, the United States undertook no new policymaking toward American Indians nor could it have done, realistically speaking.[79] Americans

---

[78] See Smith 1980:235-279 for discussion of the divisions which made ratification of the Constitution a suspenseful state-by-state process. Much of the argument between federalists and anti-federalists (respectively those for and against ratification of the Constitution) centered on the relative powers of state and federal governments. According to the Articles of Confederation, each state retained its "sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States, in Congress assembled" (Article II). Not surprisingly, the result was an extremely weak central government, one which could resolve much but enforce nothing (Smith 1980:80). In contrast, the Constitution established a much stronger union with fewer rights reserved to states and individuals.

[79] The first treaty the United States concluded with an Indian nation was signed in 1778 with the Delawares. Interestingly, that document guaranteed the Indians not only "territorial rights," but invited them "to join the present confederation, and to form a state, whereof the Delaware nation shall be the head, and have a representation in Congress" (as quoted in Barsh and Henderson 1980:33).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

were too preoccupied with the war itself and with the substantial task of governing thirteen disparate states, each of which closely guarded its newly won powers. However, within one year of its adoption, the Constitution began to play a seminal role in how tribal sovereignty was interpreted and the rights accorded natives as a result. What that document says and does not say is critical to the development of Federal Indian law.

Articles I-VII of the Constitution deal with basic political structures and processes -- the respective jurisdiction of federal, state and local governments and the institutional means by which various powers may be allocated, mediated and sustained. While there is considerable discussion of the rights and duties of citizens and state, there is scant reference to "Indians" and "Indian tribes." Sole mention of native peoples appears in the Apportionment and Commerce Clauses. In both cases, the rights of Indians are not directly addressed; rather, at issue are the delegated powers of Congress.

In the first instance, the Constitution describes the composition of the House of Representatives and its power to levy taxes.

Whatever the Americans' intent at the time, these extraordinary promises were never fulfilled nor repeated in subsequent treaties with Indian nations. Apparently, the Constitution not only curtailed states' powers, but also the possibility of Indian nations joining the confederation on legal par with other states.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons (Article I, Section 2, Paragraph 3, emphasis added).

In 1868 passage of the Fourteenth Amendment eliminated the distinction between "free persons," "those bound to service" and "all other persons," yet reaffirmed the exclusion of "Indians not taxed" from representation in Congress.

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed (Article XIV, Section 2, emphasis added).

In the second and only other discussion of natives, the Constitution states:

> Congress shall have power to...regulate commerce with foreign nations, and among the several states, and with the Indian tribes...(Article I, Section 8, Paragraph 3).

Here it is Congress, as opposed to other branches of federal or state government, with is accorded the power to regulate commerce with Indian tribes.[80] While the clause implicitly

---

[80] This provision was specifically designed to rectify major deficiencies of the Articles of Confederation. The latter were unable to prevent states from unilaterally imposing trade restrictions and duties upon foreign imports and upon goods from other states. Economically, the result was disastrous, with unchecked competition threatening the fiscal, if not political, foundation of the new nation. Under the Constitution, the regulation of trade and commerce was deliberately reserved to the federal government to safeguard the nation's financial as well as political security. Discussion of "Indian tribes" thus occurs only as part of federal, as opposed to state, authority. That is, Indian rights per se were not the main issue.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

acknowledges tribes as political entities, the wording nevertheless sheds little light on precisely what relationship tribes in fact have vis-à-vis the United States. Their status is extremely problematic for there is no mention of "Indian tribes" elsewhere in the Constitution and therefore no further elaboration or clarification of their powers. Only by omission do we learn something about tribal rights -- e.g., tribes are not accorded a position within the executive, legislative and judicial branches of government and they do not have powers reserved to them respectively by Articles IX and X:

> The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the People (Article IX).
>
> The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people (Article X).

The weak constitutional status of Indians is further undermined by the fact that natives sent no representatives to the Continental Congress and did not vote on whether or not to ratify the Constitution. For who drafted this important document, "We, the People..." did not refer to "Indians."

Historically, however, the American government did enact and enforce numerous laws pertaining to Indians. By what authority did the United states regulate the affairs of political entitites which are constitutionally excluded from representation within the governmental arena?

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Upon Independence, the original colonies became 13 independent states, united by consent, in a single government. Yet the legal status of Indians within those states remained a vexing political issue. How could the new nation permit fully independent (Indian) nations to reside within its borders, perhaps serving as a toehold for European interference, if not dominion, in the future? At the same time, how could the United States, based as it is upon a contractual philosophy of government, deny the sovereignty of tribes which it had not conquered or from which it did not obtain a formal abdication of political authority (e.g., in the form of a treaty, deed or other legal instrument)? The problem, in short, is that the ambiguous and variable status of Indian tribes during the colonial period left the new nation vulnerable to attacks regarding its own claim to political legitimacy.[81]

As noted above, however, the Constitution provides no clearcut solution to this political conundrum. While it vests in the federal government, as opposed to the states, the power to deal with Indian tribes, it falls short of defining just what legal status the latter have. Whether or not deliberate, the omission is significant for it leaves

---

[81] Such questions were indeed raised during negotiations with Great Britain over the Northwest Territory. Although Britain at first maintained that the new nation did not have jurisdiction over Indian tribes in the territory, it later backed down from American negotiators for reasons which are unclear. See Barsh and Henderson 1980.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the job of interpreting native rights largely up to the American judicial system or, more accurately, to the federal courts. This is particularly critical when one considers that

> [m]any of the early cases that established important precedents in the development of Indian law were not litigated by the Indian nations. Often, the analyses and dicta concerning aboriginal rights were tangential to the issues in the controversy. Nevertheless, these cases form the foundation of a legal system that presently engages Indian people and their land rights...(Berman 1978:637).

Much of Federal Indian law was developed by non-Indians in an arena in which native peoples had no authoritative input or representative voice. Indeed, natives' exclusion from the American "process of participation" (Barsh and Henderson 1980:16) was prescribed by the nation's founding charter, the Constitution. Any appeal or redress of grievances regarding the Indians' role in that process could only be made within the boundaries of American law itself, implicitly compromising tribal sovereignty.

The horns of this legal dilemma are well illustrated by several early cases in American jurisprudence which critically circumscribed the definition of tribal rights. Both Fletcher v. Peck (1810) and Johnson v. McIntosh (1823) involved non-Indian plaintiffs and defendants disputing each other's right to receive, convey and covenant patents to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian land.[82] Since the Indians' rights to the lands in question had been nullified in prior agreements, neither decision had any practical effect upon the rights of the tribes involved. Nevertheless, the cases are noteworthy in how they characterized American Indian land tenure and political autonomy.

Writing for the majority in Fletcher v. Peck, Chief Justice Marshall declared that

> the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state (1810:142-43, emphasis added).

In this single phrase the Supreme Court simultaneously acknowledged the Indians' right to the land, the power of the United States to extinguish that claim through such legal means as conquest and purchase[83] and the ability of

---

[82] The issue in both cases was not tribal property rights but whether individual purchases of Indian lands, made by American citizens in violation of U.S. law, were to be sustained in American courts. Consistent with international law, the Supreme court unanimously declared that such purchases did not fall within the jurisdiction of American courts, but rather within that of tribal courts. The situation was analogous to an American purchasing land in France; French law, not American law, would be applicable. After tribal lands were ceded by treaty to the United States, however, rights would be governed according to the legal practices of the new sovereign. Prior individual interests, unless specifically protected in a treaty, could be lost (Barsh and Henderson 1980:46).

[83] Under the (European) Law of Nations, purchase and conquest were legitimate means of acquiring title to foreign territory. "Discovery" did not vest in the discovering nation absolute title to land, but only the preemptive right to purchase land from natives as opposed to other sovereign claims. That is, "discovery" was a way of excluding other

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the state (in this case Georgia) to sell property interest in Indian land to non-Indians (Berman 1978). However expedient the decision was in foreclosing conflict between the state and federal government over the right to extinguish Indian claims,[84] it left unresolved the definition of native rights. Did the Indians, the U.S. government or the state have ultimate jurisdiction over the land?

In Anglo-American property law, "fee simple interest" commonly denoted absolute, exclusive ownership yet, as used by Marshall, it seemed to be coterminous (or at least not inconsistent) with other interests held by the state. In his dissenting opinion, Justice Johnson forcefully argued against such confusing usage.

...[I]f the Indian nations be the absolute proprietors

Europeans from claiming non-Christians' land. Since Europeans acknowledged that Indians possessed (i.e., cultivated, hunted on and otherwise claimed) certain territories, it was necessary, according to European law, to extinguish the natives' right of possession before clear title could be established by the colonists.

[84] As in later cases, a key issue was the jurisdiction and authority of federal and state governments in Indian affairs. In Peck, Marshall declared that Georgia had the right to issue grants to companies for lands the Indians occupied and possessed. Such grants did not extinguish Indian title, however, and legal means (e.g. purchase) were still required for those companies to take possession of the land. In MacIntosh, Marshall would further explain that the United States held ultimate right to all territory within its boundaries, though Indians might possess or occupy some land. The federal government had a "preemptive right" to purchase or otherwise convey Indian lands. "Title" in these cases was an anomalous term, confusing rather than clarifying federal vs. state vs. tribal land tenure.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> of their soil, no other nation can be said to have the same interest in it. ...[The interest of the state] is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. ...It is awkward to apply the technical idea of a fee-simple to the interest of a nation (1810:146-47).

Awkward or not, Marshall's choice of words left considerable room for further judicial interpretation. In 1823 the Supreme court again took up the issue of Indian rights in dicta. This time Marshall asserted that European discovery gave title to the discovering nation and

> the sole right of acquiring the soil from the natives, and establishing settlements upon it. ...[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished... (Johnson v. McIntosh 1823:572).

According to the Court, the British government had acquired a "limited sovereignty" over native land along with "title" in colonial times and buttressed these rights "by the sword." Marshall openly acknowledged that the rights of all Indians were not wrested from them by "conqust" nor were Indians mere "occupants," "incapable of transferring the absolute title to others" (Ibid:591). Still, he justified these legal fictions as "indispensable to that system under which the country has been settled" and therefore could not be "rejected by courts of justice" (Ibid:591-92).

Building upon themes raised in Fletcher v. Peck, the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

McIntosh decision gave additional legal authority to the concept of a hierarchy of land rights and to Marshall's assertion that it was the unquestioned right of the United States to "prescribe those rules by which property may be acquired and preserved" within its borders (Ibid:572). Interestingly, both concepts more reflected feudal notions of sovereignty and property rights than they did American legal practices at the time.

In feudal England, the king or sovereign claimed ultimate dominion over property relations with vassals, subvassals, lords and tenants holding varied and diminished interests in specific tracts (see Friedman 1985:56-65). This system was long on the wane when English settlers immigrated to the New World. By the time Americans set up their new government, the latter not only specifically and conscientiously rejected the concept of a hierarchy of interests in land, but also the notion that the sovereign's power to define property relations was itself unlimited. Such authority characterized more the "divine right of kings" than it did the contractual model of government embodied in the U.S. Constitution in which all rights not specifically delegated to the federal government were reserved to the states or to the People (Articles IX and X).

While the people of the United States (through their representatives) did indeed have the right and power to determine property law for their nation, this did not mean

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

that the federal government had an unlimited power to legislate persons and property outside its jurisdiction -- i.e., those not contractually included within the governmental process. Marshall's discussion, however, does not make this distinction clear, thereby leaving the impression that the federal government has the untrammelled authority to define the property interests of Indians within U.S. borders. The latter is thus an extremely important phrase since it is by means of the notion of geographically defined sovereignty that Marshall accords the United States jurisdiction over Indians. That is, since Indians had never consented to form part of the union, there were no grounds other than conquest or geography by which to extend U.S. authority over Indian peoples. Since the former was an acknowledged "fiction" and was definitively repudiated as such in Worcester v. Georgia (1832), this left the idea of geographic impairment of tribal sovereignty to substantiate federal jurisdiction. Indeed, the concept of the Indians' "diminished" sovereignty would be further expounded and codified as "wardship" less than a decade later in the (in)famous Cherokee Nation cases.

In 1827 the Cherokee Nation adopted a written constitution which asserted native jurisdiction within and over territory assured it by the United States in the Treaty

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of 1791.[85] Although many of the Cherokee had adopted the cultural practices of their white neighbors -- e.g., formal schooling for their children, full-time agriculture, and Western dress and housing -- they nonetheless staunchly maintained political autonomy in tribal affairs. The constitution was a formal declaration of Cherokee sovereignty couched in American legal discourse.

The State of Georgia responded by passing a series of laws extending state jurisdiction over tribal territory. In turn, the Cherokee Nation brought suit to bar Georgia from enforcing these statutes. As in Passamaquoddy v. Morton (1975), classification of the Indians proved critical to deciding Court jurisdiction and disposition of the case.

According to Article III of the U.S. Constitution, the Supreme Court is empowered to mediate disputes "between a state...and foreign states." The question was therefore whether or not the Cherokee Nation constituted a "foreign state" as that term is used in the U.S. Constitution. If so, then the Court could proceed to weigh the merits of the

---

[85] The Cherokees had ceded much of their aboriginal territory in the Treaty of 1791 but refused to completely abandon the land reserved to them. With assistance from the federal government, the Indians took up full-time agriculture and many of the accoutrements of "civilized" life, believing this would secure their land claims. Georgia, on the other hand, had in 1802 given up its claims to western lands in exchange for the federal government's assurance that the latter would extinguish Indian claims within the state as soon as it could be peacefully accomplished. Both Georgia and the Cherokee Nation believed they had the federally-assured right to the territory.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indians' claim against Georgia. If not, then the Court would have no power to even try the case.

The Supreme Court refused jurisdiction in the case, leaving the legality of Georgia's actions unresolved. The Court's reasoning, however, would definitively change the legal relationship of Indian tribes and the U.S. government. On the one hand, the Court had no difficulty acknowledging that historically the Cherokee Indians comprised an independent political entity.

> They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognized them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements (Cherokee Nation v. Georgia 1831:16, emphasis added).

On the other hand, elaborating on themes hazily conceived in McIntosh, the Court balked at defining the Cherokee Nation as "foreign."

> Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian (Ibid:17, emphasis added).

Again, Marshall's choice of words is critical, for the terminology created more, rather than less, ambiguity. Both

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"wardship" and "pupilage" could be construed in several different ways according to their historic usage in English common law and Roman law. For example, as Barsh and Henderson point out, according to the former, a guardian could not have an interest or inheritance in the ward's estate, whereas in the latter, civilian non-citizen wards could enjoy the contractual patronage of politically powerful citizens (1980:55-56). Which of these meanings was applicable to the federal-Indian relationship? Was tribal dependence voluntary or involuntary, a temporary or permanent state of affairs? Moreover, was it restricted in scope to interest in land or did it extend to other responsibilites of government?

Uneasy with his own choice of language,[86] Marshall addressed the issue of Indian sovereignty one year later in Worcester v. Georgia (1832). This case dealt with similar issues as in Cherokee Nation yet was constructed by the plaintiffs to avoid the jurisdictional hurdles which had defeated them previously.[87] Samuel Worcester was a non-

---

[86] Marshall actually requested that Justices Thompson and Story publish their dissenting opinions in which they discussed the merits of the Cherokees' claims, something which the Marshall decision avoided completely. The Chief Justice was in sympathy with the Cherokees' case yet disagreed only to the extent that the Indians were a "foreign nation." See Burke 1969.

[87] Samuel Worcester, along with a fellow missionary, deliberately sought prosecution by the state in order to bring the question of Cherokee sovereignty again before the Supreme Court. Georgia first arrested the two men for violation of state law but subsequently released them on the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian missionary who was living in Cherokee territory without state approval in violation of Georgia law. His prosecution and conviction by the state was appealed by the same legal counsel as had handled the Indian claim in Cherokee Nation. As in 1831, he argued that Georgia had no jurisdiction in Indian territory since the Cherokees comprised a sovereign nation in their own right.

This time the Supreme Court overturned the lower court's decision, declaring in no uncertain terms that Indian tribes were "a distinct people, divided into nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their own laws" (1832:542-43). Although tribes had entered into treaties with the British and American governments, such agreements did not nullify the Indians' right of self-government. Rather, the federal-Indian relationship "was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master" (Ibid:559). Georgia's laws regarding Indian territory were therefore "repugnant to the Constitution, laws, and treaties of the United States" (Ibid:563).

---

grounds that they were federal officials. The missionaries refused the plea, remained in Indian country and again were arrested. Both Worcester and Butler rejected pardons, forcing the case to be heard and appealed to the Supreme Court.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Worcester is widely regarded as the clearest articulation of native sovereignty by the Supreme Court, serving as a pillar of Federal Indian law and policy. Yet, what is important about this decision is not that it alone and by itself established the legal framework of tribes' semi-soveriegn legal status. Rather, the decision must be viewed as part of an ongoing legal process in which Anglo-American constructs about Indian rights came to be infused with legal authority.

As an admittedly critical step in this process, Worcester built upon prior assumptions regarding "sovereignty" and "title," assumptions which were transplanted from Europe to the New World, developed during the colonial period and further honed following American Independence. Marshall's rhetoric was not radically new; he drew upon accepted doctrine from European international law, English common law, the U.S. Constitution and Roman law. The amalgum it itself significant for it established an extremely broad base of judicial authority for his argument, belying its at times tedious construction.

Following Peck, McIntosh and Cherokee Nation, Worcester affirmed the tribes' legal exclusion from constitutional government. The latter also codified their status as that of "domestic dependent nations," a serious erosion of tribal sovereignty if ever there was. Subsequently, tribal grievances would be litigated by the American legal system

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and not in an international forum. Thereafter, the U.S. government not only had the fiduciary responsibility of looking after its Indian "wards," it also arrogated to itself the power to determine when and to what extent it had or had not fulfilled that responsibility.

Viewed processually, the early nineteenth century Supreme Court cases also shed some light on the way in which federal power in Indian affairs was authoritatively established in American law. The Constitution did not accord the United States absolute dominion over Indian tribes but only accorded it the right to regulate commerce with tribes and to make treaties.[88] In the power struggles between the federal and state governments in the early 1800's (a period of territorial expansion and consolidation in American history), the ambiguous legal status of Indian tribes threatened federal authority. Peck and McIntosh addressed aboriginal rights only as a corollary of litigation regarding federal and state rights. Marshall's early formulations in these land and contract disputes must be seen as an attempt to reconcile these opposing interests.

---

[88] As Justice Miller in United States v. Kagama (1886) would later state regarding the Constitution's Commerce Clause:

> [W]e this it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably on their reservations, which left out of the trade and intercourse laws justly enacted under the provision, and established punishments for the common-law crimes...without any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes (378-79).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

As a federalist, he tried to shore up federal prerogatives while giving some acknowledgment to the rights of the continent's aboriginal inhabitants.

The Cherokee Nation cases were likewise part of the domestic struggle between the state and federal governments and were decided within a highly charged political arena. Acrimonious debates had splintered the 21st Congress over the (Indian) Removal Bill in 1829, exposing the Indian qustion as a "partisan and sectional issue" (Burke 1969:506).[89] Passage of the bill did not resolve the political questions; rather, opponents and supporters of Removal continued to argue their respective positions in the press, in state elections and in court. When the Supreme Court convened in 1832 to decide Worcester, the justices and the nation were very well aware that the "issue was nothing less than the nature of the Union and the authority of the Supreme Court as the final arbiter of the constitutional system" (Burke 1969:509). While Marshall's carefully crafted decision upheld the constitutional power of the Court, it had no practical effect upon Cherokee Indians. Despite having their political independence affirmed by the Supreme Court, they were removed to Oklahoma at gunpoint on the Trail of Tears in accordance with provisions of the 1830 Removal Act.

If Worcester only illustrated the schism between legal

---

[89] For further discussion, see Burke 1969.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

theory and practice in Indian affairs, it would hardly be worth mentioning. Yet the case highlights a process whereby federal power in Indian affairs was definitively codified. Inasmuch as tribes were geographically within the boundaries of the United States, their sovereignty was "impaired." As "domestic dependent nations," they could not claim fee simple title to land but only had a "possessory right" or "right of occupancy" to it.

A hierarchy of interests had been written into Federal Indian law with the preemptive right of the federal government accorded an indisputably superior position over aboriginal title. While the courts had argued as if "aboriginal title" fit into pre-existing categories of law, in fact the interpretation of aboriginal tenure as only a "right of occupancy," subject to lawful extinguishment by the sovereign U.S., was a new construct. Its ramifications stretched far beyond the immediate issues being litigated.

The Worcester decision would prove a double-edged sword. On the one hand Indian nations were recognized as sovereign entities and excluded from the American political process. On the other, federal jurisdiction was extended over tribes since the latter's sovereignty was "diminished" and "impaired," effectively undermining much of the power which it had accorded natives. It is hardly surprising that subsequent federal Indian policy would struggle to reconcile these contradictory positions.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The Politics of Inclusion: Plenary Power

From Independence through the mid nineteenth century, the relative powers of federal and state government were continually debated and culminated in the outbreak of the Civil War. Although the nation survived this challenge to federal authority, the war nevertheless precipitated several major changes in U.S.-Indian relations. To begin with, the experience highlighted the anomalous legal status of Indian tribes and individuals within the United States. On the one hand, the nation had spent several bloody years fighting over whether states had the right to cede from the union and form an independent polity. Indian tribes, however, had existed as (semi)sovereign nations within U.S. borders since the latter's formation. On the other hand, the Civil War had put an end to the legal enslavement of one race -- Blacks -- but had left the legal subordination of another -- Indians -- intact.

While the wardship of American Indians was difficult to reconcile, it was only after the Civil War had ended, with federal authority firmly entrenched that the United States developed specific steps to address the nation's "Indian problem." From 1832 until 1871, the United States passed no new statutes which infringed on the domestic sovereignty of Indian tribes[90] but concentrated its efforts instead upon

---

[90] The only exception to this was the (re)enactment of the Trade and Non-Intercourse law which dealt more with federal, as opposed to state or individual rights, than it

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

gaining land cessions from Indians and removing them to reservations where they would not hinder non-Indian settlement of the frontier. However, once the majority of American Indians had been pacified, major railroad lines laid and a network of American towns stretched continuously from east to west coasts, the United States undertook several initiatives to disband tribal self-government.

Beginning in 1871, Congress put an end to treatymaking with Indian nations (1871)[91], barred natives from entering into contracts without the consent of the Secretary of the Interior (1871), imposed a federally organized Indian police force upon tribes (1887) and enacted a series of laws regulating tribal social and economic organization, the most devastating of which was the Dawes (or Allotment) Act (1887) whereby federal reservations could be allotted in severalty to individual Indians at the discretion of special agents appointed by the President for such purposes.[92] All of these were predicated upon the earlier legal characterization of Indian sovereignty as akin to that of "wardship." The Acts were also buttressed by several new judicial interpretations of Indian rights.

With passage of the 14th Amendment in 1868, "all

---

did with the internal affairs of tribes. See Prucha 1990:64-68.

[91] This was enacted unilaterally by the federal government, with no input from tribes.

[92] See discussion in Barsh and Henderson 1980:62-66.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

persons born or naturalized in the United States, and subject to the jurisdiction thereof, [became] ...citizens of the United States and of the State wherein they reside." Designed pricipally to remedy the legal status of Blacks, the language of the reform called into question the citizenship of American Indians. Yet, according to a Senate Judiciary Report of 1870, the amendment had no effect upon the status of Indian tribes since the latter had "never been subject to the jurisdiction of the United States" (as quoted in Barsh and Henderson 1980:72). The Supreme Court used similar language in Elk v. Wilkins (1884) when it ruled Indians were ineligible to vote in U.S. elections because tribal Indians owed no allegiance to the United States.

Both assertions seemed to fly in the face of established practice, for the United States clearly had been regulating Indian affairs for some time. For members of the Senate Committee, however, consent of the Indians was still an important consideration. In keeping with the contractual foundation of American democracy, the senators asserted that citizenship could not be forced upon natives by federal fiat. In the Elk decision, in contrast, this formulation of Indians' "right" to decide poltiical allegiance was reinterpreted as a statement of "fact" (Barsh and Henderson 1980:73). Indians were not American citizens and could not be unless Congress decided otherwise, i.e., ruling that individuals were sufficiently assimilated to merit

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

citizenship.

On the one hand, the reasoning in Elk was not wholly inconsistent with Worcester. In the latter, Marshall had stated that tribal "dependency" did not mean that Indians had abandoned their own national charters. On the other, the Elk court now established that it was the United States, rather than tribes themselves, which had the exclusive power to decide Indian political allegiance. Combined with the natives' inability to forge bilateral agreements (treaties) with the United States, the result was a significant erosion of tribal powers.

The federal government's extensive legal prerogatives were further substantiated by United States v. Kagama (1886) in which the Supreme Court noted:

> ...these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. ...[The] power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from...the Constitution...as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else (375, references omitted, emphasis added).

Drawing on McIntosh, which declared that native sovereignty was impaired because tribes were geographically within the United States, Kagama ruled that Indians were automatically subject to federal jurisdiction since the United States "owned" the country.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

By the late nineteenth century, tribal "dependence" was interpreted as more than just a relationship of political expedience, where the weaker Indian nations sought (or at least could not reject) the protection of the stronger U.S. government, as Marshall characterized it in 1832. Moreover, the federal government came to claim not only a preemptive right to Indian land, but the legal authority to extend federal jurisdiction over tribal property and members' conduct. The federal government was thus declaring "plenary power" in Indian affairs.

In the late 1800's, these changes in U.S.-Indian relations were manifest by passage of the General Allotment Act in 1887. Designed to hasten Indian assimilation, break down tribal government and reduce native economic dependence upon the federal government, the Act was widely supported. Even those whites who wanted to strengthen tribal governments lobbied for the legislation. In the latter's view, the Indians' legal insecurity stemmed in large part from "aboriginal title." These Friends of the Indian, as they were called, believed that a fee simple interest to specific parcels would secure the natives from the wanton and devastating dislocations the latter suffered at the hands of the federal government. The Friends also assumed, quite erroneously, that title would automatically subject Indians to the laws of the territories and states in which they resided, according the latter the privileges of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

citizenship.

Allotment proved a spectacular failure, however, resulting in greater tribal land loss (90 million acres) than by any other federal policy in U.S. history. In addition, Indians did not become assimilated and less dependent upon federal welfare nor did they obtain American citizenship. Eventually, allotment did end, but not as the result of Indian petitions against it (for natives were still politically external to the representative process). Rather, the policy was curtailed at the instigation of government bureaucrats concerned with the exhorbitant costs engendered by increasingly impoverished Indians.

By the early twentieth century, the legal subordination of natives was not only firmly entrenched in American law and policy, it also justified federal intervention in tribal affairs. No longer were Indians "wards" to be isolated for their protection from rapacious whites. Now there was the legal authority and means to force native inclusion within the federal framework. How Indians were to participate was not, however, an issue they themselves had the power to decide.

In 1924 Congress passed a law making all Indians American citizens, whether or not they were already allotted land, whether or not they were assimilated. Citizenship was granted in order to hasten the transformation of Indians

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

from "tribalists" to Americans worthy of the name,[93] and in order to remove the legal inconsistencies that guardianship posed. After all, how could the United States extend jurisdiction over alien wards? The civilizing process, which was rather unsuccessful until then, could be speeded up only if the U.S. government had the power to take more active steps in teaching Indians the "right philosophy." As American citizens, Indians were definitively included, as individuals, within the American legal arena. As political entities, however, tribes still had no representative position within American government but were administered by the Bureau of Indian Affairs.

The Politics of Identity: Recognition

According to Felix Cohen's classic reference work, the Handbook of Federal Indian Law,[94] "the term 'Indian' may be

---

[93] According to provisions of the Allotment Act, Indians were to be taught

> Industry, continuity of effort, loyalty, efficiency, perseverance, ambition, economy, business administration, neatness, sobriety, truthfulness, integrity, self-preservationand protection, law observance, self-reliance, self and family support, participation in governmental activities, mental growth and development, and love of country (as quote in Barsh and Henderson 1980:97).

[94] Felix Cohen is renowned for having served as Solicitor General of the Department of the Interior and for the innumerable articles he wrote on Federal Indian law and policy during his distinguished career. He first wrote the Handbook in 1942 in order to provide governmental personnel with a coherent synthesis of established doctrine and case law guiding federal Indian policy. Although intended and written as a reference work about law, the work has attained

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

used in an ethnological or in a legal sense" (1942:2). Whereas the former refers to racial categories -- e.g., Caucasian, Negro, Mongolian -- the latter is based upon both biological and social factors, expressing a relationship between an individual and a community. "From a legal standpoint, then, the biological question of race is generally pertinent but not conclusive [in Federal Indian law]" (Ibid).

Cohen's discussion makes it appear as if there are only these two meanings of "Indian" and that the categories are mutually exclusive -- the one based on race, the other on biological and social considerations. Yet such a characterization belies the political factors affecting both racial and legal definitions of "Indian" and the interrelationship between them.

Throughout American history, "Indian" has been used to denote a wide range of phenomena in and outside the legal arena. Lineal descendants of single tribes have been termed 'Indian' as well as those whose genealogy has included more than one tribal affiliation. Just as significantly, the

---

the authority of law itself, being cited by justices and policymakers alike. However useful the tome, it is important to remember that it is only one interpretation of governmental legal actions. Most importantly, in attempting to construct legal rationality out of changing political expediency, it sloughs over precisely those extra-legal factors which gave rise to the diverse and often contradictory assumptions, practices, statutes, treaties, programs and court decisions which are collectively known as Federal Indian law.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

term has been applied in certain cases of miscegenation though not in others. In parts of the South, for example, children of black and Indian unions were, during certain periods, more likely to be termed "colored" or "mulatto" by whites than they were "Indian" regardless of exact blood quantum. In the Western territories, in contrast, children of Indian mothers and white fathers were often termed "Indian." Racial classifications inevitably had social, political and economic repercussions for individuals and groups.

Ethnological categories of who is and is not an "Indian" are therefore not the objective descriptions of biological descent and community membership as Cohen would have them. Instead, they reflect the socio-political assumptions of the person or persons doing the classifying and the purposes for which the distinction is made. As discussed above, the term "Indian" was originally a European construct and did not at all reflect aboriginal concepts of self and other. Over time, legal constraints on native options reinforced the economic, political and social otherness of Indian peoples. While the latter came to define themselves in contradistinction to non-Indians, they did not always or necessarily use the same criteria of difference as did whites. That is, the importance of biological descent, political affiliation and socio-cultural traditions has varied considerably between Indians and non-

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indians as well as among Indians themselves. More to the point, the different ethnological definitions of "Indian" cannot be understood apart from Federal Indian law and policy.

As codified in the late nineteenth and early twentieth centuries, the doctrine of plenary power gave the federal government extensive legislative ability to regulate Indian affairs. Not only could Congress paternalistically develop programs to hasten Indian assimilation, it also had the power to define who would and would not be eligible for the services. In turn, these programs had a profound imapct upon tribal social structure, economic organization and political authority.

The Allotment Act, for example, gave individual natives fee simple title to specific parcels of land, thereby depriving a tribe of its collective resource base and severely undermining leaders' authority to regulate members' actions through the allocation of land, water, hunting and fishing rights. Aboriginally, chiefs commonly exercised political authority by virtue of their persuasive and oratory skills and their demonstrated ability to take care of tribal members economically and politically. This entailed the distribution of material goods -- whether the products of hunting, fishing agriculture or trade -- as well as successfully mediating relations with non-tribal members. In restricting Indians to fixed individual parcels, however,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the federal government deliberately sought to extinguish tribal organization. As White (1983) amply demonstrates with regard to the Choctaw and Pawnee Indians, when economic self-sufficiency and political authority are fractured, often so too is the cultural integrity of the tribe. Governmental policy is therefore an important variable in whether and to what extent a particular group of Indians endures ethnologically.

By the early 1900's, the federal government had enacted numerous laws and policies which greatly impacted upon native autonomy. In addition, the federal government had defined "Indian" with regard to the provisions of specific acts, statutes or policies. On the one hand, Congress never stated or implied that individuals who did not fall within these special purpose classifications were not "Indian." On the other, it was the federal government which now defined criteria for tribal membership, a right historically viewed as the prerogative of sovereign nations. Concerning the Eastern Band of Cherokee in North Carolina, for exmaple, Congress states that as of March 4, 1931,

> ...no person of less than one sixteenth degree of said Eastern Cherokee Indian blood shall be recognized as entitled to any rights with the eastern Band of Cherokee Indians except by inheritance from a deceased member or members...(as quoted in Cohen 1972:5).

In 1934, with the economic repercussions of allotment and of the Depression especially acute on reservations, the autonomy of tribal government was again undermined legally.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ironically, passage of the Indian Reorganization Act was purportedly designed to strengthen indigenous political organization. Major provisions of IRA included: halting further allotment of Indian land, authorizing funds to purchase lots for landless Indians, providing special vocational education for Indian children and, very importantly, empowering tribes to adopt a constitution and by-laws for self government and to develop charters of incorporation for the fiscal management of tribal property.

IRA's economic provisions directly addressed the shortcomings of allotment and attempted to establish a viable resource base from which Indians could develop economic self-sufficiency as tribes. The political reorganization of tribes was, however, a more complex issue.

According to then Commission of Indian Affairs John Collier, the Bureau of Indian Affairs (BIA) exercised broad discretionary authority over Indian tribes. Formally structuring tribal political organization in constitutions, by-laws and charters would divest the BIA of much of its arbitrary power and make the latter more responsive to the Indians the agency supposedly served. That is, with reorganization, tribes would acquire the organizational capacity and skills to regulate commerce, manage property and judicially maintain law and order in limited domains. In time, the Bureau could get out of the "Indian business," and instead serve more in an advisory than administrative

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

capacity.

Yet IRA did not prove to be the epitome of progressive reform that supporters proclaimed it to be. As many critics pointed out while the Act was still in committee, the BIA still retained extensive powers, requiring, for example, approval of the Secretary before a tribal constitution could become effective. And, although Indians were supposed to write their own constitutions, the 91 documents adopted in the first ten years of IRA were practically identical. As Assistant Solicitor Charlotte Westwood concluded in 1944 during Senate hearings, "[s]uch standardization cannot help but discredit the whole policy of Indian self-government and lead to the conclusion that these constitutions are nothing more than new Indian Office's regulations" (as quoted in Barsh and Henderson 1980:121-22).

Although tribal reorganization did not effectively alter Indian subordination to the BIA, it nevertheless did produce some modifications in U.S.-Indian relations. According to Chief Counsel Theodore Haas in 1947, tribal government afforded an institutional means of conveying federal directives to tribal membership and of receiving Indian feedback regarding Bureau policy. Both of these were to improve federal supervision of natives and delivery of services to them. Barsh and Henderson, on the other hand, point out a darker side of these "benefits." Tribal government, they say, acted as a go-between, assuming

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> apparent responsibility for the bureau's actions. ...[In addition, it] afforded Indians an opportunity to feel as if they were participating in the decisions that bound them, and thereby mitigated their sense of oppression (1980:115), original emphasis).

The impact of IRA upon Indian tribes is not limited, however, to the Indians the BIA directly supervised. Rather, the act also had an effect upon those outside of its immediate jurisdiction, albeit indirectly. According to section 19 of the law,

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians (as quoted in Cohen 1972:5, emphasis added).

Various Supreme Court decisions had long referred to Indian rights that the United States "recognized."[95] In these cases, recognition was used descriptively, denoting acknowledgment of a certain political relationship between the federal government and Indian nations. Although IRA also used the term to characterize U.S.-Indian relations, it categorized a particular form of those relations as the legal criterion for according federal jurisdiction of the Act. That is, IRA affirmed federal recognition of tribal sovereignty as a bona fide category. Other legislative forms followed suit, likewise referring to "recognized

---

[95] Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832) are two of the most prominent ones.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribes now under Federal jurisdiction."[96] While the term "recognized tribe" had no legal power beyond the acts which specifically referred to them, it nevertheless served to distinguish a large class of Indians who were eligible for BIA services from those who were not. The dichotomy would prove critical decades later when certain Indian groups would strain to demonstrate that they were not unrecognized generally, but were only unrecognized insofar as certain BIA services were concerned.

For better and for worse, many tribes under IRA jurisdiction were "reorganized" and received economic assistance. Even those who steadfastly refused to adopt a constitution, such as the Iroquois, participated in various programs designed to strengthen the cultural heritage of tribes and their economic self-sufficiency. While many of these programs did not effect the changes government bureaucrats hoped for, they did in general systemize tribal political organization and the implementation of BIA services, both of which proved especially important in subsequent negotiations of U.S.-Indian relations. That is, IRA not only institutionalized, but also exacerbated, the dichotomy between tribes who were recognzied by the federal government and receiving BIA services from those who were not.

---

[96] The Indian Health Service, for example, also made recognition a condition for receiving services.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

One federal program in which IRA's long-term impact can be seen is the Indian Claims Commission (ICC) which was established in 1946 to hear and determine native land claims against the United States. The federal government had long been protected from such claims on the basis of the Constitution's sovereign immunity clause (Article III, Section 2). As of 1855, American citizens gained the right to pursue certain grievances against the U.S. government in the newly-created Court of Claims yet Indians were disqualified in 1863 from that legal arena. In the late nineteenth and early twentieth centuries a few tribes did manage to gain special legal permission to petition in the Court of Claims but by and large this was an extremely lengthy and risky process.[97] Moreover, since the federal government was committed to the idea of assimilating Indians as individuals into the American mainstream, it was little interested during this period in any action that might reinforce tribal organization and land tenure practices.

Beginning in the 1920's, however, and continuing into the 1940's, there was steady and increasing pressure upon the U.S. government to settle, once and for all, its moral and legal acount with descendants of America's first inhabitants. Although there were several attempts to get a

---

[97] In 1879, for example, a special act allowed the Choctaws access to the Court of Claims, resolving a 50-year old claim. From 1881-1914, only 14 claims were recovered out of 31 filed.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

special Indian claims procedure enacted as a corollary of IRA, none materialized until 1946 due to a confluence of poltiical, legal, and financial considerations (see Rosenthal 1985:41-46). In part, the Indian Claims Commission was developed out of a heightened awareness on the part of Congress that existing procedures for settling Indian claims were cumbersome for both tribes and the federal government. At the same time, establishment of the Commission was congruent with important legal changes in what types of claims were considered eligible for compensation under the law.

In 1946, the Supreme Court sustained a ruling of the Court of Claims (U.S. v. Alcea Band of Tillamooks (1946)) which accorded the Tillamook Indians compensation for land based upon the Band's "Indian title" -- that is, upon the group's aboriginal possession and use of the disputed land. Until this decision, awards had only been made based upon a tribe's right to land as specified in treaties or other legal documents. Alcea, along with the creation of the Commission itself, therefore enabled many more Indians to petition for legal redress than had previously.

In theory, the Commission's jurisdiction was very broad, hearing

> claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska (60 Stat.1049 [1946]).

Yet, in practice, the claims procedure was primarily

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

utilized by tribes already recognized by the BIA and receiving services from it. Having barred individual claims completely, the Commission notified, in its first year of operation, all of the 176 tribes for whom the BIA provided programs and services. Those groups who ultimately received awards were by and large included on this initial roster.[98] While non-BIA tribes were not legally precluded from advancing a claim with the Commission, lack of such an affiliation made compensation more difficult to obtain.

As noted above, under the direct supervision of the BIA, many tribes in the 1930's and 40's revamped their political organization. With these new, more formal governmental structures in place, recognized tribes (especially those who were reorganized as well) were in a relatively good position, administratively, to initiate and sustain a land claim as a tribe. That is, in general, they had the organizational capacity to obtain necessary legal counsel and professional expertise to handle their case. Formal tribal governments were also an advantage at the final stages of the claims process when, once deemed eligible for compensation, tribes had to submit, and have approved by the federal government, a plan for how the cash award was to be spent.

This is not to say that all BIA tribes were skilled in

---

[98] There were some notable exceptions, such as several California groups who filed as a single group.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

program development and management or that tribal gvernments functioned smoothly and efficiently. In fact, quite the opposite was often case. Rather, it is only to point out that, comparatively speaking, BIA tribes had certain institutional advantages over non-BIA tribes in the claims process. The latter tended to be small in size and have a more informal political structure which was often not very efficient in dealing with governmental bureaucratic procedures and regulations. (Remember, the push to "reoganize" tribes' stemmed, in part, from the government's desire to streamline management of Indian affairs generally. Even recognized tribes had great difficulty in dealing with the federal bureaucracy.)

Being recognized by the BIA and the recipient of the Bureau's programs and services thus facilitated the claims process under the ICC for many tribes. Despite its numerous deficiencies -- i.e., the awards were based on market valuations of the land at the time of taking; they were reduced by numerous offsets; they did not include interest; and receipt of the cash was sometimes made conditional to termination itself[99] -- the claims process had a positive impact on participants. As Rosenthal notes, "in practice it helped to redefine 'Indianness' for some groups and reawaken cultural pride for all" (1985:57). The ICC process not only

---

[99] The Menominee Tribe was terminated in precisely this fashion resulting in great hardship. See Lurie 1972.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

acknowledged the merit of selected native land claims, it also confirmed the legal status of petitioners to make such claims. Settlement was further proof that the federal government recognized the existence and rights of some American Indian groups.

Throughout the 1930's and 40's, then, the rift between tribes the BIA serviced and those it did not widened. The distinction was still an administrative one, based upon the discretionary power of the Bureau as outlined in the Indian Reorganization Act. In 1955, however, following the Supreme Court's decision in Tee-Hit-Ton Indians v. United States, recognition took on significantly greater legal import.

In that case, Justice Reed held that although the Tee-Hit-Ton (Tlingit) Indians had aboriginal title to land in Alaska, the United States never explicitly recognized, by treaty or other legal instrument, the tribe's right to live on the land permanently. Without "recongized title" to the land in question, the Tee-Hit-Ton Indians had no compensable interest, under the fifth amendment, to timber which the United States had cut down on the natives' land. That is, in the absence of a legal document stating otherwise, the Indians had only a right to "occupy" and use the land; the United States held title to it by virtue of the doctrines of "discovery" and "conquest" and could therefore dispose of the land and the resources on it as it (the sovereign) saw fit.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

As in the cases discussed above, the wording of the Court is extremely important in understanding the impact of the Tee-Hit-Ton decision. As Newton (1980) points out, prior to this case, there was no legal distinction between "recognized" and "aboriginal title." Indeed, on several occasions the Court explicitly rejected the contention that "a tribal claim to any particular lands must be based upon a treaty, statute, or other formal governmental action" (as quoted of United States ex.rel. Hualpai Indians v. Santa Fe Railroad (Walapai Tribe) (1941) in Newton 1980:1236). Although the Court had used the term "recognition" in several prior Indian claims cases, it had done so without any consistency. "Far from acknowledging a distinction between recognized and aboriginal title, the Court in each case did not distinguish between two types of Indian title but considered the concept of Indian title sufficient to encompass both" (Ibid:1237).

However faulty his reasoning (see Newton 1980:1237-46 for a discussion of individual cases cited in Tee-Hit-Ton), Justice Reed nonetheless argued as if the distinction between aboriginal and recognized title had long been codified in Federal Indian law rather than it being a recent construct of his.[100] Newton observes that,

> [b]y treating the concept of recognition as an historical underpinning of case law, the Court has

---

[100] This was not unlike Marhsall's approach to "aboriginal title." See discussion above.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> forced lower courts to ascertain whether one hundred year old treaties and statutes were intended by Congress to "recognize" title within the meaning of Tee-Hit-Ton. Accomplishing this feat of judicial legerdemain is particularly difficult because, before Tee-Hit-Ton, Congress was not cognizant of a distinction between recognized and aboriginal title (1980:1241).

On the one hand, the Tee-Hit-Ton decision applies narrowly to Indian land claims in which tribes are seeking damages against the government under the fifth amendment. Since relatively few claims fall into this category, its impact has been limited in compensation cases.[101] On the other, the decision has had signficant repercussions on the property issues it litigated. Very importantly, the Court was able to codify recognition as a legal status -- i.e., "recognized title" conferred superior (compensable) legal rights than did "aboriginal title." Recognition no longer merely defined the jurisdiction of a specific legislative act or executive order, but more broadly authorized Indians' land tenure and the legal prerogatives stemming from them. The term was especially potent since the courts were now empowered to categorize native rights retroactively based upon Congressional intent to recognize, or not to recognize, Indian interests in treaties and other legal instruments. That is, recognized Indian rights ("recognized title") were distinguishable from unrecognized ones ("aboriginal title") and required legal documentation to sustain them.

---

[101] See Barsh and Henderson 1980:142.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Tee-Hit-Ton was handed down during a period of U.S. history in which Indian assimilation into the American mainstream was an explicit and immediate goal of the federal government. Only one year previously (1954), Congress had authorized the termination of some 100 Indian tribes under Public Law 280. In this environment, the Supreme Court's narrow construction of Indian rights is hardly surprising. As part of an ongoing interpretive process, the case highlights significant changes in how natives rights were conceived and affirmed legally.

In less than 200 years, tribal sovereignty had gone from "inherent" to "impaired" to "recognized." No longer did treaties reflect the consent of Indian tribes to federal trusteeship in specified areas. Instead, native rights were limited to those expressly reserved in federal documents. Through a long and complex process, the concept of tribal sovereignty became "involuted." Barsh and Henderson explain:

> Lawyers often speak of legal doctrine as "evolving." This evokes an image of adaptive improvement, a gradual progress from generalization to specialization. Legal concepts do not always "evolve." When a court is satisfied with the ramifications of a new rule, regardless of its validity, it entrenches it through the use of extensions: differentiation, specialization, evolution. However, a court repentant of an earlier position, and embarrassed to overrule it outright, may weaken it gradually by narrowing its application and rendering its meaning ambiguous, until it stands for everything and nothing at the same time. This is what we call "involution" (1980:140).

In theory, Indian tribes, that is, federally recognized

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ones, still had some sovereign rights. In both Williams v. Lee (1958) and McClanahan v. Arizona State Tax Commission (1973), for example, the Supreme Court denied states the power to regulate the affairs of Indians on reservations in the absence of explicit federal delegation of such authority. But, at the same time tribal governments were reaffirmed as independent of state jurisdiction, the exercise of tribal sovereignty was increasingly circumscribed by federal legislation and judicial decisions. By means of narrow statutory constructions, legal forms came to be interpreted more as as a "source, rather than [as] a limitation of tribal powers" (Barsh and Henderson 1980:140).

Through myriad ambivalent, and often contradictory judicial decisions, tribal sovereignty meant little if it was not recognized by the federal government. Indeed, in the early 1970's, tribes which were not recognized by the federal government were at a distinct disadvantage. By and large they were not eligible for BIA services and programs nor did they have access to the same legal protections of their rights as did recognized ones.

In 1970, for example, some 14 tribes sought to preserve their off-reservation fishing rights against regulation by Washington State. In the mid nineteenth century, many Indian groups in the region were party to treaties in which, in exchange for ceding tribal land, natives were guaranteed the exclusive right to fish within the new reservations and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

at "all usual and accustomed ground and stations....in common with all citizens of the Territory" (as quoted of the Treaty of Medicine Creek, December 26, 1854 in U.S. Commission on Civil Rights 1981:64). Since the early twentieth century, state courts had, on several occasions (State v. Towessute (1916), State v. Alexis (1916) and Washington v. McCoy (1963), interpreted the latter provision to mean that Indians had special rights to take fish in waters off the reservation, being subject to the same licensing and conservation restrictions as were non-Indians. The U.S. Supreme Court, on the other hand, held otherwise, confirming that the Indians' federally recognized treaty rights did exempt them from certain types of state regulation (U.S. v. Winans (1905), Tulee v. Washington (1942).

In 1970, the United States, at the request of the Department of the Interior, brought suit against Washington State to clarify and reinforce the Indians' off-reservation fishing rights. Decided some three and one half years later after extensive litigation and national publicity, the Boldt Decision (1974), as it came to be known (after the judge who crafted the controversial decision), definitively acknowledged that the nineteenth century treaties reserved special fishing rights to Indians, distinct from those of other citizens. The ruling did not apply, however, to Indian groups who were not federally recognized. Thus,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

while members of recognized tribes could continue to take fish in "usual and accustomed places," "unrecognized tribes" had no such legal rights. Inasmuch as fishing was and continues to be critical to the natives economically and ceremonially, lack of such guarantees seriously affects the ability of "unrecognized tribes" in the region to maintain the lifestyle, traditions and values by which they define themselves as "Indian."

By the mid 1970's, then, recognition had come to be interpreted as federal acknowledgment of a tribe's identity, organization and rights. Treaties, like BIA services and reservation lands, were seen as authoritative proof of a tribe's government-to-government relationship with the United States. Tribes lacking federal recognition (read documentation) of their rights were legally handicapped from pressing certain claims against federal and state governments. As Passamaquoddy v. Morton (1975) and Mashpee v. New Seabury (1978) well illustrate, even getting a case heard in court proved difficult for some "unrecognized tribes," never mind substantiating the merits of their claims.

Yet, historically, it is important to note that treaties ratified political decisions of the United States, not legal ones. Although the Constitution (Article 2, Section 2, Paragraph 2) vested treaty-making power in the federal government, nowhere did it or any other legal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

statute require such agreements with Indian tribes. Rather, until 1871 when Congress unilaterally outlawed them with native groups, treaties were enacted primarily to extinguish Indian title to vast tracts in a peaceful manner. The events which precipitated these agreements were diverse, making for considerable variation in native consent and in the provisions of the documents. Tribes without treaties may not have been any less sovereign than their agreement-signing neighbors, only less inclined (for reasons to be investigated) to negotiate away aboriginal rights. Without examining the historical conditions in which treaties did or did not materialize, it is impossible to determine the nature and extent of a tribe's political autonomy. Treaties alone are not conclusive of tribal sovereignty or native rights.

The contemporary view of recognition as federal acknowledgment of a tribe's government-to-government relationship with the United States thus obscures the historical process whereby the latter arrogated to itself, unilaterally, the legal authority to define tribal sovereignty. As outlined above, much of this process involved ambiguous and often contradictory intepretations of Anglo-American legal constructs grafted onto U.S.-Indian relations. Repeatedly, legal professionals argued as if such concepts as "domestic dependent nation," "aboriginal title," and "recognized title," for example, were objective,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

timeless and unassailable legal truths, rather than creative interpretations of new and complex issues developing at the interstices of Indian and white relations.

Historically, however, native rights have not been a uniform set of privileges, duties and obligations which the United States has affirmed according to fixed legal principles. Instead, how these rights have been defined and acknowledged by the federal government has varied considerably, responding to changes in the political, social and economic climate of the nation. Throughout, Indians had virtually no representative voice or authoritative input in the legal processes which so profoundly affected them.

The treaties, legislation, executive acts and judicial decisions that together constitute Federal Indian law are, then, more testaments to federal power than they are acknowledgments of tribal sovereignty. Similarly, recognition is not an abstract legal category which emerged ineluctably from case law and historical fact. Rather, the concept is the product of a long and complex process in which the federal government reserved to itself the power to interpret the history of U.S.-Indian relations. For Gay Head Wampanoags, like other Indians, that power has proven an important constraint upon native options.

Gay Head Wampanoags and Federal Indian Law

As outlined above, federal recognition is not something

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

which emerged in 1934 with the Indian Reorganization Act, in 1955 with Tee-Hit-Ton v. United States or in 1976 when the American Indian Policy Review Commission (AIPRC) published a report on the status of "non-federally recognized tribes." Nor is it a concept which has always existed in its present form in Federal Indian law. Instead, it is a construct which developed out of a lengthy legal process spanning some 370 years of contact between Indians and non-Indians.

If recognition did not develop suddenly, neither did Gay Head Wampanoags become unrecognized as the result of a single law or decision. Rather, the Indians' legal status likewise was the result of a long and complex process. Throughout, Federal Indian law consistently denied all Indians any representative voice or input. Like that of other American Indians, the legal status of Gay Headers says more about the power of the United States than it does about the sovereign rights of these natives.

Until 1870, Gay Head Wampanoags had no government-to-government relationship with the United States documented in treaties, congressional legislation or executive acts. This does not mean, however, that the tribe was not an autonomous socio-political entity. Instead, the group's lack of relations with the federal government was the outcome of the Indians' generally peaceful relations with their non-Indian neighbors, the comparatively low interest of non-Indians in the Gay Head peninsula and the federal government's policy

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of non-interference in tribal affairs in the original 13 states (under the mistaken notion that the 1790 Non-Intercourse Act did not apply in these states). Federal action, or more accurately, inaction vis-à-vis Gay Head Indians, had little to do with the relative strength or weakness of tribal organization but was based upon factors external to the tribe and over which it had no control.

In addition, the Indians' options before 1870 must be examined within the arena of U.S.-Indian relations as it existed throughout this period. That is, one must consider the probability and benefits of federal administration of Gay Head prior to incorporation of the town.

In the early 1800's, America was undergoing great territorial expansion and consolidation at the expense of Indian tribes. Treaties were signed to extinguish native territorial claims and clear the way, legally, for non-Indian settlement. Since the Gay Head peninsula had long ago been turned into private property (first into a manor and then over the Corporation for the Propagation of the Gospel), a treaty was already a moot issue by the time Massachusetts became interested in its Indians in the early 1800's. Title to most of Martha's Vineyard had long been acquired by non-Indians and Gay Head Wampanoags were already confined to a small tract of land at the westernmost tip of the island, far away from the most desirable agricultural and commercial sites. The Gay Head planatation was barely

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

sufficient for the Indians' subsistence; reducing it further would have so impoverished the natives as to turn them into an economic burden for the state, something which Massachusetts was keen to avoid.

Furthermore, Gay Headers had, realistically speaking, no power to resist state administration. Until Standing Bear v. General Crook (1870), Indians were not even considered "persons" under the U.S. Constitution and therefore entitled to rights thereof.[102] That is, before 1870 Gay Headers excercised no individual rights as either "persons" or "citizens" in American law yet would have fared no better as a tribe since Indian tribes were constitutionally excluded from American representative government. Moreover, tribes were not sufficiently "foreign" to be able to force the United States to negotiate with them on mutually agreeable terms. If such a large and sophisticated tribe as that of the Cherokees could not

---

[102] Indians' tribal membership had long been seen as making them ineligible to exercise any rights as individuals under the Constitution. This assumption was successfully challenged, however, in 1870 when Chief Standing Bear of the Ponca Indians brought suit against the federal government (General Crook) for unlawful arrest and imprisonment. The case turned on whether Standing Bear was to be considered a "person" under the Constitution and thus could seek a writ of habeas corpus or whether his tribal affiliation denied him this right. In a widely publicized decision, the court held that while tribal Indians were not accorded rights of American citizenship (an issue raised with the emancipation of slaves), natives were indeed "persons" and thus entitled to the rights thereof. The decision stimulated Friends of the Indian to lobby for extensive changes in the legal status of Indians and Indian tribes.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

prevent state encroachment on their aboriginal land and their eventual removal to Indian Country, then what were the prospects of Gay Headers who numbered an insignificant 250 or less?

And finally, why would Gay Headers even seek federal administration when the latter did not promise any substantial increase in native rights? Certainly the federal government had not safeguarded the interests of other Indians in land or resources nor did it provide any of the rights or services which the Wampanoags desired. What the latter wanted most was their autonomy and this they already were able to sustain, in a limited manner, through passive resistance.

Until 1870, then, Federal Indian law made it impossible, if not undesirable, for Gay Headers to seek federal acknowledgment of their tribal sovereignty and rights. Throughout the 1800's, the United States was increasingly interested in extirpating tribal forms. For Americans generally, it was only a matter of time before all Indians would be assimilated into the mainstream. During this period, Federal Indian law did not recognize tribal sovereignty as it did definitively codify its own power to limit native rights.

Upon incorporation as a town, the legal options of Gay Headers became even more circumscribed. Now they had an electoral voice in American government as individuals, but

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

no legal status as a tribe. Allotted land in severalty, the Indians had no legal power to prevent non-Indians from acquiring tribal land. Like other allottees nation-wide, Gay Head Wampanoags soon lost a good deal of the parcels to non-Indians (primarily merchants) in payment of debt and through ignorance for sums consideraby less than market value.

Although at the national level the Indian Reorganization Act put an end to allotment and even bought back some of the land the Indians had lost, such remedies were not applied in Gay Head. Some 64 years had passed since incorporation and the town was holding its own. To be sure, the community was not thriving but neither were its residents so impoverished as to prove an embarrassment to the government and in need of assistance, as indeed was the case with many federal allottees in Western states. Moreover, since the federal government had never administered Gay Head's affairs, there was little justification in beginning in 1934. (The legality of the state's administration of the Wampanoags would not be questioned until the 1970's when, and only when, title to the common lands was in dispute and other legal decisions opened the door for Gay Head to bring suit against Massachusetts (see Chapter 1).

As discussed above, the classification of recognized tribes under IRA had an enduring effect upon Indians

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

generally, dichotomizing those tribes who were eligible for BIA services from those who were not. Like other "unrecognized' tribes," Gay Head Indians were not politically reorganized by the BIA. Neither did they receive monies for socio-cultural programs or economic development. Although the categorization was originally an administrative one, over time it came to be seen as a legal one. By the early 1970's, lack of federal recognition hobbled the ability of many tribes, including that of the Gay Head Wampanoags, to pursue legal claims. As Mashpee v. New Seabury (1978) well illustrates, even demonstrating standing as a "tribe" in court would prove difficult.

In 1978, the federal government's power to classify Indian tribes as unrecognized was unreviewable. To become recognized, Gay Headers, like many other "unrecognized tribes," would have to petition the federal government for change in their legal status. Two options existed: special congressional legislation could declare the Wampanoags recognized or the BIA could declare the group federally acknowledged under the recently enacted 25 CFR 83. In either case, it was the federal government which had the power to influence the future through a reinterpretation of the past.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 5

RECOGNITION IN POLITICS

In the early 1970's, recognition was a powerful construct in Federal Indian law. Its authority stemmed from its gnarled configuration -- from the many different ways the term had been used, over time, in judicial decisions, administrative policies and legislative acts. Although the distinction between recognized and "unrecognized tribes" was not in fact judicially sanctioned, nevertheless it appeared so entrenched as to preclude direct challenge in the courts. Or so most thought at the time.

In 1976, however, the American Indian Policy Review Commission (AIPRC) issued a report stating that the classification of recognized and "unrecognized tribes" had no basis in Federal Indian law (see Chapter 1, note 14). A scant two years later, Federal Acknowledgment Policy (FAP) was enacted enabling "unrecognized tribes" to petition the federal government for a change in their legal status.

Both developments want explanation. If the distinction between recognized and "unrecognized tribes" was believed to rest on unassailable legal principles, then what happened to undermine this widely held assumption? And, why did some Indians need to go through an expensive and time-consuming process to obtain reclassification when the classificatory scheme itself was deemed without legal merit? In short, why

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

was federal recognition codified in the form of 25 CFR 83?

These questions cannot be answered based solely upon a textual analysis of prior case law and governmental policy. Instead, it is necessary to examine the political climate of the 1970's and its influence upon the processes of both lawfinding and lawmaking -- i.e., upon why existing concepts of right came to be challenged at this time and why a new administrative procedure was codified to "acknowledge" tribal existence. How certain concepts came to be naturalized in the FAP regulations is essential to understanding the power of the petitioning process.

Federal Guardianship: Prerogatives and Liabilities

In 1831, Chief Justice Marshall's characterization of Indian tribes as "domestic dependent nations" forever altered U.S.-Indian relations. On the one hand, it acknowledged native sovereignty yet, on the other, it seriously eroded tribal autonomy by according the United States the responsibility of protecting Indian rights from challenges by foreign governments, states and private citizens. Whereas previously, English and American legal forms merely acknowledged the existence of native rights, now the U.S. was charged with the task of safeguarding native interests as these were defined and interpreted in American courts. The federal government had a fiduciary or trust obligation regarding its native wards.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

If the concept of tribal sovereignty simultaneously reaffirmed and undermined native rights, so too did guardianship prove ambiguous, with both advantages and disadvantages for the federal government. As discussed in Chapter 4, federal trusteeship was, by the late 19th century, viewed as according the U.S. "plenary power" in Indian affairs, an extremely potent definition of federal authority. Appearing to rest on established legal principles and historical relations, this interpretation of federal jurisdiction enabled the federal government to develop comprehensive policies to extinguish tribal organization and assimilate individual Indians into the American mainstream. Guardianship not only meant that the federal government had the power to regulate Indian affairs, but also the power to alter tribal organization and to reclassify the resultant native forms as no longer "tribal," thereby eliminating the legal necessity of fiduciary protection. In other words, the U.S. had extensive authority to administer Indian tribes, and could also, by virtue of that authority, "get out of the Indian business" when it, and it alone, determined that natives were no longer eligible or in need of governmental services.

Despite the federal government's power and long-standing desire to dispose of its fiduciary responsibilities toward tribes, this was no easy task to accomplish. First, there was an historical legal framework for dealing with

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

native rights which was founded upon and entwined with principles of international and American law. Constructs such as "tribal sovereignty" and "aboriginal title" could not be selectively excised without seriously undermining the American legal system and the rules governing it. This is not to say that changes were not possible, only that when they occurred, they had to be congruent with existing concepts of right, or else risk being seen as illegitimate and unlawful. Thus, while the federal government in theory and practice exercised considerable power over Indian tribes, it nevertheless was not entirely free to do as it pleased. Rather, existing doctrine was more likely to become involuted over time, its meaning diffused, altered or restricted than it was specifically and unequivocally overturned or nullified.[103]

In addition to legal constraints, the federal government also had to deal with the practical ramifications of its Indian policies. The Dawes Act of 1887, for instance, was extremely successful in undermining tribal cohesiveness through the allotment of parcels of land to individuals yet, by 1934, so many allottees had lost their land, become impoverished and a burden on the government, that the policy was declared an economic, political and

---

[103] This is precisely the case with such legal concepts as "aboriginal title," and "wardship" which, though seminal in Federal Indian law, have been interpreted both to extend and to delimit Indian rights. See Chapter 4 above for a sampling of cases in which this occurred.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

social disaster and was terminated.[104]

All this is to say that guardianship entailed both prerogatives and liabilities for the federal government. The development of FAP cannot be understood apart from these opposing features of federal authority and the tensions they produced politically. Although long endemic to US-Indian relations, these tensions took on a new form in the mid 1970's, precipitated in part by government policies initiated some 20 years earlier, in part by developments in native leadership and in part by changes within the political arena in which U.S.-Indian relations were negotiated.

The Seeds of Change

Whereas in the first half of the 20th century the extinguishing of federal guardianship was an implicit aim of governmental policy, it became an explicit directive in 1954 with passage of Public Law 280. The latter authorized

---

[104] Although Allotment severely eroded tribal political and social organization, this was not the government's main concern. Indeed, these were the intended effects of the policy. Rather, what proved problematic for the federal government was that allottees quickly lost their parcels and, without skills and money to survive in White society, became so indigent as to require governmental aid for mere subsistence. Far from freeing the natives from the shackles of wardship so that they might experience the full benefits of "civilization," allotment all too frequently degraded existing native society, leaving Indians in far worse condition than they had been previously. It is for these reasons that public outcry eventually succeeded in curtailing the further allotment of Indian lands.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Congress to terminate its jurisdiction over some tribes, rendering them subject to state and local administration and taxation. Accordingly, between 1954 and 1962, federal authority over more than 100 tribes, bands and rancherias (primarily but not exclusively on the west coast) was terminated (United States Commission on Civil Rights 1981:23), thereby removing some 2.5 million acres of Indian land from the trust protection of the federal government.[105] During this period, individual Indians were also physically relocated from reservations to urban centers in order to hasten their assimilation.

Although these policies proved devastating for specific tribes, they nevertheless spawned important developments in pan-Indian activism. First, many American Indians, whether or not they themselves were members of terminated tribes, deeply resented this latest assault upon tribal sovereignty. As the living conditions of some natives deteriorated under state and local jurisdiction (see for example, Lurie 1980), so did Indian opposition to the policy grow. Second, relocation policy brought natives from many different tribes to urban centers for training and employment but was generally ill-equipped and prepared to deal with Indians'

---

[105] "Most of those affected were small bands on the West Coast, but two sizable tribes, the Klamaths and Menominees, were also terminated. In all approximately 12,000 individual Indians lost tribal affiliations that included political relationships with the United States" (United States Commission on Civil Rights 1981:23).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

special needs. As a result, clubs were organized by natives themselves to help relocatees and these, in turn, contributed to political activism in the 1960's, if only to improve services for membership. This activism was significantly more effective than previous Indian movements.

Until the 20th century, native opposition to governmental policies was for the most part undertaken by individual tribes. While white America long categorized native peoples as a race apart, it would take many years before Indians themselves adopted this view and this only after they were administered by a government which devised and enforced a legal distinction between Indian and non-Indian. If natives had little pan-Indian consciousness before the 20th century, it was because there were still substantial differences between and among Indian tribes which all but precluded concerted politicking on their behalf. Some, like those in the original 13 states, had been subjected to more than 200 years of political, economic and social pressures from non-Indians while, for others in the West, these were recent experiences. Those who did initiate and sustain pan-Indian political activity during this early period were generally those who had considerable experience with non-Indians (whether voluntarily or involuntarily) and the latter's social, political, and economic institutions.

By the mid 1960's, however, much had changed; most

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribes had already experienced considerable contact with non-Indians and had likewise been subjected to numerous policy directives, the jurisdiction of which was restricted to "Indians." At the same time, many non-Indians were also championing their own cultural origins or "roots," further encouraging native peoples to think of themselves as an ethnic group akin to Italian Americans, Spanish Americans, Chinese Americans, etc. With the latter organizing culturally and politically on behalf of their respective self-defined interests, it is no wonder that American Indians, or "Native Americans" as some now called themselves, developed a similar cultural charter (Keyes 1981) for political activism (see Sider 1976). During the Johnson administration, many Indians obtained valuable experience in this regard by working on Indian Community Action Programs (ICAP) funded by the Office of Economic Opportunity (OEO).

In addition to growing pan-Indianism, national prerogatives in the late 1960's and early 70's were also more receptive to demands by Native Americans than previously in American history. Just as the emancipation of black slaves stimulated a reexamination of America's treatment of Indians in the 19th century,[106] so too did the

---

[106] See for example Elk v. Williams (1884) in which the Supreme Court specifically addressed whether or not the Fourteenth Amendment granted citizenship to Indians, as it had to blacks. The Court declared unequivocally that "Indians born within the territorial limits of the United

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Civil Rights movement, some 100 years later, engender national interest in native rights. In both instances the unique legal status of American Indians was difficult to reconcile, given the newly acquired rights of black Americans. But whereas in the 19th century, Friends of the Indians aggressively lobbied for an end to natives' special legal status to secure the latter's welfare,[107] reformers in the 1960's and 70's fought for additional safeguards, privileges and compensations of tribal rights. That is, the new Indian leadership did not seek the same rights as other American citizens, but legal guarantees of the special protections already accorded tribes and their members in various treaties, legislative acts and executive orders. For Indians, "equal rights" meant diligent enforcement of tribal autonomy and not further involution of tribal

---

States, members or, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government..." (as excerpted in Prucha 1990:167).

[107] At the Lake Mohonk Conference held in 1884, Friends of the Indian resolved "That the organization of the Indians in tribes is, and has been, one of the most serious hindrances to the advancement of the Indian toward civilization, and that every effort should be made to secure the disintegration of all tribal organizations...[including t]hat to all Indians who desire to hold their land in severalty[,] allotments should be made without delay; and that to all other Indians like allotments should be made as soon as practicable" (As exerpted of the "Program of the Lake Mohonk Conference September 1884" in Prucha 1990:163.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

sovereignty.

With this distinction generally lost upon the American public, however, native rights became part of a national debate regarding Civil Rights. In 1974, for example, non-Indian employees claimed that their Fifth and Fourteenth Amendment rights (due process and racial equality) were being violated by an Indian preference policy at the Bureau of Indian Affairs, a claim which the Supreme Court firmly rejected in Morton v. Mancari (1974). The latter declared that the BIA policy was constitutional since it was not based upon the Indians' racial classification, but rather upon their special legal status as wards of the federal government. The purpose of Indian preference at the BIA

> has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life (1974:541).

No longer the concern of a tiny liberal minority whose particular bailiwick was Indians, Native American issues achieved national prominence. In the late 1960's and early 70's, Indians aggressively sought redress to long-standing grievances by organizing the occupation of Alcatraz Island in San Francisco Bay, the takeover of Bureau of Indian Affairs offices in Washington D.C., the siege at Wounded Knee and the Trail of Broken Treaties, a cross-country trek to publicize a litany of complaints against the federal government.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

These dramatic events, brought into American living rooms on the evening news, established pan-Indian activism as a potent force in the American political arena. At the same time, the effectiveness of such events to focus attention on native concerns enhanced Indians' ability to garner additional support, including necessary funds for politicking. Throughout the 1970's, there was a florescence of Indian organizations, from the expansion of the National Congress of American Indians (NCAI), to the development of such new institutiions as the Council of Energy Resources Tribes (CERT), the Institute for the Development of Indian Law, and the Native American Rights Fund (NARF). With the aid of a host of new regional and national native organizations, tribes acquired greater appreciation of their common grievances against federal, state and local governments and access to resources with which they could initiate and sustain protracted battles for legal redress. From the late 1950's through the mid 1970's, Indians and their advocates repeatedly went into court, winning major legal battles (U.S. Commission on Civil Rights 1981:4).

Many of the decisions handed down during this period had an enduring impact upon the definition and exercise of tribal sovereignty, especially in relationship to state and local governments (e.g., Williams v. Lee 1959, McClanahan v.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Arizona Tax Commission 1973, United States v. Mazuri 1973).[108] But although these cases greatly affected the lives of tribal members, they nonetheless had little direct consequence for individual non-Indians and thus were not generally publicized beyond the specific locales of the litigants. The small handful which did threaten non-Indians off the reservations, however, engendered significant political fallout and thus received concomitantly greater media coverage.

Cases like U.S. v. Washington (1974) and Passamaquoddy v. Morton (1975) made treaty rights a national concern and, especially in the latter case, highlighted the distinction between those rights accorded recognized and "unrecognized tribes." Moreover, aftershocks from both decisions continued to reverberate long after the respective judicial opinions were finalized. If political considerations influenced how these cases came to be litigated in court, so too was political foment an important by-product of the judicial decision-making process.

Backlash

As noted above, U.S. v. Washington (1973) litigated the off-reservation fishing rights of 14 tribes in Washington

---

[108] These cases dealt with the power of states and local governments on Indian reservations, and confirmed the governmental status (i.e., power) of tribes to handle such issues as taxes, commercial licenses and debts incurred on federal trust land.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

State.[109] According to several treaties ratified in the mid 1800's, signatory tribes agreed, among other things, to cede title to aboriginal territory in exchange for reservation lands and reserved rights to take fish at Indians' usual and customary fishing areas on and off federal trust lands (i.e., reservations). But as early as 1904, Indians' off-reservation fishing rights were debated in court -- specifically whether and to what extent the the State of Washington had the right to regulate these rights (e.g., U.S. v. Winans 1905, State v. Towessnute 1916, State v. Alexis 1916, State v. Meninock 1921, Tulee v. Washington 1942, Makah Indian Tribe v. Schoettles 1951, Department of Game v. Puyallup Tribe, Inc. 1967). As these cases attest, the legal dispute was ongoing for more than 60 years without definitive resolution.[110]

In the 1960's, however, the political heat dramatically increased when Indian leadership, aided by such non-Indian celebrities as Marlon Brando and Dick Gregory, staged

---

[109] Following Judge Boldt's historic decision, many more native groups in the region sought clarification of their fishing rights. Some, like the Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom tribes, were not permitted to intervene in U.S. v. Washington because the court held that they were not political successors in interest of the treaty tribes. Classified as unrecognized, they then petitioned the Bureau of Indian Affairs for a change in legal status but encountered no consistent standards by which they could effect such a change. See discussion below regarding the American Indian Policy Review Commission's (AIPRC) findings.

[110] See, for example, the general discussion of these cases in United States Commission on Civil Rights 1981:65-70.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

organized protests to State regulations and non-Indians, in turn, held counter protests to support greater restrictions on native fishing. With outbreaks of violence on both sides televised nationally, the "fishing war" again moved into the courts, this time at the instigation of the Department of Interior.[111] In 1970, U.S. v. Washington was filed in Federal district court with Justice George Boldt issuing his famous decision some three and one half years later after an exhaustive review of historical, biological, ethnographic and legal materials.

In brief, the court upheld the off-reservation fishing rights of the 14 signatory tribes, entitling them to 50% of the harvestable fish, exclusive of catches for native subsistence and ceremonial purposes. At the same time, State regulatory capacity of Indian off-reservation fishing was sharply curtailed to only those measures which protected the resource yet did not impinge upon Indians' reserved treaty rights.

Despite the clear language of Judge Boldt's decision and its affirmation by the Federal appeals court in 1975 (certiorari denied in 1976), U.S. v. Washington did not

---

[111] Over the years, similar cases regarding Indian fishing rights were litigated in Oregon and Washington State but resulted in no legal consistency. "The new Federal case was to become an attempt to stop the judicial merry-go-round by going back to the beginning -- the treaties -- to derive a thorough factual record upon which its decision and any future decisions could be based (United States Commission on Civil Rights 1981:70, emphasis added).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

resolve the fishing rights controversy. Instead, many non-Indian fishcatchers were furious with the decision and openly defied it, endangering the fish resource and exacerbating tensions between Indians and non-Indians. Because the State refused to enforce the Federal district court's decision, conditions continued to deteriorate until finally, in 1977, President Carter appointed the Federal Task Force on Washington Fisheries to study and mediate the controversy.

As the U.S. Commission on Civil Rights observes, what the federal government chose not to do is as important as the steps it undertook at the time.

> At this point in early 1977, with the case decided and upheld on appeal, an approach could have been to send agents of the Federal Government to the Northwest to enforce the district court's orders. Any necessary enabling legislation and subsequent regulations could have been sought to authorize Federal agents to enforce the law if the State failed or refused to do so, and the unlawful fishing might have ended (1981:75).

Instead of assuming that the problem was that of law enforcement, however, the federal government took the view that the Federal district court's ruling was the source of crisis and required mediation. That is, the Task Force did not use the Federal court's decision as the basic operating premise from which all subsequent negotiations would proceed. Rather, the congressional delegation sought to craft a politically expedient settlement to a confrontational crisis between Indians and non-Indians and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

between state and federal judiciaries and law enforcement agencies.

From 1977-78, the Task Force struggled unsuccessfully to force Indian tribes to negotiate fishing rights which had been unequivocally affirmed in U.S. v. Washington.[112] In the meantime, state and federal agencies clashed over which governmental power was charged with fisheries management in the Washington region. Since the state took great pains to avoid prosecution of illegal fishing by non-Indians, the federal government eventually had to step in to protect the resource, issuing court injunctions which required non-Indian commercial fisherman to comply with the Boldt decision. This act was then challenged by the state, a tactic which led the issue to be reviewed, finally, by the Supreme Court in 1979. Contrary to a longstanding belief on the part of non-Indians, the latter upheld most of the provisions of the Federal district court's 1973 decision.[113]

---

[112] According to a report of the United States Commission on Civil Rights, there were "allegations that the Washington congressional delegation, the task force, and the regional team had used their authority to threaten the tribes in other areas of intergovernmental contact if they failed to cooperate in the conciliation process. Leaders of the Lummi and Nisqually Tribes said their tribes had been threatened with the prospect of Federal fund cutbacks or other adverse congressional action if they did not cooperate with task force efforts" (1981:80, including note 159).

[113] Ever since Judge Boldt's controversial ruling, non-Indian fishermen had tried to get the case heard in Supreme Court, believing that the nation's highest court would uphold their interests. Accordingly, they tried several

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Although U.S. v. Washington was an important ruling on the reserved fishing rights of treaty tribes, equally significant is the political backlash the decision engendered. From 1973-1979, fishing rights were a volatile issue which not only led to repeated confrontations between Indians and non-Indians, but also to protracted legal battles between state and federal governments. Throughout this period, anti-Indian sentiment grew rapidly, manifested and encouraged by nationally funded non-Indian organizations and lobbying efforts seeking to abrogate Indian treaty rights entirely. The fishing rights controversy in Washington State was not the only Indian rights case which spawned such a vehement response on the part of non-Indians; however, it was particularly well publicized and touched upon an array of issues -- economic, environmental, ethnographic and political.

Coupled with other manifestations of Indian activism nationwide, the fallout from U.S. v. Washington produced a tense political climate in which Indian rights were increasingly viewed by non-Indians as anachronistic privileges, ill-suited to present conditions. The more Indians adopted the accoutrements of American society -- e.g., engaging in wage labor, attending non-Indian schools, wearing contemporary dress and participating in American

---

unsuccessful strategies. Finally, in 1979 the case was heard, only because the issue had, by then, escalated into a conflict between the State and Federal judiciaries.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

recreational pursuits -- the more non-Indians were adverse to according special rights to natives on the basis of tribal membership.

For many non-Indians, being "Indian" continued to be viewed primarily as a racial and cultural category. Since the Civil Rights Movement had deemed it unconstitutional to discriminate according to race, Indians' special treatment could only be justified on the basis of marked differences in culture, differences which precluded their competing on an equal basis with other ethnic (read culturally defined) groups, thus warranting their seclusion on reservations. But whereas non-Indians could somewhat countenance the special legal status of tribal members on federal trust land, they widely opposed extension of that status to natives who did not live on federal reservations or to those who went off them for specific purposes -- e.g., to fish or hunt. That is, where Indians' rights clashed with those of non-Indians off the reservation, non-Indian opposition was particularly fierce and obdurate. Since "unrecognized tribes" did not have the legal options afforded by wardship, they were especially vulnerable to the anti-Indian backlash, in all of its legal and non-legal manifestations.

Thus, while the Civil Rights movement initially helped American Indians to press for legal redress, its rhetoric also proved detrimental to tribal interests. Framed in terms of civil privileges guaranteed in the Constitution and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Bill of Rights, the movement was ill-equipped to deal with the sovereign rights of tribes who were explicitly denied representation by these same documents. The movement did nothing to dispell the ignorance on the part of nearly all Americans as to the historical and legal foundations of U.S.-Indian relations. As a result, the backlash continually portrayed judicial affirmations of tribal rights as legal chicanery or as manipulations of obscure privileges which had no business suddenly being pulled from the annals of American law like a white rabbit from a black top hat.[114] That American Indian tribes had rights that endured beyond the lives of individual members, was totally incomprehensible to the overwhelming majority of non-Indians. However, the latter's ignorance in this regard made it relatively easy to kindle anti-Indian activism nationwide.

In U.S. v. Washington five "unrecognized tribes" -- the Snoqualmie, Duwamish, Samish, Steilacoom and Snohomish -- were made painfully aware of their legal inferiority, being excluded completely from the jurisdiction of the Federal court's ruling. In Passamaquoddy v. Morton (1975), in contrast, "unrecognized tribes" achieved a major victory, at

---

[114] For example, in an article on the possibility of granting the New England Indians land under the 1790 Trade and Non-Intercourse Act, Time magazine reporter Frank Trippett wrote in 1977 of "the unthinkable unraveling of society," "the inherent absurdity," and "the impossible rolling back of history" (as quoted in United States Commission on Civil Rights 1981:119).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

least insofar as Eastern Indian land claims were concerned. While the latter decision provided added fuel to the anti-Indian backlash, so too did it stimulate a strong response on the part of Indians. The resultant tensions between Indian and non-Indian interests pressed insistently upon the federal government.

As discussed in Chapter 1 above, the Passamaquoddy Indians claimed that they had lost much of their aboriginal lands in treaties with Maine and Massachusetts made subsequent to the passage of the 1790 Trade and Non-Intercourse Act. Because of Maine's sovereign immunity, the Indians brought suit against the federal government (i.e., Secretary of Interior James Morton), seeking to force it to sue Maine on the natives' behalf. Previous requests for such action were rejected by the Department of the Interior, the latter stating that it had no fiduciary obligations toward this unrecognized group of Indians. Morton did not decide the merits of the Passamaquoddies' land claim; however, it did confirm in clear, unambiguous language that the wording of the 1790 Act was to be construed as applying to "any" bona fide tribe, be it recognized or unrecognized. The federal government did indeed have a fiduciary responsibility toward the Passamaquoddy Indians.[115]

---

[115] As discussed in Chapter 1, the Morton decision ruled only that "unrecognized tribes" were not a priori precluded from pursuing a land claim under the 1790 Act. Before the merits of a particular case could be litigated, however, an American Indian group would have to demonstrate that it was

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

While the plaintiff's land claim would not be resolved until some five years later by an out-of-court negotiated settlement package, still, the Morton decision had an immediate and explosive impact upon U.S.-Indian relations. Legally, the ruling definitively slashed the long-held but erroneous assumption that the 1790 Act did not apply in the 13 original states, thus enabling tribes in these states to pursue land claims they had previously been barred from filing. In addition, since jurisdiction of the Act was no longer restricted to recognized tribes, "unrecognized" ones could also seek compensation for lands taken illegally subsequent to the Act. As a result, several "unrecognized tribes" swiftly brought suit, claiming illegal alienation of their aboriginal land under the 1790 Trade and Non-Intercourse Act. Title to thousands of acres of valuable real estate on the eastern seaboard was challenged, title which was variously held by federal, state and local governments as well as by commercial and private landholders.

---

indeed eligible to bring such a suit -- i.e. that it was a bona fide tribe under the meaning of the Act. Although federal recognition was one way of establishing tribal status, it was not the only way of doing so. Indeed, the Passamaquoddy Indians did not have to prove they were a "tribe" since their ethnological status had already been stipulated. In subsequent Eastern Indian land claims cases, however, tribal status often became the threshold issue (e.g., Mashpee v. New Seabury Corp. 1978). The Morton decision thus left unresolved what a "tribe" was and what constituted evidence that one existed. Rather, the ruling only established that jurisdiction of the 1790 Trade and Non-Intercourse Act was not limited to recognized tribes.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

If Indians reacted to the Morton ruling by a flood of lawsuits, so did non-Indians respond with a broad spectrum of anti-Indian activism devoted to the complete elimination of native land claims. It is important to note, however, that in the history of Indian land claims, non-Indians have never lost their homes as the result of a successful native lawsuit. Rather, compensation for damages inevitably is negotiated, with federal and state governments providing monetary settlements, carving acreage from the public domain, or else purchasing unused land with public funds.

Despite this fact, anti-Indian backlash in the 1970's continually trumpeted cries of alarm that non-Indians would be ejected from their homes or subsequently find themselves living on reservations, paying taxes to Indians. The latter, threatened by this inflamatory rhetoric and attendant legislative attempts to abrogate whatever legal rights secured them by the courts, in turn mobilized politically, pressing hard on the federal government to fulfill its fiduciary responsibilities toward tribes.

Torn by conflicting demands, the federal government sought a political solution to a tense situation and appointed Task Force No. 10 of the American Indian Policy Review Commission in 1975 to study the history and legal status of "terminated and nonfederally recognized Indians." In the main, the Task Force was to review the historical and legal responsibilities of the Federal government toward

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

these Indians; to define federal recognition and examine existing procedures for granting it to terminated and unrecognized Indians; to assess available funding for them; and to understand the present and future needs of such groups. Very importantly, the Task Force also defined as one of its goals, "the provision of the type of information which will allow the [American Indian Policy Review] Commission and the Congress to intelligently consider the issue of Federal recognition, or some alternative, for currently terminated and nonfederally recognized tribes, bands and groups." (AIPRC 1976:3, emphasis added).

In its review of the history and contemporary status of the concept of non-recognition, Task Force 10 found no consistent standards for classifying tribes and thus condemned the continued application of the terms "non-recognized" and "unrecognized tribe."

> [T]he ongoing presence of "non-recognition" remains solely an administrative determination of the Department of Interior within the Executive Branch. Yet, despite the complete lack of substantive legal foundations, "non-recognition" has effectively denied to so-called "non-federally recognized" Indians the fully expressed protections of the federal government to Indians and the participation in the full range of federal services, program and benefits which are available through the Department of the Interior, Bureau of Indian Affairs and other Executive departments and agencies....The Task Force has found "non-recognition" and all related phenomena as highly complex, devoid of any sound rationale in theory or practice, totally inconsistent as an administrative function at the Executive Branch, and that it is a divisive tool which has become a severe detriment to Indian people....The Task Force can only conclude that "federal recognition" and "non-recognition" are really terms used to arbitrarily exclude Indians from services

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> and that all Indians are included within the plain meaning of the statutes (1976:1695-96).

Thus, although Morton narrowly dealt with the trust responsibilities of the federal government under the 1790 Trade and Non-Intercourse Act, the decision nevertheless caused the federal government to undertake a systematic review of the concept of non-recognition. Subjected to close legal and administrative scrutiny, the concept was found to be variously defined and unevenly applied to Indians, causing the latter great hardship. Once highlighted, these inconsistencies in federal law and policy left the federal government vulnerable to innumerable attacks regarding its past and present guardianship of Indian interests, attacks which could lead to extensive and costly litigation.

On the one hand, the Department of Interior received a flood of applications for recognition from Indians who had long been denied such status under the Indian Reorganization Act. Many of the applications were made as part of other legal actions brought by these groups. In the case of the Samish of Washington State, for example, federal recognition was initially viewed as necessary in order that members' fishing rights fall under the jurisdiction of the Boldt Decision. On the Eastern seaboard, many "unrecognized tribes" sought recognition as a preliminary step in their pursuit of a land claim pursuant to the 1970 Trade and Non-Intercourse Act.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

On the other, there were also those who were actively opposed to "unrecognized tribes" gaining status recognition. These included not only non-Indians who were party to land claim or other Indian rights litigation, but also members of recognized tribes who were adverse to sharing a shrinking BIA budget with an increasing client population. Many of the latter were also not completely convinced that all members of "unrecognized tribes" were "Indian" and thus deserving of recognition. That is, some members of recognized tribes feared that the mixed blood quantum and assimilated state of many "unrecognized tribes" would somehow detract from the tenuous status of those groups already receiving services from the BIA, engendering still greater anti-Indian backlash and efforts to terminate the latter. Such fears were not entirely unfounded since assimilation was, as recently as in the 1950's, used as a potent argument to justify termination of federal guardianship. Recognized tribes were thus extremely wary of any changes which might threaten their existing relationship with the federal government.

Faced with these opposing interests, the federal government found itself in an extremely difficult position. The courts demanded that it fulfill its fiduciary obligations toward Indian tribes yet there was no clear and consistent way of determining exactly just who that included or excluded. Various Supreme Court decisions and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

administrative policies all used different criteria to determine tribal status, some focusing upon a group's relationship with the federal government manifest by the existence of treaties, reservations, Congressional legislation, and appointment of Indian agencies, and some stressing a group's internal composition -- e.g., common Native American ancestry, social solidarity, political authority and occupation of a particular territory. As described by Felix Cohen, however, these were merely "considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a 'tribe' or 'band'" (1972:271). The Deputy to the Assistant Secretary of Indian Affairs, Hazel Elbert, would later testify that these standards were, in practice, inconsistently applied in a shuffling of case law, Congressional legislation, and departmental policies and actions (Elbert 1988:61).

This lack of consistency made the entire process seem (if it was not in fact) inordinately complex and politicized. Some Indian groups, like the Pueblo of New Mexico, had been deemed "tribes" for certain purposes yet not for others (compare United States v. Joseph 1876, United States v. Sandoval 1913 and United States v. Candelaria 1926.) Other groups could obtain federal recognition through Congressional legislation providing they had sufficient non-Indian support to sustain such a protracted

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

process. Still others applied to the BIA for recognition and received conflicting responses as to whether or not a land base was requisite to a change in their status.

The resulting chaos created a highly charged emotional setting which negatively affected governmental credibility and authority. Moreover, the threat of future lawsuits and the attendant insecurity as to the latter's possible effects upon U.S.-Indian relations, further hampered the Department of Interior's ability to plan for and deliver services to Indian peoples. In 1975, the BIA placed a moratorium on recognizing any tribes, pending further study of the problem. Clearly, changes needed to be made. From both political and legal standpoints, however, it was more prudent for the federal government itself to initiate changes than for Interior to wait until these were forced upon it.

Options

While revisions in federal policy were necessary, it was not obvious just what form these should take. In its report to the AIPRC, Task Force 10 made several recommendations, two of which were directed to the U.S. Congress and had wide-ranging implications for "unrecognized tribes" if acted upon.[116]

---

[116] The Task Force examined the status and condition of unrecognized as well as terminated tribes, making recommendations regarding both categories. Since terminated

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> a. For the purpose of services, programs and benefits, Congress should direct all federal departments and agencies to serve all Indians not withstanding provisions of laws to the contrary regarding specific tribes. Further, Congress should appropriate funds necessary to carry out its directive to such departments.
> b. In furtherance of such Congressional directive, notwithstanding any other provisions of law, Congress should direct all federal departments and agencies to utilize the following definition: "American Indian or Indian" means any individual who is a member, or a descendant of a member of a North American tribe, band or otherwise organized group of native people who are indigenous to the continental United States or who otherwise have a special relationship with the United States or a state through treaty, agreement executive order, or statute. This includes any individual or Alaskan Native organization (1976:1701, original emphasis).

As a political statement crafted by a select group of senators, the above seemed to address a major defect of existing policy -- most notably the lack of standards by which governmental agencies and departments defined "Indian" and "Indian tribe." Still, the proposal could hardly be deemed a definitive solution to what was a complex problem.

To begin with, several political issues want consideration. Historically, federal Indian policy was founded upon explicit recognition that the ability of Indian tribes to provide for themselves was undermined by the presence and actions of non-Indians -- i.e., by the extinguishment of aboriginal rights to land and resources,

---

tribes are the product of explicit congressional legislation, however, the administrative remedies proposed by Interior were inapplicable to them. Discussion below focuses exclusively upon the Commission's findings with respect to "unrecognized tribes."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

by confinement to reservations and by the forced assimilation of natives to American culture. Accordingly, federal services and assistance were only provided (1) in fulfillment of the government's legal obligations toward tribes (as detailed in treaties, for example) and (2) in order to hasten the civilizing process of natives with the hope of eventually eliminating the legal and moral responsibilities of guardianship altogether.

In short, the United States has never been interested in providing unlimited aid to every American Indian within its borders. Rather, what the federal government has done at any particular point in American history has been the result of a complex negotiation process involving federal, state and local powers, Indians and non-Indians. What this means of course is that federal Indian policy has run the same political gauntlet to obtain funding as have other federal initiatives. However, since American Indian tribes generally have no electoral clout at state and local levels and only a minimal voice in national elections, their ability to affect federal budgetary priorities has been extremely limited.

Thus, the Task Force's recommendation that "all federal departments...serve all Indians..." may, in theory, have addressed policy deficiencies, especially with regard to "unrecognized tribes." Implementation of such a proposal -- i.e., funding -- was, however, highly unlikely. Even in the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

best of times there was little chance of the federal government geometrically expanding the BIA's budget so as to service any and all who might claim to be "Indian." In an era of mounting anti-Indian backlash nationwide (the U.S. Commission on Civil Rights notes that 1977 was a "high water mark for the introduction of anti-Indian legislation" 1981:11), the likelihood of Congress passing such enabling legislation was nil. It is no wonder, then, that federal departments and agencies did not utilize the comprehensive definition of "Indian" and "Indian tribe" advocated by Task Force 10. Indeed, it was financially impossible to expand the BIA's client population without drastically slashing existing programs and services to recognized tribes. The latter were all too aware of this fact and thus likewise opposed the federal government indiscriminately servicing all Indians.

If some Task Force 10's recommendations were politically unfeasible, so too did they fail to resolve outstanding legal dilemmas. Recommendation "b" directs Congress to define "American Indian or Indian" as "any individual who is a member, or a descendant of a member of a North American tribe, band or otherwise organized group of native people who are indigenous to the continental United States...(AIPRC 1976:1701). While the above may seem general and straightforward, in fact the definition is extremely ambiguous when applied to the diverse range of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

unrecognized native groups in the United States. For one thing, the statement provides no guidance as to what a "tribe," "band," or "organized group of native people" is. These terms have been variously defined in academic literature, case law and administrative policy with little consensus even within the respective discourses. Do the Lumbees of North Carolina, for example, qualify as descendants of a "tribe, band or organized group of native people" when there is considerable dispute as to whether present members are descended from several remnant Indian groups as well as from white and black slave populations?

Furthermore, even if it were politically and economically feasible to provide federal services for all individual Indians who desired them (which is a very big "if"), this still would not resolve all the legal intricacies of tribal status. Historically, the United States has a government-to-government relationship with tribes. The latter's rights vary from group to group, depending upon numerous factors -- e.g., whether a group signed a treaty with the federal government and the latter's terms and whether it was the subject of specific legislation, an executive order or other legal instruments. Providing governmental services to individual natives would not necessarily change the tribe's (or band's or group's) legal status though it is this latter status which is often at issue in claims cases. Yet, granting all native groups

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

automatic tribal status could be extremely problematic, resulting in complete legal havoc with respect to the these claims. For example, in some cases, different groups or factions of the same historic tribe dispute which one is the legal successor in interest. Without deciding these cases individually, the federal government could find itself in the difficult position of defending several opposing or overlapping tribal claims cases, resulting in conflicts of interest. Moreover, federal agencies could become hard pressed to determine which group or faction in fact had the authority to represent the tribe in general.

In short, although the AIPRC report was politically supportive of "unrecognized tribes," its proposed policy directives for Congress did not resolve the question left unanswered by Passamaquoddy v. Morton (1975): namely, insofar as federal guardianship is concerned, what is a "tribe" and what constitutes evidence that one exists?

Both legally and politically, the issues were extremely complex. Recommendations that targeted the needs of specific interest groups (be they "unrecognized tribes," recognized tribes or non-Indian homeowners) were inevitably opposed by the others. And, in ignoring the legal intricacies of the problem, the solutions advocated by various groups posed even greater threats to existing tensions; if implemented, they would almost surely be met with additional litigation, something which the federal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

government was trying desperately to avoid. Rather, if the current pressure was to be eased, it had to be done in a way which was amenable to all parties -- non-Indians, recognized and "unrecognized tribes." Very importantly, it had to be consonant with existing case law yet also be politically expedient. Law and politics had to work together.

Thus, since status recognition carries with it a perpetual legal and economic commitment, the federal government could not provide BIA services to any and every Indian or Indian tribe who asked for them. Rather, politically and legally, the United States had to establish a means of determining which native groups were bona fide tribes and which were not. Moreover, since recognition is a complex issue legally and historically, i.e., according various tribes different rights depending upon their particular relationship with the U.S. government, it could not be extended retroactively with regard to all native groups. Instead, the federal government had to work toward establishing a procedure whereby "unrecognized tribes" could obtain status recognition yet not detract from those rights already exercised by recognized tribes. In short, such a procedure would "acknowledge" the existence of a tribe, thereby rendering the latter eligible for all of the rights, privileges and immunities of wardship.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Mediation

The AIPRC fulfilled its mandate by outlining the maze of conflicting regulations by which "unrecognized tribes" were denied federal services and the human consequences of such policies. At the end of its discussion on the landless (i.e., unrecognized) tribes of Washington State, the Commission recommended immediate action to extend federal recognition to "those Indian tribes, groups or bands with whom a legal relationship exists due to treaty, Act of Congress, executive order, administrative decision, Indian claims commission or judicial decree" (1976:190). At the same time, however, it advised that the Secretary of the Interior "make full case-by-case review, based on an [sic] established and well defined criteria for recognition based on ethnological, historical, legal and political findings" (Ibid, emphasis added). While the Commission did not provide an answer as to what a "tribe" was, it did call for standards by which native requests for recognition would be evaluated on a case-by-case basis. Given the political and legal (not to mention economic) exigencies, the federal government had little choice but to provide such standards.

The following year, after further study of the non-recognition "Catch-22" (1977:476), the AIPRC issued a "Final Report" in which it outlined specific procedures whereby all tribes would be guaranteed their unique relationships with the United States and the term "unrecognized" would no

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

longer apply to Indian people (1977:480). This time it recommended that Congress issue a policy statement not only affirming the latter's intention to recognize all Indian tribes, but also confirming its commitment to appropriate additional funds for newly recognized entities. To realize these goals, Congress was to create a special office, independent of the BIA, to help "unrecognized tribes" establish formal relationships with the federal government providing they met any one of seven "definitional factors" set forth by the Commission.[117] The office would contact "unrecognized tribes," provide technical assistance regarding the latter's claims and negotiate with eligible native groups so as to extend to them appropriate protections and benefits.

While this proposal was far more explicit than the one issued by the Commission previously, still, it too failed to successfully integrate political and legal considerations. Aside from the standards themselves, several issues proved especially problematic: first, that the acknowledgment process was to be handled by an office independent of the BIA; second, that the office was to "negotiate the tribe's particular status within the Federal-tribal system" (1977:481, emphasis added); and, third, that the burden of proof was upon the United States to establish that claimants

---

[117] These were drawn from Cohen's Handbook of Federal Indian Law and emphasized the political character of the group. See discussion below.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

did not meet the definitional factors set forth.

The first was opposed since, historically, the BIA (as part of the Department of the Interior) was the governmental agency charged with the administration of Indian affairs. To create a separate office to handle the acknowledgment process was to sow seeds of future conflict between the special office and the Bureau itself regarding funding, authority, jurisdiction and expertise. And, while some felt that the relationship between the agency and the office was potentially adversarial, others believed that conflicts of interest were themselves possible, if not likely, within the special office itself, given its multiple functions.

Further, if the relationship between the special office and the BIA was too equivocal to satisfy disparate interest groups, so was the function of "negotiating" a claimant's status too ambiguous to reassure various political factions. Although the Commission stated that "negotiation" was "intended to place these newly recognized tribes on a firm footing so that their claims are clear, their rights are affirmed, their special needs are assessed..." (1977:481), nevertheless, the wording left some doubt that climants would automatically and expeditiously receive all the rights and privileges accorded already recognized tribes.

Finally, the Commission's recommendation that the burden of proof rest on the United States to establish claimants' ineligibility, likewise drew criticism. To begin

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with, it not only ran counter to accepted legal principles (see, for example, Chapter 1 regarding Judge Skinner's determination in Mashpee v. New Seabury 1978), but also charged the federal government with the onerous task and cost of researching upwards of 100 claims by "unrecognized tribes." Thus, politically and legally, the Commission had not yet effected a definitive solution to the non-recognition conundrum. Further negotiations were still to take place.

Following publication of the Commission's report, the federal government continued to work on the problem, doing so within the legislative and executive branches. Before the year was out, Congress and Interior had each drafted procedures for recognizing tribes. Building upon the Commission's recommendations, both regulatory procedures sought to codify objective criteria by which native groups could establish tribal status based upon a confluence of ethnolgoical, historical, legal and political factors. Based upon a "finding of fact," bona fide tribes could thus be identified and serviced while fraudulent claims could be definitively laid to rest. Both procedures reflected political and legal exigencies.

Senate bill S.2375 ("to establish an administrative procedure and guidelines to be followed by the Department of the Interior in its decision to acknowledge the existence of certain Indian tribes") was introduced by Senator Abourezk,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

a member of the Senate Select Committee of Indian Affairs and AIPRC. Like the Commission's proposed acknowledgment process, Senate bill S.2375 provided for a special investigative office (1) to contact "unrecognized tribes," informing them of their right to petition for a change in their legal status; (2) to provide technical assistance to such groups to prepare acknowledgment petitions and compile membership rolls; (3) to review already pending petitions, allowing revisions so that groups may satisfy the guidelines set forth in S.2375; and (4) to review petitions prepared pursuant to S.2375. In addition, the Act still placed the burden of proof upon the United States to establish that petitioners did not meet proposed criteria.

While consistent in many regards with the Commission's proposals, S.2375 also differed from the latter on several important counts. To begin with, the special office was now to be part of the Bureau of Indian Affairs. Negative determinations were to be reviewable in Federal district court with the federal government paying the legal fees of groups whose tribal existence was affirmatively determined by the court. Further, once it was determined that a petitioner was an Indian tribal entity, the Secretary of the Interior was to designate the group a "federally acknowledged Indian tribe," thereby entitled to all the "rights, privileges, immunities, benefits and other services which other federally acknowledged Indian tribes are

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

eligible to receive by reason of their status" (S.2375 Section 4(e)). Finally, in addition to these administrative changes, the Abourezk bill substantially altered the "definitional factors" which were to prove determinative of federal acknowledgment.

According to the Commission's earlier recommendations, tribes were to be recognized unless the United States could establish that they did not meet any one of seven criteria. In the main, the latter focused exclusively upon a claimant's political identity -- i.e., whether the natives

(a) exhibited evidence of historic continuance as an Indian tribal group from from the time of European contact;

(b) had treaty relations with the United States, individual states, a colonial power or territorial government;

(c) were formally denominated an Indian tribe or "Indian" by an act of Congress or other governmental legal instrument;

(d) held collective rights in tribal lands or funds reserved or designated for the group's exclusive use by federal, state, territorial or colonial governments;

(e) had been treated as Indian by other Indian tribal groups;

(f) exercised political authority over members through a tribal council or other such governmental structure; and

(g) had been officially designated as an Indian tribe,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

group or community by the federal, state or local governments (AIPRC 1977:482).

With the exception of the first and last criteria (a and g), the above was drawn directly from Felix Cohen's analysis of BIA policy as to which native groups were to be considered "tribes" under the 1934 Indian Reorganization Act (see Cohen 1972:271). In fact, the Commission's proposed standards were even more strict than those originally used by the BIA since a claimant could be denied status for not satisfying any one of the seven definitional factors set forth. According to Cohen, however, criteria (b) through (f) were merely "considerations which singly or jointly have been particularly relied upon" to determine tribal status (Ibid, emphasis added). Cohen went on to note that "ethnological and historical" factors were also "entitled to great weight" in deciding tribal existence (Ibid). Given that the Commission recommended little but the more stringent codification of Bureau practices, it is hardly surprising that it was met with considerable opposition from "unrecognized tribes," most of whom faced little prospect of having their status changed should the proposed recommendations be implemented.

In contrast, in S.2375, a petitioning tribal group had to "conform" to two definitional factors and at least one from a list of five others. The first requisite was that the group be identified as "Indian, Native American, or

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Aboriginal" consistently for a period of not less than 44 years.[118] Evidence of such identification was to include, but not be limited to, seven different types of relationships or interactions: with federal, state and local governments; as indicated by records of courthouses, churches or schools; and as noted by scholars, newspapers, books and other sources deemed relevant by the Secretary of the Interior. The second requisite was that the group exhibit "evidence of a longstanding tribal governmental influence or authority over the members of the group" (S.2375 Section 5 (a)(2)). Lastly, a petitioner had to satisfy one of the following: demonstrate Indian cultural retention; hold collective rights in tribal lands or funds; be treated as an Indian tribe by other Indian tribes or groups; have treaty relations with federal, state or colonial governments; or be identified or referred to as an Indian tribe by an act of Congress or executive order which established the group's unique relationship with the federal government.

While the criteria still placed great emphasis upon the political identity of the petitioner, they did not make formal governmental recognition of the native group in various legal instruments a prerequisite to federal acknowledgment. Rather, ethnological considerations were

---

[118] In other words, the group had to be Indian since the Indian Reorganization Act was passed in 1934.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

now included as evidence of tribal identity as well. That is, a major shift had occurred -- away from demonstrating governmental "recognition" of a tribe to "acknowledgment" that a group exists as a socio-political entity.

In June 1977 the Department of Interior issued its own proposed "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe which is Eligible for Services from the Bureau of Indian Affairs." A three month period for public comment followed during which the Bureau was deluged with responses from Indian and non-Indian advocacy groups, recognized and "unrecognized tribes," scholars, as well as from law firms involved in Indian rights litigation. Based upon these analyses, substantive revisions were made and published in the Federal Register in December of that year. The major thrust of the changes involved: (1) elimination of the requirement that petitioning groups must be recognized historically by the Bureau before the modern entity could be entitled to the services accorded other BIA recognized tribes; and (2) inclusion of a more extensive procedure for permitting adversely affected parties to be heard.[119] Again the Bureau invited public comment, this time providing some

---

[119] Many non-Indians and recognized tribes actively sought an acknowledgment process in which they would be able to have some input. In its codified form, FAP does precisely this, accepting documentation from all interested parties whether or not they are in favor of the petitioner receiving federal acknowledgment. Evaluation of the evidence, however, still rests entirely with the Bureau.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

financial support for pan-Indian review of the regulations at a "National Conference on Indian Recognition and on the Impact of the Oliphant Decision of the Supreme Court"[120] held in Nashville, Tennesee in March 1978. Under the auspices of the National Congress of American Indians (NCAI) a pan-Indian lobbying organization, the conference heard testimony from recognized and unrecognized tribal representatives, from legal specialists and from representatives from the BIA and Senate Select Committee on Indian Affairs. Both Senate bill S.2375 and Interior regulations 25 CFR Part 54 were compared regarding "general tenor," "scope," "criteria," "time factors," "appeals" and "funding." Neither proposal received the unqualified endorsement of conferees. Nevertheless, in the words of Albert W. Trimble, Acting Executive Director of NCAI, the conference was an "historic event whereby recognized and non-recognized tribes/groups discussed frankly and openly

---

[120] Handed down only three weeks prior to the conference, on March 8, 1978, the Oliphant v. Suquamish Indian Tribe decision was viewed with shocked dismay throughout Indian Country. It severely undercut the power of tribal governments in criminal cases, denying the latter the jurisdiction to try non-Indian offenders for crimes on reservations. Since state and local law enforcement agencies have no jurisdiction on federal trust land, only the federal government has the authority to deal with such offenses. Given that most Indian reservations are in remote regions, far from federal authorities, this leaves Indians especially vulnerable to criminal activities committed by non-Indians on reservation land. Initially, the Nashville conference was supposed to deal only with the federal acknowledgment issue but, given the seriousness of the Oliphant decision, the latter was added hastily to the agenda.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

this subject which for decades has fostered smoldering hostility" (Trimble 1978:2).

As a result of in depth discussions in separate caucuses and on the conference floor, NCAI delegates drafted and endorsed a "Declaration of Principles on Tribal Recognition by the U.S. Government." Its 12 points hammered on four major themes:

(1) Since the United States government has a permanent obligation to preserve and protect the inherent sovereignty of all Indian tribes, the former must establish consistent policies to protect that sovereignty from infringement by state and local governments and by private interests.

(2) Recognition cannot be dependent upon arbitrary budgetary considerations but rather should be based upon the protections and services to which tribes are legally entitled.

(3) There must be valid and consistent criteria to determine which groups are to be recognized based upon ethnological, historical, legal and political factors.

(4) Federal acknowledgment must carry all the force of recognition by treaty, legislation or adminitrative policy and not affect or dilute any of the rights, services or privileges accorded already recognized tribes (NCAI 1977).

Given the substantial anti-recognition sentiment voiced by many recognized tribes over the previous years and at the conference itself, the Resolution was indeed a major

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

achievement, especially since all conferees (i.e., members of recogized and "unrecognized tribes") did not vote on the referendum. Rather, only representatives from NCAI (that is, from 'recognized tribes') had such a right. At the core of most of the opposition was fear that opening the legal door to recognition would adversely affect the rights, services, privileges and assets of already recognized tribes. Only if the latter were given unequivocal guarantees that this would not occur, would they support a federal acknowledgment process. Only if their inherent sovereignty would not be compromised in any way (e.g., being forced to revise their membership to accept previously unrecognized tribal members), would they refrain from legal attacks upon the proposed policies.

Politically, then, recognition was a particularly thorny issue. There were a substantial number of non-Indians who were not at all keen on having the federal government legally confirm the tribal identity of "unrecognized tribes" who were already or potentially party to Indian rights litigation. In most cases, federal acknowledgment of such groups would adversely affect non-Indians' legal position.

For precisely these reasons, many "unrecognized tribes" were extremely eager for clear and consistent federal standards for tribal recognition. At the same time, however, these natives were all too aware that, by

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

themselves, they had little political power. Without the support of pan-Indian tribal organizations such as NCAI, there was scant likelihood that the federal government would develop recognition criteria which did not merely codify prior BIA practices, thereby continuing to deny petitioners status recognition.

For their own part, recognized tribes were interested in strengthening tribal sovereignty of all tribes, given the vehemence of the anti-Indian backlash and its recent legal manifestations.[121] Although federal acknowledgment could significantly increase the power base of Native Americans, it could just as easily undermine the tenuous status of tribes vis-à-vis federal, state and local governments.

And finally, the federal government was under great pressure to develop a solution which all the above interest groups would endorse as equitable and consistent with legal, ethnological, historical and administrative principles. The BIA invited public comment so as to dispell notions that any proposed procedure was arbitrary, that is, a further arrogation of the government's already substantial power. Without such broad-based endorsement, the federal government risked the threat of extensive litigation, something which the entire acknowledgment process was supposed to circumvent.

---

[121] See footnote 19 above, regarding the potentially serious repercussions of Oliphant v.Suquamish Indian Tribe (1978).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

While Senate bill S.2375 also had as a goal the depoliticization of tribal recognition, structurally, this was somewhat harder to finesse since the legislative process itself is explicitly political, depending upon party politics. Eventually, the proposed bill died since it was determined that the Bureau already had the authority to develop an acknowledgment process and did not need (nor indeed did it want) specific and restrictive enabling legislation. Such a determination was, of course, as much political as it was legal.

At the NCAI Conference in Nashville, a special "Recognition Committee" reviewed both S.2375 and 25 CFR 54 on a line by line basis, adding, deleting and revising as necessary so as to make the respective proposals "consistent" with the Declaration of Principles and with Federal Indian law. Committee members also met extensively with representatives from the Senate Select Committee and BIA to discuss concerns and revisions.

Regarding the Bureau's proposed acknowledgment regulations, NCAI made changes on several key issues.

(1) The Recognition Committee altered phrasing throughout the regulations which stated or implied that the process would make petitioners eligible for services from the Bureau. The Committee felt that recognition should broadly convey recognition of rights and not just eligibility of services.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(2) Also amended was language requiring petitioners to demonstrate their "autonomy" and "continuously viable tribal governments." According to delegates, such regulations ignored the historical role of the United States in undermining tribal sovereignty and, in effect, penalized tribes who might not be able to demonstrate strength in the face of such pressures. In their stead, the committee recommended that a group establish that it "has functioned continuously and historically as a separate and distinct entity."

(3) According to the BIA, Indian tribes had to exist wholly within the boundaries of the United States to be eligible. NCAI declared, however, that groups should not forfeit tribal sovereignty merely because they straddle U.S. borders and thus struck this language from regulations.

(4) The development of tribal membership rolls as a requisite to the petition also drew sharp criticism from the Committee. The latter declared that such rolls should be voluntary and drawn up according to criteria the tribe, and not the Secretary (of the Interior), found acceptable.

(5) Finally, the Committee eliminated completely requirement #4 that "a substantial portion of the petitioning group inhabit a specific area or lives in a community viewed as American Indian and distinct from other populations in the area..." (NCAI 1977:9)

NCAI was, however, only one of several interest groups

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

offering suggestions to the BIA. From June 16, 1977 (publication of the intitial draft regulations) to August 4, 1978, the Bureau conducted some "400 meetings, discussions and conversations about Federal recognition with other Federal agencies, state government officials, tribal groups, petitioners, congressional staff members, and legal representatives of petitioning groups" and received some 60 written comments on the initial proposed regulations and 32 comments on the revised proposed regulations published on June 1, 1978 (BAR 1978:39361). By the time the final acknowledgment regulations were published in September 1978, there had been an "unprecedented" amount of consultation and discussion involved. The recommendations of no one party, organization or agency were uniformly adopted. Rather, in its final form, Federal Acknowledgment Policy represented a compromise of diverse interests committed to finding an equitable solution to an extremely difficult problem.

Regulations

As codified in Part 83 of Title 25 of the Code of Federal Regulations, Federal Acknowledgment Policy (FAP) is a "departmental procedure and policy for acknowledging that certain American Indian tribes exist" (Federal Register 1978:39362). While such acknowledgment is a prerequisite to receiving services and benefits from the federal government, it also entitles tribes to all of the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

immunities, privileges, responsibilities and obligations accorded other federally recognized tribes. The procedure applies only to those American Indian groups within the continental U.S. which are ethnically and culturally distinct and can demonstrate that they have functioned as "autonomous entities throughout history until the present" (Ibid). FAP is not intended to apply to Indian tribes, bands, pueblos and communities already receiving services from the BIA; to factions, organizations or associations which have developed only in recent times; nor to groups which have been expressly terminated by congressional legislation.

Incorporating some of the recommendations profferred by Indian organizations, FAP not only draws from prior federal Indian policy and law, but also provides an even firmer basis for the continuation of certain federal policies and practices.

First, the power and authority of the federal government or, more specifically, of the Department of the Interior, to recognize native entities, remains unwavering. Petitioners, provided they are successful, are only to receive the legal status already accorded other recognized tribes. This status includes the diverse privileges and liabilities of wardship. There are no guarantees of what these rights will entail in the future -- i.e., how political considerations will influence the interpretation

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and negotiation of legal doctrine. Rather, newly acknowledged tribes are only be accorded a special legal position within an existing arena of U.S.-Indian relations. While that position is often described as a government-to-government relationship, it is inherently unequal, based upon how the federal government defines tribal sovereignty through a confluence of administrative, legislative, and judicial procedures.

Second, FAP continues a long-standing U.S. policy (inherited from colonial times) of identifying, treating with and administering native peoples based upon the latter's affiliation with purportedly autonomous "tribes." Referring to a broad spectrum of native entities, this term has been consistently used by the federal government to distinguish Indian societies from each other based primarily upon differences in political authority and leadership. Implicit in its use, is the European notion of sovereignty, wherein political leadership has absolute authority over members. Accordingly, the identity of a particular "tribe," like that of a "nation" (which Indian groups have also been called), endures as long as there is continuity with respect to political leadership. Both the treaty-making process (in effect until 1871) and the reorganization of tribal governments in 1934 not only entailed the identification (or recognition) of purportedly discrete and bounded Indian groups, but they also buttressed, if not themselves created,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

certain forms of native political authority. As noted above, both policies proved enormously beneficial to the federal government, the former extinguishing aboriginal rights to thousands of acres of land, and the latter aiding the implementation of Bureau contracts, programs and services.

Third, with FAP limited to those Indian groups not already recognized by the BIA, the policy leaves intact the existing system of servicing native peoples largely through tribal governments. While the AIPRC had pointed out that gross inconsistencies existed, the goal of the new procedure is only to provide clear and objective criteria for admitting new tribes to the Bureau's client population. That is, FAP does not at all address differences or problems in the realization of programs between and among already recognized tribes.

Fourth, unlike Senate bill S.2375, FAP specifically declines to extend status recognition to recently formed Indian groups. The provision seeks to avoid a political nightmare involving different tribal factions, organizations and associations, each vying for legitimacy as tribal representative and/or successor in interest. That each petitioner has to demonstrate their autonomy "throughout history until the present" thus cuts down on the number of possible petitions, claims and conflicts of interest with which the Bureau might have to deal.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

And finally, the exclusion of terminated tribes and their members from the FAP petitioning process leaves the status of these groups unresolved. Although the Bureau stated that many of them quite possibly could satisfy FAP criteria, still, the procedure could not apply to these tribes since the "Department [of Interior] cannot administratively reverse legislation enacted by Congress" (BAR 1978:39361). Had an acknowledgment procedure been enacted by Congress, however, this would not have been the case. Rather, because FAP is an administrative procedure, it has no power to reverse legislative initiatives, even if the latter run counter to present policy. Thus, in order for terminated tribes to petition for federal acknowledgment under 25 CFR 83, they first have to be legislatively reinstated or "de-terminated."

If the scope of FAP deviates little from prior federal policy and case law, so do the criteria or standards by which petitions are evaluated evince the clear imprint of Cohen's "definitional factors" set forth in his Handbook of Federal Indian Law. Like the latter, FAP still sets great store by the political character of the group; indeed, five of the seven criteria bear directly upon the political autonomy of the petitioner. Of the remaining two, one deals explicitly with the contemporary social make-up and dynamics of the group and the other with its historical identity from contact to the present. The former comes from an oft-quoted

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

definition of "tribe" from Montoya v. United States -- "a body of Indians of the same or similar race, united in a community under one leadership or government and inhabiting a particular though sometimes ill-defined territory (1901:)." The latter criterion further buttresses the Bureau's emphasis upon the political autonomy of tribal groups over time. That is, documentable ancestry from an Indian nation, even if recognized in a treaty, is not, by itself, sufficient for federal acknowledgment. Rather, as Deputy Assistant Secretary Hazel Elbert declared regarding the 12,000 possible descendants of the Creek Nation: "It would be inappropriate to acknowledge the balance of these descendants, absent a showing of historical maintenance of tribal character" (1988:67, emphasis added).

Thus, in their final codified form, Bureau regulations no longer require evidence of prior recognition by the federal government but they do require petitioners to document "substantial autonomy as an Indian tribe" from contact to the present. The difference is critical: proving the former depends almost totally upon quixotic governmental policies and record-keeping; proving the latter, entails a complex task of historical, ethnological, as well as legal, interpretation. The very organization of the seven petition requirements indicates the wide range of materials to be presented by unrecognized groups and evaluated by Bureau staff.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(a) "A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." [Evidence of Indian tribal identity must include one or more of the following: identification by federal authorities; relationships and dealings with state and local governments; identification in courthouse, church and school records; by anthropologists, historians and other scholars; in newspapers and books; and by recognized tribes or national Indian organizations.] ...

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area. ...

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. ...Evidence acceptable to the Secretary [of the Interior] of tribal membership for this purpose includes but is not limited to: [descendancy rolls prepared by the Secretary; other official state, federal and local governmental records; church, school and other enrollment documents; affidavits of recognition by tribal personnel; and other records or evidence identifying persons as members of the petitioning entity.]...

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship" (25 CFR 83).

With the burden of proof on petitioners, however,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribes must use diverse primary and secondary source materials to demonstrate that they have indeed retained tribal autonomy over time despite the numerous efforts of the U.S. to extirpate native forms completely. In effect, FAP regulations require petitioners to establish their present identity and hence eligibility for federal acknowledgment, based largely upon historical evidence. The present character, functioning and membership of the petitioner are important issues, to be sure. However, the regulations make it clear that the contemporary petitioning groups must be descendant from the historical tribe. Historical continuity of the tribe is critical.

Upon enactment in October 1978, FAP thus accomplished several of the major goals identified by the AIPRC. First, the policy outlined a solution to the political and legal conundrum regarding the future status of "unrecognized tribes." The codified regulations detail a process whereby such groups can petition the federal government for a change in their legal status. After all petitioners have gone through the process and final determinations are made, there will no longer be any grounds for distinguishing between recognized and "unrecognized tribes," at least as far as their status vis-à-vis the federal government and its agencies is concerned.

Second, the BIA solicited and received an "unprecedented" amount of substantive input from diverse

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

groups. Mediating between the array of political interests and legal constraints was an extremely complex task which was accomplished in an amazingly short period of time -- approximately one and one half years. In its final form, FAP not only represented a compromise of these interests but, very importantly, was generally endorsed by them, providing "clear and consistent standards" for recognizing bona fide tribes.

Third, in resting upon purportedly factual determinations, FAP went a long way toward depoliticizing an intensely political issue. No longer would Indian groups have to garner the requisite political chips for legislative recognition, untangle arbitrary and inconsistent Bureau policies, nor try (as the Mashpee did unsuccessfully -- see Chapter 1 above), to integrate myriad legal and scholarly definitions of "tribe" which are not even consistent within disciplines, never mind across them. Rather, they could now participate in a process which "spelled out exact criteria which an Indian group had to satisfy to be acknowledged as a tribe" (Elbert 1988:62). As an added virtue, such criteria applied to all petitions yet still took into consideration, variations in socio-cultural groups (Ibid).

Fourth, the public nature of the process and the ample opportunity afforded both the petitioners and other interested parties to supplement documentation and/or appeal Bureau findings also made the process seem fair and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

equitable, if not objective. From the very first notice of a petitioner's intent to file for federal acknowledgment to its final determination, both of which are published in the Federal Register, the regulations invite all interested parties to comment on proposed acknowledgment decisions, thereby enhancing public accountability of the process. On many counts, then, the regulations seem to have much to commend them, addressing major concerns of diverse groups yet doing so in a way which is consonant with Federal Indian law.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

COILED INTENT: FEDERAL ACKNOWLEDGMENT POLICY AND THE GAY HEAD WAMPANOAGS

by

CHRISTINE GRABOWSKI

Volume II

A dissertation submitted to the Graduate Faculty in Anthropology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

1994

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 6

(RE)PRESENTATION

In 1978, Federal Acknowledgment Policy was enacted because of its apparent success in addressing both political and legal considerations. The former demanded that the federal government mediate the conflicts of interest among "unrecognized tribes," non-Indians, recognized tribes and state and local governments while the latter required that this be done within the existing framework of Federal Indian law.

Yet the federal government not only made it possible for "unrecognized tribes" such as the Gay Head Wampanoags to obtain federal acknowledgment, it also required these groups to go through the FAP processs in order to obtain status clarification. Whereas previously, some groups were recognized through congressional legislation,[122] increasingly in the 1980's both the executive and legislative branches declined to take such action, deferring to the decision-making of the BIA's Branch of Acknowledgment and Research (BAR). What does the petitioning process entail?

As noted above, the FAP process applies only to

---

[122] The Mashentucket Pequot of Connecticut were congressionally recognized in 1983.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

American Indian groups which are indigenous to the continental United States, yet not currently acknowledged as tribes by the Department of the Interior. Petitioners must present a "statement of facts" establishing the historical identity of the tribe, its continuous autonomy over time and its present socio-political structure and organization. Evidence to be relied upon includes, but is not limited to, identification as an Indian entity by: federal, state and local governmental documents; church and school records; anthropological, historical and other scholarly works; other published sources (e.g., books, newspapers, magazines); as well as identification by recognized tribes or national Indian organizations. Petitioning groups must also include a copy of their present governing document, a current list of tribal members, as well as documentation establishing that the latter are descendants of the historical tribe, are not members of other Indian tribes and have not been the subject of congressional legislation expressly terminating or forbidding federal recognition.

With the burden of proof squarely upon the shoulders of petitioners, FAP requires the latter not only to amass a great quantity of evidence, but also to organize the data according to governmental regulations for review by Branch of Acknowledgment and Research (BAR) staff. Clearly, preparing an ackowledgment petition is no casual undertaking but instead one that requires considerable time, energy, and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

organization, representing a confluence of resources which few if any of the petitioning tribes are likely to possess. Virtually all of the groups seeking federal recognition through FAP thus require outside technical assistance and resources to meet governmental criteria.

Yet, aside from the logistics of locating, reproducing and presenting necessary documentation, the evidential requirements of FAP pose substantial hurdles for petitioners which cannot be cleared simply by additional funding and personnel. These have to do both with the ambiguities of "history" and of historical documentation.

Facts on Record

As Berkhofer observes, in English, "[h]istory-as-once-lived and history-as-now-understood-and-written are described by the same words, yet they are very different undertakings" (1987:40). On the one hand, there is the presumption in Western discourse that "history-as-once-lived" is "real," that is, that the past has an objective, factual existence which is independent of any particular person's understanding and that it left tangible traces which are recoverable and decipherable through meticulous research. Historical facts are those that purportedly are "true" -- i.e., they "really happened." On the other, there is the presumption that "history-as-now-understood-and-written" can, given all the facts, faithfully represent the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

past. Thus, Western historiography defines what is and is not a fact, collects those which it deems pertinent and then privileges interpretations based upon these snippets of reality.[123] Since formal history tends to conflate the two conceptions of history, their intricate interrelationship, including tensions, remains largely unexamined.

These are, however, not abstruse dilemmas peculiar to academic historiography.[124] Rather, they are fundamental questions facing those who prepare (and evaluate) acknowledgment petitions. FAP regulations require petitioners to present a "statement of facts," demonstrating that they existed from contact to the present as an autonomous Indian tribe. The historical narratives inevitably must relate the clash of cultural values, political wills and economic strategies between Indian and non-Indian peoples. However, a good deal of what was written during and about the periods of initial and sustained contact was produced by non-Indians for non-Indians. Most of the information contained in these materials thus comes from the refracted gaze of non-Indians, a gaze which was itself not consistent over time. FAP regulations not only

---

[123] This is not to say that other paradigms do not have their own rules for discriminating relevant from irrelevant information. Rather, it is only to point out that truth and reality are far more permeable than are generally accorded in Western positivist discourse.

[124] These issues are currently debated within academe. See, for example, Canary and Kozicki 1978, Martin 1987.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

explicitly privilege these non-Indian sources, but they also require petitioners to use them as evidence that the tribe existed and was identified as "Indian" throughout history, i.e., throughout the past-as-lived.

While the biases of the historical sources are at times obvious, at others, they are considerably less so. Much of present thinking about American Indians is itself descendant from earlier encounters between Euro-Americans and natives in which only the former retained the power and authority to write history-as-now-understood-and-written. Thus, many past ethnocentric conceptions about natives are implicit in current thinking and less easily identified as bias.[125] As Dorris observes, virtually no one is immune to the pre-understandings about American Indians which emanate from the past.

> For most people, serious learning about Native American culture and history is different from acquiring knowledge in other fields, for it requires an initial, abrupt, and wrenching demythologizing. One does not start from point zero, but from minus ten, and is often required to abandon cherished childhood fantasies of super-heroes and larger-than-life villains (1987:103).

In addition to the difficulty of recognizing ethnocentrism in source materials, petitioners must also grapple with how to deal with non-Indian accounts of native society, often the only evidence that a group existed as a

---

[125] See, for example, Berkhofer 1978 for a cogent analysis of the historical construction of the very concept of "Indian."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribe at a particular point in time. To ignore materials produced by non-Indians is to leave a large evidential gap in the group's history which would almost certainly doom members' chances of satisfying FAP criteria. However, to include the biased documents without explanation is likewise perilous since it leaves the interpretation of these texts to BAR reviewers who may or may not have the necessary background to contextualize data contained in them. A last option for petitioners is to cite all of the documentation available, positive and negative, and then to provide an interpretive guide as to what the reader should and should not understand from the texts, a sort of hermeneutics of the source materials. While this seems like a viable solution -- indeed what any good historical account should do -- still, this too is problematic.

On the one hand, such comprehensive decoding of historical texts requires considerable knowledge and skill which transcend the conventional boundaries of disciplines and area specialities. A substantial background in American law, history and American Indian ethnography must be brought to bear upon the history of a particular tribe and then sculpted to fit particular FAP criteria. This involves considerable finesse since the regulations require petitioners to focus narrowly upon the group itself, upon its identity, autonomy and continuity. In placing such great emphasis upon the insularity of the tribe over time,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

FAP regulations tend to subvert the relevance of wider legal, historical and ethnographic contexts. Petitioners must not only be cognizant of such tensions, but also evince great skill in mitigating them while still addressing specific FAP criteria, for the latter provide the thematic framework in which all evidence must ultimately be fit.

On the other hand, providing contextually rich historical narratives of specific native groups still presumes that there is a single reality which can, through more diligent research and analysis, be (re)presented. That is, the approach uncritically accepts the view that history-as-once-lived exists independently of those who interpret it. Yet, as Berkhofer has pointed out, cultural pluralism undermines these premises, demanding not only that the different understandings of reality be recognized, but that they also pervade "the understandings of such understandings" (1987:40).

For those who must prepare an historical account of a particular tribe for federal acknowledgment purposes, the issue of representation is exceedingly complex. Because FAP regulations place such great store by facts defined a priori in positivist terms (hence the emphasis on "documents," "records," "reports" and "publications"), the Indians' own view of what their reality was, is and can be, is of minimal significance. The only criterion for which such data is relevant is (b) where emic perspectives explain the basis of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribal identity and affiliation and, in turn, the members' relations with one another. Since myths and oral traditions are most frequently not written, however, their role as evidence remains weak unless buttressed by publication or by other concrete manifestations -- e.g., ceremonies, ritual objects and traditional practices. Ironically, then, what the Indians themselves hold is most important about them and their history is likewise subverted within the acknowledgment process. What natives believe they are sustaining or recreating with each new generation is of less significance than what non-Indians deemed important enough to put down for the record.

Further, the entire enterprise of writing a particular tribe's history is rendered especially difficult since no contemporary American Indian tribe, whether recognized or not, is a pristine exemplar of its aboriginal antecedant. All have been profoundly affected, though in different ways, by European and American settlement. Precisely because "unrecognized tribes" have not been subject to federal authority, they have been under considerably greater pressure by state and local governments to assimilate, pressure which they have in general had little formal power to resist. Teasing out what these Indians construe to be their history can therefore tax the most committed of researchers. Yet this task is critical if the petitioners are to show that they indeed sustained their tribal identity

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

over time despite persistent and pervasive pressures to do otherwise.

Providing an historical "statement of facts" for a federal acknowledgment petition is thus fraught with multiple dilemmas regarding the interpretation of history to which there are no clearcut solutions. Moreover, each tribe, along with the peculiarities of available documentation, pose different variations of these problems. Nowhere are these issues formally acknowledged and discussed; nevertheless, the outcome of each petition inevitably is influenced by how the various parties confront the ambiguities of history and of historical documentation.

Below we will examine how these issues manifest themselves in the oral and written accounts of Gay Head's past. The chapter provides an overview of native identity at the onset of the petitioning process and an outline of the documentary evidence of the group's autonomy as a tribe. The aim is not to determine the "truth" regarding the history of the Gay Head Wampanoags or even to provide a comprehensive discussion of their identity and autonomy over time. Rather, the goal is to highlight some of the problems in (re)presenting their history for the purposes of federal acknowledgment. In Chapter 7 we will look at how these problems affected the Gay Head Wampanoags' petition for federal acknowledgment.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian Identity-as-Understood-and-Presented-by-Gay-Head-Descendants

> **The Tribal Council's one main point is to acquire the land for the descendents [sic] of the Wampanoag people; that's why the council was organized... (as quoted of Beatrice Gentry, President, Wampanoag Tribal Council of Gay Head, Inc., in the Grapevine, June, 1973).**
>
> **This [land] is our birthright, our last stand at Gay Head and we have to fight for it (as quoted of Bertha Giles, Board Member, Wampanoag Tribal Council of Gay Head, Inc., Grapevine, June 1973).**[126]

In the early 1980's, Gay Head Indians were acutely aware that the past figured prominently in their present and future. Ever since the Tribal Council filed its lawsuit in 1974 for return of the Common Lands, relations between Indians and non-Indians in Gay Head became increasingly politicized, with events at the regional and national levels exacerbating local tensions.[127] It was no longer enough for these Wampanoags to know who they were; rather, they now had to prove who they were if they, their children, and subsequent generations were to retain a collective interest in these ancestral lands. However, several recent controversial and well-publicized cases[128] underscored that presenting such proof in court was itself a complex and

---

[126] In 1982 these individuals were no longer Tribal Council officials.

[127] See Chapter 5 above.

[128] Passamaquoddy v. Morton (1975) and [128]Mashpee v. New Seabury Corp. (1978) were two especially prominent cases in which the legal status of the plaintiffs were critical. See Chapter 1 for discussion of the issues mediated, resolved and left outstanding.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

difficult process with an uncertain outcome. Although Gay Headers had few legal options but to seek status recognition through FAP,[129] many natives nevertheless bitterly observed: "Indian people have always been here at Gay Head. Why do we have to prove we're Indian?" The question not only reveals much about their misconceptions regarding the petitioning process,[130] but also about how Gay Headers conceived of themselves, each other and their collective past.

---

[129] Federal recognition was one of the original goals of the Wampanoag Tribal Council of Gay Head, Inc. (WTCGH) when it was established in 1972, some six years before FAP was enacted. The formal decision to proceed with the preparation of a federal acknowledgment petition, however, was not made until late 1981, in large part in response to the lack of success by the Mashpee Wampanoags in their lawsuit against New Seabury and to the breakdown in negotiations between the WTCGH and Taxpayers Association regarding an out-of-court settlement (see Chapter 1).

[130] Then, as now, numerous "unrecognized tribes" mistakenly believed that the FAP process is concerned with establishing the genealogical or ethnic identity of individuals. Instead, however, the seven FAP criteria require petitioners to demonstrate that the tribe has maintained itself continuously as an autonomous socio-political entity from contact to the present. Thus, FAP is not about Indian identity so much as tribal identity.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In 1982,[131] most Gay Head Indians on Martha's Vineyard identified themselves as "Gay Headers." What this meant was that they were descendants of those who inhabited the Gay Head peninsula when it was administered as an Indian District in the 19th century and that they currently lived in the town or else did so when they were "coming up."

On the island itself there was little need to mention that one was Indian since Gay Head was historically known to have been inhabited by descendants of the natives who once settled all of Martha's Vineyard, Nantucket, the Elizabeth Islands and southeastern Massachusetts prior to the arrival of the English in the 17th century. To identify oneself as a "Gay Header" was therefore not only to assert implicitly one's Indian ancestry, but also to lay claim to Gay Head history -- that is, to the past-as-lived of the peninsula and its native inhabitants. It was to define oneself as part of that history, as contemporary actors in an ongoing process in which Gay Head Indians successfully retained control over their ancestral land. Only those with deep

---

[131] Throughout the following discussion I have chosen to use the past tense in order to emphasize that it is based upon research I conducted in 1982. Much, if not all, seemed equally applicable in 1987 (the last time I conducted fieldwork in the community) and I have no reason to believe that it is substantially different as of this writing. Nevertheless, I refrain from describing Gay Head attitudes in the present tense because I am adverse to the timeless authority embodied in the use of the ethnographic present. While my use of the past tense may connote more closure than is warranted, still, I feel this is preferable to transforming historically specific observations into ahistorical verities.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

genealogical roots could presume to conflate their own residence with that of their forefathers. Only those whose relatives claimed the land before the existence of formal deeds could take their identity from that land. Only Gay Head Indians could be called "Gay Headers."

> **So you can marry a Gay Header but you're never a Gay Header. You can [even] live here a hundred years. You see, that's the difference between Gay Head and Mashpee. In Mashpee they accepted non-Indian spouses as members of the community. We didn't do that.**[132]

Non-Indians who lived in the town, even if they had done so for more of their adult lives than not, were known merely as "residents" or "inhabitants" of Gay Head. Though they may have bought land in the town, they were not of the peninsula and thus could not identify with the land and the history of its human habitation. This obtained whether or not non-Indians were married to Gay Head Indians, were year-round residents of the town or merely "summer people."

If the term "Gay Header" was an assertion of the

---

[132] In order to protect the privacy of individuals, I have omitted the names of those whom I have quoted. With the exception of the first two which appeared in print in 1973, all subsequent statements in this section were made in 1982 by different Gay Head Indians during the course of oral interviews with me. While the quotes were made by those of varying ages, lineages and political factions, they nonetheless express attitudes, concerns and beliefs which I feel were ubiquitous among Gay Headers. This does not mean that all natives felt the same on all issues; far from it, as there were deep rifts in the community which were still in evidence in 1987, when last I visited the island. Rather, the quotes were chosen to call attention to several common issues regarding Gay Head Indian identity and the rhetorics by which these were often expressed.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indians' historical dominance of the peninsula, then how did tribal council members conceive of their native identity? What did it mean to call oneself a Gay Head Indian?

My people have lived on this land for over 400 years. No one else can say that.

To be a Gay Head Indian meant first and foremost that an individual was descended matrilineally or patrilineally from the native people who inhabited the Gay Head peninsula prior to English settlement of the island in 1642. Most Gay Headers readily pointed out that their ancestry predated that of the prominent Yankee families on the Vineyard -- e.g., the Mayhews, Luces, Allens, and Cooks -- and that native habitation of the island spanned more than four centuries.[133]

But, although Gay Headers made frequent reference to their pre-colonial origins, they were wont to do so in general terms, without reference to specific individuals or events from the pre-contact or early contact periods. "Indians have always lived here," was repeated often yet without elaboration or detail. It was uttered as one would a simple, well-known fact and set the stage for personal narrative. "Always" invoked tribal continuity, authoritatively sealing the space between then and now and situating the speaker within that continuum. What followed

---

[133] See Chapter 3 for a discussion of pre-colonial settlement patterns on Martha's Vineyared.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

could only be understood in the context of "still" -- that is, Gay Head Indians still live here and what I tell you I do as a Gay Head Indian.

Whereas Yankee inhabitants of the island named their apical ancestors in order to highlight what was unique about their identity as individuals, Gay Headers used descent to emphasize their kinship with and affinity to other Gay Head Indians. When Gay Headers spoke of their ancestors by name, for example, they did not refer to the illustrious figures from history -- the kings, princesses and sachems -- from whom many "wannabe" Indians often claim descent,[134] but to those ordinary individuals listed in the 1871 "Pease Report." The latter included a census of Gay Head compiled by Massachusetts Commissioner Richard L. Pease for the purpose of allotting the Indian District's land in severalty. Not only did this document identify Gay Head residents and the specific parcels they received, but also their respective place of birth and tribe or race.

For Gay Head Indians in the early 1980's, the 1871 "Pease Report" was a very important document for it served as a baseline genealogical record for the tribe's current membership. According to the by-laws of the WTCGH, members

---

[134] Many American Indians are amused by the plethora of non-Indians who claim descent from an Indian princess, often Cherokee. In addition, chiefs, sachems and kings seem to have sired an inordinate number of "wannabe" (want-to-be) Indians. While there are a number of Wampanoag personages mentioned in colonial sources, I never heard any Gay Headers try to claim descent from them.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

had to be able to demonstrate descent from those who were considered Gay Head Indians on the 1871 roll. While the Tribal Council passed a resolution in 1979 requiring members to be one eighth Indian in order to receive tribal benefits (assuming that all on the 1871 roll were full-blooded Wampanoag), the resolution did not appear to have ever been enforced.[135]

Informally, however, Gay Head Indians freely appraised each other's degree of native ancestry based upon the assumption that those listed on the 1871 census were all full-blooded Indian. They were especially wont to do this regarding members of opposing political factions as a way of casting aspersions upon the other's legitimacy to speak on behalf of the Gay Head tribe. Since Gay Head families intermarried extensively with non-Indians in the 20th century, an individual's exact blood quantum was a sensitive issue among natives. Accordingly, it was less used to malign individuals publicly, than it was to snipe at them behind their backs leaving the attacker safe from reprisal.

The thing that's important to me is that I know deep down who's an Indian and who's not.

In addition to indicating tribal membership generally, the 1871 roll was important in identifying specific "families" and their members. Gay Headers traced their

---

[135] Indeed, in 1986, the Tribal Council Board of Directors did not consider the motion to be in effect (BAR 1986:86).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

descent from individuals on the 1871 list whose surnames served to designate a dozen and a half or so different Indian descent groups. While there were no contemporary heirs of some of the original allottees -- e.g., no descendants with the surnames Weeks, Nevers, Wamsley and Salsbury -- nevertheless there were many Gay Headers who did have the same last name as their relatives on the 1871 roll. For example, Francis, Jeffers, Madison, Manning and Vanderhoop were still in use and readily recognized throughout the Vineyard as belonging to members of historic Gay Head Indian "families."

Moreover, because natives were well versed in each other's genealogies, they "knew" who was (Gay Head) Indian and identified each other according to one's lineage affiliation, despite an individual's own, parent's or grandparent's marriage to a non-Indian. That is, within the native community, lineal descent from one of the 1870 allottees was highlighted to the exclusion of one's non-Indian ancestry, the latter contributing little if anything

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to one's social position and status.[136] Gay Headers not only knew next to nothing about the non-Indian ancestry of other Indians, but also tended to have only a hazy conception of that ancestry insofar as their own lineal relatives were concerned, even if such relatives were as close as grandparents or parents.

Gay Headers' identification of and with specific "families" was underscored by their firm belief in the many ways in which kinship influenced an individual's economic, political and social options within the community. In Gay Head, Indian households (i.e., those in which at least one of the spouses was a Gay Head Indian) invariably occupied land which had been inherited from an original allottee.[137] Different families, however, had been variously successful over the years in holding onto their allotments, in consolidating the fragmented shares of disinterested or absent heirs, and in selling off parcels at market value.

---

[136] On an individual basis, Gay Head Indians who had one Indian and one non-Indian parent had to reconcile the fact of their mixed ancestry. For those who lived in Gay Head and to a lesser extent on the Vineyard generally, there were strong social, economic and political pressures to identify as native and to deemphasize one's non-Indian heritage. Since I did not interview any Gay Head Indians who lived permanently off-island, it is an open issue how such individuals conceived of their mixed heritage in other contexts. In Gay Head, however, natives categorized each other according to their membership in known Gay Head descent groups, sloughing over if not ignoring completely the non-Indian ancestry which almost all included in their family trees.

[137] This obtained whether or not the couple was legally married or just living together as were several in 1982.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Those Gay Headers who still held interest in their familiy's property were thought to enjoy a more secure economic position locally than those whose families had long ago lost control over the original allotments.

In addition to helping out in the housing market, kin ties were thought to influence employment opportunities. Certain Indian families owned businesses in Gay Head which were fairly profitable, if seasonal, catering primarily to the flock of tourists who visited the clay cliffs from Easter through Columbus Day. Not only were family members employed in these various enterprises, but the businesses also generated sufficient income to finance other activities -- e.g., to buy a fishing boat and equipment, to purchase materials for house construction or to pay for higher education. Those whose families did not own these small businesses were believed to rely more on their own individual efforts to make a living.

Further, kinship was also thought to have a profound impact upon local politics. Several Gay Headers held the view that members of one particular descent group controlled the town and had always done so, consistently occupying the powerful positions of selectmen, tax collector and treasurer as well as such auxillary positions as cranberry agent,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

shellfish warden and library trustee.[138] The present "family" was so large that it could "push things through," outvoting the rest of the Indian community.

And socially, lineal descent also was conceived as greatly influencing the pattern of social relations, with networks strongest amongst closest kin (i.e., siblings, parents and their children) yet also binding together members of the descent group whether or not they were of the same age grade (e.g., aunts and uncles with nieces and nephews, and first, second and third cousins).[139] As with politics, non-Indian spouses were considerably more likely to socialize within their Wampanoag spouse's kin group than they were to develop friendships antagonistic to or outside of these relationships. And, non-Indians who were divorced or estranged from their Wampanoag spouses were unlikely to remain in Gay Head for, without the economic, political and social support of "family," (understood in lineal terms), most found it extremely difficult to sustain themselves in the community.

---

[138] Although non-Indian spouses sometimes occupied these lesser positions, their ability to do so was widely held to depend on the political influence of their Indian spouses whose extended kinship networks would be mobilized to support (or not) their bids for public office.

[139] In general, socializing among Gay Head Indians cross-cut generational divisions more frequently than was the norm in non-Indian households in which age, residence, occupation and social class more influenced social interaction than kinship.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The tribe is, well, we're all related really. We're all one family.

The concept of "family" not only linked Gay Head Indian households across generations, but also bound together the native community as a whole. Until the Second World War, there was considerable intermarriage among the various lineages, blurring the distinction between the kin groups. Quite a few Gay Head Indians could establish kinship ties with several descent groups and include more than one 1871 ancestor in their genealogies. Depending upon the issue and context, Gay Head Indians not only acknowledged their interrelatedness, but also held it out as a key factor in their collective identity. However bitter the disagreements among tribal members, these were still, according to Gay Headers, among "family" and closest kin. Indeed, the squabbles could become heated because there was never any danger of their creating permanent rifts within the native community. "We're all Indian" was repeated by members of disparate Gay Head Indian factions, although frequently without each other's knowledge.[140]

---

[140] While I was doing field research in Gay Head, I found it ironic that individuals who were publicly so at odds with one another would, in separate interviews, voice very similar sentiments, sometimes even using the same rhetoric. The metaphor of the tribe as family was extremely common.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

To be Indian isn't just to have a roll number.

Lineal descent from an allottee listed in the 1871 "Pease Report" was an admittedly fundamental requisite of tribal membership, being codified in the tribal council's by-laws. Still, it was not the sole manifestation of Gay Head Wampanoag identity. Gay Headers also believed they shared several features with one another which were implicit in their identification as Gay Head Indian and which were critical to "being Indian" as opposed to "being born Indian." Whereas the latter set a minimum genealogical standard for identifying as a Gay Header, the former alluded to socio-cultural characteristics shared by tribal members, i.e., to certain attitudes, behaviors, values and traditions which distinguished Indians from non-Indians.

> **I've always had this feeling deep down. This is my town and should continue being my town and if I want to walk over the north shore, east pasture, south pasture, or wherever. I don't mind people being there, saying that they own this piece of property ...[but] I feel these lands are ours.**

For those familiar with American Indian ethnography, native identification with and regard for ancestral land is a pan-tribal phenomenon. Whereas non-Indians are wont to view the soil and its resources as commodities to be bought and sold, Indian people characteristically imbue their tribe's land, flora and fauna as well as geological features with a religious significance which is antithetical to market relations. It is not that contemporary American Indians do not recognize or appreciate the dollar value of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

land, for they can indeed prove to be astute business men and women when they choose. Rather, it is that they also recognize a value in land (often expressed in religious and/or mythic terms) which cannot be measured in terms of a dollar amount. Thus, although many American Indian land claims are pursued because of the economic worth of the disputed acreage, a corrollary concern of natives (and one which often times figures more prominently in their tenacious pursuit of legal redress) is the symbolism which they feel inheres in their tribal land and its history.

Like other Indian peoples, Gay Head Indians held certain beliefs about their ancestral land which did not reflect its contemporary economic import to them. Aside from the fact that inherited allotments provided affordable housing, the land generally played little direct role in how Gay Headers earned a living in 1982. No Indians farmed commercially, for subsistence, or even sowed a kitchen garden for their family's use.[141] A handful hunted deer and collected fruits for canning but these were more the

---

[141] This in fact contrasted with other towns on Martha's Vineyard in which there was a small but significant number of ecologically-minded non-Indians who grew some of their own produce, participated in a local natural food cooperative and tried to "live off the land" as much as possible. Although in 1982 the WTCGH applied for and received grant money to construct a greenhouse which was to increase Indians' self-sufficiency. As of 1987, Gay Headers had not supplied the necessary labor to turn the proposal into a reality.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

exceptions than the norm.[142] Instead, most Indians pursued several jobs (many seasonal and part-time) including carpentry/construction, caretaking/domestic service for non-Indian summer people, miscellaneous clerical and administrative positions in town government, and various positions catering to the local tourist trade at the cliffs. The single most common employment was commercial scallopping which practically all Gay Headers pursued in good seasons whether or not they held other jobs.[143]

Despite the fact that Gay Headers did not earn a living from the parcels they owned, they nonetheless viewed land as central to their Wampanoag identity. In fact, natives saw their attitudes and use of the land as a boundary marker between themselves and non-Indians.[144]

---

[142] Elderly informants declared that this was not true in their childhood when Gay Headers more extensively utilized local resources in order to survive economically.

[143] Scallopping on Menemsha and Squibnocket Ponds took place from approximately October through April and in a good season net as high as $10-20,000 while a poor one hardly worth the effort at a few thousand. When scallops were plentiful, many Gay Headers left their regular jobs to spend 2-4 cold hours on the water to obtain their legal limit and quick cash. Although Gay Head Indians commonly fished for sport and family consumption, relatively few were engaged year-round in the commercial harvest of fish and shellfish other than scallops (e.g. lobsters, oysters, swordfish, bluefish and bass). The popularity of scalloping stems in large part from the minimal equipment required, with a small motorized boat, scallop rake, bucket, and foul weather gear easily purchased or borrowed from relatives.

[144] For the historical development of this concept see Levitas (1980), "No Boundary is a Boundary."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

We didn't get signs until white people started coming here. I think that that was the second thing they did. [First] they signed the paper for the deed and then they paid for a sign. That was the second thing they did.

Whereas non-Indians rigorously defined and defended their ownership of specific acreage with title searches, surveys, fences and No Trespassing signs, Gay Headers conceived of land tenure more in terms of overlapping interests embedded within existing and past social relations. While a Gay Head Indian could legally own a particular parcel, that title did not preclude other members of the native community from walking over it to hunt, fish, gather herbs and berries, to gain access to other property (e.g., if the latter did not have a legal easement), or to get to the beach.[145]

In accordance with this ethic of unimpeded land access, little if any of the Indians' land was fenced, posted against hunting and trespassing or otherwise marked with the diacritica of ownership. In contrast with non-Indian mailboxes, for example, those of Gay Headers were typically devoid of surnames and blank except for perhaps a rural delivery number partially worn off.

Unimpeded access to land amongst Gay Headers was

---

[145] In Massachusetts, property lines could extend to the mean low water mark of the shoreline which all but precluded public access to beaches. On Martha's Vineyard, waterfront access was a very sensitive issue since there were but a handful of beaches to which the public had unrestricted access. In Gay Head, as on the island generally, the overwhelming majority of beachfront was privately owned.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

believed to be "traditional" -- i.e., grounded in the past-as-lived and in the social dynamics of Indian relationships. Historically, Wampanoags controlled all of the Gay Head peninsula until 1870 and did so based upon a communal land tenure system in which all tribal members were entitled to usufruct rights within the community. Although individuals gained fee simple title to specific parcels in 1870, the legal change little altered natives' use of the land. In the late 19th and early 20th centuries, the few livestock that were kept continued to be pastured collectively and individual households still maintained kitchen gardens for their own use. Farming, which was never a commercial success on the peninsula, declined steadily, and eventually gave way to tourism and commercial fishing, both of which had little effect upon Indians' land use practices. Whereas tourism mostly involved day trippers to the clay cliffs, commercial fishing depended largely upon investment capital to purchase large boats and gear. Since both were seasonal and variable, many Gay Headers continued to supplement their incomes by hunting and berrying on the peninsula.

Not until the 1960's did the influx of summer homeowners and the latter's restrictive attitudes toward land ownership impinge upon the Indians' use of the land. Even then, the change was a gradual one for, at the same time that the number of non-Indians increased in the town, so did Gay Headers come to depend more and more upon the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

wages derived from tourism and less and less upon the supplemental foods derived from the land itself. Fishing, especially shellfishing, was one of the few subsistence activities from pre-incorporation days which continued to play a significant role in the Indians' economic strategies yet non-Indian land ownership had only a minimal impact on these activities.[146]

The fact that unrestricted access to Gay Head land still existed in living memory greatly enhanced its symbolic import for Gay Headers as a factor of "Indianness." That is, the practice was viewed as emblematic of the Indians' historic tenure on the peninsula, a tenure which had as much to do with native resistance to whites as it did with subordination to the latter's legal system.

While historically, natives did not bar each other from using community land, they did, at least up until 1870, restrict non-Indian access to Gay Head.[147] Thus, to point to the Indians' long-held practice of communal land use was

---

[146] Although some Gay Head Indians complained that non-Indian ownership of the beachfront hindered their access to fish and shellfish resources, in practice many natives fished where they pleased and were only infrequently barred from doing so. In part this was because non-Indian homeowners were generally less proprietary about fishermen trespassing on beaches than they were about hunters scouting near summer homes. In addition, Indians did much of their fishing in the off-season, when summer homeowners were simply not around to assert their property rights.

[147] Until 1870, non-Indians could not buy or sell land in Gay Head. Land use within the community was subject to the approval of Gay head proprietors.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to affirm implicitly native dominance in Gay Head and power as a tribe to regulate how land was to be used. It was also to establish a moral, if not legal, justification as to why Indians should continue to exercise these rights. As one Gay Header declared, "they can't stop me from using the 'ancient ways.' I don't care how close to someone's tennis court I come."[148]

In addition to claiming continuity with the past-as-lived, Gay Headers' characterization of their land use practices as "traditional" was consonant with the practical and symbolic value they placed upon "family." Since many Gay Headers were genealogically related to other tribal members, it would have been unseemly to deny "family" -- i.e., any kinfolk -- access to one's land. Since "family" metaphorically encompassed the entire tribe, this meant that, in effect, it would have been improper to deny access to any member of the native community.

Like the concept of lineal descent, then, that of unrestricted access to land served to foster solidarity and

---

[148] 'Ancient ways' are old roads and pathways which Gay Headers once used to transverse the peninsula before automobiles became ubiquitous. As parcels of land were increasingly purchased by non-Indians, access to these byways was cut off by private fencing, with the result that many of them became overgrown from disuse. Although legally the pathways are still open to the public, most non-Indians do not know about the roads or about the right to use them. However, one elderly Gay Header defiantly told me that he regularly walked the 'ancient ways'in order to let the whites know that "their fences can't keep me from going where I want."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

cohesion among members of the native community as well as to distinguish the latter from their non-Indian neighbors. Yet boundedness was a double-edged sword, with negative as well as positive implications.

> **In a place as small as this, if you come from Gay Head, automatically, unless you're white, you're Native American. And if you're Native American, in those times, you didn't belong in the white community as such.**
>
> **You weren't white so you weren't good enough, especially around here with the descendants of the Mayflower.**

Historically, Martha's Vineyard was settled mostly by those with English ancestry. In 1982, its inhabitants were still predominently White Anglo-Saxon Protestants (WASPS). Although various racial and ethnic populations immigrated to the island over the years primarily in connection with the whaling and commercial fishing industries, still, these non-Yankee populations remained very much in the minority and tended to reside in Oak Bluffs or Vineyard Haven. The squiretown of the island and county seat -- Edgartown -- was overwhelmingly WASP as were most of the town governments except, of course, that of Gay Head.

On the Vineyard, Gay Headers readily identified themselves and were identified by others as "Indian," yet that classification often connoted a diminished social status insofar as the WASP establishment was concerned. Although non-Indians consistently denied there was any

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

racial/ethnic discrimination toward Gay Headers, all of the latter with whom I spoke in 1982 felt that they were subtly and not so subtly told that they were socially marginal to the WASP majority.

Some natives did develop friendships with non-Indian individuals down-island, but Indians felt that these relationships were the exception to prevailing patterns of social interaction. Gay Headers did not attend social functions in neighboring Chilmark (e.g., potluck suppers and dances) nor did residents of the latter participate in Gay Head social activities. Only one Gay Head Indian ever married a white whose family members were long time residents of Martha's Vineyard. In general, when Gay Headers married non-Indians, which they did with great frequency after World War II, they chose mates from amongst the black Portuguese (Cape Verde) community down-island, selecting partners who were temporarily visiting the island for pleasure or work or marrying persons when they themselves were away from the Vineyard.

On the island, Indians were only too aware that they were not readily welcomed into WASP social circles. Moreover, they knew that it was not only because they were "Indian" but because their native ancestry included "dark" racial admixtures which were evident in their appearance. Tribal members were quite diverse physically, with some having blond or red hair and fair complexions while others

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

were likely to be taken for mulatto or hispanic off-island, with dark kinky or straight hair and brown skin. None looked stereotypically "Indian" with straight black hair, prominent cheekbones, an aquiline nose and tanned skin color. Those Gay Headers whose black ancestry was more apparent physically, generally recounted more discrimination than those who looked more white or "Indian."

Whatever their precise ancestry, however, Gay Head Indians presented their native identity defensively, having withstood innumerable attacks upon their Indianness launched by outsiders as well as by Gay Headers themselves, on occasion.[149] For example, most Indians were familiar with the derogatory term, "monig," meaning "more nigger than Indian," which some non-Indians on the Vineyard used in reference to the natives. In the post-civil rights era, such slurs were less frequently voiced face-to-face and most often spoken by those vigorously opposed to the Indian land suit.

The all too common experiences of Gay Headers as objects of racial discrimination were pervasive undercurrents in Indian rhetoric. These experiences not only crystalized the distnction between "we" and "they,"

---

[149] As noted above, when Gay Headers impugned each other's degree of native ancestry, they did not declare that an individual was not "Indian" and a legitimate member of the tribe. Rather, discussions of blood quantum only dealt with who was more Indian than others and thus had greater genealogical authority to act on behalf of the tribe as a whole.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

between Indians and non-Indians, but were themselves viewed by Gay Headers as part of a long process in which whites persistently tried to undermine tribal identity and Gay Head Indians successfully resisted these efforts. When Gay Headers recounted incidents of discrimination, for example, they did not dwell on how non-Indians curtailed native options. Instead, the narratives told of how non-Indians tried to define Gay Headers as something they were not -- e.g., blacks or mulattoes -- yet the natives prevailed in their Indianness and demanded their full rights as such. That is, accounts of attempted discrimination were more about the enduring strength of Gay Head Indians than they were about the racism of non-Indians. Resistance to whites, to the latter's attempts to assimilate natives into the American mainstream, was thus an essential, if not emotionally powerful, feature of Gay Head Indian identity.

> **Our people were here before white people came. When I was a girl, I didn't know what a Wampanoag was. This came into my vocabulary later. But I always knew we were different, different from Chilmarkers and the rest of them down-island. We were an Indian town.**

In initial interviews, Gay Headers readily offered how they were "different" from their white neighbors, different in terms of aboriginal ancestry, attitudes toward land, relationship to other Gay Headers and Indian peoples. Some of this strong sense of Indian identity no doubt was related to the conditions of the interviews: the Tribal Council had

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

hired me to research and write a 20th century account of the tribe for the purposes of federal acknowledgment. Research questions necessarily probed issues of identity and group boundedness, encouraging Gay Headers to look at themselves in comparison with non-Indians.

While the interview process was particularly fertile for discussing, constructing and reflecting upon one's identity[150], still, it had little bearing upon the particular terms Gay Headers used to talk about themselves and other tribal members. That aspect of identity had been sown long before the tribal council decided to seek federal acknowledgment, the result of pan-Indian activism which emerged in the 1930's and again in the late 60's and early 70's.

Whereas in 1982 most Gay Head Indians on the Vineyard referred to themselves simply as "Gay Headers," some also used the terms "Wampanoag" and "Native American," depending upon the situation and issue. In general, those who were most "traditional" -- i.e., who had spent all of their lives on the island, had travelled little off the Vineyard and socialized mostly with members of their own "families" -- called themselves "Gay Headers" or "Gay Head Indians." In contrast, those who had extensive contacts with other Indian groups off-island were much more likely to use the terms

---

[150] Including my own multiple roles in the rhetorics of identity. For a discussion of some of the dynamics of this process, see Crapanzano 1980.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"Wampanoag" and "Native American." Both terms identified the speaker as much politically as they did socio-culturally.

Although the term "'Wampanoag" appeared in colonial sources, so was "Poconaket" or "Pawkunnaket" used to describe the sachemships of southeastern New England. In the 18th and 19th centuries, however, the native residents of Gay Head were most frequently called 'Gay Head Indians,' their tribal affiliation variously listed as "Pokonaket" and even (erroneously) as "Narragansett."

"Wampanoag" gained popularity in the 1920's and 30's when Kroeberian anthropology categorized native groups throughout the United States more according to their linguistic relationship to one another in aboriginal times than upon material evidence of the groups' socio-political affiliation. This classificatory scheme was in turn buttressed by governmental policy which sent anthropologists into the field to evaluate whether or not the Indian tribes which the discipline had categorized were eligible for governmental services under the Indian Reorganization Act. Accordingly, Gladys Tantaquidgeon, herself a member of the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"unrecognized tribe" of Mohegans in Connecticut,[151] visited Gay Head in 1928 and 29, noting that despite the lack of "survival" of Wampanoag culture, Gay Headers could "still be regarded as Indians" (1930:1-26). Her work gave additional academic support to Frank Speck's observations regarding the Wampanoag descendants of Gay Head and Mashpee made a few years previously.[152]

Although both Mashpee and Gay Head were denied BIA services because they were unrecognized, the nation-wide reorganization of tribes under IRA encouraged all Indians, even those that were unrecognized, to express their identity more overtly than they had during more represssive federal policies. On the mainland, the Mashpee Indians formed the Wampanoag Nation, selecting a supreme sachem and other ceremonial leaders and organizing powwows in celebration of their aboriginal heritage. While Gay Head Indians likewise

---

[151] In 1980, as a result of the landmark decision in Passamaquoddy v. Morton (1975) (see Chapter 1), the Mohegan Indians filed a land claim pursuant to the 1790 Non-Intercourse Act, Mohegan Tribe v. Connecticut. Like the Gay Head Wampanoags, they also submitted a federal acknowledgement petition in order to improve their legal standing as an Indian tribe. For a further discussion of their case see Chapter 9.

[152] Cultural survival was not the primary object of their respective research. Whereas Speck was primarily interested in the aboriginal territorial divisions of the Wampanoags, Tantaquidgeon studied the educational needs of Gay Head and Mashpee. The remarks of both anthropologists, however, were consonant with the prevailing paradigm of American anthropology which, at the time, was much concerned with recording (or "salvaging") Indian cultures before their inevitable disappearance.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

participated in the revitalization movement, holding their own annual powwows on the peninsula and attending those on the mainland, the latter were not completely comfortable with Mashpee's arrogation of leadership over all Wampanoags (i.e., those from Gay Head, Herring Pond and Mashpee).[153] As a result, Gay Head Indians soon formed their own Aquineah Council and elected their own chief and medicine man.[154] While Mashpee continued to elect a supreme sachem of the Wampanoag Nation, Gay Head Indians were loath to grant any political power (whether effective or symbolic) to their native brethren on the mainland. As a result, identifying as "Wampanoag" was a complex issue for Gay Headers.

On the one hand, the term had come to be widely and authoritatively used in academic and popular literature. To use "Wampanoag" was to claim descent from well known and once powerful Indians in history. Squanto and Chief Massasoit were responsible for giving succor to the first Pilgrims and King Philip (Chief Metacomet) had wrought considerable havoc upon the English colonists before he and his fellow Wampanoags were finally and definitively

---

[153] In the 1930's there were only a few natives left at Herring Pond, Massachusetts and these individuals did not comprise an Indian community such as existed in Gay Head or Mashpee where natives dominated if not completely controlled the respective town governments. Mashpee's attempt to form a "Wampanoag Nation" was therefore a direct affront to Gay Head's autonomy which was not tolerated by Gay Head Indians.

[154] Their functions were largely ceremonial, e.g., representing Gay Head at pow-wows and at the dedication of the Bourne Bridge on Cape Cod.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

suppressed in 1675.

On the other, because the Mashpee Indians had so vigorously and consistently proclaimed their "Wampanoag" identity since the 1930's, Gay Headers were cautious of phrasing which might hint that their political autonomy was in any way compromised. Accordingly, those who used "Wampanoag" often prefaced it with "Gay Head" in situations where there was any question as to its referrent.

Politically conscious Gay Headers also used "Native American" with regard to themselves and other tribal members. The term gained currency in the post-civil rights era when political aspirants pandered to ethnic consituencies and Italian Americans, Polish Americans and Japanese Americans, among others, all vied for advantage within the American political arena. Although "Native American" identified American Indians as comprising a political interest group akin to other ethnic groups, still, there were differences which remained problematic.[155]

Whereas members of ethnic groups did not have to prove their ancestry, members of recognized tribes all had documents attesting to their blood quantum with respect to

---

[155] See also Chapter 5 for a discussion of the ways in which the civil rights movement failed to deal with the unique legal status of American Indian tribes.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indianness.[156] Moreover, on many federal reservations, full-bloods and mixed bloods did not have the same rights within the tribe and often constituted different political factions as a result.

For Gay Headers to identify as "Native American" was to claim membership in a group in which one's genealogy and legal status could be subjected to intense scrutiny. Existing members -- i.e., those of recognized tribes -- were not necessarily willing to admit those without the "proper" credentials. As discussed in Chapter 5, at the NCAI Conference on FAP held in 1975, many members of recognized tribes were not eager to permit "unrecognized tribes" to change their legal status because they feared that it would somehow adversely affect their own (semi-sovereignty).[157]

Thus, while some Gay Headers could and did identify as "Native Americans," the fact that their tribe lacked status recognition, somewhat undermined its usage. While on Martha's Vineyard and amongst other "unrecognized tribes" Gay Headers were little challenged with respect to being "Native American," this was not necessarily the case with some enrollees of recognized tribes who were apt to see Gay

---

[156] Governmental policy is responsible for this conflation of "blood" with Indian identity. It was not an issue amongst tribes aboriginally where adoption, capture, marriage and immigration could all change an individual's socio-political tribal affiliation.

[157] This fear has <u>not</u> diminished in the 13 years FAP has been in effect.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Headers' claim to native ancestry as an attempt to dilute Indian identity.

Whereas for non-Indians, "Native American" was used more as an ethnic (socio-cultural) category, for reservation Indians the term had political overtones. Politically sophisticated Gay Headers were thus careful about when and how they used the term.[158] While most would probably have answered affirmatively to a direct question whether or not they were "Native American," still, in general, the term was less used to identify themselves than it served as an implicit gloss of Gay Head individual and group behavior.

From what I can see, Native American people are not that competitive.

Being a Native American, you don't waste anything.

Just as the phrase "Indians have always lived here," nestled the speaker comfortably alongside some 400 odd years of native tenure in Gay Head, so did a brief generalization about Native Americans provide a similar rhetorical niche for Gay Headers. There was no questioning that the speaker was "Indian." Rather, the only issue was how closely or not an individual measured up to the stereotype offered. That is, the generalizations about "Native Americans" provided a

---

[158] As noted above, very "traditional" Gay Headers without interest or involvement in pan-Indian affairs did not use the term. Rather, they called themselves "Gay Header" or "Gay Head Indian" in keeping with how their parents and grandparents identified themselves.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

standard for judging Gay Headers, offered more in explanation than as a description.

These swirling undercurrents of both "Wampanoag" and "Native American" help to explain why, for most Gay Headers whether or not they were involved in pan-Indian activism, "Gay Head Indian" was the more commonly used, if less ambiguous, rubric of identity. It was also the term employed for the many years Gay Head was administered by Massachusetts, when residents were more concerned with coping with the legal disabilities of district status than they were with vigorously asserting tribal sovereignty.[159]

While "Wampanoag" and "Native American" were politically compelling, still, "Gay Head Indian" had the weight of tradition on its side. Gay Headers' parents and grandparents had used the term as had they themselves when they were growing up. It was comfortable and precise, if parochial. Moreover, it affirmed their attachment to Gay Head, the place, as the other terms did not. For Gay Head Indians, identifying as a tribal member was not merely to claim affinity with a group of people, but to assert the right of particular Indians to a particular place. To be a Gay Header was to be an Indian from Gay Head. After all,

---

[159] The latter would have been an extremely risky undertaking given that Western tribes were, in the mid 19th century, being herded onto reservations at gunpoint or killed outright. The term "Gay Head Indian" set the natives off as different but, with so localized a reference, could hardly threaten anyone. Who, after all, had even heard of the "Gay Head Indians?"

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"Indians have always lived in Gay Head."

Documents-as-Evidence-of-Tribal-Autonomy

Unlike the oral statements of Gay Headers, documentary accounts about Gay Head were not produced with the FAP process in mind. Whereas Gay Head Indians could be questioned directly and indirectly with regard to particular topics, it was impossible to ask those who had produced the historical documents to explain or add to the information already provided. Moreover, those who had left no account of their experience remained forever silent.

Because Gay Head Indians were contacted in the early 17th century and converted to Christianity at a relatively early date, there existed a substantial amount of historical documentation with regard to them. However, not all of the information contained in these sources was relevant to the FAP regulations and there were some unfortunate gaps in the historical record itself. (For example, the town's administrative records were burned in a fire to the Town Hall in the 1950's, leaving numerous research questions unanswered if not unanswerable.) What do the available sources indicate regarding the Indian identity and continuous autonomy of Gay Head and its inhabitants from contact to the present?

> To the intent that the Indians may be forwarded in civility and Christianity, and that drunkenness and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> other vices be the more effectually suppressed amongst them--
> Be it enacted and ordained...That the governour...is hereby impowered to apppoint and commissionate one or more discreet persons within several parts of this province, to have the inspection and more particular care and government of the Indians in their respective plantations; and to have, use and exercise the power of a justice of the peace over them in all matters civil and criminal...(Massachusetts Bay Province Laws 1693-94:150).

The granting of American citizenship to Gay Head residents in 1869 and incorporation of the town the following year put an end to more than two centuries of legal restrictions upon the persons and property of Gay Head. The legal foundation of the Indians' wardship was laid in the 17th century with the conversion of the Indians to Christianity and the establishment of a manor at Gay Head, the latter being administered first by Matthew Mayhew, and subsequently by the Corporation for the Propagation of the Gospel. Although these acts reserved to the natives the rights of occupancy/tenancy, they also, very importantly, brought the Gay Head Wampanoags within the jurisdiction of provincial law which, in Massachusetts,[160] barred Indians from traveling, bearing arms, learning a trade and conveying land to non-Indians without the approval of specially appointed guardians or the Massachusetts legislature itself.

---

[160] As dicussed in Chapter 3, from 1642 until 1685, Martha's Vineyard was administered as a separate province under the Mayhews. For the next six years, the island briefly came under the jurisdiction of Governor Thomas Dongan of New York however in 1691 the crown consolidated Plymouth, Massachusetts Bay, Martha's Vineyard and Nantucket into the Province of Massachusetts.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The net effect of these restrictions was that, throughout the colony, natives had few options outside the specific Indian plantation on which they resided. Although the Corporation's purchase of Gay Head in 1711 did not alter the legal status of the tribe per se, it did, in combination with Massachusetts statutes, reinforce the Indians' collective dependency upon each other and the land, thereby circumscribing tribal identity and authority.

> And whereas it is, of necessity, as well for the English as the Indians at Nantucket[t], Martha's Vineyard and many of the towns in the count[ie][y]s of Barnstable and Plymouth, that the Indians be employed in the whaling and other fishing voyages... (Massachusetts Province Laws December 28, 1725:361).

The very same laws which tied Indian identity to specific plantations were also responsible for changing the composition of these settlements. In 18th century Massachusetts, ship owners were permitted to indenture Indian men as crew on whaling ships and Indian women and children as servants in private homes and shipping establishments, providing Gay Head natives with one of their few economic opportunities off the plantation.[161] These contacts resulted in numerous marriages between Gay Head women and non-Gay Head men, with some of the latter settling on the peninsula. The spouses included whites, free blacks,

---

[161] The seafaring skills of Gay Head Wampanoags were so reknowned that whalers from diverse Indian tribes came to be known as "Gay Headers" since so many of these natives served in that capacity. Given that Indians were barred from learning most land-based trades, it is not surprising that so many turned to whaling despite the hazards it entailed.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Cape Verde Portuguese and Indians from other tribes, all of whom were represented on the crews of whaling vessels.[162] In the late 18th century, a census of Gay Head conducted by a member of the community indicates the extent to which the community was transformed by these mixed marriages: 54% of the 236 native residents were listed as mixed blood, 46% as full-blood and 15 additional individuals were classified as "Strangers Married Among Us" (Howwaswee 1792).

The high rate of exogamy had no effect upon the legal status of the land. According to Massachusetts law, only Gay Head proprietors were formally entitled to usufruct rights and the land could not be sold to outsiders. However, non-Indians could obtain such rights indirectly through their Gay Head Indian spouses and/or children (the latter were considered Indian). There was, then, a strong incentive for non-Indians to choose Indian marriage partners and for children of mixed marriages to identify as Indian if they wanted access to land in Gay Head.

The legal constraints on Gay Head persons and property continued throughout the American Revolution, enduring despite the change from English crown to federal government and from colony to state. After the war, Massachusetts

---

[162] The non-whites, like the Indians themselves, were readily employed on whaling ships but had few economic opportunities and an inferior social status on the mainland. This may explain why a good number of them married into the community (presumably they were shipmates of Gay Head Indians) when local whites generally did not.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

nominally extended its jurisdiction over the peninsula[163] however the latter's remote location, insular community and scant pressure on governmental resources (fiscal and legal) kept Gay Head relatively free from the paternalistic guardianship imposed on other Wampanoag groups in the state (e.g., those on the mainland in Mashpee and Herring Pond) during the late 18th and early 19th centuries. Gay Head avoided compliance with most of the Guardian Acts passed by Massachusetts until 1862, at which time the peninsula was formally designated an Indian District.

> [T]he District of Gay Head [shall] possess the same powers and privileges and be subject to all the duties and liabilities, which are now provided by law for the District of Marshpee [Mashpee[164]]; provided, however, that no person shall be authorized to vote in municipal affairs, except natives of the Gay Head tribe or of other Indian tribes of this state, married or having been married to a Gay Head woman, or such other person residing on the Planatation or only temporarily absent therefrom and married or having been married to a Gay Head woman. He shall have the right conferred on him by two-thirds of the voters of the district (Massachusetts Acts April 30, 1862:150).

As discussed in Chapter 3, district status rendered the community a corporate entity which could sue and be sued, own, purchase and convey land and enter into contracts but which had no authority to tax residents for necessary revenues. In addition, individually held land was surveyed

---

[163] This included the land held by the Wampanoags as well as the 800 acres reserved to the Corporation. See Chapter 3 above.

[164] The Mashpee Plantation became an Indian District in 1842 following a revolt by residents in protest of their exploitation by white overseers.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

as a preliminary step toward confirming fee simple title. These legal changes effectively undermined one of the key mechanisms by which tribal leaders had previously exerted authority over non-Indians with the community: namely, the allocation of and access to land. In its place was substituted a political structure which was, at least formally, more accountable to state authority. In 1870 the state took this one step further, abolishing the district and incorporating the town of Gay Head.

The constancy of Gay Head's legal subordination from the mid 17th century until 1870 belies the extensive changes the community underwent during this period. First, in contrast with aboriginal times when Wampanoag identity cross-cut sachemships giving natives rights in several different communities, by the 19th century the right to land in Gay Head became contingent upon membership in the community itself, i.e., upon a combination of descent and residence. Colonial and state laws had greatly curtailed native mobility, recognizing Indian rights only within the specific community in which natives were proprietors. While descent from a Gay Head proprietor entitled individuals to certain rights within the community (e.g., access to land), these rights had to be exercised within Gay Head itself and with the tacit approval of the other tribal members. Thus, by the 19th century, natives no longer exercised rights as "Wampanoags," generally, but did so as "Gay Head Indians," -

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

- i.e., as descendants of proprietors and as residents of the Gay Head peninsula.

Second, there was, beginning in the 18th and continuing in the 19th century, considerable change in the composition of the community as Gay Head Indians married non-Indians and accorded children of these unions full status as Indians. Over time, mixed-blood residents came to predominate numerically although individuals continued to identify as Indian since it gave them access to land and other resources on the peninsula.[165] If children of mixed parentage identified as Gay Head Wampanoags, they were immediately part of an extended kinship network which provided them with a social identity, economic assistance and political support. If, in constrast, they chose to stress their non-Indian ancestry, these individuals would be denied a position among equals within Gay Head, and were then likely to be classified as "persons of color," an inferior status within 19th century American society.

Third, with approximately one third of Gay Head's adult males absent on whaling expeditions at any one time and a

---

[165] The economic advantages of remaining in Gay Head were significant since land was not taxed and ample farmland for subsistence purposes could be obtained without cash outlay (provided of course one had the proper connections to an Indian proprietor, i.e. through one's spouse or children). Although improvements to the land could not be used as capital to finance other business ventures, nevertheless a modest living could be made in Gay Head. Necessary cash for capital improvements could be earned by periodic stints on whaling ships.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

considerable number of non-Indian males marrying into the community, there was evidence of emerging political tensions. In the mid 19th century, the community pressed Massachusetts to restrict the rights of Gay Head women who married non-Indians off island and returned to Gay Head. Levitas (1980:210) suggests that perhaps the educated and more sophisticated non-Indian spouses sought to enclose more land than native men were wont to do, placing some pressure on this limited resource. However, being that the population remained fairly stable throughout and that farming never proved very lucrative on the peninsula, it is quite possible that the non-Indians were more of a threat politically than they were economically.

Once non-Indians married into the community and gained usufruct rights through their native wives, Indian leaders would have little means of exerting effective control over these "strangers married amongst them." State policy had undermined native authority first, by recognizing proprietors' rights to specific parcels and second, by granting outsiders a limited voice in community affairs. Although Gay Head land could still not be sold to non-Indians, nevertheless Indian leaders could no longer use the reallocation of land as a means of social control. In addition, according voting privileges only to males further skewed the voting power in favor of non-Indians since the majority of adult Indians in the community were women who,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in contrast with tribal tradition, now found themselves without voting privileges. Combined with the fact that many native males were routinely absent from the community at any given period, the net effect was therefore a signficant loss of Indian authority over non-Indians living in Gay Head.

Evidence of the Indians' diminished political authority is also supported by Levitas who found that the stimulus for a change in the legal status of Gay Head came from those with the most experience off-island who had the most to gain from such a change (1980:215-19). The seven who signed a petition favoring incorporation in 1869 included three men (two Indian and one non-Indian) who had married into the group, their Gay Head spouses and one individual of Gay Head ancestry who had been born and raised elsewhere. In contrast, Gay Head Indians perceived little advantage to incorporation (the men had no desire to vote in state and national elections and, by law, the women could not). Yet, the natives had the most to lose, including their autonomy and their land. Only when Gay Head's legal autonomy was assured did the Indians finally consent to the change in legal status.

In addition to the these changes in social composition and political authority, the status of persons and property of Gay Head were becoming increasingly problematic. Indeed, by the second half of the 19th century, the latter had become a legal anomaly on several counts.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> There are, scattered over the State, more than one thousand of our people called Indians, who are placed under partial civil disabilities, and who are politically disfranchised...They are treated as the wards of the Commonwealth, recipients of its charities, but debarred from all agency in making the laws by which they are governed. ...These persons are not Indians in any sense of the word. It is doubtful if there is a pure-blooded Indian in the State. The largest number reside in or near the Marshpee District, and on Martha's Vineyard. A majority have more or less of the marked characteristics of the aboriginal race, but there are many without a drop of Indian blood in their veins. The marriage of a foreigner with a member of the tribe transforms the foreigner into an Indian. The result of this singular system has been a heterogeneous population, in which the characteristics of the white and negro races have already nearly obliterated all traces of the Indian (Massachusetts House Report 483, June 3, 1869:1-2).

Massachusetts officials had long been familiar with the legal disabilities of the state's Indian population but declined to take substantive action to remedy the situation. In Gay Head's case, commissioners explained that these Indians tenaciously adhered to their existing pattern of government (unwritten tribal law) and were fearful of any innovations upon it (Earle 1861:30-31). However, it is quite likely that the state did nothing because of its disastrous experience with the Mashpee Indian community.

The latter was accorded Indian District status in 1842, its common lands allotted to individual proprietors. While the parcels could not be sold to outsiders, Mashpee proprietors quickly cut and sold most of the available

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

timber to neighboring whites at below market value.[166] This action left the land scarred and the owners impoverished, since no crops had been planted and the Indians had spent their meager profits on alcohol. To its embarrassment and frustration, the state had to provide economic aid to the destitute Mashpee community.

Despite the fact that officials were chary of increasing the state's economic burden, still, they could not ignore mounting pressure to resolve the anomalous status of their Indian wards. After the Civil War and the abolition of slavery, the legal disabilities of Massachusetts's Indians proved especially difficult to reconcile with national policy, a policy which the state was proud to have helped forge.[167] Accordingly, in 1869, the Governor announced:

> There is no reason why the exceptional policy hitherto applied to these Indians should be continued, and the sooner they are merged in the general community,--with all the rights and privileges, and with all the duties and liabilities of citizens,-- the better it will be for them, and the more creditable to the Commonwealth ((Ibid).

That year, the state legislature quickly enfranchised all the state's Indians and incorporated the Town of Mashpee. Gay Head was also slated to be incorporated, pending a site

---

[166] While some was sold for building, most was used as firewood, which was in short supply in the neighboring towns.

[167] Massachusetts was at the forefront of the abolitionist movement.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

visit to the tribe. (Officials had not had time to visit Gay Head before introducing the legislation and did not want to initiate changes before they could examine conditions personally.) The following year, after assuaging the concerns of Gay Headers regarding continued state support of their school and their political autonomy vis-à-vis Chilmark, Gay Head was likewise incorporated as a town.

In comparison with the changes already initiated as an Indian district, incorporation seems, at first glance, to have had little impact upon the community. Indeed, much remained the same despite the formal change from district to town, from wardship to citizenship. Administratively, Gay Head experienced little alteration in its governmental structure, with district officials now becoming town officials with almost no change in personnel. There was likewise no major upheaval in the social make-up of the community since there was no significant influx of non-Indians into the town. And economically, individuals continued much as before incorporation, occupying parcels they had previously and engaging in the same mixed economic strategies, a combination of subsistence farming, fishing and intermittent wage labor on and off the Vineyard.

Although the daily life of Gay Head appears little affected by incorporation, within a few generations the newly acquired rights and obligations of town residents exacerbated tensions already present in Gay Head as an

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian district, forcing Indians to reconceptualize their tribal identity. To begin with, the change in Gay Head's legal status accorded non-Indians legal rights within the community just as the special prerogatives and immunities of the Indians were abrogated. The former could now vote in town elections, bequeath land to their children and buy and sell property within Gay Head. The Indians, in turn, had little legal means of restricting non-Indian access to what had always been tribal resources. Wampanoags themselves gained the right to sell their fee simple parcels to outsiders, thereby according natives the opportunity to use their land as capital.[168] As a result, in the 40 odd years following incorporation, much of Gay Head land was sold to non-Indians in payment of debt to local merchants, to raise capital for local investment in tourism and commercial fishing and to finance economic ventures off-island. By 1915, non-Indians owned one third of Gay Head land (Town of Gay Head 1915). While the loss of Indian title to Gay Head land did not signal a concomitant increase in the number of

---

[168] This proved especially important since Gay Headers' ability to generate cash had decreased considerably in the late 1800's with the demise of the whaling industry.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

non-Indian residents on the peninsula,[169] still, it was a corollary of several important changes which had been set in motion.

With the allotment of fee simple title to specific parcels, access to land became limited to inheritance or purchase. Whereas under communal land tenure, Indians had a right to land in Gay Head, this was not necessarily the same acreage tilled by their parents or other relatives. Rather, land could be and was apportioned according to who was desirous and capable of working it.[170]

With fee simple title, in contrast, ownership became

---

[169] There are several reasons why non-Indians in the late 19th and early 20th centuries generally did not settle on the land they acquired in Gay Head. First, agriculture was already in decline on Martha's Vineyard and the land in Gay Head was never very good, comparatively speaking. Second, the geographic isolation of the community (located 26 miles up-island along a twisting country road) made it inconvenient for year-round residents who worked 'down-island.' Third, the social make-up of the town -- predominantly 'people of color' as the Indians and mixed inhabitants were called -- discouraged most island whites from moving in amongst people they believed inferior in social status. Not until tourism began to expand on the island and a few independent souls vacationed in this beautiful but distant moor would non-Indians seek property in Gay Head and construct summer homes there. This began on a small scale in the 1920's and 30's but was litle more than a trickle until the late 1960's and early 1970's when Gay Head's comparatively cheap land began attracting numerous vacationers.

[170] In general, communal land tenure was not problematic since there was a steady exodus of Gay Head men from the community while non-Gay Head spouses who did settle on the peninsula did so only with the forbearance of the rest of the community, thereby limiting potential conflicts over land. State officials observed that the system worked remarkably well with little jealousy or strife exhibited within the community.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

fixed to specific parcels despite residence and usage. Most Indians did not write wills so that upon their death, interest in the land was divided amongst their heirs. Inasmuch as the land itself was not generally divided, many different individuals came to own several lots.[171] Over time, this proved especially problematic because there was no necessary agreement among heirs as to how the land was to be disposed or used. Some with little desire to remain in Gay Head sold their interests to outsiders, to the embitterment of the remaining heirs. Since all interest holders were not equally diligent about the payment of their part of the real estate taxes, some of the Indians' land was also lost on account of tax delinquency. And, with many titles tangled in a web of undocumented inheritance claims, some individuals were able to increase their holdings by obtaining sign-offs from shareholders or by ignoring the latter if they had moved from the community and did not actively assert a claim.

The net result of all of this was that once Indian land passed from the original allottee and his/her descendants, it remained, most often, in the hands of outsiders. With few opportunities for lucrative wage labor in Gay Head, most Indians could never amass sufficient cash and credit to buy land in the community. If they did not inherit it, Gay

---

[171] In the original set-off, allottees received homestead, pasture and beachfront parcels which were not contiguous.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Headers were unlikely to obtain land by purchasing it.[172] Thus, not only did much of Gay Head land pass permanently from Indian control, but many natives also lost access to land in Gay Head thereby greatly reducing the possibility of their remaining in or returning to the community. With economic options so meager on the Vineyard generally, this meant that for many Indians, especially those whose original homesteads had been sold, the only option was to move to the mainland in search of work.

Census reports for the town document a steady decrease in the community's Indian population throughout the 20th century: from 162 in 1900, to 126 in 1920, to 98 in 1940 to 77 natives in 1943.[173] These numbers tell only part of the story, however. In the first half of the 20th century, Indian families tended to have many more children than their white neighbors. As young Gay Headers reached adulthood, most left the Vineyard for jobs on the mainland with only a few returning to settle permanently in Gay Head. Thus, although numerically, there appeared to be only a

---

[172] This has characterized the nature of Indian title in Gay Head throughout the 20th century with virtually all who live in the town today residing on land they themselves or a close relative inherited.

[173] In 1870 The federal census listed 160 residents of Gay Head however Commissioner Richard Pease (1871) reported there to be 227 Indians in the tribe. Moreover, the latter noted that his figure was not completely reliable since many natives were absent from the peninsula at any given time. According to the BAR staff's genealogical research, at least 15 individuals were omitted by the federal census in 1870 (BAR 1987:30).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

small decrease in the Indian population of the town, there was in fact a significant loss of tribal membership during the first half of the 20th century as Gay Head Indians left the island and never returned.

Out-migration, coupled with increasing non-Indian ownership of Gay Head land, meant that Indians had concomitantly less direct control over tribal resources than they did previously as wards of the state. While Wampanoags effectively dominated town government and thus exercised considerable authority over the community as a whole, still, these leaders had less formal power to discriminate between privileges accorded Gay Head Indians and those of non-Indians.

One means of doing so, was through the assessment and collection of real estate taxes. Since native land was in general unimproved, its tax valuation was low compared to that of non-Indians who tended to build small summer homes or "camps" upon beachfront lots.[174] Not only did the summer people pay higher taxes, but Indian town officials

---

[174] Most non-Indians who summered in Gay Head in the first half of the 20th century were of modest means yet there were also a few wealthy individuals who established country homes there including Max Eastman, a noted socialist, who built a large and well-appointed compound in the community in the 1930's and a wealthy industrialist, Hornblower, who established the largest private holding in Gay Head. This contrasts with the upper middle and upper class summer residents who began building homes in Gay Head in the 1970's and 80's, the most famous of whom was Jackie Onassis, who turned the Hornblower estate into her personal retreat.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

were repeatedly lax in collecting back taxes on Indian land. This preferential treatment could not become too flagrant however since it could, and did on several occasions, backfire, causing the state to step in to rectify the imbalances. For example, in 1938, the State threatened to foreclose on some 45 parcels in Gay Head because of non-payment of real estate taxes; however in 1940 only two lots were finally seized (Levitas 1980:419).[175]

As town officials, then, Indian leaders had only limited authority over non-Indian residents. Since the community was no longer legally classified as a distinct Indian entity, residence in Gay Head was no longer a reliable indicator or manifestation of Wampanoag rights. Rather, the town had to function legally like any other in Massachusetts, its residents accorded no special rights or recognition of their Wampanoag ancestry.

If citizenship and incorporation indirectly brought about a decreased emphasis upon residence as a criterion of tribal identity, so too did they encourage a concomitant increased reliance upon descent. Here, events in and outside the community are pertinent. The nature of fee simple title meant that individual Indians had rights to

---

[175] In Mashpee, similar actions by native town officials had resulted in such shortfalls in town finances in the 1930's that the community was on the verge of bankruptcy, forcing Massachusetts to establish an independent commission to oversee town affairs. The commission was reappointed for the next 30 years.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

specific parcels whether or not they lived in town. What determined their access to land was their relationship to the original allottees and whether the lots had been sold to outsiders. Lineal descent from a Gay Head proprietor was thus more critical after 1870 because it was virtually the only means by which Indians retained a right to tribal land. Residency in the community did not accord individuals this privilege because the tribe itself no longer was legally empowered to allocate acreage to members and selected non-Indians, such as spouses.

At the same time that the Indian's claim to land in Gay Head was increasingly restricted to descent from an original allottee, their identity as Wampanoag descendants ceased to be tacitly affirmed through their legal classification as wards of the state, creating problems for tribal members off island. By the early 1900's, Gay Head had experienced at least 150 years of extensive miscegenation with other Indians and non-Indians which left a phenotypically diverse population whose members were more likely to be categorized as "mulatto," "colored," or "negro" off island in accordance with American racial norms, than they were to be considered "Indian" or "Wampanoag." While on the Vineyard itself, most island residents knew who Gay Headers were by their surnames and accorded the latter some recognition of their Indian

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ancestry,[176] off island, these Anglo, Dutch and Portuguese names (e.g., Cooper, Jeffers, Madison, Vanderhoop, Degrasse) conveyed nothing "Indian" about the individual's ancestry. Thus, when Gay Head Indians emigrated off island, they frequently encountered considerable prejudice since they were assumed to be "colored" rather than "Indian." For those who actively chose to identify as American Indians and worked, as members of one family did in the 1930's, amongst Western tribes, the result was not much better since, in the latter's classificatory scheme, anything less than full-blooded Indian was distinctly inferior.

The tendency of non-Indians off island to minimize if not ignore the Indian ancestry of Gay Headers was especially frustrating in the 1930's when federal policy -- specifically, the Indian Reorganization Act -- gave some Indian tribes[177] greater socio-political prestige and visibility (at least as far as white America was concerned) by reorganizing them into tribal governments. Although Gay Head was officially excluded from the list of federally recognized tribes serviced by the Bureau of Indian Affairs,

---

[176] Most who lived on the Vineyard were familiar with Gay Head's history as an Indian district and were wont to refer to the community as an "Indian town." Although no Gay Header was considered to be full-blooded "Indian," nevertheless, island residents in general did acknowledge to a limited degree that many in Gay Head were related to the Wampanoags who aboriginally inhabited the island and who were administered by the state until 1870.

[177] This pertained only to those tribes under BIA supervision. See Chapter 4.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

some community members nevertheless responded to the surge of pan-Indian activism nationwide by organizing annual pow-wows in Gay Head and on the mainland (in Mashpee). These events lasted several days and were attended by Indians from diverse tribes, predominantly from New England, as well as by some non-Indians. Many of the native groups represented were similar to Gay Head in their lack of status recognition vis-à-vis the federal government. Likewise, many of the Gay Head organizers were active in the pan-Indian movement and had had some previous experience and contact with other Indians. For the first time since colonial days, Gay Headers were reported to have dressed in Indian regalia, with some elements -- such as feathered war bonnets -- clearly borrowed from the Plains native tradition. Other features -- e.g., the election of a Supreme Sachem, Medicine Man and Chief -- which had not been evidenced for more than two centuries, also made their appearance at this time in Gay Head.

The overt expressions of Wampanoag affiliation in the 1930's gave further credence to lineal descent as the main criterion of Gay Head tribal identity. Even though many Gay Headers had moved off island in pursuit of jobs, they nonetheless retained a tangible link with the community through their genealogical relationship to the original Indian allottees. Most emigres would never return to settle permanently on the peninsula yet they could continue to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

identify as Gay Head Wampanoags, attend periodic pow-wows on and off the island, and maintain their affiliation with the tribe as long as they chose to identify as descendants of the 1870 allottees. Residence in Gay Head was no longer necessary in order to enjoy the benefits (and rights) of tribal affiliation.

In theory, the increasing emphasis upon lineal descent after 1870 ensured that the tribe was capable of reproducing itself. In practice, however, this change was accompanied by growing tension amongst Gay Headers. On the one hand, descent was a criterion ripe with symbolism but little power. Since Gay Head's special legal status had been abrogated in 1870, the tribe as such had no formal power over persons or property. Any authority exercised by tribal leaders within town government had to conform with the responsibilities and duties prescribed by law for these offices by the state. Thus, in their position as town officials, Gay Head Indians could have no authority vis-à-vis tribal members who did not live or own property in Gay Head. Similarly, native officials had to represent the interests of the entire town, not just those of the Indians.

On the other hand, the growing pan-tribalism of the 1920's and 30's provided national support for asserting Indian identity and rights. In contrast with their marginal local status, Gay Head Wampanoags were, in regional and national contexts, proud heirs of a cultural tradition which

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

figured prominently in the founding of the United States. Moreover, through their contacts with other Indian peoples, some Gay Headers became more cognizant of the benefits of tribal recognition and made attempts, albeit unsuccessful ones, to get reorganized under IRA.

Although Gay Head Indians generally benefitted from this resurgence of tribalism nation-wide, there was some disagreement amongst them as to how their Wampanoag identity should be expressed. For "traditionalists,"[178] who had remained in Gay Head for most of their life, the tribe was, as it had been in earlier times, a territorial-based organization consisting of Wampanoags who lived in Gay Head and whose ancestors had before them. In their view, the town and the tribe were one and the same, with town officials also serving as tribal leaders in that they looked after the interests of Indians in Gay Head as they had always done. Traditionalists were not interested in, and indeed were wary of, attempts to define the tribe more broadly in political terms, for to do so inevitably brought

---

[178] Levitas (1980), in accordance with other writers, used the terms "traditionalists" and "cosmopolitans" to characterize Gay Headers who were, in general, respectively more locally or nationally oriented in their conception of Indian identity. These terms are, however, misleading for they imply that one group adhered more closely to 'true' (aboriginal) Wampanoag values while the other included pan-tribal elements in its vision of Gay Head identity. Rather, the difference between the two orientations was more a matter of style than of substance, with the cosmopolitans considerably more willing than traditionalists to use public rhetoric to effect local political action.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

about greater scrutiny if not meddling by outsiders, be they Indian or non-Indian. Since Gay Head had historically guarded its autonomy by maintaining a low profile, traditionalists felt that this was the most prudent, if not effective, path to follow.

In contrast, for more "cosmopolitan" Gay Headers who had personal experience with other Indian groups off-island, Wampanoag descent did not merely indicate membership in the local community of Indians, but membership within a broader arena of American Indian tribes. Exposed to the complexities of tribal identity nation-wide, including the rights, privileges and protections accorded members of recognized tribes, these cosmopolitans took several steps over the next 50 years or so to transform Gay Head tribal identity into political power. These included: taking an active part in the Wampanoag Nation (in the late 1920's) and selecting ceremonial chiefs of Gay Head; successfully challenging the incumbent political faction in town office (1931) and, once in office, trying (to no avail) to gain voting rights for non-resident Indians in Gay Head (1932); honoring anew the town's unique contribution as Indians to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

World War I (1933);[179] challenging the Mashpee domination of the Wampanoag Nation and forming a competing organization in Gay Head, the Howwaswee Council (1935); trying (unsuccessfully) to establish Indian Day in Massachusetts (1935); introducing partisan politics into the historically one-party (Republican) town (1937); staging sporadic "annual" pageants at the cliffs based upon Wampanoag legends (1941-71)[180]; organizing the Aquinnah Club (1940's) and Gay Head Improvement Association (1955) to obtain civic amenities and promote Indian identity; establishing the Gay Head Museum of Whaling and Natural History; introducing numerous bills in the Massachusetts General Court affirming Gay Head Indian rights;[181] forming the Wampanoag Tribal Council of Gay Head Inc. (1972); and filing suit in federal district court for return of approximately 238 acres of

---

[179] Gay Head had sent the greatest number of men, relative to its size, to the war than any other town in New England and had been honored for its contribution in 1918. However, at that time, no mention of the town's Indian character was mentioned. Apparently, in 1933, cosmopolitans felt this was an injustice which needed to be rectified, doing so at a special powwow held some 15 years after the fact.

[180] The proceeds of this well-attended tourist attraction were used to fund the college education of Gay Head Indian youths.

[181] Among others these included requests to: investigate the feasibility of turning Gay Head into a reservation (1959); authorize the town to convey title to the cliffs, cranberry bogs and Herring Creek to Gay Head Indians (1962); allow Indian residents of Gay Head to fish without a license (1964); and to authorize the distribution of the common lands to Indian heirs (1968).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

common lands (1974).

Newspaper accounts of these actions, all written by non-Indians, present a somewhat ambiguous, if not confusing, view of Gay Head identity and leadership in the 50 odd years from the late 1920's through the mid 1970's. On the one hand, it is evident that, over the years, some Gay Headers took steps to buttress Indian identity with political power and to reaffirm, if not regain, some of the rights and privileges their Wampanoag ancestors had enjoyed historically but which had been eroded subsequent to incorporation. On the other, the articles also amply attest that many of these initiatives did not receive the widespread support of the Gay Head community. The latter's endorsement of cosmopolitan Lorenzo Jeffers' many efforts, for example, was particularly spotty.

Jeffers was an important figure in Gay Head history because he spearheaded so many pro-Indian and civic projects. His political career spanned some 50 odd years, from the 1920's through the early 70's and epitomizes the nascent conflicts regarding the redefinition of Gay Head Wampanoag identity that developed during this period.

Jeffers, along with five other Gay Headers between 1905 and 1918, attended Carlisle Indian School in Pennsylvania where he was subject to the rigorous boarding school curriculum designed to "civilize." young Indians into the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

American (white) norm.[182] Like many other Indians with this experience, Jeffers acquired from his years at Carlisle an increased awareness of and interest in pan-tribal issues which he translated into political action, becoming involved in the Wampanoag Nation in the late 1920's and recognized as one of two "chiefs" of the Gay Head branch of this organization.[183]

As a leader, however, Jeffers proved a highly controversial figure. While he succeeded in some of his efforts -- e.g., organizing annual pow-wows, establishing the Howwaswee Council, introducing partisan politics -- he was denied broadbased support because of his unorthodox (that is, unorthodox according to Gay Head Indian standards) methods. Often, Jeffers angered his fellow Gay Headers because he caused outsiders to investigate or meddle in what were considered the internal affairs of the community. In 1961, for example, in response to his legislative request for a state audit of the town's books, some 30 Gay Headers

---

[182] Among the hardships experienced by the youths included being forced to speak English, cut their hair, wear Western dress, learn industrial trades (for boys) and domestic arts (for girls), forget their Indian heritage, traditions and culture and live in isolation from their families, communities and tribes. As Hertzberg (1971) among others has pointed out, the boarding school experience gave rise to numerous Indian leaders in pan-tribal affairs, Jeffers being but one of many such individuals.

[183] The other "chief" was Harrison Vanderhoop who voted with Jeffers on several controversial issues in Gay Head politics until he (Vanderhoop) converted to Jehovah's Witness and dropped out of politics completely.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

signed a petition opposing the request. Indeed, Indian Selectman C. Earl Vanderhoop pointed out to state officials that Jeffers was not a Gay Head taxpayer at the time since he resided on the mainland.[184] In addition, fellow Indians were at times embarrassed because of Jeffers's aggressive (some would say abrasive) stance regarding Indian issues and the impolitic way in which he sought to have his ideas implemented. For instance, while Gay Headers initially supported Jeffers's efforts to establish a museum in the town highlighting its Indian heritage, they eventually withdrew their support because he did not gain the consensus of the Indian community before taking initiatives and because he openly antagonized non-Indians whose support was critical to the project.

Lorenzo Jeffers, as a leader of Gay Head who had difficulty realizing some his most strident pro-Indian ideas, was not unique, however. While his career perhaps was more mercurial than most, still, the leadership of other cosmopolitan Gay Headers (and, in later years, even that of traditionalists), was similarly uneven. Indeed, the inability of anyone, be they traditionalist or cosmopolitan in orientation, to exert consistent political influence in Gay Head was itself symptomatic of the factionalism which

---

[184] State investigation continued nonetheless and resulted in some 25 parcels being seized for non-payment of real estate taxes. These lands were subsequently sold to non-Indians.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

smoldered between the late 1920's and the early 70's and which blazed hotly in 1977. In that year, traditionalists succeeded in ousting the reigning cosmopolitans from the Tribal Council, an organization which the latter not only had formed, but dominated since 1972. The shift in power would have important ramifications upon the tribe's efforts to secure federal acknowledgment and control over the common lands.[185]

Factional disputes among Gay Headers were not, however, the only tensions manifest in the town by the mid 1970's. Equally if not more disruptive were those between the growing number of non-Indians (summer people as well as year round residents) and the Indian inhabitants of the town. During World War II the Indian population of Gay Head sank to 77 as Indian men joined the armed forces and men and women worked in the defense industries on the mainland. Having gained education and experience off-island, most Indians would settle permanently elsewhere, returning to Gay Head only for vacations. After the war, those (cosmopolitans) who did come back, worked with the non-Indian summer people to obtain such civic improvements as electricity and telephone service for the town. Like many of the changes which had come before them, these modern conveniences had little immediate impact upon the town for Gay Head remained as it had throughout history:

---

[185] These are detailed in chapter 7.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

predominently inhabited by those of Indian descent and politically controlled by members of Gay Head's prominent Indian "families." Yet, the modernization of Gay Head made it possible that, when real estate prices down island rose in the 1960's and 70's, non-Indians would snatch up land on the remote peninsula, undeterred by the lack of stores, post office or by the difficulties in obtaining clear title to Indian land. By 1970, the non-Indian year-round residents of Gay Head increased to 55 while the number of Indians sank to 63. At the same time, the number of non-Indian summer people exceeded the year-round population of Indians (Levitas 1980:507-508).

Although initially the influx of non-Indians had little effect upon Indian dominance of town politics, this was soon to change. By the time the legal dispute over the common lands erupted in the mid 1970's (see Chapter 1), non-Indians not only constituted a significant number of town residents, they also comprised a social community distinguishable from Gay Headers by their middle to upper middle class life-

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

style.[186] The non-Indians were also politically adept, if not well-connected and knowledgeable in how to organize on their own behalf. These new residents of Gay Head proved a formidable interest group, successfully obtaining a court injunction to halt the transfer of the common lands from the town to the Tribal Council in 1976 (see Chapter 1). Indian factionalism would not only greatly influence the subsequent course of events, but would itself be affected by the legal dispute over the common lands.

Thus, by the mid 70's -- some 100+ years after the town was incorporated -- Gay Head was no longer a socially, economically, and politically cohesive community. The inhabitants of the town now included a substantial number of non-Indians who were not married to Gay Headers and who were not part of the Indian social network. Moreover, these non-Indians were engaged in different occupations than the local native residents, a fact which tended to exacerbate social divisions. And politically, the town was riven in several ways. The Taxpayers Association (now composed of non-

---

[186] The differences between Indians and the non-Indians were extensive. For example, whereas non-Indians built modern, well-equipped homes (complete with such accoutrements as dishwashers, washer/dryers, trash compactors, and tennis courts), many Indians lived in older homesteads which were not renovated to accomodate the modern appliances. And, while non-Indians hosted cocktail and dinner parties, attended island cultural functions, and went to restaurants, Indians rarely did any of these. Rather, the latter's socializing was more informal and generally restricted to family gatherings which were potluck. While Indians and non-Indians were cordial to one another, generally their social circles did not overlap.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indians)[187] was engaged in a legal battle with the Gay Head Indians and the latter were further divided amongst themselves as to how to deal with this external threat.

Although Wampanoag Indians may have always lived in Gay Head, by the mid 1970's the town and the tribe were no longer "the same." Moreover, it was not even entirely clear which Indian faction represented the tribe since both sides disputed each other's right to act on behalf of all Gay Head Indians. Each had a somewhat different vision of what tribal identity meant in the present context and what it could mean in the future. Dissonance rather than harmony characterized Gay Head Wampanoag relations and tribal identity was enmeshed in a tangle of politics, law and history.

---

[187] Originally, cosmopolitan Indians, including the controversial Lorenzo Jeffers, were members of the organization however as the dispute over the common lands heated up, non-Indians held meetings in New York and Boston, thereby excluding Gay Headers. Eventually, the latter no longer felt that the organization represented their interests and therefore withdrew.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 7

THE POLITICS OF PARTICIPATION

The above representations of Gay Head identity and autonomy are but two versions of the past.[188] The issue is not that several versions of Gay Head history are possible or indeed exist.[189] Rather, insofar as the FAP process is concerned, the question is: how did these ambiguities of history affect the Gay Head Wampanoags' FAP petition? How did the Indians themselves deal with these variations upon a theme and, in turn, how did the BAR staff respond?

The answers to these questions necessarily entail a complex mix of law and politics, the former establishing parameters for the presentation and evaluation of historical and ethnographic evidence and the latter according differential power and authority to those participating in the petitioning process. What follows is a close look at the process by which the Gay Head Wampanoags petitioned for federal acknowledgment, including the steps by which evidence was prepared, submitted and evaluated and the ways

---

[188] Both accounts are of my own construction, extensively making use of data collected in 1982 yet also incorporating subsequent research. Although the narratives bear some affinity with the work I did on behalf of the WTCGH in 1982 (see Grabowski 1982b), they nonetheless were written to highlight certain issues with regard to FAP and reflect my current understanding of this material.

[189] For an excellent discussion regarding the process of selection in historiography, see Davis and Lyttle 1980.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in which political considerations affected each of these activities. The latter are especially critical if we are to understand how different parties came to participate in the petitioning process, in what capacity and to what effect. That is, if we are to address how Gay Head history was interpreted in the FAP process, we must not only examine the explicit and implicit rules guiding the presentation of evidence, but also the political climate influencing decision-making by those involved in petitioning for federal acknowledgment. Only by studying the interrelationship between law and politics, can we begin to understand the relative autonomy of legal doctrine and, in turn, its ability to affect (or not) attitudes and behavior.

The present chapter will focus on the events and factors leading to submission of the Gay Head petition and to the BIA's preliminary evaluation of evidence in the "Proposed Finding." Chapter 8 will examine the Tribal Council's response to the latter document and the reevaluation of evidence in the government's "Final Determination." Chapter 9 will analyze the short and long term ramifications of the Gay Head finding.

The Politics of Funding

In her report at an oversight hearing on federal acknowledgment held on May 26, 1988 before the Senate Select Committee on Indian Affairs, Hazel Elbert, then Deputy to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the Assistant Secretary of Indian Affairs, outlined 14 basic steps in the acknowledgment process. These covered such things as a group's formal notification of its intent to petition for federal acknowledgment, the submission of required documentation, preliminary review of a petition by BAR staff, active consideration and the publication of proposed and final findings.

Numerous factors influence how quickly petitioners pass through the 14 steps; many are mitigated or exacerbated by political considerations. However, before examining the latter's role in the Gay Head case, let us first look at some of the ways in which the availability or lack of funding bears generally upon the political climate in which petitions are submitted and evaluated and specifically influences the participation of the BAR staff, various interest groups,[190] petitioning groups themselves and consultants working on the latter's behalf.

By law, the BAR staff has one year to review a petition and to publish a proposed finding in the Federal Register after it has been placed on active consideration.

---

[190] As with the case of the Gay Head Wampanoags, many different individuals, organizations and governments can have an active interest in whether or not a particular group obtains federal acknowledgment. Often the petitioner is party to a lawsuit in which its status as a tribe is a critical issue. In such cases, the petitioner's legal adversaries would naturally oppose federal acknowledgement. Sometimes other petitioning Indian groups or even those tribes already recognized express opposition to a particular petition.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Each petition is evaluated by a team of researchers consisting of one anthropologist, historian and genealogist, each of whom focuses upon a different aspect of the criteria. When FAP was first enacted in 1978, only one BAR team was active; at the time Gay Head went through the process, two teams were operative.[191] With over 100 "unrecognized tribes" estimated to seek federal acknowledgment, this staff was (and still is) sorely inadequate to handle its caseload.

Not only do BAR teams evaluate petitions on active consideration, but they also provide technical assistance for groups in the process of putting their petitions together as well as conduct preliminary reviews of petitions. Termed "obvious deficiencies" or OD reviews, the latter highlight significant gaps in data, technical shortcomings (e.g., insufficient or inaccurate citations) and inadequacies in addressing key issues (e.g., social interaction, political process, etc.) which might hinder the team's evaluation of the evidence. Added to this is that BAR staff frequently conducts research for other

---

[191] A second team was not added until 1985. Although some work was done by individual consultants in the late 1980's, a third review team was contracted out to an Indian-owned consulting firm, First Computer Concepts, Inc. (FCCI), from 1990-92. Unlike the BAR staff itself which has various administrative duties, the FCCI team only did petition evaluations. Moreover, each member of the consultant team prepared a technical report regarding the evidence pertaining to her own discipline and was not responsible for deciding whether or not the petitioner met each criterion. That power remained with BAR itself.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

governmental offices, both within the BIA and outside it, thereby cutting into the time available for reviewing petitions.[192] Thus, with all of these responsibilities, it should not be surprising that, since FAP's inception, the BAR staff has been processing on the average somewhere between 1.5 and 2.5 petitions a year (Elbert 1988:69).

Admittedly this pace is frustratingly slow, yet funding for additional teams is an intensely political issue, depending upon congressional support from non-Indians and upon the lobbying efforts of already recognized tribes and pan-tribal organizations. At the same time, such funding openly competes with other items in the federal budget. While pro-Indian policies have never garnered widescale popular support, they are even less likely to do so when the policy in question (FAP) is designed to increase the service population of the federal government in perpetuity. It is indeed noteworthy, then, that political pressure has resulted in the hiring of an additional review team in recent years (see note 4 above) and not at all surprising that it took so long.

Further, if funding generally influences how many petitions may be reviewed by BAR staff at one time and, in

---

[192] For example, one genealogist was estimated to have spent some 20% of the time assisting the Department of Justice in a court case involving certain California Indians (Elbert 1988:69).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

turn, when a petition may be put on active consideration,[193] so too does it affect the vigor with which various interested parties can intervene in a petitioner's case. As noted in chapter 5, an important feature of the FAP process as codified is that it is a public process, permitting, indeed inviting, input from all interested parties. In some instances, a petitioner's adversary in a related lawsuit has a vested interest in the group not gaining federal acknowledgment. That party can submit to the BIA evidence that the petitioner does not satisfy FAP criteria. On the one hand, the BAR staff makes a "factual determination" based upon all of the evidence submitted and collected. On the other, that some interest groups have considerable financial resources to permit them to participate in the petitioning process (e.g., paying researchers to gather data and attorneys to submit briefs in opposition) cannot but heat up the political climate in which proposed and final findings are made.

While political grandstanding alone cannot sway a finding from positive to negative or vice versa, still, third party participation does mean that a BAR decision may

---

[193] Inadequate staffing is not the only reason so few groups have passed through the petitioning process to date. Some of the cases (e.g., the San Juan Paiute) have been particularly complex and required more time to evaluate than the normal one year review period. In the majority of cases, however, petitioners themselves have not been ready to go on active consideration because of inadequacies in their documentation as outlined in their obvious deficiencies review.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

have more extensive political and litigative repercussions than might otherwise be the case. One can only speculate, for example, if the Navajo Nation (the largest and richest American Indian tribe in the United States) had not been so vehemently opposed to the San Juan Paiute case (submitting volumes of its own documentation), would the BAR staff have spent so much time and energy preparing and documenting their favorable review of the Paiutes' petition? That is, with little or no opposition to the San Juan petition, would the same evidence have warranted such a meticulous review, or perhaps could a favorable decision have been reached more expeditiously?[194]

This is not to say that the BAR staff can or does do a cursory review of a petition when the political stakes are low. To the contrary, each evaluation process is painstaking in its review of available evidence. What it does mean, however, is that the participation of interested parties in the petitioning process is likely to increase substantially the amount of evidence to be considered by BAR staff. Moreover, the review team is under pressure to be

---

[194] Indeed, the San Juan Paiute case is one of four which went to litigation. In the first, the Navajo Nation unsuccessfully sued the BIA for its favorable determination of the Paiutes' petition; in the second, the Samish of Washington State are presently contesting BAR's negative finding; in the third, the Ione Band of Miwoks in California are suing the federal government for even having to go through the FAP procedure; and the fourth involves the Miami Nation of Indians contesting a negative final determination (see Chapter 9).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

especially rigorous in the substantiation of its analysis since there is great likelihood that attorneys for opposing interest groups will dissect its finding line by line. While all BAR reports are reviewed by the Solicitor before publication, some necessarily receive greater scrutiny from BIA attorneys than others.

Finally, available funding also plays a central role in whom a petitioner hires to do necessary historical, anthropological and genealogical research and to prepare and submit the petition itself. As discussed in Chapter 6, the regulations require a prodigious amount of research and documentation of which few but trained professionals are generally capable. Although FAP Guidelines[195] recommend that petitioners hire such consultants, not all do so, both out of choice and lack thereof.

Some groups genuinely believe they know the most about themselves and choose to prepare a petition on their own. Others do not understand the nature of the documentation required nor the complex theoretical and methodological

---

[195] This is a handbook of practical suggestions and explanations for petitioning groups published by the federal government itself.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

issues involved in providing such evidence.[196] Still others recognize the need for professional assistance but are faced with the problem of how to pay for it. Although some researchers are willing and able to work on a volunteer basis, doing so too often means that their first priority lies in meeting their salaried commitments, a fact which can significantly delay the collection of data and submission of the petition itself. Moreover, those who already have expertise in the ethnohistory and ethnography of the petitioning group may not be able to devote one or more years of their time to research even with pay since, as academics, they are often locked into teaching schedules and

---

[196] Many groups grossly underestimate the amount and depth of ethnographic and historical documentation required by FAP, mistakenly believing that "knowing who they are" is sufficient to produce an adequate petition. Not only do most of these "home grown petitions" fail to satisfy the criteria, but they also do not make full use of available written and oral data. The result is costly and frustrating to both the BAR staff and petitioner since more than one obvious deficiencies review is necessary to elicit a minimally adequate petition -- i.e. one in which there is factual evidence regarding each criterion that the BAR staff can evaluate. A common problem of these petitions, for example, is that they do not provide a detailed narrative account of the group from contact to the present but instead submit a handful of pages describing the group in general and vague terms.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the publication demands involved in seeking tenure.[197]

While legal professionals can be more flexible than academic anthropologists, historians and ethnohistorians in their availability, so too can they be considerably more expensive to hire. Moreover, their expertise is not interchangeable with that of academics since they are generally not trained in ethnography, historiography and genealogy.[198] Although some non-profit legal services are available for petitioning groups -- most notably, NARF (Native American Rights Fund) and some state-sponsored Indian legal service organizations -- still, there are relatively few legal practioners willing to take on petition work on a pro bono basis.

In sum, with the cost of preparing and submitting a well-documented petition estimated to run in the hundreds of thousands of dollars, depending upon the size of the group

---

[197] Although some academics may be able to turn their FAP research into publications (for example, James A. Clifton's The Pokagons, 1683-1983 is based upon work which he did for the Pokagon Potawatomi's petition), very often their work is not considered when they are reviewed for tenure. This makes it difficult for untenured academics to undertake FAP research even if tribes have available monies to pay them. In the Pokagon case, the petitioners were fortunate that an established scholar in Potawatomi ethnohistory such as Clifton was willing to undertake further research on their behalf.

[198] Although some lawyers have written and submitted FAP petitions (for example that of the Mohegan tribe was prepared by their attorney), these are readily distinguishable from those of anthropologists and historians. Indeed, what issues and themes the respective professionals choose to emphasize follows a pattern, distinguishing members of one discipline from the other.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and nature of documentation, all petitioners are faced with the substantial burden of obtaining outside funding for professional expertise. Up until now, ANA (Administration for Native Americans) has provided the bulk of grant monies available to petitioning groups, funding some 118 grants between 1981 and 1989 for status clarification purposes (Roessel 1989:6). However, it must be pointed out that some sophistication and organization is necessary to even apply for ANA grants, qualities which not all petitioners possess.[199] Thus, "unrecognized tribes" are in the difficult position of trying to find quality expertise at a price that they can afford. Since most groups are small, numbering less than 1,000,[200] they generally have meager financial resources, a fact which greatly circumscribes their options vis-à-vis contracting for professional services. While some have been successful in obtaining quality anthropological, historical, genealogical and legal expertise, others have not.

All this is to say that FAP is an extremely expensive process for the federal government and petitioners alike. The availability of funding is an important variable,

---

[199] Ironically, those groups whose members are most "traditional," may be least knowledgeable in grant writing and administration.

[200] The BIA estimates that out of 110 "unrecognized tribes," 80 have memberships totalling 1,000 or less. Of this, some 36 groups have under 300 members (Elbert 1988:77).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

greatly influencing who can participate in the process and to what extent they do so. Access to financial resources by no means guarantees a successful petition, but it substantially increases the likelihood that a group can at least submit one. Whether the latter provides sufficient evidence of continuous tribal identity and autonomy depends upon the nature of the documentation, its presentation and interpretation. Let us now turn to the Gay Head case and examine the extent to which legal and political considerations affected the Tribal Council's decision to place their petition on active consideration.

Petitioning for Federal Acknowledgment[201]

> **1. Group submits letter signed by its officers requesting acknowledgment as a tribe.**
> **2. Acknowledgment staff sends the group a packet of information, including a copy of the Acknowledgment regulations and suggested guidelines for preparing a documented petition.**
> **3. A notice of the filing of the petition is published in the Federal Register and in a newspaper near the group's location. A copy of the notice is sent to the Governor and Attorney general of the state where the group resides.**

On June 25, 1981, the Wampanoag Tribal Council of Gay Head Inc. sent a letter to the Bureau of Indian Affairs, petitioning for federal acknowledgment of its existence as an Indian tribe. Both legal and political factors

---

[201] As noted, the following 14 steps were outlined by the Deputy to the Assistant Secretary of Indian Affairs, Hazel Elbert, in her report to the Senate Select Committee on Indian Affairs. See Elbert 1988:62-63.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

precipitated the Council's action.

As discussed in Chapter 1, in the mid 1970's the Indians' legal classification as an "unrecognized tribe" greatly hindered their ability to pursue a land claim under the 1790 Trade and Non-Intercourse Act. Gay Headers had three options. First, they could try to prove their tribal identity in court; second, they could seek federal recognition through congressional legislation; and third, they could petition the BIA for federal acknowledgment. Ultimately, the Tribal Council's decision to prepare and submit a FAP petition was not a matter of choice, of calmly assessing the risks attendant with each alternative. Instead, the decision was forced upon the Council by political tensions which long smoldered in Gay Head but which flamed openly in the late 1970's, adversely affecting the latter's legal options. Not only did these tensions precipitate the Tribal Council's decision to seek status clarification through FAP, but they continued to impact upon the petitioning process throughout.

As previously noted, several "cosmopolitan" Gay Headers incorporated the WTCGH in 1972 as part of their efforts to secure title to the common lands. In 1974, having failed to have a warrant article introduced at town meeting which would transfer title to the lands to the Council, the latter hired NARF lawyer Thomas Tureen to bring suit against the town for return of the common lands. This he did on

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

November 28. In turn, the town's motion to dismiss was denied, placing the Indian selectmen in the awkward position of having to defend the town against legal action initiated by the Tribal Council of which the selectmen themselves were members.[202]

In the next two years, Tureen's victory in Morton consideraby buoyed the hopes of the "cosmopolitans" regarding the land suit, leading them to become more vociferous regarding Indian rights and claims. The latter's outspokenness exacerbated already rampant fears among non-Indians that the Council's land claim would soon be extended to all of Martha's Vineyard. The result was a complete halt of real estate sales up-island and a cloud upon all titles.

Yet the Council's aggressive stance vis-à-vis its land claim was not fully supported by its membership, a membership which had come to include "local" Gay Headers who were generally more comfortable with avoiding public confrontations than with seeking them out. In 1976, the "cosmopolitan" group (or family, since they were lineally related to one another) was voted out of office in a turbulent election and was replaced with a slate of "locals" who were more amenable to seeking a negotiated settlement with the Taxpayers Association regarding the land suit.

---

[202] As town counsel pointed out, if the selectmen failed to defend Gay Head in the suit, they themselves might then be sued by town residents (presumably non-Indians) for having "abandoned their responsibilities" as elected officials (The Grapevine 1975:1,4).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In attempt to resolve the clouded title problem (which affected the Indians' ability to sell as much as the non-Indians' desire to buy local real estate), the town, composed mostly of Gay Head Indians, now voted in favor of transferring the common lands from the town to the Tribal Council. In turn, the Taxpayers Association successfully challenged this action, charging that the Indian selectmen were not representing the interests of the entire town. Not only were the non-Indian property owners apprehensive about the future of their own land, but they were also worried about what the Tribal Council planned to do with the common lands once they gained title to them.

A major concern of the Taxpayers was that there be unrestricted public access to the waterfront and that the common lands be zoned to prohibit commercial development. Since most of these urbanites had bought property in Gay Head because of its unspoiled beauty, they were anxious lest the Tribal Council's recent tenative efforts in economic development (i.e., a pilot shellfish hatchery) turn into into a maloderous factory next door to their rural retreats. With the uncompromising rhetoric of the previous Tribal Council officers still ringing in their ears, members of the Taxpayers Association would settle for nothing less than legal guarantees that the common lands would remain undeveloped.

In the meantime, ill feeling between the ousted

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

political faction of the Tribal Council and the newly elected one continued, physically disrupting meetings and making for exciting newspaper copy.[203] The "dissidents" (as the deposed "cosmopolitans" were called) challenged the political legitimacy of the new council leadership while the latter dismissed the charges of their detractors. Age old grudges, rivalries and jealousies further fanned the animosity between lineages. In addition to creating a deep schism between and among the prominent Indian families, the factional dispute negatively affected the Tribal Council's ability to hammer out an agreement with the Taxpayers Association regarding the common lands.

In 1977, Governor Michael S. Dukakis appointed Albert M. Sachs, then Dean of the Harvard Law School, to mediate a settlement package amenable to the Taxpayers Association, town and Tribal Council. In 1978 an agreement was drafted giving the Council title to the clay cliffs, cranberry bogs and adjacent beaches, Herring Creek and some undeveloped land formerly held by the bankrupt Strock Corporation in exchange for relinquishing all other land claims. The dissidents strongly opposed the proposed settlement, claiming

> that if we accept this proposal as it now stands, we are not following the original intent of the land suit:

---

[203] One of the cosmopolitans reported that she found the head of a deer with a knife in it in her mailbox, and implied that it had been put there by her political enemies to intimidate her.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> ownership and control of what was meant to be when the town of Gay Head was incorporated in 1870. We will be Gay Head Indians in name only (James 1979).

The "dissidents'" organized, articulate and staunch criticism of the proposed land claim settlement greatly undermined negotiations between the Tribal Council and Taxpayers Association for the latter was never quite sure which group of Indians represented the tribe's position. Nor were the non-Indians confident that an agreement worked out with the current representatives of the Tribal Council would be sustained and adhered to after the next Council election. Indeed, the schism within the Tribal Council membership was so severe that it even prevented a vote on the proposed settlement, a fact which caused a breakdown in negotiations in the spring of 1979.

In 1980, in an attempt to force both parties (i.e., the Tribal Council and Taxpayers Association) back into negotiation, town selectmen pushed for a trial date for the land suit. Soon after, the Tribal Council drafted a new settlement which claimed additional land while the Taxpayers Association refused to consider any proposal which did not reserve a strip of beachfront to the town for public access.

In response to the impasse at the bargaining table, the Tribal Council took its first step in the FAP process and sent a letter to the BIA signalling its intent to petition for federal acknowledgment. This action was widely seen as bolstering the legal position of the Tribal Council for,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with federal acknowledgment, the latter would then be eligible to pursue its land claim under the 1790 Trade and Non-Intercourse Act. Barely one month later, on July 17, 1981, the Massachusetts Attorney General was granted the right to intervene in the land suit on behalf of the town and Taxpayers Association, a legal maneuver which accorded the latter the substantial resources of the state. NARF continued to represent the Tribal Council on a pro bono basis.

Because negotiations were stalled, each side sought to improve its legal stance through an appeal to outside governmental agencies. However, these maneuvers did not result in renewed negotiations as each side hoped, but instead raised the political stakes, making it more difficult for each side to capitulate what it had thus far defined as non-negotiable. Added to this were the legal initiatives of the dissident faction which included a 1981 petition to intervene in the land suit and demand that title to all of Gay Head be conveyed to the Tribal Council as well as a subsequent suit claiming some 27,000 acres in Gay Head, Mashpee and other Massachusetts towns.[204] These actions confirmed the Taxpayers' worst fears and hardened their resolve not to settle for anything less than solid legal

---

[204] The dissidents undertook this legal action together with several Mashpee Indians who, after their defeat in Mashpee v. New Seabury, were seeking another means of pursuing their land claims.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

assurances of their demands. For its part, the Tribal Council was a named defendant in several of the "dissidents'" lawsuits, a fact which proved a constant irritation to the Council and one which somewhat detracted from its representation of tribal interests since its authority to do so was constantly being challenged by some of its membership. Thus, in order to strengthen its own negotiating position, the Tribal Council had little choice but to proceed with the preparation of a FAP petition.

4. Group submits a documented petition.

The Tribal Council's letter to the BIA in 1981 formally announced the Gay Head Indians' intention to submit a petition for federal acknowledgment and assigned the group a priority number as to what order they would be considered for "active consideration" -- i.e., actual evaluation of their petition's evidence. (Groups become eligible for review in the order they submit their initial intent letter and not simply according to when their petitions are ready.)

Between the time Gay Head submitted its initial letter and the time a fully documented petition was ready to go on active consideration, much time would pass and the political climate would change dramatically. In early 1982, however, the Tribal Council was only interested in amassing as much evidence for their petition as was necessary to quelch any doubts that it could obtain federal acknowledgment through

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

FAP. That is, the Council leadership hoped, and truly believed, that ultimately it would not be necessary to go through the FAP evaluation process. The Council and its legal advisors theorized that the motions of preparing a petition would encourage the Taxpayers Association to "give a little" in its negotiating position, enabling the Gay Head Wampanoags to obtain federal recognition through congressional legislation as the Mashentucket Pequot Indians of Connecticut were doing, with whom the Gay Head leadership had close political ties.

The Pequots served as an attractive role model for Gay Head, demonstrating the bright future that Wampanoags too could attain. Under the astute political leadership of its tribal chairman, the Connecticut tribe had prepared a preliminary FAP petition as a prelude to pursuing congressional federal recognition.[205] The group had also received grant monies enabling it to construct attractive tribal housing and to begin planning for economic development in order to encourage tribal members to reside

---

[205] Some have speculated that this is a deliberate strategy of NARF's. That is, a group first submits an inadequate FAP petition to the BIA and then immediately lobbies for a bill granting the group congressional recognition, in effect bypassing the administrative procedure. In this scenario, congressmen are supposedly impressed with the fact that a petition has been submitted, they themselves generally lacking the knowledge or expertise to evaluate its merits.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in Ledyard rather than migrate in search of jobs.[206]

Congressional federal recognition was thus not a new goal but instead had been on the agenda of the WTCGH since the latter's formation in 1972. With the enactment of FAP in 1978 and the Mashpee Indians' disastrous experience in court, the administrative route became a viable alternative, especially in light of the vehement anti-Indian backlash which swept New England in the mid and late 1970's. Still, FAP was not the strategy of choice. The process was as yet very new, with only a handful of Indian groups having submitted petitions and of these an equal number succeeded and failed. There were, moreover, few who could advise how to best statisfy the regulations and fewer still who could predict the outcome. While the congressional option was infinitely more political, the Tribal Council officers and their legal counsel were nevertheless more familiar with the

---

[206] The tribe obtained congressional federal recognition in 1982, thereby enabling it to establish high stakes bingo on federal trust land, providing tribal members with much needed revenue and employment. The venture proved extremely lucrative, especially since the bingo revenues were not subject to state taxation or regulation. This caused quite a furor in 1991, with state officials at one point contemplating eliminating the state lottery in order to limit Pequot bingo. On February 8, 1992, the Pequots opened Foxwood, a 24 hour gambling casino, the only such establishment on the East Coast outside of Atlantic City. The first day drew some 10,000 gamblers. In 1993 the tribe was bringing in some $26 million a month and employed over 6,000 workers.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

process, including its pitfalls and deficiencies.[207] Most importantly, provided political support for the Gay Head case was forthcoming, congressional federal recognition was a quicker process, requiring only the introduction of enabling legislation and a carrying vote. Encouraged by the Pequots' success, the Tribal Council thus continued to pursue its behind-the-scenes negotiations for congressional federal recognition while publicly going through the steps of preparing a federal acknowledgment petition.

In accordance with the demands of the petitioning process, the Tribal Council sought and received funding to hire two anthropologists to provide necessary ethnohistorical and ethnographic evidence as well as to employ one Tribal Council member to assist in the compilation and organization of the genealogical documentation required by the FAP regulations for each tribal member. Whereas Jack Campisi was to research and write a narrative account of Gay Head Indian identity and autonomy from European contact until incorporation of the town in 1870, my own task was to prepare an account of the socio-political boundedness of the Indian community from 1870 to the present. This division of labor was later amended so that my research focused upon the period from approximately 1930 to 1982. In addition, I was to help

---

[207] NARF had represented the Pequots and the Passamaquoddy Indians in their respective negotiated settlements.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

supervise the collection of genealogical data while Jack Campisi would be responsible for compiling and organizing all of the required documentation and would work with legal counsel regarding its presentation to the BIA.[208]

Throughout the early stages in which petition evidence was being collected and organized, the Tribal Council remained optimistic that a negotiated settlement was still possible, mitigating the need to go through the FAP evaluation process. Although draft ethnohistorical reports were compiled by late 1982, necessary revisions, additions and corrections were made intermittently, reflecting the Tribal Council's waffling on whether or not it would in fact submit a petition.[209]

---

[208] The research assignments reflected professional as well as pragmatic considerations. Jack Campisi's testimony as an expert witness for the plaintiffs in Mashpee v. New Seabury, together with his work on the Mashentucket Pequot acknowledgment petition, accorded him the role of senior researcher. Moreover, since he lived and taught anthropology in upstate New York, his schedule was more amenable to doing regional archival research than it was to conducting interviews in Gay Head. In contrast, since the Tribal Council was providing me with housing and transportation on the Vineyard, Jack Campisi and Donald Widdiss (the Tribal Chairman) decided that I should concentrate my efforts on the data obtained from participant observation, in the course of formal and informal interviews, and by means of archival research on the Vineyard. I was to focus upon the boundedness of the Gay Head Indian community from 1930-82, the period still within the memory of living informants.

[209] My own contractual relationship with the Tribal Council ended in August 1982 with the completion of my draft report, "Gay Head in the Twentieth Century: Town and Tribe, Town vs. Tribe." Jack Campisi continued to work on the Gay Head petition at the same time that he accepted work on other acknowledgment petitions.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

By 1983, however, the two sides in the land claim had drifted irreconcilaby apart, leading the Tribal Council to request that their petition be placed on active consideration which it was on July 28, 1983. On August 5, the Taxpayers Association placed a provocative ad in the local island newspaper, seeking island-wide support and blaiming the Tribal Council for the lack of progress in the land suit. It read in part:

> What is at stake?
> The answer to this question is simple. For the residents of Gay head [sic], the loss of the case could mean loss of our property. Like most Americans, our homes represent our major asset in our lives. We view the possible takeover of our property with alarm. ...[I]f the Tribal Council is successful, it is possible that similar suits could be filed against other private lands on Martha's Vineyard. Indeed two such claims have been filed (Vineyard Gazette August 5,1983).

As in the Mashpee case (see Chapter 1), there was little legal likelihood that non-Indians would in fact lose their homes as a consequence of the Tribal Council's lawsuit. Even the dissidents' legal initiatives would scarcely result in ejectment proceedings against the wealthy and reknowned vacationers of the Vineyard. The Tribal Council called the ad "an act of desperation, laden with inaccuracies and a ridiculous statement, a scare tactic" (Vineyard Gazette August 9, 1983). However inflamatory,[210] the rhetoric did

---

[210] One member of the Taxpayers Association admitted to me in late 1987 that the ad had been deliberately contentious in order to stimulate a response on the part of the Tribal Council.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

spark heated public debate at a special town meeting and caused both sides to return to the negotiating table.

By early November, the lawyers had drawn up another proposed settlement document which was remarkably similar to the one originally crafted in 1978. According to the new agreement, the town was to give the Indians the cliff area and 238 additional acres of public land with the federal government providing approximately $1 million for 175 acres of privately owned land to be turned over to the Tribal Council for Indian housing. None of this land could be sold, exchanged or given away and the Indians had to abide by all current zoning laws. Beaches at West Basin, Pond Beach and Menemsha Pond would remain open to the public and would be maintained by the town.

The settlement also included a new provision: that the Tribal Council would not seek federal acknowledgment until after the agreement was ratified. The Tribal Council membership readily voted in favor of the settlement by which they would gain some 440 acres in exchange for dropping the lawsuit against the town, 164 in favor, 29 opposed (Vineyard Gazette November 11, 1983). Likewise, town residents, consisting of members of the Tribal Council as well as those of the Taxpayers Association, voted in favor of the agreement, 92 to 13 (Vineyard Gazette November 25, 1983). However, as it had done in 1978, the dissident faction of Wampanoags fiercely criticized the agreement. Charging that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the incumbent leadership of the Tribal Council did not represent their interests nor those of future Gay Head Wampanoags, the dissidents initially obtained a temporary restraining order preventing the Tribal Council from signing the settlement agreement. When the order was dismissed, they appealed the ruling to the Supreme Court but were denied writ of certiorari in May 1984.

The rift among Gay Headers ran deep. The dissidents were vehemently opposed to relinquising all future land claims in exchange for 440 meager acres. As they saw it, their ancestors once held all of Martha's Vineyard and had been cheated out of their land by unscrupulous whites. These Wampanoags were not only claiming all of Gay Head -- some 3400 acres -- but were also seeking guarantees of their aboriginal hunting and fishing rights,[211] two issues which were, in their view, quintessentially "Indian." Frank James, a prominent spokesperson for the dissidents, stated: "If it [the settlement] goes through I lose my rights as an Indian, forever, and I'm not about to let that happen sitting down" (as quoted in the Vineyard Gazette April 20, 1984). According to the James group, those controlling the Tribal Council -- the "Widdis faction," so named because

---

[211] This proved a significant issue during the course of negotiations. While the natives pressed for year-round hunting and fishing rights, non-Indian residents were particularly adverse to Indians hunting and fishing in Gay Head without restriction during the summer and early fall when non-Indians were most likely to be using their vacation homes.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

several of its officers had close kinship ties with Donald Widdiss, the Tribal Director -- favored the settlement because members of the faction were "on a federal gravy train" and wanted to keep their own bureaucracy alive (Boston Globe November 18, 1984). In response, Director Widdis noted that the settlement was a pragmatic compromise, reflecting "modern day reality" and years of litigation. Alluding to the fact that some of the dissidents lived off-island and thus were unaffected by the legal cloud hovering over Indian as well as non-Indian title in Gay Head,[212] Widdis declared, "It's easy to be ideological when you don't live here in Gay Head...They're [the dissidents] not being practical" (Ibid).

In accordance with the negotiated settlement, the Tribal Council requested that its federal acknowledgment petition be withdrawn from active consideration. However, in order to be implemented, the legal agreement required the approval of the Massachusetts General Court and the U.S. Congress since the state and federal governments were to provide monies for the purchase of some property which would be turned over to the Tribal Council. This soon proved a major stumbling block since the Administration made it very clear that it would not sign any bill granting federal recognition to an Indian group which had not gone through

---

[212] This effectively prevented anyone from buying or selling land in Gay Head since no title insurance could be obtained pending resolution of the Indians' land claim.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the acknowledgment process. In its view, FAP had been enacted precisely to provide a consistent, rigorous and fair procedure for according federal acknowledgment to unrecognized Indian tribes and the current Administration was loath to circumvent it.

At least this was its official position on the subject. Some felt privately, however, that this hardline approach was in fact a product of partisan politics, with a Republican Administration refusing to accomodate the legislative initiatives of liberal Democrats Ted Kennedy and Gerry Studs, the two legislators from Massachusetts who sponsored the settlement bill. Certainly the dissidents' continued opposition to the proposed settlement, a position they articulated in writing and in person to state and federal officials, including Massachusetts Governor Dukakis, the BIA and members of the Senate Select Committee on Indian Affairs, did not encourage the Republican Administration to alter its public stance. Moreover, since support of the settlement bill was of little consequence for politicians outside of Massachusetts, there was little likelihood of the legislation gaining sufficient votes to override a presidential veto.

Thus, for several reasons, it was clear that congressional federal recognition would not be forthcoming in 1984 or '85. In order for Congress to approve the proposed settlement, the Gay Head Indians would first have

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to obtain status clarification through the FAP process. Contrary to the proposed settlement worked out with the Taxpayers Association in 1983 which stated that the Tribal Council would not petition for federal acknowledgment, it was evident that the latter now had no choice but to go through the process if it sought control of the common lands. Accordingly, one week before its agreement with the Taxpayers Association expired on May 22, 1985, the WTCGH requested that the BIA resume active consideration of its petition.

5. Acknowledgment staff reviews the documented petition, notifies the group of any obvious deficiencies and significant omissions that weaken the petition, and requests further clarification or documentation to strengthen the petition.
6. Group expands its research and provides additional information requested.

As a preliminary step to active consideration, BAR conducted an obvious deficiencies (or OD) review of the Gay Head petition in early June and highlighted several areas which were in its opinion problematic. In its OD letter of June 6, 1985, BAR requested that the Tribal Council provide more information regarding such specific issues as: state recognition of Gay Head between 1935 and 1984; how tribal members viewed town government during different periods after incorporation; the informal political structure of the tribe (e.g., leaders, networks); the social and political networks binding off-island tribal members to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

those residing on Martha's Vineyard; and a detailed description of the current community which addressed the degree of social cohesion among tribal members and as distinct from non-tribal members. This letter also requested documentary substantiation for several statements made in the petition.

Three weeks later, on June 25, 1985, the Tribal Council responded with a supplemental report for criteria (b) and (c) -- i.e., those regulations dealing respectively with group interaction and political organization. This report discussed a socio-political split within Gay Head purportedly along a north/south axis[213] but did not provide information regarding the nature of tribal leadership as distinct from town government, political relations between tribal members on and off island, the nature of social cohesion within the contemporary Indian community in Gay Head and the latter's social relations with tribal members off island. In addition, it noted that since the town records burned in the 1950's, it was difficult to provide examples of state-tribal interaction from 1930-1950. In short, the petitioner's "Response" did not clarify issues which BAR had specifically flagged as problematic.

7. Acknowledgment staff reviews group's response to obvious deficiency letter.
(a) Group notified of need for further critical

---

[213] BAR researchers found no confirmation of such a division when they did field research.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

information, or
(b) Petition placed in line for active consideration.

As the BIA routinely advises petitioners, the OD review does not require that all its requests for more information be fulfilled. Rather, it merely affords the petitioner the opportunity to provide additional data which the BAR staff has identified as being germaine and useful to the evaluation process. Moreover, groups can do so without the time pressure involved once the petition undergoes active review. Petitioners may respond in whole or in part to governmental requests and must inform the government in writing whether or not they wish to proceed with the petitioning process. In the Gay Head case, having responded (though not in full) to the OD letter, the Tribal Council requested that its petition be placed on active consideration. With a BAR team available, evaluation of the Gay Head case commenced almost immediately.

8. Petition placed on active consideration. Acknowledgment team (historian, anthropologist, genealogist) reviews and analyzes petition, conducts field research, and prepares draft technical reports.

9. Acknowledgment staff recommends proposed finding to Assistant Secretary-Indian Affairs.
10. Notice of proposed finding is published in the Federal Register.

The Gay Head Wampanoag acknowledgment petition included eight volumes of evidence, the overwhelming majority of which consisted of xerox copies of supporting historical,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ethnographic and genealogical documentation. Along with the narrative account of the Indian group from initial contact through to the present, petitioners submitted a copy of most primary and secondary sources cited in the petition narrative, excepting those sources readily accessible to BAR reviewers (i.e., those currently in print with wide distributions). Also included were copies of the present governing document or constitution, ancestry charts for each enrolled tribal member,[214] present and past tribal rolls, documentation that members of the petitioning group were descendant of the historical tribe or tribes seeking federal acknowledgment and evidence that they were not members of any other American Indian tribe.

The BAR team reviewed and analyzed all of the material presented by the Tribal Council as well as that submitted by Hale and Dorr[215] as legal counsel to the Taxpayers Association. BAR also conducted a limited amount of its own documentary and field research in order to "verify and extend" the petitioner's own work. As explicitly noted in the regulations, the BIA is neither obligated nor required to find, collect or analyze data which the petitioner has not submitted.

One year after beginning the evaluation process, the

---

[214] In 1985 the Gay Head petition listed 521 tribal members.

[215] This is the same law firm which successfully represented New Seabury in the Mashpee suit. See Chapter 1.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

BIA published a "Proposed Finding Against Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc." in the Federal Register on June 30, 1986. Its evaluation of the seven criteria may be summarized as follows.

(a) Indian Identity: Wampanoag Indians and their descendants have inhabited the Gay Head peninsula since at least the 1600's and have been identified as such in colonial and state records, church documents, census reports, travelers' accounts, scholarly works, travel guides and in newspapers and other media. Because of their consistent identification over the past 400 odd years of contact as American Indians, the Gay Head Wampanoags satisfied criterion (a).

(b) Group Interaction: From the 17th century until 1870, the Gay Head peninsula was accorded a distinct legal status by colonial and state governments by virtue of its inhabitants being "Indians and people of color." Although long viewed as an Indian community by residents and non-residents alike, Gay Head nevertheless experienced significant outmigration beginning in 1807 which continued to the present. Whereas in the past, communal economic activities and social institutions fostered tribal cohesion, increasingly in the 20th century these declined in importance and in some cases disappeared altogether. With only 15% of the current tribal membership living in Gay Head

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in 1982 and with the absence of social contacts between members who live on and off island, the group manifested no tribal relations and therefore failed to satisfy criterion (b).

(c) Tribal Political Influence: Although there was scant description in the documents of the political system or processes operating in Gay Head during its extensive guardianship period (roughly from the late 1700's through 1870), still, the numerous petitions of the Indians to the colonial and state governments during this period were evidence that some form of political organization was operative, possibly in the form of a general council with religious leaders wielding political authority as well.[216]

According to the petition, between 1870 and 1972 (upon the formation of the Tribal Council), the tribe adopted the town government as their political form. There was, however, no evidence that Gay Head town officials dealt with anything more than "routine civil matters" nor took "official actions which might be interpreted as primarily benefiting the Gay Head Indians as a tribal group" (BAR 1986:4). Moreover, town government would have made for a "peculiar kind of tribal governing body" (Ibid:5) given that it had no formal jurisdiction over non-residents and that

---

[216] This was supported by the fact that the same individuals signed the numerous Gay Head petitions to the Massachusetts General Court and that native preachers were consistently included among the petitioners.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

increasingly Gay Head Indians moved off island.

Until the formation of the Tribal Council in 1972, there was no evidence that the other organizations with Indian names -- e.g., Aquiniah, Howwaswee and Pawkunnawakutt Councils -- exerted any political influence or authority over Gay Head Indians in general. No membership lists or other documents from these organizations were extant nor was there any information as to their relationship with the increasingly number of Gay Headers who moved off island.

Likewise the petition provided little evidence that the Tribal Council was widely supported by its claimed membership since there were never more than 22 members who attended the annual meetings and a quorum of 15 failed to be achieved in two thirds of the meetings between 1979 and 1985. Although the petition maintained that the Council took over political authority for the tribe in 1972, there was no noticeable change in town government at that time or since. The petitioner therefore failed to satisfy criterion (c) because it had not demonstrated tribal political influence or other authority over its membership as an autonomous entity throughout history.

(d) Governing Document: The petition included a copy of the group's present government document which outlined the group's membership criteria and therefore satisfied criterion (d).

(e) Descent: 98% of the tribal membership could

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

document their ancestry from the 1871 roll (the Tribal Council's criterion for membership). Further genealogical research could in fact trace the descent of many members to an earlier 1792 list which in turn had been determined to include descendants of the aboriginal inhabitants of Gay Head, thereby fulfilling this criterion.

(f) Membership: The petitioner met this criterion as well since Tribal Council membership did not include individuals enrolled in recognized tribes.

(g) Termination: Because the Gay Head Wampanoags were not legally terminated or subject to specific legislation forbidding a federal relationship, they satisfied criterion (g) as well.

In short, after extensive review of petition materials and some independent archival and field research,[217] the BAR team found that, while there was much official and popular identification of Gay Headers as Indians from sustained contact to the present (1642-1982), the available evidence did not demonstrate that the group had sustained tribal relations in the 20th century. The natives had not comprised a separate Indian community from about the 1930's until 1982 nor did they have a governing body of enduring leadership structure from 1870 until 1982.

---

[217] In addition to its intensive review of petition documents and archival materials, the BAR team spent two weeks on Martha's Vineyard interviewing informants and conducting documentary research.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Genealogically, however, members of the Tribal Council were found to have Indian ancestry; most were indeed descendants of those individuals denied American citizenship before 1870 because of their residence in the Indian District of Gay Head. Further, Gay Headers also satisfied the criteria that they not be included on the rolls of other Indian tribes and that they not be the object of specific legislation forbidding a federal relationship. In essence, they easily met the more technical regulations -- i.e., (d), (e), (f) and (g). That members were descendants of an historic Indian tribe, that Tribal Council members were not included on other tribal rolls, that they submitted a governing document which outlined their membership criteria and that they had not been terminated were all a matter of record.

Clearly, where the evidence was found wanting was with regard to criteria (b) and (c), those regulations dealing with group interaction and political process and two areas unlikely to be addressed explicitly and comprehensively in historical materials.[218] In the absence of an

---

[218] In some cases, criterion (a) may also be extremely problematic. For example, in the South, white society did not always identify native people as "Indians" in vital records, especially if the latter's physical appearance was evidence of mixed ancestry. While Gay Headers were also variously identified by whites as "colored" and "mulatto" in the 18th and 19th centuries, the legal wardship of Gay Head affirmed the "Indian." identity of the community, at least until 1870. Had Gay Head Indians not been legally distinguished from their neighbors, criterion (a) might have proved more difficult to satisfy for there would have been

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ethnohistorical monograph, it is rare to find sources which describe in detail the socio-political structure and organization of a particular Indian group. It is even more improbable that such comprehensive descriptions will be available from the period of initial contact through to the present.[219] Instead, bits of data must be gleaned from the historical record and crafted to form a cogent narrative, the latter's persuasiveness depending upon its ability to explain most of the disparate pieces as well as significant gaps. Criteria (b) and (c) thus require a great deal of interpretive skills both in the collection and analysis of data. Not suprisingly, (b) and (c) are also the criteria most likely to be found deficient by the BAR staff.

Given the inherent complexities of these two regulations, what was found specifically wanting or problematic in the Gay Head case? To answer this question it is necessary to critically examine what was presented in the petition narrative and supporting documents as well as how the BAR staff evaluated this evidence.

Stating Facts: A FAP petition may be submitted "in any readable form" which addresses the evidential requirements set forth in regulations (a) through (g). The Guidelines, a

---

no authoritative (governmental) identification of them as "Indians."

[219] Remember, the petitioners must demonstrate continuous tribal identity and autonomy, necessitating detailed information about the group throughout its sustained contact with American society.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

handbook of recommendations and explanations designed to assist Indian groups in preparing a FAP petition, assumes that petitioners will submit at least one comprehensive narrative account of the group from contact to the present, highlighting its continuous Indian identity throughout (i.e., criterion a). Ideally, two additional "statements of fact" should respectively deal with group interaction (criterion b) and political process (criterion c).[220]

In practice, petitioning groups have submitted evidence in diverse formats: a single detailed chronological narrative which includes information pertaining to criteria (a), (b) and (c); one historical overview and two suppplementary accounts; and even no narrative at all with the petition comprising merely a compendium of diverse sources about the group in question.[221] While the petition format is of less importance than the adequacy of

---

[220] Criterion (d) requires that petitioners submit a copy of their current governing document or a description of how the group governs itself and determines membership criteria. No group to date has failed to satisfy this criterion. Criteria (e) and (f) may be satisfied through genealogical documentation alone and criterion (g) generally entails a brief statement that the group has not been the subject of legislation forbidding a formal relationship between it and the federal government. Comprehensive narrative accounts are thus only an issue with regard to criteria (a), (b) and (c).

[221] In the OD reviews of these latter "kitchen sink" petitions, the petitioners are advised that criteria (a), (b) and (c) require a statement of fact -- i.e. a narrative account -- which addresses salient issues. Whether the groups do so, indeed, whether they are capable of doing so, varies considerably.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

information submitted, the relationship between petition narrative(s) and supporting documentation is critical.

Petition evidence may consist of many types of data gleaned from diverse sources. Although there is a clear bias in favor of written documents, petitioners can, and indeed should, also include information obtained from: oral interviews; first-hand observations made by native or outside researchers; material culture produced by group members; and data obtained from other media, such as films or photographs, about the group and its members. Some of these materials may be readily accessible to outside reviewers, however in all likelihood at least some are not unless the petitioning group itself makes known their existence. For example, that members still produce certain crafts, share traditional stories, myths, legends and practices or retain photos of significant tribal and/or familial events is often not included in the documents produced by outsiders and therefore needs to be explicitly presented in the petition.

Presentation of evidence, however, does not merely entail properly referencing source materials, noting where they can be examined and submitting copies with the petition where possible. Rather, it also involves discussing, explaining and contextualizing such evidence within the petition narrative. The latter thus performs a vital role in the presentation of evidence for it specifies how

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

particular information satisfies the criterion in question.

By themselves, data are neither positive nor negative evidence but acquire meaning in relationship to other pieces of information which have been selected and organized to form a cohesive narrative. That is, it is through the selection and organization of facts that the latter gain significance and authority. Although the narrative provides the structural frame within which facts are to be analyzed, so too do facts constitute and reinforce the very frame which gives them cogency. The more seamless the weld between data and analytic subtext -- i.e., the general theory, problem or issue which the narrative is designed to illustrate, address or describe -- the greater the authority accorded the narrative and objectivity accorded the facts. That is, the latter appear to "speak for themselves."

The petition narrative must therefore explain the facts and be supported by them. On the one hand, the regulations provide the thematic pivot around which all data must turn. The data must address to what extent the petitioner (a) has been continuously identified as American Indian, (b) sustains relations among tribal members and (c) has maintained tribal political influence or other authority over its members. The narrative must organize the information so that it bears upon, and hopefully provides positive evidence for, these issues. On the other hand, how the narrative weaves together disparate pieces of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

information is up to the petitioner.[222] It is the latter who draws connecting threads through the data and demonstrates why certain events and issues evince distinctive social or political processes, for example. It is the narrative which makes sense of the historic polyphony.

At the same time that the narrative presents a guide to how the historic record is to be understood, it would also do well to demonstrate that alternative interpretations of specific data and gaps therein do not affect the overall presentation of evidence. Wherever possible, petitioners should explain potential incongruities so that they do not undermine the group's position that it indeed has been identified continuously as an autonomous socio-political entity.[223]

In other words, the petitioner is under great pressure to connect all the dots in the historical record -- to present, account for and explain the facts so that the

---

[222] In practice, it is the author of the narrative who does this -- be the person an anthropologist, ethnohistorian, historian, genealogist, lawyer, outside volunteer or member of the tribe itself. While comprehensive narratives are more often prepared by non-tribal personnel, it is the petitioning group which bears full responsibility for the final product, however much it actually had a role in writing it.

[223] Strictly speaking, a petition narrative is not required to explain potentially negative evidence. However, as in good scholarship and law where one argues against alternative views as much as one sets forth a particular interpretation, one strengthens one's position considerably by plugging potential evidential holes before they leak.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

latter constitute evidence supporting the group's case. As BAR explains:

> The burden of proof that a petitioner for Federal acknowledgment meets the seven mandatory criteria established by the Acknowledgment regulations (25 CFR 83.7) rests clearly on the petitioner. The regulations do not require Bureau staff members to conduct any original documentary or field research. The primary mission of the Acknowledgment staff is to evaluate the petitions as they relate to the mandatory criteria. Further research is conducted by the Bureau to verify, deny, or supplement the factual information contained in the petitioner's documentation at the discretion of the Acknowledgment staff (BAR 1987:4, emphasis added).

A comprehensive and well-referenced narrative is thus only a beginning point; cited materials, as well as other data turned up during the course of the BAR team's independent verification research, should corroborate and support the interpretive frame of the narrative account. However, this represents the ideal petition; in practice, the fit between narrative and data is neither so tight nor unambiguous nor is it unaffected by considerations of time, money and politics.

The petition prepared and submitted by the WTCGH in 1985 included three narratives: one tracing the Indian identity of the Wampanoags at Gay Head from the 16th through 20th centuries (criterion a); the second focusing upon the social community throughout the period of sustained contact (criterion b); and the third upon the Indians' political autonomy and leadership patterns (criterion c). The accounts summarized published and unpublished source materials on Gay Head and made limited use of oral history.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Since the preponderance of primary sources from colonial times through 1870 dealt with the Indian wards residing on the Gay Head peninsula, it was logical, if not appropriate, to conflate discussion of the Gay Head tribe before 1870 with that of the native community inhabiting Gay Head proper. For example, regarding the diverse forms of control excerised by outsiders over Gay Head throughout the 18th century (e.g., the purchase and administration of the manor by a missionary organization, the appointment of colonial overseers and the state designation of overseers), the narrative maintained that these did not undermine native forms of decision-making and leadership.

> For all the turmoil of the eighteenth century the political and social structure of the Gay Head Indian tribe remained remarkably stable. Their overriding concern was with the protection of their land base and to this end, they were vigorous in the assertion of their rights. ... From the numerous petitions that they submitted, it is clear that they maintained a continuous political existence and that they had leaders recognized by them and the colony and state...(WTCGH 1985:a32-33).

The narrative also asserted that the insularity and social dynamics of the community likewise remained unchanged during this period.

> For most of the [17th] century the tribe lived in social and physical isolation from its white neighbors. They had ditched and fenced themselves from Chilmark so that their principal contacts came as a result of their position as landlords.[224] They farmed, raised stock

---

[224] Prior to the Revolution, colonial overseers leased almost half of the tribe's total 2400 acres to neighboring whites for pasturage and firewood, an act which the Indians vigorously protested, claiming that they did not receive the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> and fished, holding their lands in common....There is no evidence of major splits within the tribe and an analysis of the signers of the petitions strongly indicated political continuity. The analysis also indicates that rights, with respect to land, descended through both the males and remales and thus the right to participate in the political decision-making extended to both (Ibid 33).

Similarly, the text went on to assert that despite various administrative changes imposed by the state during the 19th century (i.e., several guardian acts were passed and the peninsula became an Indian District) and the emergence of an internal division over the appointment of overseers and the latter's diligence in protecting native interests, Gay Headers continued to sustain themselves socially and politically as a tribe.

> ...Gay Head maintained its tribal autonomy and control over its land. The tribe's political system operated on the basis of consensus with every member having the right to vote. While there were no state appointed overseers, as the next series of documents suggest, the tribe appointed three members to serve as overseers and spokesmen. Finally, as the committee[225] noted, the tribe maintained geographical isolation and was subjected to social isolation by the neighboring communities (Ibid:41).

Although the narratives quoted from documents which discussed the intermarriage of non-Indians into the native community and long term absence of Wampanoag men during

---

rents due them and that they themselves were forced to rent land to graze livestock. After several investigations, the Indians were credited for the overcharges of the colonial officials and new overseers were finally appointed.

[225] This committee consisted of several state appointed officials whose task it was to report upon the conditions of the Indian groups in Massachusetts as a preliminary step in policymaking.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

whaling expeditions, the petition made no attempt to address what impact the significant number of absentee Indians might have had upon the group's political functioning or indeed what effect the influx of non-Indians might have had socially and politically.[226] Neither did the text mention the ambiguous evidence regarding tribal membership before 1870 -- i.e., that during some periods, marriage to a Gay Head Indian accorded limited privileges within the native community, while at other times it did not.

Instead, the petition focused attention on the formal appeals of Gay Head residents to the colonial and state governments regarding boundary and monetary claims, using this as evidence of a viable and active tribal leadership. Likewise, it asserted that the social insularity of the tribe was a function of its physical isolation, of the

---

[226] Commissioner Earle reported in 1861 that the total resident population of Gay Head was 204, some 49 others being absent but nonetheless retaining tribal membership. The first figure included 46 families and 22 non-Gay Head Indians who had married into the tribe. Upon closer scrutiny, these numbers are extremely provocative. For example, the 22 non-Gay Head Indian spouses (who were overwhelmingly men) would have comprised almost 25% of the total adult resident population of 92 (46 times 2) and close to half (22 out of 46) of the adult male population. This means that Gay Head Indian men (numbering approximately 24) would have held a slim majority indeed over non-Indians living amongst them. This margin would have been especially tenuous given that district status soon accorded voting privileges only to men and not to women thus depriving the tribe generally of the latter's considerable electoral clout (Indian women numbering approximately 46). Given these figures, it is hard to imagine that non-Gay Head Indians had little or no impact upon the social and political functioning of the native community.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

social inferiority of Indians vis-à-vis whites and of the Baptist church through which Gay Head Indians purportedly exerted civil control over community members (WTCGH 1983).

In short, the text highlighted the geographic, legal, social and political boundaries between Gay Head and other island communities before 1870 yet sloughed over fluctuations and changes in the community's internal dynamics. Yet despite indications that the composition and functioning of Gay Head was far more complex than presented in the petition, there was still considerable evidence that the Gay Head Wampanoags continuously comprised a distinct socio-political, if not legal, entity before 1870. It was with respect to events in the twentieth century that the assumption that the Gay Head community and tribe were one and the same became increasingly difficult to sustain.

The petition acknowledged that the change from district to town status set in motion certain long-term changes, most noticeably with regard to the alienation of tribal lands to non-Indians and the eventual influx of summer people into Gay Head. Still, the narrative insisted that daily life in the town continued unchanged from its pre-incorporation days: there was no significant immigration of non-Indians into Gay Head and Gay Head Indians dominated town government, especially the influential positions of selectmen.

Although the latter points were substantiated in the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

historical record, it did not necessarily follow that daily life in Gay Head remained much as it did before incorporation. For example, as Levitas (1980) pointed out, the economic insularity of Gay Head underwent considerable change in the 50 odd years following the termination of district status as Indians shifted from subsistence farming with supplemental stints on whaling voyages to increasing involvement in local tourism and commercial fishing. While these economic strategies did not actively disrupt communal land tenure practices, neither did they reinforce them. Indeed, the shift in native occupation may explain why so much Gay Head land slipped steadily from Indian ownership during these years and why there did not seem to have been any native hue and cry over it, at least none that has been noted in the historical record. Only much later -- beginning in the 1930's and again in the 1970's -- did informants talk bitterly about the alienation of tribal lands. Was it coincidence that these were also the periods in which pan-tribal activism heightened local Wampanoag identity and expressions thereof?

Of course, that Gay Head underwent numerous economic changes after incorporation and that these most probably had some repercussions upon the dynamics of native life, does not mean that Gay Head Indians ceased to be socially and politically autonomous. What it does mean, however, is that the historic pillars of post-contact Gay Head Indian

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

identity and relations (e.g., descent from a Gay Head Wampanoag, residence within Gay Head, social and economic interdependence and legal wardship) were all undergoing a period of readjustment and realignment. Both citizenship and incorporation radically altered the options of Indian and non-Indian Gay Head residents. As economic, social and political exigencies drew off more and more Indian young adults to the mainland and, as non-Indians came to play a larger role in Gay Head,[227] so too did tensions emerge among Gay Headers themselves over the meaning and future of tribal identity.

Yet the petition narrative avoided describing, never mind explaining, these important changes. As it did for the pre-1870 period, the text emphasized the continuing social and political insularity of the Indians at Gay Head thereby conflating discussion of the social community with that of the tribe. For example, of the change from Indian District to incorporated town, the narrative stated:

> Tribal government continued under the legal guise of the town. As has been pointed out, the state gave implicit recognition to this arrangement. It never took action to disband the tribal units; its efforts were geared to resolving the legal status of the individual tribal members. The actions of the town

---

[227] This occurred not just directly through such organizations as the Taxpayers Association, but indirectly through the build-up of a larger real estate tax base, by providing seasonal service employment for local natives as caretakers, housecleaners, cooks and tradesmen, and by serving as a conduit through which mainstream American values, spending practices and ideals would reach the historically isolated community.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> selectmen were, in reality, the expressions of the tribal members. Kinship ties continued to be the determining factor in tribal administration (Ibid:57).

The petition also maintained that state laws which dealt with Indian issues[228] were themselves manifestations of the state's continued "recognition" of Gay Head's "tribal existence." Such a statement, however, confounded the identification of "Indians" with the recognition of a "tribe." While the statutes apparently were meant to pertain to both Mashpee and Gay Head (they being the only Indian communities still in existence when these laws were enacted), it is important to point out that the legislation dealt with the individual rights of Indians, the petition's assertions notwithstanding.[229] These laws indicate that

---

[228] These included legislation which provided assistance for indigent Indians (1882), excluded natives from shellfish regulations (1882), protected land held in trust for Indians from trespass (1882) and earmarked specific funds to repair the Gay Head schoolhouse which the state acknowledged was built on Indian land (1891).

[229] According to Public Statutes of Massachusetts 1882, Chapter 182, Section 15:

> When a person unlawfully enters into, intrudes upon, or holds any land, the title to which is in the commonwealth for the use and benefit of a tribe or body of Indians, or in trustees, guardians, treasurers, or agents appointed by or under the authority of the commonwealth for the use and benefit of such a tribe, or body, or of any individuals thereof or their descendants, the same may be recovered upon and information filed and prosecuted by the attorney-general or district attorney in the superior court of the county where the land is situated ((1049, emphasis added).

The broad language of this law indicates that the state legislature was concerned with protecting "Indian" land and not "tribal" land as the narrative implies.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the state continued to identify some of its citizens as Indians or of Indian descent and to accord them several distinct rights (e.g., to harvest shellfish without a permit, to receive aid if poor and to have their land protected against criminal trespass) on account of their individual identification as Indian. However, neither Gay Head nor Mashpee Wampanoags had to live in specific tribal communities to qualify for these privileges but did so on account of their personal ancestry.

In addition, none of the statutes accorded tribal polities within the state any powers and none acknowledged the existence of a tribal government or leadership structure at Gay Head. Indeed, it would have been decidedly odd had the state granted the Gay Head town government the legal authority to represent tribal interests, since incorporation in 1870 was designed specifically to eliminate the legal distinction between Gay Head and non-Indian communities within the state. If the state had sought only to alter the wardship of individual Indians as the narrative contended, then it could have been content with granting fee simple title to Mashpee and Gay Head Indians and still have acknowledged the two communities as tribal polities with specific rights. Yet, in accordance with late 19th century federal Indian policy which sought to assimilate individual natives into the American mainstream and, simultaneously, to eradicate tribal political forms, Massachusetts incorporated

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the towns of Gay Head and Mashpee, thereby placing them on the same legal footing as other towns within the state.

It is therefore an overstatement to say that the state gave "implicit recognition" to Gay Head tribal government acting under the guise of the town. More accurately, Massachusetts continued to acknowledge the Indian identity of many Gay Head residents. Whether Gay Headers in reality continued to function as a tribe, using town government to protect tribal interests, was another issue and one of considerable relevance to the FAP regulations.

Strictly speaking, the regulations do not require that petitioners prove that they were formally recognized by federal, state or local governments, only that group members demonstrate that they have comprised a politically autonomous Indian entity throughout history. That the state did or did not recognize Gay Head tribal government is thus of less importance than how the Indians maintained tribal political influence or other authority over members after the state terminated the powers of the Gay Head leadership qua tribal leaders. That is, prior to incorporation, the state's guardianship laws greatly buttressed the authority of native leaders within the Gay Head community -- e.g., to determine access to land, to sanction social behavior, to accept non-Indians within their midst and to accord the latter limited privileges as community members. After Gay Head became a town, however, Indian selectmen could not

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

exert the same authority over residents because the latter now had more legal options -- i.e., they could sell their land to whomever they chose, readily emigrate, enter into contracts, gain political rights in other communities, etc. In addition, as elected officials, the selectmen had to adhere to certain state administrative practices which limited their preferential treatment of Indians over non-Indians. If it was true, as the narrative contended, that Gay Headers used town government to protect tribal interests, then the petition had to provide concrete examples of how Indian leaders looked after tribal concerns while holding town office. This would prove no easy task.

According to the petition text, the town and tribe of Gay Head were one and the same until the early 1970's, at which time the legal dispute over the common lands led Indian leaders to establish the Tribal Council. However, as discussed in Chapter 6, there was a significant amount of out migration from Gay Head throughout the 20th century as Indians sought employment opportunities on the mainland. If these emigrants were still considered tribal members, then how did Indian town officials exert influence over non-resident Gay Head Indians? Indeed, how could Gay Head town officials claim leadership of a tribe, most of whose members eventually came to live outside of the leaders' official jurisdiction (i.e., the boundaries of the incorporated

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

town)?[230]

In addition to addressing town officials' jurisdiction over non-resident Gay Head Indians, the petition also needed to detail how Indian leaders protected the interests of tribal members living in Gay Head as compared to those of non-Indians who also resided in the town. Admittedly, non-Indians did not comprise a significant proportion of year-round residents until the 1970's. Yet, even before their numbers swelled as summer residents, non-Indians came to represent a high proportion of property owners in Gay Head by the early 20th century, acquiring many of the parcels previously allotted to Indians in 1870.[231] Did town officials distinguish between the interests of Indian and non-Indian property owners and if so, how did they do so?

Neither the original petition nor the Tribal Council's OD resonse shed much light on these issues. Inasmuch as the text continued to conflate the town of Gay Head with the tribe, it did not explore the political ramifications of Indian emigration upon tribal identity and functioning. Instead, the narrative pointed out that "tribal members held virtually every political position from 1870 through 1950"

---

[230] In 1985, out of a total 524 Gay Head Indian tribal members listed on the Council's roll, only 78 lived in Gay Head. While some of these could be considered temporarily absent, most lived permanently elsewhere and did not participate on a regular basis in Gay Head events.

[231] Levitas notes that between 1870 and 1895 there were 147 land transactions in Gay Head, 89 of which were made with non-residents (1980:352).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(WTCGH 1983:57) and that certain family lines were disproportionately represented (Ibid:70). Howevermuch this demonstrated Indian dominance of town politics and the importance of kinship, it nevertheless did not address what specifically comprised tribal, as opposed to town, interests and what role Indian officials took in promoting, safeguarding or representing the former. What information was presented regarding this issue was suggestive but fragmentary.

For example, the petition observed that in 1916 and 1926 tribal members overwhelmingly rejected independent proposals, first by the state and subsequently by the federal government, to administer the cliff area as a park.

> The two examples demonstrate the ability of the tribe to use the instrumentalities of the town to protect tribal interests. It is significant that the people at Gay Head did not assert that the taking of the land would be detrimental to the town's interests. Throughout these controversies the issues was phrased in terms of the interests of the Indians of Gay Head (Ibid:72).

In addition, the text noted the second commemoration of Gay Head's patriotism during World War I during which the community contributed the highest proportion of their young men to the war effort.

> In contrast to the first ceremony [in 1918] in which only the smallness of the community was deemed remarkable, the focus in 1933 was upon the town's distinctly Indian composition. The commemorative events of the powwow stressed their tribal identity and included a tribute to the tribal members from Colonel Goethals and a welcoming speech by [Indian] David Vanderhoop "...in the name of POKONOWASSETS Tribe of Massasoit" (Ibid:75, references omitted).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

While these examples suggested that town and tribe were intimately related to one another, at least in the first several decades of the 20th century, they said nothing about how town officials specifically exercised political influence or other authority over tribal members as distinct from non-Indian Gay Head residents. Moreover, neither the historical nor political narrative included any data regarding the functioning of town/tribe government from World War II until the formation of the Tribal Council in 1974. Instead, these two texts focused upon the formation of the Wampanoag Nation, How-was-wee and Pawkunnawakett Councils whose leaders "exercised no authority although they exerted considerable influence in tribe affairs" (Ibid:(c)13). Of what such influence consisted was unclear since no examples were provided by the narrative.

And finally, there were considerable data undermining the assertion that town government and the various councils comprised the political nexus of the tribe. The petition itself noted: "While the tribe had always controlled the town government it had never used its power to solve community problems. Instead, it had relied on voluntary task oriented ephemeral groups" (Ibid (b)13). The ensuing discussion of ad hoc voluntary groups created to perform community services better substantiates an informal tribal political structure than the purported authority or leadership of town officials in tribal affairs. In

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

contrast, several community projects which were favored by formal leaders -- e.g., Indian Day in the 1930's, a Gay Head Indian Museum, and a state audit of town finances -- met with little support, if not outright opposition, by native residents. While leaders need not have been successful in all their initiatives, still, the records of many prominent Gay Head Indians evinced sufficient controversy to question that political authority and tribal influence were wielded exclusively by those holding formal positions in town government or on the various councils. Rather, the data seem to indicate that political influence was much more fluid and acephalous, sometimes manifest in formal office but more often expressed by means of the multiple informal ties that distinguished Gay Headers from their non-Indian neighbors.

In short, the petition asserted that the Gay Head Wampanoags had maintained tribal political influence or other authority over members after 1870 primarily by consistently electing members of selected Indian families into town government. Aside from the ancestry of town officials and their kinship ties among one another, however, there was only sketchy data regarding what these natives did on behalf of their Wampanoag constituents, be they residents or non-residents of Gay Head.

Not surprisingly, the petition's approach to criterion (b), group interaction, was likewise based upon the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

assumption that for more than 100 years after incorporation, the town and tribe of Gay Head were one and the same, asserting:

> [t]he incorporation of the town did little to interrupt the insularity of the community. Social life continued to revolve around the church throughout the latter part of the nineteenth and first half of the twentieth century....It was not just that the church gave moral guidance to the community. The church was the center of social activity (Ibid:(b)9).

The text went on to detail the parties, suppers and dances organized by and held at the local Baptist church which fostered solidarity within the Gay Head community as well as the quilting bees, box lunches, work parties and Indian-only celebration of Cranberry Day by which Gay Headers reinforced social and economic ties from the late nineteenth century through the 1930's. Also discussed was the local development of pan-Indianism beginning the late 1920's and early 30's and overt expressions of Indian identity at powwows and by such organizations as the Wampanoag Nation, How-was-wee and Pawkunnawakutt Councils.

On the one hand, the petition acknowledged that World War II brought significant change to Gay Head, specifically a decline in church interest and activity, the exodus of natives off-island in search of employment, and the influx of non-Indians which began with a trickle in the 1950's and increased dramatically in the 60's and 70's (Ibid:(b)13). On the other, it maintained that tribal members continued to deal with community issues as had their ancestors by forming

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

voluntary groups, but now with an important difference. After World War II, those who cooperated in various community endeavors were more likely to form chartered organizations -- e.g., the Aquinnah Club (1940's), Civic Club (1950), Gay Head Improvement Association (1955), Gay Head Museum Corporation (1974), and WTCGH (1974) (Ibid:(b)13-15). What the text did not mention, however, was that despite such native sounding names as the Aquinnah Club, this and several other of the organizations were neither exclusively organized by Gay Head Indians nor concerned only with Wampanoag interests.

For example, the Aquinnah Club was spearheaded by a non-Indian woman who had married a Gay Header, included members (primarily women) who were non-Indian residents of Gay Head, and focused upon social issues within the community generally -- e.g., repair of the parsonage, bringing electricity to the town. Likewise, the Civic Club focused its efforts upon making several improvements in Gay Head, such as getting running water to the Town Hall and school, and included Indian as well as non-Indian town residents. And, as we have seen, the initiatives of Lorenzo Jeffers -- the politically active Gay Header who was responsible for forming both the Gay Head Improvement Association and Museum, the goals of which were explicitly to preserve and affirm Gay Head Indian identity -- at times proved so controversial that they provoked the rancor of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

fellow Gay Headers, resulting in the disbanding of both organizations. Only the Wampanoag Tribal Council of Gay Head Inc. garnered the enduring and broad based support of Gay Headers. In 1985, that support had already lasted for more than 10 years.[232]

The evidence presented in the petition regarding social relations was also equivocal. On the one hand, the text demonstrated the physical clustering of native residences in Gay Head[233] and the social and economic factors which reinforced the Indians' social cohesiveness following incorporation until 1940. The latter included the geographic remoteness of the town and lack of modern amenities,[234] racial discrimination which barred Gay Head Indians from socializing with Yankee society on the Vineyard and mixed economic strategies which relied heavily upon reciprocal kinship ties for labor, food, housing and fishing equipment (Ibid).

On the other hand, the petition averred that despite changes wrought by World War II -- native out-migration,

---

[232] As of this writing, the Council is ongoing, giving it the longest tenure -- some 18 years -- of any native organization in Gay Head. Not surprisingly, it has also been responsible for initiating and realizing the greatest number of programs and services for its exclusively Gay Head Indian membership.

[233] This by means of a map which indicated where Gay Headers lived in 1983 in relationship to the original homesteads.

[234] Both electric and telephone services were not installed until the 1950's.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

increased tourism and greater involvement in the cash economy -- Gay Head Indians remained socially distinct.

> By using a variety of techniques -- Cranberry Day, pageants, powwows, social associations -- the tribe kept itself separate from non-tribal people resident in the same and neighboring towns (Ibid:78).

Yet the text offered little data to support this contention. Instead, available documentation favored a somewhat different view of the Indians' social interaction following World War II. For example, newspaper accounts indicated that from the late 1930's through mid 1970's, Cranberry Day greatly declined in importance because of a confluence of factors. These included: an especially violent hurricane which destroyed many of the bushes; the emigration of Indians from the town in search of employment; and the increased reliance of natives upon wages rather than local gathering, fishing and hunting to meet subsistence needs.[235] Clippings also noted that while Indian powwows and pageants were held regularly from the 30's through early 50's, they were sporadic occurrences in the 60's and 70's and included non-Indian Gay Head residents as organizers, participants and audience. Similarly, as already noted, many of the voluntary associations that flowered during this period did not seem to demonstrate the clearcut boundedness

---

[235] In contrast with the early 1900's when Gay Head Indians relied economically upon the annual cranberry harvest, natives in the 1980's celebrated Cranberry Day because of its symbolic import as an affirmation of their Indian heritage.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of the Indian community in Gay Head as much as several different approaches to community development and tribal identity. And finally, there was no information, indeed no mention, either in the petition or in the many primary and secondary sources referenced, regarding the relationships between Gay Head Indian residents and non-residents, the latter comprising as of 1985 the overwhelming majority of the Tribal Council's membership.

In sum, the Gay Head acknowledgment petition failed to provide sufficient facts in support of its assertions regarding the continuing political autonomy and social solidarity of the Gay Head Indians after 1870. Although some of the data presented was favorable, in general there was only fragmentary information regarding the Indians' socio-political relations from approximately the 1930's through mid 70's. The text identified several formal instrumentalities of Indian affiliation -- e.g., town government, the church, various organizations, councils and associations -- but it did not provide adequate evidence as to how these functioned in practice to affirm, represent or safeguard tribal interests throughout this period. Moreover, there was some doubt that the town and tribe remained one and the same in the century following incorporation. Upon closer scrutiny of referenced source materials, the data seemed much more ambiguous, tribal functioning far more complex, than presented in the petition

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

narratives.

The problem, though, was less a preponderance of evidence indicating that Gay Headers had failed to sustain tribal relations throughout the 20th century than data and lapses of data which were not easily explained within the petition's framework. According to this framework, tribal identity and functioning could be considered credible only if they remained essentially the same from 1870-1970 with minor adjustments. As discussed, this position was difficult to reconcile given documentary evidence of profound legal, economic, social and political changes experienced by Gay Head residents throughout the course of this 100 year span.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 8

INTERPRETATION

Hazel Elbert's 14 steps outline the formal means by which "unrecognized tribes" petition BAR for federal acknowledgment. The steps require that all petitioners go through the same administrative procedure thus according, at least in theory, that positive and negative findings obtain based upon the substantive merits of each case rather than upon lapses in due process.

In practice, however, economic and political factors influence how quickly and successfully petitioners go through the 14 steps. As noted above, a group's financial resources is one important variable in the process, affecting whether a group can hire outside consultants and how extensively the latter conduct research, including how long they engage in fieldwork and what methodologies they are able to employ.[236] A petitioner's finances also influences the speed and extent to which it is able to

---

[236] For example, quality ethnographic data is generally obtained through several interviews with the same subject in order to develop rapport and to explore more personal or sensitive issues. It is also extremely time consuming (and therefore costly) to search through newspaper clipping files or court records (e.g. probate records, deeds, etc.) in the hope of finding information pertinent to the identity, social interaction, political autonomy and genealogical relations of the petitioning group. Where funds and/or time are limited, such explorations cannot be pursued.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

respond to BAR's requests for additional information.[237]

In the Gay Head case, the Indians were fortunate[238] to have a skilled administrator and grantsman as their tribal chairman who was able to obtain funds from ANA (Administration for Native Americans) for FAP research. Also fortuitous was that there was a substantial documentary history of the group since colonial times, that the materials had physically survived over time and that they were generally accessible, being located among colonial and state records in local and regional archives. This made the task of locating and organizing historical evidence not too onerous when compared with that faced by some "unrecognized tribes"[239] and kept down the overall cost of doing

---

[237] For example, BAR requested that the Houma of Louisiana provide more information on their contemporary community than was included in their petition. The group initially responded by conducting additional research at the cost of some $10,000, the results of which were still deemed inadequate by the BIA. The Houma strongly objected to BAR's requests for more data, stating that conducting yet another ethnographic survey would impose an unsupportable economic burden upon the tribe's limited resources.

[238] Not all groups have personnel with these skills and this can prove a genuine handicap to their petitioning efforts. Without a grant, it is difficult for a group to hire outside consultants to assist in amassing and organizing the petition data.

[239] For example, some of the groups in the South face a much more difficult job of demonstrating their historic origins and tribal autonomy since they had no unique status as individuals or as a group under colonial or state law. Rather, petitioners' ancestors could be referred to as "free persons of color," "mulattoes," "creoles" or even "whites," thereby making the task of identifying the group over time a difficult one.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

historical research.

Although the Tribal Council was not strapped for research funds, this does not mean that fiscal considerations were unimportant in the Gay Head case. On the contrary, for, as long as the dispute over the common lands remained unresolved, all land titles remained clouded in the town and economic development, non-existent. Financially, the Wampanoags could not afford to remain in legal limbo but needed to go through the FAP process as expeditiously as possible; their present and future opportunities depended upon it.

In turn, from the federal government's point of view, there were powerful reasons not to grant the Wampanoags federal acknowledgment. Undeniably a successful petition would strengthen the tribe's legal position vis-à-vis the common lands. According to the proposed settlement, the federal government would foot at least part of the bill for restitution, with the State of Massachusetts kicking in its portion. In addition to being forced to spend several million dollars to buy land and hold it in trust for Gay Head Indians, the federal government would also have to provide services for the newly recognized tribe -- e.g., health, housing, administrative support etc. -- in fulfillment of its trust obligations. Thus, while the Gay Head Wampanoags only numbered a few hundred people, the cost of federally acknowledging the group began at several

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

million dollars.[240]

Finally, since federal acknowledgment would strengthen the Tribal Council's legal claim to the common lands, there were also pressing financial reasons why the Taxpayers Association opposed the Gay Head petition. Not only did the Association try legally to prevent the WTCGH from proceding with the acknowledgment process until after the proposed settlement was ratified, but it also submitted its own ethnohistorical account to BAR once the Council's petition went on active consideration.[241]

If financial considerations throbbed insistently throughout the FAP process, so too did political factors spur the Tribal Council from one step to the next. This is not to say that the Gay Head Wampanoags' progress was smooth, only that politics fueled the momentum, albeit unevenly. In the previous chapter, we explored the events leading to the submission of the Gay Head FAP petition and to BAR's preliminary negative determination of criteria (b) and (c). According to BAR, its own independent research

---

[240] It is difficult to estimate how much Gay Headers would ultimately cost the federal government if the tribe were federally acknowledged. Much depends upon the course of federal Indian policy generally and what kinds of services the government would provide its Indian wards in the years to come.

[241] Not surprisingly, the focus of this narrative, like the Defendant's testimony in the Mashpee case, was upon how assimilated Gay Headers had become over the years, being indistinguishable socially and politically from their Yankee neighbors.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

turned up information which was at odds with the petitioner's case. But was it, as BAR contended, specific data which were problematic or was it instead how the Branch interpreted the facts that was at issue? In other words, was it a case of BAR seeing only the hole and the Tribal Council only the donut, or were there other issues at stake regarding what was required by criteria (b) and (c)? To answer these questions, let us turn to the final steps of the FAP process, concentrating upon the Tribal Council's response to the "Proposed Finding" and, in turn, upon the federal government's reaction to the Council's "Critique."

11. Petitioner and interested parties have 120 days to submit comments to rebut or support proposed finding.

The most pressing reason for the Tribal Council's pursuit of status clarification through FAP was that it would go a long way toward ensuring legal control of the common lands. This is not to deny that federal recognition was also valued for symbolic purposes -- i.e., to affirm that Gay Headers were indeed Indians rather than "of Indian descent" and that as a tribe the Wampanoags had endured (resisted) endless attempts to deprive them of their rights. Nor is it to ignore the practical benefits that Gay Headers believed went along with recognition, such as eligibility for special health and education benefits and exemption from certain forms of taxation. Rather, it is only to emphasize that, for most Gay Headers, to gain federal acknowledgment

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

while losing control over the tribe's common lands would have amounted to a Pyrrhic victory.

That Gay Headers participated in the FAP process primarily to secure their historic tie to, and identity with, the land is critical to understanding what actions they took in response to the proposed negative finding of the BIA. Before discussing these, however, two points regarding the Tribal Council bear emphasizing.

First, government regulations require that a FAP petition be approved by the petitioning group as a whole prior to its submission. In Gay Head's case, this meant that the Tribal Council officers formally "signed off" on the petition before presenting it to the BIA. More significant, however, is that it was the Tribal Council leadership who hired outside consultants and who participated in and facilitated the petition research itself. It was also Tribal Council officers who retained the ultimate authority and power to review the document prepared on the tribe's behalf, to submit data collected by researchers and to withhold information should they wish to do so. In short, in its final form, the submitted document reflected the position of the Tribal Council leadership, formed in consultation with NARF and the principal petition researcher, vis-à-vis Gay Head history and the FAP

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

criteria.[242]

Second, even though the Tribal Council began preparing a FAP petition in 1982, its leadership (under advisement from its legal counsel), did not believe that it would ultimately be necessary to complete the petitioning process. Rather, legislative recognition was the preferred strategy since the mid 1970's and the one actively pursued up until the federal government rendered this a virtual impossibility in 1985. Only when this option no longer existed did the Tribal Council request that its petition go on active consideration, submitting a petition document as it had been prepared up until that point.

Together, these points greatly informed how the WTCGH conceived of its options upon publication of the BIA's "Proposed Negative Findings" in late June 1986. Since control of the common lands was the ultimate goal of the Tribal Council, a negative determination regarding federal acknowledgment by the BIA would effectively quash the

---

[242] In theory, the Gay Head petition could have been read by any tribal member willing to take the time and energy necessary to make a trip to the Tribal Council office. Yet, in 1987 when I returned to Martha's Vineyard, I found no one -- either Indian or non-Indian -- who had personally read the document who was not a Tribal Council officer. Moreover, tribal members evinced little knowledge about the FAP regulations themselves, indicating that, in general, the process of preparing and submitting a petition -- including the arguments and data set forth -- was little known or understood by those not actively involved. Thus, for all intents and purposes, it was the Tribal Council leadership, as opposed to its general membership, who bears the lion's share of responsibility for what was presented or not in the Gay Head petition.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

proposed settlement worked out with the Taxpayers Association as well as any chance of a favorable judgment in a possible lawsuit pursuant to the 1790 Trade and Non-Intercourse Act. Disastrous for Gay Headers in general, it would also signal a humiliating defeat for the "local" Gay Headers who by then dominated the offices of the Tribal Council. Not only would they have failed to secure federal acknowledgment for the tribe, but the negotiated settlement package would immediately disintegrate as well. Legal control of the common lands -- which the "cosmopolitans" had spearheaded in the mid 1970's -- would become a virtual impossibility.

In addition to being a requisite for the Indians' land claim, federal acknowledgment was also necessary in order to refute authoritatively the informal and formal charges lodged by many non-Indians that Gay Headers were not really "Indians" but instead of "mixed" ancestry or "of Indian descent" and that they no longer comprised a tribal entity. More than pride was at issue.

Over the course of the 10 or more years during which the Gay Head Wampanoags pursued their land claim, everyone involved in the suit had become more politicized, their respective positions calcifying into "sides" and public stances. Even the "local" Gay Headers, whose position was generally more parochial than that of the "dissident" faction, became more cosmopolitan, if not activist, over

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

time. By the early 1980's, the Tribal Council leadership was not only concerned with securing control of the common lands, but was actively seeking the rights, services and immunities of federal recognition. Administration of such services as Indian health and education benefits, tax exemptions and funds for economic development would secure the Tribal Council's leadership role vis-à-vis its membership as well as provide concrete advantages to individual Indians.

In short, in the more than ten years since it was first identified as a goal of the Wampanoag Tribal Council, federal acknowledgment had ballooned in significance. No longer was it sought merely to preserve what was; rather, by the mid-80's it was seen as a necessary means of establishing a firm foundation for the tribe's future. As most Gay Headers saw it -- whether of a "cosmopolitan" or "local" orientation -- the future of their tribe hung in the balance. Title to the common lands, to which federal acknowledgment was inextricably tied, was the critical issue, without which the Gay Head tribe could not long survive. All this is to say that, in June 1986, the stakes were high for the Tribal Council. Further, the clock was ticking.

According to the FAP regulations, the Tribal Council had 120 days to respond before the proposed finding became a

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

final determination.[243] Practically speaking, the organization had three options. First, it could launch a last gasp effort at congressional recognition, hoping to garner enough political support in order to bypass the administrative procedure and its stringent criteria completely. Second, it could attack BAR's preliminary findings point by point, demonstrating that they were either inconsistent with past agency determinations or that they were unsupportable, given the available evidence. The aim of this approach would be to establish that BAR was either negligent or biased in its evaluation of the data, thus forcing a reversal of the finding within the 120 day period or subsequently upon appeal in the courts. Finally, the Tribal Council could submit to the BIA substantially new evidence which would address the petition's salient deficiencies, thus serving as the foundation of a positive final determination. Represented by NARF, the Wampanoag Tribal Council of Gay Head, Inc. pursued all three strategies.

The Legislation Alternative

As discussed above, gaining congressional recognition was hardly a new option but instead had been assiduously followed since the mid 1970's by both factions of the Tribal

---

[243] The Tribal Council requested and received a two month extension.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Council during their respective tenure and by the different legal counsel from NARF who worked on the Gay Head case.[244] Even after the petition went on active consideration, the land settlement and, concomitantly, congressional tribal recognition continued to be a political football in both houses of Congress. On April 9, 1986, some ten months into the petition evaluation process, the Senate Select Committee on Indian Affairs heard testimony from all parties to the Gay Head law suit: the State of Massachusetts, the BIA, the Taxpayers Association, Gay Head selectmen, Tribal Council officers as well as dissident Gay Head Wampanoags. When the "Proposed Negative Finding" was published in late June rendering the future of the settlement package especially bleak, the Tribal Council then appealed to the House Interior and Insular Affairs Committee to pass legislation recognizing the Gay Head tribe, a move which, if successful, would provide the group with the necessary legal standing to pursue their land claim.

At a public hearing of the Committee, Ross O. Swimmer, then Assistant Secretary Indian Affairs, testified against the proposed legislation, explaining that the Bureau's

---

[244] Tom Tureen resigned from NARF after sheparding through a negotiated settlement between the Passamaquoddy Indians and the State of Maine. His new job included providing legal counsel for the Passamaquoddy Indians who now had the daunting task of managing the millions of dollars the tribe had received in restitution of their land claim. With Tureen's resignation, Henry Sockbeson took over the Gay Head case at NARF.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"concern and objection to the bill is that we can't pay out on a claim that's invalid" (as quoted in the Cape Cod Times June 27, 1986). At the same hearing, congressmen heard from members of the dissidents as well as from those of the Tribal Council. Not surprisingly, the former reiterated their strong opposition to the settlement and to what they saw as the Council's usurpation of authority to negotiate on behalf of all Gay Head Wampanoags. In contrast, Council President Gladys Widdis made an emotional plea to the House Interior and Insular Affairs Committee, affirming that Gay Head Indians indeed comprised a tribe and calling the BIA's preliminary finding "confusing and utterly unrealistic." She explained:

> Things have been passed down to me orally. Most of our history is oral... It is not written down. It has begun to get written down, because we realize it's important to some people....
>
> Today you have a small group that represents over 500 people from Gay Head. We're asking you to clarify our status as a tribe -- not because we need it, but because you need it. We know we're a tribe. We act as a tribe. We've always been a tribe. And we will continue to be a tribe.... If you're looking in Gay Head for big pow-wows, or big celebrations every year, we don't do things that way, and I don't apologize for that. We do things our way, and we continue to do things our way. We have to learn to write things down, but it's not for our benefit, it's for yours.
>
> If you want the definition of a tribe, your word tribe is not right. I don't know what I can say to you to change your thinking. We think we have submitted a very comprehensive petition, and I don't mind telling you I resented a lot of the questions we had to answer for that petition (Vineyard Gazette July 1, 1986).

Several points are noteworthy regarding President Widdis's testimony. First, she asserted that Gay Headers

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

were a tribe despite BAR's evaluation of the data and should be accorded federal acknowledgment. That is, if there was a problem, it was not with the identity, autonomy and continuity of the Gay Head tribe, but rather with the FAP regulations themselves and their evidential requirements. Second, she took issue with the FAP criteria which, as interpreted by BAR, seemed to require more stereotypical manifestations of tribal identity than were regularly expressed by Gay Headers.

These arguments were hardly surprising, given the difficult situation in which the Tribal Council found itself. Never before had BAR reversed itself from the proposed finding to final determination and prior legislative initiatives regarding Gay Head recognition had been vigorously opposed by the Republican Administration. The Tribal Council thus had few alternatives than to try to convince the Democratic congressional majority that, in Gay Head's case, the FAP process itself was inappropriate, if not flawed. It was logical for President Widdis to affirm personally the tribal identity of the Gay Head Wampanoags in the hope of persuading committee members to ignore the BIA's preliminary negative finding. Yet the efficacy of this tactic, like the previous legislative attempts to obtain federal recognition of the Gay Head Indians, was undercut by the very nature of the political arena in which the Gay Head case had come to be negotiated.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Initiated on the heels of the landmark Passamaquoddy v. Morton (1975) decision, congressional recognition of the Gay Head tribe was sought by the Tribal Council as part of a negotiated out-of-court settlement package. Ten years later, however, anti-Indian backlash and the election of a Republican Administration would make the legislative route infinitely more hazardous. While the Mashentucket Pequots of Ledyard, Connecticut and the Houlton Band of Maliseets of Houlton, Maine were two previously "unrecognized tribes" who did succeed in obtaining legislative status clarification in the early 1980's, their situations were not analogous to that of Gay Head.[245] Both the Pequots and Maliseets were located in rural, economically depressed areas where the granting of status recognition and, in turn, federal trust lands to a small group of Indians was thought to have little impact upon non-Indian interests. It therefore cost legislators relatively little in political terms to pass recogniton bills for these tribes since there was only minor non-Indian opposition to them.

The Gay Head case, in contrast, succeeded the much publicized Mashpee v. New Seabury (1978) case and similarly involved some very valuable real estate located in the backyard of rich and powerful non-Indians. In both of the Wampanoag cases, local opposition was well organized and

---

[245] NARF had successfully effected both changes in status and clearly believed that it could do the same for Gay Head.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

financed. In addition, although the the congressional sponsors of the Gay Head settlement and recognition bills were themselves experienced in the politics of legislation, they were also controversial figures in national politics. By the 1980's, the Gay Head case was too politically hot to be quietly pushed through Congress in the latter's final days before year-end recess and thus it became a casualty of partisan politics. The Tribal Council's strategy, forged as it was during a more favorable political era, held scant hope of success in 1986. At the same time, since the Council leadership had invested so much effort (both publicly and behind the scenes) in seeking legislative recognition, it could not easily abandon the tactic without some loss of face. Although the Tribal Council continued to press for a legislative solution, prudently, it undertook other actions as well.

Written Rebuttal

The Tribal Council's written response to the Proposed Finding was a multipronged attack: (1) upon BAR's research methodology; (2) upon the qualifications of BAR staff; and (3) upon the interpretation of specific data and its significance vis-à-vis FAP regulations. Briefly, the arguments were as follows.

(1) Methodology The Tribal Council harshly criticized the BAR team (one anthropologist, one historian, one

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

genealogist) for spending a scant ten days on Martha's Vineyard doing archival research, conducting interviews and attending local events (e.g., Cranberry Day and a church service at the Gay Head Baptist Church). Not only did the Council contend that the time was inadequate to collect and corroborate evidence, but that those whom the BAR staff interviewed were not representative of the council membership.

While the BAR staff had interviewed several of those suggested by the Tribal Council, government researchers had also talked with members of the "dissident" Gay Head Indians as well as with some individuals chosen at random from the Tribal Council roll who did not live in Gay Head proper. Not surprisingly, individuals from the latter two categories had not evinced the strong support and involvement with Tribal Council affairs and issues as had Council board members generally. For example, some of the dissidents had gone as far as to say that they did not participate in any Council affairs and that, because the organization did not represent their interests, they had resigned from it. In addition, some non-resident Gay Head Indians had disavowed any knowledge or interest in Tribal Council affairs, stating that they did not even know if they were listed on the membership roll.

As presented in the "Proposed Finding," such statements seemed to carry significant weight since they were not

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

countered with a plethora of quotes attesting to members' whole-hearted participation in and concern with tribal affairs. The data thus appeared extremely damaging to the petition's assertions that, socially and politically, Gay Head Indians functioned as a distinct and cohesive entity. It was for this reason that the Tribal Council tried to impugn the statements, asserting that the sentiments were not representative of tribal membership generally. Yet levelling such criticisms involved some risk.

To begin with, the BIA is not obligated to search for evidence in support of a petitioner's case. Rather, its fieldwork is undertaken only "to verify, deny or supplement the factual information contained in the petitioner's documentation at the discretion of the Acknowledgment staff" (BAR 1987:4, emphasis added). That the BIA came upon information which was odds with the Gay Head petition was not the fault of BAR staffers. Rather, the petition itself should have provided a paradigmatic framework which could have accommodated (explained) the range of variation in the field.

As previously noted, although petitioners are not required to counter views, information or theories discordant with those in their petition, they would be wise to provide some insulation nevertheless. If they choose to present too one-sided a view of their history, ignoring ambiguous data and/or alternative interpretations, then they

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

run the risk that the BAR staff may not contextualize the information it does turn up in a way that is not damaging to the petitioner's case. This was precisely the problem with the Gay Head petition.

In presenting such a homogeneous view of Gay Head tribal identity, the petition downplayed the variation in members' identification with, participation in, and knowledge about tribal affairs, including those of the Tribal Council itself (tribal affairs and Tribal Council affairs not being defined as synonymous by all Gay Headers). When the Acknowledgment team discovered cracks in the we're-all-one-happy-tribe façade, this necessarily affected the persuasiveness of the petition narrative regarding social and political relations. That is, the narrative had not provided a description of tribal identity flexible enough to accommodate the existence of some temporarily disaffected council members as well as those for whom lack of Tribal Council participation was not antithetical to tribal identity and affiliation. The result was that when such attitudes were uncovered, they seemed at odds with tribal identity rather than variations upon a theme.

In addition, the petition's argument was further undermined by the fact that, upon closer examination, some of its evidence regarding social relations among tribal members was more ambiguous than presented in the narrative. For example, during their site visit to Gay Head, BIA

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

observers found that services at the Gay Head Baptist Church were attended only by some 19 older Indians and non-Indians, including six non-Indian visitors who were also present. After refreshments were served, the congregation quickly dispersed following a brief period of greeting and polite converstion (BAR 1986:59), indicating that the church no longer served a "socially integrating function" as it had in the past (Ibid). And, when BAR researchers attended the celebration of Cranberry Day, they witnessed 20 Gay Head Wampanoag school children picking berries and listening to a talk about Gay Head history. Only 10 Indian adults were present, none of whom were from off-island. The evening's activities (a presentation of Gay Head memorabilia, photos, videos and myths at Town Hall) were attended "largely by those who serve[d] on the council board of directors, their spouses and children" (Ibid:60), a fact which likewise cast some doubt upon the social import of the holiday for the tribe at large. In the absence of other overt expressions of social interaction among Gay Headers, the low turnout at church services and on Cranberry Day appeared detrimental to the petition's argument.

On the one hand, the Tribal Council was correct in pointing out that the handful of divergent views of tribal membership collected by BAR was not as representative as implied. On the other, the Council must shoulder some responsibility for not having provided an explanatory niche

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

for such data, however unrepresentative it may have been of tribal membership and functioning generally. Further, while the Tribal Council was also justified in criticizing the short period of field research by the BAR team, it must be noted that these investigations were never designed to discover or reveal new data, though of course they can. Aimed instead at verification, substantiation and corroboration, BAR's field research can do little more than highlight concordance or inconsistency between field conditions and their representation by petitioners. That the Tribal Council criticized BAR for not turning up representative data was thus a dangerous maneuver since, with the burden of proof on the petitioner, it merely highlighted the Council's own inadequacies in submitting an evidentially solid and theoretically unassailable petition.

Equally problematic was the Tribal Council's attack upon specific phrases in the "Proposed Finding" -- e.g., whether BAR's statement that outmarriage continued to be the "norm" could be statistically substantiated and whether data contained in one newspaper article was sufficient to ground or refute an argument about social relations. The main trouble with these criticisms was that they more reflected a lawyerly concern with establishing "probative facts" -- i.e., those pieces of verifiable information which could be used to prove something -- than they did an understanding of the nature and limits of ethnographic and historical

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

analysis. That is, the Tribal Council's "Critique" sought to apply jural rules of evidence to ethnohistorical scholarship, a mixing of paradigms which was bound to generate more heat than light.

In law, many concepts have relatively fixed and unambiguous definitions (e.g., murder vs. manslaughter, robbery vs. burglary) and rules for the presentation of evidence (e.g., hearsay is inadmissable). These rules of legal analysis have either been specifically codified or else they have been decided and honed through case law. This is not to say that there exists no room for argument and interpretion.[246] Indeed, the overflowing court dockets are themselves testimony to the negotiability and imprecision of legal concepts.

However, anthropological and historical analyses depend much less upon such widely disseminated rules and definitions as they do upon more eclectic, varied and fluid methodologies and definitions. It is not that these disciplines lack standards; rather it is that, for anthropologists and historians, a cogent and persuasive analysis may be obtained by several different methods and by the gathering of many different kinds of information. Data are less seen as absolute, unvariable truths -- i.e., the "probative facts" of which lawyers are so fond -- than they

---

[246] See generally Chapter 2 for discussion of the Critical Legal Studies (CLS) critique of legal positivism.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

are context-based pieces of information, the meaning and import of which are to be determined against other data and according to the research question at hand.[247]

When anthropologists and historians conduct research, they do not construct an entire theory based upon a single article, account, record or datum. Rather, wherever possible, good scholarship demands that information be verified and corroborated from as many sources as practical. Oftentimes, however, the historical record and informants are not as obliging as to provide such verification. If only one written source exists, the question then becomes what are the possible explanations for the data based on what is known about the period in and circumstances under which the information was recorded, produced and/or preserved. Similarly, the information offered by a single informant must be evaluated within the limitations of the individual's own history and past and present relationships. While more data is indubitably preferable to less, ultimately, the significance of particular information

---

[247] I am well aware that for those whose view of anthropology (and perhaps of history as well) is staunchly positivist, my characterizations may seem heretical. While my own theoretical position is that anthropology, history and law are all interpretive endeavors, nevertheless I do feel that there exists sufficient paradigmatic divergence among them to warrant some gross generalizations about the respective approaches. The characterizations are outlined merely to call attention to the very different working assumptions regarding facts and their presentation and interpretation across disciplines. For a provocative discussion of the differences between anthropology and history within a legal arena, see Clifford 1988.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

depends upon how much is known about its context -- i.e., who produced it, when, for what purposes, why was it preserved, etc. Conversely, quantity per se does not automatically make something "true" for there may be pressing reasons why there exist numerous accounts from one perspective but none from another available in the historical and ethnographic record.[248]

Thus, for the Tribal Council to criticize the BAR staff for citing one article in support of some of its interpretations was, by itself, a hollow argument since anthropologists and historians routinely quote a single source to make or illustrate a point. The issue was not so much whether government researchers had relied on a single source, as much as: (1) had they knowingly ignored other contemporary sources which presented contradictory evidence; (2) had they cited data out of context, thereby obfuscating or changing its meaning; and, very importantly, (3) had they set forth an interpretation which was not supported by data presented in other sources -- i.e., it was at odds with the preponderance of evidence.

Had the Tribal Council demonstrated that the BAR staff had committed any of these transgressions of anthropological and historical scholarship, then their remarks would have had more than rhetorical bite. As presented, however, the

---

[248] For an extremely insightful discussion of the problems of representativeness in historiography, see Davis and Lyttle 1975.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

methodological criticisms were in danger of ricocheting since the petition narrative itself contained numerous instances where single sources were used to substantiate a point and where generalizations glided over issues and time periods without any documentary, never mind statistical, support. Thus, although the Tribal Council's "Critique" included an attack on BAR's historical and anthropological methodology, it failed to demonstrate that the researchers had acted unprofessionally within the parameters of their respective disciplines. At best, the Tribal Council's criticisms served to highlight the discrepancy between what was "probative" in a court of law and what comprised evidence in anthropological and historical analysis. Within the adversarial arena of the FAP process, however, such theoretical insights were lost upon the parties concerned.

(2) Professional Qualifications In addition to attacking BAR research methodology, the Tribal Council's "Critique" also took aim at the professional credentials of BAR staffers, implying that their publication records and, in one case, recent inclusion on the BAR's payroll undermined the researchers' competency to perform their professional duties. Although at one point NARF sought to obtain the field notes of government researchers, apparently in an attempt to further discredit the team's research, this maneuver was unsuccessful leaving the strident accusations

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

without much substantive force. Indeed, the legal counsel for the Taxpayers Association, James L. Quarles III of Hale and Dorr, declined to even address the Tribal Council's attacks, stating:

> ...we are struck by the inflammatory accusations of bias, improper credentials, qualifications, methodology... [N]either the substance nor the tenor of these accusations and personal attacks requires any response (Quarles 1987).

While Hale and Dorr dismissed the Tribal Council's pointed comments as unseemly, one must keep in mind that, in the firm's successful legal representation of the defendant in Mashpee v. New Seabury (1978), its own lawyers were not above making similarly "inflammatory accusations" during the trial, one of the most common of which was its repeated reference to the "so-called Mashpee tribe." That Hale and Dorr took a lofty attitude in the Gay Head case may be explained by the fact that its client's position seemed relatively secure at that point, with the BIA having published a "Proposed Negative Finding" and there being no precedent as yet established for the Branch reversing itself between the proposed finding and final determination.

For its part, BAR commented briefly in the "Final Determination" upon the tenor of the Tribal Council's response, noting that

> Most of the petitioner's rebuttal (111 of 147) pages) consisted of ad hominem arguments aimed at discrediting the Acknowledgment staff and its methodology, including charges of incompetence, racism, and a prejudice against the petitioner (BAR 1987:2).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

BAR went on to imply, though did not explicitly state, that these charges carried little if any weight in its reevaluation of petition evidence. Whether this in fact was the case remains unknown except to those BAR staffers directly involved. What is known, is that BAR spent most of its energies in the "Final Determination" discussing specific data and their significance vis-à-vis FAP criteria, effectively steering attention away from the issue of personal prejudice, bias and competence.

Although the personal attacks on the Acknowledgment staff ultimately lacked substantive clout, nevertheless they cannot be summarily dismissed. Rather, they are a common trial strategy in which lawyers attempt to discredit the credentials of their opponent's expert witnesses, thereby casting doubts upon the latter's testimony. What made the tone of the "Critique" so remarkable in the Gay Head case was that, at this stage, the FAP process was not a litigative proceeding but an administrative one, with BAR's role in theory that of an objective reviewer.

But, however laudable this goal may be and however diligently BAR may or may not perform its professional responsibilities, the fact remains that petitioners themselves, as well as many outside the Bureau, do not believe that the BIA is without a vested interest in the decision-making process. Not only has the Bureau had a long history of initiating policies to erode tribal sovereignty

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

generally, but, in many cases, it is also the agency responsible for denying the rights of specific Indian groups, causing these "unrecognized tribes" to seek legal redress through the FAP process. Many petitioners who have been denied Bureau services over the years now find themselves having to petition the same agency, albeit a new branch of the organization, for a change in their legal status. Moreover, they must do so following regulations which the Bureau itself, rather than some outside agency, drew up and administers. It is hardly surprising that petitioners are skeptical about the purportedly impartial role of the Bureau in the FAP process. Indeed, "unrecognized tribes" are wont to see the BIA (and by extension BAR) as a gatekeeper with the authority and power to prevent additional Indian groups from being federally recognized. Petitioners conceive of BAR less as an impartial judge of the facts and more as an adversary with extensive powers and almost unlimited resources.

Thus, on the one hand, that the Tribal Council's stance was polemical was understandable since it was one of the principal interest groups in the petitioning process. On the other, what turned heads in and outside the Bureau was that both the tone and substance of Gay Head's "Critique" made explicit the petitioner's adversarial stance via-a-vis BAR, as opposed to other interest groups, forcing the Branch to defend itself not merely on evidential issues but also

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regarding the methodology, qualifications and ethics of the staff itself. Within the administrative framework of FAP, such attacks were, up until then, unprecedented. How effective they proved was another matter.

Understandably, the Tribal Council chafed at the extraordinary discretionary power of the Acknowledgment staff to interpret the data and to assess its import vis-à-vis the regulations. However, in focusing narrowly upon the credentials and motives of individuals on the BAR team, the Council's "Critique" made it appear as if the problem stemmed from specific persons and their relationship to the Gay Head case, rather than being generic to the FAP regulations and to the relationship between a petitioner and BAR. The result was that basic questions regarding what research methodologies and theories were appropriate to BAR's research and its evaluation of data were eclipsed by the Tribal Council's personalized attacks upon the Acknowledgment staff. Although the latter might have carried some weight before a jury in the drama of a trial setting, their impact was necessarily diminished when submitted in written form to BAR itself which, after review, prepared its own measured response and countervailing documentation. Thus, howevermuch the personal jabs expressed and engendered political tension between BAR and the Tribal Council, tension which may indeed have played some behind-the-scenes role in BAR's final determination,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the jabs nevertheless did little to resolve complex issues regarding the nature of acknowledgment research and analysis. Key among these were: what research methodologies are appropriate to the evaluation process? Specifically, how much fieldwork is necessary, feasible and cost effective to "verify and extend" a petitioner's case and how much weight is to be accorded data gleaned from documentary and non-written sources (e.g., from oral interviews and through participant observation)?

(3) Substantive Issues The third offensive tack pursued by the Tribal Council focused upon the representation and interpretation of specific data by the Acknowledgment team. Several issues received especially detailed attention.

(a) Race: Unlike the petition narrative which noted only briefly that some non-Indian seamen married into the Gay Head community in the 18th and 19th centuries, the "Proposed Finding" explored in some depth the extent of Gay Head exogamy throughout the post-contact period. The report not only set forth the national and racial origins of the seamen who married Gay Head women throughout the 18th and 19th centuries, but also quoted white officials who repeatedly commented upon the mixed racial ancestry of Gay Head inhabitants and state documents which referred to the latter as the "Indians and People of Colour of Gay Head" during this period.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Of particular relevance to the Indian identity and nature of social community, Gay Head's mixed ancestry after incorporation in 1870 was also examined by BAR. The "Proposed Finding" discussed native and non-native perceptions of Gay Head inhabitants and quoted from both primary and secondary sources.

> [T]he Indian blood has been almost washed away by the mixture of the negro and white races (as quoted of Shaler [1874] in BAR 1986:31).

> [In the 20th century, m]ost Gay Head Indians preferred to identify themselves as Wampanoag descendants and were publically [sic] referred to as Indians by most other island residents, although many tended to perceive them as being Black rather than Indian. Because the Gay Head Indians were regarded as subordinate to Whites in the social hierarchy of Martha's Vineyard, they became the subject of racial prejudice and segregation (BAR 1986:43, references omitted).

In its "Critique," the Tribal Council strongly objected to the "Finding's" detailed discussion and use of quotations regarding the Wampanoags' mixed ancestry, averring that the repetition of racial terminology (e.g., "Indians and People of Colour") was itself "racist." By this it maintained that BAR's elaboration of the Black or Negro ancestry of Gay Head Indians was highly prejudicial, aimed at undermining the "Indian" character of the community. The implication was that, had the non-Indian ancestry included only whites, it would not have figured so prominently in the "Proposed Finding."

In response, BAR argued that

> ...the racial identifications in the reports merely

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> reflect a unique historical record. Moreover, it cannot be demonstrated that such terminology was used in a discriminatory way or was derogatory or pejorative in its use, meaning, or intent....[T]he technical reports only probed the possible origins and ramifications of these racial identifications in order to present enough information on which to base a decision of whether or not the petitioner met criterion 83.7(a). After evaluating all the data, it was concluded that the petitioner had been identified sufficiently from historical times until the present as an American Indian entity (BAR 1987:3-4).

In clarification, several points should be made regarding BAR's discussion of Gay Head ancestry. First, it was entirely appropriate for the Acknowledgment team to examine the nature of Gay Head identity over time. That Gay Head Indians married non-Indians was not problematic as long as it could be demonstrated (1) either that the natives exercised some political authority and influence over the non-Gay Head Indian spouses within their midst or that they excluded the outsiders socially and politically from the tribe; and, (2) that children of mixed marriages were socialized into a Gay Head Indian identity, thus perpetuating the tribe. There was not only a substantial amount of positive evidence regarding (1) and (2) before 1870, but these data were readily set forth in the "Proposed Finding."

Second, although BAR's "Genealogical Report" meticulously analyzed the degree of Indian ancestry of Tribal Council members, it only addressed the general pattern of exogamous unions. For example, in an analysis of the marriage patterns of Gay Head Indians in 1849, 1871 and

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

from 1871-1930, it distinguished "Marriages between Gay Head Indians," "Marriages with other Indians," "Marriages with non-Indians," "Marriages with Foreigners," and "Spouses whose origins [are] undetermined" (BAR 1986:95). That is, native marriages with whites were not distinguished from those with Blacks thus undermining the Tribal Council's contention that the Wampanoags' Black or Negro ancestry was given undue attention in BAR's examination of Indian identity and descent.

Third, if the BIA's repeated discussion of the mixed ancestry of Gay Headers was indeed offered to refute the petitioner's position that the group had been continuously identified as Indian throughout history, then why did the Acknowledgment team conclude that these Wampanoags had satisfied FAP criteria (a) Indian identity and (e) Indian descent? In short, the Tribal Council's charges of intentional prejudice and racism could not be sustained based upon a substantive evaluation of the "Proposed Finding." This does not mean, however, that the Council's criticisms were entirely without merit. Let us take a closer look at the presentation of data in the "Proposed Finding."

While the BAR team did need to detail the nature of Gay Head identity over time (including changes therein), it is important to note that when the "Proposed Finding" included quotes from historical documents pertaining to the Indians'

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

mixed ancestry, it generally did so without discussion of the author's relationship to the Indians and without analysis of the terminology as it would have been used and understood at the time. For example, such terms as "Indians and People of Colour" were quoted in the "Finding" without explaining the socio-political foundation which gave meaning to the term at the time it was employed by state officials. Yet, without such contextualization of the attitudes and assumptions embodied in the use of these terms, the latter's significance as evidence cannot be properly assessed.

In the absence of important background information about the source materials themselves, the modern reader who does not have an intimate knowledge of the historical period under scrutiny is apt to project current meanings of the phrases into the past. The result is that the meaning of the data cited may be misinterpreted, with innuendoes left trailing that are indeed misleading if not completely inaccurate.

In failing to explain historical terminology, the BAR team set forth a concept of Gay Head Indian identity which was based upon Wampanoag ancestry but was nevertheless considerably more shaky regarding socio-cultural relations. That is, the repeated references to the mixed ancestry of Gay Headers did not affect the final evaluation of Indian identity and descent (respectively criteria a and e) but they did have a <u>residual</u> effect upon the issue of group

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

interaction (criterion b) and political autonomy (criterion (c).

For example, because the BIA did not explain white observers' repeated attention in historical documents to the amount of Indian "blood," the quotes regarding the Wampanoags heterogenous ancestry were apt to be accorded more weight than in fact was warranted. Like the conflation of race, language and culture so common in mainstream America in the late 19th and early 20th centuries, such attitudes on the part of whites were more indicative of the writers' own racial biases and prejudices than they were informative about Gay Head Indian social relations during this period. Unexplained, the whites' statements about Gay Head ancestry implied that the Wampanoags were somehow not fully Indian. This was implicitly reinforced through BAR's repeated reference to Gay Headers as "Indian descendants" (1986:31, 32, 33, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47), a term which connotes that the individuals are descendended from Indians rather than are themselves Indians.

The difference is subtle but critical. One would not, for example, refer to naturalized American citizens as "American descendants" but instead as "Americans." To refer to Gay Head Indians as "Indian descendants" is to insinuate that the present individuals are connected genealogically to the aboriginal Wampanoags but are not necessarily "Indian"

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

socially or politically. In contrast, to call Gay Headers "Indians" is to make an explicit statement about their ancestry as well as present affiliation and identity.

In this regard, it is important to note that the "Proposed Finding" did not use the term "Indian descendants" in reference to Gay Head natives before 1870, but instead spoke only of "Gay Head Indians," "Wampanoags," and "Indians." While these latter terms also appeared in the discussion of post-incorporation Gay Head, the term "Indian descendant" was now included on almost every page of the text dealing with this later period, effectively coloring the entire tone of the discussion. By the time the reader moved from the BIA's ethnohistorical account to the "Anthropological Report," doubts regarding Gay Head Indian social and political relations were already sown. It should hardly prove surprising that the ambiguous data regarding group interaction contained in this report provided fertile soil in which these doubts could germinate.

While there is no evidence that the Acknowledgment team was motivated by intentional and conscious racism as the Tribal Council alleged, nevertheless the way in which historical terminology was cited without adequate contextualization, constituted a serious deficiency in the BAR's presentation and discussion of the facts. Likewise, there was no historical or ethnographic justification for BAR's reference to Gay Headers as "Indians" before 1870 yet

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

as "Indian descendants" after this date. Whether deliberate or not, the result was nevertheless prejudicial, in the sense of exerting a strong influence upon how subsequent data would be interpreted.

On the one hand, the Tribal Council was correct when it criticized BAR for paying inordinate attention to the genealogical heterogeneity of Gay Head Indians while sloughing over the fact that, upon their marriage to Wampanoags, outsiders became incorporated into the tribal community and thus did not seriously threaten Gay Head's distinctively Indian socio-political character. On the other hand, the Council became mired in the degree of intermarriage with whites and blacks, an issue effectively rebutted by the BIA in the "Final Determination." Several factors may help explain the Council's actions.

First, for many Gay Headers, racial classification was a sensitive personal issue. Off-island their Indian ancestry was not immediately discernible and they were more likely to be categorized (at least initially) as black, mulatto, hispanic or even in some instances white. On-island, most Vineyarders knew who the Indian families were but accorded the natives a social status inferior to that of the local WASP majority. Thus, having personally experienced discrimination for being "too dark to be Yankee," Gay Headers were somewhat defensive about the Black ancestry of their families.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Second, racial classification of the Indian plaintiffs was an extremely important issue during the Mashpee v. New Seabury (1978) trial and one well noted by the Gay Head leadership and tribe's legal counsel. While Judge Skinner instructed the jury that race was not to inform their decision-making, nevertheless the defense had buttressed its argument regarding Mashpee assimilation with repeated references to the natives' long term pattern of exogamy with non-Indians and to the lack of overt and enduring ceremonies, traditions or practices which were shared by Mashpee natives. Whether the jury was ultimately successful in disentangling race from culture can only be imagined; in 1982, both the Gay Head Tribal Council leadership and its legal counsel thought it unlikely. Indeed, racial stereotypes and prejudices were viewed as a compelling reason for Gay Head not to seek status clarification in court.

Third, as some have speculated regarding Judge Clarence Thomas's testimony during the 1991 Senate Supreme Court confirmation hearings, references to race and racial prejudice immediately politicize an issue. In the Senate hearing, Thomas's allegations of racism placed pressure upon the Judicial Committee to demonstrate that its actions did not rest on such biases. In the Gay Head case, the Tribal Council's "Critique" similarly shifted the burden of proof from the petitioner, where it institutionally rested, to BAR

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

itself. The federal government was now on the defensive. Any advantage was, however, temporary at best since the BIA refuted the charges of racism in the "Final Determination."

(b) Group Interaction: The second major area criticized by the Tribal Council had to do with evidence that the Gay Head Wampanoags sustained social relations among tribal members. According to the "Proposed Finding," the absence of a commercial center and post office in Gay Head and the location of Indian residences along three rural roads on the peninsula signalled the social isolation of tribal members vis-à-vis one another. The Council countered by pointing out via a map and chart, both of which were included with the original petition, that Gay Headers did indeed live in close enough proximity to one another to sustain on-going social ties.

In Gay Head itself most Indians lived on lots which were contiguous with those of their extended kin.[249] The map clearly demonstrated the clustering of Indian residences within the interior of the peninsula which differed markedly from the dispersal of non-Indian homes along the beachfront periphery. Further, while only 78 Gay Headers lived in Gay Head proper, the overwhelming majority lived, for reasons of employment, either down-island (a short one half hour drive

---

[249] This was hardly surprising since the overwhelming majority of Indians occupied land they inherited. Thus, it was logical that, as the homesteads were passed to heirs intact or broken up into smaller parcels, lineage members resided on land near their kin folk.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

away) or else in southeastern Massachusetts -- i.e., near enough to visit without onerous expenditures of time or money. That non-resident tribal members readily travelled to Gay Head for family celebrations, for vacation and to register their votes on critical issues was well documented in various written sources.[250]

In turn, the BIA maintained that geographic dispersion per se had not been at issue in the "Proposed Finding" but rather it was "the degree of communication and interaction maintained within this extended community" (BAR 1987:6) which was found wanting. It went on to discuss the paucity of data in the original petition regarding Gay Head Indian resident and non-resident social interaction. While the latter was an admitted deficiency of the petition,[251] nevertheless, this fact did not deflect entirely the Tribal Council's well aimed attack.

In the Proposed Finding, the BIA had summed up its findings succinctly and unambiguously.

> The dispersed settlement pattern in Gay Head has provided for privacy and isolation. In the past, the scattered houses were intricately connected with a warren-like road system which would have facilitated communication and social interaction between friends and neighbors. The change from this profusion of small

---

[250] Levitas (1980) had noted the flow of Gay Headers between the mainland and Vineyard as had Grabowski (1982). In addition, the social column on Gay Head in the Vineyard Gazette had also documented extensive visiting among resident and non-resident Gay Headers over the years.

[251] As noted, it was even identified as such in the BAR's obvious deficiency letter to the Tribal Council.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> interconnecting roads to basically four main roads which are accessed by private drives has greatly reduced the ease of physical access to neighbors and friends. Likewise, the disappearance of all commercial establishments (except those small souvenir shops which serve the tourists) serving the local inhabitants has contributed to the isolation of the inhabitants and reduced social interaction and communication (BAR 1986:55).

No mention was made of the fact that some Gay Headers lived down- or even off-island. Rather, the entire section dealt only with the settlement pattern in Gay Head proper, drawing conclusions about Indian social relations based upon an outsider's assessment of the town's physical layout. However, if social interaction among tribal members was in fact the issue, then why did this section not mention the residence of Gay Headers down- or off-island and question the ramifications thereof upon tribal relations? Why did the analysis focus exclusively upon Gay Head proper and social interaction among Indian town residents?

While the Tribal Council was correct in criticizing the BIA's assertions regarding the negative effects of a purportedly dispersed settlement pattern, it stopped short of making a more damaging attack upon the BIA's argument. The Council did not address the lack of oral or written support for the BIA's conclusions that Gay Head Indians were socially "isolated" from each other. Nor did the Council question the evidential basis of the BIA's statements that the shift from communal economic strategies to "competitive work systems" resulted in "a gradual disintegration of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

community cohesiveness and tribal organization" (1987:3) and that increasing outmarriage among Gay Headers "has contributed to the individualistic character of the community" (Ibid:60). Certainly there was considerable data which did not support these conclusions.

First, many Gay Headers lived only a half mile or less away from relatives in a town located on a small peninsula at the westernmost tip of Martha's Vineyard. Throughout the 20th century the total population of Gay Head ranged from about 100 to 250, making it the second smallest town in the state. To assert that Gay Head Indians who grew up and lived in the town were socially "isolated" from each other indicated a startling lack of understanding of the character of any and every town as small and geographically isolated as Gay Head where virtually all social, political and economic relations take place face-to-face. To make this assertion regarding relations among Gay Headers was especially untenable given the kinship ties which not only gave the Indians rights to parcels of land contiguous to those of their relatives, but which also bound the natives socially, politically and economically to their neighbors, a fact well documented by all three anthropologists who had done work in Gay Head.

Second, there was also considerable evidence that Gay

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Headers dominated the town socially and politically.[252] Levitas (1980), Grabowski (1982) and Campisi (WTCGH 1985)) had described the clear social dichotomy between the native and non-native residents of the town; indeed the very different pattern of social relations within each group was itself readily acknowledged in the "Proposed Finding" (BAR 1987:).

Third, while it is true that Gay Headers became increasingly involved in the cash economy after 1930, it did not necessarily follow that this resulted in the "disintegration of community cohesiveness and tribal organization." For one thing, as Levitas (1980) and Grabowski (1982:72-73) both noted, Indian residents of Gay Head were still greatly dependent upon their kin to obtain and keep their jobs, be they positions in town government, in the tourist establishments at the cliffs or seasonally as scalloppers in town waters.[253] While the BIA's "Anthropological Report" was correct when it stated that

---

[252] Whatever the actual number of non-Indians in Gay Head, whether residing seasonally or year-round, the fact remains that on the island generally the town was conceived as being Indian. Indeed, the Taxpayers Association objected vehemently to what it called "majoritarian politics" on the part of Indian town officials and residents, even though the latter did not in fact comprise a majority. That the Taxpayers never managed to transform their numerical advantage into representative power in town government during the more than ten years during which they waged legal battle over the common lands is very telling evidence about who dominated Gay Head.

[253] Together these jobs provided the major sources of income for Gay Headers.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

neither Levitas, Campisi nor Grabowski had explicitly discussed the existence of an informal network among Gay Headers (1985:), surely one could presume some degree of social interaction among the native town personnel who worked together almost daily at the Town Hall (e.g., minimally three selectmen, a clerk, assessor, shellfish warden, police chief and the members of various committees); among the several branches of the Vanderhoop family who owned and operated a number of successful commercial establishments at the Head; and among the native Gay Head men and women who scalloped in Menemsha Pond whether or not they held other jobs locally or down-island, all of which was amply described in the ethnographic sources.

Fourth, the BIA's statement regarding Gay Head Indian intermarriage was equally unsupportable since the importance of lineage ties among Gay Head Wampanoags was especially well documented as was the fact that children of mixed marriages were identified as Gay Headers.[254] Further, Grabowski (1982:7-8) noted that non-Gay Head Indian spouses in the 20th century achieved only limited acceptance among

---

[254] The only exception to this occurred with regard to the children of a Gay Head woman who married a Ute man. Since federal law forbids dual tribal enrollment, it was, as of 1987, preferable that these children be enrolled in their father's tribe inasmuch as membershp in the "unrecognized" Gay Head tribe afforded them no special Indian rights, privileges or services under Federal Indian law. Socially, however, since the family moved back to Gay Head and built a home there, the children were viewed by local Indians and non-Indians alike as being Wampanoag.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribal members and generally adhered to the same pattern of social interaction as that of their native spouses.

There was, then, considerable ethnographic information to refute the BIA's conclusion that Indian residents of Gay Head were "socially isolated" from one another and that they lacked informal networks and means by which to sustain tribal cohesion. Not only was this valuable data not discussed by BAR, but the Tribal Council's "Critique" likewise sloughed over most of it, concentrating instead on rebutting the data which the BIA had set forth in the "Proposed Finding."

For example, the latter seemed to make much of the absence of organized events and gatherings through which contemporary Gay Head Indians fostered tribal relations. The "Finding" cited Levitas who noted that "the lack of community celebrations is striking" (1980:384), a fact which, together with television watching and children's participation in down-island after school activities,[255] supported her hypothesis that internal cohesion among Gay Headers had declined in recent years (BAR 1987:59).

In response, the Tribal Council pointed out that BAR itself had called Cranberry Day an "Indian heritage day"

---

[255] Ever since the local one room elementary school was closed in 1966, Gay Head children have been bused to West Tisbury. Students from all six Vineyard towns attend the Regional High School in Vineyard Haven.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(BAR 1987) and that only Gay Head Indian families attended.[256] The "Critique" also reiterated the important role of the Tribal Council since the lattter's formation in 1974 in administering numerous projects on behalf of its exclusively Wampanoag membership. These included: a pilot shellfish hatchery; a Title IV cultural heritage program for children; energy conservation measures for low income families; a tribal greenhouse; and several block grants for community development. Moreover, there were other community events organized on an ad hoc basis by local natives and attended almost exclusively by Gay Headers: Halloween and Christmas parties at the Town Hall for Gay Head children; sporadic potluck dinners, picnics and barbeques; and occasional Native American poetry readings or storytelling.

In short, if one did not assume that Gay head Indian events had to have a uniquely "Indian" theme, then one would see that there were indeed numerous formal and informal occasions upon which Gay Headers sustained and reinforced social relations with members of their own and other Indian descent groups. The problem with BAR's analysis was that it was myopically focused on American Indian cultural

---

[256] On the day BIA observers attended, the tribe's legal counsel was also present, obviously because of the presence of government officials. Moreover, non-Indian spouses attended the evening festivities but, as noted, these individuals generally adhered to the same pattern of socializing locally as that of their Wampanoag mates.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

stereotypes and sought vestiges of aboriginal or historical native culture which were being revitalized or otherwise fostered by contemporary tribal members. Hence BAR frequently quoted from written sources which highlighted the "loss" of Wampanoag culture (e.g., language, certain aboriginal skills, oral traditions, etc.) and skimmed over the non-ceremonial means by which Gay Headers sustained relations with one another. In effect, BAR gave undue emphasis to what many non-Indians view as characteristic of an "Indian" community --i.e., recognizable vestiges of aboriginal culture -- while denying the relevance of the natives' own conception of what it means to be a Gay Head Wampanoag and ignoring the ways in which that conception and manifestations thereof had been affected by external pressures.

While this criticsm of BAR's working assumptions was an extremely serious one, its impact was considerably diminished by the Tribal Council's comparison of BAR's treatment of certain socio-cultural characteristics in the Gay Head petition with superficially similar data in other acknowledgment petitions. This shifted the focus of attention from the evidential requirements of the regulations to the significance of cultural "stuff."

In response, BAR noted in the "Final Determination," that the latter is of marginal concern in the FAP process.

> It should be clear that the retention of aboriginal culture or language is irrelevant to the Acknowledgment

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> criteria, except as it might reflect positively on an Indian identity, tribal political processes, or the maintenance of a distinct community. While the technical reports in this case made reference to Tantaquidgeon and others who noted the loss or decline of Wampanoag cultural traits among the Gay Head Wampanoags, these data, again, had no direct influence on the final conclusions..."(1987:3).

Yet this statement did not entirely ring true. Its assertion to the contrary, BAR's original observations in the Proposed Finding regarding the "loss" of Wampanoag culture were not part of a discussion of the ways in which Gay Head Indians distinguished themselves socially, economically or politically from non-Indians. If, as BAR maintained, the retention of aboriginal culture had no bearing upon the FAP criteria except as it informed Indian identity, tribal political process or social relations, then cultural elements should only have been addressed with respect to these specific issues. Any other discussion was not only irrelevant but, more to the point, prejudicial.

In repeatedly highlighting what aboriginal elements were absent among 20th century Gay Headers, BAR gave implicit support to the idea that "Indianness" was nothing more than the sum total of a laundry list of aboriginal and early contact cultural practices and that, as specific items on the list disappeared, so did individuals become less "Indian" and more "American." Such a view was not only reinforced by BAR's numerous references to Gay Headers in the 20th century as "Indian descendants" rather than "Indians" (see above), but also by the dearth of information

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regarding how Gay Headers in fact viewed their Wampanoagness. That is, even more important than what BAR put in the "Proposed Finding" was what it left out. Insofar as tribal relations were concerned there were indeed some serious omissions.

Perhaps most startling was the "Anthropological Report's" failure to discuss how Gay Head Indians conceived of themselves socio-culturally -- that is, what it meant to them to call themselves and other tribal members "Gay Head Wampanoag." BAR's only mention of contemporary Gay Head tribal identity entailed a technical description of the membership criteria of the Tribal Council -- i.e., individuals had to demonstrate descent from one of the Wampanoags listed in the 1870 Pease Report -- and the following brief statement regarding native attitudes to land.

> Today, except for the belief in freedom of access to land, the Gay Head Wampanoag share the same land concepts commonly held by the greater society. This is reflected in the WTCGH's acceptance of the terms of the agreement which led to the introduction of recent land settlement legislation in Congress (1987:75).

First, the codified rules for Council membership only indicate the minimum qualifications necessary for inclusion within the organization itself. The criteria say nothing about the symbolic and practical significance of tribal identity and affiliation for members on an everyday basis -- i.e., what is important about being a Gay Head Wamapanoag and how it affects (or not) individuals' relationship with

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

other council members and non-members, be they Indians or non-Indians. By itself, biological descent from the 1870 allottees does not adequately explain the sociological significance of kinship for Gay Headers and its ramifications upon the Indians' social, economic and political relations.

Second, the assertion that, except for their belief in open access to land, Gay Headers held the same beliefs toward land as did non-Indians, was a gross distortion of Levitas's thesis. The latter explained in considerable detail the historical development of Gay Headers' attitudes toward land, including why their belief in communal access to land remained the critical defining feature of their shared identity as Wampanoag Indians. The title of the dissertation itself, "No Boundary is a Boundary," referred specifically to the fact that the lack of geographic boundaries among Gay Headers constituted the major socio-cultural boundary between contemporary Gay Head Indians and non-Indians. Moreover, although the natives were well aware and appreciative of the monetary value of their property, this did not preclude them from according their ancestors' historic tenure on the peninsula special value in their individual and collective identity as Gay Head Indians. That "local" and "cosmopolitan" Gay Head Indians alike spent more than ten years (from 1974-1987) trying to secure tribal control over the common lands was itself ample testimony of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the natives' unshakable conviction that their past, present and future identity as Wampanoags was inextricably tied to control of Gay Head land. This conviction was repeatedly expressed[257] throughout the protracted legal battle over the common lands and was clearly not held by non-Indians.

Finally, for the BIA to assert that the substantive terms of the Tribal Council's recent legislative initiative in Congress were evidence that the Indians shared mainstream American attitudes toward land was to ignore completely the political nature of the negotiation process. For more than ten years, Gay Head Indians had tried to secure legal title to the common lands to no avail. Extensive negotiation with the Taxpayers Association and Town had produced at least two proposed settlement documents, one of which was ratified by some, but by no means all, of the parties affected. As discussed above, that the Tribal Council proceeded with active consideration of its FAP petition in 1986 was itself indicative of the Indians' relative impotence within national politics, an impotence which precluded their

---

[257] Native views were well documented in numerous media accounts of the local negotiations, congressional hearings and intra-tribal ranglings regarding the land dispute. The "Proposed Finding" itself seemed to acknowledge the symbolic import of land for the Indians when it quoted a "cosmopolitan" Gay Head spokesman who observed regarding the land settlement:

> "if we accept this proposal as it now stands, we are not following the original intent of the land suit: ownership and control of what was meant to be when the town of Gay Head was incorporated in 1870. We will be Gay Head Indians in name only (as quoted of Frank James in BAR 1987:47, emhasis added).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

gaining recognition through legislative means.

While the Tribal Council renewed its efforts to effect legislative settlement of their land claim in 1987, surely it would be extremely naive to propose that the organization's previous unsuccessful experiences did not inform the Council's present strategy. That is, it is hard to conceive that, after 12 years of bitter negotiation, the Tribal Council would seek settlement terms radically different from those included in the document already ratified by the Tribal Council, the Taxpayers Association and the Town of Gay Head. And, indeed, the Tribal Council did no such thing.

Instead, settlement legislation was pursued in an attempt to circumvent the status recognition roadblock imposed by the Republican Administration. Except for this issue, the proposed bill advanced the same objectives regarding the common lands as had been agreed to in the settlement document. Insofar as the latter was concerned, it is important to emphasize that, although the Council agreed in principle with many of the dissidants' more agressive demands, neverthelesss Council leadership, in consultation with NARF, took a more pragmatic stance toward what it could reasonably obtain without going to court. Accordingly, neither the terms of the land settlement nor the legislative initiative reflected Indian attitudes toward land so much as the Tribal Council's relative political

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

power within a specific legal arena.

In failing to explore in depth the Indians' own attitudes and beliefs regarding tribal identity and Gay Head land, BAR ignored completely salient features of Gay Head Indian identity and affiliation -- i.e., those elements which informed members' behavior day to day and served to reproduce and sustain the tribe from generation to generation. Because the "Anthropological Report" did not describe the underlying logic of Gay Head Indian tribal relations, it often misinterpreted and misread native behavior and lack thereof. For example, without examining the sociological import of kinship -- i.e how it simultaneously defined Gay Headers' relationship to those listed in the Pease Report and to other contemporary Wampanoags -- one could not fully comprehend the pivotal role that "families" played in intra-tribal dynamics.

Gay Headers socialized extensively with other "family" members but by this they did not merely mean those of their nuclear family, but those members of their own descent group. On-island, the latter were more likely to participate in the same informal activities, with geographic propinquity and similar age being less reliable indicators of social interaction than one's kinship relationship. Likewise, individuals were considerably more apt to visit members of the same or closely related descent groups

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

residing off-island[258] whether for purely social reasons, as part of a shopping trip to the mainland, or while also attending a pan-Indian event in southern New England. Further, since Gay Headers were often related to more than one "family," kinship could effectively bind many, if not most, tribal members together, depending upon how it was reckoned. Factional adversaries admitted, albeit out of earshot of the "other side," that "the tribe is all one family, really. We're all related, you see."

While Levitas was correct when she observed that improved transportation and communication had decreased the social isolation of Gay Head Indians vis-à-vis American society after World War II, it was also true that, inasmuch as kinship was the most critical feature of Wampanoag identity, it continued to structure social interaction among tribal members regardless of residence, thereby sustaining the dichotomy between the latter and non-members. That is, it was through the rights, obligations and responsibilities of "family" that the Indians effectively defined the composition of their tribe, sanctioning the behavior of members and reproducing the tribe throughout history.

In addition to greatly influencing the patterns of Indian social interaction, kinship was critical in obtaining

---

[258] Conversely, members of the same "family" who lived off-island were more likely to visit their relatives in Gay Head than they were other, more distantly related tribal members.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and keeping local jobs and in developing and sustaining political power. It is no coincidence, for example, that those who evinced strong leadership within the group had numerous kinfolk who lived and voted in Gay Head.

With kinship the underlying principle of Gay Head Indian relations, some of the data which BAR found to be negative can now be cast in a different light. For instance, those tribal members who lived down island who knew little about everyday affairs in Gay Head were generally those without direct family ties to Indians who were resident of Gay Head. In contrast, Gay Headers who lived down- or even off-island for employment or educational purposes but who had "family" resident in Gay Head were more apt to be well-informed as to local community and Tribal Council happenings and were much more likely to visit on holidays, for important elections, social functions, etc.

Likewise, Gay Headers' strong feelings toward land go a long way toward explaining individual and group behavior. At a basic level, the symbolic value that the Indians accorded land accounts for why "cosmopolitans" and "locals" alike consistently resisted any and all attempts by outsiders to take over land in Gay Head whether as a national park, state road or national wildlife preserve. It also explains why the Indians so tenaciously pursued various legal strategies to secure to the tribe legal control of the common lands. Despite a factional dispute regarding how to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

obtain title, both sides were equally committed to the goal, seeing it as vital to the future of the Wampanoags as a group.

In addition to seeking to preserve rights to tribal common lands, natives saw their individual rights to specific land as an important component of their identity as Gay Head Wampanoags. Inasmuch as Gay Head Indians were allotted parcels in 1870, all current members were, in theory, heirs to ancestral homesteads. In reality, however, quite a number of the original allotments were sold over the years to non-Indians thus leaving many contemporary tribal members without a land base in Gay Head. Since most natives did not have sufficient capital to purchase land, those who had no hope of inheriting real estate from relatives generally emigrated for, with a dearth of local well-paying employment,[259] they could not afford the high rents in Gay Head or in nearby Chilmark and West Tisbury where housing was even more costly. Without land and/or landed relatives, many Gay Head Indians moved down-island to Vineyard Haven and Oak Bluffs or off-island where employment opportunities were greater and where housing costs were more reasonable. As a consequence, those who were most active in tribal affairs were those who either owned land themselves in Gay

---

[259] Since most jobs in Gay Head are seasonal, part-time and low-paying, many Indians take on several jobs in order to meet expenses and maintain a comfortable, if modest, lifestyle.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Head or had relatives who did. Even those who lived off-island were far more likely to visit Gay Head and to be informed about tribal affairs if they or relatives owned land in Gay Head.

Gay Headers' singular attitudes toward land and family are also important in understanding residence patterns and the ramifications thereof. In contrast with non-Indians who were wont to divide real estate or the proceeds from its sale among heirs, Gay Headers were more apt to preserve their fractional interests in a particular lot in common. Even if the land was unusable (i.e., it lacked potable water, solid ground for building or a necessary easement), Indian heirs were often reluctant to sell their interests in the property[260] because of the symbolic value they believed inhered in the land their ancestors once claimed.

As a result, it was frequently difficult to buy Indian allotments since all interest holders first had to be located and their consent obtained before the transaction could be effected. This sheds some light on why most parcels located in the the peninsula's interior remained in Indian hands. Non-Indians were generally not interested in surmounting considerable legal hurdles in order to gain clear title to Indian property unless enticed by the unique physical features of the land -- e.g., ocean views,

---

[260] Unless they were under financial duress or else wanted to sever their ties with the tribe.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

accessable beachfront, etc. Indeed, the overwhelming majority of real estate located along the periphery of Gay Head and on hilltops (which likewise offered unique and breathtaking panoramas) was sold to non-Indians whereas the Indians retained ownership of the interior forested lots. The latter were geographically similar to acreage in nearby towns but legally more difficult to acquire. Hence, the interior parcels were less desirable to non-Indians.

In turn, patterns of land inheritance and kinship help to explain a persistent tax problem in Gay Head and how it had been handled by Indian town officials. Although real estate taxes on a particular parcel were the joint responsibility of all interest holders, nevertheless for administrative simplicity the bills were routinely sent to one party. That individual then had to find and convince all parties to pay their respective shares of the taxes. If one or more of the interest holders did not pay, then the others had to make up the difference or risk forfeiture of the land. In Gay Head, it was not uncommon for some Indian heirs to be chronically delinquent in paying their share of real estate taxes on ancestral land while continuing to excercise the full rights of their fractional interest in the property. Since many Indian families had experienced this phenomenon first hand and town officials were themselves Indian, it was no mystery why the town's collection of taxes on native-owned property had been lax

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

over the years, resulting in periodic revenue shortfalls which most town officials had been loath to remedy through more meticulous collection procedures.

All this is to say that, together, Gay Head Indian attitudes toward land and family, attitudes which were not shared by neighboring non-Indians, were critical to understanding how Gay Headers defined themselves as an Indian group and the means by which they reproduced themselves as such from generation to generation. Without examining the process by which the Indians constructed their identity as Gay Head Wampanoags (both as individuals and as a group) and the relations that obtained as a result, BAR's "Proposed Finding" rested precariously upon an a priori paradigm of what a socially cohesive Indian community should have looked like and how its members should have interacted. That paradigm not only was comprised of traits which non-Indians deemed important, but also advanced a view of tribal relations which was essentially static and unchanging, rooted in and dependent upon cultural diacritica from the pre- and early contact periods.

Given BAR's brittle perspective of Wampanoag identity, it is hardly surprising that much supportive data regarding the nature of group interaction among Gay Head Indians were misinterpreted and not even presented as evidence in the "Proposed Finding." Not addressed by BAR, this information was likewise ignored by the Tribal Council in its written

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

rebuttal. Taking its cue from the "Proposed Finding," the Council concentrated only on evidence which BAR cited in a negative manner and sloughed over information and issues which the Branch itself had not discussed. This left unchallenged some of BAR's most basic working assumptions.

(c) Political Authority As it had done with respect to BAR's evaluation of criterion (b), the Tribal Council limited its rebuttal regarding criterion (c) primarily to what BAR had put in the "Proposed Finding" and all but ignored information the latter left out.

In the "Proposed Finding" BAR stated that

> the substance and form of town government [in Gay Head] appears indistinguishable from any other small New England town, and it is difficult to characterize any of the actions of the governing body as being distinctly Indian or tribal (BAR 1986:33).

In response, the Tribal Council pointed out that Gay Head Indians numerically dominated town office and that the town was perceived by natives and non-natives alike as being run by and for the benefit of Gay Head Indians.[261] The Council also described how town officials supported issues which benefitted the local Indians as opposed to non-Indian summer residents,[262] even when this meant a somewhat lax adherence

---

[261] Several letters from prominent non-Indian island residents attested to this fact, effectively refuting statements to the contrary in the "Proposed Finding."

[262] For example, in 1965 a non-Indian conservationist group, "Friends of the Island," opposed the construction of a connecting road between Lobsterville and West Basin in Gay Head because of its purported negative impact upon the dunes and wildlife. In contrast, Gay Head natives generally

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to administrative strictures (as, for example, when Gay Head town government was slow to collect real estate taxes on Indian-owned property).

In addition to providing more detailed information as to how the Indian town officials of Gay Head differed from those of other neighboring towns, the Tribal Council criticized BAR for focusing too narrowly upon whether or not the Gay Head town government in fact comprised the tribal government. According to FAP criterion (c), a petitioner need only demonstrate that it "has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present time." The regulation does not require evidence of a "tribal government" per se. Thus the Tribal Council did not have to demonstrate that the town administration served as the "government" of the Gay Head tribe. Rather, at issue was only to what extent native town officials had authority and influence among Gay Head Wampanoags and by what means they used their positions on behalf of the tribe generally. Put another way, what was the role of native town officials in tribal political processes?

As the Tribal Council's "Critique" pointed out, that Gay Headers were consistently voted into office by their fellow Indians and, once there, that they repeatedly used

---

supported the project since it facilitated vehicular access to and from scallopping launch sites. Eventually, the road was built.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

their positions to protect and further the interests of tribal members was itself evidence of the officials' "political authority." Whether or not many of the Indians' actions and accomplishments harked upon stereotypically Indian themes and issues was beside the point since, up to the 1970's, Gay Head was predominantly populated by Gay Head Wampanoags. Such "civic matters" as road-building, resource management and taxation were, of necessity, "Indian" issues in Gay Head since it was the Wampanoags who were most immediately and profoundly affected by the decision-making of native town officials.

On the one hand, BAR acknowledged in the "Final Finding" that the town's role as "government" of the tribe was not of critical concern and that it was the "maintenance of tribal political influence or other authority over tribal members which was at issue" (BAR 1987:8-9). The Branch even pointed out that, in its estimation, the Gay Head petition had concentrated too narrowly upon the town administrative structure, sloughing over what appeared to be informal means by which political influence and authority were also exercised among Gay Headers (1987:8-9).

On the other, BAR could not avoid the fact that it explicitly criticized the Gay Head town government for not acting as the "governing body" of the tribe.

> While there is convincing evidence that group kinship ties played a crucial role in this local [municipal] government, the town structure would have made for a peculiar kind of tribal governing body. Unlike any

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> other tribal government, the town government was mandated by state law to accept legal responsibility for all residents of the township. This came to include an increasing number of non-Indians. The proportion of non-Indian residents grew from 13 percent in 1920 to 47 percent by 1970. At the same time, as a municipal polity, the local government had no legal authority outside of the town boundaries. Therefore, it could not legally maintain jurisdiction over the significant number of Gay Head Indian descendants who resided elsewhere, either permanently or temporarily (the resident Indian population decreased by 61% between 1900 and 1970) (BAR 1987::5, emphasis added).

Although Gay Headers did not have to demonstrate the existence of a "tribal government" per se, BAR nevertheless characterized the native-dominated town government of Gay Head as a "peculiar governing body" which had no "jurisdiction over" non-resident Indians. For BAR, the issue was precisely that town officials did not, indeed could not, "govern" non-resident tribal members.

In its rebuttal, the Tribal Council pointed out that even recognized tribes do not have jurisdiction over tribal members off the reservation.[263] To require Gay Head town officials to exert authority over tribal members who were not residents of the town was to impose upon the Wampanoags an unreasonable standard of political authority.

Yet there remains a much more serious problem with BAR's analysis which was not raised by the Tribal Council. This had to do with the Branch's working assumptions

---

[263] Nor, one must add, do polities like the United States generally have jurisdiction over their citizens on foreign soil, embassies and military bases being notable exceptions.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regarding "tribal political authority," assumptions which, like those regarding tribal relations, were laid out in the negative in the "Proposed Finding."

For example, BAR's criticism that the Gay Head town government did not "take action to assert an Indian identity, define group membership, or perform traditional ceremonial functions" (BAR 1986:33) strongly insinuated that the latter indeed should have done so if it functioned as the tribe's governing body. Further, when the "Proposed Finding" stated that town officials had no "jurisdiction over" non-resident Gay Headers, BAR implied that the officials should have had such power if they in fact served as "tribal" leaders -- i.e., leaders of the entire tribe. And, when BAR compared the turnout at Tribal Council meetings with that at town meetings and found the former significantly less, it strongly intimated that attendance figures should have been much higher for the Tribal Council if the latter had the whole-hearted support of its membership.

Implicit in BAR's criticisms was that leaders exercise control "over" followers and that the latter actively support the goals and actions of leaders. That is, "leaders" lead, they guide, direct, and/or induce others to follow their actions and "followers" in turn follow or support, go along with and heed the example set by others. Also assumed by BAR was that tribal political authority

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

involves distinctly Indian issues -- i.e., it is concerned with such things as tribal identity, membership and pre-contact ceremonial traditions. Such a model takes an extremely limited view of leadership generally and is particularly inadequate when it comes to understanding American Indian political processes, including those of the Gay Head Wampanoags.

In all but the most totalitarian of regimes, leaders do not merely initiate plans and pull others along with them but they also represent and/or speak for others. Indeed, in the United States, elected government officials such as town selectmen are supposed to represent the will of the electorate. This is not to deny that Massachusetts selectmen have the power to enforce state and town statutes; rather it is only to point out that their role is also that of spokespersons whose ability to act as such is a prerequisite for them to obtain office and to be reelected.

For many American Indians,[264] it is this latter role of spokesperson which characterized most tribal leaders, not

---

[264] American Indian leaders from groups as diverse as the woodland hunters of the northeast, the desert pueblo peoples of the southwest, the coastal fishermen of the northwest, and the nomadic hunters of the plains all manifested a singular lack of coercive power over fellow tribesmen during the early contact period. Indeed, the very different relationship between a tribe's leadership and membership proved frustrating to many white officials whose job it was to extinguish Indian land rights by means of hastily drafted treaties. It was not unusual for these governmental officials to ignore the traditional leaders and to designate other, more compliant individuals as "chiefs" who then served as signators to the treaties.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

only during the pre- and early contact periods, but throughout the period of sustained contact as well. That is, for most tribes throughout the United States, including the Gay Head Wampanoags, native leaders, whether formally designated "chief" or not, did not have the power to force fellow tribal members to adhere to their policies. Instead, the leaders achieved their position based upon their ability to bring about a consensus and to persuade others to support a particular position and/or course of action. Any influence these select individuals exercised was based upon their skill in articulating, representing and realizing goals which the tribal membership deemed important.

For the early contact Gay Head Wampanoags, tribal political authority meant that certain individuals ("leaders") worked at gaining the respect and support of the general membership. As BAR itself acknowledged, a chief's or sachem's authority "could only come from [the] consensus of the people" (BAR 1987:65), his power "circumscribed and dependent upon the consent of the members of the villages as well as the leaders[']' ability to persuade" (as quoted of the Gay Head Petition in BAR 1987:65). Moreover, unpopular leaders could be replaced.

The "Proposed Finding" went on to state that this consensual form of political authority continued in Gay Head until the incorporation of the town in 1870. On what basis BAR made this conclusion is extremely interesting.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> There is only one first-hand description of the political system or processes at work at Gay Head prior to 1827, and no well-defined leaders are apparent during the period from 1687 to 1870. However, there is evidence that the Gay Head Indians continued to maintain some political influence and authority over their members. These people periodically petitioned the General Court of the Province of Massachusetts Bay between 1691 and 1781, and the Corporation for the Propagation of the Gospel between 1711 and 1776. These petitions, which were most often generated by land problems or the actions of the colonial guardians, offer the only clues available regarding the nature of Gay Head political life in the 18th century. They suggest that the Indians may have acted as a general council, and that Christian spiritual leaders such as Zachariah Howwaswee may have also served as the political leaders of the community (BAR 1987:4).

In the above, BAR admitted that the absence of "well-defined leaders" in the historical record did not mean that Gay Head Wampanoags lacked a political process. On the contrary, the numerous petitions by the group attested to the fact that political authority was being exercised among the Indians. Although BAR apparently felt the need to postulate the existence of some formal leadership structure such as a "council" or named "spiritual leaders," it is entirely possible, if not more likely ethnographically, that the very lack of specific individuals or organization in the historical record reflected the informal, diffuse, and consensual means by which tribal opinion was formed and acted upon during this period.

Quite simply, that the extant documents do not designate specific chiefs or leaders of the Gay Head tribe may be because there were no individuals who set themselves apart from the general membership, or who had more power

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

than other members. That is, political authority was exercised among tribal members rather than over them by formally recognized leaders. Moreover, there is no evidence that, in the post-incorporation period, this fundamental pattern of consensual political authority among Gay Headers changed appreciably. In fact, there is much to indicate that it endured despite and along side the formal adoption of a town organizational structure.

Mandated by the state, the latter admittedly placed certain legal constraints upon what Indian officials could and could not do in Gay Head. The state also vested the officials with explicit powers. Yet, the issue is not that town personnel were elected to office, that they had the power to administer state and local statues or even that, by law, they did not have jurisdiction over non-residents. After all, these were beyond the control of Gay Headers and it is likely that any direct and flagrant circumvention of state law would have brought official action upon the Indians. Rather, what is significant is how the Gay Head Wampanoags functioned within and around the formal structure -- i.e., how they managed to elect all but one Indian to the position of selectman during the more than 100 years since incorporation; how members of certain descent groups were consistently elected to office and dominated the town government; how Indian town officials strove to reserve local resources for Indian use; and, how these officials

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

avoided complying completely with certain state statutes (such as the collection of real estate taxes) when they adversely affected tribal members.

Furthermore, even more important than what native town officials did, is what they did not do. Tribal political authority was not wielded only by those Indians in office, but by ordinary tribal members as well. Indeed, ad hoc and informal groups of Gay Headers were responsible for realizing most of the community's projects over the years, including the upkeep of the Indian cemetary, refurbishing town buildings and property, organizing various celebrations and effecting several civic improvements. It was, in other words, a host of Indian individuals who were responsible for getting things done in Gay Head.

What is salient about tribal political influence in Gay Head is precisely the lack of a single individual or core of individuals who spearheaded all these projects. Instead, tribal political influence was exercised in many different formal and informal arenas by numerous tribal members. While some persons were consistently more likely to be associated with certain issues and events than others,[265] still, there was much overlap and a great deal of

---

[265] As discussed, Lorenzo Jeffers was very active in trying to involve Gay Headers in inter-tribal, pan-Indian affairs.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

participation on the the part of tribal members generally.[266]

If BAR's model of tribal political influence was ethnographically flawed and historically inaccurate, so too did it take an overly-restrictive view of what issues were properly within the domain of such influence. While tribal identity, membership and traditional ceremonies may serve as the focus of of a tribe's energies, whether and to what extent these issues do so at any particular point in time depend upon the circumstances and pressures under which the group operates. Thus, a tribe whose Indianness is well acknowledged by outsiders may spend little effort upon public affirmations of its identity yet devote much time and energy on improving the quality of life for members -- for example, in gaining improved education, housing, and employment. In contrast, a group whose Indianness is the source of much discrimination may downplay its distinct identity in certain public arenas. In addition, what areas a tribe concentrates on are affected not only by local

---

[266] It is noteworthy that when an individual began to initiate too many of his/her own plans rather than serving as a spokesperson for tribal sentiment, it is then that the person found him/herself out on a limb, without the support of the tribe. And, without the backing of a tribal consensus, he/she could then exercise no political influence within the tribe although outsiders may still, for a while longer, have viewed the person as a leader because of the way in which he/she articulated and worked toward certain goals. For the tribal members themselves, however, such recognition by outsiders was secondary to how they themselves viewed a person's political standing.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

factors but also by events and policies at the national level.[267]

All this is to say that what makes certain issues tribal issues is not that they deal overtly with questions of Indianness, but that they are concerned with the symbolic and pragmatic means by which tribal members sustain themselves as a group from generation to generation. That is, they deal with issues which the Indians themselves deem important to the tribe. Thus, for example, Gay Head Indian selectmen exercised tribal political influence even when they dealt with such mundane "civic" issues as road building, taxation and natural resource management because these issues impacted directly upon the ability of tribal members to remain in Gay Head, thereby sustaining their tie to the land and maintaining ongoing relations with one another.

This is not unlike a Navajo tribal chairman who deals among other things with such issues as reservation housing and sewage. If there is little question that the Navajo tribal chairman is exercising tribal political influence in his handling of civic matters on the reservation, then why

---

[267] There are, for example several periods in the 20th century when pan-Indian activism at the national level spurred numerous public manifestations of tribal affiliation at the local level. These include the early 1930's in response to the Indian Reorganization Act (IRA) and in the late 60's and early 70's on the heels of the American Indian Movement (AIM). In constrast, an especially quiescent period for many tribes was in the 50's when federal termination policy was being implemented.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

should Indian town officials' actions vis-à-vis local Gay Head issues be viewed any differently? In both cases "civic" matters" are tribal issues because they primarily affect tribal members and not because they resonate of pre-contact cultural traditions.

Given BAR's skewed emphasis upon "governing bodies," designated "leaders," and stereotypically Indian issues, it is hardly surprising that much data regarding Gay Head political process was ignored or cast in a negative light in the "Proposed Finding." For example, because BAR was looking for individuals who controlled the actions of followers, they concluded that Lorenzo Jeffers lacked political influence.

> As a pan-Indian leader and political maverick, Lorenzo D. Jeffers, who founded most of the local civic improvement organizations, exercised some influence and authority within the community and outside the town government. Yet, because his positions were often controversial and erratic, he did not muster enough support on a continuing basis to be considered a legitimate political leader of the Gay Head Indians (BAR 1987:6, emphasis added).

Ignored by BAR was the fact that the fluctuations in Jeffers's career reflected the authority which the Wampanoag tribe at times accorded Jeffers to serve as its representative and, at others, withheld. That is, just as important as Gay Headers actively supporting a particular individual as spokesperson for their interests, was regulating that person's behavior when his/her ideas and actions did not conform with tribal sentiment. Given the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Wampanaogs' diffuse, consensual mode of political process, this meant ignoring and not following through on some of Jeffers's more aggressively pan-Indian proposals when these violated Gay Headers' long-standing isolationism.

Further, it is important to point out that since leadership among Gay Headers was neither a permanent nor general status, those who, like Jeffers, engendered the disapproval of fellow tribesmen on a specific issue -- as, for example, when Jeffers called for a state audit of town finances -- did not remain forever marginalized. Instead, they could and indeed did go on to initiate other projects and causes which earned them the renewed support of tribal members.

In short, that certain individuals floated in and out of favor as tribal spokespersons was not at all unusual insofar as the Indians themselves were concerned. Nor, one might add, did it signal a lack of continuity in political process as maintained by BAR. Instead, it only indicated a more acephalous and fluid pattern of political influence in which formal and informal representatives complemented each other's ability to speak on behalf of the tribe. This pattern was not only congruent with that of many American Indian tribes in the pre- and early contact periods, but also with that evinced by the Gay Head Wampanoags themselves in the pre-incorporation period.

BAR's myopic focus upon enduring political structures

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

also led it to conclude that the comparatively low attendance figures for Tribal Council meetings indicated a lack of support for this organization by Gay Headers generally. According to the "Proposed Finding," Gay Head Indians were not apathetic politically for they evinced a strong turnout at annual town meetings; it was only at Tribal Council meetings where they had difficulty obtaining a quorum (1987:68-70). Yet, if we do not assume that political influence entails formal structures with jurisdiction over members, then a different interpretation of the attendance figures is warranted.

Gay Headers never had a single, formal governing body which made and realized all policy decisions pertinent to the tribe. Rather, as noted above, even the native-dominated town government functioned alongside a host of informal leaders who were instrumental in realizing numerous tribal projects. That is, the miscellaneous voluntary groups that developed throughout the 20th century complemented the actions of the town government.

When the Wampanoag Tribal Council of Gay Head, Inc. was formed in 1974, its mission was to provide a legal entity to which title to the common lands could be transferred. The court injunction which prevented Indian selectmen from carrying out the transfer of title precipitated a long legal battle during which the latter came to assume greater responsibilities for the tribe. On the one hand, BAR was

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

right when it observed that the Indian-dominated town government did not change appreciably when the Tribal Council was formed (1987:45). On the other, what the Branch did not mention was that the Council was never supposed to take over completely stewardship of the tribe. Rather, the Council only took on those issues which the Indian selectmen could not by virtue of the legal limitations upon their official roles. These included such projects as negotiating for tribal control of the common lands, gaining federal acknowledgment of the tribe, and setting up cultural history programs for Indian children. As the Council personnel became more skilled and sophisticated in the grant process over the years, they also sought monies for several economic development projects which were available only to small groups as "block grants." In turn, tribal selectmen continued to do their best within the legal confines of their office[268] to safeguard town owned Indian resources.

For example, town officials rejected proposals to improve tourist facilities at the Head even though this would increase revenue to the town as a whole. Indian selectmen consistently voted against improvements which would bring more non-Indians to the town (whether as summer residents or day trippers) and voted for improvements which

---

[268] As noted above, the native selectmen could not decline to represent the town in the lawsuit over the common lands or else they themselves would be subject to legal action for being derelict in their official duties.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

benefitted the year-round, predominantly Indian population who depended heavily upon local fish and shellfish resources for income.[269]

That the Tribal Council never fully eclipsed the Indian-dominated town government merely reflects the complementary roles which each played.[270] Tribal Council meetings not only served different functions from that of town meetings, but dealt with different issues as well and this was reflected in the attendance of the respective meetings.

Tribal Council meetings often involved updates regarding on-going programs and projects (some of which were long-term, such as the preparation of the federal acknowledgment petition), the status of which was continually the subject of informal community discussion and debate. Not only had most Indians heard about the issues in advance of Council meetings, but they had also discussed these with friends, family and neighbors. Decisions too were often reached ahead of time so that Council meetings were less occasions at which policy was made as they were those at which it was formally affirmed. Those who

---

[269] Hence, the selectmen's vigorous efforts to get an improved road to Menemsha Pond and a boat ramp for scallopers who fished there and the officials' opposition to improved parking and bathroom facilities at the cliffs.

[270] Moreover, informal leaders continued to operate through, around and at the interstices of the town government and Tribal Council.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

disagreed with the majority often remained silent if they sensed they had insufficient support among fellow members or perhaps did not attend at all if the opposition was overwhelming.

Town meetings, in contrast, were attended not only by town residents, but also by outside advisors, spokespersons and officials -- e.g., planning commissioners, hatchery scientists, legal counsel, etc. -- who offered data and expert opinions relevant to the issues under discussion. One must note that most of the warrant items at town meetings had to do with budgetary expenditures which, however minor for the non-Indian property owners of Gay Head (most of whom were upper-middle and upper class), represented significant financial outlays for the local Gay Head Indians. The latter therefore needed to attend town meetings to hear the contributions of the advisors and to cast their votes (by raising their hands) following public discussion and debate. Moreover, natives voiced dissident positions at these meetings with the hope of gaining listeners' support -- i.e., that of non-kin who were outside the normal sphere of gossip and influence. In short, there existed the potential for political gain if Gay Headers attended and actively participated in town meetings. In contrast, Indians obtained little benefit from such behavior at most Council meetings since the discussion of issues and the voting had, to a great extent, taken place prior to the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

formal meeting.

What we see, then, is that BAR's model of tribal political authority held Gay Headers accountable to a paradigm which, ethnographically and historically, had little relevance to them either in the pre-contact or post-incorporation periods. While BAR claimed that some of the data it turned up during its independent research were negative, it was in fact the Branch's implicit assumptions about how political influence should manifest itself in tribes which caused such an interpretation. However BAR's model more reflected the extensive powers of formal "governing bodies" than they did the fluid, consensual mode of authority and influence which characterized many American Indian tribes, including that of the Gay Head Wampanoags. As demonstrated above, when a more ethnographically relevant and historically cognizant model is used, the evidence appears much differently.

For its part, the Tribal Council devoted most of its energies to rebutting the significance of specific data which BAR had cited in the "Proposed Finding." Although the Council took BAR to task for focusing too narrowly upon the issue of government, still, it did not challenge BAR's basic premise that political influence is exercised over others and is vested in enduring leaders and governing bodies. Accordingly, in its "Critique," the Council clarified and expanded its discussion of how Indian officials dominated

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

town government, what they accomplished in office and to what extent the issues they dealt with reflected Indian, as opposed to town, interests. In doing so, however, the Council inadvertently reaffirmed BAR's structural model, including the latter's emphasis upon the more institutionalized forms of political influence. Ignored were how the Indians themselves conceived of political process (including its formal and informal manifestations) and the extent to which tribal political relations were affected by external factors at the local and national levels.

New Evidence

In addition to pursuing legislative recognition and to providing a written critique of BAR's handling of available information, the Tribal Council submitted new evidence for consideration. Comprising a small proportion of its formal response (36 out of some 147 pages), the substantive sections of the "Critique" focused upon the social relations between resident and non-resident Gay Headers and upon the leadership of several Indians, some of whom had long tenures as town selectmen and others of whom did not. In both cases, since the Tribal Council had not challenged BAR's working model of group interaction (criterion b) and political process (criterion c), the new data were presented so as to plug holes identified as such in the "Proposed

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Finding."

In order to counter BAR's assertion that "Gay Head Indians maintain[ed] little social contact with each other outside of ties within immediate families" (1987:3), the Tribal Council detailed the social networks and communication that existed among several extended Indian families in the Boston, New Bedford and Cape Cod areas. Included was a discussion regarding which family members visited each other and/or kept in touch by telephone and who communicated with kin on the Vineyard on a regular basis. Also discussed were the kin ties and ongoing social relations between town officials and non-resident Gay Headers. As the Tribal Council pointed out,

> these networks are used for overtly political purposes by the tribal leaders who hold town offices to make sure that they get out the tribal vote for elections and town meetings where critical issues are to be discussed (as quoted of the WTCGH in BAR 1987:7).

To further substantiate the social dichotomy between Gay Head Indians and non-Indians, the Tribal Council analysed the social columns which appeared in the Vineyard Gazette. The Council pointed out that when non-Indians wrote the articles about Gay Head, the focus was exclusively upon non-Indians in the town but when Gay Headers wrote them, it was the comings and goings of native families which were chronicled, providing an additional means by which non-resident Indians kept informed about their fellow tribesmen on Martha's Vineyard.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In answer to BAR's criticism that Gay Headers did "not have tribal institutions or events which serve[d] to integrate the membership and maintain social contact," (Ibid) the Council discussed five recent Indian social events (two birthdays, one retirement and two funerals) which brought together several hundred Gay Headers of different lineages and factions. According to BAR, "assemblies of this size provide[d] additional evidence that the group maintains active social relations" (1987:7).

In turn, most of the Tribal Council's new information regarding criterion (c) dealt with how Gay Headers sustained political influence outside of the town government -- i.e., through leaders, who held positions other than or in addition to that of selectman. Discussion focused upon the initiatives of Indians who held various ceremonial positions (e.g., as "'chief" and "medicine man"), who headed miscellaneous organizations (e.g., the Aquineah, Howwaswee and Pawkunnawakutt Councils) and who were instrumental in various community projects (e.g., organizing the volunteer fire department, obtaining electricity and telephone service in town, etc.). The emphasis was upon what an individual accomplished rather than upon the process by which he or she gained tribal support and respect.

In addition to the new data offered by the Tribal Council, BAR received several letters from non-Indian parties interested in the Gay Head case. These included:

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Dr. Gloria Levitas who had written a doctoral dissertation on Gay Head and owned a summer house in the town; Dr. Francis Jennings, a retired historian who lived in neighboring Chilmark; Dr. William Simmons who had recently written a book on the retention of Indian myths and legends in New England;[271] Mr. Robert T. Morgan, Sr., Chairman of the Dukes County Commissioners; Mr. Doug Cabral, editor of the Martha's Vineyard Times and Reverend Peter R. Sanborn, pastor of the Community Baptist Church in Gay Head. In general, the communications were supportive of the Gay Head petition with several offering brief clarifications of specific data. For example, Reverend Sanborn confirmed that funerals brought large numbers of Indians together; Dr. Simmons noted that Gay Headers exhibited the greatest retention of Wampanoag legends in New England; and Dr. Levitas pointed out that the loss of political autonomy which Gay Headers experienced following incorporation in 1870 was mandated by state law.

In and of themselves, the letters did not provide enough new information to counter the many negative points raised by BAR in the "Proposed Finding." Nor did they or the Tribal Council's new data challenge BAR's working assumptions regarding group interaction and political

---

[271] The information contained in Dr. Simmons's book had not been available to BAR when it conducted its site visit in 1986 nor had the Tribal Council referred to the data in the original petition.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

influence. Still, the rejoinders were important in demonstrating that the Gay Head Wampanoags had the political backing of several prominent local figures and academics as well as in corroborating some of this data. In the "Final Determination," BAR affirmed the latter but made no mention of the former.

12. Acknowledgment staff reviews submitted comments and recommends final determination.

According to BAR, the most significant information which was submitted during the formal response period was the substantive new evidence provided by the Tribal Council itself. In fact, BAR considered the latter so important that it observed in the "Final Determination" that the evidence "would have resulted in a positive Proposed Finding if it had been submitted with the initial petition materials" (1987:2, emphasis added). Adding that the preliminary determination had been a "close and difficult decision," BAR stated that

> the new evidence, when considered in light of the arguments and observations presented by the other interested parties and a reconsideration of factual data in the Proposed Finding, shifts the determination in favor of the petitioner and, therefore, warrants amending the preliminary decision that the WTCGH does not meet two of the criteria set forth in 25 CFR 83.7. However, the favorable determination in light of the new evidence was similarly difficult to decide, and this decision remains commensurably close (Ibid).

With these words, BAR reversed its proposed negative finding to a positive final determination for federal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., thereby entitling the latter to a government-to-government relationship with the United States. As a federally recognized tribe, the Gay Head Wampanoags were now eligible for special Indian benefits and services and in a secure position legally to proceed with the resolution of the land suit.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 9

SETTLEMENT

BAR's positive final determination regarding the Gay Head petition for federal acknowledgment definitively resolved the legal relationship of the tribe vis-à-vis the federal government. At the same time, how the Gay Head decision was made -- i.e., the very process by which evidence was presented and analyzed -- also had a significant impact. Discussion below will begin by addressing the immediate repercussions of the decision upon the tribe before turning to the long-term ramifications of the decision-making process.

Federal Acknowledgment of the Gay Head Wampanoags

In accordance with its new trust relationship with the Gay Head Wampanoags, the federal government undertook a preliminary needs assessment to determine what services and programs were to be made available to the tribe and how much they would cost. As part of this survey, the tribal membership list also had to be finalized in order to ascertain how many individuals would be provided for generally and who specifically might be eligible for what services.

Equally if not more important than Bureau supervision, however, was that federal acknowledgment altered the legal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

standing of the Gay Head Wampanoags with respect to their land claim. Instead of having to demonstrate in court, as the Mashpee Wampanoags had been forced to do, that Gay Headers had standing as a tribe to a claim pursuant to the 1790 Non-Intercourse Act, the latter could now litigate the merits of the claim itself -- i.e. whether Massachusetts's actions in 1870 had been lawful and whether land in Gay Head properly belonged to the Indians or to the town, individual allottees and their heirs. Given the landmark decision in Passamaquoddy v. Morton (1975), which found that the federal government did have fiduciary obligations vis-à-vis the Passamaquoddy Indians under the 1790 Non-Intercourse Act, Gay Headers stood a good chance of succeeding in their claim regarding the common lands. Indeed, in the Passamaquoddy case, the the State of Maine settled out of court, granting the tribe some $84 million in restitution.

At the same time federal acknowledgment placed the Gay Head Wampanoags in a good legal position to pursue their land claim regarding the common lands, it adversely affected the position of the Taxpayers Association which had long opposed tribal control of the lands. Not surprisingly, the non-Indians were now more than ever anxious to proceed with the proposed settlement which had been worked out previously with the Tribal Council, Town of Gay Head and state and federal governments. Although the Taxpayers Association had at one time been fearful lest Gay Headers make extensive

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

claims to land on Martha's Vineyard when the tribe gained status recognition, these fears proved unfounded. Rather, upon gaining status recognition, the Tribal Council was just as interested in quickly resolving the land claim and in avoiding costly litigation as the Taxpayers Association. Approximately eight months after the WTCGH received federal acknowledgment, the proposed settlement became law, thereby ending the thirteen year old dispute over the Gay Head common lands. As a tribe, the Gay Head Wampanoags obtained legal control over these lands as well as over other acreage which had been included in the settlement agreement.

In celebration, the Tribal Council hosted a formal dinner at a restaurant in neighboring Chilmark to which Gay Headers and selected non-Indians were invited. The event was a public celebration of the tribe's new legal status as well as a symbolic gesture toward reconciling the factional divisions which had riven the town and tribe for more than a decade. Prominent members from the county, Taxpayers Association, town government, Tribal Council and "cosmopolitan" faction of Indians attended as well as the Council's consultants and invited guests. While it was too soon for the old wounds to be forgotton, at least in public former adversaries shook hands and talked about the future of the town and tribe.

To be sure, resolution of the Wampanoags' land claim was an expected spinoff of the federal acknowledgment

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

process. From the very beginning the Tribal Council's strategy had been to negotiate an out of court settlement in which the Indians would gain land and money in restitution and federal recognition as part of the agreement, not unlike the deal worked out with the Mashentucket Pequots in Ledyard, Conneticut. For Gay Headers, successfully completing the petitioning process rendered the tribe's legal status a fait acompli rather than itself an object of negotiation. While it was no surprise that the land settlement became law on the heels of BAR's positive "Final Determination," the latter also had some unanticipated effects upon relations within the tribe.

Several months after the tribe obtained federal acknowledgment, one of the three Indian selectmen in Gay Head, Marc Widdis, declined to seek reelection to office, citing personal reasons. This left the way open for a non-Indian to be elected for the first time in the history of the town.[272] It was an ironic turn of events.

As discussed in the previous chapter, a major issue in the "Proposed Finding" had been BAR's assertion that Indian officials did not serve as the governing body of the tribe. In its written response, the Tribal Council had gone to some length to refute this point, demonstrating that Gay Headers

---

[272] The only other non-Indian selectmen in Gay Head's history had been married to an Indian and thus for all intents and purposes was within the sphere of native social, economic and political relations.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

had long dominated town government, especially the powerful positions of selectmen, and that native officials did indeed represent tribal interests at least until the formation of the Tribal Council which took over some issues. It was ironic then that, having successfully made their case to BAR and obtained status recognition, Gay Headers ceded the position of selectman so soon to non-Indians, this office being the most visible, if not prestigious, powerful and lucrative in the municipal structure.[273] What was startling was not the selectman's decision that he had given enough to the town/tribe and now wanted to devote more time to personal pursuits, this being his official reason for not seeking reelection. Rather, what was remarkable was that no other Gay Header took over the office, whether from the reigning faction of "locals" to which the outgoing official nominally belonged,[274] or from the opposing group of "cosmopolitans."

On the one hand, it was unlikely that a member of the latter would have sought election at this time or succeeded

---

[273] While some of the positions carry much responsibility, most are part-time with meager wages thus making them less desirable jobs.

[274] The selectman's brother had been the Tribal Chairman and had been highly instrumental in sheparding the group through the long and tedious acknowledgment process. The selectman's mother was the President of the Tribal Council and likewise extremely important in helping the tribe to gain status recognition. His mother's brother was the Chief of the Gay Head Wampanoags and had also held numerous positions in town.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

in gaining enough votes if he/she had run. After all, the "dissidents" (as the "cosmopolitans" were known locally) had taken numerous steps in the last five years to block the negotiated settlement and had ruffled the feathers of many members of the Tribal Council and Taxpayers Association alike. Even after the "Final Determination" had been published in the Federal Register, the "dissidents" had launched a last ditch effort to thwart the settlement process. Appealing to the federal government, a lawyer for the group maintained that the Tribal Council did not represent all the Wampanoags and thus had no power to negotiate a settlement on behalf of the entire tribe. The BIA found this position without merit and proceeded to recognize the WTCGH as the governing body of the Gay Head Wampanogs.

On the other hand, that the "'local" Gay Headers did not put up their own candidate to replace the selectman is, on the face of it, less understandable. One would think that this faction could ride in its wave of success with little effort. It is likely that a candidate from this group not only could have counted on the "local" Indian vote, but also upon the votes of at least some non-Indians since the "locals," in comparison with the "dissidents," had shown themselves to be fairly moderate in their demands and had adhered to the settlement agreement as they had always said they would. Moreover, the outgoing selectman was well

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

respected among Indians and non-Indians, all acknowledging that he had taken the responsibilities of his office very seriously and had worked hard to find equitable solutions to some difficult problems. Why then was no Gay Header even nominated to perpetuate native control of town government? Why did the non-Indians step so easily into a position which had for so long been filled by Indians? Why did most Gay Head Indians, when asked directly, express apparent disinterest in whether an Indian or non-Indian became the new selectman? The answer to these questions has to do with the very nature of tribal political authority among Gay Headers and the new relationship between the tribe and the federal government.

In its review of the Gay Head petition, BAR had sought evidence of a governing body among Gay Headers replete with enduring leaders. Despite the Tribal Council's efforts to make the data conform with the government's model, the fact remains that, until the mid 1970's, much tribal political authority was exercised by those outside of the formal structures of the town government and Tribal Council. Some Gay Headers organized voluntary associations to handle community problems and issues; others undertook community projects on an ad hoc basis; and a handful tried to get the Wampanoags involved in pan-Indian activism at the regional and national levels.

What is salient about these individuals is not merely

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

that they operated in non-institutional arenas, but that their influence and authority were extremely fluid, task specific and transitory. That is, as informal leaders, they did not have enduring political sway over tribal members but instead garnered consensual support among fellow tribesmen as issues and opportunities arose. This was reflected in the fact that the several voluntary associations which formed in the twentieth century had short life-spans and limited agendas, that many community problems and issues were dealt with by the general tribal membership, and that the several attempts to get Gay Headers involved in pan-Indian issues on a regular basis met with relatively little success.[275] Among the Gay Head Wampanoags, there was no leadership structure as there was a handful of individuals who at times evinced the personal skills and community respect to realize several projects. Even these individuals, however, experienced periods in which their status among fellow tribal members was considerably less

---

[275] It was not, as BAR maintained in the "Proposed Finding," that Gay Headers were not interested in pan-Indian issues for the Wampanoags enthusiastically participated in regional powwows and celebrations. Rather, where they expressed reluctance and avoidance was when Lorenzo Jeffers portrayed himself as the self-proclaimed Supreme Sachem of the Wampanoags and undertook several initiatives on his own without gaining the support of Gay Headers ahead of time. In other words, when Jeffers overstepped the position of spokesperson for the tribe, it was then that his support among Gay Head Indians fell away. It was, in effect, the style of political authority that was spurned by Gay Headers, not the substantive issues and activities for which he fought.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

than that of a respected leader. When this occurred, Gay Headers did not conceive of themselves as leaderless, since they never accorded their spokespersons any power over themselves. Rather, as tribal members saw it, the individual had merely "gotten too big for his britches," and was now being pulled up short for seeking to exert authority which he/she never had. Political authority inhered, as it always had, in the general membership and was expressed at times, regarding specific issues, by individual spokespersons.

If the roles of formal and informal leaders among Gay Headers complemented one another and indeed were themselves blurred throughout the twentieth century, this began to change somewhat when the legal dispute over the common lands erupted in the mid 1970's. To be an effective spokesperson for the tribe on this particular issue, it was necessary to have an official position in town government and/or on the Tribal Council -- that is, to command a type of authority and influence which non-Indians understood and formally recognized within the negotiating arena. It is for this reason that the "cosmopolitans" and "locals" fought so bitterly over control of the Tribal Council in the early 80's since whatever faction did so also directed the tribe's legal strategy.[276] As long as the legal fight over the

---

[276] The "cosmopolitans" lost their official status as representatives of the tribe when the "locals" took over control of the Tribal Council. However, the deposed faction

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

common lands remained unresolved, the two factions jockeyed for control of the Council and town government.

Once the tribe received federal acknowledgment, however, the political climate in Gay Head changed appreciably. With the full weight of the federal government now behind the Tribal Council and the latter officially designated the governing body of the tribe, the Indian selectmen's ability to act as representatives of tribal interests deteriorated. This is not to say that the actions of town officials ceased to impact directly upon the year-round Indian residents of Gay Head or that the latter no longer had a vested interest in who filled these offices.[277] Rather, it is only to point out that now, with government funds for health, education, housing and economic development being channeled through the Tribal Council, it was the latter organization which assumed primary responsibility for the welfare of its native membership. Not only would the Council administer BIA programs and services, but it would also be the official representative

---

showed themselves to be important players in the land claim dispute by initiating several legal actions which proved a thorn in the Council's side. Thus, even though the "cosmopolitans" did not formally participate in the negotiation process, they nevertheless forced the Tribal Council, Taxpayers Association and Town of Gay Head to deal with their demands.

[277] To be sure, tax rates, fishing limits and environmental preservation were only several of the many local issues which impacted directly upon resident Gay Headers and somewhat differently than upon non-Indian summer residents.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of the tribe vis-à-vis outside agencies and offices including that of state and local governments.

That one Indian selectman bowed out of public office and was not replaced by another Gay Header in 1987 was thus symptomatic of the not uncommon process in U.S. history whereby federal guardianship alters the way in which political authority is exercised in Indian tribes. By extending official recognition and support to specific individuals and political forms, whether or not these are indigenous, the federal government reifies structures which it finds useful and amenable for administrative purposes. For many tribes this has resulted in the increasing formalization of political authority to the point of generating, where they had not previously existed, tribal governing bodies complete with elected officials, tribal constitutions and tribal courts. Originally developed under the auspices of the Bureau of Indian Affairs to facilitate the administration of tribal services, the tribal governing bodies have become an integral, if highly politicized, feature of contemporary reservation life.

While the Gay Head Wampanoags had a chartered tribal council well before the tribe obtained federal acknowledgment (indeed the organization had been instrumental in realizing this goal), nevertheless the role of the Council changed appreciably with the change in legal status in 1987. Whereas in the past, the Tribal Council

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

complemented informal spokespersons and Indian selectmen in their protection of tribal interests, now the organization became the federally recognized "governing body" of the tribe. That is, the previously loose and overlapping roles of formal and informal leaders were replaced by an organizational form which was the official structure and means by which tribal political authority was to be exercised. Although in the past the Tribal Council could extend few tangible benefits to its members for want of federal recognition, the organization could now regulate Gay Headers' access to such resources as government-funded housing, economic development programs, health benefits, and educational opportunities. Insofar as the future of the tribe was concerned, membership on the board of directors now became far more important than the highly visible positions in town government. It was no wonder, then, that no Gay Headers readily jumped at the opportunity to run for town selectman in order to spend at least half of one's time dealing with vocal and organized non-Indians.

Thus, although the Gay Head Wampanoags gained legal control of their common lands which they had long sought, status recognition also engendered the consolidation of tribal political authority in the Tribal Council. For those Gay Headers already on the board of directors of the Tribal Council, this signalled an increase in political sway; for those who were not already involved in the organization, it

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

became somewhat more difficult to exert influence informally among tribal members. For the tribe in general, there was a hardening of positions and a decrease in the diffuse, consensual means by which decisions were reached among tribal members. The latter also became somewhat more passive insofar as taking initiatives on behalf of the tribe. There was a sense of waiting for the board members to "do something" -- i.e., to develop programs and services for the tribe -- thereby becoming less spokespersons than tribal "leaders" in the non-Indian sense of the term.

Despite the settlement of the land claim, then, federal acknowledgment did not bring about a blurring of the factionalism which had long existed in Gay Head nor did it spark a burst of active participation in tribal affairs on the part of Gay Headers generally. Rather, the change in legal status brought about the institutionalization of tribal political authority which only served to fertilize the environment in which political divisions might germinate.

In addition to its immediate impact upon the present status and future possibilities of the tribe, federal acknowledgment of the Gay Head Wampanoags also had several long range ramifications which were not anticipated or specifically planned by those involved in the petitioning process. Insofar as our understanding of law is concerned, these are the more interesting, if not enduring, effects

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

for, in influencing events beyond the Gay Head Indians themselves, they reveal the power of FAP as a legal process. That is, what makes the Gay Head case particularly instructive and worth close study is not the specific issues it resolved for the Gay Head Indians alone, but the way in which it affected subsequent events and issues, including other acknowledgment petitions.

This is not to dismiss or minimize in any way the symbolic and practical import of federal acknowledgment for Gay Headers. After all, FAP made possible their legal control of the common lands which, for the Indians themselves, was and is essential to tribal members both individually and as a group. Quite simply, federal acknowledgment enabled this tribe to have a present and to plan for the future. Yet, since the aim of this study is to understand the power of law, its primary focus is not upon the particulars of the Gay Head case, however compelling and dramatic they may be for the parties involved, as it is in understanding the rules and rationale of the process by which the case was decided. It is in examining what did and did not happen vis-à-vis petitions which were evaluated after the Gay Head case that the power of this legal process is best understood.

Long Term Decision-Making: The Mohegan and Miami Petitions

From the time 25 CFR 83 was enacted in 1978 until June

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

1993,[278] a total of 22 petitions underwent active consideration by BAR. Of these, eight received positive final determinations; twelve were accorded negative final determinations; and two received a negative proposed finding.[279] Following the Gay Head "Final Determination" in January 1987, only one group was federally acknowledged (the San Juan Paiute of Arizona); three petitioners were rejected (the Samish of Washington State, the Machis of Alabama and the Miami Nation of Indiana); and a negative proposed finding was published for the Mohegan tribe of Connecticut. Of these five petitions, three involved issues not directly related to decision-making in the Gay Head determination.

In the case of the San Juan Paiutes, for example, there was little question that the petitioners easily satisfied most of the FAP criteria inasmuch as some 65% of the 188 member tribe lived amongst closely related kinfolk in a remote area of the Navajo Reservation where they continued to speak the Paiute language, practice distinct religious

---

[278] These figures do not include the Snoqualmie case in which a proposed positive finding was issued on May 6, 1993.

[279] The Snohomish petition was withdrawn and not pursued to the final determination phase; the Mohegan negative proposed finding is unresolved as of this writing (1993) and is discussed below.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

ceremonies and adhere to the advice of traditional "elders."[280] Rather, the only point at issue was the group's autonomy, since a portion of its membership had been included on the Navajo tribal roll for several years. BAR determined that this was involuntary on the part of the Paiutes and therefore did not compromise the latter's political autonomy (criterion c) nor membership distinct from that of a federally recognized tribe (criterion f). The Samish and Machis petitions, in turn, both failed to demonstrate descent from an historic tribe (criterion e), in addition to being found deficient regarding criteria (b) and (c).[281]

The remaining two cases which BAR reviewed following the Gay Head "Final Determination"[282] are especially pertinent to the Gay Head case since, according to their respective "Proposed Findings," each petitioner satisfied criteria (a), (d), (e), (f) and (g) while failing criteria (b) and (c). This means that, like the Gay Head Wampanoags, both the Mohegan Tribe of Connecticut and the Miami Nation of Indiana demonstrated that they had been identified continuously from historical times until the present as

---

[280] Most of the rest of the tribe's membership either lived on other Indian reservations (e.g., the Allen Canyon [Ute] and the Koosharem [Paiute] Reservations in Utah) or in California (BAR 1987b:137).

[281] The Machis also failed to satisfy criterion (a).

[282] This discussion pertains only to the period from 1987 through June 1993.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

American Indian or aboriginal and that they were not composed principally of members of other North American Indian tribes. They also had submitted a copy of their present governing document; they included lists of their group's present and past membership which showed that members were descended from an historical tribe or from tribes which combined and functioned as a single autonomous entity; and they confirmed that their group was neither terminated nor otherwise expressly denied a federal relationship. Where the Mohegans and Miamis were found wanting by BAR was only with respect to their contemporary group interaction (criterion b) and political organization (criterion c). Let us briefly examine BAR's explanation of the petitioners' deficiencies with respect to these two criteria.

The Mohegan petition for federal acknowledgment bears a strong affinity with that of Gay Head. Not only are there many historical and ethnographic similarities between the two groups, but they also both initiated land claims pursuant to the 1790 Trade and Non-Intercourse Act.[283] The

---

[283] The other case which bears an even stronger resemblance to that of Gay Head is, of course, that of the Mashpee Wampanoags (see Chapter 1). Having lost their bid in court in 1978, the latter are currently seeking status recognition through the FAP process. At present, their petition has been reviewed for obvious deficiencies but has not yet been placed on active consideration. Given their unsuccessful lawsuit, it is likely that, when the Mashpee case is finally decided, it too will generate a great deal of political controversy.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Gay Head and Mohegan petitions for federal acknowledgment were thus launched amidst equally charged political settings in which the legal stakes of status recognition were substantial for the native plaintiffs and non-Indian defendants alike.

On October 30, 1989 BAR published a "Proposed Finding Against Federal Acknowledgment of the Mohegan Tribe of Indians of the State of Connecticut." Some four and one half years later, a final determination has yet to be rendered. At least part of the reason for the lengthy delay may be attributed to changes within the Branch of Acknowledgment and Research itself.

First, the staff anthropologist who initially worked on the Mohegan case (as well as on that of Gay Head) was permanently reassigned within the Bureau of Indian Affairs. Second, the Branch Chief of BAR was temporarily moved to another department and the post was rotated amongst several members of the BAR staff, each of whom served brief stints as Acting Branch Chief. Third, attempts to recruit additional staff to expedite the review process were not successful. Lack of consistent administration, coupled with a shortage of staff personnel no doubt contributed somewhat to the Mohegan case languishing at the proposed finding stage.

On the other hand, since several other FAP petitions were reviewed by BAR during this period, administrative

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

discontinuities alone cannot shoulder the entire weight of the protracted delay in the Mohegan case. Attention must be paid the nature of the evidence itself and the extent to which political considerations inform the decision-making process. As already noted, the Mohegans are litigating a land claim pursuant to the 1790 Trade and Non-Intercourse Act and federal acknowledgment would greatly improve their legal status in that case. But, unlike the Wampanoag lawsuits where the defendants were individual non-Indians and private businesses, the defendant in the Mohegan case is the State of Connecticut which is under few financial or time pressures to resolve the Indians' claim. Indeed, the State has substantial resources at its disposal to protect its interests.

All this is to say that it is quite likely that a positive or negative final determination of the Mohegan petition will be appealed in court -- respectively by the State or by the tribe itself. With the spector of legal action hanging over any decision in the Mohegan case, the BIA is under great pressure to render a finding which will withstand legal scrutiny not only in terms of the historical, anthropological and genealogical evidence, but also in terms of prior BAR determinations, including, if not especially, that of Gay Head.[284] In this regard, it is

---

[284] As new cases are decided, they exert increasing pressure upon the Mohegan case inasmuch as there are more interpretations with which a final finding must be

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

important to note that, to date, the Gay Head case remains the only one in which BAR reversed itself between the proposed finding and final determination. Accordingly, what issues BAR raised in the "Proposed Finding," how the WTCGH responded to these and how the data were ultimately interpreted in the final evaluation are of pressing concern to the Mohegans given the great similarities between the two cases.

As summarized in the "Proposed Finding" published in the Federal Register on November 9, 1989, the Mohegan petition was found deficient with respect to criteria (b) because

> There is not enough documentary evidence regarding group activities following the cessation of the Wigwam festivals in 1941 to conclude that the petitioning group has maintained a cohesive community within which social interaction took place since that time. The available documentation shows that since 1941, the Mohegan have had few, if any, community events or political meetings of a tribal nature. No evidence was submitted or found regarding other internal events which might have served to bring a substantial number of group members together. There was no evidence of sustained social interaction between the families represented by the current membership. The only current social activity which brings different families together is an annual homecoming which was not started until the late 1970's (BAR 1989:47136).

According to BAR, the Mohegans remained socially intact from contact through the early twentieth century. In 1671 the Mohegan tribe had been granted a sizable tract of aboriginal land by Connecticut officials. Over time, not

---

reconciled.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

only did the population suffer a significant decline in its numbers,[285] but the land base was drastically reduced as well.[286] In 1861, a second division of tribal lands by the State caused many tribal members to sell their parcels to non-Indians and move to Norwich and New London. An increasingly dispersed Mohegan population retained ties with fellow tribal members through the annual Wigwam festival which was held on the grounds of the Mohegan Church every year from 1860 to 1927 and intermittantly from 1927 to 1941. It is after this date, BAR maintains, that there is no evidence of "a cohesive community within which sustained social interaction took place" among tribal members until the late 1970's when the Wigwam festival was revived as an annual homecoming.

Several similarities with BAR's initial evaluation of the Gay Head petition are readily apparent in the Mohegan "Proposed Finding." First, both the Gay Head and Mohegan petitions were explicitly criticized for insufficient evidence of a "cohesive community" and of "sustained social interaction" among the tribal membership during the last 50

---

[285] There were an estimated 1,000 Mohegan in 1650 (which itself represented perhaps a 93% reduction from from the precontact period) yet a scant 135 were counted in 1782. From 1809 to 1902, the population numbered some 50-69 natives who lived in Mohegan (BAR 1989:2).

[286] The original colonial grant reserved some 20,000 acres for native use which had been eroded to some 2,600 acres in 1790 when the first land division was made (BAR 1989:3).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

years or so. For BAR, the issue was not so much a lack of social interaction among the Mohegans from the 1970's until the present as it was a gap in the evidence during the twentieth century -- from 1941-1967 -- during which there was a "paucity of Mohegan activities and social contacts" (BAR 1989:4).

Second, as in the Gay Head case, the Mohegan Indians were criticized for not having readily identifiable "tribal social or cultural events" through which they sustained ongoing ties with each other. By focusing exclusively on the presence or absence of such stereotypically Indian practices as the Wigwam Festival and Corn Dance, BAR implicitly accorded cultural manifestations inordinate weight in the evaluation of tribal relations. That is, for BAR reviewers, tribal relations are equated with the presence of Indian events, ceremonies, practices and beliefs whereas the absence of such events, ceremonies, etc. signal a lack of group interaction.

Third, BAR stated that the Mohegans lacked social cohesion among tribal members from 1941-1967, as indicated by the absence of tribal events or activities during these years. BAR implied that, had the Mohegans sustained the Wigwam festival or other exclusively Indian social activities from 1941 to 1967, the petitioner would have satisfied criterion (b). Since, in the Gay Head case, the Tribal Council had apparently understood and heeded, with

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

successful results, BAR's implicit request for additional evidence of a continuous cohesive community, the Mohegans are under considerable pressure to do likewise if they can -- i.e. if the evidence exists and if they can furnish it to BAR. However, one must question whether this is the Mohegans' only recourse in order to satisfy this criterion.

According to the regulations, criterion (b) requires that petitioners provide:

> Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area (25 CFR 83.7b, emphasis added).

Unlike criteria (a) and (c) which explicitly require petitioners to demonstrate respectively Indian identity and political authority over time, criterion (b) is written in the present tense ("inhabits...or lives in").[287] This means that evidence pertaining to "specific area" or "community" refers only to the nature and whereabouts of the groups as it exists in the contemporary period.[288]

---

[287] Although I have been involved in federal acknowledgment issues for more than 10 years, I never noticed the tense of criterion (b) until it was pointed out to me in 1992 by Dr. Karen Cantrell who, in addition to being an anthropologist, is a lawyer. Until that point, I had accepted uncritically the BAR staff's interpretation of criterion (b) requiring petitioners to demonstrate the cohesiveness of their Indian communities over time.

[288] According to explicit instructions of the BAR staff, "contemporary community" refers to the past 15-20 years or so.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Significantly, the criterion does not require evidence of historical continuity regarding the petitioner's habitation of a "specific area" or "community." It is therefore quite beside the point whether or not the Mohegans comprised a distinct community in 1861, 1941, 1951, 1961 or indeed, in any year before the present (roughly prior to 1970). Insofar as criterion (b) is concerned, the nature of the petitioner's social relations prior to the present era is irrelevant and immaterial.

The only issue in which continuity is pertinent in criterion (b) is with respect to whether members are "descendants of an Indian tribe which historically inhabited a specific area." This is, however, a technical matter in which present tribal members must demonstrate that they are genealogically related to members of the historic tribe. Since the same information is required under criterion (e), one may safely assume that if a petitioner satisfies the latter regulation, then it also meets the genealogical component of criterion (b).

Further, it is important to point out that, according to criterion (b), a petitioning group must "inhabit a specific area or live in a community viewed as American Indian and distinct from other populations in the area." One cannot emphasize too strongly the significance of "or" in the regulation for it indicates that a petitioning group has a choice as to how it might satisfy this regulation.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Inasmuch as the regulations define "specific area" and "community" exactly the same, viz. "any people living within such a reasonable proximity as to allow group interaction and maintenance of tribal relations" (25 CFR 83.1(o), the critical issues in criterion (b) are "tribal relations" and "group interaction," not the existence of a "community" per se. In other words, a petitioner must provide evidence that the group at present maintains "group interaction" and "tribal relations"; it is not necessry to show that the group is a "cohesive community" or even a "community" at all, provided a substantial portion of its membership inhabits a "specific area." Criterion (b) thus does not prescribe what kind of ties must be manifest among tribal members or their strength, only that there exist "tribal relations" and "group interaction" among a substantial portion of the petitioning group's membership.

Keeping in mind that criterion (b) contains a choice for petitioners, what is salient about "community" should a petitioning group opt to demonstrate group interaction in this way? Criterion (b) states that the "community must be viewed as American Indian and distinct from other populations in the area." Use of the passive voice is significant.

Although non-Indians and Indians may both view a petitioner as American Indian, they are unlikely to do so for the same reasons. Indeed, it is more than likely that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the perspective of tribal insiders and outsiders will vary, with the characteristics and practices which are important to non-Indians being of less or no significance to tribal members. Conversely, to the natives themselves, other, perhaps less obvious factors, may be accorded a greater role in tribal relations.

For example, in his study of the Comanche from 1706-1990, Morris Foster demonstrates that, while "real Comanches" adhere to Comanche conventions and values, non-members are apt to focus on other criteria such as blood quantum and residence as key, thus making for very different views of who is a member of the Comanche community and what behavior is expected of them.

> Membership in the Comanche community has, at least since the early eighteenth century, depended exclusively on communicative competence and has not included other criteria such as birth. Thus Comanches were able to supplement their population in the nineteenth century by incorporating into their community captives who had learned to communicate and interact appropriately. Conversely, those in the twentieth century who have been "born Comanche" (that is, who have a father or mother who is recognized as a community member) but who have not learned to communicate competently (generally because they have been raised outside the community) are not considered "real Comanches" by other community members" (1991:22).

Yet Foster has an even more important contribution to make regarding our understanding of community dynamics.

> What is most conspicuous about the enduring enterprise of "being Comanche" is the ability of a people to continue to associate with one another, not the preservation of a specific territory, language, or social structure through which to do so. Comanches have used a variety of social and cultural forms to remain in communication with one another, changing

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> these forms as the external conditions surrounding their lives have changed. In short, they have maintained an ongoing community (1991:20).[289]

As Foster explains, the process by which the Indians have sustained their "Comancheness" over time entails what he terms "communicative competence" -- that is, a knowledge of social context and interactive convention, as well as of linguistic structures" (1991:21). It is by regulating members' behavior at the various types[290] of public gatherings which have waxed and waned from the early eighteenth century through the present, that the Comanche have sustained communicative ties with one another and, concomitantly, their "community." In short, what accounts for the maintenance of a "Comanche community" from the early eighteenth century to the present is not the presence or absence of particular social structures or even specific

---

[289] By "community," Foster follows the formulation of Hymes and Gumperz who refer to members of a "speech community" -- those who share communicative contraints and options regarding a significant number of social situations (1991:20). Foster notes that "full participation in a community requires a communicative competence that includes a knowledge of social context and interactive convention, as well as of linguistic structures" (Ibid:21).

[290] [The Comanche have] "organized their community primarily through rules for public commingling and have maintained it from its protohistoric origins to the present by changing their units and strategies for public gathering to conform to economic constraints on mutual presence....The innovations in Comanche forms of public gathering have included (1) divisional gatherings of contiguous nomadic residence groups; (2) peyote gatherings among increasingly localized reservation families; (3) Christian church meetings and traditional summer and winter encampments...; and (4) powwow gatherings that accommodate Comanches absent from everyday reservation-area social life" (1991:167).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

events. Rather, the process by which Indians evaluate the attitudes and behavior of other Commanche at the different public gatherings is crucial to "being Comanche."

Foster's study underscores just how critical an analysis of tribal identity and affiliation, from the Indians' point of view, is to understanding the ways in which a "community" is viewed as "American Indian and distinct from surrounding populations." That group members and non-members perceive tribal affiliation quite differently influences how they respectively perceive relations within the native community. In addition, the dichotomy has a significant impact upon what facts appear in documentary sources, as well as those which do not.

For example, as already discussed, for Gay Headers, an important feature of their tribal affiliation is their strong sense of familial obligation which colors all social, economic and political relations within the Indian community. Inasmuch as the Wampanoags' interaction is circumscribed narrowly among "family" members, it is not something with which non-Indians are readily intimate nor is it something about which non-Indians are likely to write. In effect, what is most distinct about the Gay Head community -- i.e. what the native members themselves have consciously sustained from generation to generation -- is therefore least documented inasmuch as non-Indians are the ones who have produced the overwhelming majority of written

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

materials on the Wampanoags -- whether in the form of governmental documents, travel reports, missionary accounts, scholarly studies or newspaper articles.[291]

All this is to say that, in order to evaluate whether and to what extent members of a petitioning group "live in a community viewed as American Indian and distinct from surrounding populations," it is necessary to investigate how the petitioners themselves view their American Indianness and how this affects, in turn, tribal relations and group interaction. That is, one cannot assume the salience of certain activities or structures. Nor can one ascribe meaning to the presence or absence of cultural traditions and practices without first investigating their significance from the native point of view. In its presentation and evaluation of evidence, BAR should not rely only on outsiders' perceptions of the petitioning group but should also examine the ways petitioners themselves define their tribal affiliation and how this affects the dynamics of group interaction. In accordance with the basic tenets of their discipline, BAR anthropologists certainly must provide an ethnographic context for the data they present and evaluate. To do otherwise, is to engage in an ethnocentric

---

[291] For several years in the twientieth century Gay Headers themselves wrote the gossip column on their town for the Vineyard Gazette. From time to time their views were also published in the "Letter to the Editor" section of the same newspaper. All other articles about the town and tribe have been authored by non-Indians.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

exericse which cannot be called objective scholarship.

Let us now turn to the Mohegan evidence in light of the above reexamination of criterion (b).[292] First, according to the "Proposed Finding," BAR acknowledges that

> Mohegan members are concentrated in southeastern Connecticut in an area which has been the traditional Mohegan homeland. Of the 889 members for whom the group furnished zipcodes, 403 (45%) resident in the "063" New London/Norwich zipcode area (1989:67).

It would appear, then, that the Mohegans satisfy the requirement that a "substantial portion of the petitioning group inhabits a specific area...."

Second, in addition to residing within close proximity to one another, members of the petitioning group clearly interact with one another.

> With the concentration of Mohegan membership in a relatively small area of southeastern Connecticut, there are no physical barriers to communication. The[re] are short distances between towns and some commute to work in other towns. Most of them have telephones. Communication generally follows family lines. When information is to be disseminated the heads of households or key persons in a family are contacted and they in turn see that the information is passed on (Ibid:71, references omitted).

Third, while it is not obligatory that the Mohegans demonstrate that they comprise a "community" pursuant to criteria (b), it is noteworthy that BAR has no reservations

---

[292] The following discussion draws only upon the data which appeared in BAR's "Proposed Finding" of October 30, 1989. It does not examine the Mohegans' own petition document nor use information based upon independent research. This is deliberate so as to emphasize the inherent problems with BAR's presentation and evaluation of evidence in the Mohegan case.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regarding the petitioner's identity as an American Indian group. In the "Summary" under criterion (a)[293] BAR states unambiguously:

> Documentary sources have clearly and consistently identified a body of Mohegan Indians living in the general vicinity of the petitioner's base village area (encompassing Montville township and city of Norwich) from 1614, when Dutch traders first explored the region, to the present (1989:1, emphasis added).

Fourth, BAR not only readily acknowledges the American Indian identity of the Mohegans as a group, but also that members of the petitioning group are viewed as distinct from surrounding populations.

> The non-Indian minister of the Mohegan Church said that the Indians know who is Indian and who isn't but that some of the non-Indian members of the congregation know there are Indians but are not always sure which ones (BAR 1989:70).

It would appear then from this admittedly limited review of the data presented in the Mohegan "Proposed Finding" that the evidence regarding criterion (b) is not as deficient as BAR maintains. It is not that necessary evidence is lacking for certain periods as it is that BAR is applying standards of evidence which are not explicitly part of the regulations themselves. Let us now turn to BAR's evaluation of the evidence with respect to criterion (c).

In the "Proposed Finding," BAR stated that the Mohegans' pre-contact form of leadership -- which consisted

---

[293] This reads: "A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as 'American Indian,' or 'aboriginal.'"

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of a sachem and elders' council -- endured colonial guardianship until 1769 when the Indians declined to name a successor upon the death of sachem Ben Uncas III. From then until 1903, the Mohegans "governed" their affairs through some form of council as indicated by their legal communications with the Connecticut General Assembly and New London County Court. From the early 1890's through 1941 several different leaders were named as "chief" and various Mohegan organizations were responsible for pursuing land claims and for holding an annual wigwam festival and homecoming. It is after the last festival in 1941, according to BAR, that the evidence is deficient.

> There is no documentary evidence of any effort to maintain a functioning tribal governing body and little evidence of individual leadership between the early 1940's and 1967. A similar documentary gap exists for the period between 1970 and 1979....Since 1980, the group has had a formal tribal council and a governing document. However, the available evidence is not sufficient to determine the extent of the Tribal Council's political influence or other authority over its membership (1989:47136).

BAR's criticisms are threefold. First, the Mohegan Indians had no "governing body" from 1941 to 1967 and from 1970 to 1979. Second, there were no individual leaders during the same periods. And third, the information regarding the relationship between the the current Tribal Council (established in 1980) and its members was deemed inadequate as well. BAR implied that the petitioner needed to provide evidence to fill in the purported gaps if it was to satisfy criterion (c). Just as the Gay Head Wampanoags

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

submitted additional information regarding its leaders and Tribal Council in the twentieth century, so is there implicit pressure upon the Mohegans to do likewise. Again, however, let us examine whether this remains the Indians' only option.

According to criterion (c), a petitioning group must submit

> A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present (25 CFR 83.7(c)).

As already pointed out with respect to the Gay Head case, criterion (c) does not state that petitioners must demonstrate the existence of a "governing body" or even "leaders." Indeed, BAR's focus upon the presence or absence of a "governing body" on the part of the Mohegans is especially noteworthy since the WTCGH, in its rebuttal, had challenged BAR's usage of this term in 1987. In the Gay Head "Final Determination," the Branch had even acknowledged that "government" per se was not at issue. Two years later, however, BAR's repeated reference to the lack of a "governing body" among the Mohegans would seem to indicate that the Branch never fully understood the Tribal Council's point, namely that Gay Headers did not need to prove that the Indian selectmen functioned as the "governing body" of the tribe from 1870 to 1975. Instead, they only needed to establish that there was a process through which "tribal

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

political influence or other authority" was being exercised. In the Gay Head case, the political process took place in formal and in informal arenas, in town government and outside of it.

Although criterion (c) includes no mention of "governing entity" or "leaders" per se, it does require petitioners to provide evidence of "tribal political influence or other authority as an autonomous entity." While "tribal political influence" and "other authority" are not defined in the regulations, "autonomous" is.

> "Autonomous" means having a separate tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions independent of the control of any other Indian governing entity. (25 CFR 83.1(i).

What is key here is that a petitioning group establish that it has functioned as a political entity, independent of other Indian groups, throughout history. The regulation does not specify how "tribal political influence or other authority" must be exercised. Neither the form nor issues are prescribed. In fact, the definition of "autonomous" goes on to state:

> Autonomous must be understood in the context of the Indian culture and social organization of that tribe (Ibid).

Rather than forcing ethnographically diverse petitioning groups to conform to a single organizational template, criterion (c) requires only that a petitioning group have an independent process, mechanism or means by

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

which it has made decisions pertinent to its members. What is at issue is the means by which the group has sustained itself as an separate political entity, not the presence of a particular organizational form for doing so. In addition, "autonomy" itself must be understood within the ethnographic framework of that tribe.

Finally, there is the issue of political continuity. Unlike criterion (b) which concerns contemporary tribal relations and group interaction, criterion (c) deals with tribal political process over time. The latter requires that a petitioning group provide evidence of "tribal political influence or other authority over its members as an autonomous entity thoughout history until the present" (54.7c, emphasis added). The regulations state that

> "Historically", "historical" or "history" means dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory (25 CFR 83.1(l)).

Accordingly, political autonomy needs to be established from the point of the tribe's initial contact with non-Indians until the present. Yet, what is not specified is just how continuous the documentation needs to be -- i.e. what does "throughout history" mean?

In this regard it is noteworthy that, according to the "Rules and Regulations," the FAP procedure

> is intended to apply to groups which can establish a

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present (25 CFR 83.3(a), emphasis added).

Criterion (a) contains similar, though not identical language.

> A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis as "American Indian," or "aboriginal" (CFR 83.7(a), emphasis added).

The regulations define "continuously" as

> extending from generation to generation throughout the tribe's history essentially without interruption (25 CFR 83.1(m)).

It would seem then that the Mohegans, like all petitioning groups, need to establish their political autonomy from the point of initial contact with non-Indians until the present. Even though the phrase "continuously" or "on a substantially continuous basis" does not appear in criterion (c), it is reasonble to assume that gaps in the documentation of greater that 20 years would be unacceptable.[294]

Let us now return to the evidence in the Mohegan case. In its "Summary of Evidence" pertinent to criterion (c), BAR chronicled the succession of named sachems from contact to 1769 and the less structured but nevertheless formally

---

[294] One could also argue that the omission of "continuously" or "on a substantially continuous basis" from criterion (c) is legally significant. For the present purposes, however, I have chosen the more rigorous interpretation in order to emphasize a point. Namely, even adhering to the more stringent standard of evidence (i.e. continuity from generation to generation), the Mohegan case is not as deficient as presented by BAR.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

designated "councillors," "elders" and headmen who appeared in the historical record after 1769 until the end of the nineteenth century. In the twentieth century, BAR went on to detail the waxing and waning of various Mohegan organizations and their leaders. In doing so, BAR left the impression that the named leaders and organizations were the substantive basis of Mohegan political organization and that later gaps in such positions and organizational forms were to be interpreted as a breakdown or cessation of political process. Such an interpretation is not supported by the data however. Rather, one could argue that, as early as the mid eighteenth century, the Mohegans exercised tribal political influence or other authority on a consensual basis. Although at times some individuals exercised greater influence than other tribal members, these individuals had no enduring political sway for there were no positions of leadership per se for them to occupy. Instead, political authority inhered in the Mohegan tribal membership generally, and was exercised regarding specific issues by ad hoc, or temporary, spokespersons. Data presented by the Acknowledgment staff in the "Proposed Finding" supports this position.

As noted by BAR, when Ben Uncas III died in 1769, the Mohegans refused to name another sachem, this despite considerable pressure on the part of colonial officials to select an individual who was friendly to the Connecticut

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

government. It seems that the Mohegans themselves were divided regarding the succession and, failing to reach a consensus, refused to accept a leader of the non-Indians' choosing (BAR 1989:21). While BAR characterizes the dispute as a "factional" one, there is no indication that the lack of a single leader adversely affected the ability of tribal members to handle internal and external affairs. Tribal petitions continued to be made to the State of Connecticut throughout the late eighteenth and well into the nineteenth century. That the lack of a formal leader did not significantly curtail Mohegan political action strongly suggests that other informal political processes were ongoing and, apparently, successful. Clearly these processes did not depend upon individually named leaders or formal organizations.

The "Proposed Finding" goes on to note that in 1903 anthropolgist John Speck identified a "chief" and "council" for the Mohegan, with subsequent "chiefs/spokesmen" having been identified for the group until the present.[295] The title of "chief" notwithstanding, BAR also states that there

---

[295] Data were gleaned from non-Indian and Indian sources and in the main corroborated one another. In only one instance, regarding Harold Tantaquidgeon, was there a question whether he in fact was "chief" of the Mohegans through the 1950's and 60's. In point of fact, however, whether Mr. Tantaquidgeon was "chief" or not is irrelevant for all sources indicate that he was, at the very least, a "sociocultural leader" (see above) of the Mohegans and was viewed as a respected spokesperson of the group by Indians and non-Indians alike.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

have been numerous "ad hoc leaders" throughout the twentieth century who have initiated action on behalf of the Mohegans and who have comprised an important facet of the tribe's political system.

> Ad hoc leaders are individuals who, representing the tribe, can start and/or execute specific projects which, from an outsiders' point of view of the chief as leader, should be in the chief's domain. While the project is underway, the council and cooperating tribal members recognize the leadership of the leader for that particular purpose....The fact that the membership and/or council can later support the project indicates approval [of the leader's actions] (BAR 1989:41).

As detailed in Table 3 "Mohegan Leaders and Councilmen (since 1890)" which appears in the "Proposed Finding" (BAR 1989:43), there has been a continuous[296] succession of "chiefs/spokesmen" and "ad hoc leaders" thoughout the twentieth century.

On the one hand, then, BAR itself acknowledges that, following the death of Ben Uncas III, political process among the Mohegan was ongoing, albeit less formal and structured than it had been in the pre-contact and colonial periods. The historical record is replete with examples of political influence being exercised by what BAR refers to as "sociopolitical, "sociocultural" and "ad hoc" leaders.

> The Mohegan have a multifaceted political system. They have a chief who is a sociopolitical leader, but the role of this individual is largely honorary and serves principally as a spokesperson....In addition to the chief, there is a sociocultural leader who is

---

[296] There is no break of 20 years or more in the respective listings of "chiefs/spokesmen" and "ad hoc leaders."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> knowledgeable about the cultural traditions of the group and serves as a repository of this knowledge....Both the public and some tribal members recognize the role of this individual, but some outsiders confuse the role of this individual with that of chief....[Lastly,] the ad hoc leaders add another facet to the political aspects of Mohegan society. When this position is occupied by individuals like John Hamilton, then there is further confusion on the part of outsiders and some Mohegan about who are the leaders (BAR 1989:55).

On the other hand, despite the admittedly informal nature of Mohegan political process, BAR criticizes the Mohegans for not having a "governing body" through which the Indians exerted political influence or authority over tribal members from 1941-1967 and from 1970-79. The Branch also maintains that there were no "leaders" during these same years, this in direct contradiction of data presented in its own table, according to which Burrill H. Fielding was "chief/spokesman" from 1937-52 and John Hamilton and Courtland Fowler were "ad hoc leaders" respectively in the 1940's and in 1954. Upon closer examination, the data appears even more contradictory.

In the accompanying text, BAR states that Burrill H. Fielding was described by Indians and non-Indians[297] as the "sachem" or "chief" of the group until his death in 1952. In turn, John Hamilton, representing the Mohegans, petitioned the Connecticut General Assembly in 1941 regarding a land claim which the tribe had begun in 1899 and

---

[297] Several publications were cited for this information -- the Norwich Bulletin 1952, the New Haven Register 1957 and Connecticut Highways 1961.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

pursued for a time in the early 1930's. The legal action was dropped at that time because of lack of funds to "employ counsel" (BAR 1989:37). The "Proposed Finding" goes on to note that "Hamilton continued his efforts to gain legislative action on the Mohegan claims until at least 1951 (New London Day 1951) (BAR 1989:42). And, in 1967 Hamilton spearheaded a new organization -- the Council of the Descendants of the Mohegan Indians, Inc. -- one of the goals of which was to prosecute the land claim begun more than one half century earlier. For his part, Courtland Fowler also made an effort to pursue a land claim on behalf of the Mohegans in 1953[298]. In 1956, Fowler, together with Gladys Tantaquidgeon and her brother Harold,[299] headed the Mohegan Church restoration committee. According to BAR, the church has, since its reopening in 1957, "again become a gathering place and social and political focal point for the Mohegan group" (1989:44, emphasis added). Fowler was also one of the officers of the Council of Descendants (the organization John Hamilton founded in 1962) and replaced Hamilton as president in 1970 apparently in a factional coup. In 1973, Courtland Fowler appointed a Mohegan representative to the

---

[298] He wrote the BIA about the claim and was told that the federal government had "little or no supervision over Connecituct Indians" (as quoted by BAR 1989:44).

[299] Gladys and her brother were one of the three Mohegan families who continued to reside in Mohegan town throughout the 20th century. Gladys was an anthropologist who worked for the BIA in the 1930's and was described by BAR as one of the "cultural caretakers" of the Mohegans (BAR 1989:).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Connecticut Indian Affairs Council (CIAC).[300]

In short, although BAR is correct when it states that there was no "governing body" among the Mohegans from 1941 to 1967, this does not signal an absence of political process among the Mohegan at this time. Clearly, there were several "ad hoc" and "sociocultural" leaders who continued to maintain "tribal political influence or other authority" throughout the twentieth century including during the 40's, 50's, and 60's. Continuity of political process is all that is required under criterion (c).

Finally, if the purported "gap" in the data disappears depending upon the paradigm used, so do the "deficiencies" regarding the exercise of political influence among contemporary Mohegans appear quite differently when "tribal political influence or other authority" rather than "governing body" is used to evaluate data. According to the "Proposed Finding," evidence regarding the members' support of the present Tribal Council is insufficient. Yet the text also includes data indicating that the Council does indeed represent the tribe and exerts "tribal political influence" over members.

Upon forming a Tribal Council in 1980, 138 Mohegan

---

[300] In the 1980's the Mohegans have worked closely with CIAC on several issues of concern to the tribe including exempting Native Americans from local busing regulations and formalizing a policy to restrict burials at Fort Shantok Cemetery (a traditional Mohegan burial ground) to Mohegan tribal members and their spouses.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribal members elected tribal officers and approved a constitution (Ibid:57). The same year tribal members overwhelmingly voted (96 yes votes, 3 no votes), for the Tribal Council to intervene in the land claims suit (Ibid:58).[301] The Council has gone on to represent the Mohegan tribe on several issues which are important to the members including federal acknowledgment, busing, exclusive Mohegan use of the Fort Shantok Cemetery[302] and the group's political relationship to CIAC and other Indian organizations.[303] In addition, the Council has been instrumental in organizing the annual Wigwam Festival which has served as an annual homecoming since 1977. Regarding the Tribal Council's relationship to its membership, BAR notes that

> The council is respected and many Mohegn members feel that if the council has made a decision, then the decision shall stand.... Decisions of the council are disseminated largely by telephone or letters with a member of a family calling other family members"

---

[301] Further action in that suit is pending the outcome of the group's federal acknowledgment petition.

[302] The Cemetery is located at the site of a traditional Mohegan burial ground. In the late 1980's, the Council worked out an agreement with CIAC to formalize a longstanding practice whereby only Mohegan tribal members and their spouses are eligible to be buried at the cemetery.

[303] The Mohegans have emphatically stated that CIAC does not have any authority to determine who is or is not a Mohegan tribal member.

> The Mohegan Tribe does NOT, repeat NOT, accede to the CIAC's authority over its membership composition. NOR does the Tribe concede this authority to any otherperson, firm or entity (as quoted of the Mohegan Tribe in BAR 1989:56).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(Ibid:58, references omitted).

Even though the present Tribal Council may not always adhere strictly to its constitutional by-laws, BAR nevertheless presents data indicating that the organization exerts tribal political influence or other authority over the Mohegan membership. It would appear that informal political processes continue to operate within the formal council structure and outside of it. That is, the tribe did not suddenly shift in 1980 from an informal mechanism in which consensus building and ad hoc leaders were salient features to a formal "governing body." Instead, it seems more likely that, like the Gay Headers, the Mohegans formed a tribal council to handle certain issues which were difficult if not impossible to mediate informally (e.g. land claims and federal acknowledgment). Over time, and with some successes under its belt, the council has taken on other concerns of the tribe.

The above analysis of the arguments and data presented by BAR in the Mohegan "Proposed Finding" regarding criteria (b) and (c) reveal some startling discrepancies between what the regulations state and how BAR has interpreted them. Yet the aim is not to show that the Mohegans satisfy the FAP regulations, that BAR's presentation of data does not support its negative conclusion or even that the deficiencies of the Gay Head and Mohegan petitions are analogous is several respects. Rather, the goal is to

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

demonstrate how the underlying logic or rationale by which a determination was made in the Gay Head case affects subsequent petitions.

In the Gay Head case, several issues were flagged in the "Proposed Finding" as deficient and served as the ostensible basis for denying the Wampanaoags federal acknowledgment. While these issues were well beyond the scope of criteria (b) and (c),[304] the fact remains that the Tribal Council never challenged BAR's working assumptions in its written response. Instead, the Council provided the additional data which BAR implied was necessary to fill in the gaps. A supplemental report described the ways in which Gay Headers maintained cohesive ties between tribal members who were residents and non-residents of the town. The report also explained in greater detail how certain individuals functioned as "leaders" over time even though they did not necessarily occupy town office.

Officially, it was the "new evidence" which turned the tide for the Gay Headers yet the Indians themselves, as well as many outside of the Bureau of Indian Affairs, viewed the "Proposed Finding" and its reversal in the "Final Determination" as political decisions, based not upon the objective facts of the case, but upon the respective powers

---

[304] As discussed, a petitioning group does not have to demonstrate that it has comprised a "cohesive community" over time or that it has had a "governing body" and enduring "leaders" throughout history.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

of the participating parties. How much political pressure in fact swayed the decision from negative to positive remains unknown except to those directly involved in the decision-making process itself. This includes not only the BAR staff who wrote the evaluation of the evidence, but also those in the Solicitor's office who reviewed the finding before publication in the Federal Register and the other administrative personnel who were involved in the decision.

Howevermuch politics influenced the evaluation process, it is the authority and power of the final decision which most concerns us here. For, even if the reversal was purely political in nature, it still had to be justified, legitimated and substantiated on factual grounds in the "Final Determination." In order to uphold the legal authority of the regulations as an objective and consistent process, BAR still needed to explain its new position on grounds other than behind-the-scenes politicking. If BAR did not do so, then its ability to review other petitions would be severely jeopardized.[305] Although years later those directly involved in the Gay Head case may well remember the political pressures which were brought to bear, it is the text of the final decision which will endure and survive personnel changes in the Bureau of Indian Affairs.

---

[305] Periodically, Congress has held numerous oversight hearings on the federal acknowledgment process during which BAR has had to defend its actions and justify its budgetary needs in a public arena.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

And, it is the ability to obscure the role that politics has played in the decision-making process which makes the written decisions of the Branch so powerful. It is not, as CLS writers would aver, the logic per se of the findings, but that the latter purport to rest on objective, "factual" determinations which makes the decisions so difficult to challenge. Faced with a surfeit of "facts," some of which are of dubious significance if not prejudicial, subsequent petitioners are "stuck," with trying to reconcile the logic or illogic of these texts.

In the Gay Head case, the Tribal Council did not, by and large,[306] challenge BAR's interpretation of the regulations -- i.e., the implicit paradigms which informed the Branch's evaluation of evidence. This left BAR's assumptions to become further entrenched and to be applied uncritically in the petitions that followed. That these assumptions are entrenched, however, does not make BAR's interpretive frameworks correct or legally defensible.[307]

---

[306] The Tribal Council did criticize BAR's undue emphasis on "government" in the "Proposed Finding" however the Council also provided additional information as to how native town officials looked after Indian as opposed to non-Indian interests while in office. As discussed above, that BAR went on to criticize the Mohegans for not having a "governing body" from 1941-67 would seem to indicate that it little understood or else chose to ignore the Tribal Council's pointed criticisms regarding this issue.

[307] Remember, in Passamaquoddy v. Morton the unrecognized tribe of Passamaquoddy Indians successfully challenged the federal government's long standing practice of assuming that the 1790 Trade and Non-Intercourse Act applied only to recognized tribes. The decision in that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

It only means that BAR's assumptions will continue to affect the evaluation process until directly challenged or until the regulations are changed and their interpretation becomes moot.

What is instructive about the Mohegan "Proposed Finding," then, is precisely the way in which BAR's prior assumptions about "continuous cohesive community," "governing bodies" and "leaders" continue to influence how data is presented and what deficiencies purportedly obtain. The very way in which evidence is organized by BAR in the text implicitly focuses the reader's attention on certain issues (e.g., the presence or absence of cultural diacritica, the succession of designated leaders, and the governing ability of formal organizations) while obscuring or ignoring others (e.g., how natives' own conception of tribal identity and affiliation affects tribal relations and group interaction and to what extent the culture and social organization of the petitioning group influence the means by which tribal political influence is exercised among tribal members).

As in the Gay Head case, there is considerable pressure upon the Mohegans to provide the information that BAR seeks if the Indians hope to obtain federal acknowledgment. Not

---

case was responsible for the flood of land claims on the east coast in the late 1970's and contributed, along with with the controversial Boldt Decision, to the codification of the FAP process in 1978.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

only did Gay Headers follow this strategy with obvious success, but, as other petitioners go through the FAP process, these decisions will also bear upon the Mohegan outcome. Indeed, this is precisely the case regarding the petition of the Miami Nation of Indiana.

A negative "Proposed Finding" regarding the petition of the Miami Nation of Indiana was published on July 19, 1990. Like the Gay Head and Mohegan petitioners, the Miami satisfied criteria (a), (d), (e), (f) and (g) but failed to meet criteria (b) and (c). On June 9, 1992, BAR issued a "Final Determination" which sustained its initial evaluation of the case, thereby denying the Miami federal acknowledgment.[308]

In its "Final Determination," BAR summarized the evaluation set forth in the "Proposed Finding."

> The Indiana Miami were determined to have met criterion b, maintenance of a social community distinct from non-Indians, continuously from early historic times until at least the 1940's, but evidence was not sufficient to demonstrate that the present-day community met the requirements of this criterion (BAR 1992:2).

Regarding criterion (c), BAR noted:

> tribal political processes involving leaders or organizations with a broad following on issues of significnce to the overall Miami membership did not exist after the early 1940's, and therefore, the Indian[a] Miami did not meet the requirements of criterion c (Ibid).

As it did in the Gay Head and Mohegan cases, BAR maintained that the Miamis failed criterion (b) because they had not

---

[308] The Miami are currently appealing that decision.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

demonstrated maintenance of a social community continuously from early historic times until the present. BAR held that the Miamis did not satisfy criterion (c) because there was no evidence of "leaders or organizations with a broad following" after 1940.

For the present purposes, the history of the Miami Indians is beside the point. Rather, what is salient is the interpretive framework used by BAR to justify its conclusion that the Miami did not meet criteria (b) and (c). In focusing upon evidence of "community" and "leaders or organizations" BAR again applied standards of evidence which were not part of criteria (b) or (c). That it apparently felt free to do so reflected the fact that the Branch had yet to be challenged regarding its implicit paradigms.

If the Miami case merely reiterated arguments made in previous cases, then it would only confirm how entrenched certain of BAR's working assumptions are. Even though these assumptions are deeply flawed regarding criteria (b) and (c), one could at least point out that there was a certain degree of congruence between one case and the next. Indeed, one would expect (and hope) that there was consistency in the administration of the FAP process since without it there would be no "due process" for petitioners. In the Miami case, however, BAR undertook a radically new step in the "Final Determination," including a preamble to the "Summary of Evidence." It reads:

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> The acknowledgment criteria are based on and [are] consistent with past determinations of tribal existence by Congress, the courts, and the Executive Branch....As briefly stated by the Supreme Court in 1901 in Montoya v. United States (180 U.S. 261), "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." The criteria used by the Interior Department between 1934 and 1978 to recognize tribes are summarized in the 1942 Handbook of Federal Indian Law, by Felix Cohen, and are commonly referred to as the "Cohen criteria." These codified Executive Branch practice as well as judicial and legislative precedents. One of these criteria required that a group have "exercised political authority over its members through a tribal council or other governmental forms" (Cohen 1942, 171). A supplementary consideration was the "social solidarity of the group." The Cohen criteria also considered previous Federal recognition, e.g. treaty relations, executive orders, Congressional acts, or other actions. ...(BAR 1992:1).

This introduction, entitled "Intent of the Ackowledgment Regulations," is unprecedented in all of the other final determinations issued to date. Clearly it is an attempt to add legal weight to BAR's evaluation of evidence, to show that the present decision is congruent with case law and administrative policy. Yet one must question how pertinent the Montoya and Cohen definitions of "tribe" are to the FAP process and the standards of evidence outlined therein.

To begin with, however instructive the Montoya and Cohen criteria are regarding the history of the FAP regulations (illuminating why certain issues were included or excluded), they are not the regulations themselves. If the Montoya and Cohen definitions of "tribe" in fact comprised a clear, consistent and objective means of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

determining who was and was not a recognized tribe then there would have been no need to formulate, at some expense, a new administrative process. The fact remains however that the American Indian Policy Review Commission's (AIPRC) seminal investigation of the status of "unrecognized tribes" in the mid 1970's determined that existing Bureau policy was fraught with inconsistencies and, moreover, was without legal justification. It is for this reason that a totally new administrative process, with its own specially written regulations, was drafted, sent out for public comment, rewritten and finally codified in 1978.

Although the FAP criteria obviously take their inspiration from the Montoya decision and from executive policy as summarized by Cohen,[309] the wording of the seven FAP criteria is not exactly the same as appears in the Handbook or Montoya case. Indeed, the numerous drafts, public comments and rewrites of the FAP criteria indicate the meticulous care which went into the final wording of the

---

[309] It is an egregious overstatement to maintain, as BAR does, that the Cohen criteria "codified Executive Branch practice as well as judicial and legislative precedents" (BAR 1992:1, emphasis added). Cohen's Handbook could not legislate. As its learned author himself states in the introduction, the text could only describe and summarize what had been federal practice. Moreover, the Handbook itself states that tribes did not have to meet each and every criterion outlined therein. Rather, the criteria were merely "considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a 'tribe' or 'band'"(Cohen 1972:271).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

regulations.[310] That the FAP criteria do not exactly mirror the Montoya and Cohen definitions was therefore intentional and deliberate. Accordingly, it is the criteria as they appear in 25 CFR 83 which petitioning groups must satisfy, not the Montoya or Cohen criteria. And, it is the "purpose," "scope" and "definitions" as stated in the "Rules and Regulations" of 25 CFR 83 itself which must guide the interpretation of what is and is not required of petitioners.

However flawed in its legal reasoning, the Miami preamble nevertheless cannot be dismissed out of hand. That it appears at all in the "Final Determination" is highly significant insofar as the FAP process is concerned. It represents an important means by which BAR is seeking to establish a legal foundation for its interpretation of criteria (b) and (c). If the legal assertions of the Miami preamble are not challenged,[311] then BAR's position will become further entrenched and even less likely in subsequent

---

[310] See Chapter 5 for discussion of NCAI's revised wording of the proposed regulations.

[311] The Miami are currently appealing BAR's determination yet it remains to be seen whether they will focus exclusively upon rebutting BAR's evaluation of specific data (as is the case with most petitioning groups) or else will attack the Branch's erroneous assumption that petitioners must satisfy Montoya and Cohen definitions of "tribe" in order to be federally acknowledged under 25 CFR 83. It also remains to be seen whether the tribe's legal counsel will contest the Branch's ethnographically narrow working assumptions of tribal relations, group interaction and tribal political influence or other authority.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

cases to be subjected to critical review.

Despite the fact that the Miami preamble is highly unusual, it is not the only step recently taken by BAR to legitimize its own view of the current regulations, however defective that view may be, legally and ethnographically. On September 18, 1991, the federal government published draft revised FAP regulations for public comment. The changes in criteria (b) and (c) are signficant.

> (b) Evidence that a predominant portion of the petitioning group lives in a community viewed as American Indian and distinct from other populations in the area, that it has existed as a community from historical times until the present and that its members are descendants of an Indian tribal entity which existed historically or from historical tribes which combined.
>
> (c) Evidence establishing that the petitioner has maintained tribal political influence or other tribal political authority over its members as an autonomous entity throughout history until the present (BAR 1991:47326).

Changes were also made regarding several pertinent definitions.

> Community means any group of people which can demonstrate that there exists sustained interaction and significant social relationships which differentiate members from nonmembers. Community must be understood in the context of the history, geography, culture and social organization of the group.
>
> Tribal political influence or other tribal political authority means a tribal council, leadership, internal process or other mechanism which the group has used as a means of making decision for the group which substantially affect its members, influence or control the behavior of members in significant respects, and represent the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture and social organization of the tribe (Ibid:47324-25).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

There can be little doubt that the proposed changes in criteria (b) and (c) make explicit BAR's previous implicit interpretive framework. Indeed, the draft regulations include many of the same words and phrases which had appeared in the textual evaluation of evidence in prior proposed findings and final determinations yet which are conspicuously absent from the codified regulations themselves.

For example, for criterion (b), petitioners must now provide evidence of a continuous "community," the latter newly defined as a group in which there are "sustained interaction" and "significant social relationships." Insofar as criterion (c) is concerned, "tribal political influence or other tribal political authority" has been redefined as a means by which the group makes decisions which "substantially affect its members, influence or control the behavior of members in significant respects...." In effect, to satisfy criterion (b), petitioners must now comprise bounded and internally cohesive groups throughout history. For (c), they must manifest an extraordinary amount of political control over members, not unlike that exerted by non-Indian "governing bodies" but generally uncharacteristic of political processes among American Indian tribes except where they have been "reorganized" pursuant to the Indian Reorganization Act.

According to BAR, the goal of the proposed revisions is

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

to

> amend and clarify existing regulations on Federal acknowledgment, 25 CFR part 83 in order to eliminate outmoded sections, to improve the system for considering petitions and to guarantee certain independent reconsideration processes for petitioners and other parties. Minor changes are proposed throughout to clarify language in existing provisions (BAR 1991:47320).

BAR's statements to the contrary, the proposed changes are anything but "minor." They do not "clarify" what is already contained in the regulations but instead alter the meaning of the criteria by greatly circumscribing the evidential requirements. The new wording of criteria (b) and (c) and relevant definitions will make it much more difficult for petitioning groups to satisfy these regulations and much easier for the Branch to fault a petition for insufficient evidence of "sustained" social interaction and "significant" social relationships or for lacking a mechanism of making decisions which "substantially" affect the group's members in "significant" respects.

What the proposed changes do, in effect, is accord the Branch inordinate discretationary power in its interpretation of such qualifiers as "sustained," "significant," and "substantially." The non-specificity of these terms would make it very hard for petitioners to challenge BAR's evaluation of the evidence. For example, how much social interaction is needed to be termed "sustained?" What are "significant" social relationships? What are decisions which "substantially" affect members in

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"significant" respects? Petitioners would have no reliable guide as to how much information, nor what kind is enough to establish their case. The Branch, in turn, could always find that the evidence was less than "sustained," "significant" or "substantial." BAR's power to deny petitioners federal acknowledgment would be virtually unreviewable since the "standards" such as they are would be subjectively interpreted by BAR.

At present, new regulations have not been codified. Presumably, BAR would revise the proposed draft regulations, taking into account the input it received during the period of public comment, which ended on December 17, 1991. Very importantly, however, BAR is not obliged to use any of the comments it receives, or even to change the draft regulations. What form the new regulations will take is thus unknown at this point. When and if they are codified, petitioners who are under active consideration, will have the option of choosing which regulations -- the old or revised ones -- they want applied to their case.

There can be little doubt that, for the Miamis, the proposed new regulations would only make it more difficult for them to challenge BAR's interpretive framework for now the latter would have gained added legitimacy through codification. Even if the proposed revisions do not supplant the 1978 procedure, however, the Miami Indians will still have a difficult legal road before them. For, it is

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

not only how BAR interpreted the evidence pertaining to the Miamis which must be challenged, but also how the Branch interpreted prior cases, including if not especially that of Gay Head who, we recall, also satisfied criteria (a), (d), (e), (f) and (g) while failing (b) and (c) in the "Proposed Finding." That BAR's logic and rationale for evaluating evidence were not critically scrutinized in the Gay Head Tribal Council's response, permitted them to endure and reappear in subsequent cases like that of the Mohegans and Miamis. Should the Miamis, in the course of their appeal, focus upon rebutting particular bits of data rather than upon the ethnographic and legal soundness of BAR's working assumptions, then it will be that much more difficult for the Mohegans to do so if the latter's negative proposed finding is sustained and made a final determination. Each time that BAR's evaluation remains unscrutinized makes it harder for other petitioners to see, never mind contest, what has become implicit policy. In the long run, then, the Gay Head "Final Determination" reaches far beyond the parties directly involved in the case. While the positive decision resolved the Wampanoags'legal status, it also went a long way toward framing and delimiting decision-making in subsequent petitions. It is in the cumulative weight of FAP decisions over the past 15 years that the enduring power of FAP is manifest.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Lawmaking and Lawfinding 1978-1993

As originally conceived, the federal acknowledgment process was supposed to be a relatively quick, easy and economical means of resolving a thorny legal issue, the status of "unrecognized tribes." To say that it has not turned out that way is a gross understatement. As former Branch Chief Bud Shapard readily asserted at a 1992 oversight hearing of the House Committee on Interior and Insular Affairs, the process has proven

> financially burdensome on both the government and the petitioners, infuriatingly slow, and too complicated. Worst of all, the decisions are by nature subjective despite the fact they are shrouded in a swirl of academic calisthenics" (Shapard 1991, emphasis added).

Coming as it does from an individual who spent some ten years administering the FAP process, and who was, in addition, the primary author of the regulations,[312] the above statement is a damning indictment of the process. As the Shapared explains, the standards are not only inappropriate but their interpretation by BAR has been increasingly rigid as well.

> ...I now believe that while drafting the regulations in 1977 and 1978, there was a mind-set to seek out those unrecognized tribes which most closely resembled the "recognized" tribes being served by the Bureau of Indian Affairs. In my opinion, this resulted in the development of impossibly difficult standards. Recent overly narrow and restrictive interpretations of the regulations have exacerbated the problem (Shapard

---

[312] This occurred in necessary collaboration with the Solicitor's office at the Bureau of Indian Affairs. The latter retained the ultimate authority to approve the "Rules and Regulations" before submitting them to Congress.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

September 15, 1992).

Shapard goes on to explain how the regulations are inherently weighted in favor of those petitioners who most resemble already recognized tribes who have tribal land and federal funding.

> Tribal land and the payment of Federal money require CONSTANT IDENTIFICATION OF THE TRIBE (see 83.7a) by the Congress which appropriates the funds, and by the bureucracy which dispenses the money and adminsiters the land. The fact that a tribe resides within the boundaries of a reservation to the exclusion of outsiders automatically DEFINES A COMMUNITY RESIDING IN A SPECIFIC AREA (see 83.7b). The reservation boundary, itself, serves to make THE POPULATION DISTINCT FROM OTHER POPULATIONS IN THE AREA (see 83.7b). Federal money and tribal land doupled with the 1934 Indian Reorganization Act, provides the recognized tribe with a continuous common concern around which to focus POLITICAL ACTIVITIES (see 83.7c). Finally, while Indian ancestry is the one element not directly affect by historical recognition, land and money provide both the government and the tribe with a powerful incentive to keep records of INDIAN ANCESTRY (83.7b 7d) in order to avoid dissipating the benefits to non-tribal members. It is unbridled hypocrisy for recognized tribes and bureaucrats to question the Indianess of a group simply based on the fact that historically the unrecognized tribe's records are not as finite as those of tribes under the Bureau's scrutiny for decades (Shapard September 15, 1992:1-2, original emphasis).

He concludes by noting that it is practically impossible for "unrecognized tribes" to satisfy the current criteria by virtue of the fact that their lands were confiscated and they have been denied federal funding and programs (Ibid:2).

> ...[B]y continuing the present standards, Congress would be using the same serpentine logic that the Bureau of Indian Affairs has used for years. That is to say unrecognized tribes can not [sic] be recognized unless they have the characteristics of recognized tribes and they can not [sic] have the characteristics of recognized tribes because they government has not

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

recognized them (Ibid).

As Shapard demonstrates, under the present regulations, the deck is clearly stacked against petitioning groups who do not -- and could not possibly -- resemble already recognized tribes. That this is the case should come as no surprise, however, given the Miami preamble. The latter contains an explicit statement as to what BAR believes to be the relationship between the Montoya/Cohen criteria and FAP regulations.[313]

Despite BAR's transparent attempt to establish a legal foundation for its overly narrow and subjective interpretation of the FAP criteria, the fact remains that being "consistent" does not mean "exactly the same as." That the FAP criteria are "consistent" with prior case law and federal policy does not mean that 25 CFR 83 is "identical" to the Montoya and Cohen defintions of "tribe." It only means that the FAP regulations are compatible or congruent with Federal Indian law, that they do not directly contradict or abrogate prior legal decisions or policies.

---

[313] It is quite likely that this unique introduction was written by Bureau attorneys whose job it is to review BAR decisions before they are published. Even if the Solicitor's office did not itself author the section or direct it content, at the very least it would have reviewed and approved its inclusion in the Miami "Final Determination." This is significant because it was the same office, with some of the same personnel, who had been involved in, and had ultimate authority over, the FAP regulations as codified in 1978. It is also the same office that would have worked closely with Bud Shapard while he held the position of Branch Chief of BAR.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Although the aim within the Bureau may well have been to set its prior policies in legal cement, for those outside the agency -- in Congress and throughout Indian Country -- the ostensible goal of FAP was to provide a rational, objective and equitable means of determining henceforth which tribes would be subject to federal supervision and which would not. The FAP process was not supposed merely to sanction the status quo, to render the inconsistencies, errors and biases of Bureau administration legal. It is for this reason that the codified form of the regulations included language and provisions which more readily acommodated the ethnographically and historically diverse experiences of "unrecognized tribes." Hence,

> "Community" or "specific area" means any people living within such a reasonable proximity as to allow group interction and a maintenance of tribal relations (25 CFR 83.1o)....
>
> Autonomous must be understood in the context of the Indian culture and social organization of that tribe (25 CFR 83.1i).

The broad language of the FAP regulations attempted to provide some ethnographic leeway for petitioning groups. For example, all petitioners did not need to have a tribal council but instead, only required a discernible mechanism whereby "tribal political influence or other authority" was exercised.[314] Paradoxically, though, the deliberately

---

[314] NCAI expressly rejected a requirement that petitioners demonstrate "continuously viable tribal government" for such a provision ignored the federal government's role in undermng tribal sovereignty (see

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

vague and ambiguous wording of the regulations afforded the Branch staff considerable discretion as to whether or not the information presented satisfied the regulations. What, for instance, constituted "evidence" of "tribal political influence or other authority" and how much "evidence" was necessary to satisfy criterion (c)? In neither case did the regulations include standards nor outline a methodology for researching, corroborating or evaluating "evidence."

The absence of standards renders the process of interpreting data highly subjective. In addition, as each new case is decided, the working assumptions BAR uses to gather, present and evaluate data become ever more entrenched. Petitioners who do not fit the implicit paradigm of a culturally distinct, cohesive group of Indians whose members have lived throughout history in close geographical proximity to one another and who have manifested overt political authority through designated "leaders," have a difficult, if not impossible time in satisfying the regulations. As pointed out by Shapard, those petitioners who can marshall evidence to fit this rigid paradigm invariably resemble tribes who are already being supervised by the Bureau and have a land base.

> One has but to review the list of those tribes which have been considered under the present process to see that most, if not all, of the successful petitioners owned land collectively at the time of filing, albeit minuscule in some cases (Ibid:1).

Chapter 5).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Although it is not, strictly speaking, required that petitioners conform to BAR's implicit paradigm, the fact that those who are successful can provide the evidence which BAR seeks and do so, makes it seem, over time and with each successive determination, that such evidence is required under 25 CFR 83. The original "mind set" of the Bureau, focused as it is upon the geographically circumscribed, politically discrete and socio-culturally insular and cohesive Indian "tribes" which federal policies have been instrumental in creating over the years,[315] is thereby infused with legal authority through the petitioning process.

There is, then, a twofold problem with the FAP process as it now stands, the first having to do with the codified form of the regulations themselves and the second with how they are administered. As the primary author and administrator of the FAP process points out, the FAP regulations are "fatally flawed" since the criteria are most likely to be met by tribes who already have the accoutrements of recognition (a land base and federal

---

[315] There were many ways in which this was effected. The federal government physically confined tribes to reservations where land was frequently of poor quality and far removed from commercial and agricultural centers. The federal government also 'reorganized' tribal governments, complete with tribal councils and constitutions. And, through its administration of reservation programs and services, the BIA encouraged tribal members to identify and affiliate with one particular "tribe," dual enrollment being explicitly prohibited.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

funding) and least likely to be met by groups without them. There is, in other words, an inconsistency regarding what the purported goal of the FAP process is and what is practically required by the seven criteria.

Another problem with the codified form of the regulations has to do with the objective environment in which the Branch of Ackowlegement and Research ostensibly reaches its decisions.

> By virtue of the fact that the BIA's primary concern is with the recognized tribe, the Bureau is constantly exposed to charges of bias in its decisions. This does not create the most objective environment in which to consider petitions (Shapard 1992:5).

The FAP process is supposed to be "objective" yet, because the Bureau has a vested interest in who comes under its purview and the budgetary ramifications thereof, it cannot possibly be viewed as an impartial judge of evidence no matter how diligently the BAR staff do their jobs nor how insulated the latter is from public opinion. The problem is a deep seated one, going back to the origins of FAP itself.

In the highly publicized and controversial U.S. v. Washington case, Judge Boldt held that five of the 14 tribes seeking confirmation of their off-reservation fishing rights were not the political successors in interest of the signators of the Point Elliot Treaty (1855). All five tribes were "unrecognized." When Judge Boldt issued that

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

finding, he uncharacteristically,[316] accepted the federal government's legal arguments as set out in a legal brief prepared by the Solicitor's office at the Bureau of Indian Affairs. The same office, with many of the same personnel, was involved in drafting the FAP regulations in 1978. The same office, with many of the same personnel, is currently responsible for reviewing BAR decisions before they are published.

In effect, the Solicitor's office first crafted the legal argument which determined that the five intervenor tribes had no legal rights in U.S. v. Washington; it then codified the rules by which the "unrecognized tribes" (including the five which were excluded from the Boldt Decision) may petition the Bureau for federal acknowledgment; and now the office issues legal decisions as to whether or not petitioners (among whom are the five intervenors) satisfy FAP regulations. That the environment in which BAR decisions are made is less than "objective" is an understatement. Given the past and present relationship between BAR and the Solicitor's office, there can be no

---

[316] Judge Boldt was reknowned for his meticulous and thorough review of all the evidence. The Boldt Decision itself reflects his personal consideration and resolution of the complex issues involved. Many were surprised, however, when the judge apparently accepted the federal government's position, without alteration, regarding the status of the five intervenors. In June 1992 it was discovered that Judge Boldt may have been suffering from the early stages of Alzheimer's Disease when that finding was rendered. Accordingly, several of the affected tribes are currently appealing Boldt's decision.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

illusion of objective disinterest in the review process, especially when it comes to the evaluation of the petitions of the five "unrecognized tribes" from Washington State.

If the codified form of the FAP regulations is defective, so too is the process of interpreting them. Preparing a petition for active consideration and sheparding it through that phase has proven extremely costly for petitioners and the federal government alike. Over the years, obvious deficiency reviews (which were supposed to expedite the evaluation process) have entailed protracted delays in which BAR has asked for more data and petitioning groups are burdened with even greater research expenses. Even the time limit between publication of the proposed finding and final determination has been extended by BAR in several cases far beyond the 120 day comment period.[317] The added time and money spent on each petition has brought no significant improvement in the decision-making process, however. BAR has not only processed fewer petitions in recent years but has also become embroiled in several lawsuits regarding its decisions. Clearly the FAP regulations have not proven an expeditious, nor cost effective means of definitively resolving the status of "unrecognized tribes."

---

[317] The three and one half year delay in the Mohegan case is the longest to date. Almost two years passed between the Miami "Proposed Finding" and "Final Determination."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Finally, there are serious flaws in the way in which BAR has interpreted the criteria in recent years. In its presentation and evaluation of evidence, BAR typically provides a chronological account of the petitioning group from the historic tribe's initial contact with non-Indians until the present. The emphasis is upon the maintenance of community boundedness/solidarity and the political organization of the tribe throughout history. Invariably, the anthropological and historical accounts which are included in each "Summary of Evidence" provide scanty background information regarding the social, political, economic and legal factors which inform the strategies of tribal members. From BAR's summaries, it is difficult to understand why tribal members undertook certain strategies and not others[318] or to see just how important governmental policy has been in directing the course of change for the tribe.

In ignoring the federal government's own heavy hand in

---

[318] For example, in the 17th and 18th centuries many New England tribes including the Gay Head Wampanoags converted to Christianity and came to reside in Indian praying towns. Although one might be tempted to conclude that the Indians were abandoning tribal values and practices, upon closer examination of the colonial context a different interpretation of the dta is warranted. Instead, since non-Christian Indians were often categorized as "hostiles" and warred upon by colonists, it was an attempt to survive physically that drove natives to nominally join "friendly" Indian praying towns. Despite the overt religious structure of these communities which was imposed by colonial governments, many Indian residents continued to exercise a fair degree of political, as well as socio-cultural, autonomy insofar as their internal affairs were concerned.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

creating and sustaining discrete tribal entities, the Bureau fosters the view that the organization of the tribes it now services has existed throughout history. That is, it appears that there is an objective and timeless paradigm of how American Indian "tribes" have functioned from contact to the present. Recognized tribes are treated as archetypes which "unrecognized tribes" must resemble if they are to be accorded federal acknowledgment under 25 CFR 83. As a result, petitioning groups face the herculean task of trying to demonstrate that, despite continual and multiple pressures to assimilate them into American society, they have sustained the same socio-political organization as currently manifest by those under Bureau supervision and guardianship. "Unrecognized tribes" must meet a standard of tribal composition and functioning which in reality applies only to select American Indian groups during particular periods in their history and often as the consequence of outside involvements. Most insidious of all is that this de-historicized paradigm of Indian societies is then used as the purportedly objective standard by which the federal government accords and denies petitioning groups their sovereign rights.

We see, then, that the "serpentine" logic of the Bureau as to who has been and who should be its client population is reified not merely through "academic calisthenics," but through legal legerdemain as well. Through the process of

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

lawmaking, the BIA has codified and administered inherently biased regulations. In the process of lawfinding, BAR has greatly constrained the intent and meaning of the criteria and attempted to justify its flawed interpretation based upon prior case law and administrative policy. The result is a powerful mix in which anthropology and history become the hand servants of bureaucratic politics, all the while disguised as objective legal principles. It is little wonder that the numerous criticisms launched against BAR in almost annual congressional oversight hearings have been ineffective in changing the process. Most critics have not challenged the flawed legal and anthropological premises which guide BAR decision-making, thereby leaving the authority and power of the process intact.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Chapter 10

CONCLUSION

If a government official makes a mistake, well, 15 years from now, he's still there in his office. If an Indian makes a mistake, he's gone and maybe so is his tribe (Lakota elder to his son, oral communication).

What the Lakota elder well understood is the federal government's powerful advantage in dealing with American Indians. The government can enact Indian policies and wait for prolonged periods before evaluating them. During this time, federal action as well as inaction continues to influence the options and opportunities of tribal members, irrevocably altering intra- and inter-tribal relations. By the time officials get around to addressing certain problems, conditions have often changed radically and many of those most directly affected by federal initiatives have been forced to find alternative means of surviving or else have long since died. While this has occurred with respect to many programs and laws affecting recognized tribes, it is particularly the case with unrecognized ones.

Most of these groups, including the Gay Head Wampanoags, did not lose control over their land through a military defeat nor did the United States suddenly terminate its government-to-government relationship with the tribes by means of specific legal instruments such as a legislative act or executive order. In some cases, the United States at one time even formally recognized the tribes and negotiated

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

a treaty with them, subsequently only to fail to ratify the documents or to fulfill its legal obligations toward the signators.[319]

Although the reasons for groups being classified as unrecognized in 1978 are diverse, the process by which the federal government declined to acknowledge its fiduciary obligations toward these tribes spans several decades if not centuries and entails numerous acts of dubious legality. Certain aspects of Critical Legal theory provide a useful framework for examining this process and its effects upon such groups as the Gay Head Wampanoags.

On the one hand, in focusing upon the concepts of right which inhere in Federal Indian law (i.e., what is expressly sanctioned or prohibited as well as the patterns of silence in legal reasoning), we have learned much about the way in which the United States arrogated to itself the authority to

---

[319] There are, for example, numerous tribes on the west coast who signed treaties in good faith with the federal government in the mid nineteenth century. In the case of several California groups, Congress failed to ratify these documents for political reasons, leaving the signatory tribes in legal limbo and without an effective means of curtailing non-Indian encroachment upon their land. On the Puget Sound of Washington State, many tribes signed treaties with the federal government in the mid 1850's, only to have the latter take four to five years to ratify the documents and some 20 or more years to implement some of the treaty provisions. With regard to several of the signatory tribes, the federal government never fulfilled the terms of the treaties, a fact which was affirmed in the tribes' favor, more than one hundred years later in decisions of the Indian Court of Claims. Despite the federal government's recognition of these west coast tribes historically, some are currently unrecognized and seeking status clarification through FAP.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

define the limits and substance of federal jurisdiction. As demonstrated in Chapters 3 and 4, governmental action toward Indian tribes is not just a function of coercive strength, of the ability to impose force upon indigenous peoples. Rather, it is founded upon a concept of right which makes U.S. policies appear legitimate and congruent with the legal principles which guide and found our nation.[320] Certain legal concepts may be peculiar to the arena of Federal Indian law however the processes by which these terms were first defined and later applied are similar to those governing legal doctrine generally in the United States. The constructs of Federal Indian law draw extensively from other legal domains -- e.g., international law, constitutional law, property law, contract law, etc. -- thereby reaffirming the legitimacy of the constructs themselves and the legal rationale by which they were articulated with respect to Indians.

In addition, a critical analysis of the legal foundation of colonial, state and federal authority goes a long way toward illuminating the federal government's refusal to act as the guardian of the Gay Head Wampanoags thereby resulting in this tribe being classified as an

---

[320] Legitimacy is important in preventing or lessening opposition by non-Indians and Indians and in enabling the federal government to use coercive force under certain circumstances.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

unrecognized in 1978.[321] The concepts of right which gird federal authority demonstrate as well why the Gay Head Indians, like most other "unrecognized tribes," were effectively barred throughout most of their history from challenging the legal forms which corroded their tribal rights.[322]

On the other hand, focusing exclusively upon the highly rationalized arguments found in legal doctrine (which is the typical approach of CLS writers) falls short of explaining why federal authority came to be revised and expanded when and how it did. That is, a strict CLS approach ignores the societal pressures which cause existing

---

[321] Still other tribes were not even fortunate enough to have survived as a group, their members having been physically decimated, relocated or so widely dispersed that no tribal entity exists today. On Martha's Vineyard, for example, two Wampanoag groups inhabited Christiantown and Chappaquiddick into the early twentieth century. Without a land base and governmental protections and services, however, these enclaves could not survive and their residents moved away. For these "unrecognized tribes" and their descendants, the FAP process is too late, the damage to tribal integrity, complete.

[322] As discussed, in the colonial period Gay Head had been turned first into an Indian plantation and then into a manor under the guardianship of a government-sponsored missionary society, a fact which caused the Indian tenants to be administered by the State of Massachusetts in the nineteenth century. Inasmuch as the Gay Head Wampanoags had few rights under state law and even fewer ones under Federal Indian law, they were legally and practically precluded from contesting their status as wards of Massachusetts. After the Wampanoags were accorded citizenship in 1870, there was even less likelihood that the Gay Head Indians would seek federal guardianship or be successful in such legal action for, by that time, the United States was actively trying to get out of the "Indian business" as quickly as the assimilation of natives would permit.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

legal forms to be challenged and reinterpreted over time.[323] As demonstrated above, only by analyzing the role of extra-legal considerations in lawmaking and lawfinding, is it possible to understand why tribal sovereignty went from "inherent" to "impaired" to "recognized" in less than two hundred years; why the classification of recognized and unrecognized tribes was unchallenged until the mid 1970's; and why federal acknowledgment policy was enacted in 1978. Politics not only was an vital factor in all of these legal developments, but continues to influence all phases of the FAP process from a group's decision to submit a petition, to the evaluation of the evidence by BAR, to the aftermath of the Bureau's decision-making. Indeed, extra-legal considerations are indispensable to understanding the "relative autonomy" of federal acknowledgment policy and the latter's ramifications upon tribal rights.

The Relative Autonomy of Federal Acknowledgment Policy

The fact that the United States was long able to deny

---

[323] As discussed in Chapter 2, although Critical theorists aver that law is only "relatively autonomous," their analyses fail to demonstrate this by detailing the process by which certain concepts of right came to be codified and how they were subsequently interpreted by those in and outside the legal profession. The result is that it is all but impossible to assess the power of specific legal concepts for we have no way of knowing what in fact (and not merely in theory) they have made possible, permissable and conceivable.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

services, programs, funding and rights to certain Indian groups without a consistent, objective or legal rationale for doing so is itself indicative of the federal government's extensive authority and power in Indian affairs. It was, in other words, not just that the federal government cast its jurisdictional net widely over Indians based upon based upon an amalgum of legal concepts, but that its right to do so and its right not to do so (i.e., to deny tribes recognition) was not even seen as reviewable.

As discussed, not until the early 1970's when pan-Indian activism confronted the federal government's handling of native rights on several fronts did the status of "unrecognized tribes" cease to be the particular problem of individual groups. Not until a young lawyer successfully challenged the federal government's refusal to act in a fiduciary capacity toward the Passamaquoddy and Penobscot Indians of Maine did a legal door open for some unrecognized groups with respect to their legal standing to pursue land claims. And, not until litigation became a palpable threat nation-wide, with Indians and non-Indians confronting each other in numerous courtrooms and the titles of private landowners being clouded by the pending lawsuits, did policymakers see the status of "unrecognized tribes" as an issue to be addressed.

If federal authority, as manifest in legal doctrine, long prevented tribes and their counsel from seeing certain

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

inadequacies and inconsistencies in federal guardianship, it was the political fomentation of the 1960's and 70's which was responsible for challenging the legal foundation of this authority. As a result of the American Indian Policy Review Commission's seminal report in 1977,[324] the Bureau of Indian Affairs was forced to come up with a procedure to address the status of "unrecognized tribes." Although Congress had drafted a bill detailing a similar procedure, the fact that the BIA was able to retain control over the acknowledgment process speaks volumes about the agency's authority, an authority so entrenched that it effectively overshadowed the conflict of interest that inheres in the Bureau's administration of FAP.

The very process by which federal acknowledgment regulations were drafted, revised and finally codified also reveals much about the "relative autonomy" of law -- i.e., how the latter simultaneously reinforces certain ideas and initiates change. When Bureau personnel drafted the first set of proposed regulations, they took as their inspiration the practices already being used by the agency which were summarized in the Handbook of Federal Indian Law and the definition of "tribe" laid out in the Montoya decision. Since prior Bureau practice was admittedly inconsistent and without legal justification, however, the new regulations

---

[324] Formation of the Commission was itself a product of political pressure upon the federal government.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

could not merely reiterate the agency's flawed policy. Instead, the BIA needed to develop a procedure which rested upon sound legal, anthropological and historical principles. Accordingly, the draft regulations were sent out for public comment and extensive revisions were made to accomodate the criticisms received.

On the one hand, policymakers within the Bureau may well have sought to develop an administrative procedure which acknowledged only those petitioners who most resembled tribes already serviced by the agency (see Shapard's testimony above). On the other, the fact remains that there was considerable political pressure from Indian Country, from the Hill and from different professionals (including lawyers, anthropologists and historians) to come up with a process that was equitable to Indian petitioners and to already recognized tribes.[325] In their final form, the FAP regulations were similar enough to the Montoya definition of "tribe" and the Cohen criteria so as to appear consistent with case law and administrative policy. Yet, as pointed out above, there are also significant differences between the language of the respective texts and the final wording of the codified regulations so as to accomodate the diverse

---

[325] If the acknowledgment process was too easy, the standards too loose, then this would sully the unique status of already recognized tribes. The latter also felt that if the process were not sufficiently rigorous, then too many new tribal members would have to be serviced by the Bureau, thereby diminishing the benefits that recognized tribes currently enjoy.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

historical, political and ethnographic experiences of petitioning groups.

In their codified form, the FAP regulations not only incorporate elements from prior case law and administrative policy, but also create new standards which petitioners must meet in order to be federally acknowledged. Whereas legal precedent goes a long way toward establishing the legal authority of FAP, the innovations in the criteria imbue the regulations with significant power to define the parameters of tribal sovereignty. That BAR, in the preamble to the Miami "Final Determination," stresses the former and ignores the latter, demonstrates just how deliberate and self conscious the process of establishing legal authority can be. Moreover, the exact mix of old and new language in the codified regulations is critical to understanding which powers are explicit in the regulations and which are implicit and therefore are effectively precluded from analytic scrutiny.

Five of the seven FAP regulations deal specifically with the political character of the petitioner, reinforcing the position that federal recognition entails a political relationship between two autonomous entities. Petitioning groups must provide evidence of "tribal political influence or other authority..." (criterion (c)); "a copy of the group's present governing document..." (criterion (d)); "a list of all known current members...and a copy of each

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

avilable former list of members based on the tribe's own defined criteria" (criterion (e)); must not be composed principally of persons who are members of any other North American Indian tribe (criterion (f)); and must not have been "the subject of congressional legislation which has expressly terminated or denied the Federal relationship" (criterion (g)).

Whereas criterion (c) bears a strong affinity with one of Cohen's requirements and with the Montoya definition of "tribe," criteria (d) through (g) focus upon the composition of the petitioning group and the latter's autonomy as an Indian political entity. These criteria (that is, (d) through (g)) were not included in the Handbook or in Montoya. In contrast, the criteria which were outlined by Cohen (but which were not included in 25 CFR 83) were more explicitly indicative of a tribe's prior federal relationship (recognition). These included (1) treaty relations; (2) formal designation as an Indian tribe or "Indian" by Congress or by other legal instruments; (3) collective rights in tribal land or funds designated for the group's exclusive use by federal, state or local governments; (4) recognition by other Indian groups; and (5) designation as an Indian tribe, group or community by federal, state or local governments (Cohen 1972:271). Although the Cohen criteria were included in substantially the same form in early recommendations of the American

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Indian Policy Review Commission (see Chapter 5 above), they never appeared in the proposed regulations sent out by the Bureau of Indian Affairs for public comment in 1978 inasmuch as they were far too restrictive and hence politically unacceptable. Instead, they became subsumed as "some" of the ways in which a petitioning groups could demonstrate that it has been "identified" as American Indian, Indian, or aboriginal under criterion (a).

In addition, it is important to point out that while the wording of criterion (c) draws from prior legal forms, it is at the same time considerably broader than that of Cohen or the court in Montoya. These texts refer respectively to a "governmental structure" and "leadership or government" however such language was specifically excised from the final wording of the FAP regulations. Criterion (c) requires petitioners to demonstrate only "tribal political influence or other authority as an autonomous entity...." As previously noted, the FAP regulations go on to state that "autonomous must be understood in the context of the Indian culture and social organization of that tribe" (25 CFR 83.1(i), representing a significant departure of the FAP regulations from both Cohen and Montoya.

Another way in which the codified FAP regulations differ from prior case law and administrative practice has to do with the wording of criteria (a) and (b) of 25 CFR 83.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

According to Cohen, the criteria outlined in the Handbook were "considerations which singly or jointly have been particularly relied upon" to determine tribal status (1972:271d). Prior to 1978, there was no legal instrument expressly requiring that Indian tribes satisfy all of the Cohen criteria, or even a specific number or combination of them. Rather, one or several of the criteria were "particularly relied upon" by the federal government in making a decision regarding the status of an individual tribe. Cohen went on to note that "ethnological and historical factors" were also "entitled to great weight" (Ibid). There was no dicusssion, however, as to the specifics of these "ethnological and historical factors" nor as to what "entitled to great weight" meant -- i.e., exactly how the "factors" were evaluated or what they entailed.

Contrary to BAR's assertion in the preamble to the Miami "Final Determination," then, prior administrative policy as summarized by Cohen provides an an extremely weak legal foundation for criteria (a) and (b). While the wording of the Montoya decision is considerably more pertinent, it is nevertheless somewhat ambiguous. According to the court in that early case, an "Indian tribe" was a group of Indians of the "same or similar race united in a community under one leadership or government and inhabiting a particular territory" (1901). Here the term "community" does in fact appear. However, the absence of a comma

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

between "race" and "united" and between "community" and "under" (i.e "same or similar race[,] united in a community[,] under one leadership or government and inhabiting a particular territory"), would seem to indicate that the emphasis is upon the exercise of political authority over a specific group of people.[326]

Whatever the precise meaning of "community" in the Montoya definition, the fact remains that, according to criterion (b) of 25 CFR 83, petitioners must demonstrate that a substantial portion of their group "inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area..." (emphasis added). As discussed in Chapter 9, not only do petitioners have a choice whether to establish that they inhabit a specific area or live in a community, but more importantly both "specific area" and "community" are defined in the regulations as "any people living within such a reasonable proximity as to allow group interaction and maintenance of tribal relations" (25 CFR 83.1(o)). The issue in other words in the codified regulations is whether and to what extent tribal relations and group interaction exist within the petitioning group, not the presence or

---

[326] In the Mashpee case the Indian plaintiffs tried to establish that they satisfied the Montoya definition of tribe. In his instructions to the jury, Judge Skinner stated that that the latter must find that the Mashpees comprised an "Indian community" and not just a "community of Indians" (see Chapter 1).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

absence of a "community" per se.

Perhaps what is most significant about the Cohen criteria and Montoya definition, is the conspicuous absence of any requirement that a tribe manifest a characteristic "on a substantially continuous basis," "throughout history until the present," or "from historical times until the present." Neither the Cohen criteria nor the court in Montoya requires a tribe to establish its existence continuously from first contact with non-Indians to the present. Yet this standard is the issue in criterion (a), a significant factor in (c), and viewed by BAR, however erroneously, as salient to (b) as well.

The tremendous difficulty inherent in providing continuous historical evidence of criteria (a), (b) and (c) is the core reason why groups fail to obtain federal acknowledgment even when they easily satisfy the remaining more technical criteria, (d) through (g). Establishing historical continuity is not only enormously time consuming, costly and exacting in terms of locating pertinent data, but is also subject to great interpretive lattitude since researchers do not necessarily agree as to the significance of fragmented data in the historical record or of purported "gaps" in relevant information.

As discussed in Chapters 6, 8 and 9, historical sources often contain innumerable ambiguities which cannot be definitively resolved. It behooves FAP researchers (whether

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

working for the petitioning group or for the BIA) to collect as much and as varied data as is practical and to contextualize this information historically and ethnographically so that its significance vis-à-vis the FAP criteria may be properly assessed. BAR has not only been derelict in providing relevant and detailed ethnohistorical background information, but also in clearly distinguishing between fact, opinion and conclusion in its proposed findings and final determinations. BAR reports neither critically analyze the source materials used nor adequately explain the data contained therein. As a result, it is difficult to determine what BAR used as "evidence" in its decision-making and, therefore, to rebut effectively the relevance and significance of purportedly negative data. This problem does not only obtain with respect to BAR's use of official documents which have overt policy objectives, but also with regard to its use of anthropological sources which rely on native informants.

On the one hand, the fact that an anthropologist did fieldwork amidst a particular "unrecognized tribe" at some point in its history is potentially good evidence that the group existed as an identifiable Indian entity (criterion (a)). On the other, since all anthropological research is guided by a theoretical focus/bias which informs what data are collected and how, a monograph about the petitioner is not always as advantageous as one might think. This is

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

especially true of the many monographs written about American Indians during the first half of the twentieth century when scores of researchers engaged in salvage anthropology. During this period, most anthropologists concentrated their efforts upon recognized tribes since these often had the greatest number of elderly informants who could help them reconstruct the past. In accordance with their assumption that native society was well on its way to becoming exinct, the early ethnographers strove to describe a tribe's precontact cultural traditions and what little remained of them during the period of fieldwork.[327] In the rare instances where monographs and/or articles were written about an unrecognized group, it was generally to highlight how many stereotypical tribal traditions members had lost, thereby giving credence to the widely held belief that the "real" Indians were those that existed historically and that tribal manifestations would completely disappear in a generation or two.

In addition, the fact that there were no

---

[327] An infuriating limitation of most of these Boasian studies is that they describe tribal practices using an undifferentiated past tense so it is impossible to determine whether what they are discussing pertains to 20, 40, 60 or 100 years ago. Also unknown is whether the data is based upon an individual's personal experience at a specific age, or comes from an amalgum of oral tradition and history gleaned from several informants. Inasmuch as these monographs contrast "then" and "now," they are virtually useless in illuminating the process by which a group has constructed its tribal identity and sustained tribal relations over time.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

anthropological studies of some "unrecognized tribes," especially when researchers were known to have worked in the area among neighboring Indians, can reflect negatively upon a petitioner, insinuating that the latter was not enough of a bona fide tribe to attract its own anthropologist. In short, in many cases, the Boasian monographs are the only accounts of a tribe's social, political and economic organization during its early contact period and they are cited (frequently uncritically) by virtually every ethnographer who has done work on the group ever since.

BAR's historical and anthropological reports are less "factual determinations" of the political, economic and social factors which informed a group's internal and external relations than they are subjective interpretations of how the petitioner has changed during the period of sustained contact. The narratives are subjective in that they rely almost exclusively upon documentation produced by non-Indians and do not critically examine or contextualize historically or ethnographically the data contained therein. Inevitably, BAR's "summaries of evidence" detail what the Indians "lost" over time (from the non-Indian point of view) but provide little information as to what pressures the natives endured, how tribal members perceived their options and what strategies they employed. Such information is essential to any discussion of whether and to what extent Indians sustained tribal relations over time.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

FAP's requirement of historical continuity not only presents significant problems with regard to evaluating the distant past of petitioning groups but also in defining the parameters of the contemporary period. According to the FAP regulations, petitioners must demonstrate their continuous existence from contact to the present if they are to be accorded federal acknowledgment. As interpreted by BAR, the "contemporary" period is defined as the past 15 years or so. Accordingly, those groups whose petitions went on active consideration soon after FAP was enacted in 1978, only had to provide evidence of the group's Indian identity and political organization until 1978 and that of group interaction from about the mid 60's. In contrast, for groups who began the process in the late 70's and early 80's,[328] but whose petition has yet to be put on active consideration, the "present" and "contemporary" period are constantly changing. Petitioners must continually update membership rolls and undertake new research regarding tribal identity, group interaction, and tribal political influence.

In addition to being extremely costly for groups to sustain ongoing research, different petitioners shoulder substantially different burdens of proof, especially insofar as "contemporary" tribal relations and group interaction are concerned. Inasmuch as BAR has been averaging less than two

---

[328] The first step is for petitioners to submit a letter signaling their participation in the process.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

petitions per year and there are over 100 groups estimated who will go through the FAP process, at the present rate it will take some 50 years or more for some cases to be evaluated. It is unreasonable and inequitable for some petitioners to be forced to update their evidence continually throughout this protracted period. Not only will informants die, but the very conditions and policies which the petitioning groups are trying to change -- namely, the lack of federal recognition -- will continue to affect generations of tribal members. In other words, the same deleterious ramifications of federal non-recognition will continue, perhaps at the same rate, perhaps faster.

The requirement that petitioning groups establish their identity and autonomy continuously throughout history (criteria [a] and [c]) in order to be federally acknowledged thus puts petitioners at a substantial disadvantage vis-à-vis the collection, presentation and evaluation of evidence. To be sure, Indians have had to prove that they are the political successors in interest of historical entities when they pursue legal action with regard to historic claims. In the Indian Claims Commission cases, for example, tribes had to establish that they were autonomous political entities which exerted control over certain resources and territory at the time that alleged wrongs were committed. Native claimants also had to demonstrate that, as descendants of the tribe which was wronged, they were entitled individually

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

or as a group to restitution.[329] Similarly, the Mashpee Indians had to establish historical continuity in order to prosecute a claim under the 1790 Trade and Non-Intercourse Act. That is, they had to prove that they had tribal rights pursuant to the 1790 Act and that, at specific periods in history, those rights had been violated by the State.

What makes the claims cases radically different from federal acknowledgment, however, is that, for the latter, petitioners do not have to demonstrate that the federal government failed to act in a fiduciary capacity toward the group at some point or points in history. Petitioning groups do not have to prove that they were wronged legally in the past or that they are entitled to restitution or compensation because of it. Indeed, none of the proposed or codifed procedures to resolve the non-recognition conundrum -- i.e., neither the regulations of the Commission, Congress nor BIA -- required tribes to demonstrate governmental error, negligence, or malfeasance vis-à-vis these groups.

All this is to say that historical continuity is not a legal prerequisite of federal recognition unless legal doctrine explicitly makes it one. In this regard it is

---

[329] Claimants did not have to establish that, at the time of legal action before the Commission, they constituted a "tribe" according to the Montoya definition. The Duwamish Indians, for example, won a judgment award before the Commission but the money was distributed on a per capita basis to all known descendants of the Duwamish treaty tribe inasmuch as the federal government asserted that the group was not formally "organized" under IRA.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

noteworthy that according to one acknowledgment bill (S.2375) circulated before the enactment of 25 CFR 54 (83) in 1978, a group had to be identified as Indian, Native American or aboriginal, for a period of not less that 44 years -- i.e., only since the passage of the Indian Reorganization Act in 1934. Indeed, Bud Shapard, who headed BAR for more than 10 years and who played a major role in drafting the FAP regulations, recently proposed that petitioners only establish tribal identity from 1934 or perhaps the from the turn of the century to the present, substantially curtailing the length of time for which historical continuity needs to be researched.

Although historical continuity is not a necessary component of federal recognition, the fact that it is included in the current FAP regulations is extremely signficant. Historical continuity plays a central role in the evaluation of evidence by BAR regarding criteria (a), (b), and (c). Not only does it place an onerous burden of proof upon petitioners, but accords the Branch an inordinate amount of discretionary lattitude in its decision-making.

As discussed above, the wording of the FAP regulations was self-consciously broad in order to address some of the genuine concerns and criticisms of those outside the Bureau. Despite political pressures to do otherwise, Shapard notes that Bureau personnel in the late 70's held fast to their goal of crafting FAP regulations which acknowledged those

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

groups who most resembled tribes already being serviced by the federal government. That the codified regulations in fact accomplish this goal, at the same time that they appear to accomodate ethnographically and historically diverse petitioning groups, is a testament to the skill of the regulations' authors and to the power of those who got the criteria enacted. Very importantly, however, the power of the FAP process is not a function merely of the ambiguities contained in the codified language of the regulations. It also obtains through the application of the criteria to various petitioners, in other words, through the very process of evaluating evidence.

In the Gay Head case, what paradigms BAR used to present data and interpret evidence influenced what issues the Tribal Council critically analyzed in its rebuttal and those it did not. The Council focused primarily upon reinterpreting BAR's negative assertions and upon providing new data to fill in the purported "gaps." The rebuttal ignored completely the pattern of silences in BAR's presentation of evidence and the implicit, yet erroneous, working assumptions which guided what issues the anthropological and historical reports discussed and how the latter did so.[330]

---

[330] For example, in repeatedly using negative phrasing, BAR implied that the absent data should have been present, had Gay Headers in fact comprised a bona fide tribe worthy of federal acknowledgment.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ultimately, the Tribal Council was able to rebut enough evidence and to provide sufficient new information to make it politically, if not legally, difficult for BAR not to reverse its decision in the "Final Determination." Yet, in failing to challenge BAR on the latter's interpretation of criteria (b) and (c), the Gay Head Wampanoags enabled the same flawed theory and methodology to guide the Branch's presentation and evaluation of evidence in subsequent petitions -- specifically those of the Mohegan and Miami Indians. The latter groups will find it especially difficult to challenge BAR on its interpretation of (b) and (c) since Gay Head was able to fit data into the Branch's model with apparent success. For the Mohegans and Miamis, the task will be to show that BAR's working model is not only flawed anthropologically and historically, but is also antithetical to the very wording of the regulations.

We see, then, that the "relative autonomy" of federal acknowledgment policy is a function of the ongoing and interdependent processes of lawmaking and lawfinding. The enactment of 25 CFR 54 [83] in 1978 drew from prior case law and administrative policy and was influenced by political foment during the mid 1970's. Despite a deliberate attempt to have the FAP regulations accomodate ethnohistorically diverse petitioners, the criteria nevertheless are inherently biased in favor of those groups already serviced by the BIA. Further, the way in which BAR has interpreted

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the regulations over the past 15 years, especially criteria (b) and (c), has narrowed even further the meaning of "tribe" and the legal basis for determining which American Indian groups are to be accorded or denied federally acknowledgment. As in the codification of FAP, political considerations have also played an important role in the lawfinding process, influencing whether, when and why such tribes as the Gay Head Wampanoags decided to petition for federal acknowledgment and the Indians' strategies and options throughout the petitioning process.[331]

The Authority and Power of Federal Acknowledgment Policy

If the processes of lawmaking and lawfinding reveal much about the conservative and innovative capacity of law (i.e. its "relative autonomy" vis-à-vis prior legal forms and present political considerations), so too do they enable us to understand law's authority and power. Because of the self-referential mode of legal reasoning in American jurisprudence, legal doctrine is able, through its carefully chosen words, to sustain, entrench and fortify certain concepts of right while abrogating, undermining or involuting others. It is, in other words, the reasoning and logic of legal texts which imbue law with the authority (or

---

[331] It is noteworthy that the FAP process has functioned throughout 12 of its 15 year history under Republican administrations, a fact which directly affected petitioners' options outside of BAR and therefore inside as well.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

right) to prescribe and proscribe certain courses of action. And, it is the perceived authority of legal doctrine which delimits the arena of legal discourse and the issues which will and will not be critically examined.

In turn, the power of law is directly related to its authority, for the latter enables legal doctrine to make statements, the underlying logic of which appears congruent with existing concepts of right.[332] On the one hand, the potential power of law inheres in these codified concepts of right -- i.e., in the process of lawmaking. On the other, its enduring power obtains in the application of these concepts to new facts, circumstances and cases -- in other words, in the process of lawfinding. It is how legal doctrine is in fact interpreted -- not just in one case, but over time -- that is most indicative of how particular concepts of right both affect, and are affected by, individuals' attitudes and behavior.

With respect to 25 CFR 83, the authority of the acknowledgment process stems generally from the amalgum of legal decisions, executive acts and legislative initiatives known as Federal Indian law. Such concepts as "domestic dependent nations," and "plenary power" have not only

---

[332] While these may be taken from prior legal forms, they may also be borrowed from diverse non-legal arenas such as science, religion, philosophy, etc. The origin of the concepts is of less significance than how widely they are adhered to by the general public. Those concepts with broad based support are more likely to be codified and not challenged when applied than are those with limited backing.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

increased the power of the federal government over Indian peoples, but also its authority (or right) to determine how Indians are to be categorized and the rights (or lack) thereof. In addition, prior case law and administrative policy have enabled the BIA to retain administrative control over the federal acknowledgment process despite the fact that the Bureau had expressly refused to service some of the petitioning groups in the past and that it presently manages the affairs of recognized tribes, representing a clear conflict of interest.

More specifically, the authority of FAP obtains from the codified language of the regulations -- i.e., from the way in which certain terms, phrases and concepts were taken from case law and prior administrative practices and incorporated into 25 CFR 83. That the latter appears "consistent" with prior legal forms effectively precludes petitioners from critically examining what the regulations in fact state[333] (as opposed to what BAR claims that they state) and the rightness thereof. Although all the terms, phrases and concepts were modified in some respect before being included in the final regulations (with some omitted

---

[333] It is, of course, up to the petitioners' legal counsel to look after their client's interests and to make sure that due process is being served throughout the petitioning process. That no petitioner's attorney has yet challenged the BIA on the latter's misguided interpretation of the regulations is a testament to just how effective legal "consistency" is in delimiting the arena of legal discourse.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

entirely), these changes have not always been noted or respected in the application of FAP criteria to petition evidence. Indeed, the Miami preamble completely ignores the differences between the current wording of the regulations and prior administrative policy and case law.

In turn, the perceived authority both of the regulations and of BAR to administer FAP have direct consequences for the potential and enduring power of 25 CFR 83. To begin with, the FAP regulations explicitly require petitioning groups to establish their tribal autonomy from initial contact with non-Indians until the present, an onerous and expensive burden of proof, to be sure. While petitioning groups need not conform to a specific trait list of historical, socio-cultural or political variables, nevertheless criteria (a) through (g) implicitly favor petitioners who most resemble groups already serviced by the BIA. This bias is reinforced by BAR's extremely narrow interpretation of the criteria -- especially with regard to (b) and (c) -- which effectively subverts the intent and meaning of the regulations, making it very difficult for "unrecognized tribes" to obtain federal acknowledgment.

Second, the regulations detail what kinds of historical, ethnographic and genealogical evidence is necessary in order to satify criteria (a) through (g) and how it should be presented. Criterion (a) requires petitioners to submit "a statement of facts" which

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

establishes the substantially continuous American Indian identity of the group based upon one or more of seven types of evidence.[334] The same sources are to be used for criteria (b) and (c) as well as (e).[335] Although the sources appear to offer a broad evidential basis for establishing continuous identification as an Indian group, in fact only one of the seven types of evidence mentioned -- identification by recognized tribes or national Indian organizations -- is not the product of non-Indians.

In effect, petitioners must establish their tribal identity and continuous autonomy based upon the refracted gaze of non-Indians, a gaze which inevitably was influenced by the latter's own socio-cultural values, economic self-interest and political agenda at any particular point in history. While good scholarship demands that all data be corroborated and contextualized within appropriate ethnographic and historical contexts, as discussed, this has not been the case with BAR's "summaries of evidence." Instead, the latter present the information contained in

---

[334] These include: repeated identification by (1) federal authorities; (2) state governments; (3) a county, parish, or other local government; (4) records in courthouses, churches, or schools; (5) anthropologists, historians or other scholars; (6) newspapers and books; and (7) recognized Indian tribes or national Indian organizations (25 CFR 83.7 (a)(1)-(7)).

[335] This criterion requires petitioners to submit current and past membership rolls and to establish their descent from an historic tribe or tribes "using evidence acceptable to the Secretary" (23 CFR 83.7(e)).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

non-Indian sources as objective fact without critically examining the source materials and the data contained in them.

The positivist bias of the regulations thus accords great authority to the views of non-Indians as they appear in documentary sources and this authority is further buttressed by BAR when it uncritically presents these views as probative "evidence" of tribal identity or the lack thereof. In this way, prior governmental policy and decisions -- whether legally sound or suspect -- become the "factual" basis for determining whether or not petitioning groups have been "identified" over time as American Indian and, therefore, eligible or not for federal acknowledgment under 25 CFR 83.

Third, criteria (a), (b) and (c) require petitioners to establish the group's American Indian identity, descent and political autonomy from historical times until the present, thereby rendering a petitioner's present legal status a function of the group's direct ties to a specific historic tribe or tribes.[336] It is the "tribe" -- as perceived by non-Indians upon their initial contact with native peoples -- that is imbued with ethnographic authority.[337] It is the

---

[336] Petitioning groups must trace their origins back to a single historic tribe or to several tribes which combined to form a single autonomous entity.

[337] As numerous scholars have pointed out, early non-Indian views of tribes vary considerably with respect to their accuracy. In many instances, European explorers,

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

historic "tribe" which serves as the baseline ethnographic model against which all subsequent forms of the petitioner will be evaluated. And, it is the "tribe," analytically frozen just prior to, or at the point of, contact with non-Indians, that is viewed as authentically "Indian."

In privileging the identification of a tribe at a particular point in its history, the regulations foster the view that the "real" tribes and Indians are those that existed in the past. This view is reinforced by the data BAR chooses to present and omit in its "summaries of evidence." For example, BAR often refers to individual natives in the distant past as "Indians," while contemporary petitioners are termed "Indian descendants," a phrase which acknowledges a person's genealogical ties to an historic tribe but which indicates that the individual is somehow less "Indian" than his/her ancestors. BAR also highlights

---

missionaries, traders and government officials projected the monarchical structure of their own political forms upon American Indians, assuming incorrectly that "chiefs" had kingly authority over their subjects' person and property. Another common problem of these early accounts is that, inasmuch as their authors did not speak the native languages and were unfamiliar with indigenous culture generally, they were frequently unable to ascertain the precise social, political and economic relationships between and among indigenous groups -- i.e., whether a particular group was a seasonal residential unit, a politically autonomous entity in its own right, or part of a larger social, political, or economic organizational form, the configuration of which was meaningful to its native membership (as opposed to linguistic boundaries which may only be "boundaries" to linguistic anthropologists). The problem, in short, is that the identity of an historic tribe is itself an issue to be researched and cannot be accepted uncritically as "fact" based upon descriptions in the historic record.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

what cultural traditions and practices a tribe has "lost" over time without explaining what attitudes and behavior the Indians themselves hold as important to and indicative of tribal identity and affiliation at different points in history.

On the one hand, then, the power of FAP stems from what evidence the regulations explicitly require -- i.e., from the way in which the criteria implicitly sanction and foster the very same flawed governmental policies, decisions and classification which the petitioning process was supposed to circumvent. On the other hand, the inherent biases of the regulations notwithstanding, it is the actual interpretation of the regulations by BAR which has significantly constrained the intent and scope of the acknowledgment process these past 15 years.

Although the regulations were originally designed to establish objective anthropological, historical and genealogical bases for determining which tribes will and will not be federally acknowledged, in fact, BAR has exercised considerable discretionary power in deciding: what information it presents as "evidence"; what issues are not examined; and what significance is to be inferred from data and purported gaps therein. In failing to analyze the available source materials and to contextualize data contained in non-Indian documents, BAR sloughs over the seminal role that federal, state and local authorities have

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

played in circumscribing the form and substance of post-contact tribal relations. In doing so, BAR distorts the historic record and fosters unrealistic, if not culturally biased models of tribal identity and autonomy to which petitioners are held accountable. Furthermore, the plethora of ethnographic, historical and genealogical information in BAR's "summaries of evidence" belie the inherent biases of the criteria themselves and the lack of objective standards for determining what is probative, material and reliable "evidence." That FAP decisions appear to rest on "factual" determinations rather than on subjective interpretations, only enhances the authority and power of individual final determinations as well as of the decision-making process generally.

Finally, perhaps what is most significant of all about FAP is not its ability to accord or deny federal acknowledgment to specific petitioners, though of course this has tremendous ramifications for the groups concerned. If anything, more powerful is the way in which the process involutes the meaning of federal recognition itself. As discussed, criteria (a), (b) and (c) do not require "unrecognized tribes" to demonstrate that they have remained the same over time. Nevertheless, petitioners are encouraged by the wording of the regulations to focus narrowly upon the distinctiveness of their group from the point of contact with non-Indians through the present.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"Unrecognized tribes" are enjoined to present such evidence despite the fact that political and cultural boundaries were not coterminous among many American Indian groups just prior to or at the point of contact with non-Indians.[338] Moreover, BAR's informal advice to petitioning groups as well as the Branch's formal evaluation of evidence do nothing to discourage the view that successful petitioners are those who have maintained, sustained or retained certain cultural features over time. Indeed, as reported in a recent New York Times article, Branch Chief Holly Reckord maintains that "the agency decides recognition based on proof of continued cultural existence" (October 17, 1993.)

In focusing on the cultural distinctiveness of tribes over time, BAR distorts the most basic feature of federal recognition: namely, that it entails a relationship between two sovereign entities. When the federal government recognizes an Indian tribe -- or foreign nation for that matter -- it acknowledges that entity's political status and the rights thereof. Throughout American history, numerous treaties, executive acts and judicial decisions have affirmed that the sovereignty of Indian tribes pre-dates and

---

[338] For example, among Indian groups in the Pacific Northwest and parts of California, language, social organization and economic strategies did not conform neatly with tribal divisions. Indeed, the very identification of autonomous "tribes" in these regions is extremely problematic for there was considerable fluidity in the membership of residential units (e.g., households, seasonal encampments and villages) and no enduring political ties between and among these units.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

survives the formation of the United States. That is, what Federal Indian law recognizes is the inherent sovereignty of tribal groups. Likewise, what 25 CFR 83 acknowledges, and what the regulations themselves attest, is the "maintenance of tribal relations -- a political relationship" (BAR 1978:39361). Requiring "unrecognized tribes" to be culturally distinct over time in order to be federally acknowledged not only holds these groups accountable to an ethnohistorically flawed model of tribal affiliation, but also to a model which is inconsistent with the legal status of recognized tribes as political, not cultural, entities. This involution of federal recognition has wide ranging and enduring implications.

To the extent that the current FAP process is allowed to determine the fate of more than 100 "unrecognized tribes," BAR's distorted view of tribes and of federal recognition will become carved in stone. The longer FAP persists, the more the regulations and BAR's interpretation of them will be perceived as an ethnographically, historically, genealogically and legally sound means of determining which tribes are bona fide and therefore eligible for federal recognition. Although the BIA's authority to make such determinations is currently limited to "unrecognized tribes," this authority could be extended to recognized tribes in the future, thereby expanding the power of the FAP regulations and of the agency to interpret

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

them. This could result in a significant decrease in the number of recognized tribes since the BIA readily admits that many of those it currently services could not meet the stringent standards set forth in 25 CFR 83.

Although BAR has testified that the BIA does not have the power to terminate tribes -- only Congress does -- such statements should not lull recognized tribes into a false sense of security. First, in the past the BIA refused to service or curtailed services to some Indian tribes, effectively de-recognizing the groups administratively.[339] As Shapard has noted, without the benefits of Bureau services, most groups have experienced difficulties in maintaining tribal integrity. There are, in other words, many ways in which the BIA can undermine tribal sovereignty which do not involve congressional "termination" per se.

Second, although the BIA is not at present empowered to terminate tribes, there is no guarantee that Congress would not pass enabling legislation in the future to do precisely this, given sufficient political pressure. For example, it

---

[339] For example, in the Puget Sound region of Washington State there are several tribes who were administered by the BIA through the late 19th century. Inasmuch as these Indians did not occupy trust land (reservations), federal supervision of them became increasingly uneven and inconsistent from the turn of the century through the early 1970's, a fact which led to these landless tribes to be deemed unrecognized in U.S. v. Washington. Even though these groups were administered by the BIA in the past and never were Congressionally terminated, they nevertheless are currently classified as unrecognized and must go through the petitioning process to obtain federal acknowledgment.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

is possible that the BIA could be authorized under the guise of fiscal austerity to apply the FAP regulations (or some modified form thereof) to recognized tribes in order to determine which ones the agency would continue to service and which ones would be cut from its budget. With a federal deficit growing geometrically, such draconian measures are not inconceivable. Indeed, the ethnographic, historical and legal rationale for evaluating the cultural continuity of tribes is reinforced with each FAP decision published in the Federal Register.

And third, while the BIA has maintained that the FAP regulations only apply to "unrecognized tribes," in fact they have been applied to at least one recognized tribe to date. In Masayesva v. Zah v. James (1992), the court held that the membership roll of one of the largest and wealthiest of Indian tribes -- the Navajo Nation -- did not meet FAP criterion (e). Although there was no implication that the Navajo tribe would be terminated because of this deficiency, nevertheless the fact that FAP criteria were applied to a recognized tribe and the latter was found wanting demonstrates just how vulnerable all tribes are. Inasmuch as FAP decisions are legally binding, the concepts of right they authorize may be used in other legal arenas and applied to recognized tribes.

In short, in making cultural continuity a prerequisite of federal recognition, the BIA establishes a potent means

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

for delimiting who it will and will not recognize. Once imbued with legal authority, BAR's view of federal recognition as a function of a tribe's cultural continuity, can be used, not only to determine which "unrecognized tribes" are to be accorded federal acknowledgment, but also which recognized tribes are no longer bona fide. The potential for both policies lies in the wording of the FAP regulations and in the latter's increasingly narrow interpretation by BAR over the past 15 years.

Whether the concepts of tribe and of federal recognition which are fostered by the FAP process are in fact used to increase or decrease the number of Indian groups the federal government recognizes will depend upon the political pressures brought to bear upon the BIA. That both outcomes are possible is indicative of the "relative autonomy" of law -- of the latter's conservative and innovative capacity.

Coiled Intent

The above examination of FAP and of the experiences of the Gay Head Wampanoags with the petitioning process reveal much about the authority and power of law. The history of FAP and its administration since 1978 demonstrate that law is best understood not as a text, but as an ongoing process which includes lawmaking and lawfinding. By viewing FAP processually, one is able to see the ways in which the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

codified regulations draw from existing legal forms to establish their authority, thereby making 25 CFR 83 appear rational, consistent,[340] and just. Examining the codification of FAP and BAR's evaluation of evidence (the processes of lawmaking and lawfinding) also reveals how extra-legal factors cause existing concepts of right to be reanalyzed, extended or circumscribed, thereby giving rise to 25 CFR 83 itself and to the involution of federal recognition. And, by taking a processual approach to FAP, much is learned about the ability of legal forms such as 25 CFR 83 not only to prescribe and proscribe behavior, but also to influence, shape and delimit the course of action without participants even being aware that their options are so constrained.

In addition to furthering our understanding of the "relative autonomy" of law, the above study of FAP shows how the acknowledgment process helps to reinforce and perpetuate the view that Indian tribes are cultural anachronisms. Since the FAP regulations and BAR's interpretation of them require petitioners to demonstrate their group's cultural continuity from an "historic tribe," those who cannot do so

---

[340] Of course legal doctrine can be innovative and codify radically different concepts of 'right' than had existed previously. However, even when new laws appear to reverse prior policy -- e.g., as when Brown vs. Board of Education (1954) effectively nullified Plessy vs. Ferguson (1896) -- the mode of legal reasoning draws in some way from existing legal forms. In the case of Brown, the Supreme Court's decision turned upon the reinterpretation of what equality meant in the U.S. Constitution.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

are not acknowledged and thus do not receive the protection, services and benefits which the federal government accords recognized tribes. In the past, the denial of such immunities and privileges has taken a heavy toll upon "unrecognized tribes" socially, politically and economically. As more tribes have their status clarified through FAP, the schism between those who are and are not recognized will invariably widen.[341]

Thus, in restricting federal acknowledgment to Indian groups which have retained their cultural continuity, FAP gives legal expression to the popular notion that native groups must retain strong and readily observable cultural links with an "historic tribe" in order to be authentic Indian tribes. Those which do not are, by defintion, not bona fide tribes.[342] It is not that FAP denies that Indian

---

[341] In the last five years, Indian gaming has enabled dozens of recognized tribes to realize profits heretofore unimaginable. These new revenues have been used to finance health and social services, education programs, economic development projects and to make capital improvements upon reservations, all without the paternalistic supervision of the Bureau of Indian Affairs. Because of their political status, "unrecognized tribes" cannot set up gambling enterprises nor reap their financial benefits.

[342] Although the FAP regulations specfically state that a petitioner's failure to satisfy criteria (a) through (g) does not mean that a group is not "Indian," in fact the legal distinction between being ethnically "Indian" and legally a member of a recognized tribe is lost upon the overwhelming majority of non-Indians. In the main, the latter are either completely unaware that Indian tribes have a special legal status vis-a-vis the federal government or else do not understand the foundation and implications of such status. For most Americans, being "Indian"' is an ethnic category, dependent upon an individual's blood

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

tribes have changed over time. Rather, it is that the process establishes that if the changes are too many and if they are not consonant with the group's ethnographic configuration upon contact, then the status of the tribe is abrogated. Accordingly, the group is denied the very means which are most instrumental in sustaining tribal integrity, namely, federal recognition.

Lastly, it is through the analysis of FAP as a process that one comes to understand that the power of 25 CFR 83 is not restricted to according or denying federal acknowledgment to specific "unrecognized tribes." Far more significant is the way in which the regulations and BAR's interpretation of them legally sanction the BIA's use of arbitrary and subjective measures of cultural continuity to deny tribes their sovereign rights. That this appears to rest upon sound legal, anthropological, historical and genealogical principles only enhances the authority and power of the process and establishes the legal foundation for possibly extending FAP to recognized tribes.

In conclusion, the tensile strength of federal

---

quantum and cultural affiliation. Tribal identity and affiliation is viewed essentially as a cultural, not legal issue. Accordingly, when an Indian group is not federally recognized, its authenticity as "Indian" in the eyes of many non-Indians (as well as other Indians) is therefore diminished. Indeed, in many cases, members of "unrecognized tribes" have been viewed by their non-Indian neighbors as mixed bloods or as "Indian descendants," a situation which the petitioning group hopes will change upon gaining federal acknowledgment.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

acknowledgment policy stems from its "coiled intentionality" -- from the way in which it conveys certain concepts of right seemingly without coercive force. Its power is not akin to the force of a firecracker exploded, but more like that of a spring, the force of which increases, the more tightly it is wound. Therein lies the power of FAP, therein lies the power of law.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

LAW CASES CITED

Brown v. Board of Education 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)

Catawba Tribe v. South Carolina (filed 1980)

Cherokee Nation v. Georgia 30 U.S. 5 Pet. 1 (1831)

Chitimacha Tribe v. Laws 490 Fed. Supp. 164. (1980)

Department of Game v. Puyallup Tribe, Inc. 422 P.2d 754,766 (Wash. 1967)

Elk v. Wilkins 112 U.S. 94 (1884)

Epps v. Andrus 611 F.2d 915 1st Cir.(1979)

Fletcher v. Peck Dud.229 (1810)

Johnson v. McIntosh 21 U.S. 587 (1823)

Joint Tribal Council of the Passamaquoddy Tribe v. Morton 388 F. Supp. at 656 (1975)

Makah Indian Tribe v. Schoettles 192 F. 2d 224 (9th Cir. 1951)

Masayesva v. Zah v. James 792 F.Supp. 1178 D.Ariz (1992)

Mashpee Tribe v. New Seabury Corporation 592 Fed. 2d. (1st Cir.) 575 (1979)

Mashpee Tribe v. Town of Mashpee 447 F. Supp. 940 (D. Mass. 1978)

McClanahan v. Arizona State Tax Commission 411 U.S. 164 (1973)

Mohegan Tribe v. Connecticut 483 F. Supp. 597 D. Conn. (1980)

Montoya v. United States 180 U.S. 266 (1901)

Morton v. Mancari 417 U.S. 535 (1974)

Narragansett Tribe v. Southern Rhode Island Development Corp. 418 F. Supp. 798 (D.R.I. 1976)

Oliphant v. Suquamish Indian Tribe 435 U.S. 206 (1978)

Oneida Indian Nation v. County of Oneida 434 Fed. Supp. 527. (1977)

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Plessy v. Ferguson 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)

Schaghticoke Tribe v. Kent School Corp. 423 F. Supp. 780 (D. Conn. 1976)

Standing Bear v. General Crook 25 Fed. 695 (1879)

State v. Alexis 154 P.810 (1916)

State v. Meninock 197 P.641 (Wash. 1921)

State v. Towessnute 154 P.805 (1916)

Tee-Hit-Ton Indians v. United States 348 U.S. 272 (1955)

Tulee v. Washington 315 U.S. 681 (1942)

United States v. Alcea Band of Tillamooks 329 U.S.40, 91 L. Ed. 29,67 S.C. 167 (1946)

United States v. Candelaria 271 U.S. 432 (1926)

United States v. Joseph 94 U.S. 614 (1876)

United States v. Kagama 118 U.S. 375 (1886)

United States v. Mazuri 95 S. Ct. 692 (1975) rev'g 487 F.2d 14 10th Cir. (1973)

United States v. Sandoval 231 U.S. 28 (1913)

United States v. State of Washington 384 F. Supp. at 312 (1974)

United States v. Winans 198 U.S. 371 (1905)

United States ex. Rel. Hualpai Indians v. Santa Fe Railroad (Walapai Tribe) 314 U.S. 339,86 L. Ed. 260, 62 S.C. 248 (1941)

Washington v. McCoy 387 P.2d 942,951 (Wash. 1963)

Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc. Civil No. 76-193 (1976)

Williams v. Lee 358 U.S. 217 (1958)

Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832)

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

BIBLIOGRAPHY

American Indian Policy Review Commission
1976

1977 Final Report, 2 volumes. Washington D.C.: Government Printing Office.

Anderson, Terry
1978 Federal recognition: The vicious myth. American Indian Journal May 4(5):7-19.

Axtell, James
1974 Through a glass darkly: Colonial attitudes toward the Native Americans. American Indian Culture and Research Journal (1974):17-28.

1981 The European and the Indian. New York: Oxford University Press.

Banks, Charles Edward
1966 The History of Martha's Vineyard. 3 volumes. (Reprint of 1911-1925 edition.) Edgartown, Massachusetts: Dukes County Historical Society.

Barsh, Russel L.
1982 Indian land claims policy in the United States. Dakota Law Review 58:7-82.

Barsh, Russell and Richard Youngblood Henderson
1980 The Road: Indian Tribes and Political Liberty. Los Angeles and Berkely: University of California Press.

Berkhofer Jr., Robert
1978 The White Man's Indian. New York: Alfred A. Knopf.

Berman, Howard R.
1978 The concept of aboriginal rights in the early legal history of the United States. Buffalo Law Review (27):637-67.

Berthrong, Donald J.
1976 The Cheyenne and Arapaho Ordeal: Reservation Agency Life in the Indian Territory, 1875-1907. Norman: University of Oklahoma.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Bishop, Kathleen L., and Kenneth Hansen
1978 The Landless tribes of Western Washington. American Indian Journal 4(5):20-31.

Bonney, Rachel A.
1977 The role of AIM leaders in Indian nationalism. American Indian Quarterly 3(3):209-24.

Branch of Acknowledgment and Research (BAR)

See U.S. Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research.

Brenner, Elise M.
1980 To pray or to be prey, that is the question: Strategies for cultural autonomy of Massachusetts praying town Indians. Ethnohistory 27(2):135-151.

Brodeur, Paul
1982 Annals of law: Restitution. The New Yorker October 11:76-155.

1985 Restitution: The Land Claims of the Mashpee, Passamaquoddy and Penobscot Indians of New England. Boston: Northeastern University Press.

Bureau of Indian Affairs
See U.S. Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research (BAR).

Burke, Joseph C.
1969 The Cherokee cases: A study in law, politics, and morality. Stanford Law Review. 21:500-33.

Campisi, Jack
1985 The Trade and Intercourse Acts: Land claims on the eastern seaboard. In Irredeemable America: The Indians' Estate and Land Claims, ed. Imre Sutton. Albuquerque: University of New Mexico Press.

Canby, William C., Jr.
1981 American Indian Law. St. Paul: West Publishing Co.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ceci, Lynn
1977 The effect of European contact and trade on the settlement pattern of Indians in coastal New York, 1524-1665: The archeological and documentary evidence. Ph.D. diss., City University of New York.

Clifford, James
1988 Identity in Mashpee. In The Predicament of Culture. Cambridge, Mass.: Harvard University Press.

Clifford, James and George E. Marcus, Eds.
1986 Writing Culture: The Poetics and Politics of Ethnography. School of American Research Advanced Seminar. Los Angeles and Berkeley: University of California Press.

Clinton, Robert N. and Margaret T. Hotopp
1979 Judicial enforcement of the federal restraints on alienation of Indian land: The origins fo the eastern land claims. Maine Law Review 31:17-90.

Cohen, Fay G.
1986 Treaties on Trial: The Continuing Controvery over Northwest Indian Fishing Rights. Seattle: University of Washington Press.

Cohen, Felix
1972 Handbook of Federal Indian Law. Washington D.C.: United States Government Printing Office.

Cook, Scott F.
1976 The Indian Population of New England in the Seventeenth Century. Berkeley and Los Angeles: University of California Press.

Crapanzano, Vincent
1980 Tuhami: Portrait of a Moroccan. Chicago: University of Chicago Press.

Cronon, William
1983 Changes in the Land: Indians, Colonists, and the Ecology of New England. New York: Hill and Wang.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Dargo, George
1974 Roots of the Republic: A New Perspective on Early American Constitutionalism. New York: Praeger.

Davidson, James West and Mark Lyttle
1980 After the Fact: The Art of Historical Detection. New York: Knopf.

Deloria, Vine and Cliffor M. Lyttle
1983 American Indians, American Justice. Austin: University of Texas Press.

Department of Interior, Bureau of Indian Affairs
1991 "25 CFR Part 83, Procedures for Establishing That an American Indian Group Exists as an Indian Tribe; Proposed Rule." Federal Register 56(181):47320-30.

Doris, Michael
1987 Indians on the shelf. In The American Indian Problem and the Problem of History, ed. Calvin Martin. New York: Oxford University Press.

Dworkin, Ronald
1986 Law's Empire. Cambridge, Mass.: Belknap Press.

Earle, James M.
1861 Report concerning the Indians of the Commonwealth under the Act of April 6, 1859. Massachusetts Senate Document No. 96.

Eggan, Fred
1937 The Social Anthropology of North American Indians. Chicago: University of Chicago Press.

Emerson, Everett
1977 Puritanism in America 1620-1750. Boston: Twayne Publishers.

Elbert, Hazel
See U.S. Congress. Senate. Select Committee on Indian Affairs. 1988.

Ewers, John Canfield
1977 The Horse in Blackfoot Indian Culture. St. Claire Shores, Michigan: Scholarly Press.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Fabian, Johannes
1983 Time and the Other: How Anthropology Makes Its Object. New York: Columbia University Press.

Fletcher, Alice and Francis La Flesche
1972 The Omaha Tribe. (Smithsonian Reprint.) St. Claire Shores, Michigan: Scholarly Press.

Foster, Morris W.
1991 Being Comanche: A Social History of an American Indian Community. Tucson: University of Arizona Press.

Foucault, Michel
1983 The History of Sexuality. New York: Vintage Books.

Fowler, Loretta
1982 Arapahoe Politics, 1851-1978: Symbols in Crises of Authority. Lincoln: University of Nebraska.

Freeman, John F.
1965 The Indian Convert: Theme and Variation. Ethnohistory 12:113-128.

Friedman, Lawrence M.
1985 History of American Law. (Second Edition) New York: Simon and Schuster.

Gay Head Wampanoag Tribe
1983 Gay Head Wampanoag Tribe recognition petition. 8 volumes. Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

1985 Supplement to Gay Head Wampanoag Tribe recognition. Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

1986 Response. Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

Getches, David H., D. Rosenfelt and C. Wilkinson
1979 Cases and Materials on Federal Indian Law. St Paul: West Publishing Co.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Gookin, Daniel
1972 Historical Collections of the Indians in New England. New York: Arno Press.

Gordon, Robert W.
1984 Critical legal histories. Stanford Law Review 36:57-125.

Grabowski, Christine
1982a Gay Head in the twentieth century: Town and tribe, town vs. tribe. (Unpublished report prepared for and under the direction of the Wampanoag Tribal Council of Gay Head.)

Gramsci, Antonio
1980 Selections from the Prison Notebooks. New York: International Publishers.

Green, Michael D.
1982 The Politics of Indian Removal: Creek Government and Society in Crisis. Lincoln: University of Nebraska Press.

Habermas, Jurgen
1975 Legitimation Crisis. Boston: Beacon Press.

Hauptman, Laurence M.
1981 The Iroquois and the New Deal. Syracuse: Syracuse University Press.

1986 The Iroquois Struggle for Survival: World War II to Red Power. Syracuse: Syracuse University Press.

Heimert, Alan and Andres Delbanco
1985 The Puritans in America: A Narrative Anthology. Cambridge: Harvard University Press.

Hertzberg, Hazel
1971 The Search for an American Indian Identity: Modern Pan-Indian Movements. Syracuse: Syracuse University Press.

Hickerson, Harold
1970 The Chippewa and Their Neighbors. New York: Holt, Rinehart and Winston.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Howwaswee, Moses
1792 Account of Indians Resident at Gay Head. March 19. Miscellaneous Collections. Massachusetts Historical Society, Boston, Mass.

Hoxie, Frederick
1984 A Final Promise: The Campaign to Assimilate the Indians, 1880-1920. Lincoln: University of Nebraska.

Hudson, Winthrop S.
1973 Religion in America. New York: Charles Scribner's Sons.

Hurtado, Albert L.
1982 Hardly a farm house and kitchen without them: Indian and white household on the California borderland frontier in 1860. Western Historical Quarterly 13:245-270.

Jennings, Francis
1975 The Invasion of America: The Cant of Conquest. New York: Northrop.

Johnson, Richard R.
1977 The search for a usable Indian: An aspect of the defense of colonial New England. The Journal of American History 64(3):623-51.

Jones, Dorothy V.
1982 License for Empire: Colonialism by Treaty in Early America. Chicago: Chicago University Press.

Jordan, Winthop D.
1968 White Over Black: American Attitudes Toward the Negro, 1550-1912. Chapel Hill, N.C.: University of North Carolina Press.

Jorgensen, Joseph
1972 The Sun Dance Religion: Power for the Powerless. Chicago: University of Chicago.

Kairys, David, ed.
1982 The Politics of Law: A Progressive Critique. New York: Pantheon Books.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Kaplan, Michael J.
1985 "Issues in Land Claims: Aboriginal Title." In Irredeemable America: The Indians' Estate and Land Claims, ed. Imre Sutton. Albuquerque: University of New Mexico Press.

Kawashima, Yasuhide
1979 Legal origins of the Indian reservation in colonial Massachusetts. In Race Relations in British North America, 1607-1783, ed. Bruce A. Glasrud and Alan M. Smith. Chicago: Nelson Hall.

1986 Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763. Middletown, Conn.: Wesleyan University Press.

Kellog, Louise Phelps
1971 The American Colonial Charter. New York: Da Capo Press. [1904]

Kelly, Lawrence C.
1983 The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform. Albuquerque: University of New Mexico Press.

Kettner, James H.
1978 The Development of American Citizenship, 1608-1870. Chapel Hill, N.C.: University of North Carolina Press.

Keyes, Charles
1981 The dialectics of ethnic change. In Ethnic Change, ed.vCharles Keyes. Seattle: University of Washington.

Koehler, Lyle
1979 Red-White power relations and justice in the courts of seventeenth century New England. American Indian Culture and Research Journal 3(4):1-32.

Kopper, Clayton
1977 From the new deal to termination: Liberalism and Indian policy, 1933-53. Pacific Historical Review 46:543-66.

Kunitz, Stephen J.
1971 The social philosphy of John Collier. Ethnohistory 18(3):213-229.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Lauber, Almon Wheeler
1913 Indian Slavery in Colonial Times Within the Present Limits of the United States. New York: Longmans, Green & Co.

Leacock, Eleanor Burke and Nancy O. Lurie, eds.
1971 North American Indians in Historical Perspective. New York: Random House.

Levitas, Gloria
1980 No boundary is a boundary: Conflict and change in a New England community. Ph.D. Diss. Rutgers, the State University of New Jersey.

Lindley, M.F.
1926 The Acquisition and Government of Backward Territory in International Law. New York: Longmans, Green & Co., Ltd.

Llewellyn, K.N. and Adamson E. Hoebel
1941 The Cheyenne Way. Norman: University of Oklahoma Press.

Lockhart, William B. and Gale Kamisar and Jesse H. Choper
1970 The American Constitution: Cases and Materials. St. Paul, Minn.: West Publishing Co.

Lurie, Nancy Oestrich
1972 Menominee termination: From reservation to colony. Human Organization 31:257-69.

Marcus, George E. and Michael M.J. Fischer
1986 Anthropology as Cultural Critique: An Experimental Momemt in the Human Sciences. Chicago: University of Chicago Press.

Marten, Catherine
1970 The Wampanoags in the seventeenth century: An ethnohistorical study. Occasional Papers in Old Colony Studies, 2:3-40.

Martin, Calvin, Editor
1978 Keepers of the Game: Indian-Animal Relationships and the Fur Trade. Berkeley and Los Angeles: University of California Press.

1987 The American Indian and the Problem of History. New York: Oxford University Press.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Maxwell, Cecile
See U.S. Congress. Senate. Select Committee on Indian Affairs. 1988.

Mazer, Rona S.
1980 Town and tribe in conflict: A study of local-level politics in Mashpee, Massachusetts. Ph.D. Diss. Columbia University.

Mcloughlin, William G.
1984 The rise of Cherokee nationalism and anti-mission sentiment, 1824-1829. In Cherokees and Missionaries, 1789-1839. New Haven, Conn.: Yale University Press.

Mead, Margaret
1932 The Changing Culture of an Indian Tribe. New York: Columbia University Press.

Melody, Michael E.
1980 Assimilatin policy revisited: The Bureau of Indian affairs and the recognition of Indian tribes. Policy Perspectives 2(3):359-75.

Metcalf, P. Richard
1974 Who should rule at Home? Native American politics and Indian-white relations. Journal of American History 61:651-65.

Miller, Perry
1964 Errand into the Wilderness. New York: Harper & Row.

Morgan, Lewis Henry
1962 League of the Ho-de-so-no-sau-nee or Iroquois. New York: Citadel Press.

Moynihan, Ruth Barnes
1977 The patent and the Indians: The problem of jurisdiction in seventeenth century New England. American Indian Culture and Research Journal 2(1):8-18.

Nash, Gary B.
1982 Red, White and Black: The Peoples of Early America. Englewood Cliffs, N.J.: Prentice-Hall.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

National Congress of American Indians
1978 The National Congress of American Indians Congress of American Indians Declaration of Principles on Tribal Recognition by the U.S. Government. (Unpublished handout distributed at the National Conference on Indian Recognition, March 28-30, 1978 at Nashville, Tennessee.) Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

1978b NCAI Suggested Revisions, Department of the Interior Bureau of Indian Affairs (25 CFR part 54). (unpublished handout distributed at the National Conference on Indian Recognition, March 28-30, 1978 at Nashville, Tennessee.) Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

Newton, Nell Jessup
1980 At the whim of the sovereign: Aboriginal title reconsidered. Hastings Law Journal 3:1215-85.

Ordon, Kimberly Ordon
1988 Aboriginal title: The trials of aboriginal Indian title and rights--an overview of recent case law. American Indian Law Review (1):59-79.

Otis, Delos Sacket
1973 The Dawes Act and the Allotment of Indian Lands. Norman: University of Oklahoma Press.

Padover, Saul
1983 The Living U.S. Constitution. New York: New American Library.

Pease, Richard L.
1871 Report of the Commission appointed to Complete the Examination and Determination of All Questions of Title to Land, and of All Boundary Lines Between the Individual Owners at Gay Head, on the Island of Martha's Vineyard. Boston: Wright and Potter.

Peckam, Howard and Charles Gibson
1969 Attitudes of the Colonial Powers Toward the American Indian. Salt Lake City, Utah: University of Utah Press.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Perdue, Theda
1979 Slavery and the Evolution of Cherokee Society. Knoxville: University of Tennessee Press.

Prucha, Frances Paul, Editor
1990 Documents of United States Indian Policy, Lincoln: University of Nebraska Press.

Radin, Paul
1972 The Trickster. New York: Schocken Books.

Rheinstein, Max.
1967 See Weber, Max.

Ritchie, William A.
1969 The Archaeology of Martha's Vineyard: A framework for the Prehistory of Southern New England; A Study in Coastal Ecology and Adaptation. Garden City, New York: Natural History Press.

Robinson, Walter Stitt, Jr.
1953 The legal status of the Indian in colonial Virginia. Virginia Magazine of History and Biography, 61:249-57.

Roessel, Faith R.
See U.S. Congress, Senate 1988.

Rosenthal, Harvey D.
1985 Indian claims and the American conscience: A brief history of the Indian Claims Commission. In Irredeemable America: The Indians' Estate and Land Claims, ed. Imre Sutton. Albuquerque: University of New Mexico Press.

Salisbury, Neal H.
1974 Red Puritans: The "praying Indians" of Massachusetts Bay and John Eliot. William and Mary Quarterly, 3rd ser. 31:27-54.

Sainsbury, John A.
1975 Indian labor in early Rhode Island. New England Quarterly 48:378-393.

Shapard, Bud
See U.S. Congress. House of Representatives. House Committee on Interior and Insular Affairs. 1992.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Sherman, Bob
1980 Indians in the 70's: A decade review. American Indian Journal 6(1):3-9.

Sider, Gerald M.
1976 Lumbee Indian cultural nationalism and ethnogenesis. Dialectical Anthropology 1:161-72.

Simmons, William S.
1979 Conversion from Indian to Puritan. The New England Quarterly 52:197-218.

1986 Spirit of the New England Tribes: Indian History and Folklore, 1620-1984. Hanover, N.H.: University of New Hampshire.

Smith, Page
1980 The Constitution: A Documentary and Narrative History. New York: Morrow Quill Paperbacks.

Snow, Dean R.
1981 Approaches to cultural adaptation in the northeast." In Foundations of Northeast Archeology, ed. Dean R. Snow. New York: Academic Press: New York.

Speck, Frank G.
1915 The family hunting band as basis of Algonkian social organization. American Anthropologist 17:1143-51.

1928 Territorial Subdivisions and Boundaries of the Wampanoag, Massachusetts and Nauset Indians. Monograph No. 44. New York: Museum of the American Indian Heye Foundation.

Szasz, Margaret
1974 Education and the American Indian: The Road to Self-Determination, 1928-1973. Albuquerque: University of New Mexico Press.

Takaki, Ronald
1979 The metaphysics of civilization: The red race on our borders. in Iron Cages: Race and culture in 19th Century America. Seattle: University of Washington Press.

Talpalar, Morris
1976 The Sociology of the Bay Colony. New York: Philosophical Library, Inc.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Tantaquidgeon, Gladys
1930 Notes on the Gay Head Indians of Massachusetts. Indian Notes, 7:1-26. New York: Museum of the American Indian Heye Foundation.

Taylor, Graham
1975 Anthropologists, Reformers and the Indian New Deal. Prologue: The Journal of the National Archives 7:151-62.

Thomas, G.E.
1975 Puritans, Indians, and the Concept of Race. New England Quarterly 48:3-27.

Town of Gay Head, Massachusetts
1899-1982 Annual Reports of the selectmen and other town officers of the Town of Gay Head. Martha's Vineyard.

Travers, Milton
1961 The Wampanoag Indian Federation of the Algonquin Nation. Boston: Christopher Publishing House.

Trelease, Allen
1960 Indian Affairs in Colonial New York: The Seventeenth Century. Ithaca, N.Y.: Cornell University Press.

1969 Dutch treatment of the American Indian, with particular reference to New Netherland. In Attitudes of the Colonial Powers Toward the American Indian, eds. Howard Peckam and Charles Gibson. Salt Lake City, Utah: University of Utah Press.

Trennert, Jr. Robert A.
1975 Alternative to Extinction: Federal Indian Policy and the Beginnings of the Reservation System, 1846-51. Philadelphia, Pa.: Temple University Press.

Trimble, Albert W.
1978 Letter to Leslie N. Gay, Chief, Branch of Tribal Relations, November 1, 1978 from Albert W. Trimble, Acting Executive Director, National Congress of American Indians. Branch of Acknowledgment and Research files, Bureau of Indian Affairs, Washington D.C.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Trosper, Ronald L.
1981 American Indian nationalism and frontier expansion. In Ethnic Change, ed. Charles F. Keyes. Seattle: University of Washington Press.

Trubek, David M.
1984 Where the action is: Critical Legal Studies and empiricism. Stanford Law Review 36:575-622.

Tushnet, Mark
1981 The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest. Princeton, N.J.: Princeton University Press.

Unger, Roberto Mangabeira
1986 The Critical Legal Studies Movement. Cambridge, Mass.: Harvard University Press.

United States Commission on Civil Rights
1981 Indian Tribes: A Continuing Quest for Survival. Washington D.C.: United States Commission on Civil Rights.

United States Congress. House of Representatives. Committee on Interior and Insular Affairs
1992 Hearing on H.R.3430 to Establish Administrative Procedures to Extend Federal Recognition to Certain Indian Groups. 102nd Congress, 2nd Session. 15 September.

United States Congress. House of Representatives. Committee on Indian Affairs
1830 Laws of the Colonial and State Governments Relating to the Indian Inhabitants. 21st Congress, 1st Session.

United States Congress. Senate. Select Committee on Indian Affairs
1988 Oversight Hearing on Federal Acknowledgment Process. 100th Congress, 2nd Session. 26 May.

1989 Hearing on S.611 to Etablish Aministrative Procedures to Determine the Status of Certain Indian Groups. 101st Congress, 1st Session. 28 April.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

United States Department of the Interior. Bureau of Indian Affairs, Branch of Acknowledgment and Research (BAR)

1978 Guidelines for Preparing a Petition for Federal Acknowledgment as an Indian Tribe.

1987 Summary Under the Criteria and Evidence for Final Determination of the Wampanoag Tribal Council of Gay Head, Inc. April 11.

Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe. May 6.

1989 Summary Under the Criteria and Evidence for Proposed Finding against Federal Acknowledgment of the Mohegan Tribe of Indians of the State of Connecticut. October 30.

Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the San Juan Southern Paiute Tribe. December 20.

1992 Summary Under the Criteria and Evidence for Final Determination against Federal Acknowledgment of the Miami Nation of Indiana of State of Indiana, Inc. June 9.

Vecsey, Christopher and William A. Starna, editors

1988 Iroquois Land Claims. Syracuse: Syracuse University Press.

Venables, Robert W.

1980 Victim versus victim: The irony of the New York Indians' removal to Wisconsin." In American Indian Environments, ed. Christopher Vecsey and Robert W. Venables. Syracuse: Syracuse University Press.

Vollman, Tim

1979 A survey of eastern Indian land claims: 1970-1979. Maine Law Review 31:5-16.

Wallace, Harry B.

1982 Indian sovereignty and eastern Indian land claims. New York Law School Law Review 27(3):921-50.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Washburn, Wilcomb E.
1971 Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian. New York: Charles Scribner's Sons.

1985 Land claims in the mainstream of Indian/White land history. In Irredeemable America: The Indians' Estate and Land Claims, ed. Imre Sutton. Albuquerque: University of New Mexico Press.

Weatherhead, L.R.
1980 What is an "Indian tribe"?--The question of tribal existence. American Indian Law Review 8:1-47.

Weber, Max
1967 Max Weber on Law in Economy and Society. (Edited and with Introduction and annotations by Max Rheinstein.) New York: Simon and Schuster.

White, Richard
1983 The Roots of Dependency. Lincoln: University of Nebraska Press.

Wilkinson, Charles F.
1987 American Indians, Time, and the Law. New Haven, Conn.: Yale University Press.

Wolf, Eric
1957 Closed corporate peasant communities in Mesoamerica and Central Java. Southwestern Journal of Anthropology 13:1-18.

Woodson, Carter G.
1920 The relations of Negroes and Indians in Massachusetts. Journal of Negro History 4:44-58.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.