



## Mashpee Wampanoag Tribe

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RE: Draft Proposal to Reform Federal Acknowledgment Process  
Comments of Mashpee Wampanoag Tribe – Tribal Consultation 1076-AF18

The Mashpee Wampanoag Tribe commends the United States Department of the Interior for undertaking the very important task of reforming the process by which the Department acknowledges the existence of Indian Tribes.

For many years, the Federal Acknowledgment process has functioned mainly as an additional impediment to Indian tribes who have faced official neglect for centuries, and must surpass still another challenge to end that neglect. The Mashpee Wampanoag Tribe spent three decades in the process, met all of the challenges, and strongly believes that the Interior Department must improve its process. The Department should not subject other worthy tribes to decades of effort to fulfill repetitious, expensive and marginally relevant requirements of data gathering nor to a process that, in reality, improperly requires proof beyond a reasonable doubt.

The comments below reflect the experience of a tribe that spent nearly thirty years compiling data that covered nearly four centuries of survival, only to have the guidelines change, the ending move, and suffering the loss of two generations of elders who passed without seeing success in protecting what remained of their homeland. Mashpee's history is one that, ultimately, survived the most stringent application of the regulatory criteria. But even Mashpee could attain a final determination only through bringing a lawsuit to expedite a broken process. The recognition process must be reformed in a way that the burden does not turn into a war of attrition in which the government and the tribe are adversaries, rather than partners in seeking truth.

Proposal to eliminate requirement of demonstrating continuous existence since first sustained non-Indian contact.

The Mashpee Wampanoag Tribe supports the proposal to cease requiring a petitioner to prove continuous existence from the point of “first sustained contact with non-Indians.”. This very significant change is particularly important for tribes, like Mashpee, whose contact with non-Indians began before 1600, and continued devastation for years after. Early contact with Europeans brought disease that wiped out two thirds of the Wampanoag Nation before the first European colony was established. Early records could only document what remained, and only incompletely. For centuries thereafter, Wampanoag communities had to withstand constant pressures of relocation, war and disease. The records of early colonial periods are available, in part, only through expensive archival search in Europe. Surely it is unnecessary to impose such a burden to show the Tribe’s governmental existence more nearly two centuries before the United States existed. The burden of the existing standard falls unequally on tribes subject to early colonization, who are forced to document centuries more history than petitioners who were only contacted much later. The Mashpee Wampanoag Tribe supports a reformed process that moves the initial identification of a tribal community (the “Start Date”) to the 20<sup>th</sup> Century.

The Mashpee Wampanoag Tribe is concerned that the outside pressures on some tribes at the time of the Start Date might impair their ability to demonstrate tribal existence as of that time. These comments, therefore urge that such tribes have the option of submitting evidence from a prior period reaching back, as necessary, to periods before those required to fulfill the criteria, to provide the context of a tribe’s existence and the argument that its identity carried forward at least through the Start Date.

Tribal existence, as of the Start Date for petition documentation, must be determined in the first instance, by the petitioner’s own contemporaneous records of community and political organization. But a petitioner may provide additional context, including historical documents relevant to explaining the tribe’s location and identity leading up to the Start Date, and specifically including, but not limited to, the outside identifications provided by other tribes in the area, state and local governments, as well as historians and ethnologists, government reports and treatises grounded in familiarity with the petitioner and its tribal territory at that time – or within 20 years of the Start Date. Identification by local tribes, as of the Start Date, is more likely to reflect existing Indian communities than outside, occasional observers with less insight into local cultures and traditions.

Many petitioning groups have lived together for centuries as an unquestioned Indian community, but their ancestors may have come together after periods of war, dispossession or disease without internal written records, and with outside identification only as surviving Indians, but without specific tribal labels. Such identifiable Indian communities, long established before the turn of the twentieth century, should be acknowledged as equally valid as the “half-blood Indian communities” deemed eligible, in 1934, to organize under the IRA. The

DOI should adopt a unified approach that evaluates an existing Indian community as of the Start Date, without adverse consequences for changed or lost community names and homelands.

#### Splinter Groups/consolidation

The Mashpee Wampanoag Tribe agrees with the proposed change that groups that can establish autonomous tribal existence from the Start Date forward be eligible for federal acknowledgment, even though they may have, in the past, been associated with another acknowledged Tribe. In the period before and after non-Indian contact, tribal political existence was often fluid. Outside stresses, including removal and relocation may have caused formerly coherent political units to split and reform over time. Establishing political identity of a previously consolidated community as of the Start Date, and would still eliminate the need to acknowledge multiple tribal entities that may have arisen, through splintering, after that time.

#### Standard of proof

The proposal recites that a criterion is met if:

- (i) A preponderance of the evidence supports the validity of the facts claimed when viewed in the light most favorable to the petitioner; and
- (ii) The facts establish a reasonable likelihood that the criterion is met.

The Tribe applauds the additional requirement that the evidence be viewed in the light most favorable to the petitioner, and agrees that the standard, for each criteria, should be “reasonable likelihood,” but is concerned that the same “reasonable likelihood” standard in the past, has been widely disregarded in the review of documented petitions. Instead, Tribes have been held to a standard closer to proof beyond a reasonable doubt. As in the past, the proposed regulations express the intention that petitions take into account each petitioner’s historic circumstances, but substantial retraining will be necessary for that intention to have effect. In particular, the Department must not utilize prior precedent to undermine the proper evidentiary standard, and should be aware that such precedent lacked the new direction to evaluate evidence in the light most favorable to petitioner. The Department must stand behind the provision that states that “conclusive proof of the facts relating to a criterion shall not be required . . .” § 83.6 (d)(2). Unless the prior practices are explicitly abandoned, then no reform proposal can effect meaningful change.

#### Evidence of outside identification of a tribal community

Non-Indian identification of tribal communities bring specific risks to the process. The Mashpee Wampanoag Tribe’s effort to protect its homeland was seriously harmed when outside standards of Indian community existence determined whether the Tribe had standing to bring a land claim under the Nonintercourse Act. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1979). The Tribe’s standing was defeated by the jury’s application of the provisions of the

*Montoya* test. The jury rejected continued tribal existence based, in large part, on outsiders' determination that the tribe was no longer racially "Indian." Such evaluations are culturally insensitive and unreliable, and have place in the determination of a tribe's place in the federal system. As before, however, such evidence may still be helpful in meeting the remaining criteria. It may be useful as potential additional evidence, and petitioners should be so advised.

In contrast, Mashpee believes that the evidence of intertribal relationships can be particularly strong evidence of petitioner's tribal identity and used towards satisfying the recognition criteria. Mashpee's own experience reflects a reality of strong inter-tribal interaction for many years, often outside the awareness of federal or state agencies. Such interaction can be positive or negative, but can usually provide evidence of the particular understanding that Indian people may have of communities related to their own. As such, many native communities, particularly in the Northeast, have been confident that others would obtain federal recognition long before the United States has reached that conclusion.

Mashpee is, however, aware, that the federal acknowledgement process has itself created animosities among some communities, and believes that the impact of any such pressures should be mitigated by restricting the evidentiary value of intertribal interaction to periods before the adoption of 25 C.F.R. Part 83, as of 1979.

#### Expedited favorable review

The Tribe believes expedited favorable review would be a valuable addition to the process – eliminating interminable queues for petitioners whose record so clearly manifests the injustice of deferring federal acknowledgement. As proposed, the eligibility criteria focus entirely on land, in which trust status – whether federal or state –of a tribe's land base, however small, is determinative. Particularly in the East, where states asserted such governmental status over tribes, and where that state domination was frequently hostile, such continuity of state reservation status should be determinative. Patently, federal holding of land in trust for a tribe is, itself, a governmental relationship with a tribal entity, equivalent to previous federal acknowledgment, if before the Start Date. If after the Start Date, it should require immediate adjustment of the federal failure to clarify and honor its own trust responsibility, by effecting immediate federal acknowledgment.

The Department should consider what other evidence might merit expedited positive review – other commenters will have suggestions.

### Proposed findings – review.

In the event of a negative proposed finding, the petitioner should have an opportunity to seek a review that affords at least minimal due process, including evidentiary review in an impartial forum. That element of due process has been a core failing of the acknowledgment process in the past, with no safeguard for a forum with experience in Indian affairs to evaluate how the rules were applied to the evidence. Existing IBIA review, only after Final Determination, comes too late, and without process adequate to evaluate the evidence. Earlier and more thorough appeal rights could greatly focus the Final Determination to the benefit of all parties.

### Re-petitioning.

Justice requires that those denied acknowledgment based on elements that were changed through this regulatory reformation be given the opportunity of demonstrating that their applications would have been successful under the new regulations. To do otherwise would be validating the very shortcomings the Department is seeking to correct. This very important effort to reform the regulations should not abandon or ignore those tribes seriously damaged by the prior process. To do so would be shameful discrimination and evasion of fiduciary duty. Evaluation of the ability to repetition should be subject, at the petitioner's choice, to the same procedures available for review of a negative proposed finding.

### General comments:

The Mashpee Wampanoag Tribe reaffirms its support for the principles underlying the proposed reform of the recognition process. While the Mashpee petition was, ultimately, successful, its cost in money, time and human suffering was indefensible. At present, even a successful tribe enters onto its new status burdened by debt and repayment obligations, and by the less visible internal stresses created by the years of demeaning scrutiny. This must change.

The previous rules, even as revised and amended, result in continuing misguided, wasteful and ultimately misdirected efforts that frequently fail to “recognize” that a tribe has been too long neglected and ignored. The reform proposal takes significant steps towards ending manifest injustice that has only been compounded by a process that takes excessive time, effort and money to reach a frequently inadequate result. Like other tribes that have survived this process, we have no wish to perpetuate it, and hope our experience can assist to bring about needed change.