

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11885

MARIA A. KITRAS, et al.,
Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

BRIEF FOR AMICUS CURIAE AQUINNAH/GAY HEAD COMMUNITY
ASSOCIATION

IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Aquinnah/Gay Head Community Association is a civic association organized as a not-for-profit corporation under Massachusetts law. Its purpose is to provide support and assistance for educational, environmental and other projects that benefit the community of Aquinnah/Gay Head and, more broadly, the Island of Martha's Vineyard where it is located. Originally created as the Gay Head Taxpayers Association in 1974 to represent the interests of landowners in the town of Gay Head whose title was put in jeopardy by a lawsuit filed in that year in federal court based on Indian land claims (*Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, Civil Action No. 74-5826-MC (D. Mass.)), the Gay Head Taxpayers Association is a signatory to the Settlement Agreement of 1983, which mooted the lawsuit. It changed its name in 2003 to the Aquinnah/Gay Head Community Association to reflect its transformation into a charitable organization that has raised money to help save the Gay Head Lighthouse, to support the Aquinnah Public Library, to provide scholarships to graduating high school seniors from Aquinnah to attend college and similar community betterment efforts.

In 1974 the newly created Wampanoag Tribal Council of Gay Head filed suit against the Town of Gay Head claiming that the allotment of land in Gay Head, and the granting of title in fee simple to the people who were then living in what had been the Indian District of Gay Head, was illegal and that therefore all of the land in the town was by law still held in common for the benefit of the tribe. The Town of Gay Head, whose elected Selectmen at the time were all members of the Tribal Council, chose not to contest the suit. Whereupon the Gay Head Taxpayers Association was created and sought, successfully, to be admitted as a party to the litigation.

After extensive negotiations over a period of nine years, an agreement was reached among the Tribal Council, the Taxpayers Association, the Town of Gay Head and the Commonwealth of Massachusetts--which had also been admitted as a party--to settle the lawsuit on terms satisfactory to all parties. The Settlement Agreement of 1983 was then enacted into federal law by the United States Congress and into state law by the Massachusetts Legislature. A primary purpose of the Settlement Agreement and the ensuing state and federal legislation was to quiet title to land in Gay Head

that had been allotted to the Indians living in Gay Head in 1878.

The decision of the Massachusetts Appeals Court in the instant case threatens to once again burden title to land in the town, which all current landowners hold by inheritance or purchase from those who received fee simple title in 1878 or from their descendants, by finding easements of necessity based on aboriginal claims that have been extinguished by agreement and by law.

As a party to the Settlement Agreement of 1983, the Aquinnah/Gay Head Community Association appears here as a friend of the court to provide a description of the background and history of events that led to that agreement because the terms of the Settlement Agreement, and the implementing federal and state statutes, have a fundamental bearing on the case before the court.

STATEMENT OF THE ISSUES

The single issue addressed by the amicus curiae is whether the current owners of certain landlocked parcels of land in the town of Aquinnah, Massachusetts, can have rights of access over neighboring land as "easements of necessity" based on

"long-standing tribal custom and practice" of the Gay Head Indians who, in 1878, received fee title to the land in place of aboriginal rights of occupancy, in accordance with an 1870 Act of the Massachusetts Legislature. In addition, all Indian land claims in Gay Head, retroactive to the 1878 allotment, were extinguished by an act of Congress in 1987.

STATEMENT OF THE CASE

Gay Head, a town on the island of Martha's Vineyard, was treated by the Commonwealth of Massachusetts as an Indian District until 1869, when the Massachusetts Legislature enacted the Indian Civil Rights Act, making all Indians living in the Commonwealth full and equal citizens. See Acts of 1869, ch. 463. A second statute, enacted the following year, abolished the state's trusteeship over the land in Gay Head and allotted the land, giving fee simple title in individual plots to the Indians living there who had previously had only the right of occupancy under Native American title. The goal was to abolish the discriminatory legal treatment of Native Americans and give them the right to hold land as citizens of the Commonwealth and not under aboriginal rights of occupancy. All title to land in

the Town of Gay Head (now known as Aquinnah) derives from the title bestowed on the Indians living in the Town in 1878--lawful, fee simple title like that held by all other landowners in the state.

Plaintiffs are land developers who claim no Native American ancestry. They purchased certain landlocked parcels of land in the Town of Gay Head, knowing they were landlocked, and they now seek an "easement of necessity" over neighboring properties so they can develop those properties. Since no general easements of access were provided with the titles granted in 1878 (although specific express easements were included in certain titles for particular purposes--the collection of peat and access to fishing), and since the granting of easements is based on the intent of the grantor at the time of the conveyance, plaintiffs have claimed--without providing any evidence in support of the claim--that the Commonwealth intended to give the Indians who received title in the allotment of 1878 the right of access over neighboring properties.

The Land Court found no basis for any such easement and ruled against the plaintiffs. The Massachusetts Appeals Court, in a divided decision,

reversed the Land Court and found support for an easement of necessity based on "longstanding tribal custom and practice", i.e. aboriginal rights. *Kitras v. Town of Aquinnah*, 87 Mass. App. Ct. 10, 11 (2015). The Appeals Court, however, ignores the intent of the Massachusetts Indian Civil Rights Act, which was to abolish discrimination against Native Americans and allow them to own land as all other citizens of the state in fee simple *in lieu* of aboriginal title, thus extinguishing claims based on tribal custom and practice.

Moreover, in legislation enacted by the United States Congress in 1987 the validity of the allotment of 1878, and the extinguishment of all claims based on Indian rights, was confirmed retroactively. Therefore there is no basis for plaintiffs' claim of easements of necessity. The Appeals Court decision should be vacated and the judgment of the Land Court affirmed.

SUMMARY OF ARGUMENT

When the Pilgrims stepped ashore at Plymouth Rock in 1620, they were greeted by Wampanoag Indians, under their chief, Massasoit. Wampanoags and other native peoples had lived in what is now New England for at least hundreds of years before the English arrived,

nowhere more continually than on the island of Martha's Vineyard. Relations between the European settlers and the native peoples were never easy, and the Indians generally fared badly, sometimes due to circumstances but often because of deliberate mistreatment by the settlers.

By the time of the American Revolution it was generally thought that the authority of the native tribes in the 13 original states had vanished, although there remained pockets of people of Indian descent throughout the territory of the new American states, and in particular in the area of the Gay Head cliffs in the remote western end of Martha's Vineyard.

Although the Indians were often taken advantage of, from time to time attempts were made to improve their lot. One such attempt was made by the Commonwealth of Massachusetts when it enacted the Indian Civil Rights Act of 1869. After the Civil War and the adoption of the Fourteenth Amendment to the United States Constitution, which provided full civil rights to former slaves and other persons of African ancestry, Massachusetts took action to equalize the status of the Indians living in the state, giving them full citizenship and the same rights as all other

citizens of the Commonwealth. Those rights included the franchise and the ability to own land in fee. The Gay Head Indian District, which had been ruled by an appointee of the Massachusetts Governor, was incorporated as the Town of Gay Head in 1870, and the people who lived there were given title in fee to lots in the town. The intent of the Legislature was clear--to abolish the inferior legal status of the Indians and treat them like all others in the Commonwealth. pp. 9-18.

Now, almost 150 years later, the Massachusetts Appeals Court has issued a divided decision that would turn the effort of the Massachusetts Legislature on its head, misinterpreting the action and intent of the 1869 law, and the allotment that followed, so as to benefit not the Indians for whom the law was enacted but developers who seek, for their own profit, to burden the title given to those Indians--and those who now own the land by virtue of inheritance or purchase--with unspecified, unintended and ephemeral easements. pp. 18-29.

ARGUMENT

Prior to 1869 the Native Americans of Massachusetts, as elsewhere in the United States, were not citizens

and did not have the right to vote. Nor were they able to own land in fee as individuals, although they did have rights of occupancy to certain lands based on treaties with the federal government and, in some instances, on custom and practice. They were treated as members of foreign nations, called tribes, for whom certain lands were set aside--reserved--for their use and governed under tribal law and tribal authority. Fee title to the reservation lands was held, and is still held, by the federal government in trust for the Indians who live on them. State laws cannot be enforced on reservations except by agreement with the tribes or by specific federal legislation.

A. The Laws Governing Indian Land

1. The Constitution and Laws of the United States Give the Federal Government Exclusive Authority to Deal with Indian Tribes

Article I, § 8 of the United States Constitution says that Congress shall have power "to regulate commerce with foreign nations, and among the several states, *and with the Indian tribes.*" (Italics added.) In 1790 Congress enacted the Indian Nonintercourse Act, which says that "[n]o purchase, grant, lease or other conveyance of lands . . . from any Indian nation

or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

1 Stat. 137, 25 U.S.C. § 177 (1790). No transfer of land from an Indian *tribe or nation* is effective, therefore, unless done by treaty with the federal government.

2. The Laws of Massachusetts Gave Indians Living in the Commonwealth Full Citizenship and the Right to Own Land in Fee; the Land in Gay Head Was Allotted and Given in Fee to Indians Living There

In 1869 the Massachusetts Legislature enacted "An Act to Enfranchise the Indians of the Commonwealth", Acts of 1869, ch. 463, sometimes called the Indian Civil Rights Act, which granted full citizenship to Indians living in the state, with the right to vote in state and local elections and to own land in fee as individuals.¹ In 1870 the Legislature passed a second law, Acts of 1870, ch. 213, in furtherance of the goals of the 1869 law, which terminated the trusteeship the State had established over the Indian

¹ Massachusetts was a leader in providing equal rights for Indians. Congress did not get around to making Indians citizens of the United States until 1924 with the passage of the Indian Citizenship Act. 43 Stat. 253, ch. 233, 8 U.S.C. § 1401 (1924).

District of Gay Head, now to become the Town of Gay Head, and authorized--subject to the conduct of a survey--the division of the property of the town into lots, with fee simple title given to the persons who were then living on the land, most of whom were of Indian ancestry.²

Neither Massachusetts nor the federal government considered at the time that the provisions of the commerce clause of the United States Constitution, and of the Nonintercourse Act of 1790 giving the federal government exclusive authority over the disposition of tribal lands, was applicable to this land conveyance because the fee title to the land was held by the Commonwealth of Massachusetts and not by the federal government. As the court found in *James v. Watt*, 716 F.2d 71 (1st Cir. 1983), cert. den., 467 U.S. 1209 (1984), the Nonintercourse Act was passed by Congress in 1790 to deal with Indian land disputes on the new nation's *frontier*--that is, west of the Appalachian mountains--and not with Indian groups in the original

² A complete list of all persons living in Gay Head in 1870, the basis of the allotment, including their racial classification and ancestry, can be found on the website of the amicus Aquinnah/Gay Head Community Association, along with other documents cited in this brief. <http://www.aghca.org>.

13 states. The federal government did not hold fee title to any Indian lands in the original states.³

The Indians living in the trusteeship Massachusetts had established over the approximately 2,400 acres of land that was the Indian District of Gay Head had only the right of occupancy--so-called Native American title--until 1878, when, pursuant to the Act of 1870, the state approved the allotment survey it had authorized and gave fee title in the land to those persons then living on it, with the right to use and devise the property to the same extent and with the same limitations as all other citizens of the state. Massachusetts clearly intended, by the Act of 1869, to end the separate and unequal treatment of its Native American population, so that henceforth the people of Gay Head would be full and equal citizens.

³ For a full discussion of the intent and purpose of the Indian Nonintercourse Act see *Mashpee Tribe v. James G. Watt*, 542 F.Supp 797, 802-806 (D. Mass. 1982), where the United States District Court for the District of Massachusetts ruled that the Mashpee Wampanoag Tribe, a sister organization to the Wampanoag Tribe of Gay Head, was not a "tribe" or "nation" for purposes of federal trust responsibilities over its land.

3. The Authority of Massachusetts to Allot Indian Land in Gay Head and Convey Fee Title Was Challenged in a Lawsuit Filed in 1974

Almost a century after the division of the Indian District of Gay Head into individual lots, and the granting of fee simple title in those lots to the Indians living there, the authority of the state to eliminate its trusteeship and convey the land was challenged in a lawsuit filed in federal court in 1974 by the Wampanoag Tribal Council, an entity incorporated under state law in 1972. *Wampanoag Tribe of Gay Head, v. Town of Gay Head*, Civil Action No. 74-5826-MC (D. Mass.). The claim made in the suit was that both the commerce clause of the United States Constitution and the federal Indian Nonintercourse Act of 1790 made the federal government, and not the state, the exclusive lawful authority for the conveyance of Indian lands, notwithstanding the fact that the federal government had never recognized or entered into a treaty with the Wampanoag tribe and that Massachusetts, not the federal government, held fee title to the land in the Indian District of Gay

Head.⁴ Therefore, claimed the Tribal Council, the allotment of land in Gay Head by the Massachusetts Legislature, in accordance with the Act of 1870, was void; the land was still held in common for the members of the tribe who had a right of occupancy under Native American title, meaning that the original fee titles, and all transfers of rights pursuant to those titles from 1878 to the present, were unlawful.

The filing of the suit, of course, clouded the title to all property in the town of Gay Head, whether held by the descendants of those who received fee title in 1878 or those who had purchased their property from those descendants. The Gay Head Taxpayers Association, the predecessor to the amicus Aquinnah Gay Head Community Association, was formed in 1974 to represent the interests of the town's non-Indian property owners in the dispute.

⁴ Similar claims were made on behalf of other Eastern tribes—i.e. those whose land base was in one of the original 13 states of the union. See, e.g., *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), *Mohegan Tribe v. Connecticut*, 638 F.2d. 612 (2d Cir. 1980), cert. den. 452 U.S. 968 (1981).

4. The Conflict Between Massachusetts and Federal Law Was Resolved by Agreement that, *inter alia*, Extinguished Aboriginal Claims. That Agreement Was Enacted Into Federal and State Law

Whatever the merits of the lawsuit filed by the Wampanoag Tribal Council, the matter never went to trial. It was settled by agreement of the parties in 1983.⁵ All four parties to the litigation--the Tribal Council, the Taxpayers Association, the Town of Gay Head and the Commonwealth of Massachusetts--agreed that the Town's ownership of the town common lands, except for the beaches, would be transferred to the Tribal Council, along with title to designated vacant buildable property in the Town that belonged to a bankrupt estate, in return for which all claims to the remainder of the land in the town would be dropped.

The parties agreed that they would jointly seek Congressional legislation that provides federal recognition to the tribe and that "eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, whether aboriginal or under recognized title involving lands and waters in the Town of Gay Head, and that effectively clears the

⁵ A copy of the Settlement Agreement of 1983 is included in the Addendum.

title to all land in Gay Head of any such claims, whether asserted in the past, present or future." Federal legislation was considered necessary because in 1974 the United States Supreme Court had ruled that the termination of Indian occupancy rights "was exclusively the province of federal law," even as to Indian tribes in the 13 original states.⁶ And Congress did enact such a law, the Massachusetts Indian Land Claim Settlement Act of 1987.⁷ In the findings clause of the Act, Congress declared that "the pendency of this lawsuit [*Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*] has resulted in severe economic hardships for the residents of the town of Gay Head by clouding the titles to much of the land in the town, including land not involved in the lawsuit" . . . and . . . "the Congress shares with the Commonwealth of Massachusetts and the parties to the

⁶ *Oneida Indian Nation of N.Y. State v. Oneida County, New York*, 414 U.S. 661, 670 (1974).

⁷ 25 U.S.C. § 1771. Section 1771(b) reads: "Any aboriginal title held by the Wampanoag Tribal Council of Gay Head, Inc., or any other entity presently or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) of this section is considered extinguished as of the date of such transfer."

lawsuit a desire to remove all clouds on titles resulting from such Indian land claim."⁸

5. The Validity of the Settlement Agreement Has Been Upheld

The validity of the Settlement Agreement, and particularly the language extinguishing Indian claims of any kind—including the right of occupancy under Native American Title—to all lands in Gay Head (not just the Settlement Lands) has been attacked twice in lawsuits and both times has been upheld. In *Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corporation*, 443 Mass 1 (2004), the Massachusetts Supreme Judicial Court upheld as valid the agreement of the Tribal Council to hold the land it received through the settlement "*in the same manner, and subject to the same laws, as any other Massachusetts corporation.*" 443 Mass. at 3 (italics in original).⁹ More recently the

⁸ Massachusetts also enacted an implementing law, St. 1985, c. 277 ("An Act to Implement the Settlement of Gay Head Indian Land Claims"), with a substantially similar findings clause.

⁹The court noted that "[t]here is absolutely nothing to suggest that the Tribe was 'hoodwinked' or that its negotiators were 'unsophisticated' or did not know what they were doing. From all that appears in the record, the parties, represented by able counsel, engaged in protracted and difficult negotiations which produced the settlement agreement bespeaking, in

applicability of state and town gambling restrictions on the lands transferred to the tribe by the Settlement Agreement has been challenged in an effort by the Tribal Council to build a casino in Gay Head. *Commonwealth of Massachusetts et al v. The Wampanoag Tribe of Gay Head (Aquinnah) et al*, Civil Action No. 13-13286-FDS (D. Mass.). Although the final decision of the court is still pending, the court has already ruled that the Settlement Agreement itself is valid and enforceable, according full faith and credit to the decision of the Massachusetts Supreme Judicial Court in the *Shellfish Hatchery* case.¹⁰

6. There Can Be No Doubt that Any and All Claims to Property Rights in Gay Head Based on Indian Custom and Practice Have Been Extinguished

Twice, then, well-intentioned governments have sought to provide a measure of justice to Indians by bestowing fee title to land in Gay Head to the Indians who lived there in 1878 and to their heirs and assigns. First, the Massachusetts Legislature in 1869

unambiguous terms, the parties' complete understanding." 443 Mass. at 13.

¹⁰ Memorandum and Order of the Court on Motions to Dismiss, February 27, 2015. The remaining issue in the case is whether the federal law implementing the Settlement Agreement was superseded with respect to gaming by a later Congressional statute regulating gambling on Indian reservations.

enacted the Indian Civil Rights Act designed to give Indians 'full rights as citizens of the Commonwealth, including the right to own land. To implement this equal rights promise, Indians living in Gay Head were given fee title to the lands on which they were then living, to hold in the same manner as all other citizens. Second, when the legal authority of Massachusetts to devise title to Indian lands without federal approval was challenged in 1974, all interested parties including the Tribal Council executed the Settlement Agreement. The Settlement Agreement, *inter alia*, eliminated any and all Indian claims--whether under ordinary property laws or Native American title--to property in Gay Head in order to effectively clear all title of any cloud or impediment to sale.¹¹ That agreement was approved by Congress through legislation. The goal in both cases was to provide property rights--valid, quiet, defined and specific fee titles--to the Indians of Gay Head and their heirs and assigns.

¹¹ The same clause in the Settlement Agreement, Section 8(d), also extinguishes "all claims of any kind by the alleged Gay Head Tribe, whether possessory, monetary or otherwise, whether aboriginal or under recognized title" in any *other* land or water in the Commonwealth; that is, land owned by the tribe that is not located in Gay Head.

In the instant suit the plaintiffs, Kitras et al, are claiming that hitherto unknown and unclaimed rights of easement over certain properties (precisely which properties has yet to be determined) must exist because the Massachusetts Legislature in 1870 could not have intended to transfer to the Gay Head Indians properties which did not have access to a public road. They are not seeking these easements as Native Americans who have somehow been cheated during the process that led to the allotment of land title in Gay Head but rather as developers who purchased lots in Gay Head they knew to be landlocked, and they now argue that they are entitled to access over neighboring land based on Indian tribal custom and practice. By ruling in their favor, the Appeals Court has upset and interfered with carefully worked out laws and agreements intended to provide quiet title to property in the town.

B. The Claims of the Plaintiffs/Appellants and the Ruling of the Court Below Have No Basis

Despite the unambiguous actions by both Massachusetts and the federal government to give clear and unencumbered title to property in Gay Head, whether held by persons of Indian descent or others,

the majority of the Appeals Court in this case has decided that there must exist some undefined and hitherto unknown easements benefitting or burdening the fee titles granted in 1878. Invoking easements of necessity that would not be recognized for any other landlocked property held by citizens of Massachusetts,¹² the Court has determined that the Massachusetts Legislature in 1870 could not have intended to give the Indians title to lots that were landlocked, even though plaintiffs did not present any evidence to support that assumption and even though other explicit easements were provided as part of the allotment process.

1. Easements of Necessity Cannot Be Based on Indian Rights that Have Been Abolished

The court's reasoning is faulty. It is based on assuming a "chain of conveyances from the Gay Head Tribe members to the present plaintiffs . . . [that includes] . . . long-held access rights flowing from the longstanding tribal custom and practice . . ." 87 Mass. App. Ct. at 11. That chain, however, has been broken, if it ever existed. The Court's opinion

¹²Amicus agrees with and endorses the persuasive arguments made on this score by the defendants/appellees and will not repeat them here.

ignores the fact that the precise purpose of the Massachusetts Legislature in enacting the 1870 statute implementing the Indian Civil Rights Act of 1869 was to *replace* aboriginal rights of occupancy with grants of fee simple title to land that Indians living in Gay Head would then own as full citizens of the Commonwealth and hold in the same manner as all other citizens. And, after a challenge in 1974 to the authority of the Commonwealth to have made such conveyances on the ground that terminating Indian land claims was exclusively the right of the federal government, the *federal government* then extinguished those rights, retroactive to the date the conveyances were made, through Congressional legislation implementing the 1983 Settlement Agreement. As this court found in the *Shellfish Hatchery* case cited above, the Tribal Council knowingly and for good

consideration¹³ agreed to the extinguishing of all claims based on aboriginal rights. The plaintiffs' claims in this case cannot be based on "longstanding tribal custom and practice" because such rights have been extinguished by agreement and by law.

¹³Among other benefits gained by the Tribal Council from the Settlement Agreement and the implementing legislation was recognition as a tribe by the federal government, a primary goal of the lawsuit, which made the Gay Head Wampanoag Tribe eligible for substantial federal funds that support recognized tribes. This was significant because the United States Department of the Interior initially opposed the enactment of the federal law implementing the Settlement Agreement on the basis that the Gay Head Wampanoag Tribe did not meet the criteria established by the federal government for recognized tribes. A group of experts charged by the Secretary of the Interior to review the Tribal Council's application for recognition submitted an exhaustive 121 page report entitled "Evidence for Proposed Finding against Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc." which the Department cited in its opposition to the Senate bill to approve the Settlement Agreement. See letter from the Assistant Secretary of the Department of the Interior, dated February 5, 1986, to the Chairman of the Select Committee on Indian Affairs of the United States Senate included in the Addendum. And, as noted above, a similar bid by the Mashpee Wampanoag Tribe for federal recognition was rejected. See *James v. Watt, supra*. Despite the recommendation of the Interior Department, however, the Congress enacted, and the President signed into law, the implementing legislation that approved, in retrospect, the allotment of lands in Gay Head in 1878, the recognition of the Wampanoag Tribe of Gay Head and the extinguishment of all Indian claims on the land, whether under ordinary property law or Native American Title.

2. Easements of Necessity Cannot Be Found Based on Conditions that Did Not Exist at the Time of the Conveyance

According to the majority of the Massachusetts Appeals Court, access to the property deeded in 1878 was intended by the Massachusetts Legislature because otherwise the Indians would have received title to land of little or no value. A look at the map of Gay Head at the time of the allotment, however, shows that almost all of the lots lacked access to public roads because in 1880 there was only one public road in Gay Head and most of the newly created lots did not abut it. Other roads have been built in the town since then, although many lots are still landlocked, but as the existence of an easement over land depends on the intent of the grantor *at the time of conveyance* there is no reason to think that the legislators were concerned about easements to public roads in 1878. Had public access easements been intended they would have been specified in the deeds, as were easements over certain lots for access to peat deposits and fishing. Fee title to the land was given at the value the land had at the time. It is only now, in recent years, that access to public roads adds value to the

property because of the growth of tourism on the island of Martha's Vineyard.

3. The Restatement of Property Law, Cited by the Appeals Court, Is Misapplied by the Court to this Situation. Moreover, Since the Preference for Access Would Not Apply to Any Other Landlocked Properties in Massachusetts, It Cannot Be Applied in the Instant Case Based on Extinguished Aboriginal Rights

The Appeals Court's heavy reliance on what it wrongly characterizes as "the presumptions of a legal right of access under Restatement Section 2.15 of the Restatement of Property" is misplaced. 87 Mass. App. Ct. at 17. First of all, Section 2.15, "Servitudes Created by Necessity," says nothing about "right of access." It simply says that a conveyance of property implies the rights necessary "to reasonable enjoyment of the land . . ." *Id.* Restatement (Third) of Property (Servitudes) §2.15 (2000). (Italics added.) The Court, not the Restatement, is assuming that the right of access to a public road is necessary to that reasonable enjoyment. But it is quite a stretch to impute such an assumption to the Massachusetts Legislature in 1870, when Gay Head was a small farming and fishing community on a remote part of an island and automobiles had not yet been invented. It is even

more of a leap to attribute that need of access to a chain of title based on "long-standing tribal custom and practice" without any evidence that enjoyment of the land, under tribal custom, required access to a public way. And, as shown above, any property rights based on aboriginal claims have been abolished in any event. We also agree with the argument made by the defendants/appellees that, regardless of the Restatement of Property law, there is no presumption under Massachusetts law in favor of rights of access or against the conveyance of landlocked properties.

4. The Practical Consequences of the Appeals Court Decision, if Allowed to Stand, Are Far Reaching, Long Lasting and Are Contrary to the Expressed Intent of Both the Massachusetts Legislature and the Federal Government

If the decision of the Appeals Court is not vacated and the judgment of the Land Court affirmed, the immediate impact will be that the land owned by the plaintiffs, non-Indian developers who purchased lots at low prices because they were landlocked, will suddenly become much more valuable. At the same time, the titles of many other property owners in the Town of Aquinnah, Indians and non-Indians alike, will become clouded and therefore less valuable and more

difficult to sell. The Appeals Court did not identify or specify the locations of the easements of access they imputed to the Massachusetts Legislature, leaving that task on remand to the Land Court (which originally found no such easements), "a practice well within the great skills of that court," according to the decision. 87 Mass. App. Ct. at 11. In the absence of any guidelines for identifying those easements, however, it is practically guaranteed that this litigation, which has already gone on for more than 18 years, will continue for decades into the future. Do the easements lie over the lots to the south of the ones owned by the plaintiffs, toward the closest public road, Moshup Trail, which did not exist in 1878? Or over the lots to the north, toward State Road, which is much further away, and therefore requires an easement over many more lots? Whatever the Land Court determines (and we cannot imagine what criteria the court would use for making such decisions),¹⁴ the affected property owners are likely

¹⁴By Order dated August 14, 2006, the Land Court approved a motion to bifurcate the proceedings in this case, deferring the question of the location of any easements until the court determined the existence of such easements.

to challenge that determination, with another long and expensive round of lawsuits and appeals.¹⁵

And that only concerns the claims of the plaintiffs. The finding by the Appeals Court that Kitras and the other plaintiffs have a right of way over adjacent land, as heirs to longstanding tribal customs, means that *all* owners of landlocked properties in Aquinnah have the same right, since all own their property by purchase or descent from those who were allotted land in the town under the Act of 1870 which, according to the Appeals Court, could not have intended to convey landlocked property. Persons who bought land in Aquinnah with access to a public road in expectation of full and exclusive use of their property will be faced with the prospect of multiple claims of rights of way over their land by the owners of landlocked parcels seeking access to that road, access that, if granted, could render their lots unbuildable and therefore practically worthless, or alternatively, severely restrict the use and enjoyment of a lot already improved with a home. There are

¹⁵As the dissenting opinion wisely noted, the resurrection of claims based on perpetual tribal rights and customs will "become binding on the successor grantees in perpetuity." 87 Mass. App. Ct. at 19 (Agnes, J. dissenting).

likely to be many such claims, since many lots in the Town remain landlocked, and therefore much litigation, by neighbor against neighbor, Indian against non-Indian, Indian against other Indians, non-Indian against other non-Indians.

It was precisely to prevent such endless litigation and uncertainty that the Massachusetts Legislature in 1870 determined to provide fee title to the former Indian lands in Gay Head, to replace aboriginal title to occupancy, and led the United States Congress in 1987 to enact legislation extinguishing aboriginal title so as "to remove all clouds on titles resulting from such Indian land claims." 25 U.S.C. § 1771(b), 1771(3). By signing the Settlement Agreement in 1983, the Wampanoag Tribal Council showed that the Indians who live in Aquinnah also desire that all Indian land claims be extinguished, and for the same reason as the amicus Aquinnah/Gay Head Community Association--to enjoy quiet title to their property. Unless vacated by this court, the ruling by the Appeals Court will defeat all efforts made since 1870 to provide the Indians of Gay Head, their heirs and assigns with full and unimpaired ownership of their land in the same manner as all

other citizens of the Commonwealth. As Judge Agnes noted in his dissent, it would also be "an extraordinary alteration of traditional principles of Massachusetts law . . ." 87 Mass. App. Ct. at 19-20.

CONCLUSION

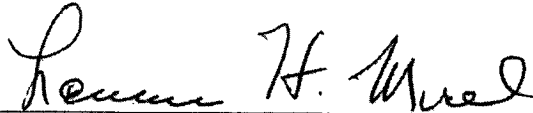
In a commendable effort to provide equal rights and full citizenship to its Native American population, the Massachusetts Legislature in 1870 gave the Indian residents of Gay Head the right to own land in fee simple, and conveyed to them such title to property in the new Town of Gay Head. The federal government confirmed that conveyance by legislation in 1987, declaring that all Indian claims on that land, whether aboriginal or otherwise, had been extinguished "as of the date of such transfer." As the defendants/appellees have shown, easements by necessity are not favored under Massachusetts law but must be proven, and the transfer of title to lots that are landlocked does not by itself show an intent of the grantor to provide an easement. The only evidence offered for such easements in this case is "long-standing tribal custom and practice." But property claims based on such aboriginal rights in Gay Head/Aquinnah have been explicitly and definitively

extinguished. There is therefore no basis for the Appeals Court's decision to find easements of necessity based on Indian customs that other owners of landlocked property in the Commonwealth do not have. The ruling of the Appeals Court should be vacated and the opinion of the Land Court affirmed.

Respectfully Submitted,

AQUINNAH/GAY HEAD COMMUNITY
ASSOCIATION

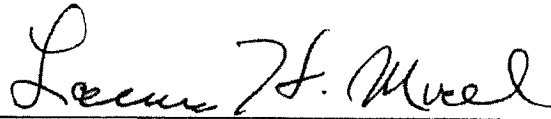
By its attorney,



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CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.



Lawrence H. Mirel

ADDENDUM

Joint Memorandum of Understanding Concerning
Settlement of Gay Head, Massachusetts Indian Land
Claims dated September 28, 1983
.....ADD001

Letter from Ross O. Swimmer, Assistant Secretary of
the Interior to Senator Mark Andrews dated February 5,
1996.....ADD013

JOINT MEMORANDUM OF UNDERSTANDING
CONCERNING SETTLEMENT OF THE GAY HEAD,
MASSACHUSETTS INDIAN LAND CLAIMS

WAMPANOAG TRIBAL COUNCIL
OF GAY HEAD, INC.

September 28, 1983

ADD001

1. The Parties to the Settlement are the parties in the litigation before the United States District Court for the District of Massachusetts known as Wampanoag Tribal Council of Gay Head, Inc., et al. v. Town of Gay Head, et al., Civil Action No. 74-5826-G (including intervenors).

The Parties shall seek to have all others who may be interested in the Settlement act so as to assure that the Settlement becomes effective.

2. The Parties agree to the following settlement, all provisions of which are to be considered as inseparable and interdependent, except as otherwise specifically provided herein, and which are all conditioned upon requisite favorable action within 18 months of the execution of this settlement by other entities, including appropriate executive and legislative branches of the governments of the Town of Gay Head, the Commonwealth of Massachusetts, and the United States of America.

3. A state-chartered corporation (hereinafter called the Tribal Land Corporation) will be created by the Wampanoag Tribal Council of Gay Head, Inc. (hereinafter the Tribal Council) for the purpose of acquiring, managing, and permanently holding lands, including the lands defined in this settlement as the Settlement Lands. The Tribal Land Corporation shall hold the Settlement Lands, and any other land it may acquire, in the same manner, and subject to the same laws, as any other Massachusetts corporation, except to

the extent specifically modified by this agreement and the accompanying proposed legislation. Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, be impaired or otherwise altered, except to the extent modified in this agreement and in the accompanying proposed legislation.

4. The Town of Gay Head will convey all its rights, title and interest in the Town Common Lands (except for the shoreline as defined in Paragraph 10) to the Tribal Land Corporation. These lands comprise about 238 acres (which include the Cranberry Lands, the Face of the Cliffs, and the Herring Creek), and are described roughly on the map attached hereto and made part of this agreement. A survey shall be made in order to determine the precise acreage and boundaries of the Common Lands. The cost of the survey shall be regarded as part of the cost of the Tribal Land Corporation's acquisition of lands under this settlement and shall be financed out of the Federal funds appropriated pursuant to Paragraph 8. Existing surfaced roads across the Common Lands will continue to be owned and maintained by the Town of Gay Head or the Commonwealth of Massachusetts, as the case may be,

and shall be open to the public. Present unsurfaced roads providing access across the Common Lands to private lands beyond shall continue to be available for access to such private lands.

5. The Town of Gay Head shall convey the so-called Cook Lands (L. No. 395) to the Tribal Land Corporation. Such property, however, shall not be part of the Settlement Lands, and shall remain subject to taxation and foreclosure in the same manner as any other privately owned property in Gay Head. Any structure placed on this property shall be subject to all Federal, State and local laws, including Town zoning laws, State and Federal conservation laws, and the regulations of the Martha's Vineyard Commission, and in no event shall any structure or structures erected on this land comprise more than 3,000 square feet or exceed a height of twelve feet with a maximum peak of 16 feet. Changes in Town zoning laws made subsequent to the date of this Memorandum may be made applicable to such Cook lands only in the manner provided for changes to the Land Use Plan as described in Paragraph 16 of this Memorandum. If the said property is used for any purpose not permitted by the Land Use Plan, or is sold, leased or otherwise alienated by the Tribal Land Corporation to any entity other than one which is Indian controlled, all right, title and interest in the property shall revert to the Town of Gay Head, provided however, that nothing herein shall prevent the granting of a valid mortgage on the said property. All residents and property owners of Gay Head, their guests and

assigns, shall have an easement to use the pond beach on the Cook Lands for such recreational activities as are now carried out on such beach, including, but not limited to, fishing, swimming, outdoor recreation, or the beaching or anchorage of small boats, and shall have guaranteed access to such beach by land as provided in the Land Use Plan.

6. The Owners of the former Strock Estate will convey their ownership interest in certain lands formerly known as the Strock Estate in Gay Head to the Tribal Land Corporation. These lands consist of three parcels separate from each other--one parcel of about 57 acres, one of about 33 acres and one of about 85 acres, or a total of about 175 acres. (The precise lot numbers falling within these three parcels are listed in Appendix A.) These lands are to be sold to the Tribal Land Corporation at fair market value established without regard to Indian claims extinguished in accordance with Paragraph 8(d).

7. If the owners of the land located between the so-called Cranberry Lands portion of the Common Lands and Menemsha Creek (hereinafter called the Menemsha Neck Lands) are willing to sell their land, the parties will support the principle that the Federal Government should provide funds in order to acquire these lands so that they may become part of and be treated as Common Lands for purposes of this settlement. Such sales shall be at fair market value established without regard to Indian claims extinguished in accordance with Paragraph 8(d). If any owner refuses to sell

or if the Federal Government refuses to provide funds for these lands, the other provisions of this settlement will nevertheless remain in effect.

8. The parties to the settlement support the principle that:

(a) The Federal Government will appropriate funds to finance the survey of the Common Lands and the Cook property described in Paragraphs 4 and 5;

(b) The Federal Government will appropriate funds, in a sufficient amount to pay for the lands of the former Strock Estate described in Paragraph 6, based upon fair appraisal;

(c) The Parties will also seek Federal funds to pay for the Menemsha Neck Lands described in Paragraph 7, if any owners desire to sell, but if such funds are not obtained, the other provisions of this settlement will nevertheless remain in effect;

(d) Congress will enact legislation that eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, whether aboriginal or under recognized title involving lands and waters in the Town of Gay Head, and that effectively clears the titles to all land in Gay Head of any such claims, whether asserted in the past, present or future. That legislation will also extinguish all claims of any kind by the alleged Gay Head Tribe, whether possessory, monetary or otherwise, whether aboriginal or under recognized title involving any other

lands and waters within the Commonwealth of Massachusetts and that effectively clears the titles to all land in the Commonwealth of any such claims, whether asserted in the past, present or future. The alleged Gay Head Tribe and the Tribal Council on behalf of all persons of Indian descent hereby agree that this settlement is in full compensation for the claims so extinguished. This legislation shall not eliminate or affect the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians.

9. Neither the provisions of Paragraph 8 nor this Joint Memorandum of Understanding as a whole shall be deemed an admission of the existence of a tribe and are instead intended simply to extinguish claims made by any Indians, whether advanced by individuals, groups or tribes.

10. The Settlement Lands shall comprise the following:

(a) The Common Lands described in Paragraph 4, excluding the shoreline abutting on ocean, sound, or pond. Such shoreline, consisting of a strip of land extending 50 feet inland of mean high water along the ocean and sound and 30 feet inland of mean high water along Menemsha Pond, Menemsha Creek and any other body of water, shall continue to be owned by the Town of Gay Head and shall be available to all Gay Head residents and property owners, their guests and assigns, for recreational and other uses now commonly made of such shoreline, and shall be subject to a conservation trust

with the Town of Gay Head as Trustee that shall insure the continued right of such uses by such persons. Access to the shoreline across the common lands shall be preserved and the roads and paths established in accordance with the Land Use Plan mentioned in paragraph 16 for such access shall be maintained by the Town of Gay Head.

(b) The three parcels of the former Strock Estate described in paragraph 6.

(c) The Menemsha Neck Lands described in Paragraph 7 which, so far as they are acquired pursuant to this Settlement, shall be treated as though they were part of the Common Lands.

11. The Settlement Land shall be subject to an express federal statutory restriction against alienation. This statutory provision against alienation shall state explicitly that (a) no Indian tribe or band shall ever exercise sovereign jurisdiction as an Indian tribe other than to the extent agreed herein, over all or any part of the Settlement lands, or over any other land that may now or in the future be owned by or held in trust for, any Indian entity, but (b) the absence of such sovereignty shall not in any way prejudice Gay Head Indians in their efforts to obtain federal benefits available to Indians or to achieve recognition as a tribe. Notwithstanding the foregoing, the federal restriction against alienation shall permit the Tribal Land Corporation to convey a strip of land up to 70 feet wide beginning 30 feet inland from mean high water and 500 feet long, starting from the

terminus of the West Basin Road and running in an easterly direction along an area of West Basin now used for mooring boats, so that the Town may construct a bulkhead and related structures at this site, subject to the limitations set forth in the Land Use Plan.

12. Subject to the conditions expressly provided in this Agreement, the Settlement Lands are to be held in trust by the Tribal Land Corporation for the benefit of Gay Head Indians, defined as all descendants of the Indians listed in the census taken in 1869. A copy of the said census is included as Appendix B of this Agreement.

13. All Federal, State and Town laws shall apply to the Settlement Lands subject only to the following special provisions, regardless of any federal recognition the alleged Gay Head Tribe may acquire:

(a) The Settlement Lands will not be treated as real property subject to taxation pursuant to Massachusetts General Laws Chapter 59, or any successor State Law, but the Tribal Land Corporation will make payments in lieu of property taxes to the Town of Gay Head or other appropriate entity on the former Strock Estate, if and when improvements are placed on those lands. The fraction of land subject to such payments shall be determined in accordance with the density requirements of Town zoning ordinances. For example, if a house is placed on land which is zoned for two-acre homesites, then two acres of the land shall be subject to payments in lieu of

taxes. The amount of such payment shall be determined by assessing the value of the improvements and the value of the land attributable to such improvement, as determined in accordance with this section, and applying the town property tax rate or any other applicable tax rates just as though the improvements and attributable land were held by any private person. With respect to in-lieu payments that remain unpaid, neither the Town nor any other person will have the right of foreclosure against the Settlement Lands. Instead of its right of foreclosure, the Town or any other person otherwise entitled to foreclosure may enforce a lien against other assets of the Tribal Land Corporation or any subsidiary thereof, or any other entity controlled by the Tribal Council. If the in-lieu payments are not fully paid three years after they are due, the Town may seize the land and improvement on which the in-lieu payments are in arrears and lease such land and improvements on reasonable terms for periods of time not to exceed five years, the sums realized from such leases to be applied, after costs, to the payment of the amount in arrears. Seizure by the Town under this provision shall in no way affect title to the land, which shall remain with the Tribal Land Corporation, and at the expiration of any lease period during which all arrearages have been paid in full, control of the land and improvements shall be returned to the Tribal Land Corporation.

(b) The Tribal Land Corporation will have the right (after consultation with appropriate State and local officials) to establish its own regulations concerning hunting (but not trapping or fishing) by Indians on the Settlement Lands by means other than firearms or crossbow. These regulations by the Tribal Land Corporation shall impose reasonable standards of safety for persons and protection of wild life and the absence of such regulations imposing such standards of safety shall be deemed unreasonable. These safety and protection standards shall be subject to judicial review for reasonableness and may be enforced by State and local law enforcement officers. Hunting by firearm or crossbow shall remain subject to the State law.

14. The Gay Head Indians will not receive Federal recognition as a Tribe as a result of Congressional legislation to carry out the provisions of this Settlement, but they shall have the same right to petition for such recognition as other groups.

15. Plaintiffs in the lawsuit against the Town of Gay Head, known as Wampanoag Tribal Council of Gay Head, Inc., et al. v. Town of Gay Head, et al., agree to cause the lawsuit to be dismissed with prejudice at the time that the Federal legislation referred to in Paragraph 8 becomes effective.

16. The Settlement Lands will be subject to the Land Use Plan attached hereto and made a part hereof. The Land Use Plan shall be enacted as part of the zoning law of the Town of

Gay Head. Future amendments of the Land Use Plan as applicable to the Settlement Lands and embodied in the Town Zoning Law will require approval by the Tribal Land Corporation, by the Town of Gay Head (by whatever majority is usually required for such amendments) at two town meetings not less than one month apart, at least one of which shall be held during the month of July or August, and by such officials, if any, of the Commonwealth whose approval is required for amendments to zoning laws.

ACCEPTED:

For the Wampanoag Tribal Council of Gay Head, Inc.

By: Shalyndra Jackson Date: 11/19/83 Witness: [Signature]

For the Town of Gay Head:

By: [Signature] Date: 11/19/83 Witness: [Signature]

For the Taxpayers' Association of Gay Head, Inc.

By: Hannah L. Mackin Date: 11/19/83 Witness: [Signature]

For the Commonwealth of Massachusetts:

By: Thomas H. Kelly Date: 11/22/83 Witness: [Signature]

True Copy of Affect.

-18-
Wenona T. Silva, Town Clerk



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

FEB - 5 1986

Honorable Mark Andrews
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for our views on S. 1452, a bill "To settle Indian land claims in the Town of Gay Head, Massachusetts, and for other purposes."

We oppose enactment of S. 1452 because it does not meet the criteria for the settlement of Eastern Indian land claims as set forth in the President's veto message on S. 366, 98th Congress, a bill "To settle claims of the Mashantucket Band of the Western Pequot Indian Tribe, and for other purposes." These criteria are (1) completion by this Department of its administrative procedure for determining whether Federal recognition of the tribe is appropriate; (2) verification of the claim; and (3) payment by the State of Massachusetts of at least one-half of the settlement costs.

S. 1452 would settle outstanding Indian land claims in the Town of Gay Head, Massachusetts. The settlement would terminate a Non-Intercourse Act claim that has been pending before the U.S. District Court for the District of Massachusetts since 1974. See Wampanoag Tribal Council of Gay Head v. Town of Gay Head, Civil No. 74-5826 (D. Mass.). This suit involves a claim to approximately 240 acres of land presently held by the Town of Gay Head as town common lands. The Indian claims at issue in Wampanoag Tribal Council have also resulted in the clouding of titles to certain private lands in the Town of Gay Head, even though many of these lands are not involved in the pending lawsuit.

S. 1452 would establish a \$3 million "Gay Head Indian Claims Settlement Fund" funded by Federal appropriations which would permit the Wampanoag Group of Gay Head Indians to acquire at fair market value some 175 acres of private settlement lands. In addition, S. 1452 would authorize use of fund monies to survey and improve both private and public settlement lands. These acquired private lands would be transferred to the Wampanoag Tribal Council, Inc., a corporation chartered under Massachusetts State law. The Secretary of the Interior (Secretary) would have the authority to begin such condemnation proceedings as were necessary to perfect any right, title or interest in the private settlement lands. So-called "public settlement lands" are to be conveyed under S. 1452 by the Town of Gay Head to the Wampanoag Tribal Council.

S. 1452 would also require the Secretary to publish in the Federal Register his findings as to whether the State of Massachusetts has satisfied certain conditions with respect to the transfer of public settlement lands to the tribal council. Satisfaction of these conditions would be a prerequisite to secretarial purchase of private settlement lands.

ADD013

Any transfer of land or natural resources involving the Wampanoag group of Gay Head Indians or individual Indians within the Town of Gay Head and the town itself which is completed prior to the effective date of S. 1452 would be deemed to have been made in accordance with the Constitution and laws of the United States. In addition, the bill would extinguish any aboriginal title or other related claims based upon the taking of aboriginal lands from the Gay Head Indians. However, the personal claims of individual Indians would be preserved.

The lands in question under this bill are part of a larger tract on which Indians have resided since before the arrival of European settlers in the early 17th century. In 1683, an agreement was negotiated between the Indians and settlers in the area which provided for the extinguishment of the aboriginal Indian title at Gay Head. While there is some question as to whether this agreement was procured in a fraudulent manner, it is our understanding that the transaction is not now being challenged. In the early 1700's, a religious aid society (the "Company") purchased certain other land at Gay Head on which Indians continued to live throughout the 1700's. The underlying fee title to these lands was retained by the Company. It is the position of the plaintiffs in Wampanoag Tribal Council that when the Company abandoned these lands during the Revolutionary War, their ancestors acquired title. By contrast, the defendants argue that the lands escheated to the Colony and subsequently to the State upon abandonment by the Company. There appears to have been about 2,400 acres in Indian possession at the end of the 1700's. Throughout the 19th century, Indians continued to live on the property, and because of their relative isolation, were left largely to govern and regulate their own affairs.

After the Civil War, however, many members of the Massachusetts Legislature expressed concern with the lack of civil rights accorded to the State's Indian residents. Indians at the time suffered under two major disabilities: they were not citizens of the State and therefore could not vote, and they could not own land. To remedy this problem, a bill entitled "An Act to Enfranchise the Indians of the Commonwealth", was introduced and became law in 1869. Among other things, the Act granted citizenship to all Massachusetts Indians, and guaranteed title to parcels of land claimed by individual Indians. In 1870, the legislature transferred all "common lands" (approximately 240 acres), "common funds, and all fishing and other rights held by the district of Gay Head to the Town of Gay Head. . . ." It is these transactions; i.e., the vesting of title in individual Indians and the transfer of the remaining common lands to the town, that the plaintiffs claim in Wampanoag Tribal Council violated the provisions of the Non-Intercourse Act.

To establish a prima facie case under the Non-Intercourse Act, a plaintiff must show that:

- o It is or represents an Indian tribe within the meaning of the Act;
- o The parcels claimed are tribal land;
- o The United States did not consent to the alienation of the land; and
- o The trust relationship between the tribe and the United States has never been terminated or abandoned.

Since the United States has had little or no involvement with the Gay Head Indians and has never formally acknowledged that a tribe even exists, it has never been in a position from which it could consent to any alienation of their lands or a termination of the trust relationship. Thus, the only two issues of significance in this matter are whether there is a tribal group capable of bringing a claim, and whether the lands at issue are covered by the Non-Intercourse Act. As noted previously, these issues and the adequacy of the State's contribution, are criteria that must be addressed before the Administration can support a settlement.

There is currently no Gay Head or Wampanoag Tribe acknowledged as existing by the Federal Government. Section 8 of S. 1452 specifically preserves the right of the Indian entity at Gay Head to petition for Federal recognition. A group representing itself as the "Gay Head Wampanoag Tribe" did file a petition for acknowledgement pursuant to 25 Code of Federal Regulations (CFR) 83 in 1981. We anticipate that a recommendation concerning the group's eligibility for Federal status will be available by Spring 1986. We believe that processing of the recognition petition filed by the Gay Head Indians should be completed before any legislative settlement is considered.

We acknowledge that there is limited precedent in the Rhode Island Indian Claims Settlement Act (25 U.S.C. 1901 et seq.) for settling a claim prior to acknowledgement of a tribe. However, we believe this precedent should not be followed in this or other future Non-Intercourse Act settlements because of our view that the determination of tribal existence is a fundamental threshold issue in making such a claim. Without tribal status, a claim is not valid. If there is no tribe, there can be no claim. Thus, if Congress were to settle this claim and the group were subsequently found not to be a tribe, Congress will have legislatively settled a claim lacking merit.

If the bill were to be amended to make implementation of the settlement contingent upon Federal acknowledgement of the Gay Head Wampanoag Tribe, our concerns about the existence of the tribe would be alleviated. However, that amendment would not address the inadequacy of the State contribution to the proposed settlement.

To sustain a Non-Intercourse Act claim, the land alleged to have been alienated must have been subject to the Act; i.e., it must have been tribally-held land. It is not clear that all of the lands subject to "extinguishment of title" by the settlement bill were held in a communal and tribal fashion at the time of the formation of the United States or the passage of the first Non-Intercourse Act in 1790.

The tribe's claim does not appear to be based on the continued existence of aboriginal title, that title having apparently been extinguished in the late 17th century. Rather, the claim is based on property interests the tribe allegedly acquired as a result of the purchase of land for the tribe's use by the Company in the early 1700's and/or subsequent abandonment of the property by the Company during the Revolutionary War. The defendants in Wampanoag Tribal Council assert that these are not "tribal" lands for purposes of application of the Non-Intercourse Act, but were merely lands subject to State law. While the petitioning group in Wampanoag Tribal Council has not specifically claimed those lands held by

individual Indians in 1869 (at least 1,700 acres), a competing Indian group known as the "James faction" has done so, and this raises a question posed by the First Circuit in James v. Watt, 716 F.2d 71 (1st Cir., 1983). The First Circuit reasoned that if individual rights attached to the land prior to 1869, then the State's action in 1869 vesting individual Indians with title was not a taking of interests in land, but was a conveyance of the State's interests to those Indians. If this hypothesis is accurate, any tribal claim to those lands would be foreclosed.

On the other hand, if the lands were in fact held as "tribal" lands at any point after enactment of the first Non-Intercourse Act in 1790 (and we are not aware of any transaction by which any tribe reacquired these lands), tribal title could not be divested by the State assignments to individual members. Thus, subsequent sales by individual Indians to non-Indians would also have been invalid.

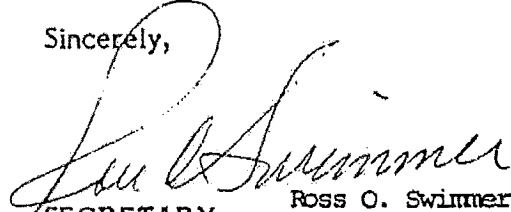
This claim is also questionable in that there was no dispossession of the Indians by the alleged taking through the 1869 and 1870 State laws. The lands were merely transferred to individual Indians or to the Town of Gay Head. Assuming that the tribe exists, and that it owned an interest in the lands transferred to the town by the 1870 legislation, it can be argued that no real injury has occurred. In its acknowledgement petition, the tribe argues that it and the town are the same entity. Since the town common lands are still owned by the town/tribe the claim in Wampanoag Tribal Council could be extinguished merely by changing the paper title to the land. The transfer of the 240 acres of town land (i.e. the so-called public settlement lands) back to the tribe is controversial only from a land-use standpoint. Disposition of such public settlement lands is an issue that can be resolved by the State without congressional attention. It is in fact these lands that apparently represent the State's contribution to the settlement.

We believe State participation in the proposed settlement is inadequate. Other than the agreement to allow the town to reconvey the town common lands back to the tribe, we see no contribution from the State in the settlement bill. Inasmuch as the town common lands, if transferred to the tribe, will be subject to severe land use restrictions and will, save for a nominal change in record ownership, maintain the current status of the land in most respects, we view the State's contribution as largely illusory.

In summary, this is an unusual claim. The impetus for the settlement seems to be at least partially motivated by the change in demographics at Gay Head after World War II. Since 1870 the tribe has remained in control of the town, its affairs, and its land. This domination of the town is now threatened by the prospect that non-Indians who have moved into Gay Head as permanent residents could someday obtain control of the town government. While the resolution of unresolved legal questions through a legislative settlement ratifying an agreement between parties to a Non-Intercourse Act suit may properly be the subject of congressional action, the as yet unresolved issue regarding tribal existence and the State's inadequate contribution mitigate against passage of this legislation.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ross O. Swimmer".

ASSISTANT

SECRETARY

Ross O. Swimmer