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Who Says the Montauk Tribe Is Extinct? Judge Abel Blackmar's Decision in *Wyandank v. Benson* (1909)

JOHN A. STRONG

At the October 1910 session of the New York State Supreme Court, sitting in Riverhead, New York, Judge Abel Blackmar announced his "findings of fact" and "conclusions of law" in the case of Wyandank Pharaoh, chief of the Montauk tribe of Indians, plaintiff, versus Jane Benson and the estate of the late Arthur Benson, defendants. The Montauk people in the crowded courtroom sat in stunned silence as the judge announced that the Montauk tribe no longer existed. The tribe, he said, "has disintegrated.... They have no internal government, and they lived a shiftless life of hunting, fishing and cultivating the ground and often leaving Montauk for long periods to work in some menial capacity for whites."[1] The tribe, continued the judge, had been in decline for decades, and the purchase of their residence rights by Arthur Benson and his family merely gave the "final death blow."

There is a tragic historical irony in Judge Blackmar's ruling. During the first century after the establishment of the European settlements in North America, the Native American people were forced to give up their hunting grounds, language, religion, political and economic systems and accept a role as domestics or

John A. Strong is a professor of history at Long Island University, Southampton, New York.

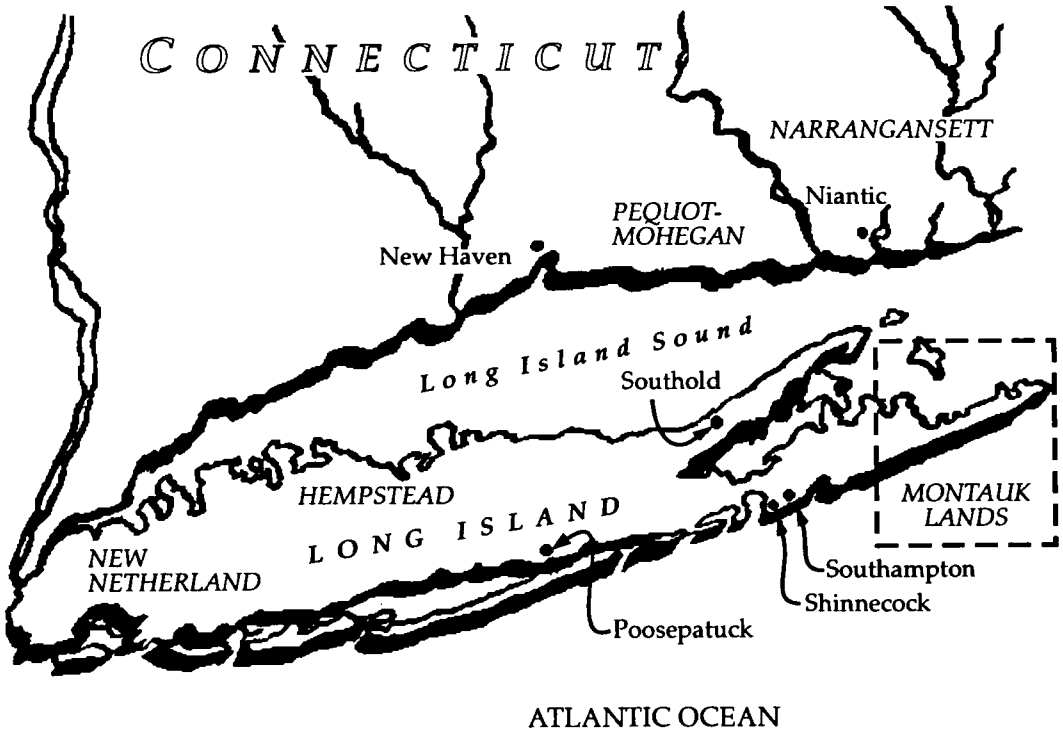
unskilled laborers in expanding settler communities. The "good" Indians were those who became Christians and adopted the outward appearances of submission to the dominant culture. The Indians lost their land, they were told, because the whites knew better how to use it and make it productive. Now, two-and-one-half centuries later, the judge was telling the descendants of those "good Montauk" that, because they had abandoned their culture, they had lost the right to their last small piece of land. The one consistency is that, in both cases, the Montauk lost their land.

The crucial issue here is the way in which tribal status is determined. After the unexpected victory of the Passamaquoddy in Maine, where tribal standing was not challenged, land cases brought by eastern tribes such as the Mashpee on Cape Cod have turned on this question. The Montauk case was one of the first to be tried in the eastern states following the landmark decision in *Montoya v. United States* (1901), which set down the legal definition of a tribe. The lawyers representing the Montauk allowed the defendants to expand the Montoya criteria and to play on racial stereotypes. The strategy, which enabled the Long Island Railroad and a consortium of developers to win, has important implications today for contemporary Indian land cases, particularly those involving landless Native American communities in the eastern states.

HISTORICAL BACKGROUND

The Montauk, an Algonquian-speaking Native American community, were living on the southern fork of eastern Long Island when the English settlers arrived in the mid-seventeenth century (see map 1). They lived in a number of small villages located near fresh water streams along the coast. The Montauk grew some domestic crops but relied primarily on hunting, gathering, and fishing for their survival. Their political and economic systems were essentially egalitarian, with few specialized roles.[2]

The English established the settlement of East Hampton in 1648 on a thirty-thousand-acre tract of land purchased from the Montauk (see map 2). This tract ran from the eastern boundary of Southampton, the first English town on Long Island, to Napeague Bay, west of East Hampton.[3] In 1661 and 1670, two more tracts of land east of the original purchase were obtained, leaving unclaimed only the areas where the Montauk located their principal settlements and



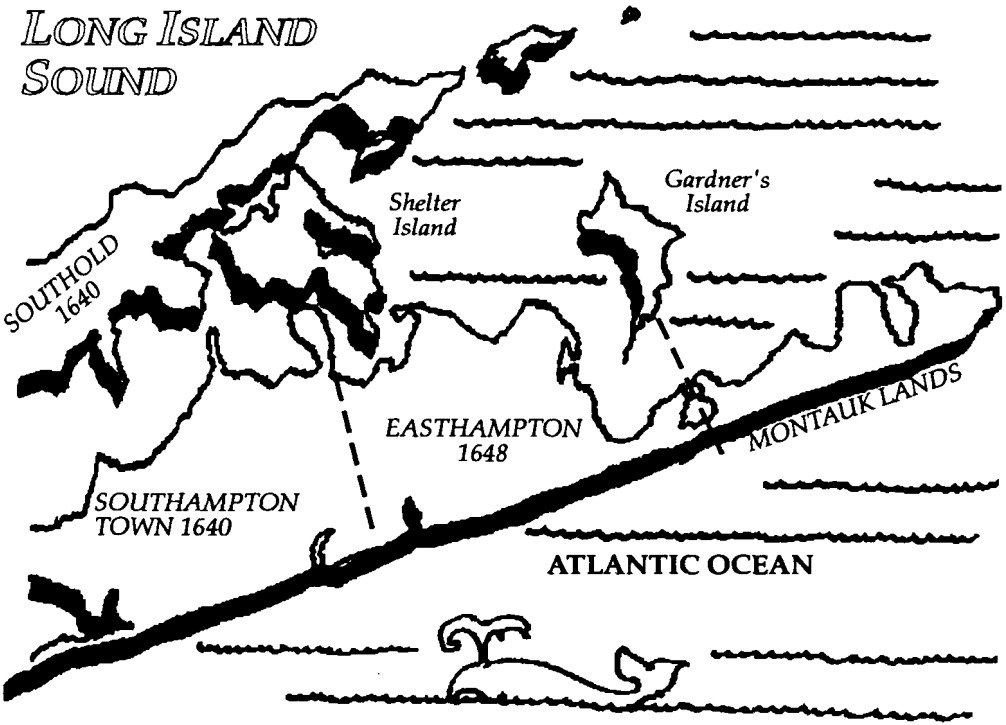
MAP 1. Southern New England (Long Island 1640)
Map by David Martine.

planting grounds (see map 3).[4] The settlers jealously guarded their exclusive right to purchase the rest of the Montauk land when they needed it. In 1686, a patent issued by Governor Thomas Dongan officially recognized this right of purchase but established, in the same patent, a body of public officials called "trustees" to supervise and monitor all relations with Native Americans.[5]

The following year the trustees, on behalf of a group of private proprietors, bought the remainder of the Montauk land for one hundred pounds sterling.[6] The negotiations included a counter bond in which the trustees guaranteed residence and planting rights to the Montauk and their heirs in perpetuity.[7] This bond therefore established a legal relationship that obligated the duly elected town officials to guarantee the Montauk rights. The Montauk were to pay a token fee of one ear of corn "upon demand, unto the trustees of whom shall be appointed in Easthampton . . . ." Acting as a referee in the relations between private citizens and the Montauk, the town assumed a responsibility that could not be voided by either of the two principal parties. Both parties agreed to this arrangement because of a long history of distrust, cultural misunderstanding, and broken agreements.

In spite of the arrangement, controversy later erupted over the schedule of payments, and the town was forced to intervene in 1703. The Montauk, claiming that the payments had not been made and that their grazing rights were not being adequately protected, precipitated a crisis by selling all of Montauk to Rip Van Dam, a wealthy New York merchant and close associate of the colonial governor, Lord Cornbury. The town moved quickly to block the sale and opened a new round of negotiations that resulted in a more detailed articulation of the rights and obligations of all three parties.[8] These negotiations resulted in four separate agreements: a confirmation of the 1687 deed; a new bond in which the trustees acknowledged that proprietors were "justly indebted . . ." to the Montauk and a payment schedule of forty shillings in interest, paid annually, on the one hundred pounds; a promise by the Montauk to honor all clauses in the new agreements; and, lastly, a carefully worded agreement about the specific land use rights at Montauk.

The land use agreement permitted the Montauk to choose between acreage on either side of Lake Montauk but prohibited them from occupying both sides at the same time. Quotas were set for grazing rights, which limited the Montauk to a total of fifty cattle and/or horses and 250 swine.[9] The Montauk then estab-



MAP 2. Easthampton 1648 purchase
Map by David Martine.

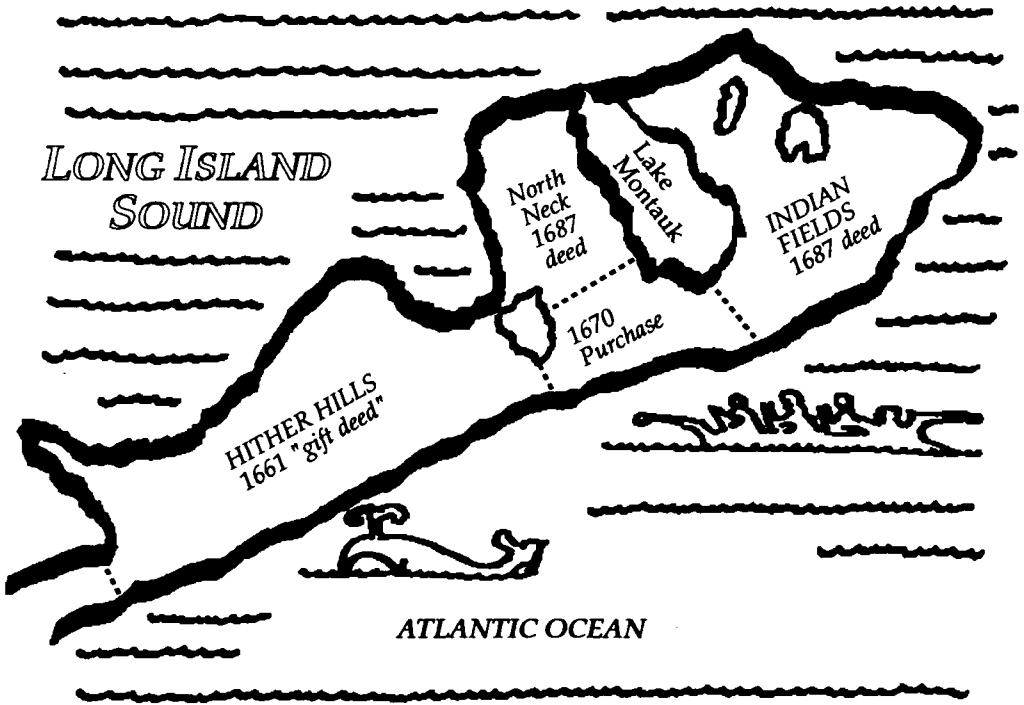
lished the custom of leasing back to local whites, on a yearly basis, any of the rights that the Montauk did not use. These leases became a major source of cash for the small community. Most of these rights were allocated to individual members of the Montauk community, but some were reserved for the tribe as a whole.[10] Timber, a vital source of fuel for cooking, heating, and fencing, could be harvested from adjacent wood lots if the Montauk experienced a shortage on the reserved area.

Both colonial and state authorities advised the East Hampton trustees on several occasions to designate the land in the 1703 agreement as an official reservation and to appoint an Indian agent who would supervise tribal affairs, but this advice was never taken.[11] The trustees and proprietors apparently expected that the Montauk would gradually die off or abandon the area. They did not want to establish an institutional structure that might limit their control over the Montauk or encourage the growth of the Native American community. In fact, over the years, the proprietors did many things to squeeze them out.

Many of the Montauk men worked for the English as whalers until the end of the whaling era in the nineteenth century. A small number left in the eighteenth century to join Samson Occom's Brotherton community and eventually settled in Wisconsin. By the turn of the present century, most of the Montauk remaining on Long Island worked as domestic servants, cattle herders for the proprietors, or laborers in the nearby white communities. The population at Montauk did not decline, however, because Native Americans from New England and from the Shinnecock and Poospatuck reservations on Long Island married into the community.

In 1719, the East Hampton trustees pressured the Montauk to block off this vital link with other Native American communities. Under penalty of a one hundred-pound bond, Native Americans who were not members of the Montauk community were prohibited from living at Montauk or using any land there.[12] This prohibition was a devastating edict for a small, exogamous community that had always depended on marriages with neighboring bands to maintain its population base and reinforce economic, social, and political networks. The long-range impact of the prohibition was so destructive that one wonders what sort of inducement was used to obtain Montauk agreement. Unfortunately, the records are silent about this.

The population at Montauk dropped to about 160 people in thirty-two families by 1741.[13] Many of the Montauk, recognizing



MAP 3. 1661 "gift deed"
1670 "9 score acre" deed
1687 Montauk deed
Map by David Martine.

that community survival depended on exogamous marriages, began to marry African-American people from nearby. Prevailing racial prejudices, of course, would not permit intermarriage with whites. In 1754, the trustees, fearing that the decline in the Montauk population might be reversed if new people were absorbed into the local community, again pressured the Montauk to accept a restriction on their population growth. A similar population restriction was imposed on the Mashpee in 1788 by the Massachusetts General Court. The Reverend Gideon Hawley, a missionary serving the tribe, argued that this edict would serve to strengthen the "Christian and Indian character" of the Mashpee and was, therefore, for their own good.[14] The result, of course, was to reduce the population base at Mashpee and free more land for the whites.

Samson Occom, the Mohegan missionary, who had been living at Montauk since 1749, was present during the negotiation of the new agreement. Ironically, Occom himself had violated the population control edict of 1719 when, in 1751, he had married a Montauk woman named Mary Fowler. The Montauk elected a committee of seven, led by Sirus (Silas, Cyrus) Charles, to meet with the trustees. This time there was no mention of a bond that could be forfeited if the agreement were broken; instead, the trustees wrote into the agreement the threat of arrest and prosecution for trespass. Women who married "foreign Indians, Mustees, or Mulattos" lost their right to live at Montauk, and their children could not inherit any land claims.[15] In addition, all of the Montauk were prohibited from selling their grazing rights to "foreign" Native Americans or African-Americans.

This agreement was in direct violation of the 1687 bond, which guaranteed land rights to all Montauk and their posterity forever. Now women could lose their ancient rights through marriage. The children of said marriages lost the right to claim their inheritances from their mothers. Even though the trustees designed the agreement to reduce the Native American presence at Montauk, Occom signed as a witness. He may have been concerned about the possibility that the presence of African-Americans at Montauk would be used by the whites to undermine the Montauk land claims. Undoubtedly, he would have defended his actions with words similar to those of Reverend Hawley; certainly the result of the policy was similar. Unfortunately, Occom did not write about these affairs in his diary, and his biographers do not mention them.[16] Occom left Montauk in 1761 to accept a commission on the Oneida Reservation.

The East Hampton town trustees managed the Montauk lands

without much opposition from the proprietors until 1851, when it was discovered that the trustees had been putting the fees charged for hunting privileges on Montauk into the town coffers. The proprietors sued the trustees, charging dereliction of duty and mismanagement.[17] Any profit made from the land at Montauk, argued the proprietors, belonged to the owners, not to the town government. The court agreed and ordered the town to turn over all of the documents to the proprietors and to cease from interfering in the management of the Montauk lands. The rights of the Montauk, however, were explicitly recognized by the court in the ruling.

When the proprietors applied to the state of New York to form a private corporation to govern Montauk, they were required to include a clause protecting the Montauk residence and planting rights. The act of incorporation turned over the responsibility of protecting the Montauk rights to the state of New York, but the state had no mechanism for resolving such disputes. The only recourse, therefore, was through the state courts.

In 1870, David Pharaoh, acting as chief of the Montauk, and his counselors, Elisha Pharaoh, George Pharaoh, and Jeremiah Wright, sued the proprietors on behalf of "all the individual Indians residing at Montauk . . . ," charging that the trustees were cutting timber that belonged to the tribe.[18] The Montauk, stated Chief David, had been given the right in the 1703 agreement to fence in a general field for their planting and to cut fencing material and firewood. The fencing required a considerable number of mature trees every year, and the Montauk had no other source of supply. The whites, who could easily find wood elsewhere, were depleting a vital resource and causing irreparable damage to the Montauk community. Chief David asked the court to restrain the proprietors from taking any more wood from Montauk and requested an injunction prohibiting any cutting by the proprietors until the case was tried.

The court granted the plaintiffs an injunction prohibiting the trustees from taking wood until the case was heard. The proprietors filed an immediate appeal to vacate the injunction.[19] The judge refused, but he did modify the area designated in the prohibition to a twenty-acre lot identified as the primary source of wood on Montauk. The case was referred to court referee Justice Benjamin Downing on 27 April 1871. The following autumn, Downing reported his findings, recognizing David Pharaoh as chief of the Montauk tribe, which was

> occupying the same premises known as Montauk, at the time of discovery and early settlement of that part of America by the white people and that said Indians were then entitled to the entire of all said lands, including the premises described in the complaint.

Justice Downing recognized the Montauk tribe and did not question their right to bring suit in the New York courts, but he ruled against them, arguing that they had sufficient timber supplies for their needs. Although it would appear that an important legal precedent had been set, a court referee's findings do not carry the weight of a judicial decision. More importantly, the question of tribal status was not at issue in the case.

In 1878, several of the proprietors sued, in the case of *Grinnell v. Baker*, to obtain the right to sell the common lands at Montauk to the highest bidder.[20] The court granted them this right, but Judge O. Dykman ruled that the Montauk residence and planting rights remained protected. In one of his findings of fact, the judge further ruled that the Montauk tribe was a legal entity and that David Pharaoh was the duly appointed chief. The highest bidder was Arthur Benson, a wealthy Brooklyn businessman who wanted absolute, unencumbered title to the Montauk peninsula. Benson had his agents begin negotiating with individual Montauk in 1885, offering them cash settlements and new homes in the village of East Hampton if they would sign away their residence and planting rights.

The Montauk families later testified that Benson's agent, Nathaniel Dominy, had told them that the residence rights in the 1687 and 1703 agreements could not be voided by Benson's purchases. Dominy later confirmed this under oath. The wording in the deeds, however, was very explicit, calling for the Montauk to "remain away permanently from the said Montauk and not to enter upon the same for any purpose whatever . . . ."[21] Dominy explained the deeds to the Montauk, because most of them were unable to read or write. Only Maria Pharaoh, the matriarch of the tribe, was able to sign her name. All of the others made an X, which was designated as a legal signature.

By 1893, all of the Montauk residing on the lands had signed away their rights. When Benson began selling large parcels of land at high prices to real estate developers and to the Long Island Railroad, many of the Montauk who lived in nearby communities joined together in 1896 under the leadership of Wyandank Pharaoh, David Pharaoh's son, to bring suit against Benson and the

Long Island Railroad. They charged that the deeds were invalid and that whites were illegally occupying their lands.[22]

The lawyers for the defense filed a demur, arguing that the tribe had no legal standing before the New York State Supreme Court. The Montauk lawyers appealed to the appellate court, but the justices agreed with the demur and ruled that "the plaintiff is not a natural person or a corporation authorized by law to maintain an action as a tribe."[23] Reverend Eugene Johnson, a member of the Montauk tribe who was living in Philadelphia, entered a second suit in 1898. The reverend was a citizen and therefore a "natural person," but his case also failed, because the judge ruled that a tribe may not sue in court unless it has the permission of the New York legislature.[24] Legislative approval finally came in 1906, and the case reached Judge Blackmar's court in 1909. This time, the Montauk did receive a full court hearing on the basic charges. Charles Maas, the lawyer for the Montauk, made two primary arguments:

> 1. The Montauk tribe exists, and Wyandank Pharaoh is the duly recognized chief. The existence of the tribe was established by the judge's finding of fact in *Grinnell v. Baker* and is exempt from challenge. [Curiously, there was no mention of the 1871 trespass case.]
> 2. The deeds signed in 1885, 1893, and 1903 were all invalid.
>
> A. The deeds were obtained under fraudulent circumstances. The Montauk were led to believe that they could return to Montauk whenever they wished. They were encouraged to view the sale of the rights as no different from the leases of pasturage traditionally sold to whites on a yearly basis.
>
> B. The deeds were never approved by the New York state legislature as required by the 1777 constitution and subsequent statute.
>
> C. The deeds were negotiated with individual members of the tribe and therefore violate state law prohibiting the purchase of Native American land from individual tribal members.

But, once again, the Montauk suffered a crushing defeat. They appealed their case, but the appellate court agreed with Blackmar and added that the Montauk had mixed with "inferior races" and had become "impaired by racial miscegenation, particularly with the negro race . . . ." A new appeal was filed, but the court denied it in 1917 without opinion. A third appeal was also denied without

comment by Judge James Van Sicely on 8 March 1918.

Although Blackmar's decision would undoubtedly be read as arbitrary, outrageous, and racist today, it reflected the attitudes of the times. Blackmar, it should be noted, was a liberal who had ruled in a landmark case that the state of New York had the right to impose limitations on the working hours of women in the textile mills. When the mill owners argued for the sanctity of private property, Blackmar replied that the state had an obligation to intervene on behalf of the exploited women. That obligation, he argued, carried greater constitutional weight than the property rights of the mill owners.[25] The construction of his arguments in the Montauk case, therefore, cannot be dismissed as a strained attempt to rationalize the seizure of the Montauk land for private developers. The judge's reasoning in his decision takes on additional significance because this was not a jury trial. The full weight of the case was on Blackmar's shoulders, and there is every indication that he took his responsibility very seriously and considered his arguments carefully; it is also painfully evident, however, that he did not take the time to inform himself about the historical context of the early documents, nor did he appreciate the cultural complexities of such terms as *tribe* and *Indianness*.

BLACKMAR'S RULING: DONGAN AND DARTMOUTH

Blackmar began his list of findings with a review of the historical documents presented to him by the plaintiffs and the defendants. One of the crucial documents was the Dongan Patent, issued by the New York colonial government to the town of East Hampton. In 1686, Governor Dongan required all of the towns on Long Island to obtain new patents. The governor was seeking to gain more central control over the colony and to establish a greater degree of uniformity in administrative procedures. Dongan was particularly concerned, as were his predecessors, Nicolls and Lovelace, with the disruptive potential in conflicts over land purchased from Native Americans. The governor realized that the parcels of town land that still belonged to Native Americans could become the center of future turmoil.

Consequently, the East Hampton officials were granted, for a fee of two hundred pounds, a new patent that vested the trustees with the power to supervise and sanction the purchase of land from the Montauk and to manage all of the undivided land in the

town. The patent was a practical compromise between the feudal concept of crown property and the newly emergent concept of private property that was becoming a sacred icon to the colonial settlers. Private citizens must have a license to purchase Native American land, and the appropriate public agency would monitor the process. In return for the settlers' accepting colonial authority, the patent protected East Hampton's exclusive purchase rights. The purchase of Native American land was, therefore, clearly distinguished from all other real estate exchanges. This policy was consistent with the administrative strategy established by Richard Nicolls, the first governor of New York colony, to tighten colonial control over all relations between Native Americans and whites.

The next two documents that Blackmar examined were the 1687 deed conveying the rest of the Montauk lands to the proprietors from East Hampton and the counter bond guaranteeing residence and planting rights to the Montauk people. These documents, both negotiated by the trustees, clearly indicate the intent of the Dongan Patent. The deed was negotiated on behalf of the proprietors for the purchase of North Neck, Indian Fields, and Point Field at Montauk (see map 4). The process firmly established public control over all private land purchases from Native Americans.

A week later, on 3 August, ten Montauk men were called back to confirm that they and their people fully understood the meaning of the deed and the counter bond. This endorsement was written on the bottom of the 25 July deed.[26] Undoubtedly, the trustees' assurance, described in both documents, that they would be responsible for protecting the rights of the Montauk was a factor in persuading the Montauk to accept the settlement. This interpretation is confirmed again by events that followed sixteen years later and resulted in the 1703 agreements.

Blackmar, however, argued that the Dongan Patent was both a public action and a private grant. The public action established the trusteeship system, and the private grant was a license to purchase land from the Montauk. Once the proprietors had this license, he argued, no approval for any future purchase could be required. This grant, said Blackmar, was similar to the colonial charter granted to Dartmouth College in New Hampshire. In the historic Dartmouth College case, the Supreme Court ruled that the charter could not be altered by the new state government after the American Revolution. There was no need, therefore, to obtain approval from the state of New York, because the permission given to the

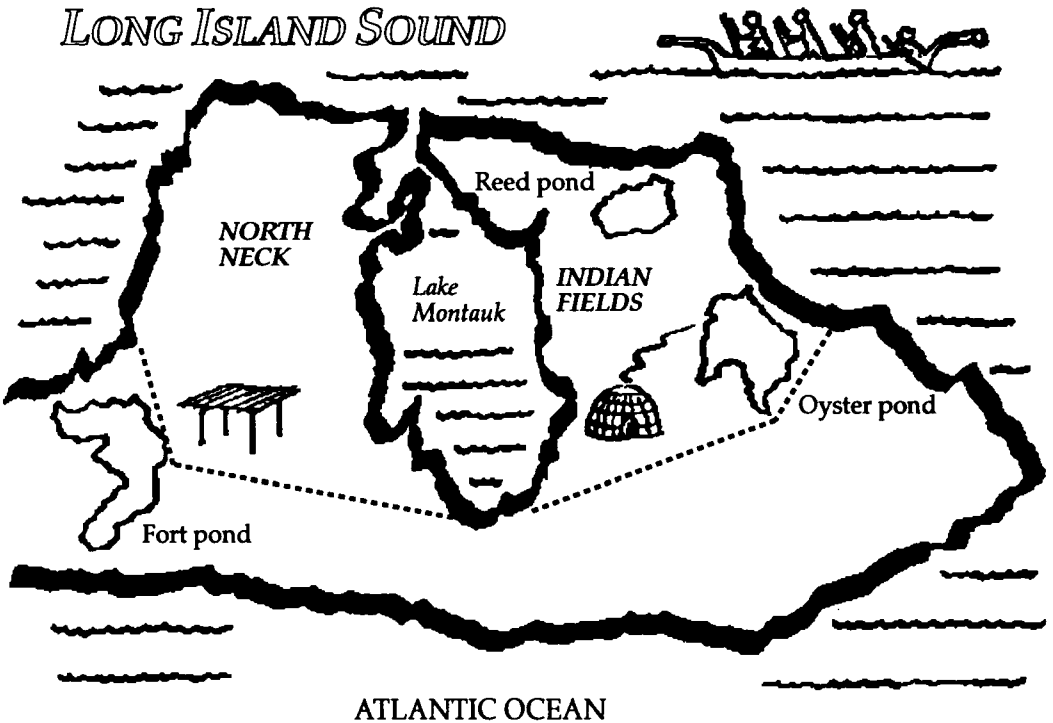
proprietors in East Hampton by Governor Dongan had been passed along to Benson when he purchased Montauk from the descendants of the former proprietors.

There is considerable irony in citing the Dartmouth case against the Montauk. Samson Occom had intended to use the money he raised in England to build an Indian college on or near Montauk lands. He never forgave Reverend Eleazer Wheelock for taking the funds to establish Dartmouth on the northern frontier of New Hampshire, far away from his people in southern New England. Now a case involving that college was being wielded against his Montauk descendants.

In their appeal, the Montauk's new lawyer, Allen Caruthers, attacked Blackmar's application of the Dartmouth case. The Dartmouth case, countered Caruthers, involved a contract between a government body and a private corporation. John Marshall wanted to guarantee that state governments could not arbitrarily alter private business contracts. Maas pointed out that the Dongan Patent was an agreement between a municipality and the colony of New York; there was no private party involved. The patent clearly states that the newly appointed trustees were given the license to buy the unpurchased lands. The East Hampton trustees gave the proprietors permission to buy the land, but the colony of New York, later the state, was sovereign. These sovereign bodies had an undisputed right to overrule municipal ordinances and did so regularly. The Dongan Patent, therefore, did not absolve the defendants from obeying the state requirement to obtain its permission prior to the purchase of Indian land. In fact, the patent, by its very definition, established the legal precedent of control over Indian purchases by a public body superior in authority to the town of East Hampton. No one could dispute the fact that the United States government and the state of New York assumed all of the sovereign power previously held by the crown.

The appellate judge did not respond to these arguments. He simply repeated Blackmar's contention that the Dongan Patent conveyed a private property right that could be passed along to anyone who would thereafter purchase the said property. Benson therefore did not have to seek approval for his purchase, because the Dongan Patent protected him from any interference with his private property rights.

The judges had made a radical departure from existing interpretations of New York state Indian law. Section 37, article 1 of the 1777 New York state constitution, which prohibited the purchase



MAP 4. Montauk Reserved Lands 1703
Map by David Martine.

of Indian lands without the approval of the state legislature, had been written by John Jay to protect Indians from "the frauds too often practiced towards the said Indians in contracts for their lands . . . ."[27] This provision was a continuation of the colonial policy that called for supervision of all trade and treaty relations between colonists and Native Americans.

The Dongan Patent reasserted the intent of the colonial authorities to monitor all purchases of Native American lands. The proprietors were granted a license by the colonial authorities to purchase land at Montauk under this general policy. Benson therefore bought the land from the proprietors of Montauk, but he could not buy the license to purchase Montauk residence rights, because that was a colonial action and the colonial authority was now replaced by the state of New York. Blackmar's ruling that this was a "private property" right runs counter to Jay's reasoning.

Eminent New York jurist James Kent also commented on these issues a generation later:

> [T]he protection of the property of the feeble and dependent remnants . . . within our limits . . . [is] a fundamental article of government . . . . [T]he British Crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in fee . . . . But these grants were not intended to convey, and the grantees never pretended that they had acquired, an absolute fee in the land.[28]

Kent also noted that the states had assumed all of the rights to enter treaties and acquire land vested in the previous colonial governments. "They exercised the power," Kent continued, "which had before been vested in the Crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of New York state."[29] Blackmar never addressed the contradictions between the interpretations of these historic jurists and his own opinion on the Dongan Patent.

BLACKMAR'S RULING: FRAUD AND DESULTORY CONVERSATION?

Blackmar then turned to the charge of fraud. He apparently believed that even if the state had reviewed the Benson purchases, they would have been approved. Blackmar did not consider the testi-

mony that the Montauk families had been misled by Benson's agents to be convincing evidence of fraud. Even though Dominy admitted telling the Montauk that they could return to Montauk whenever they wished, there was no evidence that Benson had instructed his representative to say this. The deeds, said the judge, had been negotiated in good faith by Benson, who had been, Blackmar believed, quite generous and had acted in the Montauk's best interest. The fact that most of the Montauk were illiterate and dependent on an oral interpretation of the deeds was not considered by the judge. Blackmar dismissed Dominy's advice to the Montauk as "desultory conversation." The appellate judge agreed with Blackmar and told the Montauk that they were clearly much better off now that they had been "assimilated" into civilized society than they had been when they were scratching out a meager existence on Montauk.

BLACKMAR'S RULING: THE JUDICIAL APPLICATION OF AN ANTHROPOLOGICAL CONCEPT

When he came to the crucial question of tribal existence, Blackmar rejected the plaintiff's arguments that Judge Dykman's findings in the *Grinnell* case established the legal status of the Montauk tribe. Blackmar agreed with the defendants that the ruling merely accepted the unchallenged assertion of fact by Chief David that he was the leader of a tribe of Indians called Montauk. Had the 1871 ruling on the trespass case been introduced, it would have been dismissed on the same grounds.

The question of tribal identity remained open, and the burden of proof, said Blackmar, was on those claiming to be tribal members. The defense had cited the criteria in the case of *Montoya v. the United States.*[30] The Supreme Court had ruled that a tribe was a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." Benson's lawyers then expanded on Montoya and presented a list of characteristics that they urged Judge Blackmar to apply. In order to be recognized as a tribe, the Montauk must be in conformity with statutes or a treaty, be governed by a leader whose orders must be obeyed, must consist of members who have turned their back on civilized society, must be able to make war and peace on their own, punish crime, or administer civil justice among themselves, must

be recognized as a tribe by any public agency in the past thirty years, and must have a continuous history of regularly scheduled meetings for tribal business.[31] Such criteria, if universally applied, would probably deny tribal status to most tribes in North America.

Blackmar did not accept the defense's list, but he did apply an artificial standard that reflected the prejudices of his day. In his twenty-third finding of facts, quoted at the beginning of this article, the racial biases and cultural confusions that played such an important role in the case emerged. The Montauk, said the judge, had lost their Indian traits. The comment tells us more about Blackmar and the class and racial prejudices of the times than it does about the "Indianness" of the Montauk. Ironically, this very same description often appears in the colonial records in reference to Native American peoples. Whites frequently commented contemptuously about the "lazy" Indians who hunted and fished while their women tilled the fields.

Seventeenth- and eighteenth-century ethnographic accounts by English observers also commented on the "lack of leadership" and the absence of anything similar to their own governmental institutions among the native peoples. These negative stereotypes, which had been used to describe the native peoples during the colonial period, were now cited as evidence that the Montauk were no longer Indians. In both instances, the stereotypes were part of a rationalization defending the alienation of Native American lands.

The leadership criterion is particularly ironic, because the hierarchical model presented by the defense had never existed among the Long Island bands before the English arrived. The concept of an absolute leader or "grand sachem," first introduced by Lion Gardiner as a mechanism to facilitate the purchase of land, was now turned upside down: The Montauk were denied their right to protect their lands in court, because they did not have a chief whose every order must be obeyed.

Blackmar had actually demonstrated that there were still many aspects of the Montauk culture that had survived generations of acculturation. Some of the changes, cited by Blackmar as evidence of tribal disintegration since 1885, had actually taken place during the early eighteenth century. The integration of the Montauk into the fringes of the English economy as menial laborers, for example, was not a pattern that had developed in the late nineteenth century, as Blackmar implied. This accommodation to the English economy began soon after the arrival of whites in North America

and remains a common pattern among most Native American groups on the continent.[32] These cultural adjustments to the economic realities have seldom been used in a court of law as a criterion for determining "Indianness."

The findings by Blackmar that the Montauk were no longer a tribe were invalid anyway, said Caruthers in his appeal, because the court had ruled in *Buttz v. Northern Pacific Railroad* (119 U. S. 55) that

> [n]either lapse of time, allotment of a portion of the tribal lands in severalty, immigration of a majority of the tribe, nor the fact that habits and customs of the tribe has [*sic*] changed by intercourse with whites will authorize the courts to disregard tribal status.[33]

Caruthers neglected to cite two other relevant cases that would have supported his position. In *Tiger v. the Western Investment Company*, 221 U. S. 286 (1911) and *United States v. Rickert*, 188 U. S. 432 (1903) the court held that only Congress can determine when changes in customs are sufficient to invalidate tribal status.[34]

The historical fact is, continued Caruthers, "that the tribe at the present time consists of over 377 beings, 237 adults, forty-eight minors, all of whom are accounted for, and ninety-two whose place of residence is unknown, this appears in the files in Washington."[35] Blackmar therefore had overstepped his authority when he declared the Montauk tribe to be extinct. A tribal ledger of uncertain date recently was discovered by the descendants of James Waters, one of the Montauk leaders during the long court struggle. There are well over four hundred entries, which appear to have been made between 1915 and 1920. Caruthers may have been referring to this list in its early stages before it was completed. The Montauk may have continued to collect names in preparation for the third appeal, which, unfortunately, was dismissed without an opinion. The tribal roll will be published in spring 1992 by the Suffolk County Archaeological Association in the new edition of *The History and Archaeology of the Montauk.*

In their response to the Montauk appeal, the defense hammered away on two themes. The Montauk, they said, did not meet the Montoya criteria because they did not live in a united community under one leadership or government, and they had disintegrated from their aboriginal tribal status because they had adopted "habits of civilization" and intermarried with African-Americans. The criteria were again inflated beyond Montoya but not so

grossly as in the original trial. The defense expanded the reference in Montoya to "unity in a community under one leadership" to read "maintaining an organization in conformity with statutes, or in conformity with a treaty . . . ." In other words, the Montauk had to come forth with minutes of meetings, a constitution, or a treaty to satisfy the defense's definition of a tribe. These arguments struck a responsive chord in every judge that the Montauk faced from the beginning of the struggle, when Wyandank sued the Long Island Railroad in 1895.

The Montoya criteria were required, said the defense, because of the absence of any official governmental recognition of the Montauk. Tribes often establish their existence through actions by the legislature, the executive, or the judiciary, but none of these, said the defense, had ever recognized the Montauk. "So much for governmental recognition," concluded the defense lawyer with a glib and arrogant assurance. Had Caruthers attacked these arguments head on, he might have had a stronger case. It would have been fairly easy to establish that the Montauk met the criteria set in Montoya and the subsequent rulings on tribal status.

It is possible, of course, that the climate of opinion at the time made it unlikely that a stronger Montauk case would have resulted in a different outcome. The nation was committed to the goal of unrestrained economic growth and development. The Montauk were a poor community of farmers, handymen, and domestics facing the giant engine of a new industrial age, an irresistible force fired by the ideology of "progress." The Montauk were the proverbial "dogs in the manger," standing in the way of a "better life" for all. The judges clearly spoke the minds of a vast majority of white Americans when they implied that Benson had actually been generous to a fault and that the white fathers knew what was best for their little brown brothers.

NOTES

1. *Wyandank v. Benson*, "Cases and Points," East Hampton Public Library Archives, 56. This edition, printed by the Daly law firm, is not paginated consecutively. The citations here are keyed to the author's table of contents in a typescript insert in the East Hampton library files. The case file is located in the Suffolk County Civil Court Annex, Riverhead, NY (file 3576).

2. John A. Strong, "The Evolution of Shinnecock Culture," in *The Shinnecock Indians: A Culture History*, ed. Gaynell Stone (Lexington, MA: Ginn and Company, 1983), 36-38.

3. Joseph Osborne, ed., *Records of the Town of East Hampton*, vol. 1 (Sag Harbor, NY: Hunt, 1887), 2–4.
4. Raymond Smith, ed., *In Re Montauk* (East Hampton, NY: East Hampton Town Trustees, 1926), 25–29, 32–34.
5. Ibid, 36–45.
6. Osborne, *Records of the Town of East Hampton*, vol. 2, 213–14.
7. Smith, *In Re Montauk*, 48-49.
8. Ibid., 49–56,
9. Ibid., 54–56.
10. Trustees of Montauk, "Fatting Field Books," East Hampton Library Archives, (1854-79), see 1855.
11. John A. Strong, "How the Montauk Lost Their Land," in *The History and Archaeology of the Montauk*, ed. Gaynell Stone (Stony Brook, NY: SCAA, 1979; revised edition scheduled for publication spring 1992).
12. Brooklyn Historical Society Library, "Montauk Deeds," folder 10.
13. Samson Occom, "An Account of the Montauk Indians of Long Island," in *History and Archaeology of the Montauk*, 149.
14. William S. Simmons, *Spirit of the New England Tribes: Indian History and Folklore, 1620–1984* (Hanover, NH: University of New England), 20.
15. Smith, *In Re Montauk*, 59–61.
16. See Harold Blodgett, *Samson Occom* (Hanover, NH: Dartmouth College Manuscript Series 3, 1935), and W. Deloss Love, *Samson Occom and the Christian Indians of New England* (Boston: Pilgrim Press, 1899).
17. Henry Hedges, *Memories of a Long Life* (East Hampton, 1909), 32–34.
18. Pharaoh Trespass Case, East Hampton Library Archives. See also Suffolk County Historical Documents Room, Riverhead County Center, Riverhead, NY, File 881.
19. Ibid.
20. Smith, *In Re Montauk*, 234–39.
21. Samuel Pharaoh deed, Hearings before the Subcommittee of the Senate Committee on Indian Affairs, 22 September 1900 (Washington, DC: US Government Printing Office). On file in State University of New York at Stony Brook, NY, Library Records Room (SIN, 56C, drawer 14, A32), 53–54.
22. Ibid., 24-127. See also file 2171 in Suffolk County Historical Documents Room, Riverhead County Center, Riverhead, NY.
23. Ibid., 125.
24. Ibid., 127.
25. Robert Snyder, "Women, Wobblies, and Worker's Rights," *New York History* 61 (1979): 29–57.
26. Osborne, *Records of the Town of East Hampton*, vol. 2, 214.
27. Charles Lincoln, *The Constitutional History of New York*, vol. 4 (Rochester, NY: Lawyer's Cooperative, 1906), 153.
28. Ibid., 167.
29. Ibid., 170.
30. *Montoya v. United States, United States Reports* (New York: Banks Law Publishing Co., 1901), vol. 180, 266.
31. *Wyandank v. Benson*, "Cases and Points," Defendant's Brief, Case on Appeal 26, 43–44.
32. John A. Strong, "From Hunter to Servant: Patterns of Accommodation to Colonial Authority in Eastern Long Island Indian Communities," in *To Know the*

Place, ed. Joann Krieg (Hempstead, NY: The Long Island Studies Institute, 1986).

33. *Wyandank v. Benson*, "Cases and Points," Appellants Points in Court of Appeals: 510f., p. 26.

34. L. R. Weatherhead, "What Is an Indian Tribe? The Question of Tribal Existence," *American Indian Law Review* 8:1 (1980): 9.

35. *Wyandank v. Benson*, "Cases and Points," Appellants Points: 28.