IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 102-63

(Filed: **March 31, 1982**)

JESSIE SHORT et al.)
)
v.) Indians of a Reservation, definition of;
) Indians of the Hoopa Valley Reservation
THE UNITED STATES)

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OPINION

SCHWARTZ, Trial Judge: The history of this case is set out in the opinions of the court in 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied, 416 U.S. 961 (1974)(determining liability); 209 Ct. Cl. 777 (1976)(allowing interventions and closing the class), and in an opinion of September 23, 1981, denying motions to dismiss and to substitute a plaintiff. 228 Ct. Cl.___, 661 F.2d 150 (1981), cert. denied, ___ U.S.___ (March 22, 1982). The present opinion sets standards for the qualification of the roughly 3800 remaining plaintiffs as Indians of the Hoopa Valley Reservation entitled to share in the income of the Reservation.

Suffice it here to say that the court has earlier held the Hoopa Valley Reservation to be one reservation, all of whose peoples, specifically including such of the 3800 plaintiffs as are held to be Indians of the Reservation, have equal rights in the division of the timber profits from the unallotted trust-lands of the reservation, and thus that the Government has wrongfully paid the profits exclusively to the members of defendant Hoopa Valley Tribe.

Decision on the pending motions for summary judgment on behalf of some 3300 plaintiffs now requires the formulation of standards for the determination of who is an Indian of the Reservation, and the application of the standards to the individual plaintiffs who are the subjects of cross-motions for summary judgment. On a case by case basis, the court has already granted summary judgment to 121 plaintiffs who have established their claim or have been conceded to be Indians of the Reservation.

In its decision of September 23, 1981, the court ruled that the "detailed and carefully drawn" standards used by the Hoopas to determine the membership of the Hoopa Valley Tribe "provide an appropriate basis for determining which of the plaintiffs are Indians of the Reservation." Ct. Cl. No. 102-63, slip op. at 14, 661 F.2d at 158. The motions for summary judgment having been referred to the trial judge by orders of October 1, October 18, and November 12, 1976, he was directed on September 23, 1981, to use the Hoopa standards as the "guideline and basis for determining which of the plaintiffs are entitled to

share in the timber payments because they are Indians of the Reservation." The court left it to the trial judge's sound discretion "to determine what, if any, changes should be made in the Hoopa standards and in the application of the governing standards in individual cases." Id. at 15, 661 F.2d at 159. In this connection, the court spoke of the need for some flexibility so that recognition can be given to the small number of cases in which strict application of the standards would produce manifest injustice.

What follows responds to these directions.

The first, all-important matter to be studied, for it will be determinative of the standards to be applied to the plaintiffs, is the membership standards used by the Hoopas. A prime source for these standards is the court's decision on liability reported in 202 Ct. Cl. 870, and more particularly findings 136-156 made therein and exhibits on the trial (herein "fdg.___" and "pl. exh.__," or "def. exh.___"). Additional tribal records documenting the development of the Hoopa standards are attached to appendices 43 and 47 to the defendants' joint brief filed August 15, 1977 (herein "App. 43", or "App. 47"). Once the Hoopa standards are determined in Part I, they will be applied to plaintiffs in Part II.

I. The Standards for Membership of the Hoopa Valley Tribe

The Hoopa Business Council. Since the Hoopa Business Council superintended the development of the Tribe's membership standards, a preliminary word about the Council is appropriate.

The Indians of Northern California, among them the Hoopas, were not politically organized, and except for a brief period in 1915-1916, the first Hoopa representative body was the Hoopa Business Council organized in 1933. Fdgs. 109, 110, 119-125. Members of the Council were elected from districts within the Square by the Indians residing there. Fdg. 127. The Square is the name of the original reservation, and is identified with the Hoopas, whose Tribe has been permitted to intervene here as a co-defendant. The plaintiffs claim to be Yurok Indians of that part of the Reservation, added in 1891, known as the Addition.

In 1948, the Bureau of Indian Affairs (BIA), in preparation for the distribution of timber profits to the Indians of the Square, suggested to the Council that it "must start to revise the roll and determine who is entitled to receive payment," and that the Council "might pass an ordinance, with the approval of a general council, stating who is a member now, whether children of enrolled members must be born on reservation to be enrolled, etc." Pl. exh. 296. The roll to be revised was doubtless the census roll of the Reservation. This roll in its last years of compilation, 1933-40, listed residents of the Square and of the Addition, together, and also listed some nonresidents of the Reservation. Fdgs. 37-48. A new, exclusively Hoopa membership roll was necessary, if, as was the deliberate intent, those to receive payments were to be limited to residents of the Square deemed to be Hoopas.

The First List of Hoopa Tribe Members. In response to the BIA's suggestion, the Council set about the compilation of a tribal roll. The product of its work was "Schedule A," also entitled "Official Roll as of October 1, 1949, of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys." It was approved at a general election on May 13, 1950 and by the BIA on March 25, 1952. Fdgs. 147, 153. It listed 659 names and gave the percentage of Indian blood--type unspecified--of each person listed. Def. exh. 136b.

Creation of Schedule A began with informal discussions of the criteria to be used and the solicitation of the opinions of residents of the Square. A requirement that members possess a minimum degree of Hoopa blood was favored by some of the Council members. Affidavit of R. R. Baldy, App. 44, defs' brief filed August 15, 1977, para. 10. The BIA, however, suggested, and the Council preferred, reliance on the schedules compiled for land allotments on the Square. Baldy affidavit, para. 11; Council Minutes, July 1, 1948, pl. exh. 744, 1; see fdgs. 78-100.

Allotments were first made on the Square in 1896 by an agent named Turpin, but these were not approved. Fdg. 88. In 1918, agent Mortsolf prepared a new schedule, which was approved in 1922. Fdg. 90. Because the Turpin schedule had not been approved, and because the Council apparently believed that "Captain Turpin scheduled allotments in a haphazard way to many non-Hoopas," the Council decided to use the names on the Mortsolf schedule. These latter, they believed, were

limited to Hoopas who with their descendants were thought to be the most inclusive group considered part of the Hoopa Community. Baldy affidavit, paras. 11, 12. The Mortsolf schedule of allottees, and their descendants, with the omission of two allottee families known to be non-Hoopas, accordingly became Schedule A, the first list of members of the Hoopa Valley Tribe. Id., para. 12.

A minimum blood degree was not required, although some concern for blood was demonstrated by the request, in the applications for membership, for the justification for the application and a specific inquiry for the degree of "Hoopa Indian blood." Fdg. 138. Schedule A itself, under a heading reading only "Degree of Blood," listed the blood of each member next to his name, def. exh. 136b, Schedule A, and it is clear that the blood of a number of those listed included non-Hoopa Indian blood. Exhibits 1, 23(List II), to Pls' Requests for Admissions, filed Feb. 28, 1977, Defs' Admissions Nos. 1, 3, 126, filed April 14, 1977.

Schedule B. Not long after the creation of Schedule A, the Council came to believe that some longtime Hoopa residents of the Square were not included in Schedule A, though their or their ancestor's failure to receive an allotment "was through no fault of their own." Fdg. 139. Allotments on the Square had been discontinued in 1933, before all those eligible had received parcels, fdg. 96, and so it was quite possible that some Hoopa residents of the Square had been eligible, but unsuccessful for lack of land.

Another list was therefore created. It was called Schedule B and entitled "Addition to the Official Roll of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys." Essentially a supplementation of Schedule A, Schedule B contained the names of 18 Indians who had applied for and been excluded from Schedule A, but whom the Council considered, notwithstanding their failure to receive an allotment, to be "true Hoopas" and their descendants. Fdgs. 139, 142. At a Council meeting in December 1951, the difference between Schedules A and B was thus described by the chairman: "[T]he A roll was based on the allottees and their descendants, [and] the B roll were those that were left out, or they didn't apply . . . ." Pl. exh. 764, 1.

Both Schedules A and B were approved at a general election of May 13, 1950, and by the BIA on March 25, 1952. Schedule A was approved as a whole, in one vote. In the case of Schedule B, however, the 18 candidates, by name or family group (e.g., "George Nixon, Sr. and children") were voted on and approved separately. Fdg. 147; pl. exh. 561. The notice of the election stated that its purpose, inter alia, was "to adopt officially into the Hoopa Valley Tribe" members listed on Schedules A and B "to enable them to share in Hoopa Tribal benefits and moneys." Fdg. 141. The persons on Schedules A and B now constituted the entire tribal membership as of October 1, 1949, thereafter known as the base roll.

The Constitution. Concurrently with the development of Schedules A and B, the BIA suggested that the Council revise the Hoopa "Constitution and By-Laws" first adopted in 1933 when the Council was established. Council Minutes, Oct. 7, 1948, pl. exh. 746, 1. See fdgs. 123-125. The draft proposed by the BIA provided, in Section 1 of Article IV, for tribal membership of the children of members and for corrections to the membership roll, and in Section 2, for rules for the adoption of new members and for termination of membership (fdg. 145):

> Article IV.
>
> Section 1. The membership of the Hoopa Valley Tribe shall consist as follows:
>
> (a) All persons of the Hoopa Indian blood whose names appear on the official roll of the Hoopa Valley tribe as of October 1, 1949, provided that corrections may be made in the said roll by the Business Council within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.
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> (b) All children born to members of the Hoopa Valley Tribe who are at least one-quarter degree Indian blood.
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> Section 2. The Business Council shall have the power to make rules governing the adoption of new members or the termination of membership in the tribe.

No specific degree of Hoopa or Indian blood had been required for original membership under Schedule A or B, and a number of Indians with little or no Hoopa blood became members by inclusion on Schedule A. Yet the blood of the persons on the base roll was in the Constitution described as "Hoopa Indian blood," and, further, the 1/4 blood degree to be

required of their children, for membership, was to be "Indian blood."

The Council repeatedly used the term "Indian blood," and not "Hoopa blood" or "Hoopa Indian blood," to describe the blood requirement for after-born children, leaving no doubt that other than Hoopa blood was intended to be included. For instance, in the notice of the election to adopt the Constitution and Schedules A and B, the Council said that the election would "determine the minimum degree of Indian blood which members of the Hoopa Tribe must have to be eligible for Tribal enrollment in the future." Fdg. 141.

The degree of blood to be required of the children was put up for vote. The vote of the 98 electors on various degrees was very close: for "limiting future tribal enrollment" to 1/2 degree Indian blood, there were 15 votes; for 1/4 degree, 42 votes; and for 1/8 degree, 41 votes. Pl. exh. 561. The electors, composed exclusively of Schedule A listees, fdg. 142, thus approved the Constitution as proposed by the BIA, with the 1/4 Indian blood degree requirement unchanged. The Constitution was so adopted on May 13, 1950; the BIA added its approval on Sept. 4, 1952. Fdgs. 144, 145, 153.

With the adoption of the Constitution and the two Schedules, the official tribal roll comprised the 659 allottees and descendants on Schedule A, and the 18 deserving of allotment and their descendants added by Schedule B, all living on October 1, 1949. The Constitution contemplated only three types of changes in membership, all provided for in Article IV; (1) the addition of

"[a]ll children born to members of the Hoopa Valley Tribe who are at least one-quarter degree Indian blood" (herein "after-born children"); (2) "corrections" in the roll by the Council within five years of the approval of the Constitution, i.e., until September 4, 1957; and (3) additions or subtractions under rules which the Council might make "for the adoption of new members or the termination of membership in the tribe."

Schedule C. Schedules A and B omitted many applicants for enrollment, among them some long-time residents of the Square. To remedy the omission, standards were thereupon established, in April 1953, pursuant to the Council's Article IV, Section 2 power to make additional membership rules, for a third list of members, Schedule C. Schedule C required (1) 15 years of residence on the Square, prior to June 2, 1953, when applications closed; (2) forebears born on a ranchero on the Square; and (3) at least 1/4 Hoopa blood. A special screening committee would pass on applications. Fdg. 152; pl. exh. 572A. While the available records do not expressly set out the date by which the 15-year residence requirement had to be satisfied, the date of June 2, 1953, by which applications for Schedule C were to be submitted, is the most reasonable. This is the Government's position.

Schedule C, listing 18 successful applicants, was adopted on June 10, 1954. Fdg. 152(c); def. exh. 137f. When a member asked, at a Council meeting on December 6, 1951, at which Schedule C was first being considered, what was the basis of the C roll, the chairman replied that "the C roll were those

that didn't b.long here, but were living here." Pl. exh. 764, 1. No attention seems to have been paid to the difference between the "Hoopa" blood required by Schedule C and the "Indian" blood requirement for children of members in the Constitution.

Redefinition of Membership Standards--1959. Within the five years allowed by the Constitution, the Council by resolution added members by way of corrections to the base roll. See, e.g., def. exh. 137c. After-born children were also admitted, pursuant to Article IV, Section 1(b) of the Constitution. See def. exh. 137d, 2; def. exh. 137g. Applications were rejected in numerous letters from the Council. See App. 47.

Some of the Council decisions, by secret ballot without explanation of the applicant's deficiencies, created controversies. See, e.g., Council Minutes, April 28, 1955, pl. exh. 782, 2; May 16, 1955, pl. exh. 783; May 11, 1956, pl. exh. 785, 2-3. One such controversy centered on the denial of membership applications, under the standards of Schedule A, by allottees in fact, who were not listed in the 1922 Mortsolf allotment schedules, but whose allotments were approved when schedules containing their names were resubmitted in 1933. Fdgs. 90, 93, 95, 96. At least four Indians similarly situated, however, were included on Schedule A. App. 43, exh. 36. A BIA official requested clarification, on the ground that Schedule A was nowhere stated to be limited to the Mortsolf schedule allottees, and the "common definitions given" of Schedule A were that it consisted of "[a]ll allottees or direct descendants of allottees living as of Oct. 1, 1949," a definition obviously including allottees in fact though not listed by Mortsolf.

Such controversies led to the adoption on November 6, 1959, of a resolution to provide, among other things, a set of definitions which would "accurately describe the procedures followed and clarify the intent not heretofore expressed in the membership requirements as set forth in Article 4 of the Constitution and Bylaws of the Hoopa Valley Tribe approved September 4, 1952." Fdg. 155. The need to silence charges of arbitrariness and inconsistency levied at the Council was mentioned.

In pursuance of the purpose to define the terms used in the Article IV membership standards, paragraph 1 of the resolution defined the term "Hoopa Valley Tribe" used in section 1 of Article IV of the Constitution, to include the "remnants of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, and Tish-tang-atan Bands of Indians, residing within the twelve-mile square . . . and their descendants." Fdg. 155.

Schedule A was defined, in paragraph 3 of the resolution, as the group of Mortsolf allottees and their descendants, both living on October 1, 1949. Fdg. 155 (the date Oct. 1, 1941, in finding 155 is an error and should read "Oct. 1, 1949"). When, however, the BIA continued to press its point that Schedule A actually included allottees in fact who were not on Mortsolf's schedule, the Council acceded and in a resolution of December 11, 1959 redefined Schedule A as consisting of "allottees living on October 1, 1949 and descendants of allottees living on October 1, 1949." Fdg 156. A separate resolution of the same date permitted reexamination of previously rejected applications by allottees in fact. Pl. exh. 570.

Schedule B was defined, in paragraph 4 of the resolution, as consisting of those living on October 1, 1949, who had filed enrollment applications at the same time as those eventually included on Schedule A, who were eligibile for, but did not receive allotments, whose residence on the Square "was not subject to question," and "who were generally considered as members of the Hoopa Valley Tribe and permitted to participate in Tribal Affairs, and their descendants living on October 1, 1949." Fdg. 155.

Schedule C, and the difference between Schedules A and B on the one hand and C on the other, were in the resolution explained thus: Schedules A and B were described in paragraph 2 as making up the official roll of the Tribe referred to in the Constitution, and paragraph 5 defined the constitutional power to correct the roll as limited to those who qualified under those Schedules. Schedule C was in paragraph 6 defined as those Indians who had applied within a 60-day period ending June 2, 1953, and were qualified by a minimum 15 years residence on the Square, "forebearers" [sic] born there, and at least "1/4 degree Hoopa blood."

The difference between A and B on the one hand and C on the other lay in the inheritability of membership of members' children. The child born on or before October 1, 1949 of a Schedule A or B member automatically became a member by descent alone. The child born on or before October 1, 1949 of a Schedule C member did not. That child could become a member only on qualifying under the tripartite requirements of Schedule C.

Once elected, however, the Schedule C member could pass, equally with Schedule A and B members, his membership to his children under the provision of Article IV, Section 1(b) of the Constitution for after-born children, i.e., children born after October 1, 1949. This was the effect of the last paragraph of the Resolution, entitled "Procedures"(fdg. 155):

> The C Schedule established certain specific requirements to be met by those persons who were ineligible for enrollment under the requirements of Schedule A and Schedule B. Eligibility was determined on an individual basis and did not automatically pass from a parent to a child born prior to October 1, 1949. However, once an individual was approved for membership as a C Schedule applicant, he acquired the same rights and privileges as other enrolled members.

Finally, the resolution defined the term "children" used in the after-born child provision of Article IV, Section 1(b) of the Constitution as "restricted to persons born after October 1, 1949." This provision confirmed the distinction between those Indians living on October 1, 1949, who could become members on satisfaction of Schedule A or B requirements, and those born thereafter. The Indian born on or before October 1, 1949, seeking admission by the standards of Schedule A or B, need only show his allotment, or descent from an allottee, for membership under Schedule A, or, for membership under Schedule B, that he was a "true Hoopa" in the sense of Schedule B or descended from one. The Indian born after that date could become a member only by derivation from a parent who was a member, together with a personal 1/4 degree of Indian blood.

For the Indian seeking Schedule C membership, birth before 1949 was only the beginning. That Indian was required to show