719 F.2d 1133

Jessie SHORT, et al., Appellants,

v.

The UNITED STATES, Cross-Appellant and Appellee,

and

Hoopa Valley Tribe, Cross-Appellant and Appellee.

Appeal No. 102-63.

United States Court of Appeals,

Federal Circuit.

Oct. 6, 1983.

William C. Wunsch, Weyman I. Lundquist and William K. Shearer, San

Diego, Cal., argued for appellants.

Thomas P. Schlosser, Seattle, Wash., argued for intervenor Hoopa Valley Indian

Tribe.

James Earl Brookshire, U.S. Dept. of Justice, Washington, D.C., argued for

appellee, United States.

Before RICH, DAVIS, BENNETT, SMITH and NIES, Circuit Judges.

DAVIS, Circuit Judge.

This ancient case (commenced against the Government in the Court of Claims

some two decades ago) comes once again for appellate scrutiny. Ten years ago,

in 486 F.2d 561, 202 Ct.Cl. 870 (1973), cert. denied, 416 U.S. 961, 94

S.Ct. 1981, 40 L.Ed.2d 313, the Court of Claims decided that the Hoopa Valley

Reservation was one reservation all of whose Indian peoples (including, in

general, non-Hoopa Indians residing on or connected with the reservation) were

"Indians of the Reservation" entitled to equal rights in the division of timber

profits (and other income) from the unallotted trust land of the reservation,

and therefore that the United States had wrongfully paid those profits

exclusively to the members of the *1134 Hoopa Valley Tribe. [FN1] In 209

Ct.Cl. 777 (1976), the court allowed interventions by new plaintiffs and closed

the class of plaintiffs (now amounting to some 3800). In 661 F.2d 150, 228

Ct.Cl. 535 (1981), cert. denied, 455 U.S. 1034, 102 S.Ct. 1738, 72 L.Ed.2d

153 (1982), the court denied new motions to dismiss and to substitute the Yurok

Tribe as plaintiff, and directed the trial judge to recommend standards for the

qualification of the approximately 3800 remaining plaintiffs as Indians of the

Hoopa Valley Reservation entitled to share in the income of the Reservation.

On March 31, 1982, then Trial Judge Schwartz, who had long handled the case at

the trial level, issued his opinion on that subject. In that decision, he

established standards for qualifying the various plaintiffs and granted and

denied the plaintiffs' motions for summary judgment in accordance with those

standards. All parties appeal from that decision which is now before us. [FN2]

FN1. The Hoopa Valley Tribe, which previously participated as amicus

curiae, was permitted to intervene at that time as a party defendant.

See also Hoopa Valley Tribe v. United States, 596 F.2d 435, 219 Ct.Cl.

492 (1979).

FN2. The parties filed petitions for review of Trial Judge Schwartz's

decision before October 1, 1982. Pursuant to an October 4, 1982 order of

this court, the Claims Court entered judgment on October 6, 1982,

corresponding to the decision recommended in this case by Trial Judge

Schwartz. The case was transferred on October 1, 1982, to this court under

section 403 of the Federal Courts Improvement Act of 1982, 96 Stat. 57-

8 (April 2, 1982).

Shortly before and at the oral argument of this appeal, the United States and

the Hoopa Valley Tribe raised again the issue of the jurisdiction of the Court

of Claims (and, now, of the Claims Court) over the entire suit. Though the

question of the court's jurisdiction had been previously raised (and

jurisdiction sustained) on a number of occasions, the new challenge was on

grounds not before articulated (though the assault was one that could readily

have been presented much earlier). We allowed the Government and the Hoopa

Valley Tribe to file motions to dismiss on the new basis, and those motions

have been extensively briefed. We withheld decision on the appeal until the

Supreme Court had decided United States v. Mitchell, U.S.Sup.Ct., Oct. Term

1982, No. 81-1748 (Mitchell II). That decision was rendered on June 27,

1983 (--- U.S. ----, 103 S.Ct. 2961, 77 L.Ed.2d 580), and we then allowed

the parties to brief the impact on the present case of the Supreme Court's

recent opinion and ruling. We are now ready to dispose of the current appeal.

In Part I of this opinion, infra, we discuss the new challenge to jurisdiction

and reject it, especially in the light of Mitchell II. In Part II, infra,

we consider the merits of Judge Schwartz's standards and affirm them, as well

as his conclusions of law.

I. Jurisdiction

[1] This is an action for monies said to have been illegally distributed to

members of the Hoopa Valley Tribe, without any share going to those of the

plaintiffs who qualify as Indians of the Hoopa Valley Reservation. The details

are set forth in the Court of Claims' decisions reported at 486 F.2d 561

and 661 F.2d 150. The current jurisdictional attack [FN3] is that Congress

has not waived sovereign immunity for the suit and in any event that plaintiffs

have no substantive claim for money from the United States (even if their

allegations and substantive positions are sustained, as they have been).

FN3. As we have said, there have been several other jurisdictional

challenges in the past--all rejected by the Court of Claims.

A.

In Mitchell II, the Supreme Court upheld jurisdiction in the Court of

Claims (and, now, in the Claims Court) of a suit by Indian plaintiffs for

damages for breach of fiduciary duties by the Government. On the

jurisdictional issue now before us, the current case is essentially governed by

that recent decision. Just like Mitchell II, this litigation concerns

Indian-owned forest lands on an Indian reservation (there, the Quinault
Reservation in Washington; here, the Hoopa Valley Reservation in California),
with these forest resources being managed *1135 by the Department of the
Interior which exercises "comprehensive" control over the harvesting of the
Indian timber. See Part III of the Supreme Court's opinion in Mitchell
II, --- U.S. at ----, 103 S.Ct. at 2969-2974; also see --- U.S. at ----,
103 S.Ct. at 2965-2966. The "broad" statutory authority of the Secretary of
the Interior over the sale and management of the timber on the two reservations
is precisely the same, i.e., 25 U.S.C. ss 405-406. In Mitchell, those
plaintiffs claimed breach by the Government of fiduciary duties in the
management and sale of the timber; here, plaintiffs likewise claim breach of
such fiduciary duty. The difference is that in Mitchell II the alleged
injury had to do with such things as the price obtained for the timber, failure
to manage on a sustained yield basis, and exacting improper fees and charges--
here the injury is the discriminatory distribution of the proceeds of the
timber sales and management (and other Reservation income). The Supreme Court

expressly held that the statutes and regulations relating to the management of

Indian timber, see primarily 25 U.S.C. ss 405-407, established a

fiduciary relationship with respect to the timber, and because they clearly

established such "fiduciary obligations of the Government in the management and

operation of Indian land and resources, they can fairly be interpreted as

mandating compensation by the Federal Government for damages sustained. Given

the existence of a trust relationship, it naturally follows that the Government

should be liable in damages for the breach of its fiduciary duties."

--- U.S. at ---- - ----, especially ----, 103 S.Ct. at 2971-2973,

especially 2972. It must also follow that the Government was under fiduciary

obligations with respect to the comparable Indian forest lands involved here,

and is liable for breach of fiduciary obligation in failing to distribute the

sale proceeds (and other income) to persons entitled to share in those

proceeds--such as those plaintiffs who turn out to be qualified in this case.

B.

The contentions of the Government and of the Hoopa Valley Tribe (on the

matters discussed in this Part I) that have survived Mitchell II [FN4] all

lack merit. First, it is conceded that Mitchell II destroys the argument

that there has been no waiver of sovereign immunity. The Supreme Court ruled,

overriding prior intimations to the contrary, that the Tucker Act is the only

necessary consent to suit where statutes and regulations create substantive

rights to money damages against the United States. --- U.S. at ----, 103

S.Ct. at 2969. "If a claim falls within this category, the existence of a

waiver of sovereign immunity is clear" and the statutes or regulations founding

the claim "need not provide a second waiver of sovereign immunity." Id. The

opinion went on to declare that, in determining whether statutes or regulations

create substantive rights to money, the court need not construe them "in the

manner appropriate to waivers of sovereign immunity." Id.

FN4. We refer to the contentions made in the briefs filed with us by those

parties after and in the light of Mitchell II.

The remaining issue (for this Part I) is whether there are statutes or

regulations creating substantive rights to money. As we have said supra,

Mitchell II specifically held that the forest management laws and

regulations (which likewise pertain to this case) do create such substantive

rights to money. The Government and the Hoopa Valley Tribe now try to

distinguish Mitchell II by saying that that case involved only allotted

lands, while the present litigation concerns unallotted lands. The former are

dealt with in 25 U.S.C. s 406 and the latter in 25 U.S.C. s 407. But the

Supreme Court's whole opinion consistently treats together both sections (and

the regulations under them) in ruling that the statutory scheme creates a

fiduciary duty toward the Indians entitled to the proceeds of the forest. See

--- U.S. AT ----, ----, ---- - ----, ---- - ----, 103 s.ct. at 2963-2964,

2964-2965, 2969-2971, 2971-2974. The *1136 comprehensive control by the

Interior Department is precisely the same for both types of land, and that is

the primary reason for finding a fiduciary duty on the part of the Government,

--- U.S. at ---- - ----, 103 S.Ct. at 2971-2974. The purpose to benefit

the Indians is equally clear. Section 407 (treating with unallotted lands)

authorizes sale by Interior of timber on unallotted lands, and then

specifically provides that "the proceeds from such sales * * * shall be used
for the benefit of the Indians who are members of the tribe or tribes concerned
in such manner as [the Secretary] may direct." In this respect there is no
substantial difference between sections 406 and 407, [FN5] and both "can fairly
be interpreted as mandating compensation by the Federal Government for damages
sustained." --- U.S. at ----, 103 S.Ct. at 2973-2974.

FN5. Section 406 provides that proceeds of sales from allotted land "shall
be paid to the owner or owners or disposed of for their benefit under
regulations to be prescribed by the Secretary of the Interior" (emphasis
added).

Both movants (the Government and the Hoopa Valley Tribe) also make much of the
fact that the Act of April 8, 1864, 13 Stat. 39, which authorized the
establishment of the Hoopa Valley Reservation and on which the Court of Claims
primarily based its determination that qualified plaintiffs were entitled to
share in the disputed monies (although they were not members of the Hoopa
Valley Tribe), did not contain any authorization to the Government to sell or

manage timber or empower the Government to distribute the proceeds. That may

be true but it is irrelevant to the jurisdictional point before us. When this

action was begun in 1963, the timber management legislation (mainly 25

U.S.C. ss 405-407) and the regulations thereunder, which do sustain

jurisdiction, had long been on the books [FN6] and covered all the monies

claimed in the suit (which do not go back beyond the six years prior to the

commencement of the action in 1963). The function of the 1864 statute is to

help show that the Government had a fiduciary relationship toward qualified

plaintiffs with respect to the Hoopa Valley Reservation and also to show that

the Secretary's action in excluding all but members of the Hoopa Valley Tribe

from the distribution of the monies was unlawful.

FN6. The first of these statutes was enacted in 1910, and the first

regulations issued in 1911.

It is also said that 25 U.S.C. s 407 directs use of the timber proceeds for

the benefit of Indians "who are members of the tribe or tribes concerned," and

that none of the plaintiffs is a member of an organized or recognized "tribe"

(as the Hoopa Valley Tribe has been since 1950). But it is clear to us that

Congress, when it used the term "tribe" in this instance, meant only the

general Indian groups communally concerned with the proceeds--not an officially

organized or recognized Indian tribe--and that the qualified plaintiffs fall

into the group intended by Congress. This was in effect an implicit holding of

the Court of Claims when it decided in 1981 (en banc) that the non-organized

Yurok tribe should not be substituted for the present plaintiffs. 661 F.2d

at 153-156. In any event, it is the proper interpretation if, as has already

been held, qualified plaintiffs are entitled to recover a proper share of the

proceeds. From its original enactment in 1910 until its amendment and

reenactment in April 1964, s 407 provided that proceeds from the sale of timber

on unallotted lands "shall be used for the benefit of Indians of the

Reservation " (emphasis added). [FN7] The 1964 substitution of "members of the

tribe or tribes concerned" for "Indians of the Reservation" was obviously not

designed to cut off existing rights of Indians of a reservation with respect to

communal land (or to change the definition of those entitled) but rather more

clearly to allow coverage of Indians who were entitled to proceeds from

reservation property but who happened to reside elsewhere than on the

reservation. H.R.Rep. No. 1292, 88th Cong., 2d Sess., reprinted in

*1137 1964 U.S.Code Cong. & Ad.News 2162-63. [FN8] The word "tribe" (as

related to Indians) has no fixed, precise or definite meaning but can

appropriately include "Indians residing on one reservation." See the

definition in 25 U.S.C. s 479 (part of the Indian Reorganization Act of June

18, 1934). With respect to the Hoopa Valley Reservation, that is its meaning

in 25 U.S.C. s 407.

FN7. This was the way the statute read when this suit was begun in 1963.

FN8. The Hoopa Valley Tribe attempts, by referring to unpublished

testimony at committee hearings and by offering a present-day affidavit of

a witness at the hearing in the 1960's, to persuade us that what is now s

407 was always meant to cover only organized tribes, but this far-fetched

"legislative history" is totally unpersuasive (even if admissible, which is

very questionable) as against the official history, the terms of the

legislation, and the whole context of the unpublished hearings.

Finally, there can be no doubt whatever that, if the Secretary decides (as he

has) to distribute proceeds under s 407, he must act non-discriminatorily and

cannot exclude any of those Indians properly entitled to share in the

proceeds. In this instance the Court of Claims has twice held that qualified

plaintiffs are entitled to share and that their exclusion was arbitrary (see

202 Ct.Cl. 870, 980-81 (finding 189); 661 F.2d at 155)--and those

holdings are the law of this case. In s 407 Congress obviously did not permit

the Secretary, once he decides to distribute proceeds, to make arbitrary

classifications in distributing those proceeds.

C.

A conceptually separate (though closely related) ground of jurisdiction is

supplied by the fact that plaintiffs are suing for a portion of the funds

collected by the Government from sales of Indian timber and initially deposited

in trust funds in the Treasury before the illegal distribution. Most (if not

all) of the monies for which plaintiffs are suing were deposited in the

Treasury in a "proceeds of labor" account or an account for "interest on

proceeds of labor." See 202 Ct.Cl. at 970-71. Under 31 U.S.C. s

1321(a)(20) (as previously worded and as worded in Pub.L. 97-258, Sept. 13,

1982, 96 Stat. 919) those are designated trust funds; accordingly, the

proper beneficiaries can sue under the Tucker Act if those funds illegally

leave the Treasury. There is, of course, jurisdiction to decide whether

claimants are proper beneficiaries (at least if, as here, their claims are

substantial and non-frivolous). It has now been decided (in the Court of

Claims decisions already cited) that qualified plaintiffs have a direct

interest in those funds, which are now or previously were in the Treasury, and

are proper beneficiaries. They therefore have a right to sue for the parts of

those funds improperly distributed to others or illegally withheld from those

claimants. Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007, 178

Ct.Cl. 599 (1962); Hoopa Valley Tribe v. United States, 596 F.2d 435, 436-

37, 219 Ct.Cl. 492, 493-94 (1979). If, as here, monies are collected and held

by the Government for particular persons, the Tucker Act authorizes suit even

though the person has not himself paid over the money. See Mitchell II, ---

U.S. at ----, fn. 23, 103 S.Ct. at 2971, fn. 23.

D.

For these reasons we deny the motions to dismiss and reaffirm the jurisdiction

of the Court of Claims and the Claims Court over this action.

II. Merits

[2] On its merits this case presents the standards to be applied in

determining those of the 3800 plaintiffs who are qualified to share in the

Reservation's timber proceeds (and other income) as Indians of the

Reservation. [FN9] This is a matter of individual entitlement not of tribal

membership for other purposes. See Short v. United States, supra, 661

F.2d at 154. In its en banc decision of September 23, 1981, the Court of

Claims, 661 F.2d 150, 158-59, held that (a) "the standards used to determine

the membership of the Hoopa Valley Tribe *1138 [i.e., those who actually

received shares of the monies] also provide an appropriate basis for

determining which of the plaintiffs are Indians of the Reservation"; (b) the

trial judge should initially formulate those standards but in doing so

"basically should apply" the Hoopa Valley Tribe standards; (c) the trial judge

had, however, "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"; and finally (d) "[t]here is need for some flexibility,

so that recognition can be given to the small number of cases in which the

[Hoopa] standards cannot be strictly applied or in which their strict

application would produce manifest injustice. Moreover, there may be

differences between the situations of the Hoopas and the Yuroks [plaintiffs

claim to be Yuroks] that necessitate some differences in the standards

governing the membership of the two Tribes." [FN10]

FN9. Judgments have already been entered for 22 plaintiffs determined by

the Court of Claims to be qualified and for 121 more whose status the

Government did not challenge after the 1973 decision on liability. See

Short v. United States, supra, 661 F.2d at 151, 152, 153, 154.

FN10. We reiterate, once again, that it has always been plain that this

development of standards was solely for the purpose of determining the

money judgments in this suit, not for other purposes of tribal membership

or organization. See 661 F.2d at 154-55. See also Part III, infra.

Judge Schwartz's comprehensive and careful opinion is designed to meet those

directives. First he set out in detail the standards actually used for

membership in the Hoopa Valley Tribe (and therefore actually used for

distribution of the monies in question). Then he applied those standards to

the group of plaintiffs, making changes needed to obviate "the factors

wrongfully used to exclude the claimants from the distribution" and in part to

conform to the different history of plaintiffs' group from that of the Hoopas.

For details of the trial judge's determinations, we refer to his opinion. His

summary of conclusions, which we affirm, is reproduced in the Appendix to this

opinion. See also note 14, infra. [FN11] We discuss below the objections

raised by the various parties to Judge Schwartz's conclusions.

FN11. At the direction of the trial judge, the Government and the Hoopa

Valley Tribe filed with the Court of Claims (on May 3, 1982) a list of the

plaintiffs who defendants believe qualify under the five standards

established by the trial judge (Attachments A through E). These lists were

based on information previously supplied by plaintiffs. The joint list

included 2161 plaintiffs.

A. Plaintiffs-Appellants' Objections

Judge Schwartz found that the Hoopas had separate schedules of membership,

depending generally on the relationship of the individual to the Hoopa tribe or

the Square (where the Hoopas lived) as of various dates (Schedules A, B, and

C). [FN12] As we have said, he then formulated analogous groups of plaintiffs,

as shown in the Appendix to our opinion (these were grouped into five

Attachments). [FN13] The trial judge also indicated *1139 that individual

plaintiffs, not included in one of these five groups, could subsequently seek

qualification on the basis of "manifest injustice" and the individual's

particular set of circumstances.

FN12. In paraphrased summary, these Hoopa schedules were found to be:

Schedule A: Square allottees, or their descendants, living on October 1,

1949;

Schedule B: Indians living as of October 1, 1949, whose residence within

the Square was not subject to question, who never received allotments but

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;

Schedule C: Indians residing within the Hoopa Valley Reservation for a

minimum of 15 years, who had forebears born within the 12-mile square Hoopa

portion of the Reservation, who had at least 1/4 degree Indian blood, and

who filed an application within the 60-day period ending June 2, 1953.

FN13. In paraphrased summary, Judge Schwartz determined the following

groups of plaintiffs to be qualified:

Attachment A: Allottees of the Reservation and their descendants living

anywhere on the Reservation on October 1, 1949.

Attachment B: Residents of the Reservation (and their descendents) living

on October 1, 1949, who have received Reservation benefits and services,

and hold an assignment or can prove entitlement to an allotment.

Attachment C: Persons living on June 2, 1953 with at least 1/4 Reservation

blood (defined to include a number of tribes connected with the

Reservation) who had lived on the Reservation for 15 years prior to June 2,

1953 and have ancestors born on the Reservation.

Attachment D: Persons possessing at least 1/4 Indian blood and who were

born after October 1, 1949 and before August 9, 1963 [the date the present

action was commenced] to a parent who did qualify or would have qualified

as an Indian of the Reservation under Attachments A, B or C, supra.

Attachment E: Persons born on or after August 9, 1963, of at least 1/4

Indian blood derived exclusively from a parent or parents who qualified

under Attachments A, B or C, supra.

Plaintiffs challenge the composition of the trial judge's five groups, mainly

on the ground that he should not have used the dates and some of the standards

the Hoopas used because, it is said, those dates and standards were peculiar to

events and circumstances in Hoopa history and immaterial to the history of the

plaintiffs or of the Yuroks who did not live on the Square (the portion of the

Hoopa Valley Reservation occupied by the Hoopas). There are two sets of

plaintiffs represented by different counsel; between them they raise the

following points: (1) census enrollees (on the whole Reservation) and their

descendants should be considered fully equal to allottees (and their

descendants) (Attachment A) for qualification purposes; (2) assignees and

their descendants should also be considered fully equal to allottees on

Attachment A; (3) Attachment B should include plaintiffs who did not live on

the Reservation on October 1, 1949 (as well as those who did); (4) instead of

the dates employed by the trial judge (Oct. 1, 1949) (used by the Hoopas);

June 2, 1953 (also used by the Hoopas); August 9, 1963 (considered the

commencement of the present suit), the most relevant date should be April 23,

1976, when the Court of Claims closed the class of plaintiffs; and (5)

application of the Hoopa Valley Tribe's criteria of blood degree for those born

after October 1, 1949 (see Attachments D and E) is error.

In appraising these points--which were made before the trial judge and which

he considered--we are governed, as he was, by the fundamental premise,

enunciated by the en banc Court of Claims in 1981--and of course binding on

us--that "the standards used to determine the membership of the Hoopa Valley

Tribe [FN14] also provide an appropriate basis for determining which of the

plaintiffs are Indians of the Reservation" entitled to recovery here. 661

F.2d at 158. Some leeway was allowed to the trial judge but the Hoopa Valley

Tribe standards were to be the matrix. We cannot agree with plaintiffs'

apparent views that major surgery, with profound alterations, was contemplated,

or that the function of the trial judge, under the Court of Claims' 1981

decision, was basically to decide de novo, with some reference to the standards

of the Hoopa Valley Tribe, who were "Indians of the Reservation." Moreover, in

the limited area where the trial judge had leeway, it was recognized by the

Court of Claims to be within his "sound discretion," 661 F.2d at 159, a

discretion which he has exercised and which is subject to review here only for

abuse. There is also one more general factor we must consider. The Court of

Claims was very eager to bring this long-lasting case to its proper conclusion,

and that was a prime reason it determined to follow the general outline of the

existing Hoopa standards, see 661 F.2d at 157-159. Unnecessary further

proceedings to determine qualification should therefore be avoided. [FN15]

FN14. These standards were known in 1981 to the Court of Claims since they

had been "described and explained" in the findings in the 1973 decision.

See 661 F.2d at 158. The trial judge did not misconstrue them in his

opinion which we are reviewing. See Part II, C, 1, infra.

FN15. Of course, the same general principles apply to our review, infra,

of the objections of the United States and the Hoopa Valley Tribe.

In this light we reject plaintiffs' objections (as we do those of the

Government and the Hoopa Valley Tribe, see infra). Judge Schwartz correctly

framed his standards on the standards of the Hoopa Valley Tribe, and he did not

abuse his discretion in refusing to make the further changes plaintiffs sought.

The refusal to include all assignees (and their descendants) on Attachment A

(note 14, supra; Appendix, infra) was warranted because (1) Schedule A of the

Hoopa list (note 13, supra) was definitely limited to allottees (and their

descendants); (2) Attachment B of the trial judge's standards (note

*1140 14, supra; Appendix, infra) specifically takes account of those

Indians holding assignments; and (3) the trial judge's opinion also expressly

leaves open to any plaintiff "who can qualify only on the basis of an

assignment held by the plaintiff or an ancestor" to argue in further

proceedings that he is entitled to recover on the basis of "manifest

injustice" (recognized by the Court of Claims, 661 F.2d at 158) in view of

the facts of his individual case. These are good reasons for the judge's

position. As for those who had (or whose forebears had) census enrollments

(but neither allotments nor assignments), Judge Schwartz refused to consider

that as a per se mark of qualification because (1) "though census enrollment

bespeaks a tie to the Reservation, it does not establish an attachment to the

Reservation equal to that of allotment, which is ownership of the land";

[FN16] (2) some enrollees lived off the Reservation while residence was

required for an allotment (or assignment); and (3) relief could be available

under the "manifest injustice" standard by proof of census enrollment plus

other adequate ties to the Reservation. Taken together, that is most certainly

a sensible stance.

FN16. Assignments were also directly related to land.

Use of the blood degree provisions of Hoopa Schedule C (note 13, supra), in

formulating the trial judge's standards for Attachments C, D and E (note 14,

supra; Appendix, infra), is also acceptable. That was an integral

requirement for those Hoopas not on Schedules A and B, and therefore should be

followed in trying to approximate those who would have appeared on those rolls

for the distribution of the monies if those rolls had been properly prepared

and not limited to Hoopas alone. So also for the general residence requirement

for Attachment B (note 14, supra; Appendix, infra); that requirement was

directly based on Hoopa Schedule B (note 13, supra) which undoubtedly called

for residence on the Reservation. [FN17]

FN17. Similarly, the trial judge properly held that listing on Hoopa

Schedule C (note 13, supra) did not carry with it automatic membership of

those Indian children living on October 1, 1949. "The C children were

themselves required for membership to have the Schedule C qualifications."

Consistently, the judge carried this over into Attachments C, D and E (note

14, supra; Appendix, infra).

The most substantial of plaintiffs' objections relate to the use in the new

standards of dates directly concerned with Hoopa history alone (October 1,

1949; June 2, 1953) and not otherwise pertinent to plaintiffs. But we cannot

say that the trial judge erred in directly following the Hoopa standards, as

the Court of Claims ordered him to do, or that he abused his discretion in

refusing to employ later or other dates. The purpose of the exercise, for this

case, is to pay to those plaintiffs, deprived by the Hoopa standards of proper

payment, the share they would have been paid under those standards if those

criteria had included all the Indians of the Reservation, not merely the Hoopas

alone. To achieve that end, it is relevant to consider the dates actually used

in determining to whom to pay out the monies in question. In particular, it

would not be right to advance the date for qualification (as plaintiffs ask) to

April 23, 1976, when the Court of Claims allowed no further plaintiffs to be

added; that date has no connection whatever with the substantive issues the

Court of Claims considered and which we are now considering. [FN18]

FN18. In one of their reply briefs on the merits, plaintiffs point to two

alleged minor "errors" in the trial judge's standards, and assert they were

inadvertent and should be corrected. We are not certain those parts of

Attachments B and E (note 14, supra; Appendix, infra) were inadvertent,

but in any event we leave those plaintiffs excluded by these alleged errors

to possible individual relief under the doctrine of "manifest injustice" if

other facts show that those individuals should be included in the class

entitled to recover.

B. The Government's Objections

The Government has five objections to the trial judge's standards, none of

which we accept. We treat them in turn.

1. In view of Hoopa Schedule B (note 13, supra), the proposal is that the

trial *1141 judge's Attachment B (note 14, supra; Appendix, infra) be

modified to require additional factual proof and analysis (in further

proceedings) of plaintiffs' participation in benefits and services before

inclusion in Attachment B. Only in that way, the United States says, can it be

known that plaintiffs included in Attachment B have a connection with the

Reservation analogous to that of Hoopas listed in Schedule B. We think,

however, that Attachment B, as now worded, is clearly analogous in its terms to

Hoopa Schedule B and we leave it to the trial judge's discretion, on remand, to

implement the general standard of Attachment B as he sees fit. It is needless,

and surely would not advance this litigation to its conclusion, for us to

mandate further particular proceedings if the trial judge properly believes

that he can decide inclusion in Attachment B on the basis of the materials and

information already available to him.

2. The United States disapproves of any consideration of assignments to

plaintiffs (or their forebears) (see Attachment B, note 14, supra; Appendix,

infra) because the Hoopa tribe did not use assignments in deciding who of that

tribe's members should share in the disputed payments. We agree with the trial

judge that this practice of the Hoopas is not controlling. It may not have

been necessary for the Hoopas to use assignments, but it is nevertheless clear

that the same qualifications were required for an assignment as for an

allotment; it was scarcity of land at the time that accounted for the making

of assignments instead of allotments. Both show attachment to the land. We

have already rejected (see Part II, A, supra) plaintiffs' desire to place all

assignees (along with allottees) in Attachment A. But that is no reason to

differ with Judge Schwartz in his careful treatment of assignees in Attachment

B, and also as possible part of proof showing "manifest injustice."

3. Objection is likewise made to the trial judge's contemplation that census

enrollments can be used in connection with proof of "manifest injustice." See

Part II, A, supra. But proof must in any case show adequate ties to the

Reservation, and a census enrollment can certainly be one factor in that

proof. There should be no automatic rule totally excluding such enrollments

from being given any consideration in any case.

4. The Government takes exception to the inclusion of six Indian groups

(Karok, Sinkyone/Sinkiene, Tolowa, Wintun, Wiyot and Wailake/Wylackie) in the

trial judge's concept of Reservation Indian blood for Attachments C, D and E

(note 14, supra; Appendix, infra). The Government says that those six groups

had inadequate connection with the Reservation. Though there may be evidence

and material going the other way as to each of those six, there was also

sufficient support for the trial judge's finding to require us to uphold it

under the "clearly erroneous" standard.

5. Finally, the United States argues that no plaintiff who is a member of

another tribe or band should be allowed to recover in this action. This is the

plea for "disqualification by dual tribal status" that the trial judge

expressly rejected. We agree with him. As Judge Schwartz carefully pointed

out, there is no good proof that the Hoopas ever disqualified any Hoopa from

receiving a share of the monies in question because of "dual membership." Nor

do the Hoopas' official standards exclude Indians who have "dual membership"

from sharing in the monies at issue here. In addition, there is no federal

statute or regulation barring an Indian from receipt of federal funds simply

because he is also a member of another Indian group. Those reasons are enough

to refuse to introduce "dual membership" into the standards to govern

plaintiffs' shares. [FN19]

FN19. We do not pass on the question whether a plaintiff "dual member" who

accepts money in this case will then be barred from receiving other monies

from different, separate tribes or groups. That is not an issue before us.

C. The Hoopa Valley Tribe's Objections

Cross-appellant Hoopa Valley Tribe (defendant-intervenor in the action) has

raised a large number of objections (some of which are the same as the

Government's) *1142 which amount in toto to rejection of almost all of the

standards proposed by the trial judge. We do not agree that any of the Tribe's

objections call for modification of the decision below.

1. The Tribe insists that Judge Schwartz erred in finding the Hoopa standards

(Schedules A, B, C, note 13 supra) on the basis of the written documents and

refusing to find the "real" or "true" Hoopa standards on the basis of

extraneous materials (such as current affidavits) proffered by the Tribe. The

short and conclusive answer is that the trial judge's findings as to those

standards (based on the official Hoopa constitution and resolutions, approved

by the Secretary of the Interior) accord precisely with the 1973 findings of

the Court of Claims, 202 Ct.Cl. at 959-67, which were confirmed by the Court

of Claims in 1981, 661 F.2d at 158. That 1981 decision did not envisage

that the trial judge would engage in a new study and new trial to determine for

himself what were the "true" Hoopa standards. It follows that those of the

Tribe's arguments that rest on the Tribe's current view of the "true" Hoopa

standards cannot prevail. The most important of these positions is that

Schedule A (note 13, supra) required residence on the Square on October 1,

1949, although the official Hoopa standards did not say so. [FN20] The same is

true of the contention that Schedule A had some specific "Indian blood"

requirement. Another is the contention that the residence mentioned in Hoopa

Schedule C (note 13, supra) must be continuous and as such should be carried

over to Attachment C (note 14, supra; Appendix, infra); there was simply no

such requirement in the official Hoopa standards.

FN20. The 1973 decision of the Court of Claims specifically found that

residence was not required for inclusion on Schedule A. 202 Ct.Cl. at

963 (Fdg. 148).

2. If the Tribe is still contending that the date for inclusion in Attachment

A (note 14, supra; Appendix, infra) should be that the plaintiff (or perhaps

his allottee forebear) was living on October 1, 1919 (twenty-five years after

allotments to non-Hoopas, just as 1949 was about twenty-five years after

allotments to the Hoopas), that argument is obviously groundless. The court's

effort is to mold for the non-Hoopa Indians of the Reservation the Hoopa

standards used for distribution of the monies in the 1950's and 1960's (which

of course used October 1, 1949), not to create a fantasy class along new and

irrelevant lines which might seem "fairer" to certain people but much less

"fair" to others.

3. Hoopa Schedule B (note 13, supra) employed subjective standards like

"residence not subject to question," "generally considered as members of the

Hoopa Valley Tribe," and "permitted to participate in tribal affairs." The

trial judge substituted the objective criteria of Attachment B (note 14,

supra; Appendix, infra), but the Hoopa Tribe urges that he should have

included the same subjective criteria as the Hoopas put into Schedule B. This

suggestion, too, is unacceptable. To avoid protracted further proceedings in

this already too-prolonged litigation, objective criteria are necessary and

preferable. Moreover, the kind of proof of "tribal participation" or

"community acceptance" the Tribe desires cannot be obtained in the case of non-

Hoopas of the Reservation. As the Court of Claims held in 1981, 661 F.2d at

155, (see, also, 202 Ct.Cl. at 950 (fdgs 109-110), 951-954 (fdgs 113-117),

957 (fdg 126), 958-59 (fdgs 132-135)), there was no similar tribal organization

or entity for those non-Hoopas, and the non-Hoopas (excluded from the Hoopa

Valley Tribe) could not have "participated" in such organizations. Conversely,

there was no non-Hoopa tribal organization which could "generally consider"

plaintiffs as "members" or "permit" them to "participate" in its affairs. (See

also our discussion, Part I, B, supra, of the United States' exception with

respect to further individual proof as to receipt of benefits and services.)

4. We also reject the Hoopa Valley Tribe's proposal that any plaintiff should

be automatically disqualified if he or she was eligible for membership in the

Hoopa Tribe in 1949 and either did not apply or was turned down. The Hoopa

Tribe did not *1143 distribute applications to everybody who might be

eligible (202 Ct.Cl. at 959-960 (fdg 137)), particularly to those who did

not live on the Square, and it is indisputable that, in implementing its

standards, the Tribe was anxious to exclude persons not considered by them to

be Hoopas.

5. The Tribe's objections respecting assignments, census enrollment, the

Indian groups to be considered in determining "Reservation blood," and "dual

membership," are all essentially the same as those made by the Government, and

our reasons for rejecting them are similar. [FN21]

FN21. The belated contention of the Hoopa Valley Tribe that plaintiffs, to

receive monies under 25 U.S.C. s 407 (related to payments from the

fruits of unallotted lands), must be members of an organized Indian entity

is unacceptable for reasons given in Part I, B, supra, in our discussion of

the relationship between 25 U.S.C. s 407 and the current jurisdictional

issue.

To sum up, all parties' objections to the trial judge's standards and to his

conclusions of law are disapproved.

III. Nature of our Decision

At the close of our opinion we again stress--what the Court of Claims several

times emphasized and we have interlaced supra--that all we are deciding are the

standards to be applied in determining those plaintiffs who should share as

individuals in the monies from the Hoopa Valley Reservation unlawfully withheld

by the United States from them (from 1957 onward). This is solely a suit

against the United States for monies, and everything we decide is in that

connection alone; neither the Claims Court nor this court is issuing a general

declaratory judgment. We are not deciding standards for membership in any

tribe, band, or Indian group, nor are we ruling that Hoopa membership standards

should or must control membership in a Yurok tribe or any other entity that may

be organized on the Reservation. We fully agree with Judge Schwartz that

"[s]hould the Yuroks decide to establish a tribe, they are free to vote any

membership standard they desire" and we "are not deciding what shall be the

membership of a Yurok tribe or of any Indian tribe." We also agree with him

"that the decision reached in this court [both the Claims Court and the Court

of Appeals for the Federal Circuit] will obtain only for the years until final

judgment, and for the years to come while the situation in the Reservation

remains the same subject of course to births and deaths."

We note, finally, our fervent hope that this very old case will speedily be

concluded in the light of the trial court's judgment now affirmed in its

entirety by this court. The case will be remanded to the Claims Court for

further proceedings in accordance with this opinion.

Affirmed and Remanded.

APPENDIX

The trial judge's ultimate decision ("Conclusion of Law") was as follows:

"For the reasons set out in the foregoing [opinion], it is concluded that the

plaintiffs of the following classes are qualified as Indians of the Hoopa

Valley Reservation and are therefore entitled, equally with all others

qualified, to shares of the profits of the unallotted trust lands of the

Reservation. Judgment is given for these plaintiffs, against the Government

and the intervening defendant-Tribe, the payor and recipient of sums due the

plaintiffs, of the sums payable, the amounts to be ascertained in further

proceedings under [then Court of Claims rule 131(c)]:

1. Allottees of land on any part of the Reservation, living on October 1,

1949, and lineal descendants of allottees living on October 1, 1949.

This class is composed of plaintiffs on attachment A, which is to be a part

hereof and to be furnished to the Clerk, to the extent practicable, by

defendants jointly, within 30 days of this order.

2. Persons living on October 1, 1949, and resident on the Reservation at that

time, who have received Reservation benefits or services, and hold an

assignment, or can make other proof that though eligible to receive an

allotment, they have not been *1144 allotted, and the lineal descendants of

such persons, living on October 1, 1949.

This class is composed of plaintiffs on attachment B, which is to be a part

hereof and to be furnished to the Clerk, to the extent practicable, by

defendants jointly, within 30 days of this order.

3. Persons living on June 2, 1953, who have at least 1/4 Reservation blood, as

defined below, have forebears born on the Reservation and were resident on the

Reservation for 15 years prior to June 2, 1953.

This class is composed of plaintiffs on attachment C, which is to be a part

hereof and to be furnished to the Clerk, to the extent practicable, by

defendants jointly, within 30 days of this order.

4. Plaintiffs of at least 1/4 Indian blood, born after October 1, 1949 and

before August 9, 1963 to a parent who is or would have been, when alive, a

qualified Indian of the Reservation under any of the foregoing paragraphs 1, 2

or 3, or has previously been held entitled to recover in this case.

This class is composed of plaintiffs on attachment D, which is to be a part

hereof and to be furnished to the Clerk, to the extent practicable, by

defendants jointly, within 30 days of this order.

5. Plaintiffs born on or after August 9, 1963, who are of at least 1/4 Indian

blood, derived exclusively from the qualified parent or parents who is or would

have been when alive a qualified Indian of the Reservation under any of the

foregoing paragraphs 1, 2 or 3, or has previously been held entitled to recover

in this case.

This class is composed of plaintiffs on attachment E, which is to be a part

hereof and to be furnished to the Clerk, to the extent practicable, by

defendants jointly, within 30 days of this order.

6. Reservation blood, as used herein, shall mean the blood of the following

tribes and bands: Yurok, Hoopa/Hupa; Grouse Creek;

Hunstang/Hoonsotton/Hoonsolton; Miskut/Miscotts/Miscolts; Redwood/Chilula;

Saiaz/Nongatl/Siahs; Sermalton; South Fork; Tish-tang-atan; Karok;

Tolowa; Sinkyone/Sinkiene; Wailake/Wylacki; Wiyot/Humboldt; Wintun.

7. The motions for summary judgment of all plaintiffs not listed on

attachments A, B, C, D and E are denied, without prejudice to renewal within

three months after this order becomes final, on a certification by counsel of

record to the best of his belief, that the facts summarized in the motion, and

to be determined on oral or written hearing, demonstrate either the

qualification of the plaintiff under one of the standards adopted by the court

or that the denial of qualification of the plaintiff would on the special facts

of the case be manifestly unjust.

8. The furnishing by defendants of the above-mentioned attachments A, B, C, D,

and E, shall be without prejudice to the rights of defendants to challenge this

decision or any part thereof. Recently substituted and former counsel for

defendant Hoopa Valley Tribe are expected to cooperate so that no time will be

lost in the preparation of the lists to become attachments A-E hereto.

Defendants are to furnish the Clerk with the original and 12 copies of each of

these attachments.

9. The plaintiffs' motions for summary judgment are denied and granted as

provided above."