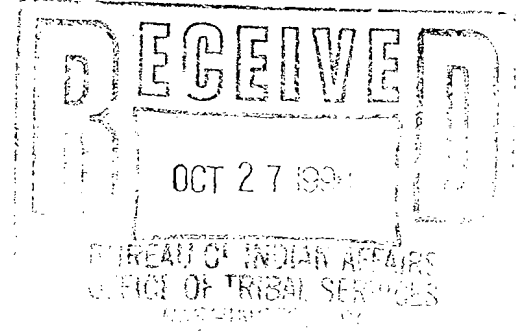


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United States Department of the Interior

OFFICE OF THE SOLICITOR
Tulsa Field Solicitor's Office
7906 East 33rd Street, Suite 100
Tulsa, OK 74145
(918) 669-7730
TELEFAX (918) 669-7736



October 22, 1998

MEMORANDUM

TO: Deborah Maddox, Director, Tribal Services, BIA
FROM: M. Sharon Blackwell, Tulsa Field Solicitor
SUBJECT: Existing Statutes and Regulations Relating to Indian Blood Quantum

INTRODUCTION

In response to your request for participation by our office in addressing legal issues related to the proposed regulations governing Certificates of Degree of Indian Blood (CDIB), we have conducted a computerized legal search of various terms related to Indian blood quantum in the context of federal laws and federal regulations. This search, if not completely exhaustive of all references to Indian blood quantum in federal laws and regulations, is very close to being completely exhaustive, and indicates that Indian blood requirements are common in the area of federal Indian law.

LEGAL ANALYSIS

1. ENROLLMENT AND ENROLLMENT APPEALS

Federal law, 25 U.S.C. § 163, authorizes the Secretary to establish a final membership roll for a tribe "whenever in his discretion such action would be in the best interest of the Indian," requires that the roll contain the ages and quantum of Indian blood, and provides that

"when approved by the said Secretary are declared to constitute the legal membership for the respective tribes" for the purpose of segregating the tribal funds as provided in 25 U.S.C. § 162, "and shall be conclusive both as to ages and quantum of Indian blood." Section 163 expressly excludes the Five Tribes, the Osage Tribe and the Chippewa Indians of Minnesota from its provisions.

Federal regulations 25 C.F.R. § 61.2 establishes guidelines for preparation of rolls by the Secretary of Interior "pursuant to statutory authority." These regulations do not apply to compilation of membership rolls for tribes which have the responsibility for preparation and maintenance of their membership rolls. *Id.* Under the regulations, the roll should contain degree of Indian blood for each person when required by law. 25 C.F.R. § 61.14.

Federal regulations also govern appeals of "adverse enrollment actions" by BIA officials and by tribal committees under two limited circumstances: when the adverse enrollment action is incident to the preparation of a tribal roll subject to Secretarial approval or when the tribal governing document requires appeals to the Secretary. These regulations define "adverse enrollment actions" as including a change in degree of Indian blood by a tribal committee which affects a tribal member when the tribal governing document provides for an appeal of the action to the Secretary, a change in degree of Indian blood by a Bureau official which affects an individual, and the certification of degree of Indian blood by a Bureau official which affects an individual. These regulations illustrate the significance of certificates of degree of Indian blood by referencing them in the procedure for appeals; however, they do not describe the method and type of documentation needed in making an initial determination of an individual's degree of Indian blood.

2. EDUCATIONAL/VOCATIONAL BENEFITS

Eligibility requirements for attendance of federal schools by Indian students include a "one-fourth or more" degree of Indian blood as a requirement under 25 C.F.R. § 31.1. The one-quarter blood requirement is also contained in 25 C.F.R. § 32.4(z) for purposes of Indian education policies, as follows (emphasis added):

(z) Eligibility for services. Serve Indian and Alaska Native students who are recognized by the Secretary of the Interior as eligible for Federal services, because of their status as Indians or Alaska Natives, *whose Indian blood quantum is 1/4 degree or more...*

See also 25 U.S.C. § 2007(f) (defining "eligible Indian student" as a member or a descendent of "at least a 1/4 degree Indian blood). The quarter blood quantum requirement is also included in 25 C.F.R. § 36.3 for purposes of regulation of academic standards for basic education of Indian children, as follows (emphasis added):

"Indian student" means a student who is a member of an Indian tribe and is *one-quarter (1/4) or more degree of Indian blood quantum.*

The quarter blood quantum requirement is also included in 25 C.F.R. § 40.1 for educational and vocational loans to students who reside on reservation, as well as students who reside near the reservation "when a denial of such loans or grants would have a direct effect upon Bureau programs within the reservation." It is also included for purposes of Adult Education programs under 25 C.F.R. § 46.2, which states (emphasis added):

Indian means a person who is a member of, *or is at least a one-fourth degree Indian blood descendent of a member of*, an Indian tribe, and is eligible for the special programs and services provided by the United States through the Bureau of Indian Affairs to Indians because of their status as Indians;

A blood quantum requirement is included in 25 C.F.R. § 273.12 for student eligibility for educational benefits provided under Johnson O'Malley Act contracts, as follows (emphasis

added):

Indian students, from age 3 years through grade(s) 12, except those who are enrolled in Bureau or sectarian operated schools, shall be eligible for benefits provided by a contract pursuant to this part *if they are 1/4 or more degree Indian blood and recognized by the Secretary as being eligible for Bureau services*. Priority shall be given to contracts (a) which would serve Indian students on or near reservations and (b) where a majority of such Indian students will be members of the tribe(s) of such reservations (as defined in 273.2(o)).

Methods of establishing eligibility for Indian Fellowship and Professional Development Programs are described in 34 C.F.R. § 263.21(a) as follows (emphasis added):

(a) Evidence that the applicant is an Indian as defined in § 263.3. Evidence may be in the form of--

(1)(i) A copy of the applicant's documentation of tribal enrollment or membership; or

(ii) A copy of a parent's or grandparent's documentation of tribal enrollment or membership, with supporting birth certificates or similar documents showing the applicant's descent from the enrolled member;

(2) A letter of certification on official letterhead with the appropriate signature from a federally or State recognized tribe or band; or

(3) *A certificate of degree of Indian blood (CDIB) issued by an authorized representative of the Bureau of Indian Affairs or an official of a federally recognized tribe;*

3. EMPLOYMENT ASSISTANCE, VOCATIONAL TRAINING, AND INDIAN HIRING PREFERENCE

The term "Indian" as defined in 25 C.F.R. § 26.1(G) for purposes of the Employment Assistance Program and as defined in 25 C.F.R. § 27.1(i) for purposes of vocational training includes blood quantum requirements as follows (emphasis added):

(b) "Indian" means any person of Indian or Alaska native descent who is an enrolled member of any of those tribes listed or eligible to be listed in the Federal Register pursuant to 25 C.F.R. § 83.6 as recognized by and receiving services from the Bureau of Indian Affairs or *a descendant of one-fourth degree or more Indian blood of an enrolled member*; and any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood which is not derived from a tribe whose relationship is terminated by an Act of Congress.

Indian preference requirements do not appear to require membership in a federally recognized Indian tribe. For example, 25 C.F.R. § 5.1 list persons who may receive Indian hiring preference within the BIA as follows (emphasis added):

For purposes of making appointments to vacancies in all positions in the Indian Health Service a preference will be extended to persons of Indian descent who are:

- (a) Members of any recognized Indian tribe now under Federal jurisdiction;
- (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
- (c) *All others of one-half or more Indian blood of tribes indigenous to the United States;*
- (d) Eskimos and other aboriginal people of Alaska; and
- (e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, *a person of at least one-quarter degree Indian ancestry of the Osage Tribe* of Indians, whose rolls were closed by an act of Congress.

Provisions governing Indian preference within the Public Health Service, 42 C.F.R. § 36.41, contain similar provisions.¹

4. SOCIAL SERVICES AND LOANS

For purposes of determining eligibility for financial assistance and social services programs, there is a blood quantum requirement only for Alaska natives and Oklahoma Indians pursuant to 25 C.F.R. § 20.20(a)(1), which states (emphasis added):

- (1) The applicant must be an Indian, *except that in the States of Alaska and Oklahoma a one-fourth degree or more Indian or Native blood quantum* will be an additional eligibility requirement...

The term "Indian" is defined in 25 C.F.R. § 20.1(n) for purposes of financial assistance and social services programs to include a blood quantum requirement, as follows (emphasis

¹ The main difference appears in sub-section (e) of 42 CFR § 36.41, which provides: "(e) Until January 4, 1990 or until the Osage Tribe has formally organized, whichever comes first, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress."

added):

(n) "Indian" means any person who is a member, *or a one-fourth degree or more blood quantum descendant of a member* of any Indian tribe.

Federal law, 25 U.S.C. § 480, provides that on and after May 10, 1939, "no individual of less than one-quarter degree of Indian blood" is eligible for a loan of funds made available in accordance with several other laws. Revolving loan funds also cannot be loaned to "Indians of less than one-quarter Indian blood." 25 U.S.C. § 482.

5. LAND ALLOTMENTS; NATURAL RESOURCES

The term "individual Indian" is defined in 25 C.F.R. § 151.2(c) for purposes of acquisitions of land in trust as follows (emphasis added):

- (1) Any person who is an enrolled member of a tribe;
- (2) Any person who is a descendant of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;
- (3) Any other person *possessing a total of one-half or more degree Indian blood of a tribe*;

Provisions defining "Indian" for purposes of protection of Indians and conservation of resources, 25 U.S.C. § 479, contain similar, but not identical, provisions, including reference to "all other persons of one-half or more Indian blood."

Eligibility for an allotment of land from the public domain is governed in part by Indian status under 43 C.F.R. § 2531.1(b), which requires that any person desiring to file an application for an allotment of land on the public domain "must first obtain from the Commissioner of Indian Affairs a certificate showing that he or she is an Indian and eligible for such allotment." The certificate is required to bear a serial number, "record thereof to be kept in the Indian Office," and required forms must be obtained "as stated in § 2531.2(b)." Subsection (e) provides that the eligibility for allotments of Indian women married to non-Indians

"will be determined without reference to the quantum of Indian blood possessed by such women," but solely with reference as to whether they are recognized members of an Indian tribe or are entitled to such membership. 43 C.F.R. § 2531.1(e).

A definition of "Indian individual" is contained in 25 C.F.R. § 262.2(d) for regulation of the protection of archaeological resources, including a blood quantum requirement, as follows (emphasis added):

- (1) Any person who is an enrolled member of a Federal recognized Indian tribe;
- (2) Any person who is a descendent of such a member and was, on June 1, 1934, physically residing within the present boundaries of any Indian reservation; or
- (3) Any other person *of one-half or more Indian blood of tribes indigenous to the United States.*

6. TRIBAL REORGANIZATION

A definition of "Indian" contained in 25 C.F.R. § 81.1 (i), for purposes of tribal reorganization, includes a blood quantum requirement as follows (emphasis added):

- (i) "Indian" means (1) All persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 C.F.R. § 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the Act of June 18, 1934, 43 Stat. 984, as amended; and (2) *any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood.*

A blood quantum requirement is also contained in one of the definitions of "tribe" for purposes of tribal reorganization set forth in § 81.1(w) (emphasis added):

- ... (2) *any group of Indians whose members each have at least one-half degree of Indian blood* for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes.

7. HOUSING

Requirements for the housing assistance improvement program set forth in 25 C.F.R. §

256.13 allow use of CDIB to establish Indian status as follows (emphasis added):

(d) Fourth, you must furnish documentation proving tribal membership. Examples of acceptable documentation include a copy of your Certificate of Degree of Indian Blood (CDIB) or a copy of your tribal membership card.

8. LICENSED INDIAN TRADER

Under 25 U.S.C. § 264 and 25 C.F.R. § 140.3, any "person other than an Indian of the full blood" attempting to reside in Indian country as a trader without a license, is required to forfeit all merchandise offered for sale to the Indians, except persons residing among or trading with the Five Tribes.

9. BLOOD QUANTUM REQUIREMENTS FOR INDIVIDUAL TRIBES

A. Oklahoma Tribes

1. Five Tribes

The degree of Indian blood of members of the Five Civilized Tribes (i.e., Cherokee, Chickasaw, Seminole, Muskogee-Creek and Choctaw Nations, hereinafter referred to as "Five Tribes") is determinative of the restricted or unrestricted lands owned by tribal members. Throughout this century, there have been a number of laws which define restricted status of Indian lands according to Indian blood quantum. See Act of April 6, 1906, 34 Stat. 137, § 19; Act of May 27, 1908, 35 Stat. 312, § 1; Act of June 14, 1918, 40 Stat. 606, § 2; Act of May 10, 1928, 45 Stat. 495, § 1.

The most recent of these laws, the Act of August 4, 1947, 61 Stat. 731, currently governs the restricted status of thousands of acres of Indian lands in eastern Oklahoma. Section 1(a) of the 1947 Act provides (emphasis added):

(a) That...no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by *an Indian heir or devisee*

of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated....

Section 2 of the 1947 Act requires use of the final rolls developed by federal officials during the allotment process at the beginning of the twentieth century to determine blood quantum for purposes of the restricted status of lands belonging to Five Tribes members, but it does not necessarily apply to tribal determinations of Indian blood quantum for other purposes.

Section 2 provides (emphasis added):

In determining the quantum of Indian blood of any Indian heir or devisee, the final rolls of the Five Civilized Tribes as to such heir or devisee, if enrolled, shall be conclusive of his or her quantum of Indian blood. If unenrolled, his or her degree of Indian blood shall be computed from the nearest enrolled paternal and maternal lineal ancestors of Indian blood enrolled on the final rolls of the Five Civilized Tribes.

Federal law authorizes leasing of restricted lands belonging to Five Tribes members "of one-half or more Indian blood," only under rules and regulations established by the Secretary of Interior. 25 U.S.C. § 393a (emphasis added).

Regulations governing the creation of trusts for restricted property of members of the Five Tribes, 25 C.F.R. § 116.4, contain a one-half degree of Indian blood quantum requirement consistent with the 1947 Act, requiring the following provision in the trust agreement (emphasis added):

(a) That such of the current income from the corpus of the estate as may be payable to the Indians of the Five Civilized Tribes *of one-half or more Indian blood* shall be remitted by the trustee to the Secretary of the Interior or such other official as he may designate for appropriate disposition.

Regulations concerning leasing of restricted lands of members of the Five Civilized Tribes of Oklahoma for mining, 25 C.F.R. § 213.45, set standards for lands acquired by

"persons of one-half or more Indian blood," by "full blood Indians," by "Indians of less than full blood," and by "heirs of one-half or more Indian blood but less than full bloods."

2. Osage Tribe

With a few exceptions,² federal regulations governing Osage members generally contain a one-half degree of Indian blood requirement for a variety of purposes. See 25 C.F.R. § 117.26 (extension of credit for certain purposes pending qualification of personal representative of an estate of a deceased Indian "of one-half or more Indian blood" who did not have a certificate of competency at his death"); § 117.27(a) (certain payments to personal representative of the estate of a deceased Indian "of less than one-half Indian blood who had a certificate of competency;" § 117.27(b) (payment of certain classes of judgment funds to personal representative of the estate of a deceased "Indian of one-half or more Indian blood" who did not have a certificate of competency); § 117.28 (payment of certain claims against the estate of "a deceased Indian of one-half or more Indian blood" who had no certificate of competency); and § 152.9 (issuance of certificates of competency to adult members of the Osage Tribe "of one-half or more Indian blood").

Federal regulations rely heavily on BIA records for purposes of determining blood quantum of Osage persons for purposes of preparation of a competency roll for unallotted

² Federal law governing disposition of Osage judgment funds, 25 U.S.C. §§ 883, 883a, 883b, reference allottees and heirs of Osage blood, and contain no blood quantum requirements. Consistent with federal law, the definition of an Osage tribal member contained in 25 C.F.R. § 91.2 expressly eliminates an Indian blood quantum as follows: (d) 'Tribal Member' means any person of Osage Indian blood of whatever degree, allotted or unallotted." See also 121.3 (claims by "heirs of Osage Indian blood of deceased allottees); See also 25 C.F.R. §§ 121.5, 121.6, 121.9 (referencing "heirs of Osage Indian blood" with regard to judgment fund distributions); and § 122.5 (Osage Indian blood requirement for members of Osage Tribal Education Committee).

members of the Osage Tribe "of less than one-half Indian blood" who has not received a certificate of competency. See 25 C.F.R. §§ 154.1 - 154.5. The competency roll must include the "total quantum of Osage blood and non-Osage Indian blood" of each person listed on the competency roll. 25 C.F.R. § 154.2. In certain circumstances, the Osage Agency register of Indian families for the year ending December 31, 1901, must be accepted "as prima facie evidence of the quantum of Indian blood." 25 C.F.R. § 154.3(b)(1) and (2). Where Indian blood of a different tribe is involved, "the certification of the superintendent or other officer in charge" of the Indian Agency having jurisdiction over the affairs of that tribe "shall be accepted as prima facie evidence in determining the quantum of non-Osage Indian blood." 25 C.F.R. § 154.3(b)(3). If the superintendent or other officer in charge of the other Agency is unable to certify as to the quantum of Indian blood of a non-Osage parent of an unallotted Osage member of less than one-half Indian blood, "affidavits as to such parent's quantum of Indian blood, when properly executed by two qualified individuals, may be accepted." 25 C.F.R. § 154.3(b)(4).

The federal regulations governing the Osage competency roll contain provisions affording due process to a person, when the superintendent determines that the person is of less than one-half Indian blood. The superintendent must notify that person and inform the person that if objection is not received within 20 days from date of notification a certificate of competency will be used. 25 C.F.R. §154.4. The party may dispute the finding by submitting "two affidavits or other evidence in support of his claim." The "claim affidavits or other evidence of the person as to his quantum of blood" must be submitted to the Commissioner of Indian Affairs "for a ruling before the certificate of competency is issued."

B. Alaskan Tribes

While some federal laws and regulations concerning Alaskan Natives have no blood quantum requirements,³ the Alaska Claims Settlement Act, 43 U.S.C. § 1602(b) includes a blood quantum requirement in its definition of "Native" for its purposes as follows:

"Native" means a citizen of the United States who is a *person of one-fourth degree or more Alaskan Indian* (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, *in the absence of proof of a minimum blood quantum*, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. *Any decision of the Secretary regarding eligibility for enrollment shall be final;*

Other definitions of Alaskan Natives contained in various federal regulations are not identical, but contain similar blood quantum requirements: 13 C.F.R. § 124.100 (minority small business and capital ownership development); 50 C.F.R. § 17.3 (concerning endangered wildlife and plants); 50 C.F.R. § 18.3 (relating to sale of marine mammals); and 50 C.F.R. § 216.3 (regulating the taking and importing of marine mammals). *See also* 43 C.F.R. § 2561.0-3 (degree of Indian blood is irrelevant to rights related to native allotments by an Indian who resides in Alaska); 43 C.F.R. § 4300.0-5.

C. Canadian Born Indians

Federal law, 25 U.S.C. § 1359 contains the following blood quantum requirement for Indians born in Canada who cross the border (emphasis added):

Nothing in this subchapter shall be construed to affect the right of American

³ Federal law, 25 U.S.C. § 500n, defines a "native of Alaska" as including native Indians, Eskimos and Aleuts "of whole or part blood," for purposes of laws governing a reindeer industry.

Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess *at least 50 per centum of blood of the American Indian race*.

Federal immigration regulations, 8 C.F.R. § 289.1, provide (emphasis added):

The term "American Indian born in Canada" as used in section 289 of the Act includes *only persons possessing 50 per centum or more of the blood of the American Indian race*. It does not include a person who is the spouse or child of such an Indian or a person whose membership in an Indian tribe or family is created by adoption, unless such person possesses at least 50 per centum or more of such blood.

Other federal regulations governing visa and passport requirements as applied to non-immigrants, 22 C.F.R. §§ 41.1(b) and 42.1(f), define the term "American Indians born in Canada," as (emphasis added):

...An American Indian born in Canada, *having at least 50 per centum of blood of the American Indian race* (Sec. 289, 66 Stat. 234; 8 U.S.C. 1359).

The Legal Services Corporation regulations, 45 C.F.R. § 1626.10 also include a blood quantum requirement for eligibility for legal aid to Indians born in Canada as follows (emphasis added):

(b) All Canadian-born American Indians *at least 50% Indian by blood* are eligible to receive legal assistance provided they are otherwise eligible under the Act.

D. Other Specified Tribes

The following laws and regulations include blood quantum requirements related to enrollment of members of specific Indian tribes for judgment fund distribution purposes, as follows: 25 U.S.C. § 585 (Northwestern Bands of Shoshone Indians); 25 U.S.C. §§ 961, 967a (descendants of allottees of Omaha Tribe who possess "Omaha blood *of the degree of one-fourth or more*"); 25 U.S.C. § 1142 (New York Indians, including those who are Brotherton Indians of Wisconsin of *at least one-fourth degree* Emigrant New York Indian blood...) Federal law

also has included blood quantum requirements with regard to specific tribes for many other purposes.⁴

CONCLUSION

Currently existing federal laws and regulations require some form of proof of Indian blood for various purposes. Some of these regulations even expressly refer to Certificates of Degree of Indian blood. Unless these laws and regulations are amended to eliminate the need for a method of proving Indian blood or Indian blood quantum, uniform standards for issuance, amendments and denials of Certificates of Degree of Indian blood are essential for compliance with the law.

⁴ See 25 U.S.C. §§ 677, 677a(b)(defining a "full-blood" as a tribal member who possesses "one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half") and 677a(c) (defining a "mixed-blood" as a tribal member who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class, and those who became mixed-bloods by choice). See also 25 U.S.C. §§ 677v, 677w, 677aa (relating to partition and distribution of tribal assets between mixed blood and full blood members of the Ute Indians of Utah); 25 U.S.C. § 715e (one-eighth blood quantum requirement for compilation of membership rolls relating to restoration of federal supervision over Coquille Indian Tribe of Oregon); 25 U.S.C. § 903b(c) (updating of Menominee Tribe membership roll, and requiring a one-quarter degree of Menominee Indian blood for heirs of allottees); 25 U.S.C. § 971 (termination of federal supervision and distribution of tribal assets to persons on membership roll of the Ponca Tribe of Nebraska, including descendants of enrollees "of not less than one-quarter degree Indian blood of the Ponca Tribe"); 25 U.S.C. § 1300g-7(a) (restoration of supervision over Ysleta Del Sur Pueblo and definition of tribal members, including descendant of an enrollee who has "1/8 or more degree" of Tigua-Ysleta del Sur Pueblo Indian blood); 25 U.S.C. § 1300 h-3 (federal recognition of Lac Vieux Desert Band of Lake Superior Chippewa, and establishment of membership roll, including persons who are "at least one-quarter Chippewa Indian blood.."); 25 C.F.R. § 61.4 (preparation of rolls of various Tribes, some of which have blood quantum requirements); 25 C.F.R. § 75.6 (revision of rolls of Eastern Band of Cherokee Indians, North Carolina); 25 C.F.R. § 153.3 (degree of Indian blood required on enrollment application for Crow Tribe); and 25 U.S.C. § 1300i-5(3) ("The Secretary shall determine the quantum of 'Indian blood' or 'Hoopa Indian blood,' if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982 decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (CL.Ct. No. 102-63).

If you have questions related to this memorandum, please contact me at (918) 669-7730,
ext. 228.

FIELD SOLICITOR

A handwritten signature in black ink, appearing to read "L. Susan Work". The signature is written in a cursive, flowing style.

L. Susan Work
Attorney