COLVILLE CONFEDERATED TRIBES COURT OF APPEALS

HOFFMAN v. COLVILLE CONFEDERATED TRIBES

No. AP95-023 (Colv. Ct. App., May 5, 1997)

Summary

The Colville Confederated Tribal Court of Appeals affirms the trial court, holding that the appellant has failed to prove that under tribal law, he is entitled to an increase in blood quantum based upon factual proof of additional Indian blood.

Full Text

Before LaFOUNTAINE, Presiding Justice, FRY and NELSON, Associate Justices

Opinion and Order Affirming Trial Court

This matter came before this appellate panel of Presiding Justice Frank S. LaFountaine, Justice Elizabeth Fry, and Justice Dennis Nelson of the Colville Tribal Court of Appeals, created by the Tenth Amendment[1] (Article VIII-Judiciary) of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation for oral arguments on July 26, 1996. After reviewing the records and files herein, and hearing the oral

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[1]Amendment X - Judiciary

Article VIII Judiciary

Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Indian Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes.

The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the judges of these courts by statute.

Section 2. *Court of Appeals.* The Colville Tribal Court of Appeals shall consist of a panel of individual justices appointed by the Business Council, with the recommendation of the Chief Judge, to terms of six years.

Section 3. *Tribal Court.* The Colville Tribal Court shall consist of a Chief Judge who shall be appointed by the Business Council for a [term] of six years, subject to a vote of confidence every three years in conjunction with that year's general election by a majority of the qualified voters of the Confederated Tribes participating in the vote of confidence.

Section 4. *Compensation and Term.* Except for the terms of the Justices of the Tribal Court of Appeals and the Chief Judge of the Tribal Court, the term of any appointed judge shall be determined by the Business Council. The compensation for the services provided shall be determined by the Business Council and such compensation shall

arguments, this appellate panel of the Colville Court of Appeals has decided to *Affirm* the decision of the trial court as to the following findings and/or conclusions, that:

1.) The appellant, Floyd L. Hoffman, has failed to introduce clear and convincing proof that he is entitled to an increase in blood quantum based upon factual proof of additional Indian blood;

2.) The appellant, Floyd L. Hoffman, has neither argued nor presented any tribal, state or federal statute or case law which requires the Tribes in either 1907 or 1937 to afford due process of law to its members in exercising the Tribes' powers of self-government through adoption and reductions of blood quantum conferred through adoption;

3.) Appellant, Floyd L. Hoffinan, has not pled or raised any customs of the Colville Confederated Tribes related to rights conferred through adoption and blood quantum established through adoption as needed to warrant a hearing pursuant to CTC § 3.4.04 to determine a custom followed by the Colville Confederated Tribes defining rights and status conferred through an adoption in 1907 and defining what rights, if any, are protected during a reduction in blood quantum taking place in 1937; and

4.) Appellant's petition for blood degree correction is denied.

Brief Statement of Procedural History

On January 12, 1995, the appellant, Floyd L. Hoffman, and other petitioners[2] filed a petition for blood degree correction with the tribal court, pursuant to Amendment IX of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation and pursuant to the Colville [Tribal] Membership Code, CTC §§ 36.7.01 through 36.7.09. Petitioners were Floyd L. Hoffman, a Colville tribal member; and his children, Wanda J. Hoffman Bloom, Terry L. Hoffman, Stacie L. Hoffman, and Earl Hoffman; and the children of Earl Hoffman: Shawna Hoffman, Sandra Hoffman, Floyd Hoffman, Edith Hoffman and Gilbert Hoffman. Additionally, petitioners filed a motion with the trial court for an order placing the petitioners' names on an April 7, 1995 claims monies distribution list.[3]

On February 1, 1995, the respondent, the Confederated Tribes of the Colville Reservation (hereinafter Tribes) filed an answer to the petition, and on February 2, 1995, petitioners filed a request for a trial hearing date.

A hearing was held on April 4, 1995 before Chief Judge Mary T. Wynne of the trial court. Present at the hearing were the appellant, Floyd L. Hoffman, and the petitioner, Wanda Hoffman Bloom, and the Tribes was represented by Steve Suagee of the Reservation Attorney's Office.

Petitioners introduced numerous exhibits and called one witness, Wanda Bloom, daughter of appellant, Floyd L. Hoffman, to testify. The Tribes introduced six (6) documents and called Audrey Sellars, Director of the Enrollment Department to testify. Both the Tribes and the petitioners agreed that in 1907 Joseph and Annie Etue Ferguson were adopted into the Colville Confederated Tribes as possessing 1/2 each Indian blood quantum, and recognized by the BIA as such.

After the trial, on April 20, 1995, the court requested briefing on whether the adoption of Annie Etue Ferguson into the Colville Tribe in 1907 as possessing one-half degree Indian blood vested her with a blood degree which could not be reduced regardless of her factual blood degree. Both petitioners and the Tribes filed more evidence with their post-trial briefs.

On September 7, 1995, the trial court issued a thirty-three (33) page memorandum opinion denying the appellant's blood correction, and dismissing the other petitioners from the cause of action on the ground that they lacked standing.

On September 14, 1995, Floyd L. Hoffman filed a notice of appeal with the Colville Tribal Court of Appeals.

Constitutional Amendments Dealing With Tribal Membership

On May 20, 1949, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment III[4] of the Colville Tribal Constitution by a referendum vote, and

not be diminished during the respective terms of the Justices and Judges unless removed from office as provided in this Article.

Section 5. *Vacancies and Removal from Office.*

a. If a Judge or Justice shall die, resign, be removed under subsection b or recalled from office under subsection c, the Business Council shall appoint a replacement to fill the unexpired term.

b. A Judge may be removed from office prior to the expiration of a term for good cause pursuant to a Bill of Impeachment filed with the Business Council and approved by a 2/3 majority of all of the members of the Business Council. The Business Council shall convene a Special Session to vote on the Bill of Impeachment after allowing the judge an opportunity to present a defense to the Bill of Impeachment. The decision of the Business Council shall be final.

c. A Judge may be removed from the office for good cause prior to the expiration of a term by a majority of the voters of the Confederated Tribes of the Colville Reservation at a special election called for that purpose. A special election under this subsection shall be called by the Colville Business Council within 10 days after a Petition for Recall naming the specific Judge, setting forth the specific charge or charges and signed by at least 1/3 the number of those eligible to vote in the last preceding election is filed with the Business Council. The results of any election under this subsection shall be final.

Section 6. *Discipline.* Upon petition of any Colville Tribal Judge or Justice, or by a majority of the Business Council presenting specific reasons for imposing discipline on any Justice or Judge of any Court established pursuant to this Article, the Colville Tribal Court of Appeals shall be convened to consider, and where necessary, impose discipline upon the Justice or Judge according to Rules of Judicial Conduct to be adopted by the Tribal Court of Appeals that are not inconsistent with the Constitution of the Confederated Tribes of the Colville Reservation.

Section 7. *Implementation.* This Article shall take effect upon the appointment of the Chief Judge by the Business Council after ratification of this Article by the electorate and its approval by the Department of Interior as provided in Article VI. (Approved by the Confederated Tribes October 20, 1990. Approved by the Secretary of the Interior April 17, 1991.)

[2]On April 30, 1996, this appellate panel ordered that the petitioners, except for the appellant, Floyd L. Hoffman, be dismissed from this appeal, because they failed to perfect their right to appeal by failing to file a notice of appeal within ten (10) days from the entry of judgment. This ruling and this opinion and order do not bar the petitioners from refiling their petition or petitions for blood correction because the tribal court found that they lack standing to bring their original lawsuit. Once they have standing to maintain such a lawsuit, they may refile their petition or petitions.

[3]The trial court denied petitioner's motion to order petitioners' names to be included on the list for distribution of monetary settlement. This order was not appealed or argued before this appellate panel.

[4]Amendment III

Article VII, *Membership of the Confederated Tribes of the Colville Reservation.*

There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1. The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the

Amendment III was later approved by the Commissioner of Indian Affairs on April 14, 1950. Amendment III amended the Tribal Constitution to add Article VII, *Membership of the Confederated Tribes of the Colville Reservation.*

Article VII created a new provision governing membership in the Tribes. Article VII recognized as tribal members the following persons:

(a) All persons of Indian blood whose names appear as members of the Tribes on the official census of Indians of the Colville Reservation as of January 1, 1937;

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining a permanent residence on the Colville Indian Reservation; and

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining residence elsewhere in the continental United States provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs.

Article VII (Amendment III) also provided that the Business Council of the Tribes has the power to prescribe rules and regulations governing future membership in the Tribes, including adoption of the members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior;

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood;

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotment or inherited interests. (Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.)

On May 9, 1959, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment V[5] of the Colville Tribal Constitution by a referendum vote, and Amendment V was later approved by the Acting Commissioner of Indian Affairs on July 2, 1959.

Amendment V amended Article VII, *Membership of the Confederated Tribes of the Colville Reservation* of the Tribal Constitution and By-Laws. Amendment V added to Article VII a new Section 3, which provided that after July 1, 1959, no person shall be admitted to tribal membership unless such person possessed at least one-fourth (1/4) degree blood of the Tribes, constituting the Confederated Tribes of the Colville Reservation.

On March 22, 1988, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment IX[6] of the Colville Tribal Constitution by a referendum vote, and Amendment IX was later approved by the Secretary of the Interior on May 19, 1988.

Amendment IX amended Article VII, *Membership of the Confederated Tribes of the Colville Reservation* of the Tribal Constitution and By-Laws. Amendment IX added to Article VII a new Section 4, which provided the following:

(1) that all Indian blood identified and stated as being possessed by all persons whose names appear as members of the Confederated Tribes of the Colville Reservation on the official census of the Indians of the Colville Reservation of January 1, 1937, shall be considered Indian blood of the Tribes, which constitute the Confederated Tribes of the Colville Reservation;

(2) that no tribal member's blood degree will be decreased as a result of Amendment IX;

(3) that pursuant to procedure which shall be adopted by the Colville Business Council, any

(a) applicant for membership, or

(b) Tribal member who is listed on the official census of the Indians of the Colville Reservation of January 1, 1937, or

(c) Tribal member descended from a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, may petition the Tribes, to officially recognize for enrollment purposes that a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, possesses Indian blood that is not listed on the official census of the Indians of the Colville Reservation of January 1, 1937, and such Indian blood, when properly authenticated by clear and convincing proof, shall be recognized as blood of the Colville Tribes.

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[5]Amendment V

There shall be added to *Amendment III, Membership of the Confederated Tribes of the Colville Reservation*, a new provision governing membership of said Tribes which shall read as follows:

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (1/4) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. (Adopted by the Colville Confederated Tribes on May 9, 1959. Approved by the Acting Commissioner of Indian Affairs July 2, 1959).

[6]Amendment IX

Article VII, *Membership of the Confederated Tribes of the Colville Reservation.*

Section 4. All Indian blood identified and stated as being possessed [Ed. Note: Court's footnote ends here.].

Standard of Review - Clearly Erroneous

Appellant asserts that *de novo* review is justified because this case involves "review of documents not witness credibility" as "in" *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, 6009-10 (C.B. Pot. Sup. Ct., Feb. 17, 1988). Opening Brief at page 17. The Court is not rejecting the appellant's assertion of law, but the Court does not believe a *de novo* review is required in this appeal.

The Tribes argued in their response brief that "a panel of this Court of Appeals has expressly adopted a 'deferential, clearly erroneous standard of review for factual determinations made by the trial court, as articulated in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982).' *Colville Confederated Tribes v. Nadene Naff,* Case No. AP93-12001-03, at 2 (Colv. Ct. App., Decision of January 22, 1995)."

Because the appellate panel in *Colville Confederated Tribes v. Nadene Naff* adopted its "clearly erroneous" standard from the United States Supreme Court's 1982 *Pullman-Standard* decision, it is instructive to review subsequent refinements in that standard at the federal level. First, the *Pullman-Standard* decision based this standard of review on Federal Rules of Civil Procedure (hereinafter FRCP), Rule 52(a), which in 1982 provided that district courts' "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." In 1985, FRCP 52(a) was revised into its present wording to provide that trial court "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The Advisory Committee Notes to the 1985 Amendment state that the amendment was intended to clarify and standardize application of the "clearly erroneous" standard. The basic purpose was to ensure that an appellate court would not disregard the standard when trial court factfinding was based on documentary evidence rather than the court's opportunity to evaluate the demeanor credibility of a witness. The Advisory Committee Notes also state that the Supreme Court had "not clearly resolved this issue" in the *Pullman-Standard* decision.

Supreme Court decisions subsequent to *Pullman-Standard* (but prior to the effective date of the 1985 amendment of FRCP 52(a)) do in fact clarify that the clearly erroneous standard must be uniformly deferential to trial court factual findings, regardless whether the evidence on which they are based is documentary or oral:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.... If the district court's account of the evidence is plausible in light of the record in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.... [citations omitted].
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> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511-12 (1985). Followed in *RCI Northeast Services Division v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987) ("It is by now settled beyond peradventure that findings of fact do not forfeit 'clearly erroneous' deference merely because they stem from a paper record.").

Appellate courts are also admonished when reviewing a mixed question of law and fact to confine *de novo* review to the purely legal aspects of the question, and to strictly avoid engaging in fact-finding while considering how the law applies to facts found by the trial court. In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14, 106 S. Ct. 1527, 1529-30 (1986), the United States Supreme Court reversed the Ninth Circuit for making factual findings on a matter that the district court had not addressed due to its differing view of the law. The Ninth Circuit had justified doing so on the basis of *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984), which the Colville Tribal Appellate Court adopted in *Colville Confederated Tribes v. Nadene Naff* as setting the appropriate standard of review for mixed fact/law questions. *Naff* at 2.

Finally, the Supreme Court has articulated the policy behind the broad deference to trial court factual findings:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is a correct one; requiring them to persuade three more judges at the appellate level is requiring too much.... [T]he trial on the merits should be the "main event" ... rather than a "tryout" on the road. [Citations omitted.]

Anderson v. Bessemer City, 470 U.S. at 574-75, 105 S. Ct. at 1512 (also quoted in *Icicle Seafoods*, 475 U.S. at 714, 106 S. Ct. at 1530). In accord with this policy are the Advisory Committee Notes on the 1985 Amendment of FRCP 52(a):

> To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of the litigants, multiply the appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Although the federal law discussed above is not binding on this Court, it derives from the reasoning of the *Pullman-Standard* decision that the Colville tribal appellate panel found to be "persuasive" and adopted in *Colville Confederated Tribes v. Nadene Naff.*

Under the Tribal Constitution and Membership Code, the Blood Correction Cause of Action Is Limited To A Factual Inquiry In Which A Petitioner Must Prove By Clear and Convincing Evidence That He Possesses A Greater Degree of Colville Blood Than the Tribes Recognizes.

As stated above, in 1949, the Colville tribal membership approved Amendment III of the Tribal Constitution by a referendum vote. Amendment III established the 1937 census roll as the base roll of the Tribes, and also established a minimum one-quarter Indian blood degree as one of the requirements for tribal membership for persons born after January 1, 1937. In 1959, the tribal membership by referendum approved Amendment V, which restricted the blood degree requirement to one-quarter degree **Colville** Indian blood.

In 1988, the membership by referendum approved Amendment IX. Amendment IX provides that all Indian blood possessed by any person listed as a tribal member on the 1937 base roll of the Tribes "shall be considered Indian blood of the Tribes which constitute the Confederated Tribes of the Colville Reservation."

Thus, one effect of Amendment IX was to treat the non-Colville Indian blood of the 1937 base enrollees (and only such enrollees) as Colville blood for purposes of compliance with the 1/4 degree Colville blood requirement of Amendment V. A second effect of Amendment IX was to preserve all blood degree as a matter of tribal constitutional law, regardless of the actual degree of Colville Indian blood possessed.

Amendment IX also provides a way for a tribal member, or applicant for membership, to establish by "clear and convincing proof" and in accordance with "procedures ... [to be] ... adopted by the Colville Business Council" that a person listed on the 1937 roll as a tribal member possessed more Colville Indian blood than is shown on the tribal roll.

As the evidence record in this appeal shows, and as the trial court clearly found, all tribal census rolls prior to and including the 1937 roll were riddled with inconsistencies regarding blood degree. Mem. Op. at 21-22. Amendment IX in effect resolved those inconsistencies by— (1) preserving the blood degrees of 1937 enrollees as minimum blood degrees (regardless of the actual blood degree) and (2) providing a way to prove with clear and convincing evidence that a person actually possessed a higher degree of Colville blood.

In the present case on appeal, it is undisputed that appellant, Floyd L. Hoffman, is listed on the 1937 roll as a Colville tribal member with a blood degree of 5/32. He claims to possess a higher blood degree, and Amendment IX provides that he must prove it with "clear and convincing proof."

The Colville Membership Code,[7] CTC Title 36, provides the "procedures" referred to in Amendment IX by which a person such as the appellant must prove that he possesses more Colville blood than is listed on the roll. The Colville Membership Code's procedures for blood degree corrections are found at CTC §§ 36.7.01 through 36.7.09. The introductory provision states that the purpose of the procedures is "to provide for a fair and unbiased examination of all blood degree corrections requested by the Tribes or by any other person." CTC § 36.7.

The form of action to correct blood degree is a civil complaint in Colville Tribal Court in accordance with standard civil procedures except where specifically modified by the Colville Membership Code. CTC § 36.7.02. This provision does not make any substantive law applicable to this cause of action. The substantive law applicable to this cause of action is set forth in CTC § 36.7.03 (newly codified at Colville Tribal Law and Order Code, Title 8, § 8-1-242, Standard of Proof), which provides that:

> In all actions for blood degree corrections the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, rebuttable by the plaintiff, that the blood degree listed on the roll is correct.

Adopting language from Amendment IX, the plain language of tribal law thus states that "all" blood correction actions must be based on clear and convincing factual proof. In accord is

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[7]Pertinent parts of Title 36 CTC are reproduced here:

CTC TITLE 36 COLVILLE TRIBAL MEMBERSHIP CODE

36.1 Preamble

Section 36.1.02 *Burden of Proof and Standard of Proof.*

The burden of proof shall be upon the Applicant to establish all elements of the Applicant's entitlement to enrollment or entitlement to a correction of blood degree under the Tribal Constitution and rules and regulations of this Code, unless otherwise specifically stated herein. Any matters required to be proved under this Code unless otherwise specifically stated, must be proved to the satisfaction of the Tribal Court Enrollment Committee or the Council, as provided herein, by clear and convincing evidence.

36.7 *Blood Degree Correction.*

The following procedure shall be used in making corrections (increases or decreases) of all blood degrees presently listed on the roll of the Tribes. This procedure is established to provide for a fair and unbiased examination of all blood degree corrections requested by the Tribes or by any other person.

Section 36.7.01 *Standing, Parties.*

The following entities shall have standing to file, and prosecute a blood degree correction action:

(1) The Chairperson of the Enrollment Committee of the Tribes.

(2) The Chief Enrollment Officer of the Colville Confederated Tribes.

(3) Members of the Tribes who desire to have their own blood degree, as listed on the roll of the Tribes, corrected; provided that in this section 'member' shall mean the natural person himself or herself, or the legal guardian of any minor or incompetent member, or the administrator or executor of the unprobated estate of a deceased member listed on the roll of the Tribes.

(4) Any person entitled to request a blood degree correction pursuant to Amendment Nine (IX) to the Constitution of the Confederated Tribes of the Colville Reservation.

Section 36.7.02 *Form Of Action and Procedure.*

An action for blood degree correction shall be by civil complaint for blood degree correction in the Colville Tribal Court. The Tribal Code governing civil actions and Civil Rules of the Court shall be applicable to this procedure except as specifically provided in this Code.

Section 36.7.03 *Standard of Proof.*

In all actions for blood degree corrections the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, rebuttable by the plaintiff, that the blood degree listed on the roll is correct.

Section 36.7.04 *Sovereign Immunity.*

The sovereign immunity of the Tribes shall not be a bar to suits for injunctive relief brought in the Colville Tribal Courts by parties having standing under this Code to bring actions for correction of blood degrees under the provisions of this Code. This waiver shall not apply to any other cause of action and shall not be a waiver of immunity from the award of money damages.

Section 36.7.05 *Jury Prohibited.*

Actions brought under this section shall be tried by the judge alone and no person shall have a right to trial by jury in an action brought to correct a blood degree.

Section 36.7.06 *Form of Judgment.*

Judgments in cases involving petitions for correction of blood degrees shall be issued in writing over the signature of the trial judge and shall be limited to declaratory judgments, injunctions, and awards of reasonable costs and representative fees, as set by the Court, to prevailing parties.

Section 36.7.07 *Effect of Judgment.*

Judgments in actions to correct blood degrees shall be binding on all parties to the action; provided that such judgments shall be admissible into evidence in all other actions to which they are relevant but shall not be determinative of any actions in which they are found relevant and admissible.

Section 36.7.08 *Jurisdiction.*

For purposes of all actions to correct blood degrees the Colville Tribal Court will be considered to have jurisdiction over such actions pursuant to C.T.C. Section 3.1.01, as such section is now written or shall in the future be amended, in that the events giving rise to the action are deemed to have occurred within the tribal jurisdiction.

Section 36.7.09 *Appeals.*

Any party to an action to change a blood degree may appeal the judgment of the trial court pursuant to the Colville Tribal Code rules for civil appeals. Any appeal shall stay the judgment of the trial court until the completion of the appeal. A judgment on appeal shall be final. The prevailing party in an appeal of a judgment in a change of blood degree action shall be awarded costs of appeal and reasonable fees for representation.

CTC § 36.1.02 that all means matters to be proved under the Membership Code must be with clear and convincing evidence.

The trial court correctly noted that the clear and convincing standard is an "onerous burden because it requires that the petitioner produce evidence ... so clear and convincing that the opposition's evidence is plainly outweighed." Mem. Op. at 11, citing *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, (C.B. Pot. Sup. Ct., Feb. 17, 1988) and *General Motors Acceptance Corp. v. Bitah*, 16 Indian L. Rep. 6002, (Nav. Sup. Ct., Aug. 11, 1988). The trial court also noted that federal case law formulations of the clear and convincing evidence standard are not binding on the trial court, but acknowledged that the federal cases state "essentially the same" standard as the "plainly outweigh" formulation in the tribal court decisions. Mem. Op. at 12, n.9.

Federal cases are not binding on this tribal court system, but an examination of the two cited cases from other tribal courts discloses that those courts did not have occasion to address factors set forth in the federal court decisions, which are relevant to the present appeal. It is appropriate to consider some of the factors regarding clear and convincing proof that are discussed in the federal decisions.

First, clear and convincing evidence must convince the trier of fact that the truth of the proponent's assertion is "highly probable." *Colorado v. New Mexico*, 104 S. Ct. 2433, 2437-38 (1984) (interstate water allocation under the Court's original jurisdiction, in which the Court itself is the factfinder). Second, the evidence must cause the factfinder to be convinced "immediately" or "without hesitation." *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841, 2855 n.11 (1990); *Colorado v. New Mexico*, 104 S. Ct. at 2437-38 (1984). Third, the underlying policy reason for use of the clear and convincing evidence standard in civil litigation, as opposed to a preponderance standard, is to reflect a preference that the risk of erroneous factual determination be allocated primarily, though not exclusively, to the party who bears the burden of proof, in this case appellant. *Colorado v. New Mexico*, 104 S. Ct. at 2437-38 (1984).

Because the clear and convincing standard of proof is established in a tribal constitutional amendment approved by the tribal membership, the policy reasons in support of allocating the risk of erroneous factual determination to appellant apply with special force in this case. It is not easy to establish entitlement to a blood degree correction because the membership intended for it not to be easy. There is thus a strong tribal interest in preserving the 1937 roll as the starting point for all membership matters, and accordingly a statutory presumption that the blood degrees on the roll are correct.

Appellant Has Failed To Prove His Burden By Clear and Convincing Evidence That He Is Entitled To An Increase In Blood Quantum Based Upon Factual Proof.

After reviewing the evidence of the appellant presented to the trial court, it is clear to this appellate panel that the appellant has failed to prove by clear and convincing evidence that he is entitled to a blood degree correction based upon factual proof.

For most of the proceedings before the Colville Tribal Court and the Colville Tribal Court of Appeals, the appellant was without legal counsel admitted to practice before the Colville Tribal Court. The appellant attempted to represent himself, though he had the help of the other petitioners, whom the trial court eventually found to have no standing to bring the original lawsuit. The case of the appellant suffered from the lack of a sufficient record to meet his burden of proof.

As a preliminary matter, Tribes attached an affidavit of Audrey Sellars to their response brief and cited to the affidavit in their response brief. The trial court in its order dated April 20, 1995 requested only that the parties brief the issue of adoption. All additional evidence, whether documentary or testimonial, was stricken from the parties' briefs and was not considered by the trial court in rendering its decision. This appellate panel adopts this course of action taken by the trial court.

As stated earlier in this opinion, appellant has the burden of proving "by clear and convincing esidence, that a blood degree other than that which is listed on the 1937 Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be." CTC § 36.7.03. *See also* Constitution, Amendment IX, Art. VII, 4(2)(c), which requires proof "by clear and convincing proof."

This is a heavy burden because it requires that the appellant produce evidence that clearly convinces the trial court, that is, evidence so clear and convincing that the opposition's evidence is plainly outweighed. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, 6009 (C.B. Pot. Sup. Ct. 1988); *General Motors Acceptance Corp. v. Bitah*, 16 Indian L. Rep. 6002, 6003 (Nav. Sup. Ct. 1988). This burden of proof is a very difficult level of proof to establish for any blood correction because: (1) people who are required to establish this high level of proof are not the custodians of the only available official records in existence that constitute "proof," or admissible evidence, of blood degree. Usually, such records are in the custody of either the Tribes or the United States; and (2) the records in existence related to Indian blood degree are usually historical documents containing contradictory information with little or no admissible evidence on the methods used to collect data for each type of historical document. However difficult this standard may be, it is the burden established by tribal law and the Tribal Constitution which must be met in the Colville Tribal Court before a trial court can increase a blood degree.

To reach a conclusion on an issue, a trial court must review all of the substantial credible evidence before it. Substantial credible evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. The credibility and weight to be given the evidence is not a function of the number of witnesses called by the parties or the number of documents submitted into evidence, but rather, the substance of the evidence itself and the intangible factors which may properly be considered by the trier of fact. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, 6009 (C.B Pot. Sup. Ct.). In other words, the evidence may be inherently weak and conflicting, yet it may still be considered substantial.

It is well-established that if the evidence is conflicting, it is within the province of the fact-finder to determine the weight and credibility to be afforded the evidence. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, 6009 (C.B. Pot. Sup. Ct.).

In the matter before the trial court and this appellate panel, the Enrollment Office conceded there is no simple formula for evaluating evidence supporting claims for blood degree corrections.[8] The trial court agreed in its memorandum opinion. Preferred evidence consists of individualized statements or documents given in some sort of context that enables the trial court to evaluate the reliability of the information, such as individual history cards, testimony from probate proceedings, and affidavits for allotments or services.

The law provides a framework for weighing such evidence. Affidavits about old events or persons long deceased are frequently helpful when such affidavits were made at or near the time the event occurred, but this appellate panel is always wary of the motives behind recent affidavits. For instance, a 1910

[8]Affidavit of Audrey Sellars, dated June 16, 1995, p.4.

statement about the ancestry of someone living in 1910 is generally more credible than a 1995 affidavit about the same person, unless the later affidavit is based on old documents that were not available to the person making the 1910 affidavit.[9] This is because statements are more reliable when made contemporaneous with an event. The longer the passage of time, the less reliable the information unless substantially supported by other evidence.

Testimony or written statements by a person familiar with the facts, or personally acquainted to a person making a statement, are given more weight than testimony or statements by people who are not familiar with the facts or the person making the statement. Sworn statements are given more weight than unsworn statements. Likewise, the more formal the setting is when the statement is made, the more weight the law gives to the statement. For instance, a statement made in a probate proceeding will be given more weight than a statement casually given by that same person or another in a less formal setting. This is because statements made during probate proceedings are made in open court by a sworn witness [who] is subject to cross-examination and impeachment, and subject to criminal penalties if the witness fails to tell the truth.

This appellate panel of the Court of Appeals adopts the above rules for enrollment appeals and has applied the above rules to the findings of the trial court in this appeal. The evidence and weight given to each piece of evidence by the trial court is discussed below. We affirm the findings and conclusions of the trial court.

This Court adopts the finding of the trial court that

> Perhaps because the parties decided not to introduce testimony on each document, many of the documents admitted into evidence, submitted by both parties, have little weight under the legal principles discussed above [in the Trial Court's Memorandum Opinion].

The constitutionally mandated starting point of this appeal is the 1937 Census. The evidence showed and the parties admitted that the appellant, Floyd Hoffman, is listed on the 1937 Census as possessing 5/32 Indian blood; Floyd Hoffman's mother, Helen Ferguson, is listed on the 1937 Census as possessing 5/16 Indian blood; Floyd Hoffman's father, Clarence Hoffman, possesses no Indian blood on the 1937 Census; Floyd Hoffman's grandparents, Joseph and Annie Ferguson, are listed on the 1937 Census as: Joseph Ferguson 1/2 Indian blood and Annie Etue Ferguson 1/4 Indian blood.

At trial, appellant argued that his blood degree should be increased because Annie Ferguson possessed at least 1/2 Indian blood. In support of this argument, the appellant introduced the following evidence:

First, appellant introduced "Delayed Death Certificate" from the 1935 Census showing that Joseph and Annie Ferguson possessed 21/32 Indian blood when they died. Under the law as set forth above and adopted by this appellate panel, the death certificates, without more, received little weight by the trial court because no evidence was introduced to indicate that the information upon which the death certificates were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Second, the petitioner admitted into evidence four (4) fee patent applications, two applications were dated 1928 and two applications were undated, all of which listed Helen Ferguson and Esther Mason Ferguson as possessing 5/8 Indian blood. No evidence was introduced that these patent applications were sworn applications made in a formal setting or subject to cross examination and impeachment. Though the applications were personally made by Helen and Esther Ferguson, no evidence was introduced that information contained in the applications was verified by the BIA and that the information provided was accurate.

Third, evidence was admitted showing that Esther Ferguson McClung, natural and full sister of Helen Ferguson Hoffman, appellant's mother, is an enrolled member of the Colville Confederated Tribes possessing 5/16 Indian blood, while Helen Ferguson Hoffman is listed as possessing only 3/8 Indian blood. In 1983, the children of Esther Ferguson Mason successfully changed Esther Mason's blood degree to 5/8 Indian blood. This allowed the children, first cousins to Floyd Hoffman, to enroll in the Colville Confederated Tribes as possessing 5/16 Indian blood. Applying the above legal framework, this inconsistent information provides little weight in light of the fact that Esther Ferguson McClung is the only child of Joseph and Annie Ferguson listed on the 1937 Census as possessing 5/8th Indian blood.

Fourth, appellant admitted into evidence a 1981 BIA letter stating that if there are "conflicting degrees of Indian blood" between natural brothers and sisters then the record should be changed to reflect the same level for all brothers and sisters. This evidence neither weighs in favor nor against appellant since policy does not indicate whether the blood degree should be increased or decreased or which blood degree should be preferred in a case, such as in this appeal, where multiple degrees are listed.

Fifth, the appellant relied on a BIA letter dated February 21, 1910, showing that Joseph and Annie Ferguson were adopted into the Colville Confederated Tribes as each possessing 1/2 degree Indian blood. Under the law as set forth above, the letter, without more, received little weight by the trial court because no evidence was introduced to indicate that the information upon which the letter was based was given in a formal setting, subject to cross examination and impeachment, or was by a person personally acquainted with the Hoffmans.

Sixth, appellant submitted Census records from 1899, 1903, 1904, 1907, 1908, 1912-13, 1913, 1924, 1930, 1933, 1935, 1937, and 1939 that showed: (1) Floyd Hoffman's blood degree fluctuated from 3/16 to 5/32 to 1/8; (2) Helen Ferguson Hoffman's blood degree fluctuated from 1/2 to 3/8 to 5/16 to 5/32; (3) Esther Ferguson Mason's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from 5/8 to 1/2 to 5/16; (4) Mabel Ferguson McClung's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from 1/2 to 5/16; and (5) Annie Etue Ferguson's blood degree fluctuated from 21/32 to 1/2 to "less" than 1/2 to 1/4 to 1/8.

The trial court noted that these records are contradictory on their face. Under the law as set forth above, such contradictory evidence received little weight by the trial court because no evidence was introduced to indicate that the information contained in the census records were given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Finally, appellant submitted a school record indicating that Annie Etue Ferguson possessed 1/2 degree Indian blood. Again, appellant has failed to provide supporting evidence to indicate that the information upon which the school records were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

To summarize appellant's evidence, it is inconsistent. It does not provide a record that supports a finding of any one specific blood quantum by clear and convincing evidence. This appellate panel affirms court's finding that it "does not find a clear weight of this (appellant's) evidence supporting any specific blood quantum."

The Tribes, on the other hand, argue that the appellant's evidence, listed above, fails to prove by clear and convincing evi-

[9] Affidavit of Audrey Sellars, dated June 16, 1995, p.4.

dence that the blood degree listed on the 1937 Census for Floyd Hoffman is incorrect. In support of this argument, the Tribes introduced the following evidence that consistently supports a finding that Annie Etue Ferguson's actual Indian blood degree, as established through heredity, was 1/8th.

First of all, the Tribes admitted into evidence a marked sworn and witnessed affidavit dated March 27, 1905 made by Cora Desautel Etue, Annie Etue Ferguson's mother, and witnessed by the U.S. Indian Agent at the Colville Agency, Miles, Washington. Though the purpose of the affidavit when made is not clear from the evidence, the affidavit purports to show a historical and genealogical record of Cora Desautel Etue, her husband and children. The document indicates that Cora Ferguson herself only possessed 1/4 Indian blood and Annie Etue Ferguson only possessed 1/8 Indian blood. Applying the legal analysis set forth above, this affidavit received considerable weight by the trial court It is obvious from the face of the document that the document was made in a formal setting because it was witnessed and sworn to. In addition, the statement contained first hand information from Cora Desautel Etue who was intimately familiar with the facts concerning her family.

In analyzing the Tribes' evidence, the trial court reviewed the appellant's exhibits of official Colville "Individual History Cards" for Annie Etue Ferguson, Helen Ferguson, Mabel McClung and Esther Ferguson which shows that their blood degree quantum was consistent with Cora Etue's 1905 statement. No evidence was introduced on the setting in which a "Individual History Card" is compiled. However, the trial court was aware, from previous blood degree correction cases, that the "Individual History Card" is one of the main ways for the Enrollment Office and the BIA to accurately reflect biographical information for each member. For this reason these cards received considerable weight by the trial court.

Finally, the Tribes introduced into evidence a 1968 letter from the BIA approving Colville Business Council Resolution 1968-50 requesting a decrease of Annie Etue Ferguson's blood degree from 1/4 to 1/8. From this investigation and recommendation by the BIA, the Enrollment Office did decrease Annie Etue Ferguson's Indian blood on the 1937 Census from 1/4 to 1/8. However, because of the Enrollment's Office interpretation of Amendment IX as stipulated to by the parties, the Enrollment Office increased Annie Etue Ferguson's Indian blood on the 1937 Census to 1/4 after Amendment IX was passed. As testified to by Audrey Sellars at the trial court hearing, this letter represents official action taken by the Enrollment Office in investigating and correctly representing the blood degree of Annie Etue Ferguson. For this reason, this letter received considerable weight by the court.

From the above, the appellant has failed to meet his burden of proving by clear and convincing evidence that Floyd Hoffman's Indian blood on the 1937 Census should be increased to a specific blood degree which has been established as factually correct by clear and convincing evidence. Though appellant had several documents admitted into evidence, he relied on only a few of the documents. Appellant failed to show the trial court the importance of each document at the trial court hearing. Many of the documents used by the appellant to make his case were contradictory. Appellant failed to explain the contradictions. In short, appellant failed to clearly convince the trial court that the 1937 Census reflects a lower blood degree than actually exists. Appellant's evidence was not so clear and convincing that the evidence supporting the 1937 Census was plainly outweighed. The above findings and conclusions are affirmed by this appellate panel.

The Appellant Has Neither Argued Nor Presented To The Trial Court A Tribal, State Or Federal Statute Or Case Law Which Requires The Tribes In Either 1907 Or 1937 To Afford Due Process Of Law To Its Members In Exercising The Tribes' Power Of Self-Government Through Adoption And Reductions Of Blood Degrees Conferred Through Adoption.

The appellant argued that since Joseph and Annie Etue Ferguson were adopted into the Tribes as 1/2 blood quantum each, this amount is a vested right and cannot later be changed.

At the trial court hearing, the appellant entered into evidence a BIA letter dated February 10, 1910 which summarizes the unanimous Adoption July 8, 1907, by the Colville Business Council, that they [Joseph and Annie Ferguson] be enrolled with the Colville Tribe. The BIA letter continued that the evidence clearly establishes that "both Joseph and his wife [Annie] are 1/2 blood Indians recognized by the tribe."

The Tribes stipulated to the entry of this document into evidence and Ms. Sellars, Tribal Enrollment Office, confirmed that Joseph and Annie Etue Ferguson were adopted into the Tribes as each possessing 1/2 degree Indian blood. The trial court found that there was substantial credible evidence that Joseph and Annie Ferguson were conferred 1/2 Colville Indian blood by adoption in 1907.

A dispositive issue in this appeal is, what effect does the adoption into the Colville Tribes of Annie and Joseph Ferguson have with each having 1/2 Indian blood quantum? The trial court asked the question "If this adoption vests with the [appellant] a property right, then can the Tribes later lower the blood degree amount conferred by adoption based upon heredity findings and us[e] the process that was invoked here?"

Appellant has shown that adoption into the Tribes did occur in 1907, which conferred a blood degree of 1/2 by the Tribes. However, appellant has presented no tribal, state or federal law defining what legal protections for the legal rights conferred existed in 1907 when Joseph and Annie Etue Ferguson were adopted into the Tribes.

Under modern principles of tribal sovereignty, Indian tribes define their own membership. Under the existing Colville Tribal Code, adoption into the Tribes is a final, discretionary act by the Council, not a right, and the Council's decision is nonappealable. CTC § 36.5.01, *see also* CTC § 36.5.05 (decisions of Business Council final and no appeal of any kind to any tribunal or other agency for any reason shall be allowed from a denial of adoption by the Business Council).

The trial court and this appellate panel are limited in the relief that they can provide. In this matter, the trial court and this appellate panel can only grant such relief as the law passed by the Colville Business Council allows. The appellant has failed to present any tribal, state or federal law which would have prohibited the Tribes, in exercising their right to define their membership, in 1937, to decrease Annie Etue Ferguson's 1/2 Indian blood degree conferred through adoption in 1907.

In addition, the appellant has not argued nor presented any law that would have required the Tribes to afford Annie Etue Ferguson due process of the law before decreasing her blood degree from 1/2 Indian blood when she was adopted in 1907, to 1/4 listed on the 1937 Census. That is, no evidence was presented by the appellant to the trial court that notice and a hear-

ing were required prior to the Tribes decreasing Annie Etue Ferguson's blood degree on the 1937 Census.

This appellate panel of the Court of Appeals reserves judgment on the Tribes' argument[10] that "The Only Cause of Action Below [Trial Court] Was A Petition For Blood Degree Correction, And Because Such Action Is Limited To A Factual Inquiry, This Court Has No Subject Matter Jurisdiction Over Appellant's Legal Claims." Any statement on this argument would constitute obiter dictum, because of our previous ruling in this appeal.

This appellate panel of the Court of Appeal reserves judgment on the Tribes' argument[11] that "The Waiver Of Sovereign Immunity Establishing Jurisdiction Over A Blood Correction Limits The Action To A Factual Inquiry." Any statement on this argument would constitute obiter dictum, because of our previous ruling in this appeal.

This panel appellate of the Court of Appeals reserves judgment on the Tribes' argument[12] "An Equal Protection Claims Must Be Brought Pursuant To The Colville Civil Rights Act,[13] Title 56, And Because Such A Claim Was Not Pleaded or Adjudicated Below, It Cannot Be Considered On Appeal." Any statement on this argument would constitute obiter dictum, because of our previous ruling in this appeal.

Petitioner Has Failed To Affirmatively Plead or Prove That, Under Custom Law: (1) Annie Etue Ferguson Has A Vested Right to the 1/2 Blood Degree She Received Through the 1907 Adoption; and (2) The 1/2 Blood Degree Received Through the 1907 Adoption Was Reduced Illegally, To Warrant the Trial Court To Conduct A Custom Hearing on This Issue.

The Trial Court stated in its memorandum opinion that "[I]f there were no written laws pertaining to the tribal adoption in 1907, 'custom law' is the relevant inquiry. Unlike Anglo statu-

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[10]A quotation from Tribes' Response Brief—

> The membership Code expressly requires that in "all" blood correction actions, the plaintiff must factually prove what his blood degree should be. CTC § 36.7.03. This is based on Amendment IX to the Constitution. As soon as a party, such as an appellant in this case, begins making legal arguments as an alternative to the factual proof requirement he is outside the scope of the blood correction cause of action. Appellant has argued that Annie Etue Ferguson's blood degree was recognized as one-half when she was adopted in 1907, and that this blood degree cannot be reduced as a matter of law, under either tribal customary law or equal protection considerations. The only action pleaded below was a blood correction action, and appellant made no allegations in support of some other cause of action that may conceivably allow adjudication of these legal claims. Hence the Court lacks subject matter jurisdiction over these non-fact-based claims."

[11]A quotation from the Tribes' Response Brief—

> The Membership Code, CTC 36.7.04, provides a very specific limited waiver of the Tribes' sovereign immunity for blood correction actions:
>
> The sovereign immunity of the Tribes shall not be a bar to suits for injunctive relief brought in the Colville Tribal Court by parties having standing under this Code to bring actions for correction of blood degrees under the provisions of this Code. This waiver shall not apply to any other cause of action and shall not be a waiver immunity from an award of money damages.
>
> The "provisions of this Code" referred to plainly include the requirement that blood degree increases be proved with clear and convincing evidence. The waiver does not extend to the adjudication of any legal theory offered as an alternative to the proof requirement. And because the waiver "does not apply to any other cause of action," the burden is on appellant to identify a different cause of action that provides a waiver of sovereign immunity for alternative legal claims. The Tribal Courts Memorandum Opinion, at pages 4-6, contains an accurate discussion of tribal sovereign immunity as the basis for denying a motion that appellant had brought prior to trial. The court concluded that the relief sought in the motion was outside the scope of the immunity waiver for the blood correction action. As set forth in that discussion, the Tribes concurs that sovereign immunity is a bar to the Courts jurisdiction, and that any such waiver must be express, unequivocal, and strictly construed. For the same reasons that sovereign immunity barred the motion, sovereign immunity also bars appellants legal claims.

[12]Quotation from Tribes' Response Brief—

> Section 2 of appellant's Opening Brief asserts that the equal protection provisions of the Colville Civil Rights Act CTC § 56.02(h), require that his mother Helen's 5/16 blood degree be increased to equal the higher 5/8 blood degree of her sister Esther. The Tribes have already explained why Esther's higher blood degree cannot be treated as factual proof. As a legal issue, rights protected under the Civil Rights Act must be vindicated by an action brought under the terms of that statute.
>
> CTC § 56.03 sets forth the requirement for a civil rights cause of action. Neither the Colville Tribes nor any of its entities may be a defendant in such an action. The only proper defendants are individual officers or agents of the Tribes. In the present case, only the Tribes is a defendant. There are no allegations as to which individual officials of the Tribes may have infringed appellant's equal protection rights, or how such person's actions may have infringed those rights.
>
> This appeal does not involve a civil rights cause of action, and appellant may not raise it for the first time in this Court.

[13]Title 56 COLVILLE TRIBAL RIGHTS ACT-

56.01 *Title.*

This Act shall be known as the Civil Rights Act of the Confederated [Tribes] of the Colville Reservation.

56.02 *Civil Rights of Persons Within Tribal Jurisdiction*

The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:

(a) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(b) violate the right of people within its jurisdiction to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(c) subject any person for the same Tribal offense to be twice put in jeopardy;

(d) compel any person in any criminal case to be a witness against himself;

(e) take any private property for a public use without just compensation;

(f) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(g) require excessive bail, impose excessive fines, inflict cruel and unusual punishments;

(h) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(i) pass any bill of attainder or ex post fact law; or

(j) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a tribal jury of not less than six persons.

56.03 *Right of Action*

Any person may bring an action for declaratory and/or injunctive relief only, against any executive officer or employee of the Confederated Tribes, or any employee or officer of any government agency

tory laws on adoption, Indian law is deeply rooted in the customs and traditions of the Tribes, which is woven into one's lifestyle and beliefs." *In Re P.*, J82-3021, 5-6 (Colv. Tr. Ct. 1983); *In Re: J.J.S.*, 11 Indian L. Rep. at 6031-32. Traditionally, "custom" is unwritten law. *In Re P.*, J82-3021 at 5-6. The trial court could have requested a "custom hearing" when "any doubt arises as to the customs of the Tribes ..." CTC § 3.4.04.[14] *Also, see* § 56.07 of Colville Tribal Civil Rights Act. However, the burden of proof is on the appellant in this blood degree correction action to invoke CTC § 3.4.04. Since the appellant has the burden of proof, he must affirmatively plead that a custom of the Tribes controls the law on an issue pertinent to his blood degree correction action in order for the trial court to request a customs hearing. This has not been done in this action. In the appellant's petition and subsequent pleadings, no specific allegations have been made regarding the applicability of custom law pertaining to adoption or blood corrections. Therefore, this appellate panel will affirm the decision of the trial court for not ordering a customs hearing.

After reviewing the records and files herein, and being fully advised in the premises, the court orders as follows,

It is ordered that:

1.) The decision of the trial court is affirmed, and the appeal is denied and dismissed.

It is further ordered that:

1.) Reasonable costs and reasonable representative fees are awarded to the prevailing party pursuant to CTC § 36.7.07 and CTC § 36.7.09.