IN THE MAGISTRATE DIVISION
OF THE OREGON TAX COURT
Income Tax

ALLEN L. FOREMAN, Plaintiff, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendant.	))))))))))	No. 001029C **DECISION**

Plaintiff appeals from defendant's assessment of a deficiency stemming from an adjustment to plaintiff's 1999 state tax return in which defendant determined plaintiff did not qualify for the tax exemption available to certain American Indians under ORS 316.777.[1] A trial was held in Salem on January 25, 2001.

Plaintiff appeared on his own behalf. Defendant appeared through Mr. David Zeh, an auditor with the Department of Revenue. For ease of reference the parties will be referred to as "plaintiff" and "the department."

STATEMENT OF FACTS

Plaintiff is an enrolled member of the Klamath Tribe and works as the Tribal Chairman. Plaintiff owns 320 acres in a remote location outside the town of Chiloquin, in Klamath County, Oregon. Plaintiff purchased the property in October 1997 from Lavina (Lalo)[2] Smith. Plaintiff testified that Ms. Smith originally obtained title to the property

[1] All references to the Oregon Revised Statutes are to 1999.

[2] The name on the original title is Lavina Lalo, now deceased, who obtained title prior to marrying a Mr. Smith.

around 1910 by allotment from the federal government under the Dawes Act. Ms. Smith owned the property continually until it was sold to plaintiff by the Lalo/Smith estate. The property is roughly two miles from the highway and lacks telephone and electric utility services.

Plaintiff maintains a separate house in the town at Chiloquin on 215 3rd Street, which he rents from William Erly. Plaintiff testified he began renting this home in late 1998 or early 1999. The department's witness testified he has DMV records as far back as 1992 showing the 3rd Street address; however, he admitted he is unaware whether an address change will update all prior DMV records. Plaintiff testified that he uses the rental home in town for the following stated purposes: as a communication and message center and point of contact for phone services and e-mail; to do laundry; for the storage of business records and personal belongings; for emergency shelter when conditions prevent plaintiff and/or his family from getting to their "primary" residence; and, as a point of pickup and shelter for plaintiff's teenage daughter, who attends school in town. (Ptf's Complaint at 4.) Neither party presented evidence as to where plaintiff lived prior to 1997/1998 or whether this has been standard living practice for plaintiff and his family.

Plaintiff filed a 1999 Oregon personal income tax return, claiming an income exemption under ORS 316.777. The department denied the exemption and issued a deficiency. Plaintiff filed written objections to the deficiency and the department reviewed the matter in accordance with ORS 305.265. The department thereafter upheld its initial determination and assessed the tax deemed owing on June 27, 2000. Plaintiff timely appealed to this court.

COURT'S ANALYSIS

A state's power to tax income of tribal members is limited, for one, by whether the tribal member resides within "Indian country." *Oklahoma Tax Com. v. Sac and Fox Nation*, 508 US 114, 113 S Ct 1985, 124 L Ed 2d 30 (1993). Oregon's income tax statutes follow that prescription, stating, in relevant part, that:

> "(1) Any income derived from sources within the boundaries of federally recognized Indian country in Oregon by any enrolled member of a federally recognized American Indian tribe residing in federally recognized Indian country in Oregon at the time the income is earned is exempt from tax under this chapter." ORS 316.777 (emphasis added).

Congress has broadly defined "Indian country" to include formal and informal reservations, federally dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. 18 USC § 1151 (1994).[3]

In deciding whether plaintiff falls under ORS 316.777(1), the court must determine whether plaintiff resides in "federally recognized Indian country." Plaintiff argues that the 320 acres qualifies as an Indian allotment. There is no dispute that plaintiff owns the 320 acres. However, it is unclear to the court whether an Indian allotment retains its allotment status once the land is conveyed. In addition, the court must glean from the facts presented whether plaintiff actually resides on that property.

Plaintiff argues that he resides on the 320 acres and his use of the rental house in town is for convenience only. Defendant presented the 2000 tax roll, which shows no improvements (i.e., a home or other structures) on that land. (Def's Ex Mar 21, 2001 letter, attachs 1-3.) Plaintiff did not present rebuttal evidence of living quarters on the property or

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[3]This definition has been generally accepted by the courts in tax immunity cases, although it is found in the federal criminal code under the Major Crimes Act. See *Alaska v. Native Village of Venetie Tribal Gov't et al.*, 522 US 520, 527-531, 118 S Ct 948, 140 L Ed 2d 30 (1998).

otherwise explain how he “lives” on the land. Plaintiff's sole response was to assert that the county records "will not show improvements due to the fact that the County has no jurisdiction on such lands." (Ptf's Apr 3, 2001 letter.)[4] Based on this lack of evidence and the fact that, by statute, plaintiff carries the burden of proof, the court concludes that plaintiff does not reside on the 320 acres. ORS 305.427. Given this conclusion, it is unnecessary for the court to determine whether an allotment retains its status upon conveyance.

In the alternative, plaintiff argues that because he resides in Klamath County, he resides in federally recognized Indian country. He takes this argument from the fact that the Klamath Tribe was restored to federal recognition in 1986, under 25 USC section 566. Specifically, he points to language stating that federal services and benefits shall be provided to eligible tribes "without regard to the existence of a reservation for the tribe." 25 USC § 566(c) (1994). That broad language was used because of the fact that the Klamath Tribe no longer has a reservation.[5] The specific federal services and benefits provided are not enumerated in the statute.

A number of events in history, the progression of time, and changes in the relationships between the federal government and Indian tribes have brought about the cessation of many reservations. At the turn of the 20th century, the Dawes Act allotment

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[4]Plaintiff invited the court to make a visual inspection of the property to verify the existence of a residence; however, it is not up to the court to conduct a fact-finding investigation. That duty is on plaintiff, who has the burden of proof. *See* ORS 305.427. There are many ways plaintiff could have presented evidence that there is a dwelling of some sort in which he resides on the 320 acres.

[5]In 1954, federal supervision of the Klamath Tribe was terminated and the land was purchased from the tribe by the United States government. *See* 18 USC § 564 (1994) (overruled to the extent it is inconsistent with 25 USC § 566, the Klamath Restoration Act of 1986). To this date, the United States is not holding any land in trust for the Klamath Tribe and a reservation has not been re-established.

program granted to Indians, in trust, land that was not part of a reservation. *See* 25 USC §§ 331-358.[6] Indian allotments are recognized as coming within the definition of "Indian country." *See United States v. Pelican*, 232 US 442, 449, 34 S Ct 396, 58 L Ed 676 (1914).

Because all of Klamath County is neither a reservation nor an allotment, plaintiff's case depends on whether the county comes within the meaning of "dependent Indian community," the third category in the definition of "Indian country." *See United States v. McGowan*, 302 US 535, 538-539, 58 S Ct 286, 82 L Ed 410 (1938); *see also United States v. Sandoval*, 231 US 28, 46, 34 S Ct 1, 58 L Ed 107 (1913). In examining the meaning of "dependent Indian community," the Court recently set forth a two-part test: "first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, [the lands] must be under federal superintendence." *Venetie*, 522 US at 527 (concluding that Congress intended that both tests be satisfied for a finding of "dependent Indian community").

In restoring the Klamath Tribe to federal recognition, the federal government did not purchase or designate either a portion or the entirety of Klamath County for Indian use. *Cf. Venetie*, 522 US at 533 (finding that the federal set-aside requirement was not met where no restrictions existed on land purchased from the federal government by the Venetie tribe, so that non-Indians could use and purchase the land). While supervision over the Klamath *Tribe* was restored, the federal government did not exert its supervision over all of the *land* in Klamath County to the exclusion of the state of Oregon. In the language of 18 USC

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[6]Relative to the Klamath Tribe, the allotment program ended in 1938. *See* 25 USC § 552.

section 1151, Klamath County is not a "dependent Indian *community*."

In addition, the intention of 25 USC section 566(c) is made clear by its specific reference to federal *services*. *Cf. Spang v. Dept. of Rev.*, OTC-MD No 982156C (Nov 4, 1999) (finding that health services districts, established pursuant to the restoration of the Siletz tribe, are not intended to be included in the meaning of "Indian country" under 18 USC section 1151). That the federal government provides health, education, social, and economic services to the Klamath Tribe does not connote federal superintendence over Klamath County. *See Venetie*, 522 US at 534. Such forms of general federal aid "are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Id.*

CONCLUSION

The court finds that plaintiff has failed to establish that he lives on an Indian allotment. The court also finds that Klamath County has not been set aside for the Klamath Tribe and its land is not regulated or controlled by the federal government; therefore, it is not a "dependent Indian community" within the meaning of 18 USC section 1151.

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IT IS THE DECISION OF THIS COURT that plaintiff is not entitled to a 1999 personal income tax exemption under ORS 316.777, and that defendant's income tax assessment stands.

Dated this _____ day of July, 2001.

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DAN ROBINSON
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON JULY 17, 2001. THE COURT FILED THIS DOCUMENT ON JULY 17, 2001.