IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

TINA RETASKET,	)	
	)	TC-MD 060584E
Plaintiff,	)	
	)	**DECISION GRANTING**
v.	)	**DEFENDANT'S CROSS**
	)	**MOTION FOR SUMMARY**
DEPARTMENT OF REVENUE,	)	**JUDGMENT and DECISION**
State of Oregon,	)	**DENYING PLAINTIFF'S**
	)	**MOTION FOR SUMMARY**
Defendant.	)	**JUDGMENT**

Plaintiff appeals Defendant's Conference Decision Letter dated April 18, 2006, which denied Plaintiff's amended returns for tax years 2001, 2002, and 2003. Plaintiff claims ORS 316.777 entitles her to an income tax exemption for the contested years. The parties submitted the case to the court on cross motions for summary judgment. Oral argument on the motions was held January 24, 2007. Cathern E. Tufts, Attorney at Law, represented Plaintiff. Darren Weirnick, Assistant Attorney General, represented Defendant.

I. STATEMENT OF FACTS

The parties stipulated to the following facts:

During 2001, 2002, and 2003 (the relevant years), Plaintiff was an enrolled member of the Confederated Tribes of Siletz Indians of Oregon (Siletz Tribe), which is a federally recognized American Indian Tribe, and she derived her income from sources within federally recognized Indian country in Oregon. (Stip Facts 1, 3.) Plaintiff resided, during the relevant years, at 159 Tena's Street in Siletz, Oregon (referred to herein as "the property" or "Plaintiff's property"); she held fee simple title to the property and paid property taxes on the property. (Stip Fact 2.)

Subsequent to the Termination Act of August 13, 1954 (Termination Act),[1] but prior to the relevant years, title to the property was transferred in fee simple title to Plaintiff's predecessor in interest with no restriction on alienation. (Stip Fact 7.) The Restoration Act of November 18, 1977 (Restoration Act)[2] restored the Siletz Tribe's status as a federally recognized Indian tribe. (Stip Fact 8.) During the relevant years, there were no federal restrictions on alienation of the property. (Stip Fact 5.) The property was not owned by the Siletz Tribe or the United States government; was not under the jurisdiction of the United States government; and was not held in trust by the United States government for the benefit of Plaintiff, the Siletz Tribe, or any tribal member. (Stip Facts 4, 6.) During the relevant years, the property was not within the approximately 3,987 acres of reservation lands set aside for the Siletz Tribe and held by the United States in trust for the benefit of the Siletz Tribe and its members. (Stip Fact 9.)

Plaintiff claims that, for tax years 2001, 2002, and 2003, her income was exempt from taxation under the provisions of ORS 316.777. Defendant disagrees, arguing the exemption does not apply because Plaintiff did not reside in Indian country.

II. ANALYSIS

Generally, Oregon residents are subject to state income taxation. ORS 316.037.[3] Qualifying American Indians are exempt from state income taxation under ORS 316.777(1) as follows:

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[1] Act Aug 13, 1954, ch 733, § 1, 68 Stat 724 (1954) (codified as amended at 25 USC §§ 691-708 (2000)).

[2] Pub L 95-195, § 3, 91 Stat 1415 (1977) (codified as amended at 25 USC §§ 711-711f (2000)).

[3] All references to the Oregon Revised Statutes (ORS) are to 1999, with no subsequent changes applicable to tax years 2001, 2002, or 2003.

> "(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."

The parties have stipulated that Plaintiff is an "enrolled member of a federally recognized American Indian tribe" and that, during the tax years in question, her income was "derived from sources within the boundaries of federally recognized Indian county in Oregon." *Id.*; (Stip Facts 1, 3). Therefore, the only question before the court is whether, during the years 2001, 2002, and 2003, Plaintiff resided in "federally recognized Indian country in Oregon * * *." ORS 316.777(1).

The court begins by observing that, when interpreting a matter of federal Indian law, " 'statutes passed for the benefit of dependent Indian Tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' " *Foreman v. Dept. of Rev.*, 18 OTR-MD 476, 480 (2005) (*Foreman*) (quoting *Bryan v. Itasca County*, 429 US 373, 392, 96 S Ct 2102, 48 L Ed 2d 710 (1976)).

Applicable definitions of "Indian country" are found in 18 USC section 1151[4] and Oregon Administrative Rule (OAR) 150-316.777(2).[5] The OARs define Indian country generally as "any federally recognized Indian reservation or other land that has been set aside for the residence of tribal Indians under federal protection." OAR 150-316.777(2). In *Spang v. Department of Revenue*, this court articulated the federal definition of "Indian country" as comprising three separate categories: "(1) reservation land; (2) dependant Indian communities; and (3) Indian

[4] All references to the United States Code (USC) are to 2000.

[5] All references to the Oregon Administrative Rules (OAR) are to 1999.

allotments." *Spang v. Dept. of Rev.*, 16 OTR-MD 166, 168-69 (1999) (*Spang*).[6] The question is whether Plaintiff's property fits within any one of the three categories of Indian country.

A. *Is Plaintiff's property located within the limits of an Indian reservation?*

The Siletz Tribe's reservation was terminated in 1955 by the Termination Act, which provided "for the termination of Federal supervision over the trust and restricted property of certain tribes * * *," including the Siletz tribe. 25 USC §§ 691-92. Under the 1977 Restoration Act, the Siletz Tribe and its members became "eligible for all Federal services and benefits furnished to federally recognized Indian tribes * * * without regard to the existence of a reservation for the tribe or the residence of members of the tribe on a reservation." 25 USC § 711a(a). With the exception of hunting, fishing and trapping rights, the Restoration Act restored "all rights and privileges of the tribe and of members of the tribe under any Federal treaty, Executive order, agreement, or statute, or under any other authority, which were diminished or lost under the [Termination Act] * * *." 25 USC §§ 711a(b), (c). However, the Restoration Act did not "alter any property right or obligation * * *." 25 USC § 711a(d).

Plaintiff alleges that her property "is located within the boundaries of the original Coast Reservation * * *,"[7] and argues that the Restoration Act restored the reservation boundary existing at the time of the Termination Act. (Ptf's Memo of Points and Authorities at 5, 7-8.)

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[6] 18 USC section 1151 defines the term "Indian country" as:

> "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[7] Plaintiff also states that "[t]he parties have stipulated" to this description of the property's location. (Ptf's Memo of Points and Authorities at 5.) However, that stipulation is not before the court. (*See* Stip Fact 9) (stating that the property "was not within the approximately 3,987 acres of reservation lands set aside for the Siletz Tribe and held by the United States in trust for the benefit of the Siletz Tribe and its members.")

Plaintiff argues that "Indian title to this property was never extinguished and that the fee simple title issued following termination has been merged with the right and privilege to have the land protected in trust restored by the Restoration Act." (Ptf's Reply and Response at 4-5) (emphasis in original). Plaintiff finally argues that, "[u]pon restoration, the rights of tribal members on [reservation] lands were restored, leaving only a magisterial act of issuing the proper papers." (*Id.* at 4.)

Plaintiff's argument that her property is Indian country because it is located within the reservation boundary as it existed prior to the Termination act echos a similar argument involving members of the Klamath Indian Tribe and presented to this court in *Foreman*.[8] The court in *Foreman* declined to find that the statutory language "Indian reservation" had the same plain meaning as "reservation boundary," and concluded that the "Klamath reservation boundary [was] not Indian country within the meaning of 18 USC section 1151(a)." *Foreman*, 18 OTR-MD at 482, 485.

The parties have stipulated that the property "was not within the approximately 3,987 acres of reservation lands set aside for the Siletz Tribe and held by the United States in trust * * *." (Stip Fact 9.) In *Spang*, this court recognized that the "Siletz Indian Tribe had its reservation terminated in 1955 and restored in 1977. The Tribe currently owns 3,987 acres of land in Oregon designated as reservation land. That land is used for the growing and harvesting of timber and no tribal members live on the formal reservation." *Spang*, 16 OTR-MD at 167.

The court acknowledges that, although the Restoration Act restored rights and privileges of the Siletz Tribe and its members and made them eligible for federal services and benefits, it

[8] In *Foreman*, "[p]laintiffs allege[d] their Property held in fee simple title [was] Indian country because it [was] located within the existing Klamath reservation boundary as it existed prior to the enactment of the [Klamath] Termination Act." 18 OTR-MD at 482.

was done "without regard to the existence of a reservation for the tribe or the residence of members of the tribe on a reservation[,]" and the Restoration Act did not alter any property rights or obligations. 25 USC § 711a(a)-a(b). Nothing in the Restoration Act provides that the status of Plaintiff's property changed as a result of the act. Plaintiff's predecessor in interest held the property in fee simple, and Plaintiff held the property in fee simple during the relevant years. (Stip Facts 2, 7.)

The court finds, therefore, that the Restoration Act did not reinstate federal superintendence over the entire former reservation, as Plaintiff claims. To uphold Plaintiff's argument would require an overly broad reading of the Restoration Act and a substantial departure from precedent, which the court is unwilling to make. The court concludes Plaintiff did not reside on land in an Indian reservation during the subject years.

B. *Is Plaintiff's property located within a dependent Indian community*?

The phrase "dependent Indian community" in 18 USC section 1151(b) refers to a limited category of Indian land that is neither a reservation nor an allotment. *Alaska v. Native Village of Venetie Tribal Government et al.*, 522 US 520, 527, 118 S Ct 948, 140 L Ed 2d 30 (1998) (*Venetie*). The United States Supreme Court in *Venetie* held that, to qualify as a dependent Indian community, property must "satisfy two requirements -- first, [it] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, [it] must be under federal superintendence." *Id.*, 522 US at 527. In *Spang*, this court found it clear from *Venetie* that "there must be both a 'federal set-aside' and a 'federal superintendence' for a finding of dependent Indian community." *Spang*, 16 OTR-MD at 170 (citing *Venetie*, 522 US at 527). With respect to those two requirements, the United States Supreme Court's "Indian country precedents * * * indicate both that the Federal Government must take some action setting apart

the land for the use of the Indians 'as such,' and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Venetie*, 522 US at 531 n 5 (emphasis in original).

Plaintiff argues that her property qualifies as a dependent Indian community because it is adjacent to tribal land currently held in trust, the land has always been in Indian hands, the land "was set aside for the Tribe and, later, for individual Indians, and [it is] land to which federal superintendence has been restored." (Ptf's Memo of Points and Authorities at 12.)

1. *Federal set-aside*

"The federal set-aside requirement ensures that the land in question is occupied by an 'Indian community'." *Venetie*, 522 US at 530. The parties have stipulated that, during the relevant years, the property was *not* within the approximately 3,987 acres of reservation lands set aside for the Siletz Tribe and held by the United States in trust for the benefit of the Siletz Tribe and its members. (Stip Fact 9.) Further, because Plaintiff held fee simple title to the property and resided thereon, the property was not occupied by an Indian community. (*See* Stip Fact 2; *Venetie*, 522 US at 530.) Based on the above facts, the court cannot conclude that the property qualifies as a dependent Indian community set aside by the Federal Government for use by Indians as Indian land.

2. *Federal superintendence*

"[T]he federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 US at 531. In prior cases in which federal superintendence was found, "the Federal

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Government actively controlled the lands in question, effectively acting as a guardian for the Indians." *Id*. at 533 (citations omitted).

Here, the parties stipulated that the property was not held in trust, was neither owned by nor under the jurisdiction of the United States government, and was not subject to federal restrictions on alienation. (Stip Facts 4, 5, 6.) Plaintiff argues that federal superintendence exists because federal and tribal agencies provide most services, such as police protection, healthcare, adult education, and general welfare, while the state and county provide minimal services. (Ptf's Memo of Points and Authorities at 13.) A similar argument was made, and rejected, in *Venetie* where the Court stated:

> "Indian country precedents * * * do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid[, and] are not indicia of active federal control over the [Venetie] Tribe's land sufficient to support a finding of federal superintendence."

Venetie, 522 US at 534. In *Spang*, this court rejected the argument for a finding of a dependent Indian community where the property was located within one of 11 counties designated a "Health Service Delivery Area" and "established by the federal government to enable that body to provide certain health benefits to members in need." 16 OTR-MD at 170. "Those areas * * * are not 'set aside by the Federal Government for the use of the Indians as Indian land' or 'under federal superintendence,' as required by the Court's decision in *Venetie*[.]" *Id*. The court finds, therefore, that the provision of services by federal and tribal agencies is not sufficient evidence of active federal control to support a finding that Plaintiff's property is under federal superintendence.

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C. *Is Plaintiff's property an Indian allotment*?

Plaintiff argues that, although "[t]he land might not have been considered an allotment prior to the Restoration Act[,] * * * once the Congress returned all the 'rights and privileges * * *' to an eligible tribal member, its allotment status was merged and confirmed." (Ptf's Reply and Response at 5.)

This court has previously recognized that an allotment is a specific parcel created out of a diminished Indian reservation and held in trust for the benefit of individual Indians. *Spang*, 16 OTR-MD at 169 n 3 (citing *Venetie*, 522 US at 529). More specifically, "[a]n Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment)." *Foreman*, 18 OTR-MD at 485-86 (citing *Yankton Sioux Tribe*, 188 F3d at 1022). This court has noted that "both types of allotments are Indian country regardless of whether they are on or off an Indian reservation." *Id*. at 486. Plaintiff's property, therefore, is a trust allotment only if it is held in trust by the federal government, and it is a restricted allotment only if it is subject to a restriction on alienation in favor of the United States. *Id*. at 485-86.

1. *Trust allotment*

The court concludes that Plaintiff's property is not a trust allotment. The term "trust" describes a "fiduciary relationship regarding property and subjecting the person with the title to the property to equitable duties to deal with it for another's benefit." *Black's Law Dictionary*, 1513 (7th ed 1999). The existence of a trust requires three elements: a trustee, a beneficiary, and trust property. *Id*. (citing *Restatement (Second) of Trusts* § 2 comment h (1959)). Here, there are only two elements: the property and the property owner, *i.e.*, Plaintiff, who held fee simple title

to the property during the relevant years. (*See* Stip Fact 2.) Fee simple title, by its very definition, is "the broadest property interest allowed by law," and is the "most absolute [with] respect to the rights which it confers." *Black's Law Dictionary*, 630 (7th ed 1999). Plaintiff's property, held in fee simple, is not a "trust allotment" because it is not "being held *in trust* for the benefit of anyone." *Foreman*, 18 OTR-MD at 486 (citing *Spang*, 16 OTR-MD at 169 n 3) (emphasis in original). The parties' stipulation that, during the relevant years the property was not held in trust by the United States government for the benefit of Plaintiff, the Siletz Tribe, or any tribal member, confirms this. (*See* Stip Facts 2, 6.)

2. *Restricted allotment*

The court further concludes that Plaintiff's property is not a restricted allotment. The property was transferred to Plaintiff's predecessor in interest with no restriction on alienation and, during the relevant years, Plaintiff held the property with no federal restriction on alienation. (Stip Facts 5, 7.) Plaintiff's property is, therefore, not a "restricted allotment" because it is not "subject to a restriction on alienation in favor of the United States." *Foreman*, 18 OTR-MD at 485 (citing *Yankton Sioux Tribe*, 188 F3d at 1022). Further, this court has previously held that "lands that are owned in fee without * * * restrictions on alienation [in favor of the United States] do not qualify as Indian country under [USC section] 1151(c)."[9] *Id*. at 486. Because Plaintiff owns the property in fee simple without restriction on alienation, the property does not qualify as an Indian allotment.

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[9] The court in *Foreman*, citing *Yankton Sioux Tribe*, goes on to recognize that such lands "may be classified as Indian country under [USC section] 1151(a) if they are within the boundaries of an Indian reservation[,]" as discussed above in Section II A.

D. *Is other federal protection available?*

Finally, Plaintiff claims her "property is the type of land that commands federal protection, even if it does not otherwise neatly fit into the categories" of 18 USC section 1115, and that federal and tribal interests outweigh state interests to the extent that state taxation is preempted. (Ptf's Reply and Response at 6-7.) Plaintiff cites several United States Supreme Court cases, but fails to provide a sufficient basis on which the court could conclude in her favor on that point. Further, the court may not, of its own accord and without statutory authority, exempt Plaintiff from taxation by the state. As stated above, applicable definitions of which types of property qualify as Indian country are found in 18 USC section 1151. Those have been fully discussed herein, and Plaintiff's property does not qualify.

III. CONCLUSION

The court concludes that during the years 2001, 2002, and 2003, Plaintiff did not reside within federally recognized Indian country in Oregon, as defined in 18 USC section 1151, because the property was not within an Indian reservation, was not within a dependent Indian community, and was not an Indian allotment. As a result, Plaintiff is not entitled to exemption from state income taxation under ORS 316.777. Now, therefore,

IT IS THE DECISION OF THIS COURT that the income earned by Plaintiff is not exempt from state taxation for tax years 2001, 2002, and 2003;

IT IS FURTHER DECIDED that Plaintiff's Motion for Summary Judgment is denied; and

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IT IS FURTHER DECIDED that Defendant's Cross Motion for Summary Judgment is granted.

Dated this _____ day of July 2007.

COYREEN R. WEIDNER
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

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 Coyreen R. Weidner on July 12, 2007. The Court filed and entered this document on July 12, 2007.