In the United States Claims Court

(FILED JUNE 6, 1986)

JESSIE SHORT, ET AL., Plaintiffs, v. THE UNITED STATES, Defendant, and THE HOOPA VALLEY TRIBE OF INDIANS, Defendant-Intervenor.	No. 102-63

CLARIFICATION ORDER - STANDARD B

On March 31, 1982 the trial judge handling this case in the U.S. Court of Claims issued an opinion establishing five eligibility standards (A-E) under which plaintiffs could qualify as "Indians of the Reservation" for purposes of collecting a money judgment. The parties appealed that decision, but the U.S. Court of Appeals for the Federal Circuit affirmed, holding that the trial judge did not err in establishing Eligibility Standards A-E or in providing a "manifest injustice" exception for plaintiffs who should be regarded as Indians of the Reservation despite their inability to qualify under one of the five standards. Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983).

Presently at issue, by way of motions for partial summary judgment by the defendant and defendant-intervenor, is the correct interpretation of Eligibility Standard B, which reads:

> Persons living on October 1, 1949, and resident on the Reservation at that time, who have received Reservation benefits or services, and hold an assignment,

> or can make other proof that though eligible to receive an allotment, they have not been allotted, and the lineal descendants of such persons, living on October 1, 1949.

Id. at 1143-44 (emphasis added). As the parties have made abundantly clear, there are several ways to interpret the phrase "or can make other proof that though eligible to receive an allotment, they have not been allotted."

The defendant looks to the history of the Reservation allotment process on various Reservation tracts and argues that to prove eligibility for an allotment, each Indian must prove: (a) residency on the tract in question when the President authorized allotments; (b) selection of a specific parcel of land on that tract; and (c) existence at the time the selection was made. [For a history of the allotment and selection process, see findings 49-135 in Short v. United States, 202 Ct. Cl. 870, 907-959 (1973).]

Similarly, defendant-intervenor, the Hoopa Valley Tribe, asserts:

> ...[P]laintiffs who fail to show both of the following are ineligible to receive an allotment within the meaning of this court's B standard:
>
> (1) That he, or the ancestor through whom he claims, resided on a portion of the Hoopa Valley Reservation on the date when the President authorized allotment of that tract, i.e., Old Klamath River Reservation - June 17, 1892; Connecting Strip - September 30, 1892; and Square - March 9, 1894; and
>
> (2) That he, or the ancestor through whom he claims, made a selection of a certain parcel, identified with definite boundaries and including his improvements, prior to the date on which allotment rolls for that tract of the reservation closed, i.e., Klamath River Reservation - June 17, 1893; Connecting Strip - 1892; and Square - March 8, 1918."

(Tribe's Br. at 30-31) (footnote omitted).

In essence, both the defendant and the Tribe insist on proof of compliance with procedures for obtaining an allotment. They contend that plaintiffs who applied for and selected allotments but were not allotted through some fault of the government would be considered "eligible to receive an allotment." Those who did not apply for or select land would not qualify.

This approach virtually ignores the trial judge's ruling (and the Federal Circuit's affirmation), that "proof of an actual application for allotment will not be required." Opinion of March 31, 1982 at 35. The trial judge's ruling emphasized that proof of compliance with the formal procedures for obtaining title to an allotment would not be essential to prove eligibility.

The burden of proving either possession of an assignment, or eligibility to receive an allotment (by whatever formal or informal evidence is available) rests with plaintiffs. While plaintiffs need not show compliance with formal allotment procedures, they must prove that they, or those through whom they claim, were otherwise eligible. In addition, qualifying plaintiffs must have been residents on the Reservation, living on October 1, 1949, who received reservation benefits or services.

Plaintiffs who do not hold an assignment, or claim through an ancestor who did, must offer some equivalent proof of their enduring connection with the Reservation. Proof of connection through possession of an interest in, or strong association with, Reservation land is the type of proof contemplated under Standard B. See Id. at 31 (assignment and allotment "[b]oth equally show attachment to the land."); see also Id. at 33 (census enrollment alone "does not establish an attachment to the Reservation equal to that of allotment, which is ownership of the land.").

As indicated, census enrollment alone is insufficient proof of eligibility. There must be a greater degree of proof of connection to the land, either through continuous use and association with a particular parcel or some other proof necessarily personal in nature and therefore not subject to specific definition. By way of general example, (and putting aside the fact that he held assignments of land) the case of Mr. George Nixon, Sr., an allottee of the Square, is useful.

Mr. Nixon apparently had not complied with all the procedural requirements for an Indian seeking an allotment despite his name appearing on the tentative allotment schedule. Nonetheless, his connection with the land was strong enough to warrant allotment:

> A review of the file indicates that Mr. Nixon claims to have lived on the land which is requested to be allotted to him since approximately 1895 and there also appears to be some physical evidence that the land in question was in fact monumented on the assumption that it was an Indian allotment. Under the circumstances, we have an elderly Indian gentleman having resided on the property according to his own recollection almost 80 years, some physical evidence that the land had been considered an allotment, and the expressed desire of the tribe that the land on which the man has been living most of his life be in fact allotted to him, we would not have any objection to an allotment being made to him as requested....

(Memorandum from Assistant Secretary to Secretary of Interior, February 1, 1973, Tribe's Reply Br., Ex. 87.)

While Mr. Nixon's case is useful as a general example of a strong connection to Reservation land, by citing it the court does not imply that his case should be used as a standard against which all plaintiffs should be compared. Rather, plaintiffs seeking to qualify under Standard B who do not hold assignments (and therefore must make "other proof" of eligibility to receive an allotment) will be judged as qualified or unqualified according to the particular facts of their case. Plaintiffs who can offer proof of enrollment on a tentative allotment schedule will have met their burden of proving eligibility to receive an allotment.

Importantly, those plaintiffs who do not qualify under Standard B may be considered under the manifest injustice exception. In light of the foregoing, both motions for partial summary judgment are denied.

Lawrence S. Margolis

LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court