

1956

## Preston Allen v. Porter L. Merrell : Brief of Plaintiff

Utah Supreme Court

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### Recommended Citation

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No. 8589, Supreme Court, Utah

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

UNIVERSITY

JAN 28

LAW LIB

PRESTON ALLEN, suing for himself  
and other American Indians similarly  
situated,

*Plaintiff,*

—vs.—

PORTER L. MERRELL, individually  
and as County Clerk, Duchesne  
County, Utah,

*Defendant.*

**BRIEF OF PLAINTIFF**

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# IN THE SUPREME COURT of the STATE OF UTAH

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PRESTON ALLEN, suing for himself  
and other American Indians similarly  
situated,

*Plaintiff,*

—vs.—

PORTER L. MERRELL, individually  
and as County Clerk, Duchesne  
County, Utah,

*Defendant.*

Case No. 8589

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## BRIEF OF PLAINTIFF

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### Preliminary Statement

This is a test suit by an American Indian residing on an Indian reservation in Utah, suing for himself and other American Indians similarly situated, to determine whether the action of a state election official in denying plaintiff a right to vote because of his residence on an Indian reservation is contrary to the Constitution and laws of the United States and the laws of the State of Utah. Also involved is the validity of so much of par. 11, Section 20-2-14, Utah Code Annotated, 1953, as disqualifies from voting Indians who reside on Indian reservations and have never acquired residence in a

county in Utah prior to taking up their residence on such reservation. Because of the importance of this question to the more than 3,783 American Indians residing in Utah and in an effort to obtain an authoritative ruling in advance of the last registration day prior to the general and Presidential election of November 5, 1956, the original jurisdiction of this court has been invoked. At the present time Utah is the only state in the United States which denies Indians a right to vote. This case presents the basic question of whether this most singular discrimination is contrary to the Constitution and laws of the United States and the laws of Utah. Its importance transcends the borders of the State of Utah, because presumably, if under the Constitution and laws of the United States, Utah can exclude Indians residing on reservations from voting, other states could impose similar restrictions upon the more than 400,000 Indians in the United States.

### Statement of Facts

Plaintiff is an American Indian born in Utah on December 21, 1913, being over twenty-one years of age.<sup>1</sup> He resides at Altonah, Duchesne County, Utah, on assigned tribal land, title to which is held by the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation. At all times material to this suit plaintiff has resided in Utah and has resided in

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<sup>1</sup> Since this is an original action before the court on a motion to dismiss and not to make permanent the alternative writ, the facts alleged in the petition must be taken as admitted. There is no dispute as to the essential facts.

Duchesne County for more than four months and in the election precinct in which he is registered for more than sixty days. He is a registered voter in Duchesne County, Utah, and except for par. 11, Section 20-2-14, Utah Code Annotated, 1953, the validity of which is drawn in question in this suit and is alleged to interfere, under applicable Utah laws, he is qualified to vote. In the last general election in Utah plaintiff was qualified and did vote.

Plaintiff resides within the area embraced within the Uintah Indian Reservation established by the Executive Order of the President dated October 3, 1861, and set aside by the Act of May 5, 1864, 13 Stat. 63, as a Reservation for the Indians of Utah. Pursuant to the Act of June 4, 1898, 30 Stat. 429 and the Act of May 27, 1902, 32 Stat. 245, 263, certain of said Reservation lands were allotted in severalty to individual Indians and the balance thereof was opened to entry and settlement under the public land laws and much of it has been disposed of by fee patents and other conveyances to non-Indians. Certain undisposed of portions have been restored to tribal use and ownership.

In 1897 the Utah Legislature adopted a statute, which has remained unchanged by legislative action and is now par. 11, Section 20-2-14, Utah Code Annotated, 1953, and provides with respect to registration and voting:

“(11) Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chap-

ter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation."<sup>2</sup>

This statutory provision has been the subject of opinions by the Attorney General of Utah. In 1940 the then Attorney General ruled that it did not apply to reservations which had been opened for entry under the public land laws, such as the Uintah Reservation, and that Indians on that reservation were to be permitted to vote.<sup>3</sup> It was under this construction that plaintiff has heretofore been allowed to vote.

Subsequently, on March 23, 1956, the present Attorney General of Utah ruled in an opinion to the Secretary of State, who had inquired as to who has the responsibility of providing voting facilities for Indians, that "... Indians who live on the reservations are not entitled to vote in Utah and a Board of County Commissioners has no duty to provide them with voting facilities."<sup>4</sup>

On September 8, 1956 plaintiff presented himself at the office of defendant, the County Clerk of Duchesne County, Utah, who under Sections 20-6-3 to 20-6-9 has responsibilities as an election official of the State of Utah to issue and receive absentee ballots. Plaintiff

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<sup>2</sup> Initially adopted in Laws of 1897, Chapter L, Section 11. This exact language accompanied by a proviso was enacted in 1896, Laws of Utah, Chapter CXXVI, pp. 383-4, but the proviso was dropped in 1897.

<sup>3</sup> The full text is Appendix A hereto.

<sup>4</sup> This opinion is set forth in full in Appendix B hereto.

asserted to defendant that he would be absent from the precinct and county on election day, September 11, 1956, and requested that he be issued a ballot and allowed to cast an absentee ballot in the September 11, 1956 primary election, which would select nominees or candidates for United States Senator, Representative in Congress, Governor of Utah and other state and local offices. Defendant refused to issue plaintiff an absentee ballot for the sole reason which he then stated in writing, as follows:

“Under authority of Sec. 20-2-14, Paragraph 11, Utah Code Annotated, 1953, I, Porter L. Merrell, Duchesne County Clerk, do hereby refuse to give a Ballot to Preston Allen of Altonah, Utah, because he has stated to me that he lives on an Indian Reservation and did not establish a residence in any other precinct in the State of Utah prior to this time. . . .”

Defendant has advised plaintiff and others similarly situated that because of par. 11, Section 20-2-14, Utah Code Annotated, 1953, he in the future would not issue a ballot to any Indian residing on an Indian reservation unless the Indian applicant had established a residence in some county in Utah prior to establishing a residence on the Indian reservation.

Plaintiff brings this action to challenge defendant's action and seeks:

(1) A mandatory order of this court directing defendant as County Clerk of Duchesne County and all election officials of the State of Utah and Duchesne County acting under his direction and control to refrain

and desist from enforcing or applying Section 20-2-14, Utah Code Annotated, 1953, so as to deny plaintiff and other American Indians similarly situated, or any of them, the right to vote in any elections of the State of Utah, the County of Duchesne, or the community in which they reside for the sole reason that they, or any of them, are American Indians, reside on an Indian reservation or have never resided elsewhere in the State of Utah than on an Indian reservation; and

(2) An order declaring that no Indian citizen shall be denied a right to register and vote, or either of them, by reason of his being an Indian, residing on an Indian reservation or never having resided elsewhere in the State of Utah than on an Indian reservation; or

(3) In the event that this court is of the opinion that Section 20-2-14 is properly interpreted and valid, as applied by defendant to Indians residing on Indian reservations in Utah, then this court is requested to issue an injunction or mandatory order restraining defendant from allowing any white person residing on non-Indian land within the former Uintah Indian Reservation from voting as a resident of Utah.

### **Points Upon Which Plaintiff Relies**

I. Indians Residing on Reservations in Utah, Like All Other American Indians, Are Citizens of the United States and the State in Which They Reside and Are Entitled to All Privileges and Immunities of Such Citizenship.

II. The Denial of Voting Privileges to Indians Residing on Indian Reservations in Utah on the Sole Ground That They Have Not Resided Elsewhere in the State and For No Reason Connected With Capacity or Qualification to Vote Constitutes Discrimination Between Indians and Non-Indians on Account of Race or Color and is Prohibited by the Fifteenth Amendment.

III. The Exclusion of Persons Residing on Indian Reservations, Except Those Who Prior to Establishing Such Residence Have Established a Residence Elsewhere in the State of Utah, From the Classification of Residents for Voting Purposes Constitutes Unreasonable and Discriminatory Classification Precluded by the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment.

IV. If Par. 11, Section 20-2-14 is Valid as Applied to Deny Indians Residing Within the Former Uintah Reservation the Right to Vote, Equal Protection and Application of the Law Requires that White Persons Residing Within the Former Reservation Also be Excluded from Voting.

V. This Court Has Authority to Issue An Injunction or Other Equitable Relief to Protect Plaintiff's Political Rights Guaranteed by The Fourteenth and Fifteenth Amendments.

## ARGUMENT

I. Indians Residing on Reservations in Utah, Like All Other American Indians, Are Citizens of the United States

**and the State in Which They Reside and Are Entitled to All Privileges and Immunities of Such Citizenship.**

Since June 2, 1924, when Congress passed the Indian Citizenship Act (43 Stat. 253) all Indians born within the territorial limits of the United States have been citizens by virtue of that act.<sup>5</sup> The Nationality Act of 1940 (54 Stat. 1137, 1138) eliminated any doubt as to the status of Indians born after the 1924 act<sup>6</sup> and the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U.S.C., Sec. 1401 codifies the previous legislation as follows:

“(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;” (p. 122)

By virtue of the Fourteenth Amendment to the United States Constitution, Indians residing in Utah are citizens of that state. Section 1 of that amendment provides:

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<sup>5</sup> This act naturalized 125,000 native-born Indians, Cohen's *Handbook on Federal Indian Law*, p. 153.

<sup>6</sup> In *Harrison v. Laveen*, 67 Ariz. 337, 196 P. (2d) 456, (1948) the court stated:

“The Congress on June 2, 1924, 43 Stat. 253, declared all Indians to be citizens of the United States, 8 U.S.C.A. § 3, and then, just prior to World War II, on October 14, 1940, enacted the ‘Nationality Act of 1940,’ U.S.C.A., Title 8, section 601, so as to clear up any doubt created by the language of the Act of 1924 as to the status of Indians born after the effective date of the prior Act.” (p. 459)

See also *Totus v. United States*, 39 F. Supp. 7 (D.C. Wash., 1941).



“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

In *Deere v. State of New York*, 22 F. 2d 851 (N.D. N.Y., 1927) the court stated in addressing itself to a question of diversity of citizenship:

“An Indian, becoming a citizen of the United States and residing in a state, is held to be a citizen of that state. *Boyd v. Nebraska*, 143 U.S. 135-162, . . .” (p. 852)

Nor can there any longer be a question that Indians residing on Indian reservations in Utah are residing in the State of Utah and citizens thereof.<sup>7</sup> This question was settled in *United States v. McBratney*, 104 U.S. 621, where the Supreme Court held that the Ute Reservation in Colorado was within that state.<sup>8</sup> As late as 1946 the Supreme Court in *New York Ex Rel. Ray v. Martin*, 326 U.S. 496 (1946) in following the *McBratney* case, in a case involving an Indian reservation in New York, stated with reference to the *McBratney* case:

“The holding in that case was that the Act of Congress admitting Colorado into the Union overruled all prior inconsistent statutes and treaties and placed it ‘upon an equal footing with the original States . . .’; that this meant that Colorado had ‘criminal jurisdiction over its own citi-

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<sup>7</sup> This is impliedly admitted in the ruling of the present Attorney General, Appendix B, par. 1.

<sup>8</sup> This opinion of the highest court in the land cannot be reconciled with par. 11, Sec. 20-2-14 or the opinion of the Attorney General. See *Cohen's Handbook of Federal Indian Law*, p. 158 to this effect.

zens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation'; and that consequently, the United States no longer had 'sole and exclusive jurisdiction' over the Reservation, except to the extent necessary to carry out such treaty provisions which remained in force. That case has since been followed by this Court and its holding has not been modified by any act of Congress." (pp. 497-498)

Also, in *Draper v. United States*, 164 U.S. 240, the Supreme Court had under consideration the Enabling Act of the State of Montana and concluded that an Indian reservation is geographically, politically and governmentally within the boundaries of the state wherein it is located, unless Congress upon admission of the state into the Union, has expressly excepted such reservation.

In *Porter v. Hall*, 34 Ariz. 308, 271 Pac. 411 (1928) the Supreme Court of Arizona was considering an original action in that court, similar to the present action in this court, by an Indian seeking to establish his right to vote and to obtain a writ of mandamus against the county recorder to require him to allow plaintiff to vote. One of the defenses was that "... the reservation in question, though geographically in Arizona, is politically and governmentally without it, since it is not subject to the full jurisdiction of our [Arizona's] laws." The Supreme Court carefully analyzed the Arizona Enabling Act, which is in all respects comparable to that of Utah, and held:

"We have no hesitancy in holding, therefore, that all Indian reservations in Arizona are within

the political and governmental, as well as geographical, boundaries of the state, and that the exception set forth in our Enabling Act applies to the Indian lands considered as property, and not as a territorial area withdrawn from the sovereignty of the state of Arizona. Plaintiffs, therefore, under the stipulation of facts, are residents of the state of Arizona, within the meaning of section 2, article 7, supra." (p. 415)

Subsequently the Supreme Court of Arizona in *Harrison v. Laveen*, 67 Ariz. 337, 196 P. (2d) 456 followed its conclusion in *Porter v. Hall*, *supra*, as to Indians residing on Indian reservations in Arizona being residents of Arizona and held that the Arizona constitution excluding persons under guardianship from suffrage did not extend to Indians living on reservations, who were entitled to vote.

In another leading case in Indian Affairs, the District Court of Appeals, Fourth Appellate District of California, in considering a contention by a county that "reservation Indians are not residents of the county for the purpose of obtaining direct county relief under the code sections involved" made an extensive analysis of the legal and factual factors applicable and held in *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P. 2d 92, 96, 99 (1954):

"The decisions hold that the United States does not have exclusive jurisdiction over Indian reservations in all respects. On the contrary, the state's jurisdiction extends to all matters which do not interfere with the control which the federal government has exercised over Indian affairs.

The principle that Indian reservations are geographically, politically and governmentally within the boundaries of the state wherein they are located, unless Congress, upon admission of the State into the union, or otherwise, has by express words excepted such areas from that jurisdiction, was laid down by the Supreme Court of the United States in *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869. . . . In the absence of such limiting treaty provisions, tribal lands within the state are part of the state and subject to its jurisdiction in many respects, regardless of whether or not the Indians themselves may be exempt from certain aspects of that jurisdiction. *Langford v. Monteith*, 102 U.S. 145, 26 L. Ed. 53.

\* \* \*

"The decree holding that plaintiff is a resident of the County of San Diego, State of California, and that she is not disqualified from receiving the benefits provided for by section 2500 of the Welfare and Institution Code by reason of the fact that she resides on an Indian reservation situated within the boundaries of this county must be sustained." (pp. 96-99)

Other evidence of this conclusion which has been considered by the courts includes the long history of federal legislation bearing on the issue. The states have been authorized by federal statute to enter upon Indian lands for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations, or for the purpose of enforcement of compulsory school attendance by Indian pupils. (45 Stat. 1185; 60 Stat. 962; 25 U.S.C. sec. 231.) Under the Federal Highway Act (42 Stat. 212) Indian lands

in Utah are deemed as much a part of the area of the state as other private lands. Indian lands within the state are counted, along with public land, as a basis for additional federal road contributions. Reservation Indians are counted in the federal census as residents of Utah and are included in the population figures which are used not only for determining representation in Congress, but also as a basis for the allocation of positions in the federal civil service and as a basis for various contributions of the federal government to the education and welfare of the state. (Smith-Hughes Act of February 23, 1917, 39 Stat. 929, George-Barden Vocational Act of August 1, 1946, 60 Stat. 775; National School Lunch Act of June 4, 1946, 60 Stat. 230). States have been authorized to condemn restricted Indian lands in accordance with state laws. (Sec. 3, Act of Mar. 3, 1901, 31 Stat. 1058-84; 25 U.S.C. Sec. 357.

The statement by the court in *Acosta v. San Diego County*, 126 Cal. App. 2d, 455, 272 P. 2d 92, 97 is equally applicable to Utah:

“No Indian reservation in San Diego County is self-sufficient, and no resident of any such reservation can help traveling beyond its borders, nor can he escape ordinary state cigarette, gasoline, sales or use taxes. Reservation Indians who purchase or possess unrestricted property outside the reservation enjoy no more advantageous a tax status than their white fellow citizens.” (p. 97)

It having been shown that Indians living on reservations in Utah are citizens and residents of that state, it must, therefore, follow that under Section 1, Amendment

XIV of the Constitution of the United States, they are endowed with the rights, privileges and immunities equal to those enjoyed by all other citizens and residents of the state. *Oyama v. State of California*, 332 U.S. 633, (1948); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, (1948); *Acosta v. San Diego County*, *supra*, p. 98.

**II. The Denial of Voting Privileges to Indians Residing on Indian Reservations in Utah on the Sole Ground That They Have Not Resided Elsewhere in the State and For No Reason Connected With Capacity or Qualification to Vote Constitutes Discrimination Between Indians and Non-Indians on Account of Race or Color and is Prohibited by the Fifteenth Amendment.**

The Fifteenth Amendment to the Constitution of the United States provides:

“Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Denial of the right of suffrage to an Indian because he is an Indian is prohibited by this amendment. Also prohibited is the denial of suffrage to Indians of a particular class when other persons of the same class but of other races are permitted to vote. The denial of the franchise to illiterate Indians is unconstitutional, if white or black illiterates are to vote. Illiterates as a class may be prohibited from voting, but racial distinction within a class is repugnant to the Fifteenth Amendment. Conceivable classifications could be arrived at which if applied to Indians living on reservations and all other

citizens as a class would lawfully eliminate reservation Indians from voting, but mere residence in a certain portion of the state of Utah as distinguished from another portion of the state is not such a lawful classification. It bears no relation to qualifications to vote. Section 20-2-14 can have only one possible purpose or effect, namely, to exclude Indians residing on Indian reservations from voting. Stripped of all verbiage and sophistication this is purely and simply a classification and denial based upon race or color. The decided cases demonstrate that denial of suffrage to Indians because they are Indians and the allowance of suffrage to part of a class and not to the balance of the same class is prohibited. In 1871 the United States District Court for Oregon stated with respect to the Fifteenth Amendment:

“. . . an Indian . . . who is a citizen of the United States is entitled to vote, or rather he cannot be excluded from this privilege on the ground of being an Indian, as that would be to exclude him on account of race.” *McKay v. Campbell*, 16 Fed. Cas. 161 (1871).

A few years later the Supreme Court of the United States in *United States v. Reese*, 92 U.S. 214 stated:

“The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on ac-

count of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." (pp. 217-218)

In *Neal v. Delaware*, 103 U.S. 370 the Supreme Court in ruling that a provision of the Delaware Constitution restricting the right of suffrage to the white race was invalid and had been enlarged by the self-executing effect of the Fifteenth Amendment, made the following statement which is particularly applicable to Section 20-2-14, which like the Delaware Constitutional provision, may have been valid when adopted but became invalid with the change of conditions and supreme law:

"Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes." (pp. 389-390)



In *Guinn v. United States*, 238 U.S. 347 (1915) the Supreme Court struck down the so-called "grandfather clause" of the Oklahoma Constitution pointing out that the self-executing provisions of the Fifteenth Amendment eliminate any repugnant provisions in state law:

"(c) While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarbrough*, 110 U.S. 651; *Neal v. Delaware*, 103 U.S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State." (pp. 362-363)

In *Myers v. Anderson*, 238 U.S. 368 (1915) the "grandfather clause" in Maryland was also declared invalid as a discrimination based on race.

Furthermore, it cannot be contended that specific words dealing with classification in terms of race or color

must be found in the invalid statute for the Fifteenth Amendment to apply. The Supreme Court has made clear that where the practical effect and thrust of the statute is to accomplish a discrimination on the basis of race or color it is invalid. In *Guinn v. United States*, *supra*, the Court disposed of such a contention as follows:

“We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment.” (pp. 364-365)

Again, in *Lane v. Wilson*, 307 U.S. 268 (1939) the Court in considering a suit for damages under the civil rights act (8 U.S.C. 43) by a negro deprived of a right to vote on the basis of another “grandfather clause” in

a revised Oklahoma Constitution pointed out that the Fifteenth Amendment extended to sophisticated as well as simple-minded discrimination:

“We therefore cannot avoid passing on the merits of plaintiff’s constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. *Guinn v. United States*, 238 U.S. 347; *Myers v. Anderson*, 238 U.S. 368. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.” (p. 275)

It is also clearly established that the sanction of the Fifteenth Amendment extends to primary elections, such as the one involved in the denial of plaintiff’s right to vote, as well as to general elections. In *Smith v. Allwright*, 321 U.S. 649 (1944) the Supreme Court in dealing with the exclusion of Negro voters from a Texas primary election stated:

“It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U.S. at 314; *Myers v. Anderson*, 238 U.S. 368; *Ex parte Yarbrough*, 110 U.S. 651, 663 et seq. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Con-

stitution the great privilege of the ballot may not be denied a man by the State because of his color." (pp. 661-662)

See also *Nixon v. Herndon*, 273 U.S. 536 (1927) and *Nixon v. Condon*, 286 U.S. 73 (1932) to the same effect. *Grove v. Townsend*, 295 U.S. 45 (1935) to the contrary was expressly overruled by *Smith v. Allwright*, *supra*.

In 1948, after the Arizona Supreme Court had decided *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948) allowing Indians the right to vote in Arizona, Chief Judge Orie L. Phillips, speaking for a three judge Federal court eliminated what was then thought to be the last discrimination by any state in the Union against Indians in exercising suffrage. In that case, *Trujillo v. Garley*, unreported (printed as Appendix C hereto) the question was whether the New Mexico Constitution provision excluding from franchise "Indians not taxed" was invalid. Chief Judge Phillips stated:

"So, we think we should decide the question of the constitutionality of the provision in the New Mexico Constitution. It says that 'Indians not taxed' may not vote, although they possess every other qualification. We are unable to escape the conclusion that, under the Fourteenth and Fifteenth Amendments, that constitutes a discrimination on the ground of race. Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote." (pp. 6-7)

The court then went on to analyze the contention that the provision did not really mean Indians not taxed but Indians that live in the pueblos in tribal relationship

and held the distinction was not valid. Obviously referring to the previous Attorney General's rulings in Utah on Section 20-2-14, allowing Indians the right to vote, the court stated:

“We know that the other states who have had similar requirements—Utah, one of the Dakotas, I am not sure about Colorado, I know it has such a requirement—most of the other states, if not all, who have this requirement have administratively determined that it was a requirement which could not constitutionally be imposed by the state. While such rulings are not controlling, they, perhaps, are entitled to consideration.”<sup>9</sup> (p. 8)

Following the criteria of the Supreme Court in *Lane v. Wilson*, *supra*, and *Guinn v. United States*, *supra*, i.e. excluding all verbiage and considering discrimination as discrimination, whether it be simple-minded or sophisticated, the Utah statute boils down to this. No test bearing any relationship to voting knowledge or capacity is imposed. If a person resides on an Indian reservation and has not previously established a residence elsewhere in the state he is excluded from voting. Whom does this apply to? As administered it applies to (1) Indians who were born on the reservations and have never resided elsewhere, and (2) Federal employees and their families. The latter may retain voting privileges in their home or domicile state and do not lose residence for voting purposes while in the Federal service. There is no

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<sup>9</sup> In an opinion dated January 26, 1938, the Solicitor of the Department of the Interior analyzed similar provisions in the laws of Idaho, New Mexico and Washington and determined that they were invalid under the Fifteenth Amendment.

reason why they should vote in Utah elections. On the other hand, if the Indians born on the reservation are to gain the franchise they are required to give up their native homeland, move away from their property, family and belongings and establish a residence elsewhere in the state. No other citizen or voter, other than an Indian, is imposed upon by such an unfair and unpurposeful requirement. It bears no real shield to its racial discrimination.

As a matter of fact, the Utah statute was not adopted with any purpose in mind of avoiding racial discrimination or creating equal treatment and classification for the Indians. At the time it was passed, Indians were not citizens and therefore were not entitled to vote. The Federal District Court for Oregon had ruled in *McKay v. Campbell*, 16 Fed. Cas. 161 (1871) that Indians were not citizens under the Constitution and the Fourteenth Amendment. The Supreme Court in *Elk v. Wilkins*, 112 U.S. 94 (1884) held that an Indian who had left tribal relations was not entitled to vote in Nebraska, stating:

“The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.” (p. 109)

As has previously been demonstrated, not only has the passage of time developed as a matter of fact and law that Indian reservations in Utah are within the state, but the law has been changed so as to make Indians citizens.

The self-executing provisions of the Fifteenth

Amendment, the Supreme law of the land, have eradicated the conflicting provisions of Section 20-2-14 which are no longer in effect. See *Guinn v. United States*, *supra*. This was the concept of the Attorney General of Washington in an opinion dated April 1, 1936 (Opinion No. 4086 cited in the opinion of the Solicitor of the Department of Interior referred to in footnote 9), with respect to the Indian disfranchisement clause in the constitution of Washington:

“We are of the opinion, taking into consideration the 15th Amendment and the Act of June 2, 1924, that it is doubtful whether the provisions of Article VI of the state constitution with respect to Indians are now in effect.”

As will be demonstrated in the following section, there is no reasonable basis upon which discrimination against Indians residing on reservations can be made. All reasons have become ancient and archaic and have disappeared. The discrimination is one purely on the basis of race or color and is invalid.

### **III. The Exclusion of Persons Residing on Indian Reservations, Except Those Who Prior to Establishing Such Residence Have Established a Residence Elsewhere in the State of Utah, From the Classification of Residents for Voting Purposes Constitutes Unreasonable and Discriminatory Classification Precluded by the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment.**

The Fourteenth Amendment provides in Section 1 thereof:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There can be no doubt that the action of defendant is state action, if par. 11, Section 20-2-14, is still valid. He is authorized by statute to perform certain functions as an election official of the state and in exercising those functions purported to act in accordance with par. 11, Section 20-2-14. The question, therefore, is whether the statute, as applied and interpreted, denies plaintiff privileges and immunities of citizenship or equal protection of the laws.

The Fourteenth Amendment protects the fundamental rights of citizens. With respect to the importance of suffrage, the Supreme Court in *Smith v. Allwright*, 321 U.S. 649 (1944) stated, at p. 664:

"The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race."

A full and complete statement of this basic premise of our Federal constitutional republic is stated by the Fourth Circuit in *Rice v. Elmore*, 165 F. 2d 387 (1947), *Cert. denied* 333 U.S. 875 (1948), as follows:

"An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government on the



part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The disfranchised can never speak with the same force as those who are able to vote. The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time." (p. 392)

The Supreme Court of Arizona in *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948) in upholding the right of Indians in Arizona to vote stated:

"In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality." (196 P. 2d 456, 459).

Mr. Justice Holmes, speaking for the Court in *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) stated with respect to the Fourteenth Amendment:

"That Amendment 'not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. . . .'"

Of course, not only does the equal protection clause

apply to Indians, as well as all persons within the jurisdiction of a state, but the privileges and immunities clause also applies to Indians. *Deere v. State of New York*, 22 F. 2d 851 (1927).

While under the equal protection clause the States may make classifications and could in the instant case make classifications of persons entitled to vote, those classifications must be based on some reasonable basis and bear a relation to a lawful purpose. *Tigner v. Texas*, 310 U.S. 141 (1940); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Not only must classification be uniformly applied, but if a classification fair and reasonable on its face is administered in an unequal and unfair manner such action violates the Fourteenth Amendment. *Yick Wo v. Hopkins*, *supra*.

In the instant case the ruling of the Attorney General of Utah, being applied to exclude plaintiff and others similarly situated from suffrage reads in its "conclusion": "No facilities are necessary for Indians living on reservations." In its final paragraph the ruling reads:

"Accordingly, Indians who live on the reservations are not entitled to vote in Utah and a Board of County Commissioners has no duty to provide them with voting facilities."

There is no mention of any other group or class, except Indians. The ruling is addressed to the question of Indians residing on reservations and is applied to *Indians* alone. It is discriminatory and so is the application of the statute.

The statute itself does not impose a reasonable and

valid classification. There is no valid reason why Indians residing on Indian reservations should be treated differently from those residing off the reservations. No test of literacy, education, public interest or other factors relative to voting qualifications is made. There can be no valid reason why Indians on reservations should be excluded from residents for voting purposes, any more than residents of "Federal Heights" or "Mill Creek" who have not resided elsewhere in the state (including Indian reservations) should be excluded. It is axiomatic that some of the leading college graduates residing on the Uintah Indian Reservation, or land formerly within the reservation, are perhaps more qualified to vote than less educated and experienced citizens residing elsewhere in the state.

As indicated by Attorney Generals Chez and Giles in the opinion issued by them in 1940 (Appendix A), considerations which may have once prompted classification of residents of Indian reservations differently from other citizens of Utah have now evaporated with the passage of time and the reversal of Federal Indian policy from that of concentrating Indians on reservations to one of education and increasing economic security to enable the Indian citizen to assume complete jurisdiction over his own affairs and to participate fully in the activities of the state in which he resides.<sup>10</sup>

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<sup>10</sup> This statement of change of attitude by the Federal government is the substance of the policy stated in a letter dated July 21, 1948 from the Chief Counsel of the Bureau of Indian Affairs to the Department of Justice. Obviously this policy is a complete change from that which pertained in 1897 when the Utah legislature passed par. 11, Section 20-2-14.

Since the Utah legislature in 1897 passed the statute now in question not only has the Indian obtained full citizenship, but he has been invested with many other rights and privileges to lessen his difference from his white neighbor. The most recent federal action in this direction was to provide for the termination of Federal supervision over certain Indians and Indian tribes in Utah and other states.

The Act of August 27, 1954, 68 Stat. 868, provides for a plan of termination of Federal supervision over certain of the members of the Ute Indian Tribe of the Uintah and Ouray Reservation. Plaintiff is Vice-President of the non-profit Utah Corporation organized to manage their affairs by the group of "mixed-bloods" as to which supervision is in the process of being terminated. The Act of September 1, 1954 (68 Stat. 1099) provided for the termination of Federal supervision over the property of the Shivwit, Kanosh, Koosharem and Indian Peaks Bands of the Paiute Indian Tribe in Utah. These termination bills contemplate that the states will assume further and complete governmental responsibility for such services as education, law enforcement, agricultural assistance to the Indians concerned and other functions will be transferred to agencies of the state or local government in the same manner as they are provided normally for other citizens.

On August 15, 1953 the President signed three acts designed to further reduce the setting apart of Indians. Public Law 277, 67 Stat. 586, removed discriminations with respect to purchase of liquor by Indians. Public

Law 280, 67 Stat. 588, provided for the conferring of full civil and criminal jurisdiction over Indian reservations in five states and provided means for extending the act to other states. Public Law 281, 67 Stat. 590, ended a long-standing discrimination against Indians with respect to personal property and loans on cattle they own.

The denial of the franchise to the Indians residing on Indian reservations who have not established a residence elsewhere in the State of Utah prior to establishing residence on the reservation cannot be justified on any ground which is not discriminatory on account of race or color or does not constitute unreasonable and unequal classification or treatment of citizens of the same class and characteristics.

A. Arguments Often Advanced As Affording A Basis For A Distinction As To Indians Do Not Constitute A Valid Basis For Separate Classification For Voting Purposes.

1. *Indian reservations are not extraterritorial to a state and persons of the same class within a state must be treated alike.* We have heretofore analyzed the decisions and the legislative and factual considerations demonstrating that persons residing on Indian reservations are in fact and in law within the State of Utah. *United States v. McBratney*, 104 U.S. 621; *New York ex rel. Ray v. Martin*, 326 U. S. 496 (1946); pp. 10-15, *supra*. A number of leading cases have held that once it is established that Indians are residents of a state and citizens thereof, they are entitled to vote as such and any

classification which excludes Indian citizens for voting purposes because of residence on a reservation is invalid. *Trujillo v. Garley* (D.C.N.M., unreported, Appendix C hereto); *Harrison v. Laveen*, 67 Ariz. 337, 196 Pac. 2d 456 (1948); *Swift v. Leach*, 178 N.W. 437 (N.D., 1920); *State v. Norris*, 37 Neb. 299, 55 N.W. 1086 (1893).

2. *Reservation Indians are not exempt from state jurisdiction exercised within constitutional limits.* Indians residing on reservations in Utah are clearly not exempt from operation of state law. When a reservation Indian is away from the reservation, he is subject to state law in exactly the same way as is any other citizen. See Cohen's *Handbook of Federal Indian Law*, p. 119, fn. 34. Congress has repealed the bulk of those ancient federal statutes which draw a distinction between the status of Indian citizens and other persons outside of a reservation. See, for example, Public Law 277, 83d Cong., approved August 15, 1953 (67 Stat. 586), making inapplicable to any area that is not "Indian Country," 18 U.S.C. § 1154, 1156, 3113, 3488 and 3618, the so-called Indian liquor laws; Public Law 281, 83d Cong., approved August 15, 1953 (67 Stat. 590), repealing laws which prohibit purchases from Indians of hunting articles, cooking utensils and clothing and the sale to Indians of arms and ammunition, and modifying the laws prohibiting the sale or acquiring loans on livestock purchased for Indians by the United States, 25 U.S.C. § 195, 265, 266; 18 U.S.C. § 1157.

With the exception of the so-called ten major crimes punishable by federal law (Act. of June 25, 1948, 62 Stat.

683, 827; 18 U.S.C. § 1153) and other crimes by Indians against Indians which might be tried in tribal courts, for example, all offenses committed on Indian reservations either by Indians or by non-Indians are punishable in the federal courts under state statutes. Act of June 28, 1948, *supra*, 18 U.S.C. §§ 13, 1152. *United States v. Kagama*, 118 U.S. 375 (1886). State taxing power has been extended to Indian reservations. See the Act of May 28, 1924 (43 Stat. 244, 25 U.S.C. § 398); Act of March 3, 1927 (44 Stat. 1347). See, also, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

3. *Indians are sui juris*. Plaintiff and other Indians are permitted to sue like other citizens in state and federal courts. *Felix v. Patrick*, 145 U.S. 317, 332 (1892). They may execute contracts. Cohen's *Handbook of Federal Indian Law*, pp. 164-166. See *Harrison v. Laveen*, 67 Ariz. 337, 196 P. (2d) 456 (1948), for a complete disposition of the argument that Indians are not *sui juris*.

4. *Indians are not persons under guardianship*. Efforts have been made to exclude Indians from voting on the grounds that they are persons under guardianship or that they are wards. This argument is not valid. *Harrison v. Laveen, supra*, overruling *Porter v. Hall*, 34 Ariz. 308, 271 Pac. 411 (1928). The word "ward" is used in many senses but in connection with Indians it has no connotation of incapacity as to property which they themselves own. Cohen's *Handbook of Federal Indian Law*, pp. 169-173; *Harrison v. Laveen, supra*.

It may be helpful here to correct certain common

impressions with respect to Indians living on reservations.

(a) Despite widespread opinions to the contrary, Indians are not confined to reservations and no official has custody of the persons residing on Indian reservations. While in years past there was a practice, unauthorized by statute, of requiring the issuance of a pass to Indians desiring to leave the reservation, this practice has long been obsolete. Cohen's *Handbook of Federal Indian Law*, pp. 176-177. Today Indians need no permission to leave a reservation and travel to and from the reservation just as any other citizens travel to and from their own farms or homes. As a matter of fact, with the allotment and opening of the Utah reservation upon which plaintiff resides, the identity of the reservation as such has, for practical purposes, been destroyed.

(b) Not only does no federal official have the right to the custody of the person of an Indian, but an Indian is entitled to *habeas corpus* if any federal official seeks to detain him without a warrant. *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891, C.C. Nebr. (1879).

5. *Indians are not incompetent persons.* While it is sometimes said that certain reservation Indians have not received "certificates of competency," this term is a word of art having to do with the status of his property and not of his person. A reservation Indian may handle his own affairs. He does not have to obtain permission or consult any governmental or tribal official as to where



he shall live, what employment he shall seek and perform, whom he shall marry or as to other matters, the decision as to which is ordinarily reserved for competent persons. He has been subjected to military service equally with other citizens. *Totus v. United States*, 39 F. Supp. 7 (D.C. Wash., 1941). It is common knowledge that many Indians, including those entering the military service directly from Indian reservations, have served their country with distinction in recent conflicts. They are entitled to GI loans and benefits and many Indians whose residences are on reservations in Utah are attending leading educational institutions and establishing outstanding records. Many Indians hold leading public positions of responsibility, one being the Chief Justice of the Supreme Court of Oklahoma.

6. *Indians residing on reservations require representation by officials in whose election they have a voice.* Almost every session of Congress enacts legislation of fundamental importance to Indians as a group. This special legislation governs the lives and property of Indians on reservations. In addition, Indians generally are subjected to the same laws as other citizens. One of the fundamental concepts of our constitutional democracy, with its republican form of government, is that all citizens should have an opportunity of lending their voice to the selection of those who will represent them in enacting the laws of the land. Upon this basic concept is founded the slogan "Taxation without representation is tyranny." Because of the status and unique historical background of Indians and their special relationship to

federal and state governments, legislation and administrative action as to them has become more intimate and complicated perhaps than that applicable to any other group of citizens. For this reason it is possibly more important that Indians be given an opportunity to join in the selection of lawmakers and officials than it is that any other group be given the opportunity.

The foregoing background places in bold relief the question: "On what reasonable basis may Indians residing on Indian Reservations become a separate class for exclusion from voting privileges?" Why does the Utah statute exclude only residents of Indian and military reservations, yet remain silent as to all other kinds of reservations and withdrawals, such as game sanctuaries, bird refuges, reclamation withdrawals and reserves, national forests, stock driveways, federal power withdrawals and other such areas. The simple reason is that the legislature desired in 1897, when it was constitutional to do so, to exclude (1) soldiers and (2) Indians. Soldiers could lawfully be excluded, then and now. They do not establish a residence in Utah, since they are not residing on military reservations in the usual sense of establishing residence. The general rule as to soldiers is stated in 18 *Am. Jur.* at p. 224 as follows:

"... it is the general rule that a soldier or sailor does not gain a voting residence in a particular place by reason of his mere presence there while in the performance of his duty. Conversely, a soldier or sailor does not lose his residence for voting purposes on account of his employment, even though he may, during his period of service,

change his residence, where his intention to retain his original residence is sufficiently shown."

The same rule applies to persons in government service. 18 *Am. Jur.* p. 223.

The Indian under the operation of the Utah statute does not have the privilege of ballot guaranteed to military men. He must move off the reservation, leave his home and property to qualify. This is an unreasonable, unequal and unconstitutional classification.

B. The Supreme Court of the United States in the Past Twenty-Five Years Has Given Broad Interpretation to the Protection Afforded By the Fourteenth Amendment.

In recent years, not only has the Supreme Court given extensive consideration to the validity of exclusions of persons from voting, see pp. 17-21, *supra*, but it has been liberal in interpreting guaranties provided in the Fourteenth Amendment. In *Buchanan v. Warley*, 245 U.S. 60 (1917), it held that no state may prohibit any person from occupying a residence in a particular area or class of areas. In *Shelley v. Kramer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953), it has been held that the Fourteenth Amendment even precludes the enforcement of restrictive racial covenants and agreements with respect to property. Both state and federal courts have held that state laws denying Indians or other racial minorities the same privileges to hunt or fish that are enjoyed by other residents of the state are directly in violation of the United States Constitution. See, *e.g.*, *Takahasni v. Fish and Game*

*Commission*, 334 U.S. 410 (1948). In *Bradley v. Arizona Corp. Comm.*, 60 Ariz. 508, 141 Pac. 2d 524 (1943), the Supreme Court of Arizona upheld the constitutional right of an Indian to sue to obtain a certificate of convenience or necessity for the operation of a motor vehicle as a contract carrier. The United States District Court for the District of Columbia ruled in *State of Arizona v. Hobby*, (D.C. D.C., March 3, 1953, unreported) that a state may not constitutionally bar persons of Indian blood residing on Indian reservations from participating in Social Security benefits administered by the state. Finally, in the field of public education, the Supreme Court has extended the effect of the Fourteenth Amendment to prohibiting the states and the District of Columbia from maintaining racially segregated public schools. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

**IV. If Par. 11, Sec. 20-2-14, is Valid as Applied To Deny Indians Residing Within The Former Uintah Indian Reservation The Right to Vote, Equal Protection and Application Of The Law Requires That White Persons Residing Within The Former Reservation Also Be Excluded From Voting.**

The thrust of the interpretation of March 23, 1956, by the Attorney General of Utah is to deny Indians residing on reservations and who have never established a residence elsewhere the voting facilities and the right

to vote. There is nothing in the opinion of the Attorney General or the action of defendant to indicate that white persons residing within the exterior limits of the Uintah Indian Reservation established by Executive Order of October 3, 1861, and the Act of May 5, 1864, 13 Stat. 63, were equally with Indians, to be denied the right to vote. As a matter of fact, it is admitted by defendant that white persons residing on non-Indian land within the former reservation are being allowed to register and vote. More than 500,000 acres of the Uintah Reservation were sold at public auction in 1910, 1912 and 1917, and were purchased by non-Indians. Large additional areas of land have been the subject of homesteads, mineral locations, entries and patents. It is clearly established federal law that even patented land within an Indian Reservation remains part of the reservation. *United States v. Celestine*, 215 U.S. 278, 285 (1909). In *Tooisgah v. United States*, 186 F. 2d 93 (1955), the Tenth Circuit Court of Appeals stated:

“Once reservation is established all tracts included within it remain a part of the reservation until separated therefrom by Congress.” (p. 94)

As a matter of fact, even if classification can be sustained on the ground that the legislature may lawfully exclude residents of one part of the state from suffrage at the same time it allows residents of another part of the state to vote, it would be axiomatic that equal protection and application of the laws would preclude a second discrimination within the classification, that of allowing whites in that area to vote but denying Indians in the same area a right to vote.

Since under the Fourteenth Amendment the State of Utah is required to grant equal protection of the laws to all persons subject to its jurisdiction, the election officials of Utah must be required to treat whites and Indians on the former Uintah Reservation alike.

Therefore, in the event this Court should fail to grant the mandatory relief prayed for to guarantee Indians residing on reservations in Utah a right to vote, then a mandatory order should issue requiring the equal application of the law by the denial of the right to white persons similarly situated.

**V. This Court Has Authority to Issue an Injunction Or Other Equitable Relief to Protect Plaintiff's Political Rights Guaranteed By The Fourteenth and Fifteenth Amendments.**

The rights asserted by plaintiff are fundamental constitutional rights guaranteed by the Fourteenth and Fifteenth Amendments. As demonstrated by the opinion of Chief Judge Phillips, such rights are legitimately protected by injunction or other equitable remedies and this is so, even though the right protected is a political right. *Trujillo v. Garley* (unreported, Appendix C).

In *Rice v. Elmore*, 165 F. 2d 387 (1947), cert. den. 333 U.S. 875 (1948), the Court concluded that the action of state officials in a Democratic primary denied the constitutional rights of a negro and that injunctive relief was appropriate. It stated at p. 392:

“There can be no question, therefore, as to the jurisdiction of the court to grant injunctive relief, whether the suit be viewed as one under

the general provision of 28 U.S.C.A. § 41 (1) to protect rights guaranteed by the Constitution, or under 28 U.S.C.A. § 41 (11) to protect the right of citizens of the United States to vote, or under 28 U.S.C.A. § 41 (14) to redress the deprivation of civil rights."

## CONCLUSION

Plaintiff and other American Indians residing on Indian reservations in Utah are citizens of the United States and the state in which they reside. As such, they are, under the Constitution of the United States and the Constitution of the State of Utah, entitled to all the rights, privileges and immunities of citizens. Since the Utah legislature enacted paragraph 11, Sec. 20-2-14, the Uintah Reservation has been opened for settlement and has been allotted in part to individual Indians. Also, since that time Congress has extended citizenship to the Indians residing on reservations in Utah. Sec. 20-2-14, as construed and applied by defendant to exclude from suffrage Indians residing on Indian reservations in Utah who have not established residence elsewhere in the State of Utah prior to taking up residence on the reservation, constitutes an unlawful discrimination on account of race and color. Paragraph 11 so construed and applied, constitutes unreasonable classification in violation of the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment. By the self-executing provisions of the superior federal law, the Fourteenth and Fifteenth Amendments, such portions of par. 11 which direct such action, automatic-

ally became inoperative because of their invalidity upon the extension of citizenship in 1924 to all Indians born in the United States. The mandatory relief sought by the plaintiff should be granted and the alternative writ made permanent.

Respectfully submitted,

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APPENDIX A  
OFFICE OF THE ATTORNEY GENERAL  
STATE CAPITOL  
SALT LAKE CITY 14, UTAH  
October 25, 1940

Mr. Sterling John Talbot  
Whiterocks, Utah  
Dear Reverend Talbot:

I am pleased to give you the following views relative to my interpretation of the application of the provisions of Subdivision (11), Section 25-2-14, Revised Statutes of Utah, 1933, which reads:

“For the purpose of registration or voting the place of residence of any person must be governed by the following rules as far as they are applicable:

\* \* \* \*

“(11) Any person living upon an Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter unless such person had acquired a residence upon such Indian or military reservation.”

You are interested to know whether the foregoing statute longer applies to the Uintah Indian Reservation in Utah since the unallotted lands of that Reservation by an Act of Congress of the United States, approved May 27, 1902, (32 Stat. 263) were restored to the public domain, and since by a proclamation of the President of the United States, dated July 14, 1905, such lands were declared open to entry. The lands so restored to

entry have largely passed into private ownership both among the white and Indian settlers. Registration and voting districts have since been established thereon, and the occupants of those lands have voted, so I am informed, within such voting precinct as late as 1928 when the provisions of the foregoing statute were called to their attention and the exercise of the franchise within that locality challenged. I understand that with the recurrence of each election this matter has been a serious bone of contention among the people in Uintah County.

After an extended study of this problem I am of the opinion that the statute in question contemplated a closed reservation. Moreover, the changed conditions in the locality in question with reference to the attitude taken toward the occupants of the lands in question by both State and county public authorities in the assessment, levying, and collection of taxes, together with the general jurisdiction assumed by State and county public officials over the affairs of the citizens residing upon the domain within the reservation, indicates clearly the inapplicability of the statute in question. Prior to the time when the unallotted lands within the reservation were declared open to entry, the Federal Government exercised exclusive jurisdiction, and access to the reservation was forbidden except by military pass. As stated above, since the unallotted lands were thrown open to entry, voting precincts have been established and State, county and school taxes have been levied and collected as well as income, cigarette, motor car and sales taxes from those residing upon the open reservation.

It will be noted the statute refers to residence in some county in Utah, not some other county. Therefore, when the reservation was thrown open to homestead settlers it is entirely reasonable to assume that the reason for segregating that territory from Uintah County for election purposes no longer persisted. Then, too, it must be observed that the attitude of the Government towards the Indians themselves with relation to voting privileges has changed materially since the Utah statute in question was enacted. By Federal Act approved June 2, 1924, all non-citizen Indians born within the territorial limits of the United States are declared to be citizens of the United States. The Act further provides that the granting of citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. (U.S. Stat. at Large, Vol. 43, p. 253)

Under Amendment XV to the Federal Constitution, Section 1, the right of any citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Under the Federal Constitution, the Acts of Congress and the Constitution and laws of this State, therefore, I am of the opinion that the Indians themselves residing upon the Uintah Reservation who are of the age of twenty-one years, and who are otherwise eligible under Utah law, are eligible to vote within the precinct within which they are residing though such precinct may be within the territorial boundaries of the Uintah Reservation.

If I am correct in this conclusion there would seem to be no rhyme or reason in applying the provisions of subdivision (11), *supra*, to persons other than Indians residing upon the Uintah Reservation.

It is, however, in the final analysis a matter which is of sufficient importance to warrant the earnest consideration of the next Legislature, and if there is doubt of the correctness of my conclusions, the remedy lies with the Legislature. Certain I am that the changed conditions and circumstances, together with recent enactments of Congress regarding voting privileges of Indians themselves, calls for further attention of the Legislature to the statute question. Meantime I am clearly of the opinion that the doubt should be resolved in favor of granting the franchise to the citizens residing in the Uintah Reservation rather than denying the same.

Kindest personal regards.

Very truly yours,

/s/ Gover A. Giles  
Assistant Attorney General

Approved:  
/s/ Joseph A. Chez  
Attorney General

## APPENDIX B

March 23, 1956

Secretary of State  
Building

REQUESTED BY: Hon. Lamont F. Toronto, Secretary of State

OPINION BY: E. R. Callister, Attorney General  
K. Roger Bean, Assistant Attorney General

QUESTION: Who has the responsibility of providing voting facilities for Indians?

CONCLUSION: No facilities are necessary for Indians living on reservations.

Indians who are born in the United States are citizens of the United States. 8 U.S.C.A., Section 1401. As such, they are entitled to the same voting privileges as other citizens. Constitution of Utah, Article IV, Section 2. But like other citizens, they must establish a voting residence in Utah in accordance with the terms of Section 20-2-14, Utah Code Annotated 1953. Paragraph 11 of that section provides as follows:

“(11) Any person living upon any *Indian or military reservation* shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation.”

Accordingly, Indians who live on the reservations are not entitled to vote in Utah and a Board of County

Commissioners has no duty to provide them with voting facilities. Indians living off the reservation may, of course, register and vote in the voting district in which they reside, the same as any other citizen.

Yours very truly,

E. R. CALLISTER  
Attorney General

ERC:gq

## APPENDIX C

### ABSTRACT OF REPORTER'S TRANSCRIPT OF UNREPORTED OPINION OF THREE-JUDGE FED- ERAL COURT IN NEW MEXICO VOTING CASE, *TRUJILLO V. GARLEY*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

MIGUEL H. TRUJILLO,

*Plaintiff*

vs.

ELOY GARLEY, as County Clerk  
and ex officio County Recorder of  
Valencia County, New Mexico,

*Defendant.*

No. 1353

JUDGE PHILLIPS orally delivered the opinion of  
the Court.

\* \* \*

Now, this matter comes before the Court at this time on an application for a preliminary injunction, mandatory in character, which would restrain the registration officials, the County Clerk, from refusing to register the plaintiff as a qualified elector in his precinct, and all other persons similarly situated with the plaintiff. The right was denied by the county official, the County Clerk, on the ground that the plaintiff was an "Indian not taxed," and that notwithstanding that he had paid excise taxes, and denial of the right to register being

based upon the fact that he had not paid ad valorem taxes on real or personal property.

The Constitutional provision in question is Section 1 of Article 7 of the Constitution of the State of New Mexico, which provides that every male citizen of the United States who is over the age of twenty-one years and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime, unless restored to political rights, and then comes the provision here material, and "Indians not taxed," shall be qualified to vote at all elections for public officers.

In disposing of the application for a preliminary injunction, the Court will find the facts specifically as they are set forth in the stipulation of the parties.

Three preliminary questions are raised. One is that the plaintiff here asserts a political right, and that courts of equity should not grant redress for protection of what are regarded as political rights in the strict sense of that term, and that the plaintiff's remedy is an action at law. The right asserted here is a right guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and implemented by statutory provisions. The Act of April 20, 1871, the part now found in 8 U.S.C.A. in Section 43, says that every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory



subjects or caused to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding of redress. Under the statute, and the more recent adjudications—and particularly the case of *Rice v. Elmore*, decided by the Fourth Circuit and reported in 165 Federal 2d, 387, and other kindred cases—we think injunction is an appropriate remedy for the redress of the claim or right here asserted.

The second is that the Indian pueblos are not a part of the State of New Mexico. The United States does not exercise exclusive jurisdiction over the pueblo Indian areas. For certain purposes, they are within the jurisdiction of the State of New Mexico. We think they are a part of it. In this connection, see *United States v. McBratney*, 104 U.S. 621.

The final preliminary question is whether this Court should at this time undertake to decide the constitutional question involved, for the asserted reasons that it involves a construction of the phrase “Indians not taxed” which had not yet been authoritatively construed by the Supreme Court of New Mexico; that this Court should not indulge in academic constructions of the state statutes for the purpose of determining constitutional questions, but should relegate the parties to an action in the state court where the meaning of the phrase involved will be determined by the state court; and that the constitutional

issue, if any remains, will be clear cut. It is well settled that the Federal courts should avoid the determination of constitutional questions where construction of state statutes or state laws are involved and should wait until there has been an authoritative determination of the meaning of the state law by the state courts before the constitutional question is determined. Accordingly, it has been held many times that if, under one construction of a state statute or constitutional provision, the constitutionality of the law would be clear, whereas under another construction the law would be unconstitutional, the Federal court should not undertake a construction in advance of the determination by the state Supreme Court. And it has also been held that such a course should be followed if under a given construction the constitutional question would disappear from the case.

Those principles are laid down in *Spector Motor Service v. McLaughlin*, Tax Commissioner, 323 U.S. 101, the *Meridith v. Winter Haven*, 320 U.S. 228.

In the instant case the plaintiff is confronted with this situation, that the administrative authorities construed this constitutional provision to prohibit him from voting unless he has paid ad valorem taxes on real or personal property. That construction is somewhat indicated, if not clearly held, in the recent decision of the Supreme Court of New Mexico in *Tapia v. Lucero*, No. 5082, decided July 13, 1948, wherein the court said: "On the new trial, in view of what we have said, the unsatisfactory state of the proof on the important issue whether the plaintiff and other members of the pueblo Indian

tribes pay ad valorem taxes, no doubt will be clarified and settled by a specific finding." Moreover, unless this question is determined, if the plaintiff is right in his contentions, he would be deprived of his right to vote at the coming election. Furthermore, this is a civil rights case. We are of the opinion that, under the more recent decision of the Supreme Court of the United States, the duty and right of the Federal courts to protect the citizen in the assertion of his civil rights is clearly indicated. Ordinarily, a Federal court does not, in a case where it had jurisdiction, step aside because a question of state law is involved at the threshold of the determination of the case. The exceptional cases where the court does that are as pointed out by the late Chief Justice Stone in *Meridith v. Winter Haven*, and of course in that category of exceptions are the constitutional question cases. But there is no indication now that a speedy decision can be had in the courts of New Mexico. And it is obvious to us, unless we decide this question, this plaintiff and others similarly situated will be deprived of the right to vote at the coming national election.

Of course, we are determining this case on the status of the present civil rights as set forth in the Fourteenth and Fifteenth Amendments to the Federal Constitution, and in the statutes enacted complementary thereto.

Now, with respect to deciding this constitutional question, perhaps this further observation should be made. As we view the provision of the New Mexico Constitution, it is immaterial whether or not from a constitutional standpoint "Indians not taxed" means Indians

who do not pay ad valorem tax or means Indians who do not pay state taxes of any character. It might be true—and I think we must admit—that if the state Supreme Court should ultimately hold that the payment of a tax on one purchase of gasoline or on one sack of flour would qualify the Indian to vote, that the constitutional question so far as this plaintiff is concerned would disappear. But the practical situation is that the statute is being construed otherwise, and this Indian is being deprived of the right to vote, if he has the right to vote, by the limited construction. So, we think we should decide the question of the constitutionality of the provision in the New Mexico Constitution. It says that “Indians not taxed” may not vote, although they possess every other qualification. We are unable to escape the conclusion that, under the Fourteenth and Fifteenth Amendments, that constitutes a discrimination on the ground of race. Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications of a voter, must have paid a tax. How you can escape the conclusion that that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any other race is beyond me. I just feel like the conclusion is inescapable.

Now, the suggestion was made that they really don't mean Indians not taxed, but they mean Indians

that live in pueblos in tribal relationships, and who are favored by the Federal requirements that their land and personal property is free from taxation by the State. The fact remains that the constitutional provisions say that each citizen who possesses these other qualifications may vote unless he is an Indian. If he is an Indian, it says he may not vote if he has not paid a tax. We don't think the distinction which the able argument of the Assistant District Attorney has presented does justify us in concluding that this is not a discrimination on the ground of race.

It, perhaps, is not entirely pertinent to the issue, but we know how these New Mexico pueblo Indians and non-pueblo Indians in the state have responded to the need of the country in time of war in a patriotic whole-hearted way, both in furnishing manpower in the military forces and in the purchase of war bonds and patriotic contributions of that character. We know that the other states who have had similar requirements—Utah, one of the Dakotas, I am not sure about Colorado, I know it has such a requirement—most of the other states, if not all, who have this requirement have administratively determined that it was a requirement which could not constitutionally be imposed by the state. While such rulings are not controlling, they, perhaps, are entitled to consideration.

Why should an Indian, who answers his country's call like these Indians have, be deprived of the right to vote because he appears to be favored by a requirement of the National Government? That is, certain property

shall be exempted from taxation. I don't know whether it is still on the statute books, but when I was in the Legislature, back in 1921, we passed a statute giving an ex-serviceman an exemption of two thousand dollars from taxation. There was a special class that enjoyed a particular tax exemption. Would it have been constitutional for New Mexico to have then said this class that enjoys the two thousand dollar tax exemption shall not be permitted to vote? And especially if they had said they may not vote if they are Swedes or Norwegians or Germans. I just don't think, and my brothers agree with me, that this constitutional provision can be sustained in the face of the Fourteenth and Fifteenth Amendments, and we so conclude.

Perhaps Judge Savage and Judge Broaddus would like to amplify what I have said.

JUDGE BROADDUS: I have nothing.

JUDGE SAVAGE: You have very well stated my views, Judge Phillips. I might add this. There has never been any question in my mind as to the unconstitutionality of the constitutional provision. I have been troubled by the cases to which Judge Phillips referred indicating that under certain circumstances the Federal court should stand by and wait for an authoritative construction of the state statute or state constitutional provision. But I am convinced that the Federal court should not stand by and await the outcome of an action to be instituted in the state court when the practical result would necessarily be to deprive a certain class of citizens of their con-

stitutional right to vote at the next election. Certainly, that would be the practical result here should we defer decision in this case until an action could be commenced and prosecuted through the state courts of New Mexico.

JUDGE BROADDUS: Of course, the Court is in harmony in interpreting these statutes; the civil rights statutes, and Fourteenth and Fifteenth Amendments, with the natural rights of men and their civil rights and responsibilities. The thought occurs to me, as we have discussed and as you may properly direct to the attention of counsel, that this matter may be disposed of as a final matter.

JUDGE PHILLIPS: Perhaps I should have stated this Court's jurisdiction is predicated on 28 U.S.C.A. Section 21, subdivision 1, and subdivision 12 and subdivision 14. Now, having indicated our views, it would seem that every relevant issue of fact and law is presented. There seems to be no good reason why it shouldn't be agreed by counsel that the Court enter a final judgment at this time on the Complaint, and the facts as reflected in the stipulation. I don't see **how** there can be any additional facts pertinent, and what we have said disposes of the real merits of the controversy. Another important reason for that is this: That the state could immediately appeal to the Supreme Court of the United States. Of course, you could appeal from the order granting an interlocutory injunction. But, if we made a final disposition and entered a final order, you could appeal from that and the Supreme Court could then, if it was so minded, advance the case and hear

it on the 10th of October, which would be the second Monday, tenth or eleventh, I am not sure which, the time when the Court usually begins to hear cases. They meet on the first Monday and I think start hearings on the second Monday. There would be a strong possibility that you could get a final decision by the Supreme Court of the United States in October so that you would know when the election came whether to permit these people to vote or not. Of course, you would have to register them in the meantime. But whether or not you would count their votes could, I should think, possibly be determined by the election in November. That is the speediest way to get a determination of this question that I can see.

Is there any objection to a final determination?

MR. FEDERICI: No objection on the part of the State. I think that is a good suggestion and we will concur in it. We want a speedy determination.

JUDGE PHILLIPS: Let counsel add to the stipulation they have already made that this is submitted for a final and permanent injunction, and the Court will enter a declaratory judgment that that portion of the New Mexico Constitutional provision "Indians not taxed" contravenes the Fourteenth and Fifteenth Amendments and is void, and will enjoin the County Clerk of Valencia County from refusing to register the plaintiff as a qualified voter, and from refusing to register the other Indians similarly situated in his county who are qualified voters other than the fact that they have not paid the taxes.