# JESSIE SHORT ET AL. v. THE UNITED STATES

[No. 102-63. Decided October 17, 1973]

ON THE PROOFS

**Indian claims; Act of April 8, 1864 establishing Indian reservations in California; rights of Indians in communal lands of enlarged reservation.**—A reservation was established in northern California pursuant to the Act of April 8, 1864, 13 Stat. 39, its boundaries were provisionally determined in 1865, a 12-mile square tract of land (the Square) on the last reach of the Trinity River before it joins the Klamath River was formally set aside by an order of President Grant in 1876, and the reservation was extended by order of President Harrison in 1891 to include an adjoining 1-mile wide strip of land on each side of the Klamath River from the confluence of the two rivers to the ocean (an area now called the Addition). 3,323

*On November 16, 1973 the court ordered that the case be remanded to the trial judge for further appropriate proceedings with respect to patent '957.

Syllabus

Indian plaintiffs (to simplify the litigation the cases of 26 representative plaintiffs were chosen for trial) contend that as Indians of the Addition they are entitled to share in the resources of the entire reservation, including the Square which contains valuable timber land; they claim that the 1891 executive order in enlarging the reservation formed a single, integrated reservation to which all Indians on both the Square and the Addition got equal rights in common. The Government contends that the Square survived the enlargement of the reservation in 1891 as an entity whose resident Indians (the Hoopa Valley Tribe) had vested substantive rights, exclusive as against the Indians of the Addition, and that the 1891 order joined the Square and the Addition for administrative purposes only. It is *held* that since the act of 1864 authorized the President in his discretion to locate not more than four Indian reservations in California, at least one of them to be in the northern district of the state, of such extent as he deemed suitable for the accommodation of the Indians of the state, all without mention of any Tribe by name, and since neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian Tribe by name nor intimated which Tribes were occupying or were to occupy the reservation, the Hoopa Indians of the Square acquired no vested or preferential rights to the Square from the fact alone of being the first to occupy the Square with Presidential authority. It is also *held* that since the 1891 order imposed no qualification on the incorporation of the Addition into the reservation (except respecting privately owned land within the area), and since no vested Indian rights in the Square existed, the effect of the order was to enlarge both the area and the population of the reservation without any limitation on the rights of all the Indians in the communal lands of the enlarged reservation. Certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial as provided in findings 217–218 accompanying the recommended decision of the Trial Judge filed May 22, 1972, to whom the case is remanded for further proceedings.

**Indian claims; statutes; construction and operation; executive authority, extent of grant; Act of April 8, 1864 re California Indians.**

[1] Where the act of April 8, 1864, 13 Stat. 39, conferred discretionary powers on the President in carrying out its statutory scheme, such powers are to be construed in keeping with the broad connotations of the words employed. Pursuant to the language the President had complete discretion in determining which Indian Tribes were to be located on any of the reservations authorized by the act, the number of the Tribes to occupy a reservation, and the size of a reservation according to the number of Tribes and Indians to be accommodated.

Indians ⇐ 12

Per Curiam

**Indian claims; land; reservation or granted land; title and rights acquired; Act of April 8, 1864 re California Indians.**

[2] Given the statutory scheme of the act of April 8, 1864, 13 Stat. 39, to set aside four tracts of land in California to be retained by the United States for purposes of reservations to accommodate Indians in said state, where no Indian Tribe was specifically mentioned by name either in the act itself or public notices of 1864 and 1865 and executive order of 1876, no one Indian Tribe acquired any vested or preferential rights to the disputed area from the fact alone of being the first or among the first to occupy said area with Presidential authority as against any other Tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion.

Indians ⇐ 12

**Executive orders; construction and operation; generally.**

[3] The words of an executive order, as those of the statute by whose authority the executive order was made, are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears.

United States ⇐ 28

*Harold C. Faulkner*, attorney of record, and *William C. Wunsch*, for plaintiff. *Wallace Sheehan* and *Faulkner, McComish & Wunsch*, of counsel.

*Herbert Pittle*, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

*Jerry C. Straus*, for Hoopa Valley Tribe, amicus curiae. *Wilkinson, Cragun & Barker*, *Angelo A. Iadarola*, *Richard A. Baenen* and *Alan I. Rubinstein*, of counsel.

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Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on defendant's exceptions to a recommended decision filed May 22, 1972, by Trial Judge David Schwartz pursuant to Rule 134 (h). The court has considered the case on the briefs and oral arguments of counsel for the parties and the amicus curiae. The court agrees with the decision as hereinafter set forth, rejects the objections and exceptions of defendant and amicus, and hereby affirms and adopts the decision as the basis for

its judgment in this case. Insofar as defendant and amicus curiae have presented arguments to the court which differ from those presented to the trial judge, the court has considered them but does not deem any change in the trial judge's opinion or findings is called for. The court has, however, excised from the findings the trial judge's notes which he indicates were not intended as findings.

Subsequent to the trial judge's decision and the oral argument before the court, the Supreme Court decided *Mattz* v. *Arnett*, 412 U.S. 481 (1973). We consider the trial judge's opinion and findings, and our decision herein, to be fully consistent with the opinion and decision in that case. Although the ultimate issues in the two cases are different, several aspects of the Supreme Court's opinion tend substantially toward supporting our holding in the present case.

It is concluded, therefore, that certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial, as provided in findings 217–218. The case is remanded to the trial judge for further proceedings. The motion of the Hoopa Valley Tribe to intervene is granted.

## OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* In 1876 a 12-mile square tract of land in Northern California, on the last reach of the Trinity River before it joins the Klamath River, was set aside by order of President Grant as the Hoopa Valley Indian Reservation. Most but not all of the Indians of the tract, called the Square, were and have been Hoopa Indians. In 1891 President Harrison made an order extending the boundaries of the reservation to include an adjoining 1-mile wide strip of land on each side of the Klamath River, from the confluence of the two rivers to the ocean about 45 miles away (in consequence of which the reservation took on the shape of a square skillet with an extraordinarily long handle). Most of the Indians of the added tract, called the Addition, were and have been Yurok Indians, also known as Klamaths.

The Square is heavily timbered and in the last 20 years the

timber on its unallotted trust-status lands has begun to produce revenues of about $1 million annually. These revenues, administered by the United States as trustee for the Indian beneficial owners, have been divided by the Secretary of the Interior exclusively among the persons on the official roll of the Hoopa Valley Tribe, an organization created in 1950, whose membership rules limit enrollment to allottees of land on the Square, non-landholding "true" Hoopas voted upon by the Tribe, and long-time residents of the Square of a prescribed degree of Hoopa blood, descended from natives of the Square.

The plaintiffs are 3,323 Indians, in the main Yuroks of the Addition and their descendants, who are ineligible for membership in the Hoopa Valley Tribe and have thus been denied a share in the revenues from the Square. They bring this suit against the United States as their trustee for a money judgment for their alleged share in the timber income, claiming it as all-reservation property. The Hoopa Valley Tribe, in a sense the real party defendant, is present in the case as an amicus curiae aligned with the defendant; the position of the Government and the Tribe are identical and the two have filed joint briefs. (References to defendant or to the Government will therefore mean the Hoopa Valley Tribe as well.)

To simplify the litigation, the cases of 26 plaintiffs believed to be representative of the 3,323 were chosen for trial with the expectation that if the plaintiffs as a group were upheld on the common issue, resolution of the sample cases would develop standards by which the parties could dispose of many or most of the remaining cases. The first order of business is therefore the basic issue of whether the Indians of the Addition may be excluded from sharing in the revenues of the communal lands of the Square.

The history of the reservation may be succintly stated: It was established in 1864 pursuant to the Act of April 8, 1864, 13 Stat. 39, its boundaries were in 1865 provisionally determined to be what has since been called the Square, formally so defined by an order of President Grant in 1876 and extended to include the Addition by order of President Harri-

son in 1891. The act of 1864 is the basis of the claims of all parties. No claim is made of any title or right antedating or overriding the statute or the authority exercised thereunder.

The plaintiffs contend that as Indians of the Addition, they are entitled to share in the resources of the entire reservation, including the Square. The enlargement of the reservation in 1891 formed, they maintain, a single, integrated reservation to which all the Indians on both the Square and the Addition got equal rights in common. The contrary position of the Government is that the Square survived the enlargement of the reservation in 1891 as an entity whose resident Indians had vested substantive rights, exclusive as against the Indians of the Addition. The executive order of 1891, the Government says, joined the Square and the Addition for administrative purposes only, not for purposes of substantive rights, and without effect on already vested rights of the Indians of the Square, now organized as the Hoopa Valley Tribe. The controversy is decided here in favor of plaintiffs, for the reasons which follow.

On August 21, 1864, Austin Wiley, the federal Superintendent of Indian Affairs for California, in a public notice "located" a reservation, to be called the "Hoopa Valley Reservation," "situated" on the Trinity River in Klamath County.[1] A second notice in February of the following year defined the boundaries of the "Hoopa Reservation" as a square tract bisected by the last 12 miles of the Trinity River before its junction with the Klamath and extending 6 miles on each

[1] "By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington City, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct."

"AUSTIN WILEY,
*"Superintendent Indian Affairs for the State of California*
"FORT GASTON, CAL., *August 21, 1864*"

side of the Trinity.[2] Eleven years later, on June 23, 1876, President Grant in an executive order precisely defined the "exterior boundaries" of the "Hoopa Valley Indian Reservation" in accordance with a survey, and declared that the 89572.43 acres embraced therein were "set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." [3] The circumstances surrounding the establishment and enlargement of the reservation are described in the accompanying findings of fact.

Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation. In this they were consistent with the statute whose authority was being exercised, the Act of April 8, 1864,

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[2] *"To Whom It May Concern:*

"Be it known that by virtue of power vested in me by Act of Congress passed April 8th, 1864, and acting under instructions from the Department of the Interior, I have located and set aside for an Indian Reservation the following described tract of land to be known as the Hoopa Reservation: Beginning at a point where Trinity River flows into Hoopa Valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath River, as will be more particularly described by a map of said Reservation.

"Notice is hereby given to all persons not to settle or improve upon said Indian Reservation excepting as the Agent in charge may permit and in no manner to trespass thereon or interfere therewith.

"Free transit through the Reservation will be permitted all travelers, packtrains and stock, subject to such restrictions as the local Agent may see proper to impose.

"AUSTIN WILEY,
*"Supt. Ind. Aff's, Cal."*

"HOOPA RESERVATION, CAL.
*"February 18th 1865."*

[3]

"EXECUTIVE MANSION,
*"June 23, 1876*

"It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: 'Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3'; thence south 17½ degrees west, 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River,' be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)"

"U.S. GRANT"

13 Stat. 39. That act, cited by both public notices and by the executive order, authorized the President in his discretion to locate not more than four Indian reservations in California, at least one of them to be in the northern district of the state, of such extent as he deemed suitable for the accommodation of the Indians of the state, all without mention of any tribe by name.

Section 2 of the act read as follows (13 Stat. 40):

> Sec. 2. That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: * * * *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

The powers conferred by this statute are to be construed in keeping with the broad connotations of the words employed: "at his discretion," "suitable extent," "accommodation of the Indians," "practicable" and "due regard." *South Puerto Rico Company Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 260–61; 334 F. 2d 622, 631–32 (1964), *cert. denied*, 379 U.S. 964 (1965). It is not disputed that the President had complete discretion as to which tribes were to be located on any of the reservations. The number of the tribes to occupy a reservation was also a matter for Presidential decision. There were many Indian tribes in California; in the north, in the area of the Hoopas and the Yuroks, almost every river and creek had its own tribe. Since there were to be no more than four reservations in the state—less, if the President so decided—it was in-

evitable that each reservation could and almost certainly would be occupied by more than one tribe. How many tribes was left to the President; the President would in his discretion adjust the size of a reservation to the number of tribes and Indians to be accommodated.

Given such a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe in the notices of 1864–65 and the executive order of 1876, the Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy the Square with Presidential authority. The sequence in which tribes were authorized to occupy a reservation gave no rights. Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation, gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Healing* v. *Jones*, 210 F. Supp. 125, 138, 153, 170 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963); *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 278 (1935).

It is claimed by defendant, however, that the Hoopas were the sole aboriginal occupants of the Square. The legal consequences were this claim upheld, as against the statute and the President's authority, need not be gone into, for the claim of fact is unfounded. The accompanying findings recount that the Hoopas shared the Square with at least some Yuroks, whose native villages ranged along the Klamath River from the ocean to the Trinity—the area later to become the Addition—to the banks of the Trinity near the Klamath. This conclusion of fact as to the presence of Yuroks on the Square prior to white settlement does not, of course, support the claim of the present plaintiff Yuroks of the Addition, who were not introduced into the reservation until 1891, but it does negate the claim of the defendant insofar as it is based upon original exclusive Hoopa occupancy of the Square.

Another contention is that vested rights in the Square were conferred upon the Hoopas under a treaty made by

Wiley at the time he established the reservation in 1864. This treaty, which made peace with the Hoopas and several other tribes then at war with the United States, obligated the United States "to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa Valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes." It is conceded that this promise was not a treaty in the constitutional sense. Its making was not authorized, and it was not ratified. Its text is found as an attachment to a report by Wiley printed in the annual report for 1864 of the Superintendent of Indian Affairs; it is there captioned "Treaty of peace and friendship between the United States government and the Hoopas, South Fork, Redwood, and Grouse Creek Indians."

Putting aside any question of the binding quality of this document, it is not properly to be read as having sought to restrict the President's discretion under the act of 1864 or to give rights in the reservation to some tribes and withhold them from others. Within the week of the making of the treaty, Wiley in his first public notice locating the "Hoopa Valley Reservation" described the reservation only as an "Indian reservation" without any reference to who should occupy it. In the setting in which the treaty was presented to the Indians who agreed to it, described in the accompanying findings, the treaty is properly to be construed as a promise to devote Hoopa Valley to an Indian reservation for those tribes that would cease their hostilities and live at peace with the United States. So understood, the Klamaths or Yuroks were among its beneficiaries, for they laid down their arms and thenceforth remained at peace with the United States. There is good ground for concluding that though the caption of the treaty did not mention the Klamaths (Yuroks) as original parties, they were entitled to its benefits as among the tribes to whom the treaty was in fact presented and who were thereby persuaded to lay down their arms.