

15 Cal.App.3d 557

1557 Paul DONAHUE, Plaintiff and Appellant,
v.

CALIFORNIA JUSTICE COURT FOR the
KLAMATH TRINITY JUDICIAL
DISTRICT, Defendant,

PEOPLE of the State of California, Real
Party in Interest and Respondent.

Civ. 28294.

Court of Appeal, First District,
Division 3.

Feb. 24, 1971.

As Modified on Denial of Rehearing
March 26, 1971.

Hearing Denied April 29, 1971.

Proceeding for writ of prohibition to prohibit the Klamath Trinity Judicial District of Humboldt County from proceeding with trial of an Indian charged with violating California Fish and Game Code sections. The Superior Court, Humboldt County, Donald H. Wilkinson, J., denied the petition, and petitioner appealed. The Court of Appeal, Harold C. Brown, J., held that the State of California is not prohibited by federal law, past or present, from applying its fish and game laws to nontribal Indians or others who come upon the Hoopa Reservation without authorization, but that permission to fish on the reservation, given by tribal authorities to nontribal Indians, is a complete defense to any such charge.

Affirmed.

1. Indians ⇄38(2)

Purposes of federal legislation transferring to certain states the duty of law enforcement and criminal jurisdiction over Indian reservations were to effect withdrawal of federal responsibility for Indian affairs wherever practicable, to terminate subjection of Indians to federal laws applicable to Indians as such, and to satisfy need for more effective law and order enforcement on Indian lands. 18 U.S.C.A. § 1162.

2. Indians ⇄10

Generally, right of individual Indians to share in tribal property is dependent upon membership in the tribe.

3. Indians ⇄38(1)

Immunity provision of Fish and Game Code for Indians whose names are inscribed on tribal rolls merely reiterated prior existing rights of tribal members West's Ann.Fish and Game Code, § 12300

4. Indians ⇄36

State of California is not prohibited by federal law, past or present, from applying its fish and game laws to nontribal Indians or others who come upon Hoopa Reservation without authorization. West's Ann.Fish and Game Code, § 12300; 18 U.S.C.A. § 1162.

5. Indians ⇄12

Under Presidential Order establishing Hoopa Reservation "for Indian purposes," one of such purposes was right to fish. West's Ann.Fish and Game Code, § 12300; 18 U.S.C.A. § 1162.

See publication Words and Phrases for other judicial constructions and definitions.

6. Indians ⇄12

Governmental policy is to encourage tribal Indians to become self-sufficient in development and commercial use of resources of reservation.

7. Indians ⇄32

Congress may by legislation limit power of Hoopa Indians to license others to fish upon Hoopa Reservation; federal act transferring basic law enforcement and criminal jurisdiction from United States to state does not preclude this. 18 U.S.C.A. § 1162.

8. Indians ⇄32

State is not precluded from exercising its general police power under factual situations reasonably requiring state to limit power of Hoopa Indians to license others to fish upon Hoopa Reservation. 18 U.S.C.A. § 1162; West's Ann.Fish and Game Code, § 12300.

9. Indians ⇄38(1)

Under federal statute transferring jurisdiction over Indians on Indian reservations to certain states and specifically providing that nothing in the statute should

deprive any tribe or Indian of any right, privilege or immunity with respect to fishing, or control, licensing or regulation thereof, and federal statute providing for penalty for whoever without lawful authority or permission goes upon any land reserved for Indian use for purpose of fishing thereon, permission to fish on Hoopa Reservation, given by tribal authorities to nontribal Indians, is complete defense to charge of violation of California's Fish and Game Code. West's Ann.Fish and Game Code, §§ 8603, 8686, 12300; 18 U.S.C.A. §§ 1162, 1165.

George F. Duke, Richard B. Collins, Jr., Lee J. Sclar, Robert J. Donovan, William P. Lamb, California Indian Legal Services, Berkeley, for plaintiff and appellant.

Thomas C. Lynch, Atty. Gen., Edward P. O'Brien, Robert R. Granucci, Deputy Attys. Gen., San Francisco, for respondent.

HAROLD C. BROWN, Associate Justice.

This is an appeal from the order denying a petition for a writ of prohibition by the Superior Court of Humboldt County seeking to prohibit the Klamath Trinity Judicial District of Humboldt County from proceeding with the trial of appellant who is charged with violating California Fish and Game Code, sections 8603 and 8686 (possession and fishing with a gill net with a mesh larger than 1¾ inches).

When appellant was arrested for violating the Fish and Game Code, he was fishing on a river within the Hoopa Indian Reservation. The Fish and Game Code provides that it is not applicable to California Indians whose names are inscribed on the tribal rolls while on the reservations of such tribe. (Fish & Game Code, § 12300.) *Appellant is an Indian but his name does not appear on the tribal rolls of the Hoopa Valley Tribe*, although his wife and his children's names are inscribed on the official rolls.

Two questions are before us: First, did the act of Congress of April 8, 1864 and the Order of President Ulysses S. Grant of June 23, 1876 (which acts created the Hoopa Indian Reservation) and U. S. Public Law 280 (18 U.S.C.A. § 1162, which transferred the basic law enforcement and criminal jurisdiction from the U. S. Government to the state) authorize the state to prosecute an Indian who is not a member of the Hoopa Tribe from fishing on its reservation in a manner violative of the California Fish and Game Code? Second, did Public Law 280 prohibit California from depriving the Hoopa Tribe of the right to authorize non-Hoopa Indians to fish on its reservation with immunity from the provisions of the California Fish and Game Code?

We have concluded that both questions must be answered in the affirmative.

The property rights of the Hoopa Indian Tribe were established by the Executive Order of President Ulysses S. Grant on June 23, 1876. The order provided that the described land was set aside for Indian purposes. (Kappler, "Indian Affairs, Laws and Treaties," Vol. 1, p. 815; see also *Elser v. Gill Net Number One*, 246 Cal.App.2d 30, 54 Cal.Rptr. 568; *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, for historical background of establishment of the Hoopa Reservation.)

In 1953, the basic duty of law enforcement and criminal jurisdiction over Indian Reservations was transferred from the Federal Government to certain states (California was included). The act (Public Law 280, act of August 15, 1953, ch. 505, § 2, 67 Stats. 588, 18 U.S.C.A. § 1162) provided that the State of California "(a) * * * shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country * * * to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, * * * and the criminal laws of such State or Territory shall have the same force and

