No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,
PETITIONER,

v.

THOMAS CAPTAIN,
RESPONDENT.

BRIEF FOR PETITIONER

Team 14
Counsel for the Petitioner

January 14, 2013

LEWIS AND CLARK LAW SCHOOL
NATIONAL N.A.L.S.A. MOOT COURT COMPETITION

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QUESTIONS PRESENTED

1. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park?

2. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe?

STATEMENT OF THE CASE

This case presents questions of whether a member of a non-federally recognized Indian tribe may proclaim his exception from state criminal law by reasserting the tribe's aboriginal title to a present-day state park. Also presented are questions whether a state can exert its criminal jurisdiction to control the use and protection of archaeological, cultural, and historical objects of a non-federally recognized Indian tribe.

Statement of Proceedings

This cause comes before the Court upon a writ of certiorari from the Oregon Court of Appeals. Petitioner State of Oregon filed suit in 2011 in the Oregon Circuit Court for the County of Multnomah against respondent Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-258.961 or Or. Rev. Stat. 390.235-390.240.

The Oregon Circuit Court held that the Cush-Hook Nation, of which respondent Thomas Captain is a member, still owned the lands in question. The Oregon Circuit Court further held respondent not guilty for trespass or for cutting timber without a state permit. The court found respondent guilty for violating Or. Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq*. for damaging an archaeological site and a cultural and historical artifact and fined him $250. Both parties appealed the decision. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. Petitioner filed a petition and cross petition for certiorari and respondent filed a cross petition for certiorari to the Court.

Statement of Facts

The Cush-Hook Nation of Indians ("Nation") is a non-federally recognized tribe whose original homelands include what is now Kelly Point Park in Portland, Or. (R. at 1.) Expert witnesses in history, sociology, and anthropology establish that the Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans. (R. at 3.) In 1806, William Clark of the Lewis and Clark expedition encountered the Nation's permanent village site, located in the area now enclosed by Kelly Point Park's boundaries, and presented the headman of the tribe with one of President Jefferson's peace medals. (R. at 1.)

In 1850, Anson Dart, the superintendent of Indian Affairs for the Oregon Territory drafted and signed a treaty with the Cush-Hook Nation. (R. at 1.) The Nation agreed to relocate to a specific coast range location 60 miles west of their original territory. (R. at 1.) To avoid the encroaching American settlers, the Nation moved to another coast range location shortly after signing the treaty with Dart. (R. at 1.) The treaty was sent to the U.S. Senate pending ratification. (R. at 2.)

Also in 1850, Congress passed the Oregon Donation Land Act ("Act"). (R. at 2.) The Act required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted fee-simple title. 9 Stat. 496-500. Joe and Elsie Meek applied for a received fee title to the land that encompassed what is today Kelly Point Park less than two years after living on the land. (R. at 2.) Meek's descendants sold the land to Oregon in 1880. (R. at 2.)

In 1853, the U.S. Senate refused to ratify the Cush-Hook Treaty. (R. at 2.) The federal government has never formally recognized the Cush-Hook Nation of Indians. (R. at 3.)

In 2011, Respondent, a Cush-Hook citizen occupied Kelly Point Park to reassert the Nation's ownership of the land and to protect culturally significant trees that had grown there. (R. at 2.) Respondent believed that in order to "restore and protect" carvings on the trees he had to cut down and remove them to the Nation's coast range location. (R. at 2.) While respondent was returning from Kelly Point Park state troopers arrested him and seized the carvings. (R. at 2.)

ARGUMENT

I. Any Rights the Cush-Hook Nation May Have Ever Had to the Lands in Question Have Been Extinguished

Aboriginal title is a right of occupancy that stems from the doctrine of discovery. See *Johnson v. McIntosh*, 21 U.S. 543, 592 (1823); *County of Oneida, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985); *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986). The doctrine of discovery stipulates exclusive aboriginal possession of land as valid until such possession is extinguished by the United States. *See Johnson,* 21 U.S. at 587; *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 669 (1974). It also holds that the sovereign is vested with fee title, subject only to the aboriginal right of occupancy. *Johnson,* 21 U.S. at 592; *County of Oneida,* 470 U.S. at 234–35. Extinguishment of aboriginal title may be achieved "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *U.S. v. Santa Fe Pacific R.R.,* 314 U.S. 339, 347 (1941). If accomplished through legislative means, Congress must clearly intend for the legislation to extinguish aboriginal title. *Id.* at 353-54. While "forcible removal of an Indian tribe from its aboriginal homeland…does not [generally] constitute voluntary abandonment," forcible removal undertaken "pursuant to clear and specific congressional authorization demonstrably intended to extinguish aboriginal

title" will meet the burden of clear legislative intent. Felix S. Cohen, *Handbook of Federal Indian Land,* § A2a, at 492–93 n. 172. Whether or not the circumstances surrounding extinguishment were fraudulent raises political, not justiciable, issues. See, e.g., *Santa Fe Pacific R.R.,* 314 U.S. at 347 "([W]hether [extinguishment] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.").

Absent extinguishment by the federal government, aboriginal title is not dependent on federal recognition or affirmative acceptance by Congress. *Wichita Indian Tribe v. U.S.,* 696 F.2d 1378, 1382 (Fed. Cir. 1983). Therefore, the tribe need not provide a treaty or statute as proof of aboriginal title. *Alabama-Coushatta Tribe of Tex. v. U.S.*, 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000) (citing *Oneida Indian Nation,* 414 U.S. at 669; *Santa Fe Pacific R.R.,* 314 U.S. at 347; *Cramer v. U.S.,* 261 U.S. 219, 229 (1923). However, aboriginal title may also be lost if it is abandoned. *Wichita Indian Tribe*, 696 F.2d 1378, 1382 (Fed. Cir. 1983). See, e.g., *Alabama-Coushatta*, 3-83, 2000 WL 1013532 (citing *Santa Fe,* 314 U.S. at 347, 353) ("Once established in the United States, aboriginal title endures in perpetuity until it is appropriately extinguished by the sovereign or abandoned by the tribe.").

A. Congress Intended to Grant and Did Grant to the Meeks, as Claimants to the Oregon Land Donation Act, Full Beneficial Ownership of the Lands in Question

There is no dispute in this case that prior to 1850 the Cush-Hook Nation held aboriginal title to the lands in question; the issue is whether that title has since been extinguished. The Oregon Donation Land Act of 1850 required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 465-500. To serve this purpose, the white settlers must have the full right and title to the land granted. In passing this legislation, U.S. Congress treated the Oregon

Territory as a broad expanse of territory exactly alike, under the principle that the land was all equally under the public domain of the federal government. Full right and title was intended to be granted by the Oregon Donation Land Act of 1850, evidenced as soon as possible, save the completion and acceptance of the terms described. (R. at 2.) An extinguishment by force is satisfied by the Act where the federal government intended to end all aboriginal title to public land following its passage. See *U.S. v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976).

Respondent may use the findings of law below to argue that because the Meeks, as claimants to the lands in question under the Oregon Land Donation Act of 1850, did not fulfill the requirements to receive valid fee simple title, the eventual sale by the Meeks' descendants to the State of Oregon in 1880 is also void. This logic does not follow case law. The Oregon Supreme Court has interpreted shortfalls to the required four years of continued residence into category exceptions. Where the death of a settler upon public lands before the expiration of the required four years of continued residence, etc., all his right in such lands descend to his heirs. *Delay v. Chapman*, 3 Or. 459 (1869). There is no factual evidence on record that bars a finding that the land sold to the State of Oregon by Meeks' descendants does not hold a valid and complete title to the lands in question.

While an "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards", when the Government clearly intends to extinguish Indian title the courts will not inquire into the propriety of the ruling. *Santa Fe Pacific R.R.* 314 U.S. at 354. This Court must rule on whether the governmental action was intended to be a revocation of Indian occupancy rights, not whether the revocation was affected by permissible means. *Gemmill*, 535 F.2d at 1147-1148. While encroachment

causing Indian withdrawal is not, in itself, effective to extinguish aboriginal rights, white settlement may be used as evidence of intent to extinguish aboriginal title by domination. See *U.S. v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1389 (Ct. Cl. 1975). The logic following that "[m]aking lands available for white settlement…constitute[s] termination of aboriginal ownership." *Id.*

B. The Intention of Congress Determines Whether the Cush-Hook Nation Retains Aboriginal Title to the Lands in Question

Congress has not intended to give the Cush-Hook legal and justifiable rights asserted for them and has willed that they do not exist. In addition to the Oregon Donation Land Act of 1850, Congress has refused to federally recognize the Cush-Hook Nation. While the Act does not explicitly mention the Nation, the timing of its passage illustrates Congress's intent to terminate all claims of aboriginal title, absent specific exceptions. By passing the Act, Congress declared that all lands in Oregon were public lands and that any exceptions to the Act were to be established by explicit language agreed to. This being the true intent of Congress, the respondent must prevail in this instance following Art. I, Sec. I of the U.S. Constitution.

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Respondent may use the unratified treaty signed with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, as evidence to support their claim of congressional approval and acknowledgement. (R. at 1) This is not the case. The language of the unratified treaty exposes Dart's proposed removal of the Cush-Hook Nation 60 miles away, completely removed from the Nation's cultural history. (R. at 1-2). There was no mention of retained rights to the lands in question, suggesting that Dart understood the Cush-

Hook Nation had no recognized right elsewhere, and that lands throughout the Oregon Territory were in fact public. With the Senate's refusal to ratify the treaty, congressional intent was defined. Absent ratification, the treaty language holds no weight in this Court, as an unratified treaty has no force until ratified by a two-thirds vote of the Senate. U.S. Const., art. II, cl. 2; *S.E.C. v. International Swiss Investments Corp.,* 895 F.2d 1272, 1275 (9th Cir.1990). Since the Cush-Hook Nation treaty was never ratified, it cannot provide any basis for respondent's claim to land. *Robinson v. Salazar,* 838 F. Supp. 2d 1006, 1024 (E.D. Cal. 2012).

Where there is no apparent intent of Congress to grant to the Nation any permanent rights to the lands in question, there is no particular form for congressional recognition of Indian right of permanent occupancy. Intention of congressional action must be present to accord legal rights, not merely permissive occupation. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949). *Tee-Hit-Ton Indians v. U.S.* 348 U.S. 272, 279 (1955). Here, after Congress passed the Oregon Land Donation of 1850, ratifying a treaty ran afoul of congressional will. The Senate refused to ratify the Cush-Hook Nation treaty because it had already intended for the extinguishment of their aboriginal rights with the passage of the Oregon Land Donation Act of 1850.

This court should also consider the current use of the land in question; the area is a state-protected park maintained for public enjoyment. The Court of Claims recently held that inclusion of land as a forest reserve is itself effective to extinguish aboriginal title to that land. *Pueblo of San Ildefonso*, 513 F.2d at 1386. While Kelly Point Park is not a federal park, the Court should consider the similarities that the land in question has to a federally

controlled park. The land is currently being maintained and protected by the laws of the State of Oregon.

II. Oregon Properly Exercised Criminal Jurisdiction to Control the Use of, and to Protect, Archaeological, Cultural, and Historical Objects on the Land in Question

Petitioner contends that the findings of fact by the Oregon Circuit Court for the County of Multnomah regarding the archaeological, cultural, and historical significance of the tree is correct and should be upheld. Furthermore, Petitioner contends that the court was correct in finding Captain guilty under Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. Because the language of 358.920 applies to archaeological objects found on both public *and* private land, Oregon correctly exercised its criminal jurisdiction here regardless of whether the land is owned by the state or by the unrecognized tribe.

A. Jurisdiction Over Federally Unrecognized Tribes Belongs to the State

If, as Petitioner herein contends, the Cush-Hook Nation does not own the land under aboriginal title, then the land is public land and Captain should have been convicted on all three of the counts originally charged. As an unrecognized tribe, the Cush-Hooks are not entitled to the benefits of federal recognition regardless of whether they hold aboriginal title to the land or not. Although federal recognition is not a requisite for vesting treaty rights in a tribe[1], the treaty signed with Dart in 1850 was never ratified and is therefore a legal nullity. *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed.Cir. 2000).

Therefore, despite the purported ownership by a non-federally recognized tribe, Oregon has criminal jurisdiction to protect, and control the uses of, archaeological, cultural, and historical objects on the land in question. Here, Oregon properly cited Captain under Or.

[1] *United States v. Washington,* 641 F.2d 1368, 1370-71 (9th Cir.1981).

Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq*. 358.920 "Prohibited Conduct" (1)(a) states that "A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by permit issued under ORS 390.235." 358.920 (8) states that a violation of the provisions of this section is chargeable as a Class B misdemeanor. 358.905 "Definitions" defines "Archaeological object" as an object that: "(A) Is at least 75 years old; (B) Is part of the physical record of an indigenous culture found in the state or waters of the state; and (C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products."

Here, petitioner was arrested after cutting down a tree carved by his ancestors. Captain's actions satisfy the requirements of the statute: the image from the tree is (A) more than 75 years old; (B) is part of the physical record of an indigenous culture found in the state; and (C) is material remains of past human life or activity that are of archaeological significance. Captain does not claim to have obtained a permit to remove the image.

The Cush-Hook Nation, as a federally unrecognized tribe, and Petitioner Captain, as a member of the tribe, are both properly subject to state jurisdiction: criminal, civil, and regulatory. *Hagen v. Utah*, 510 U.S. 399 (1994).

B. Oregon's Jurisdiction is not Preempted by Federal Law

Even if the Cush-Hook Nation were a federally recognized tribe, Oregon would still be permitted to exercise criminal jurisdiction under Public Law 280.[2] In Oregon, Public Law

[2] Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or

280 confers jurisdiction on the state for all Indian country[3] within the state, except the Warm Springs Reservation. 18 U.S.C.A. § 1162(a). However, Public Law 280 only applies to Indian Country, and for land to be considered Indian Country "some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country" *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 (1998). Here, even if the tribe is granted the land under aboriginal title, action would be required by Congress or the Executive before the land in question may be designated at Indian country. Finally, because the tribe lacks federal recognition, the Native American Graves Protection and Repatriation Act (NAGPRA) does not apply.[4] Oregon state law, therefore, is controlling on the land in question and it was proper for Oregon to exercise criminal jurisdiction in this case.

Conclusion

Because the Oregon Land Donation Act of 1850 was intended by Congress to extinguish aboriginal title, the Cush-Hook Nation does not own the land that constitutes modern-day Kelly Point Park. Furthermore, without a valid treaty or federal recognition, the Cush-Hook Nation and its individual members, including Respondent, are properly subject to the criminal jurisdiction of the state of Oregon.

Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

[3] "[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C.A. § 1151.

[4] U.S. Department of the Interior, National Park Service, *National NAGPRA: Frequently Asked Questions*, available at http://www.nps.gov/nagpra/FAQ/INDEX.HTM (last visited Jan. 14, 2012).

Respectfully submitted,

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