No. 11-0274

The Supreme Court of the United States

State of Oregon,

Petitioner

v.

Thomas Captain,

Respondent and cross-petitioner

On Appeal From the Oregon Court of Appeals

Brief for Petitioner

Team No. 18

Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

I. DID THE APPELLATE COURT ERR IN HOLDING THAT THE CUSH-HOOK NATION HOLDS ABORIGINAL TITLE TO THE LAND ENCOMPASSING KELLEY POINT PARK?

II. DID THE APPELLATE COURT RULE CORRECTLY THAT OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS IN KELLEY POINT PARK?

STATEMENT OF THE CASE

STATEMENT OF FACTS

Prior to 1850, the Cush-Hook tribe occupied the land which presently contains Kelley Point Park. In1850 the tribe signed a treaty with Anson Dart, the superintendant of Indian Affairs for the Oregon Territory, agreeing to relocate 60 miles westward from their ancestral land, to a coastal area where the majority of the tribe currently lives. However, in 1853 the U.S. Senate refused to ratify the Cush-Hook treaty, and the tribe and its citizens never received compensation for the lands in and around modern-day Kelley Point Park. The United States has not taken any further action to recognize the Cush-Hooks, and the Cush-Hook tribe remains a non-federally recognized tribe of Indians. R1-2.

In 1806, forty-four years prior to the Cush-Hooks' relocation, William Clark of the Lewis and Clark expedition visited the Cush-Hook village. Clark gave the Cush-Hook headman/chief a peace medal from President Thomas Jefferson. Some historians have understood acceptance of the medal to demonstrate which tribal governments would be recognized by the United States. R1.

Two American settlers, Joe and Elsie Meek, moved onto what is now Kelley Point after the Cush-Hooks relocated. Congress passed the Oregon Donation Land Act (ODLA) in 1850,

which allowed white settlers to receive fee simple titles to land after residing upon and cultivating the land for four years. 9 Stat. 496-500. The Meeks eventually received fee simple title to the land under the ODLA, although they never cultivated or lived upon the land for the required four years. Their descendants sold the land to Oregon in 1880, and Oregon created and presently maintains Kelley Point Park on that land. R-2.

In 2011, Thomas Captain, a Cush-Hook citizen, left his residence in the coastal mountain range where the tribe currently resides, and occupied Kelley Point Park. He sought to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees which had been subject to recent vandalism. Hundreds of years ago tribal shamans and medicine men carved totem and religious symbols onto those trees, and the carved images are now 25-30 feet above the ground. Intending to restore and protect a vandalized image carved by one of his ancestors, Thomas cut a tree down and removed the section containing the image. While returning to his tribe's location in the coastal mountain range, he was arrested by state troopers and charged with trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Oregon Revised Statutes §358.920 (2012) and §390.235 (2012). R2-3.

STATEMENT OF PROCEEDINGS

Oregon initiated criminal proceedings in the Oregon Circuit Court for the County of Multnomah against 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. §358.905-358.961 and Or. Rev. Stat. §390.235-390.240. Captain consented to a bench trial. The court held that because Oregon did not actually own the land encompassing Kelley Point Park, Captain was

not guilty for trespass or for cutting timber without a state permit. However, the court also ruled that the relevant Oregon statutes on the desecration of archaeological and historical objects applies to all lands under Public 280, tribally owned or not, and therefore criminal action against Captain for the damaging of an archaeological, cultural, and historical object was proper. Both parties appealed the decision. The Oregon Court of Appeals affirmed without issuing an opinion, and the Oregon State Supreme Court denied review. Oregon then filed a petition to the Supreme Court, with Captain also filing a cross petition. Certiorari was granted on two questions.

The circuit court's interpretation of *Johnson v. M'Intosh*, 21 U.S. 543 (1823) led to the conclusion that extinguishment of aboriginal title requires treaty ratification and proper compensation. The question of "proper" procedures for the extinguishment of aboriginal title is a question of law, and the Supreme Court may review the circuit court's finding de novo. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941); *Johnson*, 21 U.S. at 586. The circuit court's finding that Or. Rev. Stat. §358.905-358.961 et seq. and Or. Rev. Stat. §390.235-390.240 et seq. apply to all state lands under Public Law 280 implies that the statutes were interpreted as criminal/prohibitory. The characterization of state law as either criminal/prohibitory or civil/regulatory is a question of law involving statutory interpretation of Public Law 280, and the Supreme Court should review the characterization de novo. *Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006), cert. denied, 549 U.S. 1242 (2007).

SUMMARY OF ARGUMENT

This court should reverse the appellate court's holding that the Cush-Hook Nation retains aboriginal title to the land encompassing Kelley Point Park. Congress extinguished the Cush-Hook's aboriginal title through the passage of the ODLA, and was acting within the scope of its powers when it did so.

The Cush-Hook held aboriginal title to the land, but never received recognized title to it. Because aboriginal title is not considered property for the purposes of the Fifth Amendment, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), its extinguishment by Congress does not raise constitutional issues, as long as the intent to extinguish is made clear. *Greene v. Rhode Island*, 298 F.3d 45 (1st Cir. 2005); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 (2d Cir. 2004). The United States was therefore within its power to grant at least temporary, "possessory" title to the Meeks. *Hall v. Russell*, 101 U.S. 503, 512 (1879); *Vance v. Burbank*, 101 U.S. 514, 521 (1879). The Meeks' failure to meet the requirements of the ODLA did not necessarily invalidate the subsequent sale to Oregon by their heirs. The heirs were free to enter into contracts in anticipation of future developments, including those involving title, and such contracts should be treated as valid. *Lamb v. Davenport*, 85 U.S. 307, 314 (1873). The holding of the appellate court should be reversed on this question.

This court should uphold the appellate court's ruling that Oregon's criminal action against Captain for the damage of historical, cultural, or archaeological objects was proper. Kelley Point Park is not situated within "Indian country," as defined for the purposes of criminal jurisdiction in 18 U.S.C.A. §1151 (1949), and Oregon therefore has normal criminal jurisdiction over Captain. Even if the court finds that Kelley Point Park is "Indian country," Public Law 280 confers criminal jurisdiction in Indian country to six states, including Oregon. 18 U.S.C.A.

§1162. Jurisdiction by Oregon is proper because the relevant statutes are prohibitory, not regulatory, in nature. This court has ruled that states can enforce prohibitory statutes in Indian country under Public Law 280. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976). The holding of the appellate court that Oregon has jurisdiction over Captain was therefore proper.

ARGUMENT

I. THE APPELLATE COURT ERRED IN HOLDING THAT THE CUSH-HOOK NATION HOLDS ABORIGINAL TITLE TO THE LAND ENCOMPASSING KELLEY POINT PARK

The Appellate court's finding that the Cush-Hook Nation owns the land encompassing Kelley Point Park was in error and should be reversed because it ignores the federal government's power to extinguish aboriginal title. Though normally done with compensation, this court made clear in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) that the government has the power to extinguish aboriginal title even without compensation. While some of the reasoning and language used in the opinion have been criticized, its conclusion has been upheld in many cases since. *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Idaho v. United States*, 533 U.S. 262, 277 (2001); *Seneca Nation of Indians v. New York* 382 F.3d 245 (2d Cir. 2004); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). The intent to extinguish title must be made clear, *Greene v. Rhode Island*, 298 F.3d 45 (1st Cir. 2005), and this requirement was met in the case at bar through the passage of the OLDA. The long history of compensating Native American tribes in exchange for land would seem to imply that the Cush-Hook are morally entitled to compensation for the extinguishment of their aboriginal title, but they are not *legally* entitled to such compensation, nor are they entitled to ownership of the land. The question of adequate compensation, moreover, is outside

of the scope of this case. For the present case, it should suffice to say that the federal government, acting within the scope of its powers, extinguished the aboriginal title of the Cush-Hook Nation when Congress passed the OLDA, and the Cush-Hook are therefore not the owners of the land encompassing Kelley Point Park.

1. THE FEDERAL GOVERNMENT MAY EXTINGUISH ABORIGINAL TITLE WITHOUT COMPENSATION

   A. The nature of the Cush-Hook Nation's title to the land was aboriginal--not recognized--title.

The Cush-Hook Nation's occupation of the land since time immemorial granted them a right of occupancy, or what has come to be known as "aboriginal title," but not "recognized title." Relying heavily on the doctrine of "discovery," this court found, in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), that Indian tribes had a right to continue to occupy land discovered by European sovereigns, but their rights to complete sovereignty were "necessarily diminished" by this discovery, and their ability to sell their land to whomever they pleased was "denied by the fundamental principle that discovery gave exclusive title to those who made it." *Id.* at 574. The sale of Indian land to non-Indians was already restricted by the Trade and Intercourse Acts, 25 U.S.C.A §177 (West), but through application of the doctrine of discovery, this court clarified that Indian tribes only had a right of occupancy. Permanent title rested with the discovering sovereign—in this case, Great Britain. After the Revolutionary War, title to the land discovered by the British passed to the U.S., and the federal government acquired the exclusive power to extinguish aboriginal title, "either by purchase or by conquest." *Johnson*, 21 U.S. at 587.

By contrast, a tribe could obtain recognized title to land only through recognition in a federal treaty or statute. Recognized title to land is treated as property under the Fifth

Amendment, and its taking gives rise to a right to compensation. *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935). For Indian title to be recognized, Congress, through a treaty or statute, "must grant legal rights of permanent occupancy within a sufficiently defined territory," and "there must be an intention to accord or recognize a legal interest in the land." *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 644 (9th Cir. 1986). Intent is key; mere entry into negotiations or even a formal signing of a treaty over the lands in question do not imply an intent to recognize Indian title. *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945) (holding that a treaty to secure safe passage through land occupied by Indians did not imply recognition of Indian title to that land). Such intent should be "clearly and definitely expressed by instruction, by treaty text, or by the reports of the treaty commissioners," rather than simply inferred. *Id.* There is no particular form for such recognition; it may be established in a variety of ways, but "there must be the definite intention by *Congressional* action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955) (emphasis added). To obtain recognized title, *Congress* must take some form of definite action that expresses their intent to recognize the tribe. Without proof of such action, an Indian tribe cannot claim recognized title.

Because the federal government never acted with any intent to recognize Indian title for the land in question, the Cush-Hook Nation's interest in the land is that of aboriginal title, derived from their long-term occupation of it. Occupancy necessary to establish aboriginal title is a question of fact. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). The appellate court found that the Cush-Hook had met the requirements for aboriginal title, and that determination is not being questioned here. The Appellate court said nothing about recognized title, however, and only act that may indicate any intent on the federal government's part to

confer recognition is the distribution of the "sovereignty tokens" by Lewis and Clark upon their visit. Distribution of such materials does not amount to the *Congressional* action and would not meet the requirement established in the case law. The treaty with Dart, even if it had been ratified, conferred recognition only upon the land the Cush-Hook currently occupy, not the land in question, which they were being asked to vacate.

B. Extinguishment of aboriginal title without compensation satisfies the Fifth Amendment

Despite strong language about the power of the federal government to extinguish aboriginal title through "conquest," the vast majority of Indian land was exchanged for some form of compensation. *E.g.*, Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 75 (2005); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946). This court has even stated that the Indian right to occupancy is "considered as sacred as the fee simple of whites." *Mitchel v. United States*, 34 U.S. 711, 746 (1835) (*quoting Cherokee Nation v. State of Ga.*, 30 U.S. 1, 48 (1831)). Even as the court expressed its opinion that taking Indian land without compensation would not meet the "high standards for fair dealing in light of which laws dealing with Indian rights have long been read" in *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941), the same court was unequivocal in its acknowledgment of Congress's power to do so: "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues." Id. at 347. It then went on:

> "The exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it 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.

Id. (*quoting Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823)). Although the use of the political question doctrine[1] in Indian affairs was later discarded, *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977), subsequent decisions have continued to hold that the taking of aboriginal or unrecognized land is not compensable under the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). All such cases have relied on the same precedent: *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The holding in *Tee-Hit-Ton* makes it unequivocally clear that the taking of land under aboriginal title is not compensable because such title is not "property" for the purposes of the Fifth Amendment[2]. *Id.* at 279. The facts of *Tee-Hit-Ton* are somewhat similar to the case at bar. An Alaskan tribe sought compensation for timber taken from the land they occupied under aboriginal title, but for which they never received federal recognition. Had they received such recognition, they would have been entitled to compensation for any taking of their land—even partial. *Id.* at 277. Because there was no such recognition, the court held that the tribe's claim to the land was one of mere possession, and that "is not a property right but amounts to a right of occupancy which the sovereign grants . . . but . . . which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id.* at 279.

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[1] "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

[2] The Takings Clause of the Fifth Amendment to the U.S. Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Prior to *Tee-Hit-Ton*, only one Supreme Court case had held that the taking of lands held under aboriginal title was compensable. *See United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946) (*Tillamooks*-I). The facts of that case are similar to the one here. The Tillamooks, an Oregon tribe, signed a treaty with the same Anson Dart, providing for the cessation of land to which they held aboriginal title. The Tillamooks were then moved to a reservation set aside for them, along with three other tribes. The treaty with Dart, which was to be operative only upon ratification, was never ratified, and none of the four tribes received the compensation they had been promised. The court held that they were entitled to just compensation, and in doing so, rejected the idea that the power of Congress over Indian affairs was absolute. *Id.* at 54. Congressional power over Indian affairs "does not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *Id.*, *quoting United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

Although the holding in *Tillamooks*-I would seem to imply that aboriginal title cannot be extinguished without just compensation, it was clarified in subsequent proceedings that the right to compensation was not grounded in the Fifth Amendment, but in legislation that specially addressed those tribes. After being remanded to determine appropriate compensation, the case reappeared before the Supreme Court on the issue of whether or not the tribe was entitled to receive interest on the compensation amount. The general rule is that interest on claims against the U.S. cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U.S.C.A. § 2516(a) (2000). The only exception, the court noted, is when a claim arises out of a taking that is compensable under the Fifth Amendment. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) (*Tillamooks*-II). The court then went

on to say that their decision in *Tillamooks*-I was not grounded in the Fifth Amendment, and that the tribe was therefore not entitled to an award of interest. *Id.* The holding in *Tillamooks*-II should not have been a surprise to anyone who had done a close reading of the opinion in *Tillamooks*-I. It is clear that the tribe's right to compensation stems from the Act of 1935[3]. *Tillamooks*, 329 U.S. at 53. In his concurrence, Justice Black made explicit his belief that if Congress had not passed the Act of 1935, the government would have been under "no more legal or equitable obligation to pay" the Tillamooks than it was obligated to compensate any other tribe. *Id.* at 54. Indeed, when the Ninth Circuit—relying heavily on the reasoning in *Tillamooks*-I—stated that the taking of "original" Indian title should be compensable, *Miller v. United States*, 159 F.2d 997, 1001 (9th Cir. 1947), this court wasted no time in expressly disapproving of that holding in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 (1949) (clarifying that the holding in *Tillamooks*-I does not hold the Indian right of occupancy compensable without specific legislative direction to make payment). Thus, it is clear that absent explicit legislation that either confers recognition upon tribal lands or requires for compensation for the taking of it, Congress has the power to extinguish aboriginal title without compensation.

Because the Cush-Hook Nation did not receive official recognition for their aboriginal title to the land in question, nor did any act of Congress place upon the government a legal obligation to pay compensation for the taking of it, the federal government was acting within its powers when it extinguished the Cush-Hook's aboriginal title through the ODLA. The holding in *Tee-Hit-Ton*, as well as some of the language used, has been criticized as discriminatory

[3] 49 Stat. 801. This act conferred jurisdiction on the Court of Claims, with the right to appeal to the Supreme Court, to hear claims of aboriginal title brought by certain tribes, including the Tillamooks.

towards Native Americans[4], but it has been followed throughout the years. *See, e.g.*, *United States. v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Seneca Nation of Indians v. New York* 382 F.3d 245 (2d Cir. 2004); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000); *State v. Elliott*, 159 Vt. 102 (1992); *Robinson v. Salazar* 838 F Supp 2d. 1006 (2012, E.D. Cal). In fact, as recently has 2001, this court has stated that Congress could extinguish aboriginal title "by Congressional fiat." *Idaho v. United States,* 533 U.S. 262, 277 (2001). The question of whether Congress *should* extinguish aboriginal title without compensation aside, the power of Congress to do so is thus firmly established. Extinguishment can take many forms, and the only requirement is that the intent to extinguish be made clear. *Greene v. Rhode Island*, 298 F.3d 45 (1st Cir. 2005); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 (2d Cir. 2004).

C. The Oregon Donation Land Act was sufficient expression of intent to extinguish aboriginal title

An expression of intent is required to extinguish aboriginal title, *Greene*, 298 F.3d at 54, but the form of expression may take many forms. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449 (7th Cir. 1998) (holding that a treaty to create a reservation is sufficient expression of intent to extinguish aboriginal title), *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004) (finding that a treaty ceding territory to the British Crown extinguished aboriginal title). *But see United States v. Dann*, 706 F.2d 919 (9th Cir. 1983) (implying that including the land in a federal grazing district is not sufficient expression of intent to extinguish aboriginal title). Even mere action, absent any written expression of intent, has been deemed sufficient. *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976) (holding that the forcible removal of a

[4] *See* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1 (2005), Michael C. Blumm, *Why Aboriginal Title Is A Fee Simple Absolute*, 15 Lewis & Clark L. Rev. 975 (2011).

tribe and subsequent treatment of the land as part of the national forest reserves was sufficient expression of the federal government's intent to extinguish the tribe's aboriginal title).

Considering such precedent, the passage of the OLDA and subsequent treatment of the land in question should be considered sufficient expression of Congressional intent to extinguish the Cush-Hook Nation's aboriginal title. Although mere conveyance of land does not extinguish any aboriginal title attached to it, *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 344 (1941), the totality of the circumstances should serve as adequate expression of intent. The treaty signed with Dart, though never ratified, along with the imminent passage of the OLDA should have given the Nation notice that Congress intended to extinguish their title to make room for settlers.

Congress—acting within the scope of its powers and sufficiently expressing its intent—extinguished the aboriginal title that the Cush-Hook Nation held to the land encompassing Kelley Point with the passage of the ODLA. The Cush-Hook Nation therefore has no valid ownership claim to it, and the next issue to address is whether Oregon does.

2. THE MEEKS' FAILURE TO MEET REQUIREMENTS OF DONATION ACT HAS NO EFFECT ON OREGON'S OWNERSHIP OF LAND

Even without actual lawful title, a settler could sell his interest in land obtained under the ODLA. Land settled upon under the ODLA did not have the actual effect of a grant until the settler met the requirements for residence, cultivation, and proof of both. *Hall v. Russell*, 101 U.S. 503, 512 (1879); *Vance v. Burbank*, 101 U.S. 514, 521 (1879). The settler's interests were merely "possessory," granting him only a right to occupy and maintain possession of the land. *Hall*, 101 U.S. at 510. Significantly, however, such possessory rights could be sold, and the

effect of a sale would be abandonment by the original settler and a grant to the purchaser of a right to begin a new settlement on his own. *Id.* at 512. In the case of a settler's death before the requirements could be met, his heirs were not entitled to a grant, but only the same possessory rights he had held—the title remained with the United States. *Id.* at 513. Even without obtaining full title, a settler could still enter into valid contracts—even concerning the title—in anticipation of eventual lawful acquisition of the title later on. *Lamb v. Davenport*, 85 U.S. 307, 314 (1873). These cases show that there are several ways that a settler could contract or devise his interests in land obtained under the ODLA.

For this reason, the sale of the land by the Meeks' heirs to the state of Oregon is not necessarily void. The findings of the circuit court indicate that the Meeks neither lived on the land for the requisite four years, nor cultivated it; thus, the fee simple title they held—however it was obtained—did not have actual effect because they had failed to meet the requirements laid out in the ODLA. The possessory rights they held, however, transferred to their heirs upon their death. Provided the OLDA still authorized settlement, the heirs thereby gained the right to settle on the land and begin their own settlement. The record is silent on whether the heirs resided on and cultivated the land as required; even assuming they hadn't, however, the possessory rights were passed to them, and in accordance with *Lamb*, 85 U.S. at 314, they could enter into a contract over the title they believed they either were already in possession of, or would gain possession of in the future. Under this reasoning, the sale to the state of Oregon was not void. It granted Oregon the same possessory rights that the Meeks and their heirs had held, permitting the state to occupy the land as long as the federal government—the actual holders of the title—did not object.

3. OREGON'S OWNERSHIP CLAIM SHOULD SURVIVE EVEN A REVERSAL OF *TEE-HIT-TON*

Oregon's ownership of the lands in question are not completely dependent upon the reasoning in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) and should be unaffected even if the case is overturned. *Tee-Hit-Ton* has come under heavy criticism since it was decided[5]. The unpalatable language used in the reasoning, as well as the discriminatory effect it has on the property rights of Native Americans, may leave it vulnerable to reversal if the reasoning of the case should be questioned directly before this court. Even if the case is reversed, however, that should only entitle the Cush-Hook Nation to compensation for the taking of their lands, not ownership to it.

Although Indian tribes' federal common law right to sue for wrongful taking of their land is not normally barred by limitation or laches, at least one case suggests that the standards are different for occupancy-related claims. In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), an Indian tribe repurchased land that was located on what was originally the tribe's aboriginal territory and sought to reestablish aboriginal title so they could avoid city property taxes. This court held that the equitable doctrine of laches, among others, barred such a disruptive claim, especially in light of the tribe's failure to bring suit in the 200 years since the land had first been sold. *Id.* at 216. In those 200 years, the state had developed "justifiable expectations" about its jurisdiction over the area, and the tribe was not permitted to disrupt the changes that had been made in reliance upon such expectations. *Id.*, *quoting Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). This ruling came despite the fact that the very same tribe, a few years earlier, was permitted to proceed with a suit for monetary damages arising out

[5] *See* Note 4, infra.

of the wrongful taking of the same lands. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (*Oneida*-II). It is the nature of the claim—monetary or occupancy—that distinguishes the two cases.

Based on the *Oneida* cases, the Cush-Hook Nation is entitled to seek monetary damages for the uncompensated extinguishment of their aboriginal title to the land in question, but the doctrine of laches should prevent any claim of ownership, even if *Tee-Hit-Ton* is overturned. Similar to the Oneida tribe, the Cush-Hook had close to 200 years to file suit but failed to do so. Indeed, even the case before the court today was not initiated by them, but rather the result of criminal proceedings against one of their tribe members. Such delay should bar any claim of ownership for the Kelley Point Park lands by the Cush-Hook.

II. THE APPELLATE COURT CORRECTLY RULED THAT OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS IN KELLEY POINT PARK.

Oregon has criminal jurisdiction over Thomas Captain because Kelley Point Park is not "Indian country" as defined for the purposes of criminal jurisdiction in 18 U.S.C.A. §1151 (1949). Kelley Point Park can only be considered Indian country if it is a dependent Indian community. The park is not a dependent Indian community according to the test established in *United States v. McGowan*, 302 U.S. 535, 539 (1938), which requires that the land in question be validly set aside by the federal government for the use of Indians and be under federal supervision. Even if the Cush-Hook Nation owns the land, no actual community of Cush-Hook Indians resides on it and the Cush-Hook are not a federally recognized tribe, indicating the

federal government never had the intention of setting the land in question aside for Indian use. The limitations on state jurisdiction attached to Public Law 280, 18 U.S.C.A. §1162 therefore do not apply to the park, and Captain is subject to regular state criminal jurisdiction regardless of his or the land's tribal affiliation.

Oregon has criminal jurisdiction over Captain even if Kelley Point Park is considered "Indian country," because Oregon Revised Statutes §390.235 and §358.920 are prohibitory, not regulatory, in nature. Public Law 280 gives Oregon criminal jurisdiction in Indian country, and the United States Supreme Court has ruled that this jurisdiction applies to criminal statutes, but not regulatory schemes. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976). Desecration of archaeological and historical sites under the Oregon Revised Statutes are criminal in nature because the state seeks to prohibit rather than regulate the activity of desecration, desecration is not a narrow subset of a generally permitted activity, and the state has a public policy interest in overseeing the preservation of sites of archaeological and historical importance.

Because Kelley Point Park cannot be considered Indian country for the purposes of criminal jurisdiction, and because Oregon Revised Statutes §390.325 and §358.920 are criminal in nature and applicable in Indian country regardless of the park's status, the appellate court ruled correctly that Oregon has criminal jurisdiction over Captain for desecration of an archaeological and historical site.

1. OREGON HAS CRIMINAL JURISDICTION OVER THOMAS CAPTAIN BECAUSE KELLEY POINT PARK IS NOT "INDIAN COUNTRY" FOR THE PURPOSES OF CRIMINAL JURISDICTION.

Public Law 280 and its exceptions apply only to "Indian country." 18 U.S.C.A. §1162(a). If Kelley Point Park is not found to be Indian country, Oregon has normal criminal jurisdiction over Captain, regardless of his or the land's tribal affiliation. *Sturdevant v. State*, 76 Wis. 2d

247, 256 (1977) (where state had criminal jurisdiction over defendant tribal member who committed burglary within boundaries of state but outside of reservation).

For the purposes of criminal jurisdiction, "Indian country" is defined as: (1) land within an Indian reservation, (2) all dependent Indian communities within the borders of the United States, and (3) all Indian allotments, the rights of which have not been extinguished. 18 U.S.C.A. § 1151. Kelley Point Park is not and has never been an Indian reservation, nor an allotment of land by the government to individual tribe members. To qualify as Indian country, the court would have to find that the park is a "dependent Indian community." To be found a "dependent Indian community," the land in question must be: (1) validly set aside by the federal government for the use of Indians, and (2) subject to federal supervision. *McGowan*, 302 U.S. at 539; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

The first major problem with defining the park as a "dependent Indian community" can be read directly from the statute's wording—there is no Cush-Hook Indian community, nor any other Indian community, residing in Kelley Point Park. The U.S. Supreme Court, in *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 (1998), found that the "set-aside" requirement established in *McGowan* "ensures that the land in question is occupied by an Indian community," indicating that the court considered actual residence by an Indian tribe a requirement for conferring status as "Indian country." Such a requirement is only logical, because the underlying basis for federal jurisdiction over Indian tribes is that such tribes are distinct communities with tribal sovereignty. *Worcester v. Georgia*, 31 U.S. 515 (1832). To find that such jurisdiction extends to territory where no Indian community exists would violate the spirit in which that jurisdiction was granted.

Ownership of the land by a tribe is not sufficient to prove it is "Indian country." In fact, there has been a strong presumption against finding land to be "Indian country" if that land is not held in trust by the federal government. *See Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073, 1075 (10th Cir. 1993) (finding that land purchased by tribe for commercial purposes was not "Indian country"); *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 921 (1st Cir. 1996) (holding that land bought unilaterally by tribe and held in fee simple, for purposes of building housing, was not "Indian country"). The lower court erred in ruling that the Cush-Hook own title to the land, but even if the Cush-Hook own the land, they do so only under aboriginal title, and such title is distinguished from land held in trust. The court in *Buzzard* reasoned that land held in trust can be presumed "Indian country" because the federal government, by agreeing to hold land in trust, states that it is prepared to exercise jurisdiction over the land. *Buzzard*, 992 F.2d at 1076. Trust land is considered to be "set apart" for Indian use because trust title must be approved by the Secretary of the Interior, who pursuant to 25 C.F.R. § 151.9-151.10 (1999) must consider, *inter alia*, the Indians' need for the land and the purposes for which the land will be used. *United States v. Roberts*, 185 F.3d 1125, 1132 (10th Cir. 1999). The federal government makes no such considerations in granting aboriginal title to land. The only basis for granting aboriginal title is exclusive use and occupancy of the land by the tribe prior to its loss. *United States v. Santa Fe P. R. Co.*, 314 U.S. 339 (1941). The Supreme Court ruled in *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 (1998), that "some explicit action of Congress…must be taken to create or to recognize Indian country." While granting trust title may announce intent to exercise jurisdiction by the federal government, mere acknowledgement of a tribe's historical occupancy does not.

The *McGowan* test's requirement that the land be set aside by the federal government for Indian use is not satisfied by a low level of federal interest in the land. The court in *Buzzard* rejected the tribe's argument that the purchased land in question had been set apart for the tribe by the federal government because, pursuant to the Indian Non-Intercourse Act, 25 U.S.C. §177 (1970), the tribe could not sell the land without approval from the Secretary of the Interior. *Buzzard*, 992 F.2d at 1076. The only evidence of past federal acknowledgement of the Cush-Hook's ownership of Kelly Point Park are the tribe's contact with Lewis and Clark in 1806 and the treaty signed in 1850 with Dart. Since 1850, the federal government's actions have run contrary to any possible intent to set aside the land for the Cush-Hooks. The government granted title to the land the Meeks in 1850. Since 1880, the state of Oregon itself has maintained Kelley Point Park on the land. The federal government never recognized the Cush-Hooks as a federally recognized Indian tribe under the Federally Recognized Indian List Act, 25 U.S.C.A. § 479 (1994). The validity of the government's grant of the land to non-Indian settlers in 1850 is irrelevant to the issue of the government's intent to set aside the land for Cush-Hook use.

In *Hydro Res. V. U.S. E.P.A.*, 608 F.3d 1131, 1149 (10th Cir. 2010), the court found that the land in dispute was not Indian country, because the federal government had given up its interest in the land by selling it in 1970, and the state of New Mexico provided all essential public services to the land. These facts align closely with the case at bar. Oregon operates Kelley Point Park as a state park. The federal government gave up its rights to the land in 1850 and maintains no supervision over the land, nor any kind of activity which could be construed as supervision. There is no evidence the federal government has had any relationship to the land since giving up its rights to it in 1850.

Kelley Point Park cannot be considered "Indian country" for the purposes of jurisdiction because it does not meet the definition of "Indian country" as found in 18 U.S.C.A. §1151. The park does not meet the test established in *McGowan,* requiring that the land be (1) set aside by the federal government for Indian use and (2) under federal supervision. The federal government has not acted in any way consistent with intent to set aside the land for Indian use nor to supervise it. There is no actual Indian community residing on the land. Ownership of the land is not held in trust. Therefore, Thomas Captain was not in "Indian country" when he removed the symbols from Kelley Point Park.

When a member of an Indian tribe commits a crime within the boundaries of a state but outside of "Indian country," the state has sovereign power to try that member for the crime. *Sturdevant v. State*, 76 Wis. 2d 247, 256 (1977). Oregon accordingly has criminal jurisdiction over Captain.

2. OREGON HAS CRIMINAL JURISDICTION OVER CAPTAIN EVEN IF KELLEY POINT PARK IS CONSIDERED "INDIAN COUNTRY," BECAUSE OREGON REVISED STATUTES §390.325 AND §358.920 ARE PROHIBITORY, NOT REGULATORY, IN NATURE.

The state of Oregon has criminal jurisdiction over offenses committed in Indian country to the same extent it has jurisdiction elsewhere in the state, with limited exceptions that do not apply to the case at bar. 18 U.S.C.A. §1162. The Supreme Court, however, has construed Section 4 of Public Law 280, 18 U.S.C.A. §1360 (1954) to mean that states have jurisdiction only over private civil litigation in Indian country. States therefore cannot enforce general civil/regulatory laws in Indian country. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976).

The critical question then becomes whether Oregon Revised Statutes §358.920 and §390.235 are defined as "civil/regulatory" or "criminal/prohibitory" in nature. If defined as the

latter, the state can assume jurisdiction under Public law 280, pursuant to 18 U.S.C.A. §1162. The Supreme Court accepted the following standard for distinguishing "civil/regulatory" and "criminal/prohibitory" laws:

> [i]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

The Oregon statutes in question prohibit the excavation or alteration of, and removal of archaeological items from, any archaeological site on public or private lands. O.R.S. §358.920(1)(a); O.R.S. §390.235(1)(a). The statutes should be read as prohibitory in nature, because the intent of the statutes is to prohibit, not regulate, the desecration and alteration of archaeological sites. In ruling that California's penal law prohibiting high-stakes bingo games was regulatory in *Cabazon*, the Court noted that in California gambling had the general approval of the state, subject to regulation: California permitted a "substantial amount of gambling activity, including bingo," and the state itself promoted gambling through the state lottery. *Cabazon*, 480 U.S. at 211. Traffic laws have been found to be regulatory for the related reason that traffic violations can be considered a subset of the larger, permitted activity of driving. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991); *State v. Stone*, 557 N.W.2d 588, 591 (Minn. Ct. App. 1996). There is no general approval for desecrating or altering archaeological sites in Oregon, and no larger permitted activity for which the prohibited activity is a subset. Respondent may argue that the statutes are not intended primarily to prohibit desecration, but to regulate excavation by archaeological professionals. Although the statutes do contain language regarding stewardship of archaeological objects and

approval of archaeological excavations by the Oregon State Museum of Anthropology and other state organizations in §358.920(4)(a) and §390.235(1)(b)-(4), this language is worded in the form of exceptions to the general rule that archaeological sites shall not be disturbed. The wording of both § 358.920(1)(a) and § 390.235(1)(a) affirmatively prohibit desecration, alteration, or removal of archaeological sites by the population in general, rather than prescribing rules regulating archaeological excavation by professionals.

Allowing narrow exceptions to the general prohibition does not make a law regulatory in nature. *United States. v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) (holding that Washington's fireworks law were prohibitory rather than regulatory, despite allowing for limited exceptions at public displays, movies, etc.). The Oregon statutes prohibit the activity of desecration without a permit. O.R.S. §358.920 (2012); O.R.S. §390.235 (2012). Despite the allowance for permits, the statutes still clearly prohibit desecration of archaeological sites in general.

Respondent may argue that the language of § 358.920 and § 390.235, including the requirement for a permit and the submission of evidence for approval to state organizations, and the inclusion of the statutes under Chapters 390 and 358 of the Oregon Revised Statutes, governing the State Parks and Recreation Department and Archaeological and Historical Sites, respectively, indicate they are regulatory laws. But the standard established in *Cabazon* requires a reading of the statute's intent, not merely its label. *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1993). The intent behind Or. Rev. St. §358.920 and §390.325 is clearly to prohibit desecration or alteration of archaeological sites, with exceptions for archaeological professionals.

Or. Rev. Stat. § 358.920 and §390.325 are more analogous to laws governing fireworks possession than to those regulating gambling or traffic. In *Marcye*, 557 F.2d at 1364, the court

found that the intent of Washington's fireworks law, which banned all dangerous fireworks with narrow exceptions, was prohibitory in nature. Similar to the Oregon statutes in question here, Washington's law prohibited use of dangerous fireworks by the general public with exceptions for those with a state license and training. Rev.Code Wa. Ann. 70.77.535 (1961). The Ninth Circuit noted that licensing was not the primary purpose of the law, despite the inclusion of licensing language. *Marcye*, 557 F.2d at 1364. The Ninth Circuit followed its own precedent in *Quechan*, F.2d 304 at 307, by finding that the intent of a California fireworks law prohibiting sale of federally classified Class C fireworks to the public was prohibitory, not regulatory, in nature. In enforcing these laws, states demonstrated intent to prohibit fireworks use by the general public, not to regulate the use of fireworks. These fireworks laws share with Or. Rev. Stat. § 358.920 and §390.325 a clear intent to prohibit the activity in question, not the intent to subject a generally approved activity such as gambling or driving to regulation.

Oregon's decision to attach criminal rather than financial penalties to the statutes in question suggests the state's intent was to prohibit rather than regulate the disturbance of archaeological sites. Oregon enforces the statutes in question by criminal misdemeanor penalties, and that the state derives no revenue from enforcement of the statutes. Or. Rev. Stat. §358.920(8); §390.325(7). The court in *Marcye* distinguished Washington's fireworks law from other regulatory schemes requiring a license, such as hunting or fishing, by noting those schemes were designed to both regulate the activity and collect revenue. *Marcye*, 557 F.2d at 1364. Neither California nor Washington collected revenue from their fireworks laws, as license fees were limited to costs incurred by the state. *Quechan*, 984 F.2d at 307. The court in *Quechen* also noted that California attached criminal penalties to its fireworks laws in support of its finding that the laws were prohibitory. *Id*. Although attachment of criminal penalty does not by itself

make a statute prohibitory, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987), it is indicative of Oregon's intent to prohibit rather than regulate disturbance of archaeological sites.

A state may be able to enforce laws concerning activities which on their face seem to be outside the scope of Public Law 280 if the state has a public policy interest in controlling the activity. The court in *Cabazon* included a "shorthand test" for distinguishing between prohibitory and regulatory laws: asking whether the conduct governed by the statute violates the state's public policy. In *Jones v. State*, 936 P.2d 1263 (Alaska Ct. App. 1997) the court held that while the hunting of deer generally did not violate Alaska's public policy, unregulated hunting of deer did violate that policy, reasoning that unregulated hunting could "ultimately destroy the practice of hunting itself, by destroying the game population." *Id.* at 1267. Citing this state interest in preserving its game population, the court ruled that Alaska's gaming law was prohibitory and enforceable in Indian country. Oregon has a similar interest in preserving archaeological sites found within its borders, and public policy dictates that it should be able to enforce laws protecting those sites.

Driving laws have also been found prohibitory when violation of those laws implicate public policy. The court in *St. Germaine v. Circuit Court for Vilas County*, 938 F.2d 75, 77 (7th Cir. 1991) found that a Wisconsin law imposing a fine and a 190-jail sentence for driving with a suspended license was prohibitory in nature and enforceable by the state in Indian country. The Seventh Circuit, in declining to classify the act of driving with a suspended license as a regulated subset of driving in general, held that Wisconsin's interest in protecting its citizens from incompetent and dangerous drivers was "public policy enforcement of the highest order." *Id.*

The court chose to focus on the narrow act of driving with a suspended license in determining that the law was prohibitory. *Id*.

Courts have been more willing to grant states jurisdiction when the revocation of driving privileges is due to prior incidents of intoxicated driving. *State v. Losh*, 755 N.W.2d 736 (Minn. 2008). The court determined in *Losh* that the narrow conduct of driving with a revoked license should be the focus of the prohibitory/regulatory test, because the Minnesota legislature, by enacting harsh mandatory penalties for drivers failing chemical tests under implied-consent laws, had demonstrated it had a larger overall strategy to protect the public from drivers who pose a threat to others due to repeated drug and alcohol use. *Id* at 744. Therefore, even if the Court in the present case is inclined to interpret Or. Rev. St. §358.905-961 and §390.325-240 as regulation of the broader activity of archaeological excavation, the provisions in § 358.920 and § 390.325 should be read narrowly as prohibitions of archaeological desecration for jurisdiction purposes under Public Law 280 to respect Oregon's public policy interest in protecting sites of archaeological importance.

Respondent may argue that the state's public policy interest is actually the protection of Indian cultural artifacts, and that prosecuting an Indian for removing those artifacts runs counter to that interest. Or. Rev. St. §390.235(1)(c) states that Indian tribes themselves must approve permits for excavation. But the law contains no provision exempting Indians with ancestral rights to the artifacts from prosecution for its desecration, and the State Parks and Recreation Department has final authority on issuing permits. Or. Rev. St. §390.235(1)(d). If the state enacted the law to preserve Indian cultural artifacts, it has the power to determine how to enforce that policy interest, and in this case Oregon's statute protects Indian artifacts by forbidding anyone, including Indians, from desecrating archaeological sites. The Oregon statutes by no

means preclude or abridge tribal members' rights to protect their cultural heritage. Considering the deference given to Indian tribal authority on the issue of excavation permits in § 390.325(1)(c), it is likely Captain would have been granted a permit to remove the artifacts by obeying the law.

Finally, the prohibitory/regulatory distinction established in *Cabazon* raises issues of tribal sovereignty. *Cabazon*'s prohibitory/regulatory test was prompted by concern for protecting Indian sovereignty from state interference, after Public Law 280 assumed state jurisdiction in Indian country where it had not existed before. *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986). Any sovereignty argument on the part of respondent is weakened considerably because no Cush-Hook community resides on the land, and any regulatory threat to sovereignty exists only as it applies to the land, not the community itself.

Concern for Indian sovereignty must also be balanced by taking into account the underlying reasons for the existence of Public Law 280. Congress enacted Public Law 280 because it was concerned with an "absence of adequate tribal institutions for law enforcement." *Bryan* 426 U.S. at 379. It is not likely that either the federal government or the Cush-Hook tribe itself have adequate means to prohibit unauthorized archaeological excavation in Kelley Point Park. The park is superintended by the state. The Cush-Hooks, in order to protect these archaeological sites, would have to maintain jurisdiction over a territory sixty miles away with no Cush-Hook inhabitants. The Cush-Hook interest in preserving their cultural heritage is likely better served by state enforcement.

Oregon has criminal jurisdiction over Captain for desecration of an archaeological site under Public Law 280. Or.Rev.St. §358.920 and §390.235 clearly seek to prohibit the desecration of archaeological sites by the general public, not to regulate archaeological

excavation. Oregon has a strong public policy interest in preserving sites of archaeological importance, and Captain's act of cutting down trees and removing three-hundred year old artifacts in Kelley Point Park violates that interest, regardless of his own tribal status. Prohibitory laws which protect a state's public policy interest are enforceable in Indian country under Public Law 280, and Oregon rightly charged Captain with violation of § 358.920 and §390.235.

CONCLUSION

The Supreme Court should reverse the appellate court's finding that the Cush-Hook Nation retains aboriginal title to the lands encompassing Kelley Point Park. Despite the heavy criticism it has received, the holding in *Tee-Hit-Ton* remains the law today. As such, Congress was acting within its power when it extinguished aboriginal title to the land, and the subsequent failure to compensate the Cush-Hook did nothing to change that. Title, or at the very least possessory rights, passed from the Meeks to Oregon, where it remains today. While there was no legal obligation to compensate the Cush-Hook, there probably was—and still is—a moral one. The proper venue for such a question, however, is in a suit for monetary damages initiated by the tribe itself or, though probably less likely, an act of Congress. For the case at bar, it should suffice to say that ownership of the lands in question should remain with the state of Oregon.

On the other hand, the appellate court ruled correctly that Oregon has criminal jurisdiction over Captain for desecration of an archaeological site under Public Law 280. Because Kelley Point Park is not a dependent Indian community set aside by the federal government for Indian use, it cannot be considered "Indian country" for jurisdiction purposes. Even if the court considers Kelley Point Park Indian country, Public Law 280 gives the state of

Oregon criminal jurisdiction for protecting archaeological sites in the park because the governing law is prohibitory and not regulatory in nature. The appellate court was therefore correct in ruling that the state of Oregon has criminal jurisdiction to protect archaeological, historical, and cultural objects in Kelley Point Park.