The Supreme Court of the United States

State of Oregon,

Appellant/Petitioner,

v.

Thomas Captain,

Appellee/Respondent

On writ of certiorari to the

United States Supreme Court

Brief for Appellee/Respondent

Team No. 19

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QUESTIONS PRESENTED

I. WAS THE LOWER COURT CORRECT IN HOLDING THAT THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK?

II. DID THE LOWER COURT ERR IN HOLDING THAT OREGON HAD 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

A. Statement of the Proceedings

This case is before the court on appeal by both parties. The State of Oregon brought this criminal action against 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. 358.905-358.961. (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historic materials). Captain consented to a bench trial. The Oregon Circuit Court for the County of Multnomah determined that the Cush-Hook Nation owns the aboriginal title to the land comprising Kelley Point Park and thus found Captain not guilty trespass or for cutting timber without a state permit. The court, however, found that Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. apply to all lands in the state of Oregon under Public Law 280 independent of tribal ownership; and thus found Captain guilty for damaging an archaeological site and a cultural and historical artifact. The court fined Captain $250. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. R2-4.

B. Statement of the Facts

The Cush-Hook Nation of Indians is a tribe from the territory of present-day Oregon State. William Clark, of the Lewis & Clark expedition, first encountered the Nation in April 1806. The Cush-Hook village was located at the meeting of the Columbia and Willamette Rivers in what is now Kelley Point Park, an Oregon state park inside the limits of Portland, Oregon. Expert witnesses established that the Cush-Hook Nation "occupied, used, and owned the lands in question before the arrival of Euro-Americans." R1, 3.

After their meeting with William Clark, the tribe continued to live in the village and surrounding area and engage in their traditional way of life. In 1850, the Nation signed a treaty with Anson Dart, superintendent of Indian Affairs for the Oregon Territory. In the treaty, the Cush-Hook Nation agreed to relocate to a specific location 60 miles west in the foothills of the Oregon coast range. After signing the treaty, the nation relocated to the coast range to avoid the encroachment of American settlers. The U.S. Senate, however, refused to ratify the treaty and the Nation never received the promised compensation for their lands or any of the other promised benefits of the treaty. Since the treaty was not ratified and the federal government has not undertaken any additional efforts to recognize the tribe, the Nation remains a non-federally recognized tribe of Indians. R1-2.

After the relocation of the Cush-Tribe, two American settlers moved into the area comprising what is now Kelley Point Park. The couple received fee title to the land from the United States under the Oregon Donation Land Act of 1850, which provided plots to citizens who cultivated and lived on the land for at least four years. The Meeks, however, never cultivated or lived on the land for the required four years. Their decedents sold the land in 1880 to the State of Oregon. Oregon turned the land into Kelley Point Park. R2.

In 2011, Thomas Captain, a Cush-Hook citizen, moved from the Cush-Hook tribal area in the coast range of mountains to Kelley Point Park. He occupied the park to reassert his Nation's ownership of the land and protect culturally and religiously significant trees in which Cush-Hook shamans and medicine men had made religious and sacred carvings over three hundred years ago. Vandals had recently begun climbing the trees and defacing the images, in some instances even removing the carvings from the trees to sell. Captain cut down one tree and removed the section containing the vandalized image, intending to restore and protect the sacred artifact carved by one of his ancestors. State troopers arrested him while he was returning to his Nation's location in the coastal mountain range. R2.

STANDARD OF REVIEW

This case is brought before the United States Supreme Court upon the Court's grant of certiorari on two questions. Extinguishment of aboriginal title presents a matter of law to be reviewed *de novo*. *See United States v. Dann*, 873 F.2d 1189, 1192 (9th Cir. 1989). Determining criminal jurisdiction is a matter of law to be reviewed *de novo*. *See Cook Inlet Region, Inc. v. Rude*, 690 F.3d 1127, 1130 (9th Cir. 2012), *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Under a *de novo* standard of review, this Court owes no deference to the lower court's determination of aboriginal title or proper criminal jurisdiction. This court has jurisdiction under 28 U.S.C. § 1257. (West 2012).

SUMMARY OF ARGUMENT

We contend that the Cush-Hook Nation still holds aboriginal title to the land in present-day Kelley Point Park. In order for aboriginal title to be extinguished, there must be a clear and unambiguous expression of intent to do so from Congress. Because congress never expressed a clear intent to extinguish the Cush-Hook Nation's aboriginal title, this court must find that the aboriginal title to the land was never extinguished.

As aboriginal title constitutes tribal lands, this court must find that Oregon does not have 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 the Cush-Hook Nation. Public Law 280, which grants states jurisdiction over crimes committed by or against Indians on tribal lands, cannot grant Oregon jurisdiction because the state archaeological statutes are inconsistent with the intent of federal archaeological law. Moreover, Public Law 280 does not authorize the enforcement of merely regulatory laws like Oregon's archaeological statutes and was passed to control lawlessness on tribal lands, to which Thomas Captain was not contributing. Therefore, since Public Law 280 does not grant Oregon jurisdiction, this court must find that Oregon does not have criminal jurisdiction in this case and thus dismiss the charges against Thomas Captain.

ARGUMENT

I. The Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park

We urge this court to affirm the ruling of the lower court that aboriginal title held by the Cush-Hook Nation to the land that now comprises Kelley Point Park was never extinguished.

A. The Cush-Hook Nation possessed aboriginal title to the land in question prior to 1850 based on their actual, exclusive, and continuous use and occupancy of the land since before its discovery by white settlers

In the Trade and Intercourse Act of 1790 Congress provided that non-Indians could not acquire land from Indians except by treaty entered into under the federal Constitution. Trade and Intercourse Act of 1790, ch.33, 1 Stat. 137 (1790). Chief Justice Marshall reaffirmed this notion in *Johnson v. M'Intosh* and added that the incapacity of the Native Tribes to alienate land held under aboriginal title preceded the statutory decree; it arose naturally out of the relationship between the native tribes and the federal government:

> [The Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). According to *Johnson*, the federal government owned the "absolute title" to the land while tribes possessed a "title of occupancy" good against all but the sovereign power. *Id.* at 587-88. The title of occupancy is most often referred to as aboriginal title.

Aboriginal title is established by showing "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *Sac & Fox Tribe of Okla. v.*

United States, 315 F.2d 896, 903 (Ct. Cl. 1963); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 344-45 (1941). A claim of aboriginal title does not require any showing of federal recognition. *See Santa Fe*, 314 U.S. at 347 (aboriginal title need not be based "upon a treaty, statute, or other formal government action"); *see also Cramer v. United States*, 261 U.S. 219, 229 (1923) ("[t]he fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive"); *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985).

The "[o]ccupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *Santa Fe*, 314 U.S. at 345. Questions of historical fact are reviewed for clear error. *Confederated Tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 334, 342 (1996). The Oregon Circuit Court found that the Cush-Hook Nation "occupied, used, and owned the lands in question before the arrival of Euro-Americans." R3, The factual findings of the circuit court clearly satisfy the necessary requirements of aboriginal title and there is no evidence upon which to overturn this ruling. The court should affirm the judgment of the lower court that the Cush-Hook Nation established aboriginal title.

B. The aboriginal title of the Cush-Hook Nation to the land comprising present day Kelley Point Park was never extinguished.

Johnson established the principle that the federal government possesses the exclusive right to extinguish aboriginal title. *Johnson*, 21 U.S. at 586-87. This principle remains largely unchanged to this day. *See Cramer v. United States*, 261 U.S. 219, 227 (1923) ("[I]t has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States"); *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941) ("This policy was

first recognized in [*Johnson*] and has been repeatedly reaffirmed"); *see also Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 668 (1974).

In the case of *Lone Wolf v. Hitchcock*, the Supreme Court held that the extinguishment of Indian title creates a political, nonjusticiable issue. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Though this doctrine has been abrogated in regards to recognized Indian title, *see Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977), *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980), it remains the law (absent some statutory directive to the contrary) that congressional takings of aboriginal title are not reviewable by the judiciary, *see Sioux Nation*, 448 U.S. at 415 n.29 (dicta); *see also Idaho v. U.S.*, 533 U.S. 262, 277 (2001) (dicta). Once the court has determined that Congress clearly intended to extinguish aboriginal title, the courts will not "inquire into the means or propriety of the action." *United States v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976).

In light of the dependent ward relationship between the federal government and the native tribes, *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831), extinguishing aboriginal title requires a clear expression of congressional intent. *Santa Fe*, 314 U.S. at 346 (requiring "plain and unambiguous action"). "An extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.* at 354. This accords with the well-established canons of construction when dealing with Indian law that "treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor." Cohen's Handbook of Federal Indian Law § 2.02, (Nell Jessup Newton ed., 2012) [hereinafter, Cohen's Handbook].

Absent a showing that aboriginal title has been extinguished through a clear expression of congressional intent, this court must conclude that the Cush-Hook Nation still possesses aboriginal title to the area comprising Kelley Point Park.

1. *The Oregon Donation Land Act did not extinguish aboriginal title to the land in question because it did not express a clear congressional intent to do so.*

In the case of *Plamondon ex rel Cowlitz Tribes of Indians v. United States*, the United States Court of Claims expressly considered the question of whether the Oregon Donation Land Act, passed on September 27, 1850, uniformly extinguished aboriginal title to the land designated under the act and answered in the negative. *Plamondon ex rel Cowlitz Tribes of Indians v. United States*, 467 F.2d 935, 937 (Ct. Cl. 1972); *contra U.S. v. Ashton*, 170 F. 509 (W.D. Wash. 1909). We urge this court to adopt the reasoning put forth in *Plamondon*. In support of their conclusion, the *Plamondon* court cites another act of Congress, descriptively titled An Act for Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for other Purposes of June 5, 1850, 9 Stat. 437 [hereinafter Act of June 5, 1850], as expressing Congress' desire that all aboriginal land claims west of the Cascade Mountains be extinguished *by treaty*. *Plamondon*, 467 F.2d at 526. The court reasoned that in light of the Act of June 5, 1850, "the mere act of surveying" did not "have any effect upon the Indian title of these tribes." *Id.* at 528-29. This court adopted similar reasoning in *United States v. Santa Fe Pacific Railroad Company* when it found that an act establishing the office of Surveyor General of New Mexico did not extinguish aboriginal title to the area to be surveyed. *Santa Fe*, 314 U.S. at 348.

The Circuit Court for Western District of Washington reached a contrary conclusion in *United States v. Ashton*, finding that aboriginal title to all land within the Oregon Territory

was extinguished when Congress created the Oregon Territory and then passed the Oregon Donation Land Act "because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon." *United States v. Ashton*, 170 F. at 513. This court should reject the reasoning of *Ashton*. It ignores completely the Act of June 5, 1850 authorizing the President to appoint commissioners to "negotiate treaties with the several Indian tribes . . . for the extinguishment of their claims to lands lying west of the Cascade Mountains." 9 Stat. 437. Congress is of course free to change their attitude toward aboriginal title or to pass a statute rendering a prior one superfluous, but in order for such a change to effect an extinguishment of aboriginal title, it must be, according to the standard of "plain and unambiguous action," clearly and expressly stated. The only thing clearly and expressly stated by Congress in 1850 was that aboriginal title was to be extinguished by treaty. This is particularly clear when we look at the continued efforts that Congress made to secure treaties extinguishing aboriginal title to the Oregon territory in the years after the passage of the Oregon Land Donation Act. *Plamondon*, 467 F.2d at 526. The relevant history points to only one conclusion: the Oregon Land Donation Act did not by its terms extinguish aboriginal title in the Oregon Territory.

The only other defense of the proposition that the Oregon Donation Land Act extinguished all title to the region is that the offering of lands for public settlement is inconsistent with continued aboriginal title to the territory. We urge the court to reject this conclusion. While there is precedent for the proposition that title is extinguished when the federal government treats tribal land as public land, *see e.g. Nooksack Tribe of Indians v. United States*, 162 Ct.Cl. 712, 715 (1963), that conclusion is not warranted here. In the *Nooksack* case, the court was referring to lands already ceded to the government by a tribe

other than the one claiming their rights. *Id*. at 715. It was not merely the treatment of the land as public land, but the additional cession of the land by treaty, even if by a different tribe, that together expressed a clear congressional intent that aboriginal title to the particular area in question be extinguished. The best that may be said of the Oregon Donation Land Act is that granting patents to particular plots under the provisions of the act is inconsistent with aboriginal title over the plot granted. This does not necessitate or even suggest a finding that the offering of a large territory up for settlement clearly and expressly extinguishes all aboriginal title to the land in question.

It is not necessary to conclude, as did the lower court, that Congress erred in describing the all the lands in the Oregon Territory as being public lands of the United States (though such a conclusion is certainly not anathema to the argument presented here). We freely admit that courts should be hesitant to find an error on the part of Congress when another interpretation is just as reasonable, even in light of the liberal canons of interpretation applied to Indian law. The other possible interpretations, however, render the same result.

In light of the Act of June 5, 1850, for example, Congress might have only meant for "public lands" as used in the Oregon Donation Land Act to refer to those lands ceded by treaty to the United States government. This would provide the same result, that is, the Oregon Donation Land Act did not extinguish all aboriginal title in entire territory, and yet would avoid the problem of imputing error to a congressional action.

A third reading leads us again to the same conclusion. Native lands under aboriginal title are held in fee by the United States. *Johnson v. M'Intosh*, 21 U.S. 543 (1823). It would be reasonable to refer to such lands as public lands in a statute; and we do not doubt the conclusion of the court in *Ashton* that Congress meant to encourage settlement upon the

entirety of the Oregon Territory through the Oregon Donation Land Act. But even reading the statute as encouraging settlement on lands held under aboriginal title by the native tribes does not suggest a clear expression of congressional intent to extinguish in a single action any aboriginal title still held in the Oregon Territory.

The result is clear: any reasonable interpretation under the canons of construction previously discussed leads to the conclusion that aboriginal title to the land comprising present-day Kelley Point Park was not extinguished in the Oregon Donation Land Act.

2. The treaty made by the Cush-Hook Nation did not extinguish aboriginal title to the land in question because Congress did not ratify the treaty.

Through the course of our research, we were able to find no case that would support the proposition that a treaty providing for a voluntary cession of Indian lands demonstrated a clear congressional intent to extinguish aboriginal title when Congress did not ratify the treaty. The contrary position, however, is readily available.

It was established in *Buttz v. Northern Pacific Railroad Company* that aboriginal title was extinguished when two Indian tribes signed a treaty ceding the property and then subsequently abandoned the land. *Buttz v. Northern Pac. R.R. Co.*, 119 U.S. 55 (1886). The court placed the date of extinguishment as the date of ratification by the second tribe, nearly a year before the treaty was ratified by Congress. *Id.* at 69. Though this seems to suggest that extinguishment of aboriginal title occurs at the instant of Indian, rather than congressional, ratification, such a reading would be wholly incorrect. First, Congress eventually ratified the treaty in *Buttz*, unlike in the present case. The *Buttz* court made no statement concerning whether an extinguishment would have been effected at all in the absence of congressional ratification of the treaty. Second, the conclusion of the *Buttz* court was based on a prior relationship between the federal government and the two Indian tribes; a close reading of the

case reveals that Congress had expressed their approval of the terms of the treaty they eventually ratified prior to its ratification by the Indian tribes. *Id.* 60-61.

The Act of June 5, 1850 expressing Congress's intent to extinguish title through treaty only bolsters this point. If Congress intended to extinguish title through bilateral agreements between the federal governments and the tribes, it would be odd to determine that an extinguishment was effected when Congress refused to ratify a treaty that would have done precisely that.

It is unnecessary to explore this point further when the basic principle is so readily grasped by our intuition and common sense: Congress cannot clearly express their desire to do a thing through their rejection of a proposal precisely the thing in question. No expression of Congressional intent to extinguish aboriginal title can be gleaned from their refusal to ratify a treaty that would have done just that.

3. The grant of land to the Meeks was void ab initio because the Meeks failed to abide by the terms of the statute and therefore the grant did not effect an extinguishment of aboriginal title.

Whatever may be said about the extinguishment of aboriginal title if the patents had been properly granted, *cf. United States v. Atlantic Richfield Co.*, 435 F.Supp 1009, 1020 n.45 (D. Alaska, 1977) (dicta) (suggesting that aboriginal title is extinguished "when the United States makes an otherwise lawful conveyance of land pursuant to federal statute"), extinguishment of Indian title cannot be based on a grant of land inconsistent with federal law. The Surveyor-General charged with granting land in the territory was authorized to grant land only to those settlers who lived on and cultivated the land for the required four years. Oregon Donation Land Act, 9 Stat. 496. This court should follow the lower court in finding that the grant of land to the Meeks was a violation of federal law upon which an

assertion of extinguishment based on a clear expression of congressional intent cannot be founded.

4. The Cush-Hook's involuntary leaving of the land in question did not extinguish their aboriginal title.

Because aboriginal title is based on use and occupancy, it follows that aboriginal title may also be extinguished by an abandonment of the land by the Indian tribes. *See Williams v. Chicago*, 242 U.S. 434, 437-38 (1917); *see also Buttz v. Northern Pacific*, 119 U.S. 55, 68. This abandonment, however, must be voluntary. Cohen's Handbook, § 15.09. It follows that a forcible removal not authorized by the federal government does not extinguish aboriginal title. It is worth noting that while aboriginal title can technically be lost through voluntary abandonment, voluntary abandonment has rarely served as the foundation for extinguishment of aboriginal title. *Id.* As such, there are few cases from which to draw proper comparisons.

The record states that the tribe moved on account of the treaty and increasing white settlement in the area. These facts are not entirely clear on what precisely motivated the Cush-Hook Tribe to leave their homelands, but they do suggest a few reasons. First, it appears as if the tribe was operating under the assumption that the treaty they had signed would be ratified. If this is the case, then it seems that they moved on the belief that they would receive compensation for the land they were giving up.

Such movement under false pretenses can hardly be considered voluntary in any meaningful sense of the word. Imagine a situation in which a man was said to lose legal title to his chair if he voluntarily leaves it and then someone else sits down. If a second man offered the first man a dollar to leave his seat so that he may sit down, and then refused to pay when the requested action was performed, it would be purely academic to call the first man's actions voluntary so as to invoke the aforementioned rule. There is no good reason in

the present case to draw a distinction between removal through threat of physical violence, which clearly does not constitute extinguishment unless authorized by the federal government, and removal through promise of compensation never received. If Congress itself had promised the tribe compensation for their cession of the land and then refused to pay it after the land was ceded, aboriginal title may be held to have been extinguished.[1] Such an extinguishment, however, would be based not on the doctrine of voluntary abandonment but on a clear expression of congressional intent. As the record indicates, Congress never actually promised any compensation; the tribe was instead relying on the representations of Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. R1-2. His authorization to act as a negotiator of treaties with the native tribes notwithstanding, the courts should not infer congressional intent from Dart's actions, particularly when Congress refused to ratify the treaty that Dart drew up.

Another factor suggested by the facts is that the tribe moved on account of increased white settlement in the region. In light of the violence and conflict that often occurred when native tribes encountered white settlers, the Cush-Hook Tribe's desire to escape such conflict cannot be deemed voluntary so as to effect an extinguishment of aboriginal title. If the court allowed such a result, it would open the formerly exclusive power of the federal government to extinguish aboriginal title to anyone with an axe to build a home and a plow to till a field.

5. This court should reject the "weight of history" argument put forth by the Vermont State Supreme Court in State v. Elliot.

In *State v. Elliot*, the Vermont Supreme Court suggested that "extinguishment may be established by the increasing weight of history." *State of Vt. v. Elliot*, 616 A.2d 210, 218 (1992). This court should reject this notion in its entirety. It ignores the long, established

[1] The appropriate remedy for the tribe in such a situation would be a claim for compensation for the taking; its success would be dependent on the statutory remedies available at the time the claim was brought.

history of Indian law and completely dissolves the fundamental principle that the federal government alone can extinguish aboriginal title.

The case has been roundly criticized by Indian law scholars, Meredith Hatfield, *Will The "Increasing Weight of History" Crush The Vermont Abenaki's Chances for Federal Acknowledgement*, 23 Vt. L. Rev. 649, 649 (1999), with one scholar noting, "The Vermont Supreme Court's holding . . . disposes of the rule of law, and replaces it with a selective reading of the conqueror's history," John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 Buff. L. Rev. 77, 77 (1994). Another scholar added that "This view incorrectly interprets existing federal law on what acts are sufficient to extinguish Indian title" and stated that the court interpreted "extinguishment doctrine in a way which would allow tribal property rights to be lost in a casual manner, rather than through clear expression of congressional intent." Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 482-83 (1994).

It is enough to state here that the case does away with precedent and destroys the foundation upon which the doctrine of aboriginal title is built, namely the exclusive right of the federal government to extinguish aboriginal title through a clear expression of congressional intent. This court should reject the "weight of history" argument put forth by the Vermont Supreme Court.

6. The combined acts of the federal government do not demonstrate any clear congressional intent to extinguish aboriginal title.

Various cases have put forth that the idea that a series of combined acts by the federal government demonstrate a clear intent to extinguish aboriginal title. The courts in these cases tend to refuse to rule on whether any particular action was sufficient to extinguish title, but

concludes that the entirety of the federal government's behavior towards the territory exhibits the requisite clear intent to extinguish title. Without denying that Congress can, if is so desires, express its intent to extinguish title through a series of actions, we submit that this was not the case here and proceed on two points.

First, insomuch as these cases may be read as espousing a principle similar to that put forth in *State v. Elliot*, *supra*, namely that aboriginal title might be extinguished by the "weight of history," the court should reject their reasoning for the same reasons.

Second, without denying that Congress can, if it so desires, express its intent to extinguish title through a series of actions, rather than discretely, the series of actions in the cases expressing this principle created a much more robust case for an clear expression of intent to extinguish than is present here. In *Plamondon v. United States*, for example, the court considered three separate factors: "the change in congressional intent, the establishment of the Chehalis Reservation, [and] the Presidential proclamation of March 20, 1863." *Plamondon ex rel Cowlitz Tribes of Indians v. United States*, 467 F.2d 935, 937 (Ct. Cl. 1972). In *United States v. Gemmill* the court found that four factors contributed to a century's long course of conduct that when taken together was sufficient to extinguish aboriginal title. The factors included: the California Land Claims Act of 1851 requiring that person claiming lands in California present their claims within two years or lose title; a forcible removal of the tribe by military forces of the federal government; inclusion of the lands in a national forest reserve; and congressional payment of compensation for the lands. *United States v. Gemmill*, 535 F.2d 1145, 1148-49 (9th Cir. 1976). In *Gemmill* each of the factors considered presented a strong claim in and of themselves for extinguishment of title. Indeed, the *Gemmill* court acknowledged a recent ruling by the Court of Claims holding that the

designation of land as a forest reserve is by itself enough to effect an extinguishment of Indian title. *Id.* at 1149 (citing *United States v. Pueblo of San Ildefonso* 513 F.2d 1383, 1386, 1391-92 (Ct.Cl. 1975)).

It should be clear that no similarly strong case is evident based on the factors presented in the present case: passage of an act permitting settlement in the Oregon territory; a treaty that was never ratified by Congress; abandonment of the lands under false representations; and a land patent granted in violation of federal law. This court should find that, in addition to no single act of the federal government being enough to constitute extinguishment, the factors when considered together are still insufficient to demonstrate a clear expression of congressional intent to extinguish title.

C. Holding that the Cush-Hook Tribe possesses aboriginal title would not bring into question the title of the rest of the land in the former Oregon Territory

It is important to emphasize the narrow nature of the ruling requested of the court. A ruling finding that aboriginal title was not extinguished would not bring into question the title of all lands in the former Oregon Territory. Most of the tribes in the region ceded their title by treaty in the 1850s. *Plamondon*, 467 F.2d at 936. Title to these lands would not be brought into question. Additionally, we do not here challenge the effectiveness of properly granted Oregon Donation Land Act claims in extinguishing aboriginal title to the land granted. We request only that the court draw the reasonable conclusion that a patent granted in violation of federal law does not express a clear congressional intent to extinguish title.

We implore the court to follow its own well-established principle that aboriginal title may not be extinguished without a clear expression of congressional intent to do so. As this expression of intent is lacking, the court must conclude that the Cush-Hook Nation owns aboriginal title to the lands.

II. Oregon lacks the criminal jurisdiction necessary to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question

The Oregon Circuit Court for the County of Multnomah did not have criminal jurisdiction to hear the case against Thomas Captain. Plaintiffs argue that notwithstanding the Cush-Hook Nation's ownership of the land under aboriginal title, the state of Oregon has criminal jurisdiction over Thomas Captain to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question. Plaintiffs contend that under Public Law 280, Oregon has "jurisdiction over offenses committed by or against Indians in the areas of Indian country," and therefore has jurisdiction over Thomas Captain for violating Oregon law [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. 18 U.S.C. § 1162 (West 2010).

Plaintiffs' arguments improperly rely upon a state statute that is inconsistent with federal law, mischaracterize the breadth of Public Law 280's grant of jurisdiction, and ignore Congress's intent in enacting Public Law 280. Therefore, because the Oregon Circuit Court for the County of Multnomah did not have the criminal jurisdiction over this case, the lower court erred in finding Thomas Captain, a citizen of the Cush-Hook Nation, guilty of damaging an archaeological site and its artifact owned by Mr. Captain's Nation when he attempted to protect the artifacts.

A. Public Law 280 cannot authorize regulation of property in a manner inconsistent with any Federal statute

In authorizing Oregon's jurisdiction over offenses committed by Native Americans on tribal lands, Public Law 280 created exceptions to states' authority for laws concerning the real or personal property of any Native American or any tribe held in trust by the United

States. Nothing in Public Law 280 "shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." *Id.* The Cush-Hook Nation holds aboriginal title to the property, making the area tribal lands. *See Johnson v. M'Intosh*, 21 U.S. 543, 593 (1823). Therefore, Public Law 280 can authorize Oregon's jurisdiction over offenses committed by Native Americans on these lands unless the laws are inconsistent with federal law. Congress has consistently held that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

The Supreme Court has supplied a method for determining consistency of federal and state laws: "In order to gauge consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared." *Bd. of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U.S. 478, 487 (1980). Therefore the policies behind the federal and state laws regarding the excavation and removal of Native American artifacts must be compared to determine whether Oregon's statutes are inconsistent with federal law because an Oregon statute inconsistent with federal law cannot be enforced under Public Law 280.

1. The Cush-Hook Nation owns the cultural artifact in question

The Cush-Hook Nation has ownership over the artifact which Thomas Captain sought to protect. The ownership of all Native American cultural items discovered on tribal lands after November 16, 1990 is determined by federal statute: "in the case of … objects of cultural patrimony… [ownership shall be] in the Indian tribe or Native Hawaiian

organization on whose tribal lands such objects or remains were discovered." 25 U.S.C. § 3002 (West 2012).

The carvings done by the Cush-Hook shamans and medicine men over three hundred years ago conform to the statutory definition of an object of cultural patrimony. Firstly, the object must have "ongoing historical, traditional, or cultural importance." 25 U.S.C.A. § 3001 (West 2012). Thomas Captain, a member of the Cush-Hook Nation, believed the carvings were of ongoing to importance to his culture, and the Oregon Circuit Court for the County of Multnomah agreed, stating that her "cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol". R3. Furthermore, the object's importance must be "central to the Native American group or culture itself, rather than property owned by an individual Native American." 25 U.S.C.A. § 3001 (West 2012). The court has interpreted this section to mean that "the cultural item's essential function within the life and history of the tribe engenders its inalienability such that the property cannot constitute the personal property of an individual tribal member." *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997). The shamans and medicine men made the carvings in living trees on tribal lands that were not owned by individuals. Moreover, the carvings were made as part of the shamans' positions within the tribe, so the carvings were made for the tribe generally, not for the shamans as individuals. Therefore the carving was an object of cultural patrimony and therefore is owned by the Cush-Hook Nation.

2. The Federal statute regarding the excavation of archaeological resources from Native American lands supplants Oregon's inconsistent state statute

Since the Cush-Hook Nation owns the artifact in question, Public Law 280 could not give the state of Oregon the authority necessary to regulate the Cush-Hook's property through state statutes that are not consistent with federal law. Public Law 280 cannot

authorize the regulation of Indian's real or personal property in a manner inconsistent with federal law. Thomas Captain was found guilty of damaging an archaeological site and artifact because he did not comply with Oregon's statutes concerning archaeological sites [Or. Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq*.]. Under these statutes, "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 a permit issued under ORS 390.235." Or. Rev. Stat. Ann. § 358.920 (West 2012). Subsection (1) of ORS 390.235 explains that "a person may not excavate or alter an archaeological site on public lands … or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department." Or. Rev. Stat. Ann. § 390.235 (West 2012).

While on its face ORS 390.235 seems to discuss the issuance of permits for excavation on public lands, subsection (5) notes that the permits required by subsection (1) can also apply to private lands. *Id.* Furthermore, the official Oregon State website includes a subsection about the permits needed for archaeological excavation, which cites the Oregon Administrative Rules. Oregon Parks & Recreation Dept.: Heritage Program: Archaeological Service, http://www.oregon.gov/OPRD/HCD/ARCH/Pages/arch_excavationperms.aspx (last visited Jan 14, 2012). These rules explicitly state that, "a person who desires an archaeological permit to excavate or remove objects on private lands pursuant to ORS 358.920(1)(a) and 390.235 must submit a request to the Oregon State Parks and Recreation Director or his or her designee." Oregon Administrative Rules 736-051-0090 (Oregon State

Archives 2012). Therefore, these statutes would seem to require that a Native American receive a permit to excavate tribal land in Oregon and remove cultural artifacts.

However, the federal statute for excavating Native American lands, unlike Oregon's state statute, does not require Native Americans receive a permit to excavate their own tribal land. Under the federal statute, "no permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe." 16 U.S.C.A. § 470cc (West 2012). Notably, this exception to the federal statute which generally requires a permit to excavate tribal lands is only applicable when tribal law that would regulate excavation on Indian lands is absent. Congress has been sensitive to the unique position of Indian nations as being sovereign nations inside the United States, and as the Supreme Court has noted, sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). Thus Congress clearly sought to grant Indian nations the authority to regulate excavation on their own land in deference to their sovereignty when they enacted this provision of the statute regarding excavation permits.

Since Public Law 280 can only authorize the regulation of property through state laws that are consistent with federal laws, the presence of inconsistency, as the court explained, must be determined through a comparison of the policies promoted by the state and federal laws. Oregon's statute, which requires a permit, does not directly conflict with the federal statute because the federal statute does not prohibit states from further regulating excavation. However, the Oregon statute is clearly inconsistent with the policy of tribal sovereignty and a tribe's own ability to regulate excavation that Congress sought to promote in the federal

statute. Oregon's statute does not give any exception for Native Americans excavating on their own tribal land, and simply ignores the sovereign status of the tribes and the tribes' capacity to regulate the actions of its members on its lands. The federal and state laws are therefore inconsistent because the federal law promotes the policy of tribal sovereignty while the state law promotes a policy of states assuming the right to regulate the conduct of Native Americans on their tribal lands. Since Public Law 280 cannot authorize the regulation of the real or private property of Native Americans if state laws are inconsistent with Federal statutes, Public Law 280 cannot confer upon Oregon state courts the jurisdiction over Thomas Captain necessary to charge him criminally for removing his own nation's cultural artifact from the land owned by the Cush-Hook Nation.

B. Public Law 280 does not authorize enforcement of regulatory laws

Public Law 280 was enacted to give states jurisdiction over criminal offenses committed by or against Indians on tribal lands, but the specific statutes which Thomas Captain is accused of violating are clearly civil and regulatory in nature. Public Law 280 ensures that, "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." 18 U.S.C. § 1162 (West 2012). In regard to the civil jurisdiction of Oregon courts, the legislative history Public Law 280 shows that Congress had no intention to confer complete civil regulatory control over tribal lands to the states. Instead Congress only instead intended to allow State courts to adjudicate private civil litigation involving Native Americans. *See Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 384 (1976) (*citing* H.R.Rep.No.848, pp. 5, 6, U.S. Code Cong. & Admin. News 1953, p. 2411). *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Thus for a state law to be enforced on tribal lands

under Public Law 280, it must be criminal in nature because granting a state general civil regulatory power over tribal lands would erode tribal conventions. *See id* at 208.

There is no bright-line rule in determining whether a law is criminal or civil, but the distinction can be best understood by determining the intent of the law:

> If 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.

Id. at 209. A state statute, for example, that only permits bingo to be played when the games are operated and staffed by members of charitable organizations, the profits are kept in accounts only used for charitable purposes, and the prizes do not exceed $250 per game was determined to be regulatory because the state did not prohibit bingo but instead regulated how it was played. *Id*. at 210.

The statutes which Plaintiffs claim Thomas Captain violated are regulatory and not prohibitory. Archaeological excavation is permitted to occur in Oregon, subject to an excavator receiving a permit under Or. Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq.* Just as a state law could regulate who could run a bingo game and how the game could be conducted, so too can a state law regulate who can excavate archaeological sites and how the excavation can proceed. Oregon's statute clearly intends to regulate but not prohibit excavation, and so Public Law 280 does not grant Oregon jurisdiction necessary to enforce these laws on tribal lands.

C. Enforcement of Oregon's statutes on tribal lands is not in keeping with the legislative intent of Public Law 280 to prevent lawlessness on tribal lands

Congress enacted Public Law 280 against the framework of tribal sovereignty, aware that tribes held "attributes of sovereignty over both their members and their territory." *U. S.*

v. Mazurie, 419 U.S. 544, 557 (1975). The intent of the law, as interpreted by the courts' reading of the legislative history, was not to allow states to have control over Native Americans, but instead to combat the problem of lawlessness on tribal lands. *See Bryan* 426 U.S. at 379. *See also Cabazon Band of Mission Indians*, 480 U.S. at 208. Public Law 280 served as a way to enforce these laws through state courts at a time when many tribes were not sufficiently organized to enforce laws themselves. *See Bryan* 426 U.S. at 379-80.

The conduct that is currently at issue, Thomas Captain's violation of Oregon statutes regarding archaeological excavation, does not rise to the level of lawlessness on tribal lands, particularly since his conduct was designed to protect tribal artifacts from vandalism. Thomas Captain was not recklessly or dangerously removing a cultural carving from his tribe's lands; instead he was attempting to protect the carvings. The state has failed repeatedly to save a number of the carvings from vandals who have defaced and even sold the carvings for profit. Thomas Captain was simply protecting his culture and his land from the vandals whom the State could not or would not apprehend. Thus, Thomas Captain's conduct was neither promoting nor contributing to lawlessness on tribal lands but rather combating it. Therefore, Public Law 280 should not be used by Plaintiffs to authorize Oregon's jurisdiction to prosecute activity that was designed to reverse the malicious effects of vandalism that the State itself ignored.

CONCLUSION

This court must conclude that the Cush-Hook Nation still retains aboriginal title to the land in question and therefore must find that Oregon does not have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land

in question. For the aforementioned reasons, we urge this court to affirm the ruling of the lower court that the Cush-Hook Nation possess aboriginal title to the land in question, and to overturn their ruling against Thomas Captain as Oregon lacks criminal jurisdiction.