No. 11-0274

Supreme Court of the United States

State of Oregon,

Petitioner

v.

Thomas Captain,

Respondent and cross-petitioner.

On Writ of Certiorari to the Oregon Supreme Court

Brief for Petitioner

Team No. 20

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STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The State of Oregon brought a criminal action against Thomas Captain, a member of the Cush-Hook Nation, a non-federally recognized Indian tribe, in the Oregon Circuit Court for the County of Multnomah. The State alleged Thomas Captain wrongly trespassed on state lands, cut timber in a state park without a permit, and desecrated a site of archaeological and historical significance in violation of Oregon state law.

After a bench trial, the Circuit Court held that the Cush-Hook Nation still holds aboriginal title to the land within Kelley Point Park. The court also found that Congress wrongly designated the disputed land as "public" in the 1850 congressional act and that its subsequent allotment to settlers and later sale to the State of Oregon was void. In light of these findings, the Circuit Court concluded that Thomas Captain was not guilty of trespass on the land or of cutting timber without a state permit. But notwithstanding purported tribal ownership, the court also held that, under Public Law 280, Or. Rev. Stat. 358.905-358.961 *et.*

seq. and Or. Rev. Stat. 390.235-390.240 *et. seq.* apply to the land in dispute. Thomas Captain was found guilty of violating both laws and thus faced a fine of $250.

Both the State of Oregon and Thomas Captain appealed the Circuit Court's decision. The Oregon Court of Appeals affirmed the lower court's findings; the Oregon Supreme Court denied review. The State of Oregon then filed a petition and cross-petition for certiorari and Thomas Captain filed a cross-petition for certiorari to the United States Supreme Court. The Supreme Court granted certiorari on the issue of the Cush-Hook Nation's aboriginal title, as well as on the State of Oregon's authority to exercise criminal jurisdiction in Kelley Point Park, regardless of the Cush-Hook Nation's alleged aboriginal right to the land.

II. STATEMENT OF FACTS

The Cush-Hook Nation, a non-federally recognized tribe of Native Americans, currently resides near the Oregon coast. Until the 1850s, however, the tribe resided in land now designated as Kelly Point Park. While residing there, the tribe negotiated a treaty with the superintendent of the Oregon Department of Indian Affairs. Under the terms of this treaty, the tribe was to receive compensation in return for moving away from their land. In anticipation of this compensation and to avoid encroaching settlers, the tribe chose to relocate to their current location. Unfortunately, the negotiated treaty was not ratified by the U.S. Senate and the tribe never received the expected compensation. Nevertheless, the tribe remained in their new location; no evidence in the record suggests they maintained ties with their old residence in any way.

In 1850, Congress passed the Oregon Donation Land Act, which allowed settlers who met certain qualifications to receive titles to land previously owned by Native American

tribes in Oregon. Under this Act, the Meeks received the title to the land, although the record suggests that they did not meet the qualifications outlined in the Act. The land remained with the Meeks family until their descendants transferred the land to the state of Oregon, which created the Kelly Point Park.

In 2011, Thomas Captain, Respondent here, began living in a tent in Kelly Point Park. Captain is a member of the Cush-Hook Nation and had resided in the current tribal area prior to relocating to Kelly Point Park. Captain observed that certain carvings, which were of sacred and historical significance to his tribe, were being vandalized. To protect these symbols, Captain cut down a tree and attempted to remove the symbol to the current tribal area.

However, park police stopped and arrested Captain before he could exit the park. He was charged with trespassing, with cutting down a tree on a state park without a permit, and will removing an archeologically significant artifact without a permit in violation of Oregon criminal law.

STANDARD OF REVIEW

There are both questions of fact and of law relating to the issue of aboriginal title in this case. Whether occupancy sufficient to establish aboriginal possession of land exists is a question of fact. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). For questions of fact, a "clearly erroneous" standard of review applies. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Under this standard, a finding is "clearly erroneous, when "although there [may be] evidence to support it, the reviewing court…is left with the definite and firm conviction that a mistake has been committed." *Id.* at 394.

However, the State challenges the lower courts' legal conclusions that aboriginal title has not been extinguished. Additionally, the State defends its authority, under Public Law 280, to exercise jurisdiction over the land at issue. Review of such legal conclusions and inferences derived from factual findings is *de novo*. *Alabama-Coushatta Tribe of Tex. v. United States*, 3-83, 2000 WL at *6 1013532 (Fed. Cl. June 19, 2000). Review of courts' interpretation of statutes is also *de novo*. *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996), and the Court thus need not defer to the lower courts' interpretation of congressional statutes applicable to the present case.

SUMMARY OF ARGUMENT

The Cush-Hook Nation does not have aboriginal title to the land in Kelley Point Park, and Thomas Captain cannot raise aboriginal title as a valid defense in the trespass action the State has brought against him.

The question before the Court is not whether the Cush-Hook Nation ever had aboriginal title to the land in Kelley Point Park, but rather whether that title has been extinguished. Though the Respondent argues and the courts below find otherwise, the Cush-Hook Nation's aboriginal title to the land in question has long been extinguished.

The State of Oregon first argues that the tribe voluntarily relinquished aboriginal title to the land in Kelley Point Park when its members chose to relocate to the Oregon coast range region in 1850. Thus, the finding below – that the Cush-Hook Nation still has aboriginal title to the land in question – is incorrect, and Congress did not err in describing the disputed land as public in the Oregon Donation Land Act of 1850. In the alternative, the State contends that, even if the tribe had not relinquished aboriginal title through voluntary

relocation, Congress acted within its authority to rescind aboriginal title through the Oregon Donation Land Act, and congressional intent to extinguish title was apparent from both the language of the Act itself and the surrounding circumstances.

Further, the State of Oregon has clear jurisdiction to punish the Respondent for his violation of state law. Thus, no jurisdictional issues prevent the State from enforcing its laws to protect the archeological artifacts within Kelly Point Park.

First, the State owns the land in which the crime and arrest took place. This provides clear jurisdiction for the State of Oregon and should cause the Court to rule for the Petitioner. Moreover, even in the absence of land ownership, the State retains jurisdiction. Because Public Law 280 fully authorizes state criminal jurisdiction, the State of Oregon has jurisdiction even over Indian Country. The Respondent alleges that the State would need regulatory jurisdiction to punish him; however, this argument is based on a fundamental misunderstanding of the criminal/regulatory distinction. Once the proper view of this distinction is adopted, it is clear that the law in question is a criminal law, and thus jurisdiction is proper.

ARGUMENT

I. THE COURTS BELOW ERRED IN FINDING THAT THE CUSH-HOOK NATION CONTINUES TO HAVE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK.

The Supreme Court, in the seminal case of *Johnson v. McIntosh*, 21 U.S. 543 (1823), first articulated the principle of aboriginal title, a legal doctrine derived from the theory that the United States government's "absolute ultimate title [to American soil] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring." *Id.* at 592. This principle

recognizes that, though Indians have valid and protectable land occupancy interests, the United States government's title is supreme.

The State of Oregon does not dispute that the Cush-Hook Nation once had aboriginal title to the land at issue, but rather challenges the finding that the tribe *continues* to have aboriginal title. The record indicates that the Cush-Hook Indians, by exercising their own autonomy, voluntarily relinquished title. Further, the State challenges the finding that, even if the tribe had not already abandoned its title, the United States government, though vested with plenary authority over its own lands, did not properly extinguish aboriginal title through congressional act.

A. The Cush-Hook Indians relinquished aboriginal title by voluntarily abandoning the land in Kelley Point Park.

The Respondent cannot properly raise a defense of aboriginal title against the State's trespass claim; as the record indicates, the Cush-Hook Indians voluntarily left the land they had occupied since time immemorial in order to settle elsewhere and thus effectively relinquished their aboriginal title to the land in question.

Aboriginal title[1] is differentiated from "recognized" or "reserved" title in that aboriginal title does not refer to land that Congress granted to Indian tribes, indicating a right to permanently occupy and use certain land. *Cayuga Indian Nation of N.Y. v. Cuomo*, 758 F. Supp. 107, 110 (N.D.N.Y. 1991). Rather, Indians have "an equitable possessory interest, not a property interest, in their aboriginal lands." *Alabama-Coushatta Tribe of Tex. v. United States*, 3-83, 2000 WL at *11 1013532 (Fed. Cl. June 19, 2000) (citations omitted).

[1] Though aboriginal title may refer to either tribal or individual title, individuals establish aboriginal title "in much the same manner that a tribe does." *United States v. Dann*, 873 F.2d 1189, 1196 (9th Cir.). The State's argument against individual aboriginal title thus would proceed no differently than it would against tribal title, and we need not distinguish between the two.

Aboriginal title is a type of permissive Indian land occupancy dependent upon actual, continuous, and exclusive possession of land. *Cayuga Indian Nation*, 785 F. Supp. at 110. Accordingly, although fee simple interest in land may not be lost by abandonment, *Cristofani v. Bd. of Educ. of Prince George's Cnty.*, 632 A.2d 447, 450 (1993) (abandonment of real property does not result in loss of property right), a tribe's aboriginal title to a parcel of land may be vitiated by abandonment, as the actual and continuous possession conditions would not be met. *Cayuga Indian Nation*, 785 F. Supp. at 110.

The State does not dispute that the Cush-Hook Indians occupied, used, and owned the land in question before the arrival of Euro-Americans to the region, but that they relocated westward to the Oregon coast range of mountains in 1850 and have remained there since is also undisputed. R at 1-2. This relocation is sufficient indication of voluntary abandonment. No evidence on the record indicates any further contact with or activity in the land at issue. Indeed, based on the facts on the record, a finding of actual, continuous, and exclusive land possession is unsubstantiated and could not support a conclusion that the Cush-Hook Nation still maintains aboriginal title in the land now comprising Kelley Point Park. In the absence of evidence indicating continued use and occupancy "in accordance with the ways of life, habits, customs and usages" of the tribe, *Sac & Fox Tribe of Indians v. United States*, 383 F.2d 991, 998 (Ct. Cl 1967), *cert. denied*, 389 U.S. 900 (1967), or even "intermittent contacts" with the area, such as through hunting or gathering food on the land, *United States v. Seminole Indians of the State of Fla.*, 180 Ct. Cl. 375, 385 (1967), a finding of continued aboriginal title lacks factual support and is clearly erroneous. The State does not call for the reviewing court to improperly usurp the fact-finder's role in weighing evidence before it. *See Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012). Rather, the State merely

points to the facts on the record that, as a whole, are insufficient to support the Respondent's position.

The case at bar is also distinguishable from *Turtle Mountain Band of Chippewa Indians v. United States* 490 F.2d 935, 947-48 (Ct. Cl. 1974), in which the court rejected the government's argument that the tribe's voluntary abandonment of its homeland constituted a relinquishment of aboriginal title. There, the government sought to introduce additional evidence on appeal that was not already on the record. *Id.* at 948. Here, to support its contention, the State points to specific evidence already before the court. There, reliable and sufficient evidence on the record bolstered the Chippewa Indians' position that they were still attempting to use and maintained a presence on the land in their accustomed manner. *Id.* at 947-48. Here, as discussed above, there is no indication of such continued use. Indeed, the *Turtle Mountain* court indicates that, had there been permissible evidence to support a finding of voluntary abandonment, as there is here, the government would have had a credible claim that aboriginal title had been relinquished voluntarily. *See id.* A court, following the *Turtle Mountain* court's line of reasoning, cannot avoid the conclusion that the Cush-Hook Nation has long abandoned any claim for aboriginal occupancy rights.

Moreover, the Cush-Hook Indians' abandonment of the land was voluntary. This is significant because "[t]he law is well-established that 'forcible removal of an Indian tribe from its aboriginal homeland either by government action or by private parties does not constitute voluntary abandonment unless the forcible removal was undertaken pursuant to clear and specific congressional authorization demonstrably intended to extinguish aboriginal title.'" *Alabama-Coushatta Tribe of Tex. v. United States*, 3-83, 2000 WL at *52 1013532 (Fed. Cl. June 19, 2000) (citations omitted). In other words, in the absence of congressional

act extinguishing title, only the tribe's own voluntary abandonment constitutes valid rescission. Persuasive policy reasons support a requirement of such a finding: the doctrine of aboriginal title derives from case law recognizing Indian sovereignty, albeit sovereignty subject to limitation by the United States government. *See Johnson v. McIntosh*, 21 U.S. 543, 592 (1823). Thus, ensuring that tribes are not wrongly divested of their property interests – even federally unrecognized interests – is in keeping with this broader principle.

The Cush-Hook Nation's negotiated but un-ratified treaty with Anson Dart has no probative value in disproving the voluntary nature of the tribe's departure from their aboriginal lands. Negotiated but un-ratified treaties that are to become effective only when ratified are not binding. *Blackfeet et al. Nations v. United States*, 81 Ct. Cl. 101, 129 (1935). That the Cush-Hook Indians may have left the disputed lands in anticipation of ratification of the treaty, or even that they left to escape encroaching Americans, gives no indication that their relocation was involuntary. Where no evidence indicates forced departure, it would not be appropriate to make such a finding. Furthermore, though the treaty was not ratified by Congress, to claim that the Cush-Hook Indians were unlawfully forced from their aboriginal land through the actions of third parties is unsubstantiated by the record, which instead points to a tribe exercising its own sovereignty by choosing to relocate.

That the Cush-Hook Nation vacated the land at issue and relocated elsewhere is undisputed. Thus, based on the record before it, the lower courts' finding that the Cush-Hook Nation's occupancy of the Kelley Point Park land was actual, continuous, and exclusive was clearly erroneous; the record does not allow for the conclusion that the Cush-Hook Indians have maintained aboriginal title to the land. Indeed, the record instead indicates that the Cush-Hook Nation chose to relocate and voluntarily relinquish aboriginal title. R at 2.

Additionally, Congress did not err in describing the land in question as public land in the Oregon Donation Land Act: the land was no longer occupied and thus had become part of the public domain, for "when an Indian tribe … ceases to actually and exclusively occupy and use an area of land, such land becomes the exclusive property of the United States as public lands." *Quapaw Tribe of Indians v. United States*, 120 F. Supp. 283, 286 (Ct. Cl. 1954).

B. Congress has plenary authority to extinguish aboriginal title.

The Supreme Court in *Johnson v. McIntosh* wrote that the "exclusive right of the United States to extinguish [Indian] title, and to grant the soil, has never…been doubted." *Id.* 21 U.S. 543, 543 (1823). Thus, even if aboriginal title had not been relinquished through the Cush-Hook Nation's voluntary relocation, the U.S. government – or, more specifically, Congress's – plenary authority over Indian affairs allowed for extinguishment of aboriginal title through congressional action. *See United States v. Kagama*, 188 U.S. 375, 384 (1886). Whether title is extinguished "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." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (citation omitted). Furthermore, since aboriginal title is not a property right, it is not afforded constitutional protection, and Congress has the authority to terminate it at will in the manner it sees fit. *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1030 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

There is no question about whether Congress had the *authority* to extinguish aboriginal title to the disputed land through the Oregon Donation Land Act of 1850, and we need not linger long on this point. The propriety or morality of extinguishing Indian title to

aboriginal lands is not for the judiciary to assess, nor is it the courts' place to remedy possible injustices suffered by Indians: "[the Court's] task here is a narrow one. [It] cannot remake history." *In re Wilson*, 634 P.2d 363, 372 (Cal. 1981) (citation omitted). Instead, the key legal issue, if the Cush-Hook Nation did not voluntarily abandon aboriginal title, is whether the Oregon Donation Land Act extinguished aboriginal title. The State of Oregon contends that it did.

C. Congress's "clear and unambiguous" intent to extinguish the Cush-Hook Nation's aboriginal title through the Oregon Donation Land Act of 1850 divested the Nation of aboriginal occupancy rights.

Even if voluntary abandonment had not already extinguished the Cush-Hook Nation's aboriginal title, the United States' grant of fee simple title to the two settlers under the auspices of the Oregon Donation Land Act of 1850 – and indeed, the Oregon Donation Land Act itself – served to extinguish the Nation's aboriginal title to the disputed land. Congress thus did not err in describing all the lands in the Oregon Territory as being part of the public lands of the United States; rather this description was itself a means of extinguishing title. Since interpretation of congressional intent is subject to *de novo* review, the Court need not defer to the lower courts' interpretations. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996).

Though intent to extinguish aboriginal title does not need to be express, there must still be evidence demonstrating "plain and unambiguous" intent to extinguish exclusive aboriginal rights. *State v. Elliott*, 616 A.2d 210, 213 (Vt. 1992). Plain and unambiguous intent may be evident on the face of a written instrument or act extinguishing Indian title or may be elucidated from surrounding circumstances. *See Delaware Nation v. Pennsylvania*, 446 F.3d 410, 417 (3d Cir. 2006); *United States v. Arrendondo*, 31 U.S. 691, 705 (1832).

Both the language within the 1850 Act itself and the surrounding circumstances point to Congress's "plain and unambiguous" intent to extinguish the Cush-Hook Nation's title.

In interpreting land grants, congressional intent is to have "prominent consideration," and grant-language should be strictly construed. *See Delaware Nation,* 446 F.3d at 418. As the court in *Beecher v. Wetherby* 95 U.S. 517 (1877) noted, "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Id.* at 520 (internal quotations omitted). Congress's designation of the land in question as "public" thus indicated its intent to open up the land for settlement. Additionally, the Act granted land patents "to every white settler or occupant of the public lands, American half-breed Indians included," who "reside[d] upon and cultivate[d] the [land] for four consecutive years" and notified the surveyor general of the precise land claimed. 9 Stat. 496-500; *Brazee v. Schofield,* 124 U.S. 495, 501 (1888). Absent indication of congressional intent to reserve aboriginal title lands from settlement or to grant title to *full-blooded* American Indians, it would be improper to interpret the Act as not exhibiting "clear and unambiguous" intent to divest title. Furthermore, Congress did not condition settlers' obtaining property rights on extinguishment of aboriginal title, which implies that it treated title as already extinguished.

The issue of aboriginal title is a matter for legal – nor moral – judgment. This Court has cautioned in the past that "the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians," especially where the clear wording of an enactment indicates congressional intent. *United States v. State of Minnesota,* 466 F. Supp. 1382, 1384-85 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota,* 614 F.2d 1161 (8th Cir. 1980). The State

contends that the Court should continue to follow this principle: legal judgment points to upholding facially clear, unambiguous statutory language.

If the wording of statute is clear and unambiguous as to congressional intent, a court need not look beyond the text of the statute. *Guam ex. Rel. Guam Econ. Dev. Auth. v. United States,* 179 F.3d 630, 633 (9th Cir. 1999). Nevertheless, the State's position is also supported by the factual context of the Act, which bolsters the theory of congressional intent to extinguish the Cush-Hook Nation's title.

The Oregon Donation Land Act was passed in order to make the Oregon Territory available for settlement, as the record unambiguously indicates. R at 2. Though encroachment into Indian lands by non-Indians that results in Indian withdrawal is not alone effective to extinguish aboriginal rights, "making lands available for white settlement … in an appropriate factual context, constitute[s] termination of aboriginal ownership." *State v. Elliott,* 616 A.2d 210, 219 (Vt. 1992). *See Gila River Pima-Maricopa Indian Cmty. v. United States,* 494 F.2d 1386, 1391 (Ct. Cl. 1974). The court in *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383 (Ct. Cl. 1975), however, found that the government's opening of lands ceded by Mexico for settlement was not sufficient to indicate congressional intent to extinguish aboriginal title. *Id.* at 1389-90. The court held that acknowledgement that the land "would sooner or later be used and occupied by migrating white settlers" did not support a finding of extinguishment in the absence of sufficient factual basis in the record to support this contention. *Id.* But where there is more than mere "expectation" – such as through "actual settlement and appropriation to the exclusion of other competing claims" – a finding of intent to extinguish might be factually sufficient. *Elliott,* 616 A.2d at 219.

In the present context, as in *State v. Elliott*, there was more than mere expectation of settlement. The Oregon Territory had already been formed when the 1850 Act was passed. R at 1. Settlers had already entered the area, evidenced by the claim that the Cush-Hook Indians had abandoned their aboriginal land to avoid encroachment, and there was clear effort by the government to allow for immediate settlement in the territory, as indicated by Anson Dart's negotiations with the Cush-Hook Nation. R at 1-2.

Numerous courts' decisions bolster this interpretation of the record and of the Act. *E.g., United States v. Ashton*, 170 F. 509 (C.C.W.D. Wash. 1909); *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States*, 87 Ct. Cl. 143 (1938); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946). *See also Brazee v. Schofield*, 124 U.S. 495 (1888). According to the *Ashton* court, the "exclusive feature of the rights of Indians as occupiers of the country within the boundaries of Oregon Territory … was terminated by the act of Congress ... to encourage families to emigrate … and become permanent inhabitants of Oregon." *Ashton*, 170 F. at 513.

Though in a later case, the Supreme Court implied that the policy put in place in Oregon was to extinguish Indian claims only by treaty and that the 1850 statute "put in motion that treaty-making machinery," *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 49 (1946), the Court today should reject this dicta. The weight of legal history and the Act itself lend no support to such a reading. Congressional power over Indian affairs is plenary, and the Supreme Court has found that a treaty is not necessary to extinguish aboriginal title. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941). The 1850 Act contains no term mandating formation of treaties in order to extinguish title to land. *See* 9 Stat. 496-500. Further, tribes, including some in Oregon, similarly divested of

aboriginal title without a treaty which later alleged wrongful taking have been unsuccessful in their claims of continued aboriginal title. *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States,* 87 Ct. Cl. 143, 150 (1938).

Lastly, there is no requirement that "extinguishment spring full blown from a single telling event. Extinguishment may be established by the increasing weight of history." *State v. Elliott,* 616 A.2d 210, 218 (Vt. 1992). *See United States v. Gemmill,* 535 F.2d 1145, 1149 (9th Cir. 1976) (continuous use of land for conservation and recreation after Indian expulsion evidence of extinguishment of title). Even if the 1850 Act itself did not extinguish the Cush-Hook Nation's title to the land, later occurrences, including the approval by the surveyor general[2] of the Meeks' stake to the land and the Senate's refusal to ratify the Cush-Hook treaty in 1853, point to congressional intent to extinguish title. *See* R at 2.

Congressional intent is clear and unambiguous, based both on the language of the 1850 Act and on the surrounding factual circumstances. Though the Respondent argues and the courts below find otherwise, the Cush-Hook Nation's aboriginal title to the land in question has long been extinguished. Thus the Respondent's defense to the State's trespass claim against him is invalid.

D. The sale of the land to Oregon by the Meeks' descendants has no legal bearing on the question of the Cush-Hook Nation's aboriginal title.

The legality of the Meeks' land transfer to the State of Oregon does not bear on the issue of the extinguishment of the Cush-Hook Nation's aboriginal title. As established above, the Cush-Hook Nation's title to the land had already been relinquished or extinguished prior to the sale. Thus whether the subsequent sale was void is not probative in this case.

[2] Since the office of surveyor general of the Oregon Territory was created by Congress, the surveyor general's actions were in effect Congress's actions. *See Brazee v. Schofield, 124 U.S. 495, 497 (1888).*

II. THE STATE OF OREGON HAS SUFFICENT JURISDICTION TO FINE RESPONDENT FOR TAKING AN ARCHEOLOGICALLY SIGNIFICANT ARTIFACT

As discussed above, the land in question does not belong to the Cush-Hook Nation. Rather, it belongs to the State of Oregon. Given this ownership, the State's authority to punish those who remove archeological artifacts from the land is clear and well-supported by a long line of precedent. But even if the land at issue were owned by some individual Native American, a collection of Native Americans, or a tribe, Oregon would still have criminal jurisdiction over those violating the State's laws within the state.

Oregon law states that "[a] person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit." Or. Rev. Stat. Ann. § 358.920 (West). Since Oregon law defines an "archaeological object" as "an object that: (A) Is at least 75 years old; (B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and (C) Is material remains of past human life or activity that are of archaeological significance," (Or. Rev. Stat. Ann. § 358.905 (West)) and the trial court found that the carving on the tree the Respondent cut down is of archeological significance, the plain terms of Oregon law have been violated.

This law is, by its terms, generally applicable. Specifically, the law applies to both public and private land. Thus, even if the State does not own the land – that is, the land belonged instead to a private group – the statute's applicability would remain unaltered. The Respondent must argue that this generally applicable law is somehow inapplicable to the present case: he must argue for an exception.

A. The State of Oregon owns the disputed land.

Since the land is state-owned, it cannot be properly characterized as falling within Indian Country despite having once been inhabited by Native Americans. By the terms of the statute defining Indian Country, this term only applies when "Indian titles to [the land] have not been extinguished."18 U.S.C.A. § 1151 (West). Moreover, case law strongly supports the notion that Indian Country can be diminished – and thus that state jurisdiction can be correspondingly increased. *Yellowbear v. State*, 174 P.3d 1270, 1273 (Wyo. 2008). *See, e.g.*, *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 353 (1961). Such expansion of state jurisdiction takes place because the only limits on state jurisdiction are the areas where the federal government has assumed exclusive jurisdiction. 18 U.S.C.A. § 1151 (West). Thus, any contraction of federal jurisdiction is – of necessity – a simultaneous expansion of state jurisdiction.

Federal jurisdiction is indeed contracted, and state jurisdiction expanded, whenever Indian titles to a given plot of land are extinguished. Congress created federal jurisdiction, and thus has the authority to unilaterally reduce the extent of Indian Country through statute *Keeble v. United States*, 412 U.S. 205, 211 (1973). Indeed, law authorizing federal jurisdiction itself even contemplates the possibility of further congressional action restraining federal jurisdiction, stating that it applies "[e]xcept as otherwise expressly provided by law" 18 U.S.C. § 1152 (2000). Similarly, Congress can diminish federal jurisdiction through treaty. *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist*, 420 U.S. 425, 463 (1975).

Thus, federal jurisdiction does not include the land in question. As shown above, the land is not under aboriginal title. Therefore, the only alternative is that state jurisdiction

exists and that no jurisdictional issues bar the prosecution of Respondent for his violations of Oregon law.

B. Even if the land is Indian Country, the State retains jurisdiction.

Even if all of the above were incorrect, Oregon still retains sufficient jurisdiction to punish Respondent for his violation of state law. Public Law 280 authorizes the exercise of state criminal jurisdiction in all areas of Oregon not within the Warm Springs reservation: "[T]he criminal laws of [each state listed below] … shall have the same force and effect within such Indian country as they have elsewhere within the State … Oregon[:] All Indian country within the State, except the Warm Springs Reservation." 18 U.S.C.A. § 1162 (West). Thus, since the area in question is not within the Warm Springs Reservation and is in the state of Oregon, Oregon has criminal jurisdiction under Public Law 280.

Respondent's only chance of avoiding this clear conclusion is to attempt to muddle the issue with an irrelevant discussion of regulatory versus criminal jurisdiction. Specifically, Respondent may allege that the statute imposing penalties for removing an archeologically significant artifact is regulatory, rather than criminal. While it is true that states do not generally have jurisdiction under Public Law 280 for non-criminal state regulation, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987), this distinction is not relevant here.

Indeed, the facts of this case provide the Court with an opportunity to clarify the *Cabazon* holding and avoid the confusion that has been engendered in the lower courts. *Cabazon* holds, correctly, "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." *Id.* at 211. This holding is straightforward: a regulation is a regulation. It is not

transmuted into a criminal statute simply because it is enforceable though the criminal justice system.

Some courts, however, have been misled by *Cabazon's* discussion of why the law in question was regulatory rather than criminal. The *Cabazon* opinion notes that California does not prohibit *all* forms of gambling or even all forms of bingo. *Id*. at 210. This observation has led some courts to argue that whenever a law does not flatly prohibit certain conduct but rather allows that conduct in some circumstances and forbids it in others, the law is regulatory rather than criminal.

However, this gloss of *Cabazon* proves too much: under this reading, all laws could, under a large enough frame, be viewed as regulatory rather than criminal. To take an egregious example, consider murder. Certainly, states do not unconditionally ban killings of humans – executions and self-defense actions are legal in many jurisdictions. But the mere fact that killing is sometimes legally permissible certainly does not mean that laws about killing are purely regulatory. Laws prohibiting killing are criminal, and any analysis of the criminal/regulatory distinction that risks overlooking this fact has missed the point. Indeed, adopting such a broad reading of regulation would all but destroy the grant of jurisdiction in Public Law 280 and overturn a long string of cases. *E.g., St. Germaine v. Cir. Ct. for Villas Cnty.*, 938 F.2d 75 (7th Cir.1991) (holding that a prohibition on driving with a suspended license is criminal – not a regulation of driving – despite the fact that laws allow driving in some contexts and not others); *Quechan Tribe v. McMullen*, 984 F.2d 304 (9th Cir.1993) (holding that at prohibition of certain fireworks was criminal, not regulatory, despite the fact that similar fireworks were allowed by the state); *State v. Lasley*, 705 N.W.2d 481 (Iowa

2005) (holding that a prohibition on selling tobacco to minors was criminal rather than regulatory even though similar sales were allowed to adults).

Since the claim that the criminal/regulatory distinction ought to turn on whether the activity in question is *ever* permitted is too broad, the Court must adopt some other way to evaluate that distinction (or abandon it entirely, overruling *Cabazon*). One tempting, but ultimately useless, alternative would be to label any statute as regulatory if it set out conditions on activity as opposed to banning it outright. This would be a tempting definition because it appears to match common usage. For example, one commonly talks about guns as "regulated" because the law places conditions on the use of a gun – that is, in effect, stating that individuals may use guns but only if they follow certain rules. Conversely, one talks about murder being criminal because it is flatly prohibited, not merely prohibited if certain conditions are not met.

On further examination this proposed standard fails, collapsing back into the standard it was designed to replace. After all, just as – with the right framing – almost any action is sometimes permitted by the law, with the right framing, any action can be viewed as conditionally allowed. To return to the killing hypothetical, an advocate can argue that killing is allowed on the condition that the individual kills only when told to do so in the military; thus, prohibitions against killing are not blanket prohibitions of a criminal nature but rather regulations that should fall outside the grant of state jurisdiction under Public Law 280.

The point of the above objections is not to suggest that federal judges would actually be swayed by such arguments. If a party seriously attempted to argue that laws against killing are not criminal, any judge would dismiss those arguments as outlandish. The point, however, is that neither of the definitions of the criminal/regulatory distinction proposed

above would actually help the judge in dismissing such outlandish arguments – the judge would be doing so solely on the well-founded intuition that criminal law must include prohibitions against murder. But if the above definitions are of no help in the easy cases, they clearly will not be of any help in the harder cases either, when help is needed. The result will be that trial and circuit judges apply their own intuitive sense to define the criminal/regulatory distinction; thus, the definition will vary from judge to judge and the goal of uniformity will be thwarted.

The Court should therefore adopt a single and universally applicable standard to determine whether a given law is criminal or regulatory. Fortunately, the 7th Circuit, in an opinion applying *Cabazon*, has articulated just such a definition. Specifically, the Court should hold that the correct way to determine whether a statute is criminal or regulatory is through a balancing test of state public policy interests against federal interests in tribal self-government and tribal self-sufficiency. *St. Germaine v. Cir. Ct. for Villas Cnty.*, 938 F.2d 75, 77 (7th Cir. 1991). At first this may appear to be an odd distinction – why should the regulatory/criminal distinction turn on weighing the interests of the state and the federal government? But at a deeper level, this policy would get to the heart of the distinction between a criminal law and regulation: the level of control exerted over the lives of individuals. Congress passed Public Law 280, granting some states criminal jurisdiction over Indian Country; Congress intends for tribes to govern their own affairs. The only way the tension between these two imperatives can be resolved is if "criminal" jurisdiction applies to the big-picture rules for organizing society while "regulatory" refers to the details.

And (as counter-intuitive as the *St. Germaine* definition at first appears) this definition of the criminal/regulatory divide matches common usage quite well. When there

are criminal laws about a subject, certain patterns of behavior are prohibited; when an area is regulated, patterns of behavior are so limited as to limit autonomy. Thus, it is exactly the sorts of rule that would seriously impair tribal self-government – that is, the tribe's ability to weigh costs and benefits and strike an appropriate balance – that would fit the common usage of regulation.

The *St. Germaine* definition also has the advantage that, unlike the unworkable definitions discussed above, it would provide guidance to trial courts and thus predictability to litigants. The test is a balancing test and could not be applied totally mechanically, so results would not be perfectly predictable. Nevertheless, they would be far more predictable than under the current system where each judge is left to interpret the criminal/regulatory distinction without guidance from the Court.

Moreover, this is an area where predictability is of particular importance. Defendants deserve to know when they are violating criminal laws – under the current system they have no way, short of trial, to determine or predict if a given statute is unenforceable. This is pernicious not only for those defendants who may be punished for conduct they honestly believed to be legal but also for those defendants who refrained from legal conduct because they were unsure of its legality. Indeed, this second problem risks significantly curtailing tribal self-government: if individuals comply with unenforceable state laws due to uncertainty, the tribe does not have a meaningful ability to govern those areas of life. Further, this uncertainty might have an effect on the tribe as well. Since the goal of preserving exclusive tribal regulatory authority is to promote tribal self-government, the Court should avoid constructions that might cause a tribe not to regulate an area of life because the tribe erroneously believed that area to fall under state criminal jurisdiction. This issue could even,

in extreme cases, lead to a dangerous lack of regulation when a tribe fails to regulate some area because it incorrectly believes that area to be governed by state criminal law.

To avoid this uncertainty, the Court should adopt the *St. Germaine* reading of the criminal/regulatory distinction and hold that drawing the line between criminal law on the one hand and regulation on the other turns on balancing the state public policy interests against the federal interests in tribal self-government and tribal self-sufficiency.

C. Under the correct view of the criminal/regulatory distinction, the Oregon law is criminal, and thus applies even in Indian Country

In applying the above definition, the court must balance the federal interest in tribal-self-sufficiency and tribal self-government against the state interest in attaining public policy goals. Fortunately, this is not difficult in this case, since the State's interest is extremely high, while the federal interest is low.

First, there can be no serious contention that the prohibition on removing archeologically significant objects threatens tribal self-sufficiency. The tribe could, at least hypothetically, earn some revenue from the display of certain artifacts in a museum or from their sale, but not nearly as much as the revenue from bingo halls. *C.f. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987). More relevantly, no evidence here suggests that these artifacts have particularly high market value. The fact that vandals have cut the images off the trees to sell, R at 2, does suggest that the images have non-zero value; however, given that there was very little cost to acquiring these images, this is not sufficient evidence of high market value – certainly not high enough market value so as to contribute to the self-sufficiency of the tribe. Moreover, the *tribe* is not the Respondent before the Court. If the Respondent prevails and the law is held to be unenforceable, then the tribe will not

benefit financially in any way. Thus, the enforcement of the law is not any risk to tribal self-sufficiency.

Thus, the only chance for the Respondent is to support his argument with the alleged damage this law would do to tribal self-government. Here Respondent's argument has at least superficial plausibility: the law forbids a Native American individual from removing a Native American artifact from Native American land, which gives the strong appearance of interfering with tribal self-government. Tribal self-government, after all, includes a right to pass those laws that impact only tribe members. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("Their right of internal self-government includes the right to prescribe laws applicable to tribe members").

But this view is far too factional: it supposes that Native American artifacts are only of legitimate interest to Native Americans and are thus suitable for local regulation. However, in the modern world, people of all races and creeds can be and in many cases are deeply interested in America's pre-European history. One group of people does not own that history simply because they are decedents of the peoples who produced it. As Native American history, it is also American history, and ought to be of interest to all Americans. Thus, this is not an area that falls squarely within the domain of tribal self-government.

Moreover, unlike some regulations, this criminal prohibition poses no genuine threat to tribal self-government. Consider, by way of contrast, a set of state farming regulations. Those rules, if allowed, would significantly curtail and control the actions of many individuals; they would raise the legitimate question as to what the tribal government is for if it cannot even set the rules about such a prominent enterprise. In contrast, the prohibitions on removing an artifact are relatively minor. They do not raise any serious doubts about the

general primacy of tribal regulation within the reservation. Both elements of the federal interest are thus quite low.

Conversely, the State's interest in preventing the improper taking of an archeological artifact is quite high. As noted above, the State of Oregon has an important interest in preserving the common American historical legacy of such artifacts – even, and perhaps especially, when those artifacts are Native American in nature. Equally importantly, the State has a strong interest in protecting the property rights of landowners. Many artifacts may be unknown to landowners and could potentially be removed without the owners' permission. Thieves could be prosecuted, of course, but if they could claim to have legally obtained the artifact from some other location, landowners would be in the awkward position of needing to prove ownership of an artifact they did not know they owned. One way to avoid this evidentiary issue is to impose criminal penalties for anyone who has removed an artifact without a permit; this is the solution that the State of Oregon chose, and the Court should respect it.

Thus, the result of the balancing test is clear: there is only minimal federal interest involved while there is a substantial state interest involved. Therefore, under the *St. Germaine* balancing test interpretation of the *Cabazon* criminal/regulatory distinction, the statute in question is purely criminal in nature and falls within the grant of state jurisdiction of Public Law 280.

The State of Oregon has multiple independently sufficient grounds for jurisdiction. It has jurisdiction because the land is ordinary land within the state and is not within Indian Country; thus, there is no jurisdictional impediment. In the alternative, the State still has jurisdiction even if the land is Indian Country because the state law is criminal (not

regulatory) in nature, and Public Law 280 authorizes state jurisdiction over Indian Country within Oregon.

CONCLUSION

Based on the foregoing contentions, Petitioner respectfully requests that the Court reverse the Oregon courts' finding that the Cush-Hook Nation has continued aboriginal title to the land in Kelley Point Park so that Respondent can be properly charged with his crime of trespass. The Court should, however, uphold the lower courts' ruling that the State of Oregon has proper criminal jurisdiction over the Respondent for violating the State's laws.