

No. 11-0274

In The Supreme Court of the United States

State of Oregon, Petitioner

v.

Thomas Captain, Respondent and Cross-Petitioner

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT AND CROSS PETITIONER

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QUESTIONS PRESENTED

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

II. Whether Oregon has Criminal Jurisdiction to control the use 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

I. Statement of the Proceedings

This is an appeal from a criminal conviction in an Oregon state court for violation of Oregon state law. Defendant alleges that the State of Oregon does not have criminal jurisdiction over defendant. Based on his status as a citizen of the Cush-Hook nation, and the nations aboriginal title, defendant alleges that his conviction should be reversed. After a trial on the merits with extensive findings of fact, defendant was convicted for violating Oregon law. Defendant seeks a writ of certiorari, to reverse the state conviction based on original Indian title of the Cush-Hook nation.

II. Statement of the Facts

In April 1806, William Clark of the Lewis and Clark expedition encountered the Cush- Hook Indians and recorded his interaction in the journals of Lewis and Clark. William Clark was an agent of Thomas Jefferson, Pres. Of the United States of America. William Clark was commissioned by the executive branch to Thomas Jefferson to explore the area then known as the Louisiana Purchase. The President provided Clark with presidential metals, also known as sovereignty tokens to be conveyed to Indians encountered on Lewis and Clark's expedition. The sovereignty tokens represented government to government transactions between the United States and Indian tribes encountered by William Clark acting as an agent for the United States. The Cush-Hook Indians received sovereignty tokens from William Clark.

In 1850 the nation signed a treaty with Anson Dart the superintendent of Indian affairs for the Oregon territory. Dart was an agent of the United States empowered to

negotiate with Indian nations. In 1850 at the request of Dart, the nation relocated to the foothills of Oregon from the coastal range. In 1853 the United States Senate refused to ratify a treaty with the Cush-Hook nation. Thus, the nation never received compensation for the area around modern day Kelley Point Park. Kelley Point Park is a Oregon state park located within the original homelands of the Cush-Hook nation. The park was originally patented from the United States to American settlers under the terms of the order Oregon Donation Land Act of 1850. The Act required “every white settler” to reside upon and cultivate the land for 4 consecutive years. The settlers did not meet the terms of the Act; nevertheless, the settlers received fee title from the United States and the settlers sold the land to Oregon which created Kelley Point Park.

In 2011 Thomas Captain a Cush-Hook citizen moved from the coastal mountain range back to the original homelands of the Cush-Hook nation. He occupied the park and reasserted the nation’s ownership of the land. In 1806, William Clark’s journals noted a unique religious practice of the Cush-Hook nation, finding that medicine men carved sacred religious symbols into living trees. Modern-day vandals have defaced these religious symbols. Thomas Captain occupied the park in order to protect these religious symbols. Thomas cut down a tree that contained the Cush-Hook religious symbols and took the symbols back to the nation’s present day reservation. State troopers arrested him for violation of Oregon state law protecting archaeological and historical sites.

In the court’s findings of fact, expert witnesses in history, sociology, and anthropology established that the Cook of nations occupied used and owned the lands in question before the arrival of euro Americans. Expert testimony also established that Dart, as Superintendent of Indian affairs signed a treaty with the Cush-Hook nation in which the

nation agreed to sell its lands and relocate to the Oregon coastal mountain range. The treaty was never ratified by the United States Senate nor did the Cush-Hook nation receive compensation for its coastal lands. The Cush-Hook nation is not on the list of federally recognized tribes compiled pursuant to the 1994 Tribal list act.

ARGUMENT

The Supreme Court has previously stated that Indians have an original right of occupancy that can only be extinguished by the United States and this original statement of law developed into what is now commonly known as aboriginal title. See, *Johnson v. McIntosh*, 21 U.S. 543, 585. In *McIntosh*, it was held that the Indian right of occupancy can only be extinguished through “purchase or by conquest.” *Id.* at 587. ‘Purchase’ clearly means the consent of the seller Indian tribe; ‘conquest’ means the destruction and defeat of the Indian tribe, which generally means a ratification of the ‘conquest’ by a treaty. Following the ratification of the Constitution in 1787, only the federal government maintains the ability to extinguish aboriginal title. Aboriginal title need not be based on any formal government action such as a treaty or statute. *United States v. Santa Fe P. R. Co.*, 314 U.S. 349, 347. This exclusive right of the federal government was codified in one of the first Acts of Congress, the Indian Non-Intercourse Act of 1790, which is currently codified at 27 U.S.C. § 177. The principle of § 177 is a continuation of the Northwest Ordinances passed in 1787 in which Congress set the terms for the non-Indian settlement of aboriginal territory and instructed:

“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.” *The Northwest Ordinance*, 1 Stat. 50 (1787)

This eighteenth century principle was recognized as a foundational principle of the United States in the Northwest Ordinance, later confirmed in *McIntosh* and then carried forward in the twentieth century in *Santa Fe Pacific*. This principle has continuing vitality and applies to the Cush-Hook claim.

The original right of occupancy of the Cush-Hook nation was recognized by the sovereignty medal conveyed by an agent of the United States, William Clark in 1806, consistent with the terms of the Northwest Ordinance and § 177. The sovereignty token, represented recognition that the Cush-Hook nation occupied the coastal region of Oregon since “time immemorial.” *Santa Fe Pacific* 314 U.S. at 360. This recognition in 1806 was confirmed by expert historical, anthropological and sociological testimony in 2011. The original Indian occupancy of the Cush-Hook nation was also confirmed by a treaty negotiated by an agent of the United States, Anson Dart, in 1850 even though the treaty was not ratified by the United States Senate. Aboriginal title is confirmed by historical evidence of original occupancy. Following the principles set forth in *McIntosh*, occupancy is the basis of aboriginal title and proof of occupancy is dependent upon history. The basic principles of the Marshall court on aboriginal title and the right of the United States to extinguish aboriginal title continue in effect in the 20th century.

Presently aboriginal title can be only be extinguished through a purchase of the land or an exercise of dominion over the land by the federal government. *Santa Fe*.314 U.S. at 347. Any action that would constitute extinguishment cannot be “lightly implied.” *Id.* at 354. Furthermore in order to extinguish aboriginal title the extinguishing action must be “plain and unambiguous.” See, *County of Oneida v. Oneida Indian Nation* 470 U.S. 226, 248, *Greene v. Rhode Island* 398 F.3d 45, 53 (1st Cir. 2005). Here, there is no explicit statement

made by the federal government extinguishing aboriginal title through a purchase or taking. The 1850 treaty cannot be considered to be a purchase because the treaty was never ratified.

Indian property rights are not diminished by the passage of time, rights that are guaranteed in the past continue into the present unless they have been clearly extinguished. The lack of the ratification of the treaty cannot be viewed as an extinguishment of aboriginal title. Congress refused to ratify the treaty; nevertheless, their specific intent in not ratifying the treaty is unclear. It is as logically likely that Congress meant to negotiate a better price for the purchase of Cushman Hook land, as it is logically likely that Congress's non ratification means Congress did not recognize the Cushman Hook as a federal Indian Tribe; in other words, a positive inference (Congress wanted to pay more or Congress did not want to recognize the Cushman Hook) from a negative act does not determine Congressional intent. Congress speaks through legislation. Here, Congress did not take the legislative Act of ratification. Therefore, the property relations of the Cushman-Hook Indians were not altered through a "plain and unambiguous" congressional statement. Even though Congress possesses ultimate authority over aboriginal title, Congress's lack of ratification of the treaty in 1853 is an exercise of congressional authority to not extinguish the aboriginal title recognized by historical occupancy and confirmed by the sovereignty token of 1806.

The Oregon Donation land Act does not constitute a taking of the land because it contains no clear statement extinguishing aboriginal title. In *Greene* settlement act in question explicitly stated that the statute "shall be regarded as an extinguishment" of any aboriginal title to land." 398 F. 3d 45 at 54. Here, the act does not mention the extinguishment of Indian title anywhere in the act. In *Oneida*, the county of Oneida argued that the phrase "last purchases," referring to the last purchase of the Oneida reservation, in the 1789 Treaty and

the phrase “land heretofore ceded” in the 1802 treaty constituted extinguishment of aboriginal title.⁴²⁰ U.S. 226 at 248. Ultimately, the Supreme Court found that these statements concerning purchase and cession of land did not constitute a “plain and unambiguous” extinguishment of aboriginal title. Similarly here, the Oregon Donation Land Act does contain language about the granting of land to incoming settlers, but does not clearly express any intention to extinguish aboriginal title.

Furthermore since original Indian title was never extinguished through the treaty or the Oregon Donation Land Act, the United States never obtained a property interest to convey to the settlers under the act. Property that has been subject to the Indian right of occupancy cannot be transferred except through treaties ratified by Congress. 25 USC § 177. The settlers did not obtain a property interest under the Oregon Donation Land Act of 1850 because the United States had no property interest to convey to the settlers. The settlers’ lack of compliance with the Oregon condition precedent to obtaining fee simple—occupying the land for 4 years—is irrelevant to the issue of whether the United States had any interest to convey the land through the Oregon Donation Land Act of 1850.

Based on original Indian title, and the lack of ratification of the 1853 treaty, the Cush-Hook Indian Nation retained its original aboriginal title. Therefore, the United States did not extinguish the original Indian title to obtain a real property interest that the United States could then convey under the Oregon Land Donation Act of 1850. The settlers therefore never conveyed a property interest to the State of Oregon for the creation of Kelley Point Park. More importantly, the State of Oregon never obtained jurisdiction from the settlers and the authorizing statute under which the settlers obtained title (land donation act of 1850) since the United States had never extinguish the original Indian title. Therefore, any criminal

prosecution of Thomas Captain by the State was done without obtaining criminal jurisdiction by the extinguishment of original Indian title. Public Law 280 is irrelevant to the case since the United States did not have any jurisdiction to convey to the State of Oregon because the United States never explicitly agreed to extinguishment of the aboriginal Indian title of the Cush-Hook Nation.

Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. cannot extend into Kelley Point Park if the Cush-Hook Nation is found to have aboriginal title. Under 18 U.S.C. § 1162, otherwise known as Public Law 280, the United States extended criminal jurisdiction over Indian Country to the listed States; Oregon being one of the States included. The main issue in the present case is that Kelley Point Park cannot be defined as Indian Country when compared to the definition listed in 18 U.S.C. § 1151. In 18 U.S.C. § 1151 Indian Country is defined as “(a) all land within the limits of any *Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) *all Indian allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same” (emphasis added). The United States never extinguished the title to Kelley Point Park of the Cush-Hook Nation by consent, therefore Kelley Point Park remained as original Indian title and did not become Indian Country in the sense of 18 U.S.C. § 1151. The term “Indian country,” as defined in 18 U.S.C. § 1151, includes “all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or

without the limits of a state.” The Court in *United States v. Mound*, 477 F.Supp. 156 (D.S.D.1979) identified four factors to be used when deciding if a community is a dependent Indian community. These four factors can be summarized as follows: 1. Whether the United States has retained title to the lands which it permits the Indians to occupy and whether the United States has authority to enact regulations and protective laws respecting the territory; 2. The nature of the area in question, the relationship of the inhabitants of the area to the Indian tribes and to the federal government, and the established practice of government agencies toward the area; 3. Whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; 4. Whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples. *Id.* at 158–59.

Kelley Point Park clearly does not fall into any of the listed definitions in the statute or any of the four reasons spelled out in *United States v. Mound* 477 F.Supp. 156 (D.S.D.1979). This is mainly because the Cush-Hook Nation remains unrecognized by the federal government and therefore the Park could never be labeled as Indian Country.

The Kelley Point Park could not be considered a dependent Indian community. “Two requirements must be satisfied for Indian lands to be classified as a “dependent Indian community” within meaning of statute defining “Indian country” for purposes of exercising federal criminal jurisdiction: first, the lands must have been set aside by federal government for the use of the Indians as Indian land, which guarantees that the land is actually occupied by an Indian community; and second lands must be under federal superintendence, which ensures that the community is dependent on federal government such that federal government and the Indians, rather than the states, exercise primary jurisdiction.” *United States v. Arrieta*,

C.A.10 (N.M.) 2006, 436 F.3d 1246. It is clear that Kelley Point Park does not fall within either one of these specifications. It is impossible for the Cush-Hook Nation to own the land within the Park and still find Thomas Captain guilty of violating Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. as the State of Oregon would lack criminal jurisdiction because it did not own the land and furthermore could not use Public Law 280 to extend its jurisdiction because the Cush-Hook Nation would still hold aboriginal title and not be considered Indian Country.

CONCLUSION

The Cush-Hook Nation still maintains aboriginal title to land in Kelley Point Park because their aboriginal title was never extinguished by a “plain and unambiguous” action of the federal government. Oregon does not have criminal jurisdiction over Kelley Point Park because the Cush-Hook Nation owns the land pursuant to their aboriginal title.