No. 11-0274

In the Supreme Court of the United States

The State of Oregon, Petitioner,

Vs.

Thomas Captain, Respondent.

On Writ of Certiorari
To the Oregon Court of Appeals

Brief for the Petitioner

Team Number: 22

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QUESTIONS PRESENTED

I. Does a federally unrecognized tribe hold aboriginal title to present day Kelley Point Park notwithstanding its relocation two centuries ago?

II. Was the State of Oregon's exercise of jurisdiction over Kelley Point Park proper?

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STATEMENT OF THE FACTS

The State of Oregon brought criminal charges against Thomas Captain, the Defendant in this action, in the Oregon Circuit Court for the County of Multnomah stemming from his activities in the Kelley Point Park. Captain is a member of the Cush-Hook Tribe of Indians, a non-recognized tribe whose ancestral lands encompassed much of the Kelley Point Park. He relocated to Kelley Point Park to protect culturally sensitive tree carvings from destruction by vandals and to attempt to reassert the Cush-Hooks ownership of this land. Captain eventually resorted to cutting down a tree, removing the cultural image, and returning it to his Tribe's current location. He was arrested and the image was seized.

The cultural and historical connection between the Cush-Hook Nation and the Kelley Park property bears mention in this case. The Cush-Hook occupied this land as part of their ancestral homeland. This Tribe was first discovered by the Lewis and Clark expedition in 1806. Lewis and Clark engaged in the practice of exchanging "sovereignty tokens", medals distributed to Indian tribes to show the intention to engage in political and commercial relations with the United States. The Cush-Hook were provided with sovereirgnty tokes by the expedition as a symbol of future co-operation. Contact with the Tribe was not again had in any official capacity until 1850, when the Tribe signed a treaty with Anson Dart, the Superintendent of Indian Affairs for the Oregon Territory. This treaty specified that the Tribe would relocate 60 miles west to the coast to facilitate the expansion of white settlers into their ancestral range.

Following the completion of the Treaty, the Cush-Hook Tribe relocated to avoid further encroachment by white settlers and farmers. In fact, the U.S. Senate refused to ratify the Cush-Hook Treaty in 1853. This refusal ensured that the Cush-Hook Nation received no compensation for their lands at Kelley Point nor any other rights to that land. Further, subsequent inaction

concerning the Tribe has ensured that they remain a non-recognized Tribe. The State of Oregon created Kelley Point Park when it purchased that land from the descendants of two white settlers, Joe and Elsie Meek, who claimed the modern day Kelley Point Park land. The Meeks received fee simple title to the land under the Oregon Donation Land Act of 1850, although there is dispute as to the legitimacy of the transfer. The Meek's may not have fully complied with the requirements of the Oregon Donation Land Act of 1850.

Although the land is now in under the stewardship of the State of Oregon, the Cush-Hook remain strongly tied to that land which directly leads to the incident involving the defendant.

STATEMENT OF THE PROCEDURE

The present action commenced in the Oregon Circuit Court for the County of Multnomah when the State of Oregon brought criminal charges against the defendant, Thomas Captain, for trespassing on state lands, cutting timber in a state park without the proper permits, desecrating an archaeological and historical site under the Or. Rev. Stat. 358.905-358.961 and for taking historical materials without the proper permits under Or. Rev. Stat. 390.325-340. The defendant agreed to a bench trial. The Circuit Court found that the defendant was guilty of violating the provisions of Or. Rev. Stat. 390.325-340 and Or. Rev. Stat. 358.905-961 but not guilty for trespass or for cutting timber.

Following this decision, the State and the Defendant appealed. The Oregon Court of Appeals affirmed without a issuing written opinion. The Oregon Supreme Court denied certiorari. The State of Oregon filed this petition and cross petition for certiorari to the United States Supreme Court prompting the Defendant to file a cross petition. The Supreme Court certified two questions.

The State of Oregon acted properly when exercising jurisdiction over Thomas Captain in Kelley Point Park. The main thrust of this argument is that Kelley Point Park is not Indian Country and therefore jurisdiction to enforce laws falls exclusively to the State of Oregon. Alternatively, if the land is held to be Indian Country, the State of Oregon still has jurisdiction under Public Law 280 ("PL-280"). In order to support this contention, the rights to the land must first be traced and this analysis revolves around the Cush-Hooks aboriginal title, or lack of, in Kelley Point Park. That issue is discussed in further detail below.

I. The Cush-Hook Tribe does not have aboriginal title to the land in Kelley Point Park.

This Court is presented with a jurisdictional issue regarding the State of Oregon's ability to sue Thomas Captain, a member of the Cush-Hook Indian Tribe, for acts of destruction on recognized State lands. Notwithstanding a complete absence of Congressional recognition of the Tribe, Thomas Captain contends that the Cush-Hook Tribe owns aboriginal title to the land in Kelley Point Park, which exempts him from the laws of the State of Oregon. Even if aboriginal title once existed, any valid assertion of it was extinguished through multiple avenues.

That the Cush-Hook tribe does not hold aboriginal title to current day Kelley Point Park is supported by six main contentions: A complete absence of Congressional recognition; The tribe did not exclusively occupy its lands; The tribe relocated to avoid encroaching Whites; The Senate refused to ratify the Cush-Hook Treaty; the Oregon Donation Land Act of 1850 extinguished any Indian title to the land, and the doctrine of laches bars any claim of aboriginal title. Each of these arguments will be addressed in greater detail below.

A. Congress has not specifically recognized the Cush-Hook Tribe's aboriginal title to the Kelley Point Park lands.

The Cush-Hook tribe has no legal title with which it can bring suit, but rather merely a right of occupancy subject to the will of the United States. In land disputes involving tribes, a tribe may establish a claim against the government only if it is a politically recognized tribe or if the tribe possesses aboriginal title to the land in question. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) ("[There must be a] definite intention of congressional action to accord legal rights").

In the instant action, the Cush-Hook tribe is not nor ever has been recognized by the United States. Specifically, Congress has not officially recognized the tribe's aboriginal title. *See Greene v. Rhode Island*, 398 F.3d 45, 50 (1st Cir. 2005) (citing *Zuni Indian Tribe v. United States* 16 Cl. Ct. 670, 672 (1989)). *See also Sac and Fox Tribe of Indians of Oklahoma v. United States*, 315 F.2d 896, 897 (Ct. Cl. 1963). *Greene* directed that Congressional recognition of aboriginal title could come from federal treaty or statute. *Id.* The main requirement is a clear Congressional intention to accord legal rights, rather than a mere right of possession. *Id.* The Court in *Greene* held that the Wampanoag tribe held no aboriginal title to the land absent Congressional recognition.

In fact, United States Senate refusal to ratify the Cush-Hook treaty suggests an unmistakable repudiation of tribal recognition. This treaty would have recognized the tribal ownership over certain lands in the coastal range of the mountains. That the federal government has taken no steps to "recognize" the Tribe in anyway, though presented with ample opportunity

to do so, suggests this Tribe has neither aboriginal title nor legal claim to the land in Kelley Point Park in this proceeding.

i. The sovereignty tokens Lewis and Clark gave to the Tribe are of no legal significance.

The Cush-Hook Tribe mistakenly relies on the "sovereignty tokens" that Lewis and Clark presented to the Tribe as evidence of their federal recognition. However, these tokens hold no political power; they were merely symbolic gifts, identifying those tribes that would peaceably assimilate into an expanding American society and culture. Despite their symbolic significance and diplomatic implications, these "tokens" are not a proper substitute for federal legislative recognition of the Tribe. *See Sac and Fox Tribe of Indians of Oklahoma v. United States*, 315 F.2d 896, 900 (Ct. Cl. 1963). In that case, the Court held that mere Congressional acknowledgment that a tribe occupied an area is insufficient to accord legal rights. *Id.* Congress did not enact any legislation granting the Sac and Fox permanent occupation rights of the land, but rather only an acknowledgment that they live there. *Id.* The instant case is identical. The sovereignty tokens are merely symbols of federal recognition of the tribe's occupancy. By no means is it a grant of permanent occupancy,.

B. The Cush-Hook Tribe occupied a shared range with other Native American tribes in the area and cannot claim they used that land exclusively.

That the Cush-Hook Tribe communally shared their homeland with other tribes defeats any assertion of aboriginal title. Aboriginal title mandates actual, exclusive, and continuous use or occupancy of the land for an extended period prior to the loss of the property. *Sac and Fox Tribe of Oklahoma v. United States*. 315 F.2d 896, 903 (Ct. Cl 1963). In *Sac and Fox*, in holding the tribe had no aboriginal title to its claimed land, the court observed that the tribe was not the

only occupants of the land in question. *Id.* at 905. Sharing the concerned land with the Sac and Fox were the Potawatomi's and the Iowa's. The case at hand is no different from *Sac and Fox.* Although the Cush-Hooks made the area in Kelley Point Park their permanent home since time immemorial, there exists evidence that the Cush-Hook tribe cohabited the area with other tribes, namely the Multnomah Indians. Because their occupancy of the land was not exclusive, they cannot be said to have possessed aboriginal title.

Given that the Cush-Hook tribe's occupation of present day Kelley Point Park was non-exclusive, this Court should find the tribe never held aboriginal title. Should this Court find the Tribe once held aboriginal title, that title was extinguished over 150 years ago by the tribe's relocation, a contention fully addressed below..

II. Even if the Cush-Hook Tribe once held aboriginal title to present day Kelley Point Park, that title was extinguished.

Assuming the Cush-Hook tribe once held aboriginal title to present day Kelley Point Park, several important triggers over the span of the last two centuries extinguished that title. The Oregon Trail saw waves of White settlers make their homes in Indian territory. Wishing to avoid these encroaching Whites, the tribe relocated to the coastal range 60 miles away from Kelley Point Park. Then in 1850 Congress passed the Oregon Donation Land Act, allowing those settlers to claim fee simple to the lands they inhabited. These factors, discussed in greater detail below, effectively extinguished the Cush-Hook's purported aboriginal title.

A. The Tribe relocated to avoid encroaching white settlers.

The Cush-Hook Tribe's purported aboriginal title to present day Kelley Point Park was extinguished by their freely chosen relocation to the mountains to avoid encroaching white

American settlers. A non-recognized tribe's right of occupancy can be terminated by conquest. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 280 (1955). "Conquest gives a title which the courts of the conqueror cannot deny…As the white population advanced, that of the Indians necessarily receded." *Id.* (quoting *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

The instant case aligns with Justice Marshall's commentary on conquest in *McIntosh*. The Cush-Hook Tribe freely, on its own will, relocated to the coast range to avoid encroaching White Americans. Keeping in spirit with *McIntosh*, these American settlements can most properly be characterized as conquest. The Oregon Donation Land Act brought scores of White settlers; the Cush-Hook Tribe moved to avoid them. The Tribe may argue that, in relocating, they kept their end of the bargain to the Cush-Hook Treaty. However, the facts indicate that immediately subsequent to signing the treaty, the Tribe moved in order to avoid encroaching White Americans. No American armies or other forces ensured of or oversaw the Tribe's relocation. Rather, the Tribe made a conscious choice to avoid the encroaching white American settlers indicating that Treaty was not the driving factor to the move to the coast. Reliance on the Treaty in this case is unjustified.

B. The Senate refused to ratify the Cush-Hook Treaty.

Moreover, the Tribe chose not to wait until Senate ratification of the Cush-Hook Treaty. A treaty holds no power until the Senate ratifies it. U.S. Cons. Art II, cl. 2.; *Robinson v. Salazar*, 2012 WL 3245504 (E.D. Cal.). *Robinson* held the treaty between the complaining tribe and the United States invalid since it was never ratified. *Id.* at 10. "Since Treaty D was never ratified, it cannot provide any basis for plaintiff's claim to land." *Id.*

The instant action is no different from *Robinson*. Until ratified, the Cush-Hook Treaty was nothing more than a proposal to a contract. Had the Tribe remained in its village until learning of the Senate decision, it might have still retained its aboriginal title. However, as the case stands, the Tribe moved to the mountains to avoid encroaching Whites before the Treaty was ratified. This case squarely fits within *Tee-Hit-Ton's* and *McIntosh's* definition of extinguishment of aboriginal title by conquest.

The facts clearly show the Cush-Hook Tribe wholly relocated, not pursuant to treaty, but rather to avoid the numerous Americans coming in from the Oregon Trail. These facts strongly suggest an extinguishment by conquest. Because of the White settlers, the Tribe relocated to the mountains where for the past 150 years they have called it home. Given that the majority of the Tribe has made a new home for almost two centuries, it logically follows that the only piece of property to which they can assert any possessory rights is their current home. The Cush-Hook Tribe cannot claim aboriginal title to a land they vacated almost two centuries ago.

C. The Oregon Donation Land Act of 1850 effectively extinguished the Cush-Hook's aboriginal title.

The unilateral action by Congress in passing the Oregon Donation Land Act of 1850 effectively extinguished any claim to aboriginal title the Cush-Hook Tribe may have once held. Unambiguous Congressional action extinguishes aboriginal title. *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1078 (9th Cir. 2010). "The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955) (citing *United States v. Santa Fe Railroad Company*, 314 U.S. 339, 347 (1941)). In *Lyon* the Court held that because

there was no pre-existing treaty between the Tribe and the federal government, the Congressional action in granting federal land in Arizona to that State extinguished aboriginal title. *Id.* at 1079.

The instant action is similar to *Lyon*. The Senate had not ratified the Cush-Hook Treaty before Congress passed the Oregon Donation Land Act. In fact, the Senate refused to ratify the treaty. This refusal indicates an intent to act consistently with its decision to open the Oregon Territory under the Oregon Donation Land Act. At the time of the Act the tribe had no recognized right of possession. *See Lyon*, 626 F.3d at 1079. Further, the tribe had already relocated to the coastal range. These facts coupled together support the determination that the Cush-Hook Tribe lost its aboriginal title. Ultimately, the Oregon Donation Land Act of 1850 effectively signaled the termination of any aboriginal title rights the Cush-Hook tribe may have once held.

D. The doctrine of laches estoppes the Tribe from asserting an aboriginal title claim.

Even if the tribe once held aboriginal title to the concerned land, that title was effectively extinguished over 150 years ago. During that 150-year time neither the Cush-Hook Tribe nor any of its individual members have asserted any claims or rights to the land or to any objects on it. In *Robinson v. Salazar*, 2012 WL 3245504 (E.D. Cal. 2012), the court observed its prior holding that a tribe that fails to assert a claim of land loses its title after a long passage of time. In that case, the suing tribe asserted aboriginal title trumped an 1851 treaty. The court held the claim invalid, as over a century had passed where the tribe slept on its rights.

The instant action is strikingly similar to *Robinson*. Until this proceeding neither the Cush-Hook Tribe nor its members, have not asserted any title claim adverse to the Oregon Donation

Land Act of 1850. The tribe has slept on its rights for a century and a half. Moreover, the tribe relocated to a new home in 1850.

In another landmark case, *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) this Court ruled that the doctrine of laches estopped the Oneida tribe from claiming aboriginal title to its lands in New York. The Court weighed several factors against the tribal claim for title, including the "longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida's long delay in seeking judicial relief." *Id* at 202. Over 200 years had passed before the tribe brought suit to establish its title to its homelands. *Id.* at 209. Further, the tribe had relocated away from its original homeland to a new place which it had called home for the 200 years leading up to the suit. *Id.* at 206. *See also Felix v. Patrick*, 145 U.S. 317 (1892) (holding that the tribe could not recover its once-held lands because it slept on its rights for too long).

The instant action is not unlike *Oneida* or *Felix*, where the Cush-Hook Tribe has been absent from its original homeland for multiple generations, almost two centuries. Further, the land it is claiming has drastically changed in that 150 years. The land has transformed from shrubbery wilderness habituated by a few Indian tribes into a recreational park used by thousands of people every year, under the stewardship and care of the State of Oregon. The doctrine of laches should preclude the Cush-Hook Tribe and Thomas Captain from asserting aboriginal title given that it entirely relocated several generations ago.

The facts of this case strongly support the claims of the State of Oregon in claiming title to the land in Kelley Point Park. Congress has not officially recognized the Cush-Hook tribe. As

such, the tribe has very limited rights in a land dispute case. The only sort of title the tribe may possess is aboriginal title. However, Congress has not specifically recognized the tribe's possessory rights to that land. Further, the Cush-Hooks were not the exclusive residents of that land; they shared the land with the Multnomah Indians. The tribe may point to the sovereign tokens given to them by Lewis and Clark. However these tokens carry nothing more than symbolic recognition of a tribe's willingness to assimilate into White culture. It is no substitute for Congressional recognition. Further, when the Senate was presented with the opportunity to recognize the Cush-Hook tribe through a treaty, it refused to ratify. This suggests a definitive federal intent to not recognize the tribe.

Any aboriginal title the tribe may have once held was lost when it relocated to the coastal range to avoid the waves of settling White Americans. This settler's conquest, triggered by the Oregon Donation Land Act of 1850, extinguished the tribe's aboriginal title. For almost two centuries the tribe has called the coastal range home. It cannot now claim title to the land that has been in the ownership and care of another for over 150 years. The doctrine of laches helps to serve an equitable result – that the tribe cannot claim aboriginal title after sleeping on its land rights for multiple generations. Even more, Congress, through the Oregon Donation Land Act, quieted any aboriginal title the tribe may have had. The land in present day Kelley Point Park has transformed from a scarcely populated wilderness a couple hundred years ago into a recreation destination for thousands of Portlanders today. Given that consideration, it would be wholly inequitable to find aboriginal title for the Cush-Hook tribe. This court should reverse the ruling of the Oregon Court of Appeals because Ttribe does not possess aboriginal title to the land in Kelley Point Park.

III. The State of Oregon properly exercised criminal jurisdiction over the defendant, Thomas Captain.

The State of Oregon properly exercised its jurisdiction over the defendant Thomas Captain when it brought criminal charges against him. Since it has been shown that the Cush-Hook do not have aboriginal title, this analysis now focuses on who has jurisdiction over Kelley Point Park. Whether or not the State of Oregon has jurisdiction depends in part on whether the parties involved are Indian or non-Indian and whether the crime was located in Indian Country. It is undisputed that the defendant in this case is and Indian. Therefore, the crux of this issue is whether Kelley Point Park is Indian Country. If it is not, then the State of Oregon clearly has jurisdiction. If the Kelly Point Park is Indian Country, the state still has criminal/prohibitory jurisdiction as granted by PL-280. There are two main contentions that support the jurisdiction of the State of Oregon in the Kelley Point Park. First, the State of Oregon is fully in possession and control of this land and it cannot properly be characterized as Indian Country or lands owned by the Cush-Hook Tribe. If the land is classified as non-Indian Country, then it is clear that the State of Oregon has the ability to exercise full criminal and civil jurisdiction and it's charging of Thomas Captain was proper. Since the land could not be classified as Indian Country, a concept explored in great detail below, the State exercises exclusive jurisdiction over the affairs of that land.

The second contention, an alternative, recognizes the fact that the land may be characterized as Indian County. Even if the land is classified as such, the State of Oregon still was proper in its exercise of jurisdiction over Captain under the grant of jurisdiction under Public Law 280 ("PL-280"). 18 U.S.C.A. §1162(a); 28 U.S.C.A. §1360(a). PL-280 is a grant by the federal

government conveying to certain states criminal and civil jurisdiction over lands classified as Indian Country. 18 U.S.C.A. §1162(a); 28 U.S.C.A. §1360(a). This alternative contention argues that the State of Oregon was operating within the statutory bounds of PL-280 and was therefore proper. These contentions are now discussed in further detail.

A. The State of Oregon is the exclusive jurisdictional body for the Kelley Point Park lands because those lands cannot be classified as Indian Country and the Cush-Hook Tribe does not have any title to the land.

The most compelling contention contained herein is that the State of Oregon is the exclusive jurisdictional body over the Kelley Point Park because that land cannot be classified as Indian Country. When determining jurisdiction, the two dispositive factors are whether the perpetrator is Indian and whether the land can be classified as Indian Country. Here, it is undisputed that Captain is an Indian. Therefore, the crux of this action concerns the classification of the Kelley Point Park land. The contention that the land is not classified will now be addressed.

i. Kelley Point Park cannot be classified as Indian Country.

The classification of Indian Country is critical because the question of who has jurisdiction, the State of Oregon or the Cush-Hook Tribe hinges on the answer, with a negative finding indicating state jurisdiction. Indian Country is defined at 18 U.S.C.A. §1151. There are three types of land that generally qualify as Indian Country. The first is "all lands within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including right-of-way running through the reservation." 18 U.S.C.A. §1151(a). The second is "all dependent Indian communities within the borders of the United States whether within the original or subsequent acquired territory thereof,

and whether within or without limits of a state." 18 U.S.C.A. §1151(b). The third and final classification is "any Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same." 18 U.S.C.A. §1151(c).

One thing is certain from these definitions of Indian Country: to be properly classified as Indian country the Federal government must have taken some action to reserve land for the use of the Tribe in question. *see* Generally, *Oklahoma Tax Com'n. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) (discussing that "the test for determining whether land is Indian Country does not turn upon whether that land is denominated 'trust land' or 'reservation'. Rather we ask whether there has been validly set apart for the use of the Indians as such, under the superintendence of the Government". In *Citizen Band of Potawatomi*, the court was charged with determining whether a convenience store on trust land, not formally designated a reservation, was under state jurisdiction. *Id.* The court held that it was Indian Country under 18 U.S.C.A. §1151 because the land was validly set apart because it had been in trust for the benefit of the Tribe. *Id.* It was the affirmative action of designating that land be held in trust that signaled that the convenience store was in Indian Country.

A further discussion of the "validly set apart" concept is found in *U.S. v. McGowan.* In *McGowan*, exercise of state jurisdiction over alcohol runners hinged on whether the land in question could be considered Indian Country. *United States v. McGowan*, 302 U.S. 535, 536 (1938). The Reno Indian Colony, a 28 acre parcel of land, purchased and managed by the Federal government, was set aside for use by multiple Nevada tribe. *Id* at 537. The Supreme Court held that this land was validly set apart and should be classified as Indian Country for two reasons. First, the land was held by the government for the use of the Tribe and the Federal

Government had the authority to regulate that land. *Id* at 539. Second, there was a long-standing and ongoing relationship since the Tribe and the government. *Id.* These two factors are specific indicia of affirmative congressional action validly setting land aside for Indians.

Additionally, in *U.S. v. John*, the court explained the concept of Indian Country. This case involved a defendant who was charged with murder and simple assault and tried in Federal District Court. *United States v. John*, 437 U.S. 634, 636 (1978). The Court of Appeals for the Fifth Circuit held that the land was not Indian Country and thus the Federal Government lacked jurisdiction to prosecute. *Id.* The land in question was held in trust by the Federal Government but was not designated Reservation land. *Id.* at 649. The court held that the land was Indian Country because it was set aside for the Indians and administered by the federal government. *Id.*

In contrast to the two cases cited above is *Mescalero Apache Tribe v. Jones.* In that case, the Mescalero Apache Tribe sued to prevent a tax assessment on the purchase of ski lift equipment at their tribally run ski resort. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973). Again, the question of whether the State's ability to enforce its jurisdiction hinged on whether that land could be classified as Indian Country. The ski resort was held to be off reservation and therefore subject to the taxing authority of the state. *Id.* at 150. Although this court uses slightly different language, the policy behind the decision is the same as *McGowan* and *Citizen Band of Potawatomi.* The land in question was not validly set apart for the Mescalero nor did it have nay indicia of Indian Country as pronounced in *McGowan*, necessitating a finding that the Ski Resort was not Indian Country. Additionally, this case illustrates an important point. After stating that absent express federal law to the contrary, Indians going beyond reservation

boundaries are subject to state law, the court pronounced that this principle is as relevant to the State's tax laws as it is to state criminal laws. *Id.*

These cases make clear that for a piece of land to be designated Indian Country, there must be action by the federal government to set aside land for use by Indians. Indications of this action include the formation of a reservation, the taking of land into trust for tribes generally and for individual tribal members, as well as the presence of an ongoing relationship between a Tribe and the federal government. Looking at the Cush-Hook Tribe and its relationship to the Kelley Point Park, it is clear that the land cannot be classified as Indian Country. To show this, an examination of the land in question is in order.

The Cush-Hook Tribe is a non-Federally recognized Tribe. Although there were plans to enter a treaty between the Cush-Hook and the United States, the Senate refused to ratify that Treaty, an act indicating that there was to be no ongoing relationship between the two sovereigns. It was also stipulated that the Tribe has had no further dealing with the federal government. Already, the facts of this case are dramatically different than those in *McGowan, John,* and *Citizen Band of Potawatomi* because those cases involved tribes with ongoing relationships with the federal government. Additionally, as it has already been stated, the Cush-Hook Tribe's aboriginal title either never existed or was extinguished.

Second, the land itself is not in trust nor has it been validly set apart for the use of the Cush-Hook Tribe. The Kelley Point land is owned by the State of Oregon and there is no indication that the Federal Government intended to set that land aside for the use of the Cush-Hook Tribe. This fact, coupled with the lack of a relationship with the Federal Government, clearly distinguishes this case from *McGowan, John,* and *Potawatomi* cases in which the land

was held to be Indian Country. Rather this case more closely resembles *Mescalero* because the conduct occurred outside of any type of Indian country and it was perpetrated by an Indian man on state land. *Mescalero* is applicable here, despite the fact that case involved taxation issues and the instant case involved criminal charges because the court itself indicated that the principles announced in that case were applicable to criminal issues. Clearly the *Mescalero* principles were meant to transcend the facts of that case and be applicable to a wide variety of Indian Country determination cases.

Besides not fitting in the case law interpretation of what constitutes Indian Country, the facts cannot satisfy the statutory provisions laid out in 18 U.S.C.A. §1151. It is not a reservation and therefore cannot qualify under 18 U.S.C.A. §1151(a). The tribe is not a domestic dependent nation under 18 U.S.C.A. §1151(b) because there is no ongoing relationship with the federal government. The land is not allotted trust land under 18 U.S.C.A. §1151(c) either. Only one conclusion can be drawn: The Kelley Point Park is not Indian Country as defined by 18 U.S.C.A. §1151 or by case law. Thus ,it can be properly characterized as a park owned and operated by the State of Oregon.

ii. Kelley Point Park is Oregon State land under the exclusive control of the State of Oregon and its exercise of jurisdiction over that land is proper.

The Kelley Point Park is not Indian County because it lacks all of the indicia, i.e. that it was validly set apart for the use of the Tribe and there is an ongoing relationship between the Cush-Hook Tribe and the Federal Government. This is important because it strongly suggests that the State of Oregon is the proper jurisdictional body over that land. It does not matter what type of law the State wishes to enforce here, i.e. criminal or regulatory; Oregon is free to enforce

all laws because the land is simply under its jurisdiction. Based on the ruling in *Mescalero*, which holds that a State has the power to enforce its laws on its own lands, it is clear that the State's use of its jurisdiction is proper. The State initially filed complaints against Captain for trespass, cutting of timber without a permit, desecrating an archaeological and historical site under the Or. Rev. Stat. §358.905-358.961 and for taking historical materials without the proper permits under Or. Rev. Stat. §390.325-340. Such a ruling would protect the established and recognizable jurisdiction of the State of Oregon within Kelley Point Park and would also prevent a checkerboard of jurisdictions. The state has full authority to enforce all of these laws on the Kelley Point Park land because the land cannot be classified as Indian Country, therefore depriving the Tribe of any ability to exercise any jurisdictional authority over it.

B. Even if Kelley Point Park could be properly classified as Indian Country under 18 U.S.C.A. §1151, Public Law 280 grants the State of Oregon criminal and civil jurisdiction over Indian Country within its boundaries.

As noted in the preceding section, the thrust of the jurisdiction issue hinges on whether the Kelley Point Park is classified as Indian Country. Although the State's main contention here is that Kelley Point Park is not Indian Country, this section addresses the possibility that the land is deemed Indian Country. Even if the Kelley Point Park is classified as Indian Country, the grant of jurisdiction over Indian Country from the Federal government under PL-280 to the State of Oregon justifies their exercise of jurisdiction. Furthermore, the State of Oregon was criminally punishing the conduct that Thomas Captain engaged in and was not merely regulating it, indicating appropriate action by the State under PL-280. Jurisdiction granted under PL-280 generally does not grant regulatory power to the state so the classification of the laws is critical

here. This section first discusses the State of Oregon's grant of jurisdiction under PL-280 and then discusses the criminal/prohibitory nature of the statutes at issue.

i. The Federal Government, through PL-280, granted Oregon criminal and civil jurisdiction over Indian Country within its boundaries.

Public Law 280 ("PL-280") was a grant by the federal government to seven states, including the State of Oregon, jurisdiction over criminal and civil matters in Indian Country. 18 U.S.C.A. §1162(a); 28 U.S.C.A. §1360(a). These provisions conferred to the listed states jurisdiction:

> "over offenses committed by or against Indians in the areas of Indian country ....to the same extent that such state or territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian county as there have elsewhere within the State or Territory" 18 U.S.C.A. §1162(a).

and

> "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country...to the same extent that such State has jurisdiction over other civil causes of action." 28 U.S.C.A. §1360(a).

The grant of jurisdiction to the State of Oregon under these statutes is broad. Additionally, the Statutes quote unambiguously grant the State of Oregon the power to enforce its civil and criminal laws within Indian Country.

This fact has been recognized by both the State of Oregon and the 9th Circuit Court of Appeals. In *Anderson v. C.T. Gladden* the Court held that the language of PL-280 was binding

upon the State, and that no legislation was needed to assume the jurisdiction so granted. *Anderson v. C.T. Gladden*, 293 F.2d 463, 467 (9th Cir. 1961). *Anderson,* a habeas corpus case, involved an Indian man serving a life sentence in the Oregon State Penitentiary. *Id.* at 464. The defendant in that case argued in part that an enabling act by the State of Oregon was needed to adopt the jurisdiction of PL-280. *Id.* However the Court went on to recognize that the State of Oregon does not need to enact such a law and that the grant of jurisdiction under PL-280 was binding automatically. *Id.* at 464. Specifically, the Court cited Oregon case law.

In *Anderson v. Britton,* a case with negative treatment in regards to its criminal holdings because a new Oregon criminal statute was enacted, discusses the adoption of PL-280 in the State of Oregon without review. *see* Generally *Anderson v. Britton*, 212 Or. 1 (1962). However, the PL-280 discussion remains persuasive authority. In that case, a criminal defendant, an Indian in Indian Country at the occurrence of the offense, argued in part that his conviction under Oregon State law was improper because PL-280 was not self-executing. *Id.* at 16. This contention was pointing out that Oregon never actively adopted, by state statute, the jurisdiction conferred to them by the Federal Government. The court state whoever that PL-280 was self-executing, automatically granting Oregon the aforementioned jurisdiction. *Id.*

If the Kelley Point Park land is determined to be Indian Country, as the other side undoubtedly argues, that necessarily means that the State has jurisdiction over that land. Oregon and the 9th Circuit Court of Appeals agree that the grant of jurisdiction under PL-280 was automatic and binding upon the State of Oregon. PL-280 grants the State jurisdiction over criminal and civil matters in Indian Country within the State. The State does have criminal and civil jurisdiction over Kelley Point Park. There are no exceptions for which the opposing side

could hide on this issue. PL-280 does exclude the state from jurisdiction over hunting, fishing, and rights guaranteed by treaty or statute. 78 Interior 101, 103 (1971). However, since there is no treaty or statute recognizing those rights with the Cush-Hook, then this exception does not apply. The second and more notable exception is case law developed and stands for the idea that PL-280 does not give the state regulatory power on Indian land. Having established that PL-280 applies to the Kelley Point Park land, the issue of whether the laws were adjudicatory or regulatory is discussed below.

ii. The statutes that Captain violated were adjudicatory, not regulatory, and therefore within the grant of jurisdiction to the State under PL-280.

The next issue is whether the State, when it charged Captain, was acting within the scope of its jurisdiction under PL-280. Although the grant of jurisdiction is expansive, it is limited by a prohibition on enforcing regulatory laws. *see* Generally *Bryan v. Itasca County*, 426 U.S. 373 (1976). It is our contention that the laws enforced by the State of Oregon were adjudicatory, not regulatory, and therefore that enforcement was appropriate under the grant of jurisdiction under PL-280. An in depth analysis of this distinction is critical to the outcome of this contention.

There have been several Supreme Court cases on this issue spanning both civil and criminal issues. In *Bryan v. Itasca County*, the State of Minnesota attempted to levy property taxes against an Indian in Indian Country under PL-280. *Id.* at 375. The Court pronounced that Congress meant for State courts to *decide* criminal and civil matters arising on reservations. *Id.* at *385*. The court noted two important policy issues when reaching this conclusion discussing the extent of both criminal and civil matters. In regards to civil jurisdiction, the court stated that a "full panoply of civil regulatory powers, including taxation" would be contrary to the policy

behind PL-280. *Id.* at 388. In terms of criminal jurisdiction, the court stated it was the policy of PL-280 was to prevent "lawlessness on certain Indian reservations". *Id.* at 379. *Bryan* stands for the proposition that the grant of jurisdiction to Oregon encompassed only its ability to adjudicate and prohibit conduct in Indian Country and that full regulatory pwer would infringe to far on Tribal sovereignty. *Id.* at 388.

A second major case involving this issue was *California v. Cabazon Band of Mission Indians*. In this case, the State of California attempted to impose it regulations concerning bingo in Indian Country under PL-280. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 205-206 (1987). The Court ultimately held that the State could not impose this regulation because PL-280 only grants jurisdiction over adjudicatory offenses, such as criminal offenses and private civil litigation in State Court, not civil regulatory offenses, and that the gaming ordinances were regulatory. *Id.* at 209. In reaching this decision, the court stated;

> "If the intent of a state law is generally to prohibit certain conduct, it falls within PL-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 PL-280 does not authorize there on an Indian reservation. The shorthand test is whether the conduct at issue violated the State's public policy." *Id.* at 209.

As *Bryan* and *Cabazon* indicate, in order to be appropriate under PL-280, the state must be enforcing a criminal or adjudicatory proceeding and not a civil one. The shorthand test as announced by *Cabazon* is whether the conduct violates the State's public policy. In order to fully understand this issue, it is appropriate to provide a case summary of this area of the law.

The crux of the issue here is exemplified by the short hand test announced in *Cabazon*. The question of whether something is prohibitory/criminal or civil/regulatory hinges on the public policy behind that law. One area of the law that exemplifies this principle is traffic laws. In *St. Germaine v. Circuit Court of Vilas County* and *State v. Losh*, driving with a suspended license was held to be prohibitory and within the grant of jurisdiction under PL-280 driving without a license, is a violation of public policy. *See* Generally, *State of Minnesota v. Losh*, 739 N.W.2d 730 (Minn.App. 2007), *St. Germaine v. Circuit Court for Vila County*, 938 F.2d 75 (7th Cir. 1991). This public policy-driven test for determining the type of law being enforced has been expanded beyond traffic violations, however. *See State v. Couture*, 587 N.W. 2d 849 (Minn. App. 1999) (ruling that driving while intoxicated was criminal conduct); *Quechan Tribe v. McCullen*, 984 F.2d 304 (9th Cir. 1993) (law regulating the sale of fireworks, except in the hands of licensed individuals, was criminal). These cases determined that the conduct at hand was criminal because sought to prohibit conduct that was contrary to that state's public policy.

In *Quechan Tribe*, the court was faced with the question whether California law regulating the sale of fireworks was criminal or regulatory. *Quechan Tribe* 984 F.2d 304 (9th Cir. 1993). The court ultimately held that the law was criminal. *Id.* at 308. In reaching this decision the court relied upon the *Cabazon* test of a law is criminal/prohibitory if the intent of the law is 'generally to prohibit certain conduct'. *Id.* at 306. The court went further, stating, "The inquiry prescribed in *Cabazon* is however, one of the statute's intent and not simply its label". *Id.* at 307. This indicates that laws will be held to be criminal, and therefore within the grant of authority under PL-280 if the intent of the statute is to prohibit conduct, even in a regulatory scheme. Additionally, the fact that the law provided that licensed individuals could purchase those types

of fireworks, that was not enough to make the law regulatory, reflecting the intent distinction the court relied upon. *Id.* What made this statute prohibitory is that it prohibited the conduct generally, reserving a small exception for specially licensed individuals.

In the instant case, Oregon will have been justified under PL-280 for charging Captain as it did if the laws that it charged were criminal/prohibitory. There are four charges against Captain including trespass to state lands, cutting timber without a permit, violating Or.Rev.Stat. §390.235-390.240 and Or.Rev.Stat. §358.905-358,961. If these offenses are prohibitory, Oregon's exercise of jurisdiction is justified. The trespass and cutting timber without a permit are undoubtedly prohibitory. The State is enforcing its public policy of protecting its state lands by preventing conduct that would endanger those lands, such Captains intrustion and his cutting of timber. This case is similar *State v. Losh* and *St. Germaine v. Circuit Court of Vilas County.* Those two cases involved convicting defendants who were driving without a license. *Id.* Both cases involved laws that seemed regulatory, but were held to be criminal because the intent of these laws was to prohibit driving without a license, not regulate it.

Or.Rev.Stat. §358.905-358-961 and Or.Rev.Stat. §390.235-390.240 prohibits conduct that would desecrate archeological and historical sites. These statutes do allow certain cultural items to be removed, but only by trained professionals with the proper permits. Or.Rev.Stat.§390.235 (2011). Additionally, they provide that Indian cultural items will be returned to the possession of the Tribe to whom the item removed originated if possible. Or.Rev.Stat.§358.940 (1993). However, that exception is still subject to the general permitting and personnel requirements of that law. The intent of these laws are clear by their terms. They seek to protect and preserve cultural and historical landmarks. The State has chosen to prohibit

their disturbance or removal except by trained professionals in limited circumstances. These laws should be compared to the firework laws of *Quechan Tribe*. In both that case and this case, the law focuses on preventing behavior contrary to public policy. In *Quechan Tribe*, the state was promoting its policy of safety for its citizens, in the current action the State of Oregon is promoting its policy of protecting important cultural and historical sites in Oregon. The intent of the Oregon Statutes used to charge Captain were criminal/prohibitory because it was their intent to prohibit certain conduct concerning the removal and preservation of archeological or historical value. The fact that the laws of California in *Quechan* allowed licensed professionals to possess fireworks and the Oregon statutes allowing properly permitted professionals to take cultural items provides another basis of comparison. These minor exceptions to the general rule are not enough to tip the scale from criminal/prohibitory to civil/regulatory. The laws in the instant action and in *Quechan* share the intent of promoting the public policy of the state and the outcome here should mirror that of *Quechan.*

If Kelley Point Park is held to be Indian Country, then that land is undoubtedly covered by PL-280. Therefore, the State of Oregon has criminal and civil jurisdiction in Kelley Point Park. The offenses that Captain faces in this case are criminal/prohibitory because the intent of the statutes and law used to charge him is to prevent his conduct. Thus, the State of Oregon properly excised its jurisdiction over Thomas Captain in Kelley Point Park under PL-280.

IV. Conclusion

The Cush-Hook Indian Tribe does not have aboriginal Title to the land in Kelley Point Park. Throughout their history they have acted inconsistently with the notion of aboriginal title. The Cush-Hook cohabitated the land moreover cannot claim their occupancy to be

exclusive and their subsequent relocation coupled Congress's opening of the Oregon Territory to western expansion are all indicia that their aboriginal title was extinguished. Additionally, the Defendant should not be allowed to raise the issue under the equitable doctrine of laches if such aboriginal title ever existed.

Additionally, the State of Oregon was acting appropriately when it charged Captain with those offenses. First, Kelley Point Park is not Indian Country and the State has exclusive jurisdiction there. Second, even if Kelley Point Park was considered to be Indian Country, the State of Oregon would have a grant of criminal and civil jurisdiction under PL-280. The laws are prohibitory in nature and therefore within the State of Oregon's grant of jurisdiction.