

Docket No. 11-0274

SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,
Petitioner,

v.

Thomas CAPTAIN,
Respondent and Cross-Petitioner.

On Petition for Certiorari from the Oregon Court of Appeals.

BRIEF FOR RESPONDENT

TEAM NO. 23

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JURISDICTION

The judgment of the Oregon Circuit Court for the County of Multnomah was entered in 2011. Record at page 4 [hereinafter “R. at p. ___”]. The Oregon Court of Appeals affirmed the Circuit Court decision and the Oregon Supreme Court denied review. R. at p. 4. The petition for a writ of certiorari was filed with the United States Supreme Court in 2012, and granted shortly thereafter. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

QUESTIONS PRESENTED

1. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park; and
2. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe.

STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS

Expert witnesses in history, sociology, and anthropology establish that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans. R. at p. 3. The Lewis and Clark Expedition first discovered the Cush-Hook Nation of Indians in 1806. R. at p. 1. The Nation’s village that William Clark encountered during his trek was well established within the area that is now enclosed by Kelley Point Park’s boundaries. *Id.* The Cush-Hook Nation thrived in their village until relocating in

1850. R. at pp. 1-2. Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, signed a treaty with the Cush-Hook Nation in 1850 in which the Nation agreed to leave their land and relocate to a reservation in the Oregon coastal range of mountains. R. at p. 3. The U.S. Senate refused to ratify the Cush-Hook Treaty in 1853, and thus the United States never paid the Cush-Hook Nation for its lands, nor did it provide the Nation with any of the other promised benefits for leaving their aboriginal territory. *Id.* Consequently, the Cush-Hook Nation is not on the list of federally recognized Indian tribes compiled pursuant to the 1994 tribal list act. *Id.*

In 1850, Congress enacted the Oregon Donation Land Act and thereafter both Joe and Elsie Meek applied for and received fee title to the land that encompassed the previous Cush-Hook village. R. at p. 2. The Oregon Donation Land Act required “every white settlor” to live on the land for at least four consecutive years and to cultivate the property in order to receive the benefits of the Act. *Id.* The Meeks received fee title to the land in spite of their not fulfilling the requirements of the Act. *Id.*

B. STATEMENT OF THE PROCEEDINGS

The State of Oregon, Petitioner, brought a criminal action against Thomas Captain, Respondent, for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240. R. at p. 2. The Oregon Circuit Court, in a bench trial, found:

1. Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States;

2. The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. M'Intosh* because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land;
3. The United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void ab initio and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void;
4. The Cush-Hook Nation owns the land in question under aboriginal title;
5. Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not. Thus, Oregon properly brought this criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

R. at p. 3-4.

The Oregon Circuit Court held that the Cush-Hook Nation still owned the land with the Park and found Thomas Captain not guilty for trespass or for cutting timber without a state permit. R. at p. 4. However, the court found Captain guilty for violating Or. Rev. Stat. 390.235-390.240 et seq. for damaging an archaeological site and a cultural and historical artifact and fined him \$250. *Id.*

The Oregon Court of Appeals affirmed the Oregon Circuit Court decision without writing an opinion. *Id.* Subsequently, the Oregon Supreme Court denied review. *Id.*

ARGUMENT

A. THE STANDARD OF REVIEW

“Jurisdictional questions are ordinarily reviewed de novo. Accordingly, . . . we review the district court’s decision under the standard applied to sufficiency-of-the-evidence challenges: whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *U.S. v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009).

B. THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK

The concept of aboriginal title traces to the need to determine the nature of Indian tribes’ title to their lands under the Trade and Intercourse Acts, which stated that non-Indians could not acquire lands from Indians except by treaty entered pursuant to the United States Constitution. Trade and Intercourse Act (“Nonintercourse Act”), ch. XXXIII, 1 Stat. 137 § 4 (1790) (codified as amended at 25 U.S.C. § 177 (2012)). While the Act clearly states that only the federal government may transact with Indians to acquire their lands, the legislation from which it arose did not define the nature of Indian title in these lands. To interpret Indian title, the Court relied upon the doctrine of discovery, in which a European nation’s “discovery” of Indian lands created for that nation an absolute title valid against other European nations, and that this title passed to the United States upon its attaining independence from the British. *Johnson v. McIntosh*, 21 U.S. 543, 587-88, 1823 WL 2465 (U.S. Ill.) (1823).

While the United States retains an absolute title in the soil as discoverer, Indians retain rights of occupancy, possession, and use. *Id.* at 574. Indians could not dispose of these lands as they wished by transferring this right of occupancy, since only the United States could extinguish this right by purchase or conquest. *Id.* at 587. This notion of aboriginal title as a right of occupancy, extinguishable only by the federal government, remained intact, as “federal law, treaties, and statutes protected Indian occupancy and ... its termination was exclusively the province of federal law.” *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

The present dispute concerns Mr. Thomas Captain, a member of the Cush-Hook Nation tribe of Indians, who asserts aboriginal title of the tribe over its original homelands, which includes present-day Kelley Point Park at the confluence of the Willamette and Columbia Rivers, near Portland, Oregon. R. at 1. The Cush-Hook Nation occupied, used, and owned the lands in question before Euro-Americans arrived in the region. R. at 3. In 1850, the superintendent of Indian Affairs for the Oregon Territory formed a treaty with the Nation, in which the Nation agreed to sell its land to the United States and relocate to a reservation in the Oregon coast range of mountains. *Id.* In 1853, however, the United States refused to ratify this treaty, so the Nation received none of its promised compensation or benefits for relocating. *Id.*

Under the Nonintercourse Act, “[n]o purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into

pursuant to the Constitution.” Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)). In this Act, Congress prohibited acquisition of Indian lands without the approval of the federal government. Because Congress never ratified the Cush-Hook Treaty, the United States never validly acquired the lands in question. *See Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed. Cir. 2000). While the Cush-Hook Nation is not a federally recognized tribe, federal recognition is not necessary for purposes of establishing aboriginal title under the Nonintercourse Act.

“To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned.” *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2nd Cir. 1994). The dispute centers on the first and third elements, as the second and fourth can be disposed of and do not involve controversies of fact or law. If the Cush-Hook Nation is an Indian tribe despite its lack of federal recognition, then its ancestral homelands are tribal land. There is nothing in the record to suggest that the United States expressly undertook to terminate or abandon its trust relationship with the Cush-Hook Nation. Therefore, the main issues in controversy include: whether the Nation is a tribe under the Nonintercourse Act, and the implications of this status on aboriginal title; and whether the United States consented to or approved alienation of the Nation’s land, either by valid treaty or taking that extinguished aboriginal title.

The Oregon Circuit Court for the County of Multnomah ruled correctly for Mr. Captain that the Cush-Hook Nation's aboriginal title to its homelands was never extinguished, and that the Nation owns the land in question under its aboriginal title, because although the Nation is not a federally-recognized tribe, federal recognition is not necessary for purposes of determining valid aboriginal title, and the fact that the treaty was not ratified voided the transaction, maintaining the Cush-Hook Nation's aboriginal title. Furthermore, the United States' acquisition of the land is not a valid taking, because considering an acquisition by failed treaty a valid taking would be dubious policy and frustrate the purpose of the United States' trust relationship with Indian tribes.

1. Mr. Captain's Tribe, The Cush-Hook Nation, Is And Has Been A Bona Fide Tribe Of Indians For Purposes Of Determining Aboriginal Title Under The Nonintercourse Act And Federal Common Law, Even Though The Nation Is Not Federally Recognized.

The first issue arising in Mr. Captain's dispute over the land in question is whether the Nation's lack of federal recognition as an Indian tribe invalidates its aboriginal title under the Nonintercourse Act, in which the federal government has the exclusive authority to extinguish aboriginal title by approving a conveyance of Indian lands. 25 U.S.C. § 177 (2012). If the Nonintercourse Act applies to the Cush-Hook Nation, then the Nation retains aboriginal title, because Congress did not ratify the Cush-Hook Treaty of 1850 that executed the conveyance, rendering the acquisition a legal nullity. *See Karuk Tribe v. Ammon*, 209

F.3d 1366, 1371 (Fed. Cir. 2000) (held that unratified treaties between agents of the United States and an Indian tribe concerning land use were legal nullities).

i. Federal Recognition Of Indian Tribes

The Department of the Interior's federal recognition of Indian tribes began after Congress passed the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2012)). 39 F.3d at 57. In order to establish more consistency as opposed to the case-by-case basis on which it considered tribal recognition, in 1978 the Department promulgated regulations, revised in 1994, specifying a procedure by which tribes would be officially acknowledged. *Id.*; see 25 U.S.C. § 479; 25 C.F.R. §§ 83.1-83.13 (2012). The purpose of these regulations was to strengthen the relationship between these tribes and the United States, and make the tribes eligible for services and benefits available to other recognized tribes. § 83.2.

Under these regulations, a group seeking acknowledgment as an Indian tribe must have "been identified as an American Indian entity on a substantially continuous basis since 1900." § 83.7(a). It must also, from historical times until the present, have "comprise[d] a distinct community and ... exist[ed] as a community," and "maintained political influence or authority over its members as an autonomous entity." § 83.7(b)-(c). The tribe's membership, for which the tribe must produce the membership criteria, must consist of "individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." § 83.7(d)-(e). Finally, the tribe must not be the subject of congressional legislation that expressly terminated or forbade

the federal relationship. § 83.7(g). A group, if it meets these conditions, can obtain federal acknowledgement qualifying it for federal services and benefits.

ii. The Cush-Hook Nation Is An Indian Tribe For Purposes Of Aboriginal Title

The availability of services and benefits for the Cush-Hook Nation is not at issue here. Rather, Mr. Captain's dispute surrounds the Nation's claims of aboriginal title to the lands in question under the Nonintercourse Act and federal common law. The Second Circuit of the United States Court of Appeals has held that the Court's adjudication of the Golden Hill Paugussett Tribe's claim of aboriginal title should be stayed, pending the Bureau of Indian Affairs' determination of the tribe's status under the aforementioned regulations. 39 F.3d at 61.

In a case pre-dating the regulations, however, the First Circuit of the United States Court of Appeals reached a decision that is more persuasive in the present dispute, ruling that the Passamaquoddy Tribe met the conditions necessary to be considered a tribe for purposes of the Nonintercourse Act. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377-78 (1st Cir. 1975). Unlike the lower court in *Golden Hill Paugussett*, in *Passamaquoddy* the lower court already engaged in fact-finding that demonstrated the plaintiff's status as an Indian tribe under the Nonintercourse Act. *Id.* at 372-76.

In another case involving a tribe's aboriginal title claim under the Nonintercourse Act, the First Circuit has stated that "the facts in this case, though developed and interpreted in part with the expert help of historians and anthropologists, are not so technical as to be beyond the understanding of judges or juries." *Mashpee Tribe v. New Seabury Corp.*, 592

F.2d 575, 581 (1st Cir. 1979) (finding that the court need not defer to administrative process and that the issue of whether a group of Indians constitutes a tribe is suitable for in-court determination). While the Court in *Mashpee* found for the non-Indian defendants, the facts must be distinguished from those of the instant case. *Id.* at 594. The Court affirmed the lower court's holding that the plaintiffs did not maintain its tribal status, as its members voluntarily ceased functioning as a distinct and identifiable entity through periods during which its members assimilated with non-Indians. *Id.* at 587.

Similarly to *Passamaquoddy*, in the instant case, the Oregon Circuit Court for the County of Multnomah engaged in fact-finding that demonstrated the Cush-Hook Nation's eligibility to have its claim of aboriginal title considered under the Nonintercourse Act. R. at 1-3. Nothing in the record, or the lower court's finding of facts or law, suggests that the Cush-Hooks assimilated with non-Indians in such a way as to surrender their tribal character. *Id.* A majority of the tribal members remained together in the area to which they relocated after the treaty. R. at 2. Therefore, *Passamaquoddy* is more persuasive in the present dispute, because there is no question of fact as to the Cush-Hooks' historical and cultural background, qualifying it for the Nonintercourse Act's protections. In the interest of judicial economy and because the administrative regulations are unnecessary under the Nonintercourse Act, this Court need not demand administrative fact-finding.

The Nonintercourse Act states that “[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into

pursuant to the Constitution.” 25 U.S.C. § 177 (2012). In applying the Act to “any Indian nation or tribe of Indians,” Congress never states that the Act’s provisions only apply to federally recognized tribes. The Court has not construed the Act to bar tribes lacking federal recognition from its protections, stating: “There is nothing in the Act to suggest that ‘tribe’ is to be read to exclude a bona fide tribe not otherwise federally recognized.” 528 F.2d at 377 (1st Cir. 1975).

A bona fide Indian tribe, as used in the Nonintercourse Act, is “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory.” *Montoya v. United States*, 180 U.S. 261, 266 (1901), *quoted in* 528 F.2d at 377. The Court in *Passamaquoddy* ruled that the Passamaquoddy Tribe fit this definition of an Indian tribe, and that the absence of federal dealings, which were unrelated to the Passamaquoddies’ tribal status, and the lack of recognition “provides little basis for concluding that the Passamaquoddies are not a ‘tribe’ within the Act.” 528 F.2d at 377-78.

The Cush-Hook Nation meets the *Passamaquoddy* standard for acknowledgement as an Indian tribe under the Nonintercourse Act. The record suggests that Cush-Hook Nation’s members are of the same, or a similar, race. R. at 1. The fact that William Clark and Meriwether Lewis dealt with tribal leaders in 1806, and that the treaty formed by tribal leaders with Anson Dart in 1850 was honored by the entire Cush-Hook Nation, demonstrates that the Nation was united in a community with recognized leadership at the time of the treaty. R. at 1, 3. Furthermore, expert witnesses in history, sociology, and anthropology

found that the Cush-Hooks occupied, used, and owned the lands in question before the arrival of Euro-Americans. R. at 3. These facts all clearly demonstrate that the Cush-Hook Nation meets the definition of an Indian tribe under *Passamaquoddy*, and that they therefore should receive the protections afforded Indian tribes under the Nonintercourse Act.

2. While The Federal Government Has Exclusive Authority To Extinguish Aboriginal Title, It Must, Under The Nonintercourse Act And Federal Common Law, Extinguish This Title Through Treaty Or Convention; Congress' Refusal To Ratify The Treaty Renders The Treaty A Legal Nullity, And Mr. Captain's Tribe's Aboriginal Title Is Not Extinguished.

The question as to whether an unratified treaty validly extinguishes aboriginal title is another key issue in the Cush-Hook Nation's claim to aboriginal title over its ancestral homelands. After the adoption of the Constitution, only the federal government could extinguish aboriginal title. *E.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). This extinguishment must be the action of Congress, or a part of the federal government to which Congress delegated this authority. *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941). Furthermore, the congressional intent to extinguish Indian title must be "plain and unambiguous," *id.* at 346, and will not be "lightly implied." *Id.* at 354.

i. Lack Of Congressional Intent To Extinguish Aboriginal Title

In Mr. Captain's dispute, there is no plain and unambiguous congressional intent to extinguish the Cush-Hook Nation's aboriginal title to the lands in question, because the

United States Senate did not ratify the Cush-Hook Treaty of 1850 that would likely have extinguished the Nation's aboriginal title. R. at 3. Absent Congress' ratification of the treaty, it is impossible to assert clear, plain, and unambiguous congressional intent not only to enter the treaty, but to extinguish aboriginal title. Inferring congressional intent in this dispute would contradict the courts' obligation not to "infer congressional intent to extinguish Indian claims to aboriginal rights to land absent plain and unambiguous statutory language making such an extinguishment." *Greene v. Rhode Island*, 398 F.3d 45, 54 (1st Cir. 2005); see 314 U.S. at 346, 354.

ii. Treaties With Indian Tribes Must Have Federal Approval

Where the Court has ruled that a treaty conveying land from the Oneida Indian Nation to the State of New York was invalid, having been entered into without the federal government's consent, the Court also held that the tribe still had a claim for damages, even though the treaty and conveyance had been entered into in 1795, 175 years before the suit. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253-54 (1985). Although the Cush-Hook's unratified treaty was with the United States, and not the State of Oregon, it also lacked the federal government's approval, and should on that basis be ruled invalid.

The Court has held that creation and acceptance of an Indian reservation by treaty constitutes a relinquishment and extinguishment of aboriginal title outside of the reservation. *Menominee Indian Tribe v. Thompson*, 161 F. 3d 449, 462 (7th Cir. 1998); see 314 U.S. at 357-58. However, since the treaty was never ratified, the transaction was invalid and

aboriginal title to the lands outside the reservation, the Cush-Hooks' ancestral homeland, was never validly ceded to the United States.

iii. The Cush-Hook Treaty Was Invalid; The Cush-Hook Nation Retains

Aboriginal Title

In the Cush-Hook Treaty of 1850, the Nation negotiated the treaty and conveyance of land with executive officials, and both parties acted upon its provisions. R. at 3. The Nation relocated to a reservation near the Oregon Coast, and the United States opened up the Cush-Hooks' ancestral homelands for settlement by non-Indian farmers. R. at 2, 3. However, this treaty was acted upon despite the failure of the Senate to ratify it, which rendered it legally invalid. *See Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed. Cir. 2000) (finding that in the instances in which the federal government negotiated treaties that the Senate did not ratify, those treaties were nullities). Similarly, the Cush-Hook Treaty must be ruled a nullity and aboriginal title restored. If, as the Court of Appeals of the Second Circuit stated, “[a]ny conveyance without the sovereign’s consent was invalid,” 39 F.3d at 56, this rationale applies not only to treaties lacking congressional consent between Indians and states, but those unratified treaties between Indians and the United States as well.

If the Cush-Hook Nation were denied aboriginal title despite the Cush-Hook Treaty having never been ratified by the Senate, it would frustrate the purposes of the Nonintercourse Act and subsequent case law, both of which give exclusive authority to enter land transactions and treaties with Indian tribes to the federal government. One of Congress’ purposes in reserving to itself the authority to enter these agreements was to “prevent unfair,

improvident or improper disposition by Indians of lands owned or possessed by them to other parties.” *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). It would be a violation of the trust relationship created by the Nonintercourse Act, which includes federally unrecognized tribes. *See* 528 F.2d at 379. The federal government would be left with no accountability to uphold its portion of these agreements. Therefore, to remain consistent not only with the provisions of the Nonintercourse Act and federal common-law precedents, but the policy behind these laws as well, this Court must uphold the lower court’s decision and affirm its ruling that the Cush-Hook Nation owns the land under aboriginal title.

3. This Court Must Not Construe The Federal Government’s Acquisition Of The Cush-Hooks’ Land By An Unratified, Invalid Treaty As A Lawful Taking That Extinguishes Aboriginal Title; To Regard The Acquisition As Such A Taking Would Be To Lightly Imply Extinguishment, And Abrogate The Trust Relationship In An Execution Of Dubious Policy.

While the acquisition of the Cush-Hooks’ land is invalid because the Senate did not ratify the Cush-Hook Treaty of 1850, the Court also cannot view United States’ acquisition of these lands as a valid taking that extinguishes title. Congress may execute a taking that extinguishes aboriginal title, but “an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.” 314 U.S. at 354. To rule that the unratified Cush-Hook Treaty and the Nation’s land conveyance and relocation, particularly in the face of the Senate’s refusal to approve the transaction, as a taking would be an act of “lightly implying” extinguishment. *Id.*

i. Congress' Responsibility To Indian Tribes

Congress was charged with the task of protecting Indians from unfair or improper land transactions. *E.g.*, 362 U.S. at 119. The very purpose of the Nonintercourse Act was to ensure that the federal government would deal exclusively with Indian tribes, as a means of ensuring that tribes' lands would not be disposed of in questionable transactions. 25 U.S.C. § 117. It would be a direct contradiction of Congress' role and federal Indian policy to engage in such subterfuge with the Cush-Hook Nation by enticing to relocate under an invalid treaty, and then maintaining that the land was validly extinguished under a federal taking.

ii. The United States Cannot Execute A Taking And Extinguish Title Without Congressional Intent

If the federal government's acquisition of the land were an attempt to execute a taking, it would be invalid because of the violation of federal common law under *Santa Fe*, lightly implying congressional intent to extinguish without a plain and unambiguous statement of this intent. 314 U.S. at 354. It would not be invalid because of the lack of compensation, because the taking of lands to which Indians have aboriginal title does not give rise to a right of compensation for Indians. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

iii. Use Of The Cush-Hooks' Land Suggests Lack Of Intent To Extinguish Aboriginal Title

In addition to the lack of evident congressional intent to extinguish aboriginal title, the United States' use of the Cush-Hooks' ancestral lands for cultivation as farmland also suggests that this title was not extinguished. R. at 3. If the United States had treated the land

in a manner making continued Indian occupancy an impossibility, this treatment would have been sufficient to extinguish aboriginal title. *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976) (finding that the military's forcible removal of Indians from the land, as well as subsequent designation of the land as part of a national forest, was enough to extinguish aboriginal title).

Gemmill must be distinguished from the present dispute on the basis of disparate facts. In *Gemmill*, the United States took the land to include it in a national forest, for the purposes of setting the land aside for conservation and recreation. This use would have made it nearly impossible for Indians to maintain their occupancy, which the Ninth Circuit Court of Appeals ruled was a valid extinguishment of aboriginal title. In the instant case, however, the land was not clearly treated in a way wholly inconsistent with continued tribal occupancy. The land was opened up for farmland, and the Cush-Hook Nation was known to grow crops on that land prior to their relocation. R. at 1-2. Therefore, had the Cush-Hooks continued to live there, they could have satisfied government's desired use of the land – cultivation as farmland.

Additionally, the Court has held that ambiguous acts such as inclusion of the land in a federal grazing district may be insufficient to establish a taking. *See United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985). Since the use of the Cush-Hooks' ancestral land was not entirely inconsistent with the Nation's way of life, the use was also not wholly inconsistent with continued tribal occupancy, rendering the

United States' use of the land for agriculture an ambiguous act that may not establish a valid taking. R. at 1-2.

While the Court may view the land uses as relevant to whether the United States validly took the Cush-Hooks' land and extinguished aboriginal title, any taking and attendant extinguishment of this title is invalid primarily because of the lack of congressional intent to extinguish title. 314 U.S. at 354. To infer a taking and extinguishment from the federal government's unratified treaty and acquisition of the Cush-Hooks' land would be to "lightly imply" Congress' intent to extinguish title. *Id.* The unratified treaty left the congressional intent regarding the lands in question ambiguous, and ambiguities are to be resolved in favor of dependent Indian tribes. R. at 3; *Choate v. Trapp*, 224 U.S. 665, 675 (1912). On this basis, the United States did not validly take, nor extinguish title to, the Cush-Hooks' ancestral homelands. Oregon's title is a mere reversion, because if aboriginal title is not extinguished, a conveyance of fee transfers no more than a reversion which matures only when aboriginal title ends. *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989).

**C. OREGON HAS CRIMINAL JURISDICTION GRANTED BY PUBLIC LAW 280
BUT THE RELIGIOUS CHARACTER OF THE ITEMS TAKE THEM OUT OF
OREGON'S JURISDICTIONAL REACH**

"[T]he law governing the exercise of criminal jurisdiction over Indians and Indian country encompasses a complex patchwork of federal, state, and tribal law, which is better explained by history than by logic." *U.S. v. Cruz*, 554 F.3d 840, 842 (9th Cir. 2009) quoting

U.S. v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005). Federal jurisdiction over Indians derives from the United States Constitution. The Constitution gives Congress the power to regulate “Commerce . . . with the Indian Tribes.” U.S.C.A. Const. Art. I § 8, cl. 3. Using this Commerce power, Congress has granted limited jurisdictional authority to the federal courts under the General Crimes Act, 18 U.S.C. § 1152, the Major Crimes Act, 18 U.S.C. § 1153, and to state courts under Public Law 280. Public Law 280, however, contains exceptions where state courts do not have jurisdiction. 18 U.S.C. § 1162(b), (c), (d).

1. Oregon Has Limited Criminal Jurisdiction Under Public Law 280

Generally, the federal government has shared jurisdiction over Indians residing within the United States as granted by the United States Constitution. Const. Art. I § 8, cl. 3. However, Congress enacted Public Law 280 in 1953, codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, which gives Oregon and five other States broad criminal jurisdiction and limited civil jurisdiction “over offenses committed by or against Indians in the Indian country.” Oregon’s criminal jurisdiction extends to “[a]ll Indian country within the State, except the Warm Springs Reservation.” 18 U.S.C. § 1162(a).

The application of § 1162 to acts committed within the state of Oregon depends heavily upon two issues: (1) whether the parties involved are Indians and (2) whether the events at issue took place in Indian country.

i. Mr. Captain Is An Indian Under Public Law 280

There are no uniform characteristics that comprise the definition of who is an Indian. Two basic features are: “(a) that some of the individual’s ancestors lived in what is now the

United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual's tribe or community." See Cohen's Handbook of Federal Indian Law § 3.03(1), at 171 (Nell Jessup Newton ed., 2012). An Indian as identified by the Court in *U.S. v. Rogers* is an individual who "by the usages and customs of the Indians are regarded as belonging to their race." 45 U.S. 567, 573 (1846). This does not relate to "members of a tribe, but of the race generally, [-] of the family of Indians." *Id.*

By this definition, Mr. Captain here is an Indian. First, the Lewis and Clark Expedition first discovered Mr. Captain's tribe, the Cush-Hook Nation of Indians, in 1806. R. at p. 1. The Nation's village that William Clark encountered during his trek was well established within the area that is now enclosed by Kelley Point Park's boundaries. R. at p. 1. The Cush-Hook Nation thrived in their village until 1850 when it signed a treaty with the superintendent of Indian Affairs for the Oregon Territory agreeing to relocate to the foothills of the Oregon coastal range of mountains. R. at pp. 1-2. Second, Mr. Captain is recognized as a citizen of the Cush-Hook Nation of Indians. R. at p. 2. Until 2011, when he occupied Kelley Point Park to reassert his Nation's ownership of the land, Mr. Captain was a productive and established member of the Cush-Hook Nation. R. at p. 2. He moved to Kelley Point Park specifically to protect and preserve culturally and religiously significant trees that had grown in the Park for over three hundred years. R. at p. 2.

Further, the previously vandalized image seized by police from the Mr. Captain had been carved by one of his ancestors hundreds of years prior. R. at p. 2. He was transporting the

image to his Nation's location in the coastal mountain range when the state troopers stopped and arrested him. R. at p. 2.

ii. Kelley Point Park Is Indian Country

Unlike the uncertainty of the term "Indian," "Indian country" is a statutorily defined expression. *U.S. v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). Section 1151 of Title 18 of the U.S.C. states:

"the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished."

18 U.S.C.A. § 1151.

Because the land owned by the Cush-Hook Nation is an Indian reservation and a dependent community within the borders of the United States, the land within Kelley Point Park owned by the Nation is Indian Country as defined in 18 U.S.C.A. § 1151.

a) The Land In Question Is An Indian Reservation

First, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . ." includes formal or informal reservations that have passed out of "Indian ownership." 18 U.S.C.A. § 1151(a); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010). This Court held in *Solem v. Bartlett* that "[t]he . . . governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." 465 U.S. 463, 470 (1984). The Nation has aboriginal title over the land within Kelley Point Park. Its aboriginal title was never

extinguished by treaty or conveyance. Congress chose not to ratify the treaty signed by the Nation and the Superintendent of Indian Affairs for the Oregon Territory. Further, Congress has never explicitly distinguished or diminished the Nation's land holdings. Therefore, the land in question is reservation land that is owned by the Cush-Hook Nation of Indians.

b) The Cush-Hook Nation Is A Dependent Indian Community

“The language in § 1151(b) is taken almost verbatim from the Court's conclusion in *United States v. Sandoval*, 231 U.S. 28, that the federal government has a ‘duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.’” *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010). Dependent Indian communities are a category of Indian lands that are not reservations or allotments. *U.S. v. Roberts*, 185 F. 3d 1125, 1133 (10th Cir. 1999). In analyzing whether the land in question is a dependent Indian community, the land must satisfy two requirements: (1) the land “must have been set aside by the Federal Government for the use of the Indians as Indian land;” and (2) it “must be under federal superintendence.” *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998). While this would be an accurate analysis for a tribe that is not under state jurisdiction mandated by Public Law 280, this is not sufficient for the tribes located within the State of Oregon. The tribes within the boundaries of Oregon, with the exception of the Warm Springs Reservation, are not under federal superintendence. This test would effectively deny any tribe within a Public Law 280 jurisdiction the status of a dependent Indian community. Therefore, we

submit that the appropriate analysis would be (1) whether the tribe was dependent on the federal government prior to the passage of Public Law 280; and (2) whether the lands in question were recognized as Indian lands.

Using the proposed amended analysis, the Cush-Hook Nation is a dependent Indian community. First, though the Nation was not dependent on the Federal Government for its livelihood, it is clear from the treaty that the Nation submitted to the protection and guidance of the U.S. Government, represented by the Superintendent of Indian Affairs for the Oregon Territory. Second, the recognition of the land as Indian lands by the Federal Government was first witnessed by Clark's interaction with the Nation and then by the treaty signed by a representative of the U.S. Government with the Nation. It is undeniable that the Nation is, and has been, a dependent Indian community within the meaning of 18 U.S.C.A. § 1151(b) and *United States v. Sandoval*.

c) The Land In Question Does Not Include Indian Allotments

The aboriginal title held by the Nation was never severed or allotted by the U.S. Government to individual Indian tribal members. Therefore, the land in question does not contain any Indian Allotments as referenced in 18 U.S.C.A. § 1151(c).

2. Oregon Does Not Have Criminal Jurisdiction Over Cultural Items Discovered On Tribal Lands Under Public Law 280

Even though Public Law 280 confers broad criminal jurisdiction to Oregon, the exception found in 18 U.S.C. § 1162(b), that “[n]othing in this section . . . shall authorize regulation of the use of such [personal] property in a manner inconsistent with any Federal . . . statute . . .,”

applies here. The item seized from Mr. Captain's possession was an image of cultural and religious significance to the Cush-Hook Nation. The image was carved in the tree by a member of the Cush-Hook Nation and was used by the tribe during their occupancy of the land. The image was the Nation's personal property and is protected by at least one Federal statute currently in place.

The Native American Graves Protection and Repatriation Act ("NAGPRA") applies when Native American cultural items are discovered on "Federal or tribal lands." 25 U.S.C. §§ 3001, 3004. The item found in Mr. Captain's possession was a cultural item and was discovered on the tribal lands of the Cush-Hook Nation. The definition of "tribal lands" within the NAGPRA includes "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities." 25 U.S.C. § 3001(15). In addition, the definition of "tribal lands" as found in the implementing regulations of NAGPRA contains "all lands which: (i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States." 43 C.F.R. § 10.2(f)(2).

The land in question is identified as "tribal lands" within the NAGPRA because it is "within the exterior boundaries of any Indian reservation" and is a "dependent Indian communities." The Nation has aboriginal title over the land within Kelley Point Park and the title was never extinguished by treaty or conveyance. Congress chose not to ratify the treaty signed by the Nation and the Superintendent of Indian Affairs for the Oregon Territory. Furthermore, Congress has never explicitly distinguished or diminished the Nation's land

holdings. Therefore, the land in question is reservation land that is owned by the Cush-Hook Nation of Indians. The land is also a dependent Indian community because the Nation submitted to the protection and guidance of the U.S. Government, represented by the Superintendent of Indian Affairs for the Oregon Territory and the Federal Government recognized the land as Indian lands. It is, therefore, unquestionable that the Nation is, and has been, part of a reservation and a dependent Indian community within the meaning of NAGPRA.

3. Desecrating An Archeological And Historical Site In Indian Country Is Not Enforceable By Oregon Under PL 280

Alternatively, the Court in *U.S. v. Stone* found that 18 U.S.C.A. § 1162 only “transferred the federal jurisdiction provided in sections 1152 and 1153 to those states designated in section 1162.” 112 F.3d 971, 973 (8th Cir. 1997). Further, federal jurisdiction over violations of the federal statutes of general applicability is not eliminated by the function of Section 1162. *See U.S. v. Burns*, 529 F.2d 114, 117 (9th Cir. 1975). The General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, broaden federal jurisdiction to include the outlined crimes committed by Indians within Indian country. Section 1162 simply divests the federal government of jurisdiction over the crimes listed in sections 1152 and 1153 and confers that jurisdiction to the States enumerated in section 1162. Section 1152 covers offenses where the situs of the offense is an element of the crime. *See U.S. v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997). Here, the Oregon statutes in question are applicable to “public or private lands.” O.R.S. § 358.920(1)(a); *See* O.R.S. §§ 358.905, et.

seq. This language indicates that the location of the offense is not an element of the crime. The statute clearly makes the offense punishable whether committed on public or private land. *Id.* Further, desecrating an archeological and historical site is not a crime recorded in 18 U.S.C. § 1153. Because the offense at issue is not covered under section 1152 or 1153 the jurisdiction over the offense has not been vested in Oregon within the application of Public Law 280.

CONCLUSION

The Oregon Circuit Court for the County of Multnomah ruled correctly in finding that Mr. Captain's tribe, the Cush-Hook Nation, retained aboriginal title over its ancestral homeland within Kelley Park. R. at 4. Mr. Captain has demonstrated that the Cush-Hook Nation is an Indian tribe, making its ancestral land tribal land. 39 F.3d at 56. Because the Senate chose not to ratify the Cush Hook Treaty in 1850, the United States has never consented to or approved the alienation of this tribal land or extinguishment of aboriginal title. *Id.* Furthermore, under the Nonintercourse Act and federal common law, the trust relationship between the United States and the Cush-Hook Nation was never terminated. *Id.*

Although the Cush-Hook Nation is not a federally recognized tribe, federal recognition is unnecessary for a tribe of Indians to qualify for the federal government's protection of its aboriginal title under the Nonintercourse Act. F.2d at 377-78. The Cush-Hook treaty was never ratified, which demonstrated a lack of congressional intent to alienate the Nation's lands and extinguish its aboriginal title either by sale or by taking. R. at 3. The

congressional intent, being ambiguous, must be read to favor the Cush-Hook Nation's interests. 314 U.S. at 354.

As the protector of dependent Indian tribes, the federal government has a responsibility and obligation to limit conveyances of land to those approved by the United States. *See, e.g.*, 470 U.S. at 233-34. Congress passed the Nonintercourse Act, which applies to federally unrecognized tribes like the Cush-Hook Nation, creating a tradition of a trust relationship between the federal government and Indian tribes. 528 F.2d at 379. It would be a violation of this trust relationship, as well as dubious policy, to allow an unratified treaty to control the Cush-Hooks' present-day aboriginal title and attendant rights. Congress' obligation is to protect Indian tribes against unfair or improper land deals, not enable them by giving force to an agreement they rejected at its inception. 362 U.S. at 119.

By rejecting the Cush-Hook Treaty, Congress rejected the alienation of the Cush-Hooks' land, and the extinguishment of its aboriginal title. Therefore, as the lower court determined, the Cush-Hooks retain aboriginal title to the land, and Mr. Captain should prevail.

"A defendant's substantial rights, as well as the fairness and integrity of the courts, are seriously affected . . . when the court . . . has no jurisdiction to try him for the alleged offense." *U.S. v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009).