

No. 11-0274

In The  
**Supreme Court of the United States**

State of Oregon,

*Petitioner,*

v.

Thomas Captain,

*Respondent/ Cross Petitioner,*

On Petition For Writ of Certiorari  
To The Oregon Court of Appeals

PETITION FOR WRIT OF CERTIORARI  
BRIEF FOR PETITIONER

Team 32

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## **QUESTIONS PRESENTED**

1. In 1850, Congress passed the Oregon Donation Land Act which opened lands no longer occupied by the Cush-Hooks for settlement. The federal government granted fee simple title to the Meeks, and after the land in controversy was conveyed to Oregon in 1880, it became Kelley Point Park. Can the Cush-Hook Nation, a federally unrecognized tribe, claim aboriginal title to Kelley Point Park?
2. Respondent trespassed onto state land, cut down, and removed an archeological object. Oregon statute prohibits the unauthorized alteration and removal of archaeological objects. Did Respondent violate Oregon law?

## STATEMENT OF THE CASE

### STATEMENT OF THE PROCEEDINGS

Respondent was tried by a bench trial in the Oregon Circuit Court for the County of Multnomah. R. 3.<sup>1</sup> The presiding judge determined that Respondent was not trespassing because the Cush-Hook Nation retained aboriginal title over Kelley Point Park. R. 3. However, the judge did find Respondent guilty for violating Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 for damaging an archaeological site and a cultural and historical artifact and fined him \$250. *Id.*

In 2011, Respondent was arrested for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site. Respondent consented to a bench trial in the Oregon Circuit Court for the County of Multnomah. There, the court determined that the Cush-Hook Nation's aboriginal title had not been extinguished and that the tribe owns the land in question under aboriginal title. Consequently, Respondent was found not guilty for trespass and cutting timber without a permit, but was found guilty for damaging an archaeological site and historical artifact and fined him \$250.

Both the state of Oregon and Respondent appealed the decision. The Oregon Court of Appeals affirmed the decision without writing an opinion, and the Oregon Supreme Court subsequently denied review. Afterward, the state of Oregon filed a petition and cross petition for certiorari to the U.S. Supreme Court. Respondent also filed a cross petition for certiorari to the U.S. Supreme Court. The Supreme Court granted certiorari on two issues.

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<sup>1</sup> "R." citations denote the consecutively paginated appellate record of facts.

## STATEMENT OF THE FACTS

The Cush-Hook Nation is an Indian tribe whose homelands are located in present-day Kelley Point Park, Oregon. R.1. Although the Cush-Hook Nation is not politically recognized by either Oregon or the United States, it has occupied the area since time immemorial. *Id.* The earliest known documentation of the tribe's existence comes from the journals of Lewis and Clark in 1806 during their well-known expedition to the American west. *Id.* The journals of Lewis and Clark detail the customs and religious traditions of the tribe, as well as the tribe's system of government. *Id.* Before leaving the area, Lewis and Clark offered the tribe a President Thomas Jefferson peace medal, which symbolized that the tribe and the United States desired to engage in political and commercial relations and that each government recognized the legitimacy of the other. *Id.*

Sometime later, in 1850, the Cush-Hook Nation signed a treaty with the then Superintendent of Indian Affairs for the Oregon Territory, Anson Dart. *Id.* The treaty established that the tribe would relocate 60 miles west to a location within the foothills of the Oregon coastal mountain range and in return the tribe would be compensated for their lands. R. 1-2. Subsequent to the treaty's signing, the Cush-Hooks traveled to the area designated in the treaty and they have remained there ever since. *Id.* However, the Senate failed to ratify the treaty so the tribe was not compensated for the lands they ceded, nor were they given title to the lands they now reside in. *Id.*

After the Cush-Hooks relocated, Joe and Elsie Meek moved onto the land previously inhabited by the tribe. *Id.* The couple was ultimately granted fee simple title to the land by the United States in accordance with the Oregon Donation Land Act of 1850. *Id.* The Act itself required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. *Id.* However, the Meeks failed to fulfill the

Act's requirements before receiving fee simple title for the 640 acres from the federal government. *Id.* In 1880, the Meeks' descendants sold the land to Oregon, and thereafter the Kelley Point Park was created. *Id.*

In 2011, a Cush-Hook citizen, by the name of Thomas Captain (Respondent), attempted to reassert his tribe's ownership of Kelley Point Park by moving onto the Park. *Id.* Within Kelley Point Park, there are many old trees that are culturally and religiously significant to the tribe. *Id.* The trees are important to the tribe because the shamans of the tribe carved sacred totem and religious symbols into the trees three hundred years ago. *Id.* Unfortunately, within the last few years, vandals have been damaging the totems and the state has done nothing in response to this. *Id.* Taking matters into his own hands, Respondent cut down one of the sacred totems and removed the area of the tree where the image was carved. *Id.* Respondent was stopped and arrested for trespass on state lands, cutting timber without a permit, and desecrating an archaeological and historical site. R. 2-3.

## ARGUMENT

### **I. BECAUSE THE UNITED STATES CAN LEGALLY EXTINGUISH ABORIGINAL TITLE WITHOUT COMPENSATING THE CUSH-HOOKS, THE OREGON DONATION LAND ACT AND SUBSEQUENT CONVEYANCE OF FEE SIMPLE TITLE TO THE MEEKS EXTINGUISHED ABORIGINAL TITLE**

American jurisprudence has long held that the sovereignty of the Indian populations residing within the United States was unavoidably diminished upon discovery. “[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle; that discovery gave exclusive title to those who made it.” *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823). As the discovering nation, the United States was vested with absolute title to all Indian lands. *Id.* at 592. Since *Johnson*, federal courts have faced a multitude of cases interpreting the extent of Indian property rights and the ability of the sovereign to extinguish those rights.

#### **A. CONGRESS CAN LAWFULLY EXTINGUISH ABORIGINAL TITLE WITHOUT COMPENSATING THE CUSH-HOOK NATION**

The Oregon Circuit Court erred when it concluded that the United States’ failure to compensate the Cush-Hook Nation for the Kelley Point Park land preserved aboriginal title. The United States, as sovereign, can legally extinguish aboriginal title without incurring a legal obligation to compensate the tribe. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

At the outset of this analysis, it is important to distinguish between the two different forms of Indian property rights—recognized title and aboriginal title. FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 969 (Nell Jessup Newton et al. eds., 2005). To establish recognized title, the tribe must show that the government has acknowledged the tribe’s property right through a federal treaty or statute. *Id.* If the federal government

extinguishes a tribe's recognized title, the action is a taking under the Fifth Amendment that entitles the tribe to just compensation. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375 (1937). Consequently, recognized title can only be extinguished by the federal government in accordance with the taking requirements of the Fifth Amendment.

Aboriginal title differs from recognized title in the method of proof to establish title and the consequences of extinguishment. Aboriginal title is not a recognized property right; it is a right of occupancy held by tribes. *Johnson*, 21 U.S. 543, 574 (1823). To establish aboriginal title, the tribe must show actual, exclusive, and continuous use and occupancy of the claimed area from time immemorial. *Native Village of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012). Unlike recognized title, aboriginal title can be extinguished at the will of Congress. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). Justice Douglas, in one of the leading cases on the extinguishment of aboriginal title, said: “[W]hether it [extinguishment of aboriginal title] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.” *Id.* “The power of Congress in that regard [to extinguish aboriginal title] is supreme.” *Id.*

Congress can extinguish aboriginal title without incurring a legally enforceable obligation to compensate the tribe. *Tee-Hit-Ton*, 348 U.S. 272, 279 (1955). In *Tee-Hit-Ton*, the Court held that termination of aboriginal title did not constitute a compensable taking under the Fifth Amendment because aboriginal title is not a property right; it is “a usufructuary privilege terminable at Congress’s discretion.” AMERICAN INDIAN LAW DESKBOOK 61 (Clay Smith et. al. eds., 3rd ed. 2004).

*Tee-Hit-Ton* was the first Supreme Court decision to explicitly hold that extinguishment of an aboriginal title claim does not necessitate compensation, but it was not the first Supreme Court opinion to recognize the difference between aboriginal and recognized land claims. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339-40 (1945). In *Shoshone*, the court differentiated between recognized and aboriginal title by stating, “we shall refer to the aboriginal usage without definite recognition of the right by the United States as Indian title.” *Id.* *Tee-Hit-Ton* is the culmination of federal jurisprudence holding that no constitutional obligation exists to compensate tribes for the extinguishment of aboriginal title.

When the Supreme Court has required compensation to extinguish aboriginal title, the tribe’s claim has been supported by a jurisdictional act of Congress. In *United States v. Alcea Band of Tillamooks*, the Court granted compensation for a taking of aboriginal title in favor of the Tillmook tribe. 329 U.S. 40, 51 (1946). The Court’s reasoning explicitly relied on the jurisdictional statute to justify compensation for aboriginal title: “[I]n the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title.” *Id.* In his concurrence, Justice Black stated:

Before Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or equitable obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded.

*Id.* at 54. If not for the jurisdictional act, the Tillamooks would not have been compensated. The only cases in which federal courts have required payment for the termination of aboriginal title, outside of Non-Intercourse Act cases, have required a jurisdictional statute as described above. Without such a statute, the circuit court erred under *Tee-Hit-Ton* precedent

by concluding that compensation was required to effectuate termination. *Tee-Hit-Ton*, 348 U.S. 272, 279 (1955).

**B. CONGRESSIONAL INTENT TO EXTINGUISH ABORIGINAL TITLE WAS EXPRESS AND UNAMBIGUOUS AS EVIDENCED BY THE OREGON DONATION LAND ACT AND SUBSEQUENT CONVEYANCE OF THE LAND PATENT TO THE MEEKS**

**1. CONGRESS INTENTIONALLY EXTINGUISHED ABORIGINAL TITLE THROUGH THE OREGON LAND DONATION ACT**

The purpose of the Oregon Donation Land Act was to open up Oregon land to settlement by granting fee simple land patents to homesteaders. Consequently, the Oregon Donation Land Act demonstrated Congress's unambiguous intention to extinguish aboriginal title. Aboriginal title cannot be extinguished but for "an express and unambiguous act of Congress." Felix S. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW*, 1022 (Nell Jessup Newton et al. eds., 2005).

While Respondent will argue the Oregon Donation Land Act lacked the explicit and unequivocal language required to extinguish the Cush-Hook Nation's aboriginal title, one need only to look at the purpose and affect the Act had upon the land in controversy. *Delaware Nation v. Pennsylvania*, 446 F.3d 410, 417 (3d Cir. 2006) (The intent to extinguish aboriginal title must be "plain and unambiguous" based on either the face of the instrument or surrounding circumstances) (citing *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 (2d Cir. 2004)).

The Act's purpose, opening up the land for white settlement, indicates a clear congressional intent to extinguish aboriginal title. Indeed, the now controverted land would not have been opened for settlement unless the federal government intended to convey fee simple title to homesteaders. If the federal government had intended otherwise, the patents issued to the homesteaders would have been subject to the Cush-Hook Nation's right of

occupancy. *Beecher v. Wetherby*, 95 U.S. 517 (1877). The patents granted to the homesteaders were not subject to any such encumbrance.

Moreover, in *United States v. Gemmill*, the court determined that, “[t]he relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights, not whether the revocation was effected by permissible means.” 535 F.2d 1145, 1148 (1976). Here, it is clear that Congress intended to revoke the Cush-Hook Nation’s aboriginal title because the implementation of the Oregon Donation Land Act could have had no other result. Respondents may contend that the Act lacked express language extinguishing aboriginal title. Since the Act conveyed land patents in fee simple to homesteaders, it was clearly intended to destroy any right of occupancy the Cush-Hook Nation had to the land in controversy. Furthermore, express language is not required when the intent can be inferred from the circumstances surrounding the Act’s passage and implementation. *Seneca Nation of Indians*, 382 F.3d 245, 260 (2d Cir. 2004).

Similarly, courts have determined that the federal government can extinguish a tribe’s aboriginal title by opening the land in question for settlement. *United States v. Ashton*, 170 F. 509 (1909). In *Ashton*, the Washington Court of Claims held that the aboriginal title of the Puyallup Tribe “was terminated by the act of Congress creating the Oregon Territory, and the Act of September 27, 1850, familiarly known as the ‘Oregon Donation Law,’ because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon.” *Id.* at 513. The *Ashton* case is most similar to the present case because both involve the interpretation of the Oregon Donation Land Act as it relates to the aboriginal title held by the Indian Tribes affected by the Act. Additionally, other cases have determined that “[e]xpress governmental permission to whites

to enter upon or settle land previously held by Indians by aboriginal title has been viewed as extinguishing such aboriginal title.” IRREDEEMABLE AMERICA 77 (Imre Sutton ed. 1985) (citing *Buttz v. Northern Pac. R.R.*, 119 U.S. 55 (1886); *Marsh v. Brooks*, 55 U.S. 513 (1853); *United States v. Atlantic Richfield*, 435 F. Supp. 1009 (DC Alaska, 1997); *United States v. Northern Paiute Nation*, 490 F.2d 964 (1974)).

However, not all claims for aboriginal title can be extinguished by legislation that opens up tracts of land for homesteader settlement. For example, courts have determined that “even if the aboriginal title areas of these [Indians] were open to entry, it does not automatically follow that Indian title was destroyed prior to actual entries upon various tracts of land.” *United States v. Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 660 (1975). But, the purpose of the legislation at issue in *San Ildefonso* is distinct from the present case because the legislation enacted by Congress in *San Ildefonso* was merely a survey of lands in anticipation of future white settlement. It was not a homesteading act like the case at bar, therefore its rule is not applicable.

Furthermore, the court stated, “[m]aking lands available for white settlement could, of course, in an appropriate factual context, constitute termination of aboriginal ownership.” *Id.* Here, the “appropriate factual context” does exist because, as elaborated in *Ashton*, the Oregon Donation Land Act was more than an anticipatory survey of lands; homesteaders actually moved onto the land, thereby extinguishing aboriginal title.

## **2. CONGRESS INTENTIONALLY EXTINGUISHED ABORIGINAL TITLE THROUGH THE CONVEYANCE OF THE LAND PATENT TO THE MEEKS**

Assuming arguendo that congressional intent to extinguish aboriginal title was not conclusively established through the passage of the Oregon Donation Land Act, the federal government’s intentional grant of fee simple title to the Meeks is proof of Congress’s

unambiguous intent to extinguish aboriginal title. The nature of the land interest conveyed, *fee simple*, is further evidence of the federal government's unequivocal intent to extinguish aboriginal title.

Federal courts have held that lawful conveyances of patent land by Congress can satisfy the requisite intent to extinguish aboriginal title. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands, said the court. The land patent issued to the Meeks by the United States was fee simple and did not reserve any right of aboriginal occupancy. *Buttz*, 119 U.S. 55 (1886). In *Buttz*, Congress granted a land patent to a railroad company for a right-of-way subject to an Indian right of occupancy. *Id.* at 58. Congress was supposed to extinguish the Indian right of occupancy "as rapidly as might be 'consistent with public policy and the welfare of said Indians.'" *Id.* The *Buttz* court held that because Indian right of occupancy was reserved and no act of Congress had since extinguished it, the fee title held by the petitioner was subject to the Indian right of occupancy. This case is distinguished from *Buttz* on two grounds.

First, the Cush-Hook tribe did not occupy the land in controversy at the time of the lawful conveyance, and the federal government did not convey the land with a reservation of an aboriginal right of occupancy in the Cush-Hooks. Neither the Meeks nor the government had reason to believe a right of occupancy should vest in the Cush-Hooks. Unlike the *Buttz* case, this conveyance was a fee simple grant of land to homesteaders, not a land grant for a railroad company right-of-way. Second, and most importantly, even if the Cush-Hook tribe had occupied the land at the time of conveyance, which they did not, the federal government would still retain the power to grant fee simple title to the homesteaders despite Indian

presence on the land. *Clark v. Smith*, 38 U.S. 195, 201 (1839); *Meigs v. M'Clung's Lessee*, 13 U.S. 11, 16 (1815); *Fletcher v. Peck*, 10 U.S. 87, 139, 142 (1810).

The Oregon Circuit Court erred in its determination that the Meek's failure to fulfill the prescribed requirements rendered the land patent void. In *Pechanga Band of Mission Indians v. Kacor Realty, Inc., et al*, the Ninth Circuit Court of Appeals held that the issuance of a land patent to a white settler, even though fraudulently obtained, renders a patent voidable and not void. 680 F.2d 71 (9th Cir. 1982). Unlike a void<sup>2</sup> patent, a voidable<sup>3</sup> patent is valid until it is annulled by one of the parties to the contract. When the land patent was issued, there were only two parties to the contract—the United States and the Meeks. Under the Ninth Circuit's standard for land patent contract interpretation, only the United States and the Meeks have the ability to cancel the land patent contract. Since neither party instituted a proceeding to do so, the land patent remains valid.

A long line of federal case law supports the notion that patent title in the hands of a subsequent bona fide purchaser cannot be attacked, even if the patent was originally fraudulently obtained. *Clark*, 38 U.S. 195, 201 (1839); *Meigs*, 13 U.S. 11, 16 (1815); *Fletcher*, 10 U.S. 87, 139, 142 (1810). This is an important principle in federal property law because it promotes certainty in the conveyance of land patents. A bona fide purchaser, such as the State of Oregon, has no reason to believe the land patent was obtained fraudulently and if every purchaser of property was threatened with the loss of property from actions over a hundred years prior, the system would lack. There was no evidence presented indicating

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<sup>2</sup> According to BLACK'S LAW DICTIONARY (9th ed. 2009), void means "of no legal effect; null. The distinction between void and voidable is often of great practical importance. Whenever technical accuracy is required, void can be properly applied only to those provisions that are of no effect whatsoever — those that are an absolute nullity."

<sup>3</sup> Voidable means "valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that may be ratified." *Id.*

fraud on the Meeks' behalf, and if the federal law preserves title for bona fide purchasers of fraudulently obtained land, this situation falls well within the coverage of this rule. The state of Oregon is a bona fide purchaser of the Kelley Point Park land, and under federal law its purchase from the Meeks is immune to a claim against the validity of the Meeks land patent issued over 100 years ago.

## **II. OREGON'S STATUTE OF LIMITATIONS, THE TRIBE'S ABANDONMENT OF THE LAND, AND THE USE OF THE LAND AS A STATE PARK PREVENT THE CUSH-HOOK FROM CLAIMING ABORIGINAL TITLE TO THE LAND IN COTROVERSY**

The Cush-Hook's claim for aboriginal title, notwithstanding extinguishment, is barred for three additional and equally important reasons. First, Oregon's statute of limitations bars any claims on land patents issued by the United States ten years after date of issuance. Second, the Cush-Hooks cannot claim aboriginal title because the tribe abandoned the land in controversy when the tribe voluntarily relocated to the coast range. Third, Oregon used the land to create a state park, and analogous federal cases have found that the use of land for conservation purposes bars aboriginal title claims against the land.

### **A. OREGON'S TEN-YEAR STATUTE OF LIMITATIONS BARS THE CUSH-HOOK'S ABORIGINAL TITLE CLAIM**

The Oregon statute of limitations bars any claim brought more than ten years after the date that the original patent was issued by the United States or Oregon. O.R.S. § 12.040. The challenge to the validity of the Meeks' land patent has been asserted over one hundred years after the date of issuance, and thus the claim is barred by Oregon's statute of limitations.

Federal courts have historically declined to apply state statutes of limitations to aboriginal title claims. However, cases following this line of precedent can be distinguished from the present fact scenario because they involved state acquisition of tribal land in

violation of the Non-Intercourse Act. *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (2d Cir. 1980); *County of Oneida v. Oneida Nation*, 470 U.S. 226 (1985); *Oneida Nation of Wisconsin v. State of New York*, 691 F2d 1070 (2d Cir. 1982). In these cases, the courts chose to bar otherwise applicable state statute of limitations because the state illegally extinguished aboriginal title in violation of the Non-Intercourse Act. *County of Oneida*, 470 U.S. 226, 241 (1985). Federal courts suspended state statutes of limitations because it was unjust to allow the states to use their laws to effectuate actions contrary to federal policy.

Federal courts employing this line of reasoning relied on an estoppel argument. An estoppel argument against the application of the statute of limitations does not apply here because the federal government did not contravene federal law. Suspending the application of Oregon's statute of limitations does not make sense when the action at issue was sanctioned by the federal government, the only sovereign vested with the authority to extinguish aboriginal title.

The Cush-Hooks aboriginal title claim was not brought under the Non-Intercourse Act because the Kelley Point Park land was transferred *with* federal consent. Accordingly, case law barring the applicability of state and federal statute of limitation should not apply because the entity possessing fee simple title, the federal government, consented to the extinguishment of aboriginal title. Application of Oregon's statute of limitation does not conflict with federal policy.

## **B. THE CUSH-HOOKS ABANDONED THE LAND IN CONTROVERSY AND THEREFORE HAVE NO CLAIM TO ABORIGINAL TITLE**

The Cush-Hooks abandoned the land in controversy when the tribe voluntarily relocated to the coast range. Federal courts have long held that Indian rights of occupancy

can be extinguished by voluntary abandonment. *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917); *Buttz*, 119 U.S. 55, 69-70 (1886); *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932); *Indians of Fort Berthold v. United States*, 71 Ct. Cl. 308, 334 (Ct. Cl. 1930). Although forced relocations do not constitute abandonment. *United States ex rel. Haulpal Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941). If a tribe possesses land under aboriginal title, ceases to use and exclusively occupy the land, and such disuse is documented by clear and adequate proof, the land becomes property of the United States. *Quapaw Tribe of Indians v. United States*, 120 F. Supp. 283 (1954). Tribes that abandon land under the above circumstances lose their right to claim and assert full, beneficial interest and ownership to the land in controversy. *Id.*

The Cush-Hook Nation possessed the land in controversy under aboriginal title, the tribe ceased to use that land when it relocated to the coast range, and the tribe's relocation was well-documented (R.2). The Cush-Hooks moved their entire village to the coast range. *Id.* This move was not the typical pattern of occupying different villages. *Wichita Indian Tribe v. United States*, 696 F.2d 1378 (Fed. Cir. 1983). Unlike the tribe in *Wichita Indian Tribe v. United States*, the Cush-Hooks were not a wandering plains tribe. The Cush-Hook's had a permanent village, as documented by the visits of Lewis and Clark, and *subsequent* to the signing of the treaty; the Cush-Hooks chose to move to the coast range to avoid the encroaching white settlement. A similar situation also arose in *Buttz* where the Court held that aboriginal Indian title was extinguished when the tribe left their land for a reservation, even though such action occurred before the ratification of the treaty. 119 U.S. 55, 70 (1886). The Cush-Hooks were under no obligation to move, and the U.S. government did not force the move. The Cush-Hook treaty was eventually left un-ratified, and despite the

United States failure to compensate the tribe as provided in the terms of the treaty, the Cush-Hooks continued to reside on the coast range lands without making any attempt to return to the land in controversy.

### **C. THE LAND IN CONTROVERSY'S SUBSEQUENT USE AS A STATE PARK BARS ANY ABORIGINAL TITLE CLAIMS**

If the Cush-Hook's aboriginal title was not extinguished by congressional intent, the Oregon statute of limitations, or the Cush-Hook's abandonment, then the creation of Kelley Point Park extinguished the Cush-Hook Nation's aboriginal title to the land in controversy. Courts have determined that the designation of a forest reserve, along with their continuous use thereafter for purposes of conservation and recreation, can extinguish aboriginal title to the lands. *United States v. Gemmill*, 535 F.2d 1145, 1148 (1976); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1386, 1391-1392 (1975).

In the present case, like *Gemmill*, Oregon created Kelley Point Park over 100 years ago. Since its creation, the land has been used for conservation and recreation purposes. Although forest reserves and state parks are not synonymous, the only practical difference is which sovereign is responsible for the creation of the respective reserve—states create state parks and the federal government creates federal forest reserves. Both state parks and forest reserves are created to preserve natural resources. This similarity in purpose compels the application of the *Gemmill* and *San Ildefonso* rule to the present circumstances.

## **II. BECAUSE OREGON STATE LAW PROHIBITS THE DAMAGE AND REMOVAL OF AN ARCHAEOLOGICAL OBJECT FROM PUBLIC OR PRIVATE LAND, THE RESPONDENT'S ACTIONS WERE IN VIOLATION OF THE LAW**

Oregon has criminal jurisdiction to control the use and protect the archaeological objects (tree carvings) located within Kelley Point Park because the land in question is

owned by the state of Oregon. Because the Cush-Hooks are federally recognized nor does the tribe meet the statutory definition under O.R.S. § 97.740.

**A. THE CIRCUIT COURT CORRECTLY FOUND THAT RESPONDENT VIOLATED OREGON STATE LAW WHEN HE CUT DOWN AND REMOVED THE ARCHAEOLOGICAL OBJECT**

Respondent violated Oregon Statute § 358.920 when he cut down and removed an archaeological monument from Kelley Point Park without a permit. O.R.S. § 358.920 provides that, “A person may not excavate, injure, destroy, or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under O.R.S § 390.235.” O.R.S. § 358.920. The four statutory requirements are require (1) an archaeological object (2) excavated, injured, destroyed, or altered (3) on public or private lands (4) by an individual without a permit. Respondent’s actions meet all four statutory requirements for conviction.

The first requirement is that the object in question meets the definition under O.R.S. § 358.905 for an archaeological object. O.R.S. § 358.905 defines an archaeological object as an object that:

(A) Is at least 75 years old; (B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and (C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.”

The tree carvings are archaeological objects within the meaning of the definition because they were completed over a hundred years ago, the carvings are physical record of an indigenous culture as documented in the Lewis and Clark journals, and the carvings can be considered monuments or symbols representing the material remains of past human life in the area.

The second requirement is that the archaeological object was excavated, injured, destroyed, or altered. Respondent cut down the archaeological object. Cutting down the tree destroyed its status as a monument, injured the tree by killing it, and altered the monument by removing the portion of the carving from the tree.

The third requirement, from public or private lands, makes this statute applicable regardless of the controverted aboriginal title claim. The Respondent is a citizen of the United States, and he was committing an act in violation of state law on state land. Thus, if the act was committed on public land, he would be subject to O.R.S. § 358.920. Assuming *arguendo* that aboriginal title was preserved and the Cush-Hook's hold a right of occupancy over Kelley Point Park, this statute still applies under the "public or private land" language. See O.R.S. § 358.920.

The fourth requirement allows a person to excavate or alter an archaeological site on public lands if the person has obtained a permit. The permit requirement under O.R.S. § 390.235 provides that "a person may not excavate or alter an archaeological site on public lands . . . or remove from public lands any material of an archaeological . . . nature without first obtaining a permit issued by the State Parks and Recreation Department."

The Respondent may contend that the pertinent Oregon Statutes do not apply to him because he is a member of the Cush-Hook Nation and therefore he was acting on behalf of the tribe when he removed the archaeological object. However, as defined in O.R.S. § 97.740, "Indian tribe" means any tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act or listed in the Western Oregon Indian Termination Act. The Cush-Hook Nation is not mentioned in either of the aforementioned acts, nor has

the Secretary of the Interior recognized them (the Cush-Hook Nation is not on the list of federally recognized tribes). R. 2.

Respondent may assert that the President Thomas Jefferson peace medal they received from Lewis and Clark demonstrates that they have been recognized. However, the peace medals they received were ceremonial and did not operate as token of official federal recognition. The statute provides that the Secretary of the Interior must recognize the tribe for it to be considered an “Indian tribe,” but the first Secretary of the Interior did not take office until 1849. Therefore, the Cush-Hook Nation does not meet the definition of an Indian tribe under O.R.S. § 97.740(4).

**B. THE CIRCUIT COURT ERRED WHEN IT FOUND RESPONDENT NOT GUILTY FOR TRESPASS OR FOR CUTTING TIMBER WITHOUT A STATE PERMIT**

For the reasons outlined in Issue I, the federal government effectively extinguished the Cush-Hook Nation’s aboriginal title to the land within present-day Kelley Point Park. The Oregon Circuit Court found Respondent not guilty for trespass and for cutting timber without a state permit because it determined that the Cush-Hook Nation still owned the land within the Park. However, since the tribe does not own the land, 18 U.S.C. § 1162 (more commonly known as PL 280) does not apply here because the criminal act occurred on state owned land and, as a result, the Oregon Circuit Court should have prosecuted Respondent under Oregon law. Applying Oregon law, Respondent should have been found guilty for trespass because he was trespassing on state land when he was living within Kelley Point Park. Also, Respondent should have been found guilty for cutting timber without a state permit because he did not obtain a permit as outlined in O.R.S. § 390.235 before cutting down the trees.

## CONCLUSION

The Cush-Hook Nation's aboriginal title was extinguished Congress passed the Oregon Donation Land Act and conveyed fee simple title to the Meeks. The Oregon Donation Land Act was an unambiguous expression of Congress's intent to extinguish aboriginal title because the Act purposefully opened Oregon lands to homestead settlement. The federal government's conveyance of fee simple title to the Meeks further solidified the requisite unambiguous congressional intent to extinguish aboriginal title. Furthermore, the Meeks' failure to fulfill the statutory requirements rendered the land patent voidable, meaning only the Meeks and the federal government object to the conveyance of the land patent. Finally, Oregon was a bona fide purchaser, and federal law has protected bona fide purchasers from a previous fraudulent conveyance of a land patent in the title record.

The Oregon Circuit Court erred when it concluded that the Cush-Hook Nation retained its aboriginal title to the land in controversy because the court was precluded from making such a determination under Oregon's ten-year statute of limitations for land patents. Additionally, the Cush-Hook Nation cannot reassert aboriginal title over the controverted land because the tribe abandoned the land when it relocated in 1850. Furthermore, the state of Oregon used the land in controversy to create a state park and application of analogous federal law prevents the Cush-Hook Nation's from asserting an aboriginal title claim against the land. For the foregoing reasons, the Cush-Hooks do not retain aboriginal title to the land and the Oregon Circuit Court's determination should be overruled.

In regards to the prosecution of the Respondent for violation of state law, the Oregon Circuit Court correctly found Respondent guilty for damaging an archaeological object under

the terms of the statute. For the foregoing reasons, Respondent's conviction under § 358.920 should be upheld.