No. 11-0274

In the Supreme Court of the United States

JOHN KITZHABER, in his capacity as Governor of the State of Oregon, STATE OF OREGON,

Petitioners,

v.

THOMAS CAPTAIN,

Respondent and cross-petitioner.

On Writ of Certiorari to the Court of Appeals for the State of Oregon

BRIEF FOR PETITIONER STATE OF OREGON

TEAM 34
Counsel for Petitioner
State of Oregon

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QUESTIONS PRESENTED

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

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

I. Statement of the Proceedings

The State of Oregon charged Thomas Captain with trespass, cutting timber in a state park without a permit, and desecrating an archaeological and historical site. The Oregon Circuit Court for the County of Multnomah found Captain not guilty for trespass or for cutting timber without a state permit, holding that the Cush-Hook Nation owned the land in question under aboriginal title. But the court found Captain guilty for violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* for damaging an archaeological site and a cultural and historical artifact, holding that state law applies to all lands in the State of Oregon. The court fined Captain $250.

The State appealed the decision regarding trespass and cutting of timber. Captain appealed the decision regarding the damaging of an archaeological site and a cultural and historical artifact. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review.

The State filed a petition and cross petition for certiorari, and Captain filed a cross petition for certiorari to the United States Supreme Court. Certiorari was granted.

II. Statement of the Facts

The Cush-Hook Nation, a non-federally recognized group of Indians, occupied the region of land now encompassing Kelley Point Park since time immemorial until 1850. Record ("R.") at 1. The Nation lived on the lands, harvesting crops and hunting and fishing on the lands. *Id.* The Nation maintained a permanent village on the land until they relocated. *Id.*

In 1806, Lewis and Clark discovered the Cush-Hook Nation during their expedition. Clark visited the village and met the headman/chief of the Nation. *Id.* Clark recorded his observations regarding the Cush-Hook government and its religious and cultural practices. *Id.* Clark gave the headman/chief a "peace medal"—also known as a "sovereignty token"—as acknowledgement of the Nation's potential desire to engage in political and commercial relations with the United States in the future. *Id.*

Subsequent to Lewis and Clark's discovery of the Cush-Hook Nation, Anson Dart, superintendent of Indian Affairs for the Oregon Territory, negotiated a treaty with the Nation in which it agreed to relocate sixty miles to the west. *Id.* at 3. The Nation signed the treaty in 1850, but the Senate decided not to ratify the treaty. *Id.* at 2. The Nation relocated to the agreed upon lands to the west, despite no legal obligation to do so since the Senate never ratified the treaty. *Id.* The Nation did not receive compensation for the lands they left and Congress never federally recognized it as a tribe because the treaty never became law. *Id.* at 3. Furthermore, to this day, the United States has not taken any steps to federally recognize the Nation. *Id.* at 2.

Congress passed the Oregon Donation Land Act in 1850, which gave every qualified white setter a possessory title to a parcel of land, which vested in the settler as fee simple title upon completion of a four-year residence and cultivation requirement. 9 Stat. 496 (1850); R. at 2. Joe and Elsie Meek claimed possessory title to a parcel of land under the Donation Act and applied for fee simple title. R. at 3. The United States granted fee simple title to the Meeks despite their failure to cultivate and live on the land for the required four years. *Id.* For thirty years, the fee simple title passed on to the Meeks' descendants. In 1880, the Meeks' descendants sold their title to the State of Oregon, which created Kelley Point Park.

Id. at 2. For the past one hundred and thirty years, the State has operated the Park for the benefit of its citizens.

In 2011, Thomas Captain, a citizen of the Cush-Hook Nation, trespassed onto the Park to reassert the Nation's ancient ownership of the land and to preserve culturally and religiously significant trees within the Park. *Id.* at 3. The trees contain sacred totem and religious symbols carved by tribal shamans/medicine men, a practice that Clark noted in his journals in 1806. *Id.* at 2. Recently, other vandals have defaced the images or cut down the trees. *Id.* Captain trespassed onto state land to cut down a tree and remove the section of the tree that contained the tribal image, violating state laws prohibiting trespass, cutting of timber without a permit, and desecrating an archaeological and historical site. *Id.* at 3. As he was returning to his Nation's lands to the west, state troopers arrested him and seized the image. *Id.* at 2.

SUMMARY OF ARGUMENT

The Cush-Hook Nation once held aboriginal title to the land now known as Kelley Point Park, but the Nation's aboriginal title was extinguished in three ways. First, the cumulative effect of historical events—including the Lewis and Clark expedition, Manifest Destiny, the treaty negotiation, and the Donation Act—extinguished its title. Second, the government's exercise of complete dominion adverse to the Nation's right of occupancy extinguished its title. And third, the Nation's abandonment of the land after the treaty signing but before ratification extinguished its title.

The lower courts held that the Cush-Hook Nation's aboriginal title was not extinguished because the treaty was not ratified and the Nation did not receive compensation for extinguishment. But there are other ways to extinguish title besides through treaties, and

compensation is not required to extinguish aboriginal title, regardless of whether the title was recognized. Captain's possessory claim to the land within Kelley Point Park cannot stand because of the inequitable consequences of such a holding: the State received fee title to the land in question one hundred and thirty years ago and the Nation failed to bring a possessory claim until now; the State has invested time, money, and resources into the Park; and the State's citizens rely on the Park for conservation and recreational purposes. Because of the circumstances surrounding the State's title, the equitable doctrine of laches bars Captain's claim to ownership of the lands.

The State of Oregon owns the land at issue. Congress gave possessory title to white settlers under the Donation Act, which is different from the fee simple title the United States granted to the Meeks. This fee simple title was not void *ab initio* despite the fact that the Meeks failed to fulfill the requirements set forth in the Donation Act. This Court has held that the United States could bring a claim to void the title, but it has not done so, and until it does, the legality and validity of the title must be upheld. Therefore, the State has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on its land.

ARGUMENT

Lower courts' findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed *de novo*. The lower courts' finding of fact that the Cush-Hook Nation held aboriginal title since time immemorial must be reviewed for clear error. *E.g.*, *Six Nations v. United States*, 173 Ct. Cl. 899 (1965) (explaining that decisions regarding whether aboriginal title existed must be upheld on appeal if substantial evidence exists to support that finding). The lower courts' conclusions of law regarding: extinguishment of the

aboriginal title; the status of the grant of fee simple title to the Meeks and the subsequent transfer of title to the State; and the State's criminal jurisdiction must be reviewed *de novo*. "A de novo proceeding is one that starts fresh, on a clean slate, without regard to prior proceedings and determination." *Mayer v. Montgomery Cnty.*, 794 A.2d 704, 716 (Md. Ct. Spec. App. 2002).

I. The Cush-Hook Nation Does Not Possess Aboriginal Title to the Land Within Kelley Point Park Because It Was Extinguished.

The first issue on appeal is not whether the Cush-Hook Nation had aboriginal title in the past but whether the aboriginal title has been extinguished. "In order for an Indian claimant to prove aboriginal title, '[t]here must be a showing of actual, exclusive and continuous use and occupancy "for a long time" prior to the loss of the land.'" *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (quoting *Confederated Tribes of the Warm Springs Reservation v. United States*, 177 Ct. Cl. 184, 194 (1966)). Admittedly, the testimony of the expert witnesses in history, sociology, and anthropology heard below adequately supports the fact that the Cush-Hook Indians acquired aboriginal title to their lands when Lewis and Clark encountered them, *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835), but since that first encounter the title has been extinguished.

A. There Are Several Ways to Extinguish Aboriginal Title.

The lower courts erred in concluding that the Cush-Hook Nation's aboriginal title has not been extinguished. The courts based their conclusion on the assumption that *Johnson v. M'Intosh* required the United States to ratify the treaty negotiated with the Nation and compensate the Nation in order to extinguish its aboriginal title. 21 U.S. (8 Wheat.) 543 (1823); R. at 3–4. While it is true that treaty ratification and compensation are ways to extinguish aboriginal title, they are not the only methods of extinguishment. "As stated by

Chief Justice Marshall in *Johnson v. M'Intosh*, . . . 'the exclusive right of the United States to extinguish' Indian title has never been doubted . . . whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)) (italics added). The only element required for extinguishment of an unrecognized aboriginal title is express and unambiguous congressional intent. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289 (1955) (discussing that extinguishing unrecognized title does not require compensation); *Santa Fe Pac. R. Co.*, 314 U.S. at 346. But the courts below failed to acknowledge that congressional intent does not have to occur through one specific and obvious congressional act; it can take several forms. Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L.J. 391, 418 (1985–86). *See also* William C. Canby, Jr., American Indian Law in a Nut Shell 413 (5th ed. 2009) (discussing a variety of cases involving the methods of extinguishment); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 462 (7th Cir. 1998) (extinguishing aboriginal title through the creation of a reservation in a treaty); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976) (extinguishing aboriginal title through the use of the land in a manner that was inconsistent with tribal occupancy). "[E]xtinguishment need not be accomplished by treaty or voluntary cession. The 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." *Gemmill*, 535 F.2d at 1148.

In this case, the Nation's aboriginal title was extinguished by three separate means: when the cumulative historical circumstances made Congress's intent to extinguish

aboriginal title clear; when Congress practiced complete dominion adverse to the Cush-Hook Nation's right of occupancy; and when the Nation abandoned the land before Congress ratified the treaty.

1. The Cush-Hook Nation's Aboriginal Title Was Extinguished When the Cumulative Historical Circumstances Made Clear Congress's Intent to Extinguish Aboriginal Title.

The Court has recognized ways aboriginal title may be extinguished other than through explicit executive or congressional acts. "[T]he policy of the United States has always been to extinguish aboriginal title, and the courts, by viewing the cumulative effect of the government's actions, have found extinguishment." Flushman & Barbieri at 419 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623 (1970)). In this case, the intent to extinguish became apparent through "attendant historical circumstances." American Indian Law Deskbook 47 (Second Edition, Joseph P. Mazurek et al. eds., 2d ed. 1998). The goal of the Lewis and Clark expedition, the authorization for treaty negotiations, and the Donation Act collectively amount to clear and unambiguous congressional intent to extinguish the Cush-Hook Nation's aboriginal title.

Even before the Court declared that the Doctrine of Discovery was American law, President Thomas Jefferson was well aware of the Doctrine's significance. Robert J. Miller, Native America, Discovered and Conquered 59 (Bruce E. Johansen ed., 2006) [hereinafter Discovered and Conquered]. Jefferson knew that if the United States was the first nation to establish a presence in the Northwest, fee title to lands occupied by Indians at the time of discovery vested in America, subject only to the Indians' right to occupancy. *Johnson*, 21 U.S. (8 Wheat.) at 574. "They were admitted to be the rightful occupants of the soil . . . [but] 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." Jefferson's vision of a continental American empire relied upon the United States gaining the power of preemption, which is "the sole right to buy the land from the native people." Discovered and Conquered at 3. Marshall indicated in *Johnson* that Indian tribes needed to consent to purchase and better defined consent in *Cherokee Nation* and *Worcester*. *Johnson*, 21 U.S. (8 Wheat.) at 587; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (5 Pet.) 515, 541 (1832). But since *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), this Court has held that "Congress had the power to take tribal property without the consent of the tribe and in violation of treaty promises." Cohen's Handbook of Federal Indian Law § 15.09[1][a], at 1052 (Nell Jessup Newton ed., 2012).

In order to fulfill his goal, Jefferson dispatched the Lewis and Clark expedition in 1803. Discovered and Conquered at 99. Jefferson intended for Lewis and Clark's expedition to apply the principles of Discovery to the Pacific Northwest, allowing for the expansion of America. This expansion would later be termed "Manifest Destiny." It was the specific intention that Manifest Destiny would extinguish Indian rights to occupancy. Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 Wyo. L. Rev. 329, 336 (2011) (citing Discovered and Conquered at 28, 39–40, 45–46, 86–90 (discussing George Washington's comparison of American Indians to animals and their eventual retreat from inevitable American expansion and Thomas Jefferson's plans for Indian removal and assimilation to accommodate American expansion)). This fate became certain after the Lewis and Clark expedition, which "ensured that a wave of American expansion would sweep over the indigenous peoples and tribes." Discovered and Conquered at 108. Therefore, as far back as the early 1800s, the intent of the U.S. government was for American

expansion and extinguishment of aboriginal title to the lands of the Pacific Northwest, including the Kelley Point Park area.

The Oregon Territory became part of the Union in 1848. *Id.* at 156. Two years later, Congress enacted the Oregon Land Donation Act to encourage white settlement. Ralph James Mooney, *Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West*, 63 Wash. L. Rev. 317, 322–25 (1988). As the court below concluded, the Donation Act described all lands within the Oregon Territory as "the public lands of the United States," even though some Indian titles had not been extinguished yet. R. at 3. However, this was not an error by Congress. Instead, this description shows Congress's intent to apply the elements of Discovery to the Oregon Territory, with the goal of extinguishing aboriginal title. Discovered and Conquered at 157. After Congress made the Donation Act law, it began to extinguish Indian aboriginal title through treaty negotiations. *Id.* at 158; *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 43 (1946).

Congress's decision to authorize treaty negotiations for the extinguishment of aboriginal title, which occurred in the Act of June 5, 1850, is another historical event that proves extinguishment of the Cush-Hook Nation's title. 9 Stat. 437 (1850). Contrary to the lower courts' finding, it is irrelevant that Congress never ratified the treaty Anson Dart negotiated with the Cush-Hook Nation because "[t]he decision to commission agents to negotiate treaties that were intended to cause the removal of Indians from their aboriginal lands to reservations set aside for their occupation is, in itself, an expression of congressional intent to extinguish aboriginal title." R. at 3–4 ("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 ratified the treaty and to compensate the Cush-Hook Nation for its land."); Flushman & Barbieri at 440.

Congress failed to ratify treaties with several tribes.[1] "The ultimate effect on these Indian Nations was that they lost their lands and theirs rights anyway and without receiving any compensation."[2] Discovered and Conquered at 158. In *Chinook Tribe v. United States*, the Chinook tribe signed a treaty, which was never ratified by Congress. 6 Indian Cl. Comm'n 177 (1958). Nevertheless, the Claims Commission found that the tribe's title had been extinguished because the United States had deprived the Chinook Indians of their aboriginal lands. *Id*. The same events occurred in this case. The Cush-Hook Nation signed a treaty with Anson Dart that was never ratified by Congress. R. at 3. However, even in the absence of ratification, the government took over the area previously held under aboriginal title through the Donation Act and deprived the Cush-Hook Indians of the land.

Congress's intent to extinguish the Cush-Hook Nation's aboriginal title may not have been clear and unambiguous through a ratified treaty, but it is clear and unambiguous when one examines the circumstances that have occurred over the last two hundred years. Thus, the Lewis and Clark expedition, the effect of Manifest Destiny, the treaty negotiations with Anson Dart, and the Donation Act cumulatively amount to extinguishment, regardless of the failure of the Senate to ratify the treaty.

[1] Dart negotiated ten treaties with Western Oregon tribes and three treaties with Southwest Oregon Tribes. Congress did not ratify any of these treaties. Discovered and Conquered at 158.

[2] Some of the tribes who were parties to unratified treaties were compensated later through acts of Congress or subsequent ratified treaties. *See Alcea Band of Tillamooks v. United States*, 59 F. Supp. 934 (Ct. Cl. 1945) *aff'd*, 329 U.S. 40 (1946).

2. The Cush-Hook Nation's Aboriginal Title Was Extinguished When Congress Practiced Complete Dominion Adverse to the Nation's Right of Occupancy.

As stated by this Court in *United States v. Santa Fe Pacific Railroad Co.*, the United States can extinguish aboriginal title "by the exercise of complete dominion adverse to the right of occupancy." 314 U.S. 339, 347 (1941). The Ninth Circuit Court of Appeals cited *Santa Fe* and held that "[t]he continuous use of the land to the present time for the purposes of conservation and recreation, after the Indians had been forcibly expelled, leaves little doubt that Indian title was extinguished." *Gemmill*, 535 F.2d at 1149 (citing *Pueblo of San Ildefonso*, 513 F.2d at 1386, 1391–92, which held that "the designation of land as a forest reserve is itself effective to extinguish Indian title"). The court found that a "century-long course of conduct" indicated complete dominion over the land, which was adverse to acknowledgement of aboriginal title. *Id.* This adverse conduct revealed the federal government's intent to extinguish aboriginal title. The court ruled in favor of extinguishment, even though one act reviewed in isolation would not have been sufficient for extinguishment. *Id.*

In *Uintah Ute Indians v. United States*, the U.S. Court of Federal Claims dismissed a tribe's claim for failure to prove current possession of aboriginal title. 28 Fed. Cl. 768, 789 (1993). The court stated that a "sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title. . . . Without actual and continuous Indian use, . . . the court cannot find aboriginal possession." *Id.* at 787. Thus, the government's establishment of a military fort, its official inauguration, and expansions made to the fort constituted "dominion adverse to Indian title." *Id.*

In this case, there has been more than a "century-long course of conduct" adverse to the existence of the Cush-Hook Nation's aboriginal title. Once the federal government acquired the land, it immediately allowed others to settle upon it. R. at 3. Requiring settlement and cultivation of the land in order for title to vest in the settlers under the Donation Act is directly adverse to aboriginal title. *See State v. Elliott*, 616 A.2d 210, 220 (Vt. 1992). In addition, the land has not been in the Nation's possession for over a hundred and fifty years, and the State has held title since 1880. R. at 2. The State has relied upon that title and currently operates a state park on the land for conservation and recreational purposes, which is adverse to an aboriginal right of occupancy. *See, e.g.*, *Gemmill*, 535 F.2d at 1149 ("The continuous use of the land . . . for the purposes of conservation and recreation . . . leaves little doubt that Indian title was extinguished."); *Pueblo of San Ildefonso*, 513 F.2d at 1386, 1391–92. For over a hundred and fifty years, the U.S. government (through the Donation Act) and the State of Oregon (through the operation of the state park) have exercised complete dominion adverse to the Cush-Hook Nation's aboriginal title to the land at issue.

3. The Cush-Hook Nation's Aboriginal Title Was Extinguished through Abandonment.

The Cush-Hook Nation abandoned its aboriginal title when the Nation relocated sixty miles to the west. R. at 1–2. Abandonment is one of the several ways aboriginal title can be extinguished, but it differs from the other forms of extinguishment because it does not require any action or intent from Congress. Through the Doctrine of Discovery, a tribe has the right to occupancy and the discovering nation has the right to transfer title. Since aboriginal title is based on "continuous use and occupancy," it is lost when the tribe ceases to occupy the land. *Pueblo of San Ildefonso*, 513 F.2d at 1394 (quoting *Confederated Tribes of*

the Warm Springs Reservation, 177 Ct. Cl. at 194); *Williams v. Chicago*, 242 U.S. 434, 437 (1917). "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. (19 Wall.) 591, 593 (1873).

The Court has recognized the extinguishment of aboriginal title through voluntary abandonment numerous times. In *Buttz v. Northern Pacific Railroad Co.*, the Court held that when the Indians relocated to the reservations set apart for them, the tribe gave up the occupancy of the other lands and "[t]he relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned." 119 U.S. 55, 69–70 (1886). While *Buttz* involved a ratified treaty and compensation, the Court still relied on the fact that the tribe abandoned their occupancy title and used the date of relocation—not the date of the treaty ratification—as the moment the aboriginal title was extinguished. *Id.*

In *Williams v. Chicago*, the Pottawatomie Nation ceded territory through a series of treaties and, subsequent to those treaties, migrated off the land they had originally occupied. 242 U.S. at 437. The Court characterized this migration as the tribe voluntarily abandoning its aboriginal title. *Id.* In *United States v. Fernandez*, the Court considered the validity of grants of land in East Florida and explained that the grants were subject to the Indian right of occupancy until that right ceased by cession or abandonment of the land by the Indians. 35 U.S. (10 Pet.) 303, 305 (1836).

In *United States v. Santa Fe Pacific Railroad Co.*, the Court distinguished forced removal from voluntary abandonment, saying the former was not a voluntary cessation under the meaning of an Act that dictated the ways in which extinguishment could occur in the

case. 314 U.S. 339, 358 (1941). But the Court held that the tribe's subsequent request for the creation of a reservation and acceptance of the offered reservation "amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment." *Id.*

In *Mitchel v. United States*, the Court defined Indian rights to occupation as encompassing the lands used for "their habits and modes of life." 34 U.S. (9 Pet.) 711, 746 (1835). The Court described the extent of those rights as,

> [T]heir rights to its exclusive enjoyment in their own way and for their own purposes . . ., until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians.

Id.

Abandonment must be voluntary, but the Court has not articulated factors to determine voluntariness beyond saying in *Santa Fe* that forced removal was not voluntary. *Santa Fe Pac. R. Co.*, 314 U.S. at 358. Black's Law Dictionary defines "voluntary" as "done by design or intention" or "[w]ithout valuable consideration or legal obligation." Black's Law Dictionary 1710–11 (9th ed. 2009). There is nothing to indicate that Anson Dart's negotiation with the Cush-Hook Nation and the Nation's subsequent relocation was "forced." The Indians had no obligation to leave the land until the negotiated treaty was ratified because only then did it become law. Instead of waiting for the treaty to be ratified, the Nation intentionally made the choice to relocate. While the Nation may have made that strategic choice to avoid conflicts with white settlers, it was a choice nonetheless. Thus, the Cush-Hook Nation voluntarily abandoned the lands now encompassing Kelley Point Park

when it relocated to the western foothills of the Oregon coast range of the mountains. R. at 2. This abandonment extinguished the Nation's aboriginal title.

The Cush-Hook Nation's aboriginal title was extinguished by three alternative means. First, Congress's intent to extinguish the title became clear through the accumulation of historic events. Second, the government extinguished the title by exercising complete dominion over the land adverse to the Nation's title. Third, the Nation's title was extinguished when it voluntarily left the land before Congress ratified the treaty. The fact that the Cush-Hook Nation did not receive compensation for the extinguishment of its aboriginal title does not prove that extinguishment did not occur.

B. Compensation Is Not Required for Extinguishment.

The Cush-Hook Nation's aboriginal title was extinguished even though it did not receive compensation. In *Tee-Hit-Ton Indians v. United States*, the Court held that compensation is not required for the extinguishment of an unrecognized title. 348 U.S. 272, 285 (1955). A title is recognized when Congress declares by treaty or agreement that the Indians will hold the land permanently. *Id.* at 277–78.

The Cush-Hook Nation did not make a treaty or agreement with Congress that stated it could reside in the Kelley Point Park area permanently. The "sovereignty tokens" given to the Nation by Lewis and Clark only identified tribes that were willing to engage in political and commercial relations with the United States. R. at 1. While Congress directed officials to negotiate a treaty with the Cush-Hook Nation, 9 Stat. 437 (1850), it refused to ratify that treaty. "An unratified Indian treaty is not evidence of governmental recognition of Indian title to lands described therein." *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States*, 87 Ct. Cl. 143, 153 (1938) (citing *Conley* v. *Ballinger*, 216 U.S. 84 (1910)).

Furthermore, the unratified treaty would have recognized the Nation's title to the land in the western foothills of the coastal mountains, not to the area in Kelley Point Park. Therefore, Congress did not recognize the Nation's aboriginal title.

Captain will rely on the unratified treaty, the sovereignty tokens, and the Organic Land Act of 1848, Organic Act of Oregon Territory, 9 Stat. 323 (1848), to argue that United States recognized the Nation's title, so compensation was required for extinguishment. But even if this Court concludes that the Nation's title was recognized, aboriginal title was still extinguished. Extinguishment occurs regardless of whether or not compensation owed to a tribe is paid.

In *United States v. Sioux Nation*, this Court held that the United States had "taken" lands on which the Sioux Nation held recognized title. 448 U.S. 371, 424 (1980). Instead of holding that the Sioux Nation still had title to these lands because it was not compensated, the court awarded the tribe the compensation it should have received when their title was extinguished. *Id.* ("That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid"). Like *Sioux Nation*, the Cush-Hook Nation may have a claim against the federal government for compensation, but that is not the issue presently before the Court. Today the issue is whether the Nation's title has been extinguished and that must be answered in the affirmative, regardless of whether or not the United States owes the Nation compensation.

C. The Cush-Hook Nation Does Not Have a Right to Re-Occupy Kelley Point Park Because Its Claim Is Barred by Laches.

Not only did the lower courts err in determining that the aboriginal title was not extinguished, it also erred in concluding that a member of the Cush-Hook Nation has a right to re-occupy the land because Captain's possessory claim is barred by laches.

In *County of Oneida v. Oneida Indian Nation* ("*Oneida II*"), the Court held that the tribe could pursue their claim for compensation "for a violation of their possessory right based on federal common law," but reserved "[t]he question whether equitable considerations should limit the relief available to the present day Oneida Indians." 470 U.S. 226, 236, 253, n.27 (1985) (hereinafter *Oneida II*). Even in this so-called "test case,"[3] the tribe did not seek the right to reenter the property; it only sought damages. *Oneida II*, 470 U.S. 226, 229 (1985). Later in litigation, the tribe did seek to amend the complaint to add the individual landowners as defendants. *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 67–68 (N.D.N.Y. 2000). The declaratory relief the tribe sought would have given them the right to eject the current landowners. *Id.* The district court refused to allow the landowners to be added as defendants, partly based on bad faith and undue delay on behalf of the Oneida Nation and partly based on equitable concerns. *Id.* at 79–85. The court stressed that allowing the tribe to eject current landowners had practical concerns that could not be overcome. *Id.* at 92. "Cases of this genre, the court observed, 'cr[ied] out for a pragmatic approach.'" *City of Sherrill*, 544 U.S. 197, 211 (2005) (quoting *Oneida Indian Nation*, 199 F.R.D. at 92). The court "transcended the theoretical" and held that the Oneida Nation could not add the current landowners to the complaint. *Oneida Indian Nation*, 199 F.R.D. at 93–95.

[3] *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 209 (2005).

It was unclear whether the laches defense applied to Indian possessory claims after *Oneida II* because the Court did not reach that issue. *Oneida II*, 470 U.S. 226, 227 (1985). But in *City of Sherrill v. Oneida Indian Nation*, the Court barred the Nation's claim for sovereignty on a piece of land it purchased within its historic reservation. 544 U.S. at 202. The Court held that the length of time since the taking, the delay in seeking equitable relief, and the developments in the area over many generations "evoke[d] the doctrines of laches, acquiescence, and impossibility" and rendered the relief sought inequitable. *Id.* at 221. Then, in *Cayuga Indian Nation v. Pataki*, the Second Circuit Court of Appeals applied the holding of *City of Sherrill* to a possessory claim based on aboriginal title. 413 F.3d 266 (2d Cir. 2005). The Court held that laches bars possessory claims that are disruptive. *Id.* at 274.

Caption is guilty of trespass for entering Kelley Point Park, *see* R. at 3, because allowing members of the Cush-Hook Nation to reenter the property would be disruptive and unfair to the State. Like *City of Sherrill* and *Cayuga*, the length of time since the taking, the delay in seeking equitable relief, and the developments in the area over many generations triggers the laches defense for the State. *City of Sherrill*, 544 U.S. at 202; *Cayuga Indian Nation*, 413 F.3d at 274. The United States acquired fee simple title over one hundred and sixty years ago, and the Nation is just now bringing a possessory claim. R. at 3. The State of Oregon received fee simple title from the Meeks well over one hundred years ago. *Id.* at 2. Over this length of time, the State has added value to the land by investing time, resources, and tax-payer money into the Park. The State and its citizens depend upon the Park for conservation and recreational use. Like the private landowners in *Oneida II*, the State of Oregon innocently purchased the land from the Meeks, and they have relied on the land as a state park ever since. By allowing the Cush-Hook Nation to claim a possessory right to

Kelley Point Park, the State will be punished for actions taken by the United States. In effect, the Court would be subjecting the State to the same situation that the Indians faced so many years ago. Unlike the State of New York in the series of *Oneida* cases, Oregon had nothing to do with this acquisition. *Id.* If this Court finds that the Cush-Hook Nation is entitled to anything, it must only be compensation from the United States for the extinguishment of its aboriginal title.

The State concedes that the Cush-Hook Nation once held aboriginal title to the land now known as Kelley Point Park, but that title was extinguished. A treaty is not required to extinguish aboriginal title. Congress's intent to extinguish the aboriginal title became clear and unambiguous through the cumulative effects of historical events and the government's exercise of complete dominion adverse to the Nation's right of occupancy. In addition, the Nation voluntarily abandoned the land before the signed treaty became law, thus losing its right to occupy the land.

The lower courts erred in holding that the Cush-Hook Nation continues to hold aboriginal title because the Nation did not receive compensation. R. at 3–4. Congress is not required to pay compensation when it extinguishes unrecognized aboriginal title. The Cush-Hook Nation's title was not recognized so no compensation was owed. *Id.* at 2. And even if this Court finds that the United States recognized the Nation's title, extinguishment still occurred, regardless of whether or not compensation was received.

Allowing Captain to argue that he has a possessory claim to the land within Kelley Point Park was an error by the lower courts. The consequences of this type of claim would be inequitable: the State received fee title to the land in question one hundred and thirty years ago and the Nation failed to bring a possessory claim until now; the State has invested time,

money, and resources into the Park; and the State's citizens rely on the park for conservation and recreational purposes. *Gemmill*, 535 F.2d at 1149; *Pueblo of San Ildefonso*, 513 F.2d at 1386, 1391–92. Therefore, the doctrine of laches bars Captain's argument that he has the right to reenter the Park based on aboriginal title.

II. The State of Oregon Has Criminal Jurisdiction to Protect and Control the Uses of Archaeological, Cultural, and Historical Objects Within Kelley Point Park.

A. The Activity Did Not Take Place Within Indian Country and the Cush-Hook Nation Is Not a Federally Recognized Tribe.

The first two questions to ask when determining whether a state has criminal jurisdiction in Indian law cases is whether the activity occurred in Indian country and whether the group is federally recognized as a tribe. The U.S. Code defines Indian country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012).

Kelley Point Park is not within a federally designated reservation. R. at 2. It is also not part of a dependent Indian community because the Cush-Hook Nation has not resided on the lands now known as Kelley Point Park for the past one hundred and sixty years. *Id.* at 3. The Park is also not part of an allotment, because the federal government is not holding any

land in trust for the Indians. The State concedes that the Court has taken a liberal interpretation of "Indian country," applying the term to "all lands set aside by whatever means for the residence of tribal Indians under federal protection." *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993). But the federal government has never set aside the land Captain entered for the Cush-Hook Nation and has never given any federal protection to the land. Kelley Point Park is not Indian country.

In addition, the federal government has never legally recognized the Cush-Hook Nation as an Indian tribe. R. at 1–2. The definition of tribe commonly used in federal statutes is "any tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e) (2012). Federal treaties were the most common way to recognize tribal status, and the Senate's failure to ratify the negotiated treaty has resulted in unrecognized status for the Cush-Hook Nation. R. at 2. Subsequent to the refusal to ratify the treaty, the federal government did not take any other steps to treat the Cush-Hook Nation as a federally recognized tribe. The Cush-Hook Nation could have petitioned the Secretary of the Interior for federal recognition or it could have sought recognition through Congress, but it has not done so. The Nation does not appear on the 1994 List Act, R. at 3, which requires the Secretary of the Interior to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1 (2012). Therefore, the Nation remains a non-federally recognized tribe of Indians to this day. Because the land is not Indian country, Public Law

280 does not apply,[4] however, the State has criminal jurisdiction to charge Captain under state law because Kelley Point Park is state owned.

B. The State Has Criminal Jurisdiction to Charge Thomas Captain Because Kelley Point Park Is On State-Owned Land.

The relevant inquiry is whether Kelley Point Park is on state-owned or federally owned land. The United States granted fee simple title to the Meeks under the Oregon Donation Land Act of 1850. 9 Stat. 496 (1850); R. at 3. The goal of the Donation Act was to promote white settlement of the Oregon territory. Mooney at 322–25.

> [A] grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen . . ., and who should reside upon and cultivate the same for four consecutive years, and otherwise conform to the provisions of the act.

Brazee v. Schofield, 124 U.S. 495, 497 (1888).

The Meeks received fee simple title to the land from the United States. R. at 3. This grant of title was not void *ab initio* despite the Meek's failure to fulfill the requirements provided in the Donation Act because they did not simply receive a possessory right to the land; they received fee simple title.

1. The Donation Act Granted Two Types of Titles to White Settlers: Possessory Title and Fee Simple Title.

The process of attaining title to land under the Donation Act consisted of two steps. First, the Act gave qualified settlers possessory title to parcels of land, which provided them

[4] Oregon is one of the mandatory states under Public Law 280, which extends state jurisdiction to Indian country. 18 U.S.C.A. § 1162 (2012). If the area encompassing Kelley Point Park fell within the definition of Indian country, the state would have criminal jurisdiction. Since it is not Indian country, the Court must conclude whether the land is state owned or federally owned.

the opportunity to fulfill the requirements stated in the Act.[5] Second, the settlers applied to the United States for fee simple title and received title upon a showing that they fulfilled the requirements of the Act.[6] *Id.*

There are two lines of cases that distinguish these two steps. One line of cases dealt with how the failure to fulfill the requirements affected the settlers' possessory titles. In this line of cases, the Court held that the settlers' possessory title was invalid upon a showing that they did not meet the Act's requirements. The second line of cases dealt with instances when the United States granted fee simple title to settlers under the presumption that their possessory title had vested due to completion of the Act's requirements. In this second line of cases, the Court held that the grant by the United States was not void *ab initio* despite the settlers' failure to meet the requirements.

2. The Meeks Received Fee Simple Title from the United States, Unlike the Possessory Titles Automatically Granted under the Donation Act.

Under the first line of cases, the Court has held that the Donation Act gave possessory title that only vested in fee simple upon completion of the requirements set forth in the Act. *See, e.g.*, *Hall v. Russell*, 101 U.S. 503, 509–10, 12 (1879); *Maynard v. Hill*, 125 U.S. 190, 214–15 (1888). In *Hall v. Russell*, a man settled on a parcel of land with the intention of becoming its owner under the Donation Act but died less than a year after residing on the land. 101 U.S. at 503–04. The Court explained that the federal government granted a "present right to occupy and maintain possession, so as to acquire a complete title to the soil" to every white settler in the area meeting the other qualifications, "but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." *Id.* at 509–10. The Court held that the title did not vest in the man because he did not fulfill

[5] Oregon Donation Land Act § 4, Ch. 76, 9 Stat. 496 (1850).
[6] The requirements included residing on and cultivating the land for four consecutive years. *Id.*

the four-year residence and cultivation requirement in the Act. "The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees." *Id.* In *Maynard v. Hill*, the Court considered the language of the Donation Act and held that "[t]he settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title; what is sometimes vaguely called an inchoate interest." 125 U.S. at 214–15.

But these cases differ from the case presently before the Court because the Meeks applied for and received fee simple title from the United States. R. at 3. Thus, the issue is not the effect that the failure to fulfill the requirements had on a possessory title under the Donation Act, but rather whether to acknowledge the fee simple title that the United States granted to the Meeks after they applied for the title. In situations where the federal government granted title to settlers—even if by mistake or fraud—the Court has held the grant as not void. *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403 (1915). Therefore, the Court must acknowledge the grant of fee simple title to the Meeks as valid, as well as the subsequent transfer of title to the State and hold that the State has criminal jurisdiction to charge Captain. R. at 4.

3. The Fee Simple Title Granted by the United States to the Meeks Was Not Void *Ab Initio*.

The lower courts erred in finding the United States' grant of fee simple title to the Meeks was void *ab initio*. R. at 4. Void *ab initio* means "null from the beginning." Black's Law Dictionary 1709 (9th ed. 2009). The lower courts' finding contradicts the second line of cases supporting the proposition that while the United States should have a remedy for fraudulent grants in the court system, the patents are not void *ab initio*. When citizens procure grants from the United States by fraud, misrepresentation, or mistake, the United

States can seek remedy in the courts by suing for the value of the land. *See Wright-Blodgett Co.*, 236 U.S. at 403; *United States v. Jones*, 242 F. 609, 613 (9th Cir. 1917). But the grant continues to have legal effect until the United States brings a claim, meets its burden of proof, and a court voids the claim. A grant made by fraud or mistake is voidable, meaning "[v]alid until annulled," but not void *ab initio*. Black's Law Dictionary 1709–10 (9th ed 2009); *Diamond Coal & Coke Co. v. United States*, 233 U.S. 236, 239 (1914).

In *Wright-Blodgett Co. v. United States*, the Court held,

> Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the government, and of thus obtaining public lands without compliance with the requirements of the law, while *the patent is not void* or subject to collateral attack, it may be directly assailed in a suit by the government against the parties claiming under it.

236 U.S. at 403 (emphasis added).

The Court has stated that a grant of title, even if the result of fraud or perjury, "conveys the legal title." *United States v. Minor*, 114 U.S. 233, 243 (1885). After a proceeding in equity, the patent could be set aside as void, but not until the United States brought a suit to void the fraudulent or mistaken transfer of title. *Id.* Additionally, the Court has stated, "A patent secured by such fraudulent practices, *although not void* or open to collateral attack, is nevertheless voidable, and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud." *Diamond Coal & Coke Co.*, 233 U.S. at 239 (emphasis added). Similarly, the Ninth Circuit Court of Appeals has held that the federal government needs a remedy for fraudulent claims to land under homestead laws like the Donation Act, but it has not held that a grant procured by fraudulent means was void *ab initio*. *United States v. Jones*, 242 F. 609, 616 (9th Cir. 1917).

The State concedes that the second line of cases held that the federal government may seek a remedy in the courts for a fraudulent or mistaken land grant, but that is quite different from holding that a grant of land made by mistake or fraud is void *ab initio*. In fact, the cases expressly state that the grants are not void—they are just open to suit by the United States. *Wright-Blodgett Co.*, 236 U.S. at 403 ("the patent is not void"); *Diamond Coal & Coke Co.*, 233 U.S. at 239 ("A patent secured by such fraudulent practices, although not void . . .").

The grant of title to the Meeks and the subsequent transfer to the State is not void *ab initio*. In addition, if the United States brought a suit to void the State's title to the land encompassing Kelley Point Park, it would not be successful because the State bought the land from the Meeks in good faith, lacking notice that they obtained title without fulfillment of the Donation Act requirements.[7] "It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice." *United States v. Stinson*, 197 U.S. 200, 205 (1905). In response to a claim to cancel patents obtained first by fraud but then purchased by a good-faith buyer, the Court has stated that "the defense of a bona fide purchaser for value, without notice, is perfect." *United States v. Marshall Silver Mining Co.*, 129 U.S. 579, 589 (1888). The State was a bona fide purchaser, and it would raise this defense in a claim brought by the United States to cancel the title to the land. Furthermore, "equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties." *Stinson*, 197 U.S. at 205 (citing *United States v. Burlington & Mo. River R. Co.*, 98 U.S. 334, 342 (1878); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313 (1887)). The State is an innocent party whose interests must be protected.

[7] R. at 1–4. There are no facts indicating that the State knew of the Meeks' failure to meet the requirements of the Act.

The United States granted fee simple title to the Meeks after they applied for title under the Donation Act. R. at 3. This grant is not void *ab initio*. The title continues to have legal effect until the United States brings a claim to void the title in court, and a court finds in its favor. The United States has not brought such a claim. It is unlikely that the United States would succeed on a claim to void the State's title to the land encompassing Kelley Point Park because the State was a bona fide purchaser and an innocent party who purchased the land from the descendants of the Meeks in good faith. Thus, at the present time, the Meek's title was valid and the subsequent transfer to the State was valid. The State owns the land on which Captain entered, occupied, cut down the tree, and desecrated the archaeological and historical site, and therefore, the State has criminal jurisdiction to prosecute Captain for violating state laws prohibiting trespass, cutting of timber without a permit, and desecrating a historic site.

CONCLUSION

For the foregoing reasons, this Court should reverse in part and affirm in part the judgment of the Oregon Circuit Court, which the Oregon Court of Appeals affirmed in its entirety. This Court should reverse the lower courts' finding that the Cush-Hook Nation still owns the land in question under aboriginal title and should affirm the courts' finding that the state has criminal jurisdiction to prosecute Captain.