No. 11-0274

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner

v.

THOMAS CAPTAIN,

Respondent, cross-petitioner

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

BRIEF FOR PETITIONER

TEAM NO: 38

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

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

II. 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 Facts

The Cush-Hook Indian Nation ("Nation") once occupied what is now Kelley Point Park, a state park located in Portland, Oregon. Record on Appeal, hereinafter "ROA" at 1. The federal government does not currently recognize the Nation. ROA at 1. There is documented evidence that the Nation received "sovereignty tokens" from Lewis and Clark. ROA at 1. These "sovereignty tokens" were believed to consummate an acceptance that the Indian tribe would be recognized by the United States. ROA at 1.

In 1850 the Nation signed a Treaty ("Cush-Hook Treaty") with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. ROA at 1. Dart's goal was to relocate the tribe and allow American settlers to occupy the area in which the Cush-Hook Nation had originally occupied. ROA at 1. In reliance on Dart's assurances, the Nation relocated to the mountains along the Oregon coast range. ROA at 3. In 1853, the U.S. Senate refused to ratify the Cush-Hook Treaty. ROA at 2. The Nation was denied any compensation for the lands it ceded in and around Kelley Point Park, and did not receive title to the lands they moved to along the Oregon coast. ROA at 2.

Under the Oregon Donation Land Act of 1850 ("Act"), Joe and Elsie Meek ("The Meeks") received fee simple title to "640 acres of land, that today comprises Kelley Point Park." ROA at 2. The Act required the white settlers to "reside upon and cultivate[] the [land] for four consecutive years" to be eligible for fee simple title. ROA at 2. However, the Meeks never resided upon nor cultivated the 640 acres of land. ROA at 2. In 1880, the Meek's descendants sold the land to Oregon, and Oregon created Kelley Point Park. ROA at 2.

In 2011, Thomas Captain ("Captain"), who is a Cush-Hook citizen, moved from the mountains along the Oregon coast to Kelley Point Park. ROA at 2. Captain "occupied the Park to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over three hundred years." ROA at 2. Cush-Hook tribal shaman carved sacred totem and into the trees hundreds of years ago. ROA at 2. Recently, vandals have defaced the sacred images, and in one instance cut the carvings off the trees to sell. ROA at 2. The State of Oregon has had difficulty controlling the vandalism. ROA at 2. In order to protect and restore a totem carved by one of his ancestors, Captain cut the tree containing the carving down and removed the section containing the carving. ROA at 2. Captain was stopped by Oregon state troopers, and was arrested.

The State of Oregon brought charges against Captain 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. 358.9050-358.961. ROA at 2.

II. Statement of the Proceedings

The Oregon Circuit Court for the County of Multnomah found that the Nation's aboriginal title to the land in and around Kelley Point Park had never been extinguished by the United States. ROA at 3. Because the Nation was found to hold title to Kelley Point Park, Captain was not guilty of trespass or cutting timber. ROA at 4. The court did, however, find Captain guilty for damaging an archaeological site and a cultural and historical artifact. ROA at 4. Public Law 280 was held to apply all lands in the state of Oregon, whether tribally owned or not, and therefore, the criminal action for damaging an archeological, cultural, and historical object was proper. ROA at 4.

JURISDICTION

This Court has jurisdiction to hear the claims before it under 28 U.S.C. § 1331. Section "1331 . . . of Title 28 of the United States Code confer jurisdiction on the district courts to hear cases 'aris(ing) under the Constitution, laws, or treaties of the United States.'" Oneida Indian Nation v. Oneida County, New York, 414 U.S. 661, 663, 94 S. Ct. 772, 775 (1974). A claim that raises "the issue of tribal sovereign powers" has been held to be a sufficient federal question to rest § 1331 jurisdiction. Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983). Therefore, this Court has jurisdiction to determine whether the State of Oregon has the authority to apply its criminal laws to the land in question.

Additionally, this Court has jurisdiction to review "[j]udgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground that it is repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). Here, the Oregon Supreme Court denied review of the Oregon Court of Appeals decision. ROA at 4. Therefore, the Court has jurisdiction to review the question to whether the Cush-Hook Nation's aboriginal title was extinguished.

I. The State of Oregon Owns Kelley Point Park in Fee Simple.

A. Congress Extinguished the Cush-Hook Aboriginal Title By Using Its Plenary Power

The Oregon Circuit Court erred when it found that "the Cush-Hook Nation owns the land in question under aboriginal title." ROA at 4. Aboriginal title is not an ownership interest; the title refers to the right of the original inhabitants of the United States to use and

occupy their aboriginal territory. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955). Respondents may assert that the Cush-Hook established aboriginal title rights by proving the requisite use and occupancy of Kelley Point Park. In order to claim aboriginal title, tribes have the burden of proving "actual, exclusive, and continuous use and occupancy 'for a long time"' of the claimed area. Native Vill. of Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012) (citing Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct.Cl.1967)). This use and occupancy requirement is measured "in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." Id.

In contending that the Cush-Hook's have established aboriginal title, respondents may point to and emphasize the lower court's finding that "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." ROA at 3. While the Cush-Hook tribe may indeed have occupied and used the land prior to the arrival of white explorers and settlers, that title was nonetheless extinguished by the United States.

Extinguishment terminates the use and occupancy rights of aboriginal title, except where such rights are expressly or impliedly reserved in a treaty, statute or executive order. Confederated Tribes of Chehalis Indian Reservation v. State of Wash., 96 F.3d 334, 341 (9th Cir. 1996). 'The exclusive right of the United States to extinguish' Indian title has never been doubted. And 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, its justness is not open to inquiry in the courts. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 347, 62 S. Ct. 248, 252, 86 L. Ed. 260 (1941). "The power of Congress in that regard is supreme." Id. The

lower court erred when it held that the aboriginal title to the land in and around Kelley Point Park had never been extinguished by the United States. Congress exercised its "exclusive" and "supreme" plenary power and extinguished the aboriginal title to Kelley Point Park, through 1) the passage of the Oregon Donation Land Act of 1850, and 2) the refusal to ratify the treaty between the Cush-Hook and Superintendent of Indian Affairs for the Oregon Territory Anson Dart.

1. The Oregon Donation Land Act of 1850 Extinguished Cush-Hook Aboriginal Title

The lower courts erred in finding that the Cush-Hook tribe had aboriginal title over the land in Kelley Point State Park. By enacting the Oregon Donation Land Act of 1850, Congress exercised its plenary power and extinguished the Cush-Hook Tribe's aboriginal title. The Act required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500; ROA at 2. The Act constituted a manifestation of Congress' intent to assert its right of title over the Oregon Territory.

In United States v. Ashton, 170 F. 509 (C.C.W.D. Wash. 1909), the Circuit Court for the Western District of Washington discussed Congressional acts regarding Oregon, and held that "the exclusive rights of Indians within the boundaries of Oregon Territory [were] terminated by the act of Congress creating Oregon Territory, and the 'Oregon Donation Law,' (Oregon Land Donation Act) because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon." Ashton, 170 F. 509, 513. As a result of the holding, the Puyallup tribe from present-day Washington State lost its right to occupy the land.

The Cush-Hook, like the Puyallup tribe in Ashton, were an Indian tribe within the boundaries of the Oregon Territory at the time of the Oregon Land Donation Act. Accordingly, the Donation Act also terminated the Cush-Hook tribe's aboriginal rights. Thus, Congress did not err in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States. 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 not void *ab initio* and the subsequent sale of the land by the Meek's descendants to Oregon was valid.

Appellees may argue that the United States failed to extinguish the Cush-Hook tribe's aboriginal rights, asserting that because there was no compensation or ratified treaty by the United States for the Cush-Hook's aboriginal title, the tribe did not relinquish that title. The lower court agreed with this contention, concluding that "[t]he 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." ROA at 3.

The lower courts erred in concluding that compensation was necessary for extinguishment. Although many extinguishments of title occurred through purchase or treaty, Congress can extinguish unrecognized aboriginal rights without compensation. In Tee-Hit-Ton Indians v. United States, the Tee-Hit-Tons, a clan of the Tlingit Tribe in Alaska, asserted aboriginal title after the United States took timber off what their traditional land. This Court held that Congress extinguished the aboriginal title of the Tee-Hit-Tons because Congress never recognized any legal rights of the tribe, and that this "taking by the United States of

unrecognized Indian title is not compensable under the Fifth Amendment." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285, 75 S. Ct. 313, 320, 99 L. Ed. 314 (1955). The Court cited McIntosh in concluding that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." Id.

Similar to the Tee-Hit-Ton tribe, the aboriginal rights of the Cush-Hook tribe have never been recognized by Congress. The Cush-Hook tribe has remained a non-federally recognized tribe of Indians because the Anson Dart treaty of 1850 was not ratified, and the United States has not since undertaken any other act to "recognize" the Cush-Hooks. ROA at 2. Thus, the extinguishment of the Cush-Hook tribe's aboriginal title is not compensable under the Fifth Amendment.

Additionally, the Ninth Circuit has drawn similar conclusions regarding land claim legislation and its effect on aboriginal title. In U.S. v. Gemmill, members of the Pit River Indian Tribe claimed title to land within the Shasta Trinity National Forest. 535 F.2d 1145, 1147 (9th Cir. 1976). The Ninth Circuit found that the California Land Claims Act of 1851, an Act analogous to the Oregon Donation Land Act of 1850, "amply demonstrates that the Pit River Indian title [had] been extinguished." Id. at 1149. The court found persuasive the fact that the land had been continuously used "to the present time for the purposes of conservation and recreation, after the Indians had been forcibly expelled, leav[ing] little doubt that Indian title was extinguished." Gemmill, 535 F.2d at 1149. Here, the Cush-Hook Nation has not occupied Kelley Point Park since 1850, and it has similarly been used as a park since 1880. ROA at 3. This Court should follow Ninth Circuit precedent and find that the Cush-Hook tribe's aboriginal title was extinguished by the Oregon Donation Land Act.

2. Congress' Refusal to Ratify the Treaty Also Constituted An Act of Extinguishment

The Oregon Donation Land Act was not the sole action of Congress that revealed its intention to extinguish aboriginal title. The Senate also refused to ratify the treaty between the United States and the Cush-Hook tribe signed by Anson Dart, Superintendent of Indian Affairs for the Oregon Territory Anson Dart. ROA at 2.

Extinguishment 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." United States v. Gemmill, 535 F.2d 1145, 1147-48 (9th Cir. 1976). While the executive branch possesses "broad authority to withdraw public lands from disposition under the public land laws for the benefit of Indians and to manage the disposition of Indian lands, the source of this authority is congressional acquiescence in its exercise." United States v. S. Pac. Transp. Co., 543 F.2d 676, 689 (9th Cir. 1976) (citations omitted).

The U.S. Senate's refusal to ratify the treaty, combined with their creation of the Oregon Donation Land Act, evidence the requisite governmental intent to revoke occupancy rights described in Gemmill. Through its actions, Congress showed that it intended to have white settlers on the land. The Senate's refusal to sign the treaty indicated Congress' non-acquiescence to executive action, and that Congress intended for the Cush-Hook tribe to leave their traditional land. Congress saw the treaty as unsatisfactory, and later created the Oregon Land Donation Act as what they saw as a better means to drive the Cush-Hook tribe off the land.

3. The Cush-Hook Tribe Abandoned, or Voluntarily Ceded, the Land in Kelley Point Park.

Not only did Congress extinguish the Cush-Hook's aboriginal title through the passage of the Oregon Land Donation Act and their refusal to ratify the treaty, the tribe itself extinguished its aboriginal title through abandonment or voluntary cession. This case is analogous to Santa Fe, wherein the Walapai tribe re-settled on other land upon the arrival of white settlers. Like the Cush-Hook, the Walapais' latter settlement rendered little benefit to the tribe. Nonetheless, this Court in Santa Fe concluded that the creation and acceptance of a new reservation by the Walapais "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 by 'voluntary cession'." U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 357-58, 62 S. Ct. 248, 257, 86 L. Ed. 260 (1941); see also Cayuga Indian Nation of New York v. Cuomo, 758 F. Supp. 107, 110 (N.D.N.Y. 1991) ("Since aboriginal title is dependent upon actual, continuous and exclusive possession of the land, proof of a tribe's voluntary abandonment of such property constitutes a defense to a subsequent claim concerning the land."). The Cush-Hook Nation relinquished their aboriginal title by leaving upon the arrival of white settlers, and not returning to the land nor attempting to assert their rights for over 150 years subsequent to their departure.

Respondents may argue that the instant case is distinguishable from Santa Fe because a reservation was not created for the Cush-Hook tribe. Regardless, the entire Cush-Hook Nation relocated to the coast range area agreed to in the treaty, and a majority of the Nation's citizens have continued to live there ever since. ROA at 2. There is nothing in the record of appeal to support any claims by the Cush-Hook tribe to their former land after the U.S.

Senate refused to ratify the Anson Dart treaty in 1853, nor is there evidence that the tribe returned to the land or sought other federal recognition. This inaction constitutes acquiescence by the Cush-Hook; although Congress extinguished the Cush-Hook aboriginal title through legislation and other action, the tribe itself also relinquished their title when they resettled to their current location and subsequently sought no remedy or recognition.

B. The Acts of Congress are Political, Non-Justiciable Issues

Petitioners ask that this Court consider its prior jurisprudence and conclude that the conditions surrounding extinguishment of aboriginal title by Congress are political, non-justiciable issues. "The right of the Indians . . . could not be interfered with or determined except by the United States . . . and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals." Buttz v. N. Pac. R. Co., 119 U.S. 55, 66, 7 S. Ct. 100, 104, 30 L. Ed. 330 (1886). The manner, method, and time of extinguishment of Indian title based on aboriginal possession raise political and not justiciable issues. Santa Fe Pac. R. Co., 314 U.S. at 347.

C. Even If the Meeks Did Not Satisfy the Requirements of the Land Donation Act, the United States or Oregon Still Owns Kelley Point Park in Fee Simple.

If this Court agrees with Petitioner and finds that aboriginal title was extinguished, the fee is still owned by either the United States or Oregon. Following the enactment of the Oregon Donation Land Act, Joe and Elsie Meek claimed the land that comprises Kelley Point Park and received fee title from the United States. ROA at 2. The Meeks neglected to fulfill the Act's requirement that settlers cultivate or live upon the land for four years. ROA at 2. The Meeks' descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park. ROA at 2. Even if this Court agrees with the lower courts and finds that the Meeks did

not satisfy the requirements of the Act, the fee does not belong to the Cush-Hook Nation. Either the United States still possesses the fee title, or Oregon obtained the fee through adverse possession.

To succeed on an adverse possession claim, one must "establish, by clear and convincing evidence, that the use of the property was actual, open, notorious, exclusive, continuous, and hostile for a 10–year period." Hoffman v. Freeman Land & Timber, LLC., 329 Or. 554, 559-60, 994 P.2d 106, 109-10 (1999) (citations omitted).

In E. Oregon Land Co. v. Brosnan, the Ninth Circuit concluded that in Oregon, state law regarding adverse possession controlled:

> one claiming title to the land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant.

E. Oregon Land Co. v. Brosnan, 173 F. 67, 68 (9th Cir. 1909) (citing Boe v. Arnold, 54 Or. 52, 67, 102 P. 290, 295 (1909)). Oregon created Kelley Point Park in 1880 following their purchase of the land from the Meeks descendants. ROA at 2. The state has possessed the land in an actual, open, notorious, exclusive, continuous, and hostile fashion for far longer than the ten years required for adverse possession. Respondents may contend that the notorious and hostile elements of adverse possession do not apply to Kelley Point Park. However, without such elements in place, the claims by Mr. Captain and the Cush-Hook tribe do not make much sense.

If this Court concludes that the Cush-Hook tribe still possesses aboriginal title rights, the fee simple title to Kelley Point Park is held by either the United States or the State of Oregon.

II. The State of Oregon Has Criminal Jurisdiction Over the Land in and Around Kelley Point Park Regardless of Whether the Cush-Hook Nation Holds it Under Aboriginal title

State criminal law generally applies to all of the territory within a state's borders with the exception of Indian country. See Hagen v. Utah, 510 U.S. 399, 402, 114 S. Ct. 958 (1994). For this reason, if this Court finds that the court bellowed erred in holding that the "Cush-Hook Nation's aboriginal title to its homelands [had] never been extinguished by the United States," than the state of Oregon owns the land in fee simple, and its criminal laws apply to the land in question. If this Court finds that the land in question was not properly transferred to Oregon, and the land is still held by the federal government, than Oregon criminal law should apply as Congress has already declared, via Public Law 280, that Oregon criminal law should apply to land that would otherwise be under federal and tribal jurisdiction. See Washington v. Confederated Bands and Tribes of the Yakima Nation, 439 U.S. 463, 498-99, 99 S. Ct. 740 (1979). However, if this Court finds that the Cush-Hook Nation aboriginal title was not extinguished, such title does not divest the Oregon of criminal jurisdiction. Through Public Law 280, Congress determined that Oregon criminal law would apply to Indians in Indian country. See 18 U.S.C. § 1162(a).

A. To Hold that Aboriginal Title Precludes Oregon from Enforcing its Criminal Law Over the Land in Question Would Frustrate the Congressional Policy Behind Public Law 280

Congress has plenary power of Indian affairs. Morton v. Mancari, 417 U.S. 535, 551-52, 94 S. Ct. 2474 (1974). In 1953, Congress enacted Public Law 280 "to deal with the 'problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.'" Confederated Bands and Tribes of the Yakima Nation,

439 U.S. at 471 (citing Bryan v. Itasca County, 426 U.S. 373, 379, 96 S. Ct. 2102, 2106 (1953)). The statute was not "a measure [taken] to benefit the States, but to reduce economic burdens associated with federal jurisdiction on reservations, to respond to a perceived hiatus in law enforcement protections available to tribal Indians, and to achieve an orderly assimilation of Indians into the general population." Id. at 498.

Prior to 1953, Oregon criminal law would extend "within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" Confederated Bands and Tribes of the Yakima Nation, 439 U.S. 463 at 470 (citing Williams v. Lee, 358 U.S. 217, 219-20, 79 S. Ct. 269, 271 (1959)). A "criminal offense[] by or against Indians [was] subject only to federal or tribal laws." Id. at 470 (citing Moe v. Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 96 S. Ct. 1634 (1976)). Therefore, a crime committed by an Indian in Indian country was outside the state's jurisdictional reach, and left to the tribe or federal government. See Bryan, 426 U.S. at 379.

Public Law 280 was a remedy that aimed to fill a jurisdictional hole. Specifically targeting crime in Indian country. It replaced federal and tribal criminal jurisdiction with state and tribal jurisdiction over crimes committed by Indians in specific areas of Indian country. Id. at 380. Public Law 280 legislative history, as discussed in Bryan, reveals a concern that "'States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country.'" Bryan, 426 U.S. at 379 (citing H.R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953)). Additionally, the House Report found that "[t]he applicability of Federal criminal laws in States having Indian reservations is also limited." Id. at 379. Public Law 280 was enacted to fill "a hiatus in law-enforcement authority that could

best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.'" Id. at 380. Through Public Law 280, Congress granted certain states criminal jurisdiction in Indian country with the exception of "certain tribal reservations . . . [that] each had a 'tribal law-and-order organization that functions in a reasonably satisfactory manner.'" Id. at 385 (citing H.R. Rep. No. 848, p.7, U.S. Code Cong. & Admin. News 1953, p. 2413).

The fact that Congress exempted certain Indian reservations from Public Law 280's reach demonstrates the justifications behind the statute. The reservations that were exempt "has a 'tribal law-and-order organization that function[ed] in a reasonably satisfactory manner.'" Id. at 385 (citing H.R. Rep. No. 848, p. 7, U.S. Code Cong. & Admin. News 1953, p. 2413). The few reservations exempted from exposure to state jurisdiction had a functioning tribal police force in place prior to the enactment of Public Law 280. Id.

In Oregon, the Warm Springs Reservation was not included as Indian country under the state's jurisdictional reach. 18 U.S.C. § 1162(a). In 1953, Oregon was among several mandatory states granted

> jurisdiction over offenses committed by or against Indians in [all] Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State.

Id. The statute specifically provides for jurisdiction in "[a]ll Indian country within the State", except the Warm Springs Reservation. Id. Therefore, when Congress enacted Pub. L. 280, it effectively transferred criminal, and limited civil jurisdiction over Indians in Indian country to Oregon, with the exception of the Warm Springs Reservation. The Warm Springs Reservation was exempt because it essentially "had a 'tribal law-and-order organization that

function[ed] in a reasonably satisfactory manner.'" Bryan, 426 U.S. at 385. The record contains no evidence that the Cush-Hook Nation has a functioning "tribal law-and-order organization." Id.

Current Congressional policy, pushing for Indian self-determination does not alter the conclusion that Oregon maintains criminal jurisdiction over the land in and around Kelley Point Park. The State of Oregon has demonstrated its willingness to promote tribal independence and sovereignty. Oregon retroceded its criminal jurisdiction back to the Umatilla Tribe after finding that the Umatilla tribe was capable of handling criminal matters on their land. See Strong v. Keeney, 731 P.2d 1070 (Or. Ct. App. 1987) (citing Or. Exec. Order No. EO 80-8 (1980)). However, while the Cush-Hook Nation is undoubtedly a tribe, it has yet to achieve a working government and police force that would enable it to handle criminal matters on its land.

The record contains no evidence that the Cush-Hook Nation maintained any connection with the land in question prior to Thomas Captain's arrival in 2011. ROA at 3. In fact, a majority of the Cush-Hook Indians that relocated to the coast range still reside in that area. ROA at 2. There is also no evidence that the Nation will be able to maintain a police force and tribal government. Therefore, at this time, the Nation's tribal government and organization are not comparable to that of the Warm Springs or Umatilla Reservations, and as such, any land held for, or by the tribe, should not be excluded from the reach of Oregon's criminal jurisdiction.

If this Court finds that Oregon is precluded from asserting jurisdiction, the federal government would be the only governmental body equipped to do so, and with respect to Oregon, the federal government has transferred its criminal jurisdiction to Oregon through

Public Law 280. This reasoning precludes a finding that Oregon should be sustained from asserting jurisdiction over the land in question.

1. Cush-Hook Aboriginal Title Should be Considered "Indian Country" Within the Meaning of Public Law 280

Congress's definition of "Indian country," for purposes of Public Law 280's criminal jurisdiction, demonstrates an intention to include all Indian land that was considered beyond the reach of state jurisdiction due to the sovereignty of Indian nations. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In Worcester v. Georgia, Chief Justice John Marshall defined Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States." Id. at 557. The basic premise was that "State jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34, 103 S. Ct. 2378, 2385 (1983). Therefore, an Indian tribe's status as a distinct political community precluded the enforcement of state criminal law in Indian country.

For purposes of criminal jurisdiction, Indian country is defined as either (1) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" 18 U.S.C. § 1151(a); (2) "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory" § 1151(b); or (3) "all Indian allotments, the Indian titles to which have not been extinguished." § 1151(c). Each definition describes Indian land that, prior to the enactment of Public Law 280, was under tribal and federal jurisdiction.

To hold that Oregon criminal law applies to Indian reservation land, but not to land held under aboriginal title, is inconsistent with this Court's perception of Indian sovereignty. See generally McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174-75, 93 S. Ct. 1257, 1263 (1973). (holding that a state law, which imposed a tax on a reservation Indian from resources wholly derived from the reservation, was an improper interference on matters that are within "the exclusive province of the Federal Government and the Indians themselves."). An Indian tribe has less of an interest in land that it holds under aboriginal title; therefore, land held under aboriginal title should not be shielded from state jurisdiction when reservation land, would not. See Anderson v. Gladden, 293 F.2d 463, 466 (9th Cir. 1961) (holding that State of Oregon had jurisdiction to try an enrolled member of the Klamath Tribe of Indians for a homicide that occurred on the Klamath Indian Reservation). Anderson demonstrates that through Public Law 280, Congress sought to permit state criminal jurisdiction over Indians on land to which Indian sovereign interests had previously controlled. The reservation land in Anderson contains more interests as compared to land held under aboriginal title.

Aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." Tee-Hit-Ton v. U.S., 348 U.S. 272, 279, 75 S. Ct. 313, 317 (1955). An Indian allotment, or land owned by a tribe in fee simple and held in trust by the federal government, presents the tribe with more interest in the land. See McClanahan, 411 U.S. at 174-75 (holding that "appellant's rights as a reservation Indian were violated when the state collected a tax from her which had no

jurisdiction to impose.”). Therefore, an interest held under aboriginal title should be classified as “Indian country” in light of the reasoning behind the definition of “Indian country” in § 1151.

2. Thomas Captain is an Indian Under Public Law 280

Thomas Captain is an Indian for purposes of criminal jurisdiction under Public Law 280, which requires the individual to be an “Indian;” however, the statute does not provide a definition. See 18 U.S.C. § 1162(a). Therefore, the “courts have stepped in to spell out the meaning of ‘Indian’ for purposes of criminal jurisdiction.” U.S. v. Maggi, 598 F.3d 1073, 1078 (9th Cir. 2010). In 1846, this Court determined that Indian status is “confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,-of the family of Indians.” U.S. v. Rogers, 45 U.S. 567, 573, (1846). Thomas Captain is undoubtedly a member of the Cush-Hook Nation, and takes part in the customs and traditions of his tribe. ROA at 2.

Thomas Captain is an Indian under the test set out by this Court in U.S. v. Rogers, 45 U.S. 567, 573 (1846). In Rogers, this Court had to determine whether the Cherokee Nation had criminal jurisdiction over a white man, claiming to be an adopted member, but who had no Indian blood. Id. at 571. The defendant claimed that the Cherokee Nation, not the state, had jurisdiction over him because of his status as a non-Indian adopted member of the Cherokee Nation. Id. The Court reasoned that the defendant

> [Was] not an Indian; and the [jurisdictional] exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, -of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.

Id. at 573. The Court stated that "[i]t can hardly be supposed that Congress intended to grant such exemptions" to persons with no Indian blood. Id. Therefore, the Rogers Court was concerned with creating an exception where individuals with no Indian blood could elude federal or state jurisdiction, and instead be tried by tribal courts. Id. This right was to be granted to Indians that could demonstrate a connection to the "usages and customs of the Indians" so as to belong to "the family of Indians." Id.

The Ninth Circuit developed its own test for determining Indian status under the context of "the Major Crimes Act. See U.S. v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005)). In Bruce, the defendant, charged with child abuse, asserted that she was an "Indian" and should have been charged under the Major Crimes Act, 18 U.S.C. § 1153, as opposed to the Indian General Crimes Act, 18 U.S.C. § 1152. Id. at 1222. The court reasoned that a determination of Indian status bears important legal consequences in the context of criminal jurisdiction. Id. "[U]nless state jurisdiction is specifically authorized by Congress, or he is charged pursuant to a generally applicable federal criminal statute, an Indian person charged with committing a crime against another Indian person that is not listed in § 1153 is subject only to the jurisdiction of the tribe." Id. Additionally, "[o]nce an Indian person is punished by a tribe for an offense covered by § 1152, federal courts may no longer impose any punishment for that offense." Id. Here, in the context of Public Law 280, the consequences are not as severe. A non-Indian in Oregon is subject to state criminal laws, and an Indian is also subject to state criminal laws unless he or she is on the Warm Springs Reservation, or another Indian reservation exempt from Public Law 280.

Thomas Captain does not have to be a member of a federally recognized tribe to be considered "Indian" for criminal jurisdiction purposes. Thomas Captain need only be

recognized by "a tribe or the federal government . . . [to meet the definition of] Indian." Bruce, 294 F.3d at 1223. More specifically, the Ninth Circuit affirmed, " 'a person may still be an Indian though not enrolled with a recognized tribe.'" Id.

The record demonstrates that Thomas Captain is a Cush-Hook citizen. ROA at 2. Prior to relocating to Kelley Point Park, he resided in the area along the Oregon coast range where the Cush-Hook relocated to in 1850. ROA at 1. Thomas Captain's tribal membership can further be demonstrated by the fact that the totem he cut off was cared by one of his ancestors. ROA at 2. Thomas Captain is without a doubt recognized as a tribal member by the Cush Hook Nation, and is an "Indian" for purposes of Public Law 280.

3. The Oregon Laws Applied to Thomas Captain are Criminal-Prohibitory

"[W]hen a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208, 107 S. Ct. 1083 (1987).

The test used to distinguish between criminal/prohibitory and civil/regulatory laws asks, "whether the conduct at issue violates the State's public policy." Id. at 209. More specifically, "if the intent of a state law is . . . to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to the regulation, it must be classified as civil/regulatory." Id. at 209. At issue in Cabazon was whether a California bingo law was criminal/prohibitory or civil/regulatory. Id. at 206-07. This Court concluded that because "California permits a substantial amount of

gambling activity, including bingo," the state effectively "regulates rather than prohibits gambling in general and bingo in particular." Id. at 211. In contrast, a law prohibiting the destruction of an archaeological site or cultural artifact is criminal rather than civil.

The Oregon Legislature codified its belief that "[a]rchaeological sites are . . . a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon." Or. Rev. Stat. § 358.910(1). The State has committing itself to "preserv[ing] and protect[ing] the cultural heritage of [the] state embodied in objects and sites that are of archaeological significance." § 358.910(2). In order to prohibit any person from destroying the state's cultural heritage, Oregon law makes it illegal to "excavate, injure, 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." Or. Rev. Stat. § 358.920(1)(a).

Oregon State Parks and Recreation can only issue a permit for excavation and archaeological studies. Or. Rev. Stat. § 390.235(2). The language of the statute makes it clear that the state of Oregon does not generally permit the activity in question, subject to limitations, as was the case in Cabazon. Here, the state law prohibits a person from damaging or altering an archaeological site. In Cabazon, the Bingo law regulated conduct that was generally permissible within the state. Cabazon, 480 U.S. at 211. Therefore, the Oregon statute, which protects archaeological, cultural, and historical objects, is criminal/prohibitory and should fall under Oregon criminal jurisdiction.

B. Even if the Cush-Hook Nation Retained Aboriginal Title, Such Title Does Not Divest Oregon of its Criminal Jurisdiction Within Kelley Point Park

A finding that the Cush-Hook Nation maintained aboriginal title to the land in question does not militate against Oregon's assertion of criminal jurisdiction because

aboriginal title is not an ownership right. See Johnson v. McIntosh, 21 U.S. 543 (1823). "[A]boriginal title derives from [a tribe's] presence on the land before the arrival of white settlers." U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 641-42 (9th Cir. 1986) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 75 S. Ct. 313, 317 (1955)). Such title is "not an ownership right, but rather a right of occupancy granted by the conquering sovereign." Id. at 642 (citing Felix S. Cohen's Handbook of Federal Indian Law 487 (1982 ed.)). Therefore, "Indian title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of the land." U.S. v. Gemmill, 535 F.2d 1145, 1147 (9th Cir. 1976) (citing Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823)). It follows then that "[d]espite this right of occupancy, the conquering government acquires the exclusive right to extinguish Indian title." Id. at 642 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)).

In Tee-Hit-Ton, this Court differentiated between aboriginal "permissive occupation" and "legal rights." Tee-Hit-Ton, 348 U.S. at 278-79. The Tee-Hit-Ton Indians claimed a "full proprietary ownership of the land, or . . . at least a 'recognized' right to unrestricted possession, occupation and use." Id. at 277. The Cush-Hook Nation, as did the Tee-Hit-Ton Indians, rests its claim to aboriginal title under a "claim of ownership [that is] based on possession and use. ROA at 1. In Tee-Hit-Ton, this Court found that the Indian's aboriginal title had never been recognized by the United States, as it was based on "the petitioner's use of its lands . . . like the use of the nomadic tribes of the States Indians." Tee-Hit-Ton, 348 U.S. at 288. Therefore, they were not entitled to compensation under the Fifth Amendment. Id. at 285. "Indian occupation on land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment

or any other principle of law." Id. Accordingly, an Indian tribe's use of land held under aboriginal title is subject to government regulation.

A tribe's use of land it holds under aboriginal title is restricted. See Ringrose, 788 F.2d at 642 (citing Felix S. Cohen's Handbook of Federal Indian Law 491 (1982 ed.)). A tribe holding land under aboriginal title enjoys "full use . . . of the surface and mineral estate, and to resources, such as timber, on the land." Id. The Ninth Circuit held that aboriginal grazing rights are subject to "regulation by the Bureau of Land Management." U.S. v. Dann, 873 F.2d 1189, 1200 (9th Cir. 1989).

In Dann, two members of the Western Shoshone Tribe of Indians were found to have aboriginal grazing rights based on the "number and type of animals grazed by them or by their lineal ancestors . . . at the time the lands in question were incorporated into a grazing district, . . . after the passage of the Taylor Grazing Act of 1934." Id. at 1200. The aboriginal grazing rights did not "exempt [the Danns] from regulation by the Bureau of Land Management." Id. at 1200. The court went further to state that "[e]ven Indian treaty rights, when shared with others on the public lands or waters, are subject to reasonable regulation that is shown to be essential to the conservation of the common resources and does not discriminate against the Indians." Id. at 1200 (citing Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398, 88 S. Ct. 1725, 1728 (1968)). Here, the state of Oregon is ensuring the conservation of archaeological sites of extreme cultural significance.

The use of resources, such as cutting of timber, is consistent with the purpose behind an acceptance of an Indian's tribes right to aboriginal title. Such title was granted to allow Indians to "occupy territory over which they had previously exercised 'sovereignty.'" Id. at 642. Therefore, use of the lands natural resources, such as cutting timber, is reasonable if the

tribe can "establish continuous exercise of the right since before pre-treaty times." Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 341 (9th Cir. 1996) (citing Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, 180 n.12 (9th Cir. 1981)). However, destroying valuable historical and culture totem does not conform to the limited uses granted to Indian's under aboriginal title.

The Oregon statute at issue here is "essential to the conservation of the common resources and does not discriminate against the Indians." Dann, 873 F.2d at 1200. Thomas Captain cut down a tree and removed the portion of the tree containing the carved image. ROA at 2. Due to Thomas Captain's actions, the sacred totem has been permanently removed from its "living tree," which deprives other Cush-Hook Indians and citizens of Oregon from appreciating their presence in the forest. The Oregon law is necessary for the preservation of "irreplaceable and nonrenewable cultural resource[s], [that] are an intrinsic part of the cultural heritage of the people of Oregon." Or. Rev. Stat. § 358.910(1). Section 358.910 does not restrict the Cush-Hook Nation's use of the forest trees or sacred carvings. Nothing in the record indicates that Oregon is attempting to restrict access to, or as in Tee-Hit-Ton, to sell Timber from aboriginal lands. The Oregon statute simply prohibits any person from destroying cultural and historical objects. This law benefits all the citizens of Oregon, including the Cush-Hook Nation, and should be applied to the land in and around Kelley Point Park regardless of whether the Cush-Hook Nation hold it under aboriginal title.

CONCLUSION

The land in and around Kelley Point Park is owned by the State of Oregon. The Cush Hook Nation was divested of aboriginal title to the land in and around Kelley Point Park after the passage of the Oregon Donation Land Act of 1850. While the Meeks did not adhere to

the requirements of the Act, Oregon still holds the land in question in fee simple because of the application of adverse possession. Therefore, Oregon has criminal jurisdiction over Thomas Captain for the incidents that took place at Kelley Point Park.

Nevertheless, the policy behind Public Law 280 supports Oregon criminal jurisdiction. Through Public Law 280, Congress sought to transfer federal criminal jurisdiction over Indians in Indian country to the states. Looking at the definition of "Indian country" as required by Congress, it is clear that it included any land that was previously outside the reach of state jurisdiction due to an Indian tribe's sovereign rights over their land. Therefore, if the land in question would have been excluded from state jurisdiction prior to Public Law 280, than it should now be included, at least in the state of Oregon. With respect to criminal jurisdiction, Congress has spoken, and declared that state authorities would handle criminal matters in Indian country.