No.: 11-0274

In The Supreme Court Of The United States

STATE OF OREGON, Petitioner,

v.

THOMAS CAPTAIN, Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF FOR THE PETITIONER

Team Number 44

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QUESTIONS PRESENTED

The two issues for this court to examine are:

1. Whether an Indian tribe has aboriginal title of land when that tribe has not exercised control of it for over 160 years?
2. Whether Oregon has authority in Kelley Point Park to protect archaeological objects when it is a Public Law 280 state.

STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDINGS

The State of Oregon criminally prosecuted Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archeological and historical site under ORS 358.905-358.961 and ORS 390.235-390.240. The conclusions of law found include the following: Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States; the Cush-Hook's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. M'Intosh* because the United States Senate did not ratify the treaty nor compensate the Cush-Hooks for the land; the United States' grant of fee simple title to Joe and Elsie Meek under the Oregon Donation Land Act was void so the subsequent sale of the land by the Meek's descendants to Oregon was as well; the Cush-Hooks own the land in question under aboriginal title; and ORS 358.905-358.961 and ORS 390.235-390.240 apply to all lands in the state of Oregon under Public Law 280, so Oregon properly brought the criminal action against Thomas Captain. Based on the conclusions of law, the Oregon Circuit Court for the County of Multnomah held that the Cush-Hook Nation owns the land

that comprises Kelley Point Park and that Thomas Captain is not guilty for trespassing or for cutting timber without a state permit, but he is guilty of violating ORS 358.905-358.961 and ORS 390.235-390.240 for damaging an archaeological site and cultural and historical artifact, thus issuing a $250 fine. Both parties appealed the decision. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. The State of Oregon filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court.

B. STATEMENT OF THE FACTS

The current land that makes up Kelley Point Park in Portland, Oregon, is part of the original homelands of the Cush-Hook Nation of Indians. The Cush-Hooks occupied, used, and owned the land since time immemorial, their permanent village located in the area that is not enclosed by Kelley Point Park's boundaries. Although the Cush-Hook Nation is a tribe of Indians, it is not currently federally recognized, nor is it politically recognized by the State of Oregon.

In 1850, the Cush-Hooks signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. The Cush-Hooks agreed to relocate 60 miles west so American settlers could occupy the current land. The Cush-Hooks moved after signing the treaty, but, in 1853, the United States Senate refused to ratify the treaty. As a result, the Cush-Hooks never received any compensation for the land or any other promised benefits from the treaty, including the recognized ownership of the lands they moved to.

After the Cush-Hooks relocated, Joe and Elsie Meek moved onto the land that now comprises Kelley Point Park. The Meeks ultimately received fee simple titles to the land

from the United States under the Oregon Donation Land Act of 1850, which 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. However, the Meeks never cultivated or lived upon the land for the required four years. Their descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park.

Thomas Captain, a Cush-Hook citizen, moved to Kelley Point Park in 2011 to reassert his Nation's ownership of the land and to protect culturally and religiously significant trees that had grown in the Park. The trees are important to the Cush-Hook religion and culture because tribal shamans/medicine men carved sacred totem and religious symbols into the trees hundreds of years ago. Now, these carvings are at a height of 25-30 feet from the ground. However, vandals have begun to climb the trees to deface the carvings, and in some cases cut them off to sell. The state has done little to stop these acts, so Captain occupied the Park to protect and preserve these tribal objects. In order to restore and protect one of the vandalized carvings, Captain cut the tree down and removed the section of the tree that had the carving on it. When he was returning to the Cush-Hook's location, state troopers arrested Captain and seized the carving. The State of Oregon then brought suit against Captain.

SUMMARY OF THE ARGUMENT

The issues for the court to examine are whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park and whether Oregon has authority to control the uses of, and to protect, archaeological objects on the land in question. Based on current interpretations of the law, this court should determine that the Cush-Hooks do not have

aboriginal title to the land comprising Kelley Point Park because the tribe does not, and did not, demonstrate actual and continuous possession and the Federal Government allotted the land for non-native settlement and exercised complete dominion, depriving the tribe of exclusive use. This court should also determine that Oregon does have authority in Kelley Point Park due to the fact that it is a Public Law 280 (PL 280) state and can exercise criminal and civil jurisdiction over Indians who reside in Oregon.

ARGUMENT

1. THE LOWER COURT ERRED WHEN IT FOUND THAT THE CUSH-HOOK NATION OF INDIANS KEPT ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK BECAUSE ITS RELOCATION 160 YEARS PRIOR EXTINGUISHED TITLE

Because of its outmoded definition of extinguishment of aboriginal title, the lower court erred in its application of *Johnson v. M'Intosh*, 21 U.S. 543 (1823). While it still is the seminal case that defined aboriginal title as a tribe's right of occupancy, it constricted extinguishment of that right to two events; purchase or conquest. The Court has since interpreted the Constitution's Indian Commerce Clause as granting the federal government absolute license over Indian Country. Chief Justice Marshall's simply put standards for extinguishment are no longer in accordance with the government's plenary power. It was inappropriate for the Oregon Supreme Court to use *Johnson* in its analysis of the aboriginal title claim.

Instead, the present-day interpretation of extinguishment suggests additional standards that might call for the termination of a tribe's right to occupancy. Taken collectively, aboriginal title is extinguished when the tribe ceases to demonstrate actual and continuous possession, the federal government destines the land for non-native settlement,

and its exercise of complete dominion deprives the tribe of exclusive use. *Plamondon ex rel Cowlitz Tribe of Indians v. United States*, 199 Ct. Cl. 523 (1972), establishes that a variety of factors can be taken into account to determine extinguishment of title, instead of taking them separately. *Id.* at 527. Another important example of current understanding comes from *United States v. Santa Fe, Pac. R.R. Co.*, 314 U.S. 339 (1941), where the Court acknowledged the "supreme" power the government has to extinguish Indian title in all its forms, extending the possibilities of extinguishment set forth in *Johnson*. *Id.* at 347. Two Federal Claims Courts found extinguishment beyond *Johnson's* parameters. In *Uintah Ute Indians v. United States*, 28 Fed. Cl. 768 (1993), the court held that when a tribe fails to show actual and continuous possession of land, aboriginal title is extinguished. *Id.* at 787. *Plamondon* also holds that congressional intent to extinguish aboriginal title can be used against a tribe in a claim for title. At 526. Finally, *Santa Fe* spells out yet another factor that can be used to determine extinguishment of aboriginal title. This case states that the government can extinguish title, "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." *Santa Fe* at 347. The Plaintiff in the current case can firmly establish that the Cush-Hooks no longer have aboriginal title to the lands comprising of Kelley Point Park because the tribe has not had actual and continuous possession of the land, the federal government intended the land for non-native use by negotiating a treaty with the tribe and creating the Oregon Donation Land Act, and the federal government also exercised complete dominion of the land, thus depriving the tribe exclusive use of the land.

When the Cush-Hook Nation of Indians relocated sixty miles west of its ancestral lands, it ceased its actual and continuous possession, contributing to the extinguishment of

their title. As defined by *Uintah Ute*, failing to establish any of the elements for aboriginal title will generally defeat the claim, but in particular is the actual and continuous possession of the land. Id. at 787. The Federal Claims Court notes that if a tribe were to stop living on the land for whatever reason, it would relinquish its right to occupy the land in the future and become the exclusive domain of the United States. *Id. quoting Quapaw Tribe of Indians v. United States*, 128 Ct. Cl. 45, 49 (1954). The Cush-Hook Nation voluntarily moved west 60 miles to avoid settlers and has not returned for over 160 years. In keeping with *Uintah Ute*, the Cush-Hooks lost their right to occupancy of the land after they moved in 1850 and it went under the exclusive domain of the United States.

Another factor that lead to extinguishment was the federal government's behavior toward the Cush-Hooks that illustrated its intentions to prepare for settlement first by negotiating a treaty that would relocate the tribe further west. In 1850, the superintendent for Indian Affairs for the Oregon Territory negotiated a treaty that would compensate the Cush-Hooks for their land and settle them further west. The treaty would have automatically extinguished its aboriginal title. The intention was to secure the land for American settlement, but before the treaty could be ratified, Congress passed the Oregon Land Donation Act, which entitled homesteaders fee title to lands that they occupied in the Oregon territory. After the Act's passage, Congress refused to ratify the Cush-Hook treaty. Although extinguishment was not exacted with treaty ratification, the desire to settle the Cush-Hook's viable farming land endured.

The second way the federal government destined the land for non-native use was through the enactment of the Oregon Donation Land Act. This Act, also called the Donation Land Claim Act of 1850, was created by the United States for the express purpose of donating the public lands of the Oregon Territory, including the land the Cush-Hooks previously inhabited, to settlers moving westward, as noted in § 4 of the Act. *Document: the*

Donation Land Claim Act, 1850, Center for Columbia River History (2013), http://www.ccrh.org/comm/cottage/primary/claim.htm. Throughout the Act's language, the donated lands were consistently described as being held publicly by the government. *Id*. These references indicated that the government presumed it owned the land and left no indication that it would donate lands that were still owned by any Indian Nation, including the Cush-Hooks. Per this presumption, if the government intended the Act to be a donation of all public lands in the Oregon Territory, and it donated the Cush-Hooks ancestral lands to settlers, the government must have thought the land was public, otherwise it would not have been given away. This is consistent with the Court of Claims' opinion in *Plamondon*. At 526 (1972) *quoting* Simon Plamondon v.United States, 25 Indian Cl. Comm'n at 450.

For that reason, the federal government's exercise of complete dominion deprived the Cush-Hooks of exclusive use, which added to its extinguishment. The Supreme Court in *Santa Fe* acknowledged that aboriginal title could be extinguished in a variety of ways, including, "by treaty, by the sword, by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy." 314 U.S. 339, 347 (1941). When the government proactively asserts complete control over lands held by a tribe so that the government is depriving a tribe of its right of occupancy, then the Court says a tribe's title has been extinguished. When the federal government included the Cush-Hooks' ancestral lands in the Oregon Donation Land Act, it had classified them as public and was therefore exerting its complete dominion to alienate the Cush-Hooks from them. This deprivation of the Tribe's right of occupancy makes obvious the extinguishment of its aboriginal title.

Explicit extinguishment is not required when implicit conduct expresses a clear intent to extinguish. While it is true that the Supreme Court held in *Santa Fe* that "extinguishment

cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards," the Court did not need express language from Congress before it found extinguishment: it occurred when the Tribe accepted a reservation set aside for the Tribe at its request. 314 U.S. 339 at 358 (1941). The Court opinionated that the Tribe's acquiescence implies it was relinquishing its right to occupy the lands outside the reservation. The Court agreed to "give [that acceptance] the definitiveness which the exigencies of that situation seem to demand." *Id.* Similarly, implied extinguishment is what the Court of Claims found in *Plamondon*. 199 Ct. Cl. 523 (1972). Accordingly, the Supreme Court can imply that the Cush-Hooks lost aboriginal title when the Tribe relocated 60 miles west, despite Congress' rejection of the treaty and the Tribe never receiving compensation.

In connection with that last point, the equitable doctrine of acquiescence estopps the Cush-Hooks from reclaiming aboriginal title. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Court held that "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *Id.* at 218. If a tribe has long since stopped exercising regulatory control over the land, then the current landowner has the right to expect that he or she will continue to have exclusive control and not the tribe. The Cush-Hooks are estopped from having aboriginal title because the State of Oregon has exerted jurisdiction for over 160 years and the courts can recognize that longstanding observance as acquiescence to any "present and future sovereign control over territory." *Id.*

In conclusion, the Cush-Hook Nation lost their aboriginal title by a number of considerations as promulgated by recent case law. *Plamondon* establish considerations that courts use to find extinguishment of aboriginal title, including the examination of a variety of

factors. One of the factors is congressional intent to give settlers fee simple title of land previously held in aboriginal title by tribes. The congressional intent in the current case is the negotiations and signing of the treaty with the Cush-Hooks. Despite the treaty not being ratified, the federal government still intended the land to be used for non-native settlement. Non-native settlement was also the reason for the creation of the Oregon Donation Land Claim Act, which conveyed all public lands, including lands formerly held in aboriginal title by the Cush-Hooks, to westward settlers. The Cush-Hooks right to occupancy was also extinguished through its loss of complete dominion to the federal government as per *Santa Fe*. Title was also extinguished from lack of actual and continuous use after 1850 as put forth by *Uintah Ute*. Taking these three factors in conjunction, the Cush-Hooks aboriginal title was sufficiently extinguished by the federal government.

2. THE LOWER COURT WAS CORRECT IN HOLDING THAT OREGON HAS CRIMINAL JURISDICTION TO PROTECT ARCHAEOLOGICAL OBJECTS IN KELLEY POINT PARK BECAUSE THE OREGON STATUTES ARE AN APPROPRIATE EXERCISE OF P.L. 280

An analysis of Oregon's jurisdiction over Respondent is unnecessary if the tribe no longer has aboriginal title. Oregon Revised Statute §358.920 states that no person can interfere or remove archaeological artifacts from public or private property unless authorized by permit. Oregon Revised Statute §390.235 explains the permit process as including careful considerations into the application's scientific purpose, any recovered object's destination, and what qualified institution is making the request. Respondent does not allege any application for permit nor would he qualify for one without showing evidence that meets the criteria. Additionally, if Indian artifacts are involved, then the law requires consultation with the appropriate tribe, but Oregon Revised Statute §97.740 requires an "Indian tribe" to be

federally recognized or a party to one of the Oregon termination acts. Since the Cush-Hooks do not have federal recognition or are a party to neither the Klamath Termination Act, 25 U.S.C. 3564 et seq., or the Western Oregon Indian Termination Act, 25 U.S.C. 3691 et seq., they would not be consulted when the State's Department of Parks and Recreation reviews permits.

However, even if the Cush-Hooks still had aboriginal title to the land, Oregon has criminal authority and civil adjudicatory authority. Public Law 280 was created to terminate the federal guardianship relationship with tribes and delegate criminal and civil jurisdiction to the state. 18 U.S.C.A. § 1162, 28 U.S.C.A. § 1360. State laws were to be made applicable to the tribes so as to alleviate lawlessness for tribes who did not provide their own law enforcement. *Id.* However, not all civil laws can be enforced in Indian Country and without express language from Congress a court must determine enforceability on a case-by-case basis. *See Bryan v. Itasca*, 426 U.S. 373 (1976). In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court established a set of guidelines to prove whether a state's law controls in Indian Country. Despite the case being superseded by the Indian Gaming and Regulatory Act of of 1988, 25 U.S.C. §2701, its decision regarding general laws of applicability is still acknowledged today. First "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." *Id.* at 208. Another way of making the regulatory/prohibitory distinction is:

> "[I]f the intent of a state law is generally 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 regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement...."

Id. at 209.

So the question becomes: Does the Oregon statutes meet the Cabazon test? The statutes should be criminal instead of civil in nature because Cabazon specified that if a state is prohibiting certain conduct in general, like tampering with historical artifacts, then it is a criminal law. Id. Only when conduct is deemed generally permissible, minus regulations, will it be civil/regulatory. *Id.* Oregon would have to except certain people, particular lands, etc., from its law to find the unauthorized excavation or removal of archeological objects to be a regulation. Instead, the law prohibits it on all properties and by all people. Even on private land, the archaeologist requires a State permit, as well as the permission of the landowner. Therefore, the Oregon statutes are inherently criminal.

The Oregon statutes also satisfy Cabazon's shorthand test for civil adjudicatory authority. The Supreme Court held that its plainly "whether the conduct at issue violates the State's public policy." Id. If the conduct is being prohibited because it violates a P.L. 280 state's public policy, then that prohibition will be considered intrinsically criminal and applicable in Indian Country. Oregon's public policy is included in § 358.910 of its Revised Statutes and lists its concerns as the preservation and protection of Oregon's history as "embodied in objects and sites that are of archaeological significance." Or. Rev. Stat. §358.910(2) (2012). The conduct being prohibited in Or. Rev. Stat. §358.920 is the unauthorized excavation, injury, destruction, alteration, or removal of archaeologically significant sites and objects. Allowing any of these actions would violate Oregon's policy of preserving and protecting its history and therefore makes the statutes an exercise of criminal jurisdiction.

Wisconsin, another PL 280 state, also tested their involuntary commitment statutes against the Cabazon test. In *State v. Burgess*, 665 N.W.2d 124 (Wis. 2003), the Wisconsin Supreme Court held that committing individuals predisposed to sexual violence was within the State's public policy of protecting the public and treating convicted sex offenders. *Id.* at 132. It also noted that the law was civil adjudicatory in nature because it filled a gap in tribal law:

> [T]he tribal court in this case declined to accept jurisdiction because the Lac du Flambeau Tribe had not yet passed an ordinance regarding the commitment of sexually violent persons. Thus, the appropriateness of State jurisdiction is bolstered since one of the stated purposes of PL-280 was to 'redress the lack of adequate Indian forums . . . .'

Id. at 133 quoting *Bryan v. Itasca County*, 426 U.S. 373, 383 (1976). It would be appropriate to conclude that Oregon should have jurisdiction over Kelley Point Park because the Cush-Hooks have no statutory safeguards for historical sites and objects. To declare Oregon law unenforceable would be incongruous with Congress' intent to prevent lawlessness in Indian Country.

The American Indian Religious Freedom Act does not confer the same protections to non-federally recognized tribes and its members. AIRFA was enacted in 1978 to protect tribal members' ability to practice Native American religions. 42 U.S.C. § 1996 (2012). This protection included the right to access sacred sites and to possess sacred objects. Respondent would argue that he is entitled to remove his Tribe's sacred totems and is protected from prosecution under AIRFA, but AIRFA is clear to define how far its protections reach:

> 'Indian tribe' means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791 [Act Nov. 2, 1994; for full classification, consult USCS Tables

volumes], and 'Indian' refers to a member of such an Indian tribe; § 1996(b)(ii). The Cush-Hooks are not a nation that the Secretary of the Interior has acknowledged to exist and since the law makes no mention of "non recognized Indian" tribes, it must be conferred that the Legislature did not intend to include them in the Act's passage. This is further evidenced by the inclusion of traditionally non-federally recognized native peoples like the Native Hawaiians and Alaskan Natives. If Congress wanted to include non-federally recognized American Indians, it would have referred to them like the others. Respondent cannot invoke the American Indian Religious Freedom Act rights when he is not a member of a tribe as defined in the statute.

So even if the Cush-Hooks' aboriginal title had survived extinguishment, Oregon would still have jurisdiction because Public Law 280 conveys civil adjudicatory authority. Oregon has jurisdiction because it is against Oregon's public policy of protecting and preserving the State's history to allow unpermitted excavation and removal of archaeological artifacts. It also would have a duty of preventing lawlessness in Indian Country when a tribe does not provide for its own protections. Finally, the Cush-Hooks would not be exempt because of the American Indian Religious Freedom Act because it is not a federally recognized Indian tribe.

CONCLUSION

For the foregoing reasons, Petitioner asks this Honorable Court to reverse on the issue of aboriginal title, reverse on the issue of trespassing and cutting timber without a state permit, and to affirm on the issue of violating the Oregon Revised Statutes.

Dated: January 14, 2013 Respectfully submitted,