No. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner

v.

THOMAS CAPTAIN

Respondent

On Petition for Writ of Certiorari to the
United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Team Number 46

Questions Presented

1. Did the Oregon state court err in holding the Cush Hook Nation retains aboriginal title to the lands in Kelly Point Park, despite abandonment and federal intent to extinguish title by taking, expressed in the Oregon Donation Land Act?

2. Did the Oregon state court properly hold that Oregon has criminal jurisdiction to protect and control the use of archaeological, cultural and historical objects within a state park, under state and federal law?

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Statement of the Case

I. Statement of Prior Proceedings

In 2011, the State of Oregon prosecuted Thomas Captain for trespass on state lands, cutting timber in a state park without permit, and desecrating an archaeological and historical site in violation of Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. In a bench trial, the Oregon Circuit Court for the County of Multnomah ("the Oregon court") found that Captain erected temporary housing on lands in an Oregon State Park, known as Kelley Point Park, ("the Park") and cut down an archaeologically, culturally and historically tree containing a tribal cultural and religious symbol in the Park.

The Oregon court made five conclusions of law. First, the Oregon court concluded that Congress erred by describing all lands in Oregon Territory as public lands under the Oregon Donation Land Act of 1850. Because aboriginal title to lands in the Park was never extinguished by treaty, the Oregon court concluded the Cush-Hook Nation retained title to lands in the Park. Therefore the grant of land to Joe and Elsie Meek was void at inception—invalidating the 1880 sale of those lands to Oregon. Finally, the Oregon court concluded that because Oregon statutes apply to all lands in the state of Oregon under Public Law 280, regardless of tribal ownership, Oregon has criminal jurisdiction to prosecute for desecration of an archaeological and historical site.

The Oregon court held that the Cush-Hook Nation retained aboriginal title to the lands Captain occupied and found Captain not guilty of trespassing or cutting timber without state permit. Still, the Oregon court found Captain guilty of damaging an archaeological site and a cultural and historical artifact. Captain was fined $250.

Captain and the State of Oregon appealed. The Oregon Court of Appeals affirmed without writing an opinion. The Oregon Supreme Court denied review. This Court granted petition for certiorari. This court has jurisdiction under 28 U.S.C. § 1257(a).

II. Statement of Facts

In 2011, Thomas Captain, a citizen of the Cush-Hook Nation ("the Nation"), occupied an area of Kelley Point Park. This area of the Park is part the ancestral homeland of the Cush-Hook Nation and contains many tree carvings of totems and religious symbols that are sacred to the Nation. The Cush Hook Nation is not politically recognized by the United States or Oregon and has resided in the coastal mountain range of Oregon since 1863.

The Cush-Hook people occupied the area now known as Kelley Point Park from time immemorial until the mid-nineteenth century. From their primary village, the Cush-Hook grew crops, harvested wild plants, hunted and fished in the area. In April of 1806, he Multnomah peoples introduced William Clark of the Lewis & Clark expedition to the headman/chief of the Cush-Hook Nation. The Lewis & Clark expedition visited the primary Cush-Hook village, documenting village life. Clark made through sketches and ethnographic notes about the Nation's governance, housing, cultural and agricultural practices. Clark specifically noted the Cush-Hook practice of carving totems and sacred symbols on trees. Clark and Meriwether Lewis gave the headman/chief a President Thomas Jefferson peace medal or "sovereignty token." Historians believe that these tokens demonstrated an Indian nation's desire to engage in political and commercial relationships with the United States.

In 1850, the Cush-Hook Nation signed a treaty with Anson Dart, Superintendent of Indian Affairs for the Oregon Territory. Dart wanted to make the lands available for United States settlers to occupy and farm. The proposed treaty promised benefits and compensation,

including a reservation on lands in the Oregon coastal mountain region (60 miles west of the village). After signing the treaty—but before Congress ratified it—the entire Cush-Hook nation voluntarily relocated to the coastal mountain region designated in the treaty in order to avoid United States settlers. The Cush-Hook people live there to this day. In 1853, the United States Senate refused to ratify the Cush-Hook treaty. The United States has taken no action to formally recognize the Cush-Hook people since the proposed treaty in 1850.

Years after the Cush-Hook Nation relocated, the United States granted two settlers, Joe and Elsie Meek ("the Meeks") fee simple title to the lands that would become Kelley Point Park. The Meeks claimed the 640 acres of land under the Oregon Donation Land Act of 1850 ("the Act"). In the Act, The United States promised to grant fee simple title to white U.S. citizens who cultivated and settled public lands in Oregon Territory for four years following enactment. Oregon bought the lands from the Meek's descendants in 1880 and created Kelley Point Park as a state park.

In 2011, Captain moved from the Nation's home in the coastal mountain region and occupied an area of the Park. Captain erected temporary housing in the Park to assert his Nation's ownership of the land and to protect culturally and religiously significant trees within the park. Hundreds of years ago, Cush-Hook shamans/medicine men carved sacred totems and religious symbols into living trees. These carvings are now 25-30 feet from the ground. Recently, vandals have climbed these trees, defaced the sacred carvings and sometimes removed the carvings to sell. Before Oregon took action to stop the vandals, Captain occupied the park and cut down a tree with an image that was allegedly carved by one of his ancestors. Captain removed a section of the tree containing the carving and carried

it back to his home in the coastal mountain range. As Captain traveled with the carving, state troopers arrested him and seized the carving.

Argument

By ruling that Congress erred in its definition of public lands in the Donation Land Act and by invoking the authority of Public Law 280 in enforcement of state statutes, the Oregon state court drew into question the validity and application of federal laws.[1] This Court should review the legal conclusions of the Oregon court de novo.

The United States extinguished the aboriginal title of the Cush-Hook Nation ("the Nation") to lands in Kelley Point Park ("the Park"). Although the treaty with the Cush-Hook Nation was not ratified by the United States Congress, the Nation's title to lands in the Park was extinguished by (1) the actions of the United States Government under the Donation Land Act of 1850 and (2) abandonment by the Cush-Hook Nation. Additionally, although Captain removed a carving created by one of his ancestors, he has no claim of individual aboriginal title to the carving or the lands he occupied.

The State of Oregon properly exercised criminal jurisdiction when it enforced Or. Rev. Stat. 358.905-358.961 *et seq.* (archaeological sites) and Or. Rev. Stat. 390.235-390.240 *et seq.* (historical materials) because the Kelley Point Park is not Indian country. This Court has used the two-prong, set-aside and superintendence test to define Indian country. This case fails to meet that test. The Cush-Hook Nation does not own the land nor does it have the political relationship with the federal government to constitute superintendence over the lands in dispute, even if it did own the land. Moreover, even if the Park could be considered Indian country, Public Law 280 authorizes Oregon to exercise criminal jurisdiction over Indian country.

[1] Under 28 U.S.C. §1257(a) this Court may review final judgments of a state court where the "validity of a treaty or statute is drawn in question . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

I. The United States extinguished the Cush-Hook Nation's aboriginal title to the land in Kelley Point Park, transferring title to the state of Oregon.

Under federal law, Indian nations possess full rights to occupancy, possession and use of lands under "aboriginal title"—until United States extinguishes title "by purchase or conquest." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1843). Aboriginal title may only be extinguished by the United States Federal Government. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). Extinguishment of aboriginal title may be by purchase (through treaties) or by taking. Takings are not to be "lightly implied." United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 354 (1941). Federal takings of aboriginal title do not inherently create a claim for compensation, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), though Indian peoples may file claims of compensation for takings in the U.S. Court of Federal Claims. See 28 U.S.C. §1505.

In this case, the United States extinguished aboriginal title to lands in the Park by taking and granting those lands under the Oregon Donation Land Act of 1850 ("the Act"). The Nation's movement from the lands in question prior to the ratification of the treaty, and the failure to return to those lands or assert a claim to those lands prior to Captain's occupation, demonstrate abandonment. Thus, although the Nation may have a claim against the United States for taking their ancestral lands now in the Park, the State of Oregon now possesses title to the land and the Nation's aboriginal title has been extinguished by Congressional action and the Nation's abandonment.

A. Although the United States did not ratify the 1853 Treaty with the Cush-Hook Nation, the United States extinguished aboriginal title to those lands through the Donation Land Act.

The Donation Land Act of 1850 established a surveyor-general for public lands in Oregon territory with the power to designate recipients of fee simple title to "public lands" in Oregon. 9 Stat. 496-500 (1850). The Act granted title to every "white settler or occupant . . ., American half-breed Indians included . . . who shall have resided upon and cultivated the [land] for four consecutive years" following enactment.[2] Id. at §4. Claims for land grants may not be made until three months after the surveyor-general has completed the survey and grants will not be given until four years afterward. Id. at §§ 7-8. No references are made to Indian lands or peoples other than authorizing grants to "half-breed Indians." Id. at §4

Johnson v. M'Intosh establishes the doctrine of aboriginal title as a "title of occupancy" that may be extinguished "exclusive[ly]" by the United States under the doctrine of discovery by "purchase or conquest." 21 U.S. at 587. The Supreme Court considered whether a prior grant of title by the Piankeshaw Nation was recognizable above the later grant of title from the United States. Because Chief Justice Marshall deemed the Piankeshaw Nation (and all other Indian nations) possessed a "degree of sovereignty" that was not on par with the United States, Id., the Court held that the United States had exclusive power to grant lands, which "must negative the existence of any right which may conflict with, and control it." Id. at 588.

Aboriginal title is established by an Indian Nation's occupancy in "an ancestral home" and is "to be determined as any other question of fact." Santa Fe Pacific R.R. Co., 314 U.S. at 345. In United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad Co., the

[2] Section 4 of the Act has additional requirements, granting title to settlers or occupants "above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such a declaration according to law."

Court was asked to determine whether the defendant Railroad Company owed rent on lands inside and outside of the Hualapai Reservation, subject to the Hualapai Nation's aboriginal title. The Court noted that "whether [extinguishment of aboriginal title] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."[3] Id. (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)). Noting the history of treaties negotiated "wholly or partially within the Mexican cession," the Court held that Congressional intent to extinguish must be "plain and unambiguous." Id. at 346. Such extinguishment cannot be "lightly implied." Id. at 354. Thus the Hualapai Nation's aboriginal title was not extinguished and Congress' creation of the Colorado River reservation was only "an offer." Id. at 359.

Aboriginal title may be "extinguished by the Government without compensation."[4] Tee-Hit-Ton Indians v. United States, 348 U.S. at 289. In Tee-Hit-Ton, petitioner Tee-Hit-Ton clan of the Tlingit people claimed that Congress "sufficiently 'recognized' its possessory rights" through the Organic Act for Alaska and a statute providing a civil government for Alaska. The Court held that "[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for by subsequent taking." Id. at 277. The Court proceeded to distinguish the petitioner's title by noting that lands of Alaska Natives are not recognized as "permanent rights," but merely a right of occupancy. Id. at 278. However as Justice Douglas notes in his dissent, the Organic

[3] The Petitioners do not argue that the extinguishment is non-justiciable. Rather, this citation demonstrates that the Court recognizes varied means of extinguishing Aboriginal title. "The view that the process by which the United States extinguishes title is nonjusticiable . . . has unequivocally been rejected by Congress, the Supreme Court, and international law. At the same time, the Supreme Court continues to state that Congress is authorized to extinguish tribal title when it chooses to do so, nonwithstanding treaty promises to the contrary." Cohen's Handbook of Federal Indian Law § 15.09 (a) (internal citations omitted)

[4] However "any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States" may file a claim for compensation in the Court of Federal Claims. 28 U.S.C. §1505.

Act for Alaska explicitly provides for "two classes of claimants to Alaskan lands—one, the Indians; the other, those who had mining claims." Id. at 292 (J. Douglas dissenting).

Although lands held under aboriginal title may be extinguished and become part of a State, only the United States Federal Government has the power to extinguish title. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1975). In Oneida Indian Nation, the Court heard a claim that lands were ceded to the State of New York without federal consent and thus violated federal statute. The Court held that "federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." Id. at 670. Though there were statutes and treaties between the United States and the Oneida Nation, the court relied on general principles of aboriginal title to reaffirm that only federal laws may extinguish aboriginal title.

Thus, lower courts and observers have found that "treatment of the land in a manner wholly inconsistent with continued tribal occupancy suffices to extinguish title." William C. Canby, American Indian Law in a Nutshell 413(5th ed. 2009). The Ninth Circuit has found that, even when a statute is "ambiguous as to the extinguishment" of aboriginal title, subsequent federal actions may extinguish title. United States v. Gemmill, 535 F. 2d 1145, 1148 (9th Cir. 1976). In United States v. Gemmill, the United States used military action to expel the tribes on the land in question and proceeded to incorporate the lands into a National Forest, actively managing the land thereafter. The 9th Circuit 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." Id. at 1149. Any lingering ambiguities were resolved by compensation, received in a civil suit through the Federal Claims Commission. Id. at 1149.

The Third Circuit has recently held that even fraudulent purchases may extinguish aboriginal title—so long as there is a clear intent to extinguish. Delaware Nation v. Pennsylvania, 446 F.3d 410, 416-17 (3rd Cir. 2006). William Penn's purchase of the Delaware Nation's lands was "the result of a massive fraud perpetuated by Thomas Penn on the Delaware Nation." Id. at 414. Although the Third Circuit recognized the existence of fraud, it ruled that intent, "based on either the face of the instrument or surrounding circumstances" was enough to extinguish aboriginal title. Id. at 417 (citing Seneca Nation of Indians v. New York, 382 F.3d 245, 260 (2nd Cir. 2004). Thus the clear intent to extinguish aboriginal title, even if by fraud, was enough to validate the taking of the Delaware Nation's lands into Pennsylvania.

Undeniably, the Cush-Hook Nation held aboriginal title to the lands within the Park until 1850. Numerous historical accounts indicate the presence of the Nation. Treaty negotiations between the Nation and Anson Dart recognize the validity of the Nation's title. Under the standard established by Santa Fe Railroad this determination of fact is not contested by the petitioner, as the sacred markers and stories of Europeans travelling to the region verify the occupancy of the Cush-Hook Nation. However, the Donation Land Act evidences a clear intent by the United States to take lands in Oregon and convert them to public or private use, extinguishing the title of the Cush-Hook Nation. Additionally, treaty negotiations between the Nation and the United States show a clear intent to convert the lands of the Nation into lands for Oregon territory (and later the state of Oregon).

Making Indian lands available as public lands under the Act is an "exercise of complete dominion adverse to the right of occupancy." Santa Fe Pacific R.R. Co., 314 U.S. at 345. The grant of land to the Meeks returns to the Johnson v. M'Intosh standard of

extinguishment since the grant of lands by the sovereign "must negative the existence of any right which may conflict." 21 U.S. at 588. Thus, by creating a broad grant for public lands under the Donation Land Act, Congress expressed intent to extinguish all title inconsistent with those grants. Unlike Santa Fe, there was no reservation created or no treaty signed to finalize a purchase or exchange for the Nation's aboriginal title. Yet the treaty parallels the offer to create a reservation in Santa Fe, which the entire Cush-Hook Nation accepted. The Nation's occupancy of the land ended when the Nation left those lands, did not return, and the United States subsequently granted title to the Meeks.

Like Tee-Hit-Ton this case represents a taking by the United States government that does not require compensation at the time of taking—even though there was no exchange between sovereigns through a treaty to indicate a purchase. Unlike Tee-Hit-Ton, the Nation is not mentioned in the Organic Act of Oregon, the Donation Land Act or any other signed federal statute to indicate a reservation (either of land or rights) to the Nation upon the taking of lands. On one level this makes the intent to extinguish more ambiguous as there is no explicit statute extinguishing the lands. However as the Santa Fe court noted, such an explicit mention is not required, and extinguishment may be implied by a strong showing of evidence. Here, the United States' knew of the Nation's existence on the lands, evidenced by the many historical accounts and the unratified treaty. Granting title to lands that the Nation occupied, or once occupied, is wholly inconsistent with their aboriginal title. This is strong evidence of federal intent to extinguish title, classifying the land as public, followed by clear federal action granting the land to a private party.

Furthermore, Government control and conservation of the land in question as part of a park indicates aboriginal title has been extinguished. Similar to Gemmill, Oregon has owned

the Park for over 100 years "for the purposes of conservation and recreation," after the indigenous peoples left the lands in question. 535 F. 2d at1149. Nothing in the record indicates that the Nation attempted to re-occupy or reclaim ownership of the lands until the present incident in 2011. Oregon's maintenance and use of the Park has been continuous since the time it acquired title to the lands from the Meeks. Gemmill exemplifies how such use is wholly inconsistent with continued aboriginal title and shows extinguishment.

The continued conservation, maintenance and use of the park by the State of Oregon is consistent with extinguishment and inconsistent with aboriginal title. Although Gemmill involved a National park, while this case revolves around a state park, the means of extinguishment is identical since both were taken by grants of federal power. In Gemmill, the Federal Government took military action to remove the Pit River Indian Tribe from the lands in question, later including the land in the national forest reserves in the early 1900's. Here, the Federal government took no action to forcibly remove the Cush-Hook Nation. The Nation left the lands voluntarily, anticipating treaty ratification. Later the United States granted the lands to private parties as part of federal action, later transferred to Oregon for inclusion in the Park. In both cases the chain of title is traceable to a grant from the federal government and results in lands managed in a park. Thus, because the lands were taken into public use by the Federal Government, aboriginal title was extinguished.

Although the petitioner does not contest the lower court's finding that the Meeks fraudulently represented themselves in receiving the grant, this does not mean aboriginal title was not extinguished. As demonstrated in Delaware Nation, fraud does not defeat extinguishment when occupation is not continuous and there is clear intent to extinguish title. Here, the Donation Land Act is a clear intent to extinguish any aboriginal title, restricting

purchase only to whites and "half-breed Indians," ensuring title is only granted to those considered citizens of the United States.[5] Crucially, the unratified treaty with the Cush-Hook Nation was signed by the Nation in 1850, the same year Congress enacted the Donation Land Act. The Senate refused to ratify the treaty in 1853, after the Nation had left their lands and at least one year before said lands were granted to the Meeks.[6] Granting the land in question as part of public lands evidences clear intent to take the Cush-Hook Nation's lands, as Congress knew of the existence of the Cush-Hook Nation and the location of the Nations ancestral lands and relocated lands.

Because the Cush-Hook Nation did not have a ratified treaty with the United States, no land was reserved and thus their aboriginal title was extinguished by federal taking. Thus the land in question was transferred to the state of Oregon by federal action either by grant to the Meeks, regardless of fraud, or by federal taking because the United States considered these lands as public and grantable under the Act. Even if the Meeks did not have proper title obtained by the Act, the Federal government still took control of the lands contrary to the Nation's aboriginal title. Even if the Meeks grant is invalidated, the lands would revert to the United States, not the Cush-Hook Nation, and were therefore transferred to the state of Oregon at statehood. See Montana v. United States, 450 U.S. 544 (1981) (holding that lands not explicitly reserved as part of treaties with the Crow nation were granted to the state of Montana at statehood.)

The Oregon state court erred in holding that the Cush-Hook Nation retains aboriginal title. State courts are cannot to overrule acts of Congress. The Oregon court's holding that

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[5] See Nell Jessup Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J., 1215 (1980) (noting the ethnocentrism and economics of the doctrine of aboriginal title).
[6] Though the lower court did not specify the year the Meeks received title to the lands, it would have been no earlier than 1854 under the requirements of the Act.

Congress erred in describing the lands as public ignores the extensive plenary power of Congress in defining the relationship between the United States, Indian Nations and lands.[7] See United States v. Kagama, 118 U.S. 375 (1886) (holding that Congress has plenary power over Indian Nations through the doctrine of discovery); Lone Wolf v. Hitchcock, 187 U.S 553 (1903) (holding that Congress's plenary power is absolute, includes the power to unilaterally abrogate treaties with Indian Nations).

Because the United States extinguished title by taking the aboriginal title of the Nation into public lands by the Act, the Nation may seek compensation in the Court of Federal Claims under the Indian Claims Act. 28 U.S.C. § 1505. Although the Nation is not federally recognized, the act allows suit by any "identifiable group of American Indians."[8] Id. Because Captain is an individual citizen of the Nation and does not necessarily represent the interests of the Cush-Hook Nation, this is the improper time to resolve remedy for the Cush-Hook Nation. Litigation relating to the responsibilities and rights of the Nation and the United States arising from the Act, extinguishment and taking related to the Park should therefore have been litigated in the Court of Federal Claims and not through Oregon state courts.

Thus aboriginal title to the lands in Kelley Point Park was extinguished by the United States through the Donation Land Act and evidenced by subsequent actions by Oregon.

[7] Though many scholars of Federal Indian Law have questioned the ethnocentric and arbitrary nature of the Court's classification of plenary power as "unlimited-absolute," the Supreme Court has not limited this power since its decision in Lone Wolf. See generally David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law, 98-116 (2001).

[8] However the Nation will still have to demonstrate that the "statutes or regulations at issue can be interpreted as requiring compensation." United States v. Mitchell, 463 U.S. 206, 218 (1983).

B. The Cush-Hook Nation voluntarily abandoned the land in Kelley Point Park

Aboriginal title may also be extinguished by abandonment. Under common law, aboriginal title is a right of occupancy. Once occupancy ceases, the sovereign (the United States) has the right to grant title to “vacant” lands. Johnson, 21 U.S. at 597. In Johnson v. M’Intosh, Justice Marshall drew on British common law grants from the crown to define the federal power to grant lands: “the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.” Id. To obtain title to lands deemed abandoned or vacant, a settler may obtain title

> either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

Id. at 596.

Once land is abandoned, occupancy has ended and cannot be resumed. Buttz v. Northern Pacific R.R., 119 U.S. 55, 70 (1888). The Court in Buttz v. Northern Pacific Railroad found that, although Congress did not fully ratify an agreement between the United States and Dakota Indians, the Dakota had “retired to reservations set apart for them . . . thus giving up the occupancy of the other lands.” Id. at 69. Congress then granted the lands to the railroad with full intent to extinguish title and pay the Dakota peoples for the lands. Id. at 71. The court concluded that once the lands at issue were abandoned, with “full consideration being afterwards paid, [occupancy] could not be resumed.” Id. at 70.

The Supreme Court has consistently held that when lands are abandoned, the right of occupancy or aboriginal title is terminated. Williams v. Chicago, 242 U.S. 434, 437 (1917). In Williams v. Chicago, the Pottawatomie Nation ad left the lands in question, near Lake

Michigan and the city of Chicago, for "more than half a century," before eight plaintiffs filed suit to attempt to reclaim the lands. Id. at 437. The Court found that not only had title been extinguished by treaty, but abandoned by the Pottawatomie Nation.

Abandonment must be voluntary to extinguish aboriginal title. Extinguishment cannot be "lightly implied," and the Santa Fe court found that there was no "plain intent or agreement on the part of the [Hualapai] to abandon their ancestral lands." Santa Fe Pacific R.R. Co., 314 U.S. at 354. The Santa Fe Court noted that merely establishing the Colorado River reservation did not extinguish the Hualapai's aboriginal title to their ancestral lands because Congress was only "making an offer to the Indians" and many had remained on the ancestral lands. Id. at 353-4. In fact the Hualapai were forcibly removed from their ancestral lands "not pursuant to any mandate of congress." Id. at 355. Thus the Court held that "a forced abandonment of their ancestral home was not a 'voluntary cession.'" Id. at 356.

Therefore, the Cush-Hook Nation's aboriginal title was extinguished when they abandoned their lands. Under Johnson, once lands are vacant, the United States has power to grant full title to those lands. Based on all the facts in the record, the Cush-Hook nation left the lands which would become the Park before the United States granted title. Because the lands were then vacant, the United States had full power to grant title. As in the colonization of Virginia described in Johnson, the United States granted title through recommendation of a surveyor under the Oregon Donation Land Act.

Unlike Santa Fe, Williams or Buttz, the Cush-Hook Nation does not have a treaty relationship with the United States. The Nation moved from lands in the Park to the coastal mountain region under the assumption that a treaty would be ratified. Yet after Congress failed to ratify the treaty, based on all the evidence in the record, the Nation made no attempt

to reclaim their lands for over 100 years. Like Williams, this lengthy duration of time is indicates abandonment. No evidence in this case suggests force was used to remove the Nation, making such abandonment voluntary under Santa Fe. Importantly, the Donation Land Act was enacted in 1850 and the Cush-Hook Nation abandoned the lands pending treaty ratification by Congress, in 1853.

While the Cush-Hook Nation lacks the federal or treaty recognition given to the peoples discussed in Santa Fe, Williams or Buttz, the facts still indicate the Nation abandoned title to said lands. The Nation voluntarily left their lands with the intent to permanently relocate. Congressional failure to sign the treaty that would compensate the Nation for this abandonment should be remedied, but through the Court of Claims and the federal recognition process. The varied historical documents in the factual record demonstrate the continued presence of the Nation, leaving legislative solutions through present day Congressional action or legal remedies through the Court of Claims. Claims for compensation by this taking should be resolved through legislative action, providing treaty-like remedy to the Nation by federal recognition, services, educational benefits, the creation of a reservation, etc.

Thus under the standards set by Santa Fe, the lands were voluntarily abandoned, extinguishing aboriginal title to the lands in the Park.

C. Thomas Captain has no claim of individual aboriginal title over the land, tree or carving that he removed from Kelley Point Park.

Although the doctrine of aboriginal title was conceived as a group right held by Indian Nations, individual Indians may claim a right of occupancy to defeat competing claims of title. Cramer v. United States, 261 U.S. 219 (1923). In Cramer v. United States, the Court held individual Indian occupancy was consistent with Federal policy to induce

individualized settlement of land. Id. at 227. Thus individual Indian occupancy can defeat homesteading claims by white settlers. The United States' "duty of protection and power extend[s] to individual Indians" in the protection of individual Indian title of land. Id. at 232.

The Supreme Court termed this right as "individual aboriginal title" in United States v. Dann. 470 U.S. 39, 50 (1985). In Dann, the Dann sisters, members of an autonomous band of the Western Shoshone, were charged with trespass in violation of federal grazing regulations. Although the United States had established a means of payment for extinguishment of Western Shoshone tribal aboriginal title, the Court held that individual aboriginal title may be raised as a defense. Id. at 50. However the Court made no holding on the merits and remanded.

On remand, the Ninth Circuit held that individual aboriginal title applies only to individual Indians and their lineal descendants who settled the land in question before it was withdrawn by federal action. United States v. Dann, 873 F.2d 118, 1200 (9th Cir. 1989). The Ninth circuit noted that individual aboriginal title is still subject to extinguishment by the United States. Therefore, the Ninth Circuit distinguished the present case from the policy considerations in Cramer, noting a shift in federal policy by 1934 when the Taylor Grazing Act withdrew public lands from open grazing. Id. at 1198. "In short, an Indian cannot today gain a right of occupancy simply by occupying public land. . . . Under current law, that occupancy could not be viewed as undertaken with the implied consent of the government." Id. The court concluded that the Dann sisters had inherited individual aboriginal title from their parents, subject to regulation by the Bureau of Land Management.

Recently, the Ninth Circuit held that claims of individual aboriginal title "must demonstrate continuous individual occupation that commenced before the land in question

was withdrawn." United States v. Lowry, 512 F.3d 1194, 1199 (9th Cir. 2008) (citing United States v. Kent, 945 F.2d 1441 (9th Cir. 1991)). In Lowry the defendant asserted individual aboriginal title as a defense to charges of illegally occupying a national forest. The Ninth Circuit held that individual aboriginal title is an affirmative defense, placing the burden of proof on the individual claimant. Id. The court held that Lowry did not meet the burden of proof because Lowry presented no evidence that at least one of her lineal ancestors enclosed, cultivated or resided continuously on the particular parcel Lowry occupied.[9] Id. at 1202.

In this case, Captain asserted no right of individual aboriginal title at trial, claiming instead that he was asserting title and protecting the lands from vandals on behalf of the Cush-Hook Nation. Even if the carving Captain removed from the lands was created by one of his direct, lineal ancestors, nothing within the record Captain presented evidence of such at trial to meet the standard of an affirmative defense presented by Lowry. Similar to the federal actions in Cramer, the Donation Land Act was enacted during a period of segmentation and individualization of land, evidenced by the Donation Land Act's accommodation for individual parcels grantable only to "half-breed Indians." 9 Stat. 496 §4. However, the Cush-Hook Nation abandoned the lands years before any land could be granted by the Donation Land Act. Thus any claims of individual aboriginal title were also abandoned.

Additionally, Captain does not meet the standard of Lowry or Dann as he presented no evidence that the particular segment of land he occupied was once occupied by his direct lineal ancestors prior to withdrawal. Based on all evidence in the record, the Cush Hook nation abandoned the lands before 1854, when the land was granted to the Meeks. Even if the Meeks deed is fraudulent, there is no evidence that Captain or his ancestors occupied the

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[9] Specifically, the Court noted that Lowry's ancestor owned and occupied an allotment adjacent to the land Lowry occupied. Lowry's allotment on that adjacent land was not granted until 1926, "at least 15 years *after* the property was withdrawn from settlement." Lowry, 512 F.3d at 1202 n.7.

particular area of land in question before 2011 (when Captain began his occupation of the Park). The lands have been held and maintained as a state park by Oregon since 1880.

Thus Captain has no claim of individual aboriginal title to lands within Kelley Point Park because he did not assert the affirmative defense at trial and no evidence in the record indicates continuous occupation by Captain or his lineal ancestors.

II. The trial court properly ruled that Oregon has Criminal Jurisdiction because Oregon presumptively has criminal jurisdiction under Public Law 280, even if Kelley Point Park is Indian country

The State of Oregon exercises general criminal jurisdiction over its territory as a sovereign state within the United States' dual federalism scheme. Within Indian country, a States' criminal jurisdiction may be limited, if not altogether precluded. See Worcester v. Georgia, 31 U.S. 515, 561 (1832). Congress allowed states to exercise criminal jurisdiction within Indian country by passing 18 U.S.C. § 1162 ("Public Law 280"). 18 U.S.C. § 1162. To determine the scope of Public Law 280, the threshold issue is whether the state park, Kelley Point Park, is Indian country under federal law. If Kelley Point Park is Indian country, then Public Law 280 gives Oregon criminal jurisdiction. If Kelley Point Park is not Indian country, then Oregon has criminal jurisdiction over all persons outside of Indian country within the state. Hagen v. Utah, 510 U.S. 399, 422 (1994).

A. Kelley Point Park is not Indian country for purpose of criminal jurisdiction

The State of Oregon presumptively exercises general criminal jurisdiction within state lands outside of Indian country. See generally Hagen v. Utah, 510 U.S. 399, 422 (1994). The status of the lands is a threshold issue which determines the scope of the State of Oregon's authority to protect the archaeological, cultural, and historical objects pursuant to Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. The United States Congress, exercising its plenary power over Indian country, defined the scope of Indian

country for criminal jurisdiction in 18 U.S.C. § 1151. See also United States v. Kagama, 118 U.S. 375, 384-85 (1886).

The federal definition of Indian country recognizes three categories of Indian country. First, it recognizes any land "within the limits of any Indian reservation under the jurisdiction of the United States Government." Id. § 1151(a). Second, it recognizes any "dependent Indian communities." Id. § 1151(b). Third, it recognizes all "Indian allotments." Id. § 1151(c). To qualify as Indian country, the Supreme Court concluded that section 1151 requires land to be 1) set aside and 2) a federal superintendence for a land in Alaska v. Native Village of Venetie Tribal Government. 522 U.S. 520, 530 (1998).

In Venetie, the Court ruled that Congress intended for the federal set-aside and federal superintendence prongs to define Indian country when Congress passed § 1151. Id. at 531. The Court recognized the policy rationale behind defining Indian country with these two prongs:

> The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, **rather than the States**, are to exercise primary jurisdiction over the land in question.

Venetie, 522 U.S. at 531 (emphasis added). In footnote 6, the Court notes that Congress' plenary power over Indian affairs requires some sort of "explicit action" to be taken by Congress to recognize Indian country. Id. at 531 n.6.

In this case, it is clear that Kelley Point Park does not qualify as Indian country. First, the lands were never set-aside for occupancy of an Indian community. In fact, Congress intended to have the Indian community vacate their ancestral homelands to make way for settlers. The Cush-Hook people did, in fact, vacate the lands of Kelley Point Park.

Subsequently, Congress, using its plenary power over Indian affairs and sovereign authority to originate land title, conveyed the land to settlers via the Oregon Donation Land Act of 1850. Regardless of whether the Meeks properly acquired the land and subsequently could not convey the land to the State of Oregon, it is clear that the right of occupancy cannot exist on lands an Indian community does not occupy. Unlike the community in Venetie, the Cush-Hook people do not own the land in fee simple. In fact, the Cush-Hook people have no title recognized by the United States anywhere within the United States.

Second, the federal superintendence prong of Venetie ensures that a political relationship exists between the federal government and the Indian community, because a finding of Indian country could displace State authority over that territory. In Venetie, the Indian community owned the land in fee simple. This shows that the proper superintendence analysis is outside the scope of who owns the land. Rather, it is analyzed within the context of the political relationship between the federal government and the Indian community.

In this case, Captain never argues that the lands in Kelley Point Park were held under superintendence by the federal government. In fact, the basis of his land claim emphasizes the lack of a relationship between the federal government and the Cush-Hook Nation. Not only did Congress never intend to take the lands under superintendence, it actually had a policy for alternative uses for the land in the Donation Land Act. Further, no treaty was ever ratified between the United States and the Cush-Hook Nation. The Nation never received political recognition from the federal government. The Cush-Hook Nation does not exist on the federal list of recognized tribes. Congress has never held a political relationship with the Cush-Hook people. Its failure to ratify the treaty with the Cush-Hook Nation (which is the

sole basis for their title claim) illustrates the lack of political recognition of the Cush-Hook tribe. Superintendence is not about who has title. It is about Congress' recognition.

The Oregon court held that the Cush-Hook Nation retained aboriginal title because Congress failed to ratify a treaty and never gave compensation. However, under the two prong analysis of Venetie, they still cannot be deemed Indian country under the federal standard. First, they do not occupy the lands within the Kelley Point Park. In this case, recognition of aboriginal title by Congress' failure to ratify the treaty would eliminate the Cush-Hook Nation's status as Indian country under the superintendence prong. Congress never held a political relationship with the Cush-Hook Nation, nor did it provide the Cush-Hook Nation land in trust, so that it may exercise jurisdiction over that territory in the place of State jurisdiction.

Even if Congress had ratified the treaty and added the Cush-Hook Nation to the list of federally recognized tribes, the Cush-Hook people would not have any political control over the lands of the Kelley Point Park. Instead, the Cush-Hook people would have political control over the lands they currently occupy in the coastal mountain region of Oregon.

B. The State of Oregon has criminal jurisdiction, even in Indian country, under Public Law 280.

Even if Kelley Point Park could be considered Indian country for criminal jurisdictional purposes, Congress altered the scheme of criminal jurisdiction in Indian country by passing Public Law 280. In relevant part, Section 1162(a) states:

> Each of the States. . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory 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 or Territory.

18 U.S.C. § 1162(a) (emphasis added) (table omitted). Oregon is one of six states specifically listed in the statute.

Historically, States have exercised criminal jurisdiction over non-Indian offenders in Indian country. See United States v. McBratney, 104 U.S. 621 (1881) (States have exclusive jurisdiction over non-Indian offenders in Indian country). Public Law 280 only extends criminal jurisdiction to Indian offenders in Indian country. 18 U.S.C. § 1162. This is, of course, only relevant if the Cush-Hook Nation qualifies as Indian country for criminal jurisdictional purposes. Public Law 280 is a recession of federal criminal jurisdiction to the state; it is not a diminishment the federal relationship between the Indian tribe and the federal government.[10] Public Law 280 repealed the applicability of the Major Crimes Act and the General Crimes Act effectively giving the Public Law 280 states exclusive criminal jurisdiction. See Canby, supra, at 260-263. Public Law 280 gives the State of Oregon authorization to enforce its general criminal laws within Indian country.

C. Oregon law properly protects archaeological, historical, and cultural objects

Although Public Law 280 gives the State of Oregon the authority to enforce its criminal code, the importance of protecting the archaeological, cultural, or historical articles cannot be overstated. Or. Rev. Stat. 358.905-358.961 *et seq*. (archaeological sites) and Or. Rev. Stat. 390.235-390.240 *et seq.* (historical materials). Oregon statute 358.910 indicates that these artifacts are an " . . . irreplaceable and nonrenewable cultural resource, and an intrinsic part of the cultural heritage of the people of Oregon . . ." Or. Rev. Stat. 358.910(1).

[10] For a further discussion of jurisdictional issues and understanding of Public Law 280 in courts and public opinion see Carole Goldberg, Duane Champagne & Heather Valdez Singleton, Final Report: Law Enforcement and Criminal Justice Under Public Law 280, 12, (November 1, 2007) https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf.

Oregon's protection scheme not only protects tribes within Oregon, but also any object of "cultural patrimony" whose definition:

> Means an object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore, cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object shall have been considered inalienable by the native Indian group at the time the object was separated from such group.

Or. Rev. Stat. 358.905 (h)(A).

In contrast, the federal scheme to protect Native American cultural artifacts is narrower under the Native American Graves Protection and Repatriation Act ("NAGPRA"). 25 U.S.C. § 3001-3013. NAGPRA only explicitly protects federally recognized tribes and proven lineal descendants. 25 U.S.C. §§ 3001-3002. Further, NAGPRA does not apply to private actors; it only applies to federal agencies and instrumentalities. 25 U.S.C. §3001. NAGPRA only applies to objects or remains found on federal and tribal lands. 25 U.S.C. § 3002.

The Oregon statutes protecting archaeological, cultural and historical objects apply to any person. Or. Rev. Stat. 358.920. The prima facie evidence of a violation under Oregon law is: 1) a person possesses the archaeological or historic objects, 2) a person possesses any tools that could remove such objects and 3) the person does not possess a permit. Or. Rev. Stat. 358.920. The penalty is a class B misdemeanor. Or. Rev. Stat. 358.920. .

Therefore the wider application under Oregon statutes enhances the protection of historically significant artifacts beyond the limited federal scheme. NAGPRA would not reach the carvings Kelley Point Park. Archaeological, cultural and historical artifacts represent the richness and diversity of human existence. Destruction of sacred cultural and historical objects will lead to the diminishment of collective human wisdom. Not allowing

the State of Oregon to protect these important archaeological, cultural, or historical objects would result in a jurisdictional void. Nothing in the record indicates that the Cush-Hook Nation possesses recognized political authority to pass tribal ordinances concerning the use of the lands in Kelley Point Park. Moreover, the lack of federal recognition would preclude the regulatory effects of the federal scheme to protect Native American cultural artifacts pursuant to NAGPRA. NAGPRA only protects federally recognized tribes. Further, NAGPRA does not apply to private actors; it obligates governmental agencies. The State of Oregon's scheme is more pervasive and detailed. It applies to private actors, while NAGPRA applies to federal agencies. It protects the sacred symbols, sites and cultural objects of Indigenous peoples lacking federal recognition when NAGPRA does not.

Moreover, if Captain believed that Oregon was failing its responsibility as steward of these objects, he had a civil remedy available to him. Oregon statutes provide a civil enforcement regime. Or. Rev. Stat. 358.955 This entitles any person to institute a civil proceeding against a person who violates the provisions, and the relief will be granted in conformity of the principles that govern. Id. In arresting Thomas Captain for carrying away a carving that Oregon and the Cush-Hook Nation recognize as a sacred symbol, the state was attempting to properly enforce this important law. Nothing in the record indicates that Captain was identified as a Cush-Hook Nation citizen. If Captain observed vandals during his occupancy, he can file a civil suit. Moreover, Captain could ensure the proper enforcement of Oregon statues to protect the historic, sacred site. In the alternative, Captain could file suit against the officers of the State of Oregon for failure to protect these sacred carvings. Section 358.955 gives a broad grant of suit: “any person or the Attorney General, on behalf of the

state, may institute a civil proceeding against any person" who violates Oregon Statutes protecting sacred sites. Id.

Therefore, not only is Captain's criminal prosecution consistent with state policy protecting sacred objects, but those same statutes provide a means for Captain and the Cush-Hook Nation to ensure the sacred carvings are not vandalized or stolen in the future.

Conclusion

Aboriginal title to the Lands in the park was extinguished by a federal taking and by abandonment by the Cush-Hook Nation. The Donation Land Act of 1850 took the lands which the Cush-Hook Nation abandoned into public lands, which have been maintained and conserved by the state of Oregon for over 100 years. The Cush Hook Nation abandoned lands in the park and Captain's ancestors abandoned any claim of individual aboriginal title. The State of Oregon properly exercised criminal jurisdiction over state lands because Kelley Point Park is a state park, not Indian country, and Congress authorized Oregon to enforce state criminal laws in Indian country. Finally, Oregon's regulatory scheme protects the important cultural artifacts as it belongs to the cultural heritage of the State of Oregon. Thus this Court should reverse the conclusions of the Oregon state court as to aboriginal title and affirm that court's conclusions of jurisdiction.