No. 11-0274

IN THE SUPREME COURT OF THE UNITED STATES

February Term, 2013

STATE OF OREGON,
PETITIONER,

– AGAINST –

THOMAS CAPTAIN,
RESPONDENT AND CROSS-PETITIONER.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE PETITIONER

Team 54

Counsel for the Petitioner

Table of Contents

TABLE OF AUTHORITIES

Acts:

Cases:

Statutes:

Secondary Materials:

http://www.portlandoregon.gov/parks/finder/index.cfm?action=ViewPark&ShowResults=yes&PropertyID=209
41 A.L.R. Fed. 425 (Originally published in 1979).
41 A.L.R. Fed. 425.

QUESTIONS PRESENTED

I: The Doctrine of Discovery is a well-established doctrine by which the federal government, as the sovereign nation, exercises plenary and absolute power over Indian lands while reserving rights of use and occupancy to the native population. These rights are protected against all actions but those of the sovereign as long as the native peoples maintain exclusive use and occupancy of those lands. When the sovereign does not expressly terminate those aboriginal rights through treaty or statute but proceeds to grant deeds to Indian lands to non-Indians, do those aboriginal titles become extinguished?

II: Generally, states may not exercise criminal jurisdiction over crimes committed by an Indian in Indian country, but states may exercise criminal jurisdiction over an Indian where the crime was not committed in Indian country. In 1953, Oregon was one of only five states that were required to accept Public Law 280, which mandated those five states, and any others that wished to implement Public Law 280, must exercise criminal jurisdiction in Indian country. Since the inaction of Public Law 280, many issues have arisen with regard to state criminal jurisdiction. Notwithstanding ownership of the land in question, does the state of Oregon have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on said land?

STATEMENT OF JURISDICTION

The Oregon Court of Appeals entered a decision. The Oregon Supreme Court denied review. The State of Oregon (the State) filed petition and a cross petition for writ of certiorari that was granted. Thomas Captain also filed a cross petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is an appeal of the decision of Oregon Court of Appeals to recognize the aboriginal title of the Cush-Hook nation to lands in Kelley Point Park and to find the cross petitioner guilty of damaging an archaeological site and historical artifact. This decision is reviewed under 28 U.S.C.A. § 1257, which allows the Court to review the "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari... 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."

STATEMENT OF THE PROCEEDINGS

This cause of action comes before the Court upon writ of certiorari. Petitioner, the State, appealed the decision of the Oregon Circuit Court for the County of Multnomah to uphold the claim of the Cush-Hook nation, a non-recognized tribe, to aboriginal title to lands owned by the State of Oregon. Thomas Captain appealed their finding that he was guilty of violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* The original appeal was taken to the Oregon Court of Appeals where it was affirmed without an opinion being issued. On further appeal, the Oregon Supreme Court denied review. Subsequently, the State filed a petition and a cross petition for and received a writ for certiorari in the Supreme Court of the United States. Thomas Captain filed a cross petition and received a writ of certiorari in the Supreme Court of the United States.

STATEMENT OF THE FACTS

The State of Oregon operates a state park located at the confluence of the Columbia

and Willamette Rivers. This park is known as Kelley Point Park and is within present day Portland. Kelley Point Park is home to some Native American archaeological and historical sites, which are protected by statute. The State recognizes the importance of the rich heritage encompassed within its borders and strives to protect those artifacts with historical, religious, and culturally significance to the people of Oregon through carefully designed statutes that both protect Native artifacts and allow for specific methods by which a tribe may reclaim those artifacts.

The Cush-Hook Nation is a non-recognized tribe that once occupied the land within Kelley Point Park. The Cush-Hook are mentioned, along with many other tribes, in the Lewis and Clark expedition journals as having used these lands for hunting, gathering plants, farming, and as a permanent settlement for a long period of time prior to white settlement. In April of 1806 William Clark were taken by the Multnomah Indians to meet with Cush-Hook leaders where he sketched their village and took notes on their lifestyle, including their practice of carving sacred totems and religious symbols into living trees. He even gave the Cush-Hook leader one of the peace medals that were distributed by Lewis and Clark to many tribes as tokens of sovereignty. This is was preliminary recognition of the existence of the nation by an emissary of the federal government.

The Cush-Hook continued to occupy this area until the year 1850. In 1850 Anson Dart, then superintendent of Indian Affairs for Oregon Territory, negotiated a proposed treaty with several Native tribes including the Cush-Hook. This treaty required that the nation move to an area of land 60 miles to the west of their traditional lands to make those lands available for white settlement. The Nation, without waiting for the treaty to be officially recognized by ratification, voluntarily abandoned their occupancy of their ancestral

lands and moved to the proposed area in the foothills of the Oregon coast range. The Nation chose to move due to their desire to escape the encroachment of whites that were already beginning to settle upon their traditional territories.

In the same year Mr. Dart negotiated the proposed treaty with the Cush-Hook nation Congress passed the “Oregon Land Donation Act” in an attempt to entice white citizens to move to Oregon and begin settling the area as a part of the United States territories. This act promised to allot 320 acres of land in the Oregon territory to any single white male, or 640 acres to any married couple, in exchange for their promise to cultivate and reside upon that land for four consecutive years. 9 Stat. 496-500. This land would be granted to the settlers by fee simple title directly from the federal government. This land was referred to as 'public lands' within the act and was viewed by Congress to be free of any legal claims at the time of the passage of the Act. White settlers, Joe and Elsie Meeks, chose to take advantage of the 'Oregon Land Donation Act' and settled on the lands that are now known as Kelley Point Park. Though they were not cultivating or living on the land for four years, they were granted a fee simple title for their 640 acres from the United States government.

In 1853 the treaty Anson Dart made with the Cush-Hook, along with over a dozen others, went unratified by Congress. The Cush-Hook nation was not held at that time, or at any time since, to be a federally recognized Indian tribe and they were not granted any recognizable title to their lands. They had already abandoned their exclusive use and occupancy of the lands in favor of less populace areas in the western coast range and so had no rights to use the areas in question from the time of abandonment forward. These acts served to extinguish any claims to aboriginal title.

In 1880 the descendants and heirs of Joe and Elsie Meeks sold the land acquired by

their ancestors 30 years before to the State of Oregon. This land was originally owned by the Port of Portland and was then acquired in 1984 and turned into Kelley Point Park. The park is run by the state and protects the artifacts left from the original Cush-Hook tribal occupation. http://www.portlandoregon.gov/parks/finder/index.cfm?action=ViewPark&ShowResults=yes&PropertyID=209

In 2011, Thomas Captain (Respondent) trespassed upon State lands and erected temporary housing in the Kelley Point Park. The Respondent is a descendant of the Cush-Hook peoples and hoped that his temporarily residing in the park would somehow revive his tribe's extinguished aboriginal title. There is no evidence that the Respondent was operating as an agent of the tribe or with the tribe as a whole but was, instead, an individual Indian attempting, unsuccessfully to make assertions on behalf of the tribe. Respondent claimed he was concerned for the religious artifacts located within the park. The historical sites contain the traditional sacred tree carvings of the Cush-Hook. The faces and symbols are carved into living trees that have grown in the area for the last several centuries and the symbols are now at a height of 25-30 feet in the air. Recently vandals and thieves have been climbing the trees to deface the sacred artifacts or to cut them off the trees to sell illegally. The State has, so far, been unable to stop this vandalism. Respondent claims he wanted to protect the images from further damage and so continued his unlawful occupancy of the lands in question.

Respondent, without notifying the "appropriate Indian tribe and the Commission on Indian Services" so that "the appropriate Indian tribe, with the assistance of the State Historic Preservation Officer, [could] arrange for the return of any objects" took it upon himself to cut down one of the trees carved with a sacred totem. Or. Rev. Stat. § 358.940 (2). The tree, according to the Respondent, had been carved by one of his ancestors. Respondent cut down the tree and then proceeded to further vandalize the site by removing the image carved into

the tree. Respondent claims he wanted to protect the image and have it restored to his tribe and so he took it from the park. Respondent was stopped by state troopers on his way back to the coastal region his tribe has occupied for the last 61 years. He was arrested for illegally removing an artifact of historical significance and the troopers, for its preservation and protection, then seized the image according to statute.

Due to the abandonment of the ancestral lands by the Cush-Hook and the federal government's actions to extinguish aboriginal title, the Respondent has no rights to occupy the area in Kelley Point Park, nor does he have any individual rights to the artifacts located therein. The State of Oregon was acting fully within its rights to prosecute the Respondent for trespass upon lands owned by the State. Further, the artifacts located within the park are of historical and cultural significance and are rightly protected against removal, damage, or vandalism by any party, irrespective of said party's purported affiliation with the tribal nation that originated the artifacts or said party's purported intent to return the artifacts to that tribe.

SUMMARY OF THE ARGUMENT

First and foremost, the State would like to point out that the Cush-Hook Nation is not a federally recognized tribe under Title 28 of the U.S.C.A. Therefore, the land in question cannot belong to a tribe that, for all legal purposes, does not exist. Consequently, there is no issue as to whether or not the State owns said land. Additionally, because the Cush-Hook Nation is not a federally recognized tribe and cannot own said land, there is no issue as to whether the State has criminal jurisdiction on said land. Going beyond this argument, the State has prepared arguments that still will still show the State is the owner of the land in question, and, therefore, has criminal jurisdiction on said land.

Because the aboriginal title to the land in question, purportedly held by the Cush-Hook Nation, has been extinguished, the State concedes that it is the lawful owner of said land. The United States, acting as the sovereign nation, had the exclusive right and power to terminate the aboriginal title by any means they deemed appropriate under the Doctrine of Discovery. Congress showed a clear intent to extinguish aboriginal title by passing the 1850 'Oregon Land Donation Act' and, subsequently, issuing deeds in fee simple to non-Indian settlers. The Cush-Hook Nation voluntarily abandoned their exclusive occupancy and use of the land in question in 1850 and, as a consequence, lost any right to aboriginal title to said land they may have held at that time. Aboriginal title, once extinguished, cannot be revived without a showing of continuous occupancy on the part of the tribe or individuals that can trace occupancy.

Notwithstanding who owns the land in question, the State has criminal jurisdiction upon said land. However, the State does own the land in question, and, therefore, the State has criminal jurisdiction over said land. In the alternative, should the Court find the Cush-Hook Nation, and not the State, owns the land, the State still has criminal jurisdiction on said land under Public Law 280.

ARGUMENT

I: **THE COURT SHOULD FIND THAT THE ABORIGINAL TITLE PURPORTEDLY HELD BY THE CUSH-HOOK NATION HAS BEEN EXTINGUISHED AND THAT SAID LAND IS RIGHTFULLY POSSESSED BY THE STATE OF OREGON.**

The Petitioner, the State of Oregon, asks the Court to overturn the lower courts holding that the Cush-Hook nation retains aboriginal title to the land in Kelley Point Park.

The United States is the sovereign nation and, as such, has the absolute authority to extinguish aboriginal 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." Beecher v. Wetherby, 95 U.S. 517, 525, 24, L.Ed. 440. Congress failed to ratify the initial treaty negotiations, but Congress showed clear intent to extinguish aboriginal title when it passed the Oregon 'Donation Land Act' and began granting fee simple titles to only non-Indian settlers.

Further, aboriginal title claims require "proof of exclusive use and occupancy of the land for a long time prior to the loss of the land, and whether the requisite occupancy and use has been shown presents a question of fact." 41 A.L.R. Fed. 425 (Originally published in 1979). While the Cush-Hook originally occupied the lands in Kelley Point Park, they voluntarily abandoned those lands and gave up aboriginal rights to it as a tribe. Respondent's individual aboriginal title rights are also forfeit, as the Court has held that voluntary abandonment may also extinguish title and his ancestors have not continuously occupied the land in question. United States v Kent 679 F.Supp. 985 (ED Cal. 1987), *revd.* on other grounds 912 F2d 277.

A: **The United States, acting as the sovereign nation, had the exclusive right and power to terminate the aboriginal title by any means they deemed appropriate under the Doctrine of Discovery.**

The United States has plenary and absolute authority to extinguish aboriginal title. It is well settled that the right to exclusive title to lands rests in the sovereign nation. The Doctrine of Discovery, as it is commonly referred to, establishes the idea that discovery of lands confers title to them to the sovereign with only a right to occupy

those lands going to the native peoples.[1] The premiere case defining the Doctrine and its tenets is Johnson v M'Intosh in which the system by which title was established in the United States after discovery was set out. "Discovery, the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were made here. The European governments asserted the exclusive right of granting the soil to individual, subject only to the Indian right of occupancy." Johnson v. M'Intosh, 21 U.S. 543, 562, 5 L. Ed. 681 (1823). This right of occupancy is "subordinate to the absolute ultimate title of the government." *Id*.

The sovereign has a duty under the recognized conventions of the Doctrine of Discovery to protect the rights of aboriginals against any but the sovereign. In the United States v. Alcea Band of Tillamooks, the right of native peoples under original Indian title was described as follows:

> "Original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46, 67 S. Ct. 167, 170, 91 L. Ed. 29 (1946).

As in our case, the Alcea Band of Tillamooks (Tillamooks), along with several other tribes located in Oregon, engaged in treaty negotiations with the United States government in the years following the 1848 Act establishing the government of the Oregon territory.

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[1] *See* "Europeans who conquered North American continent have fee title to lands they have conquered, while original inhabitants of those lands, the Indians, have continued right to occupy their lands which is frequently called 'aboriginal title' or 'Indian title.'" Seneca Nation of Indians v. New York, 382 F.3d 245.

Congress did not ratify the treaties with these tribes, like those with the Cush-Hook Nation. Those treaties that were unratified were not viewed to grant aboriginal title to those native peoples residing in the areas in question.[2] The Tillamooks were able to successfully sue the government, not for a renewed title to their traditional lands, but for compensation for the taking of lands they received in later treaties. The Tillamooks were not attempting to regain possession of their lands but merely being compensated for the taking of those lands. The Court went on to state that, "[a]dmitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67. The Court fully recognized the authority of Congress to terminate aboriginal title but chose to allow the Tillamooks to sue for compensation. With regard to the Cush-Hook, the only question being presented is whether or not they maintain aboriginal title not whether they are entitled to be compensated for their lands. Under theory set forth here, it is clear that the United States was acting within its full and legal capacity as sovereign when it terminated the aboriginal title rights of the Cush-Hook through its myriad actions exercising complete dominion contrary to the exclusive occupancy of the area by the native peoples.[3]

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[2] "An unratified Indian treaty is not evidence of governmental recognition of Indian title to lands described therein. Conley v. Ballinger, supra. ... The fact that the United States did make treaties with other Indians in this same area falls short of establishing individual title to a described area in an unratified treaty. Blackfeet Indians v. United States, 81 C. Cls. 101. Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States, 87 Ct. Cl. 143, 153 (1938).

[3] *See* United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (DC Alaska 1977). U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 355, 62 S. Ct. 248, 255, 86 L.Ed. 260 (1941). United States v. Gemmill, 535 F.2d 1145 (Cal. 1976), *cert. den.* 429 U.S. 982, 50 L.Ed.2d 591, 97 S.Ct. 496. Northwestern Bands of Shoshone Indians v. United States, 95 Ct.Cl. 642 (1942).

B: **Congress showed a clear intent to extinguish aboriginal title by passing the 1850 'Oregon Land Donation Act' and, subsequently, issuing deeds in fee simple to non-Indian settlers.**

By encouraging settlement of the Oregon territories through the 'Oregon Donation Land Act' of 1850[4], Congress made a clear showing of its intention to extinguish aboriginal title to those lands. As previously shown, the rights of aboriginal title rest on the exclusive occupancy of the lands in question by the native peoples. This right is held to mean that they are entitled to occupy that land to the exclusion of white settlers.[5] In United States v. Ashton, the Circuit Court of Washington decided a case regarding the title to shore lands claimed by right of aboriginal title by the Puyallup Indian Nation. The Court found that all claim to aboriginal title was extinguished when their exclusive use was interrupted by Congressional act. They explained their reasoning as follows:

> "The exclusive feature of the rights of Indians as occupiers of the country within the boundaries of Oregon Territory, which as originally organized included this state, was terminated by the act of Congress creating Oregon Territory, and the act of September 27, 1850, c. 76, 9 Stat. 496, familiarly known as the 'Oregon Donation Law,' because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon." United States v. Ashton, 170 F. 509, 513 (C.C.W.D. Wash. 1909).

The court in Ashton makes a very clear statement that the 'Oregon Donation Land Act' constitutes a complete and total extinguishing of aboriginal rights and leaves no question as to the intention of the sovereign's will.

The land in the present case, Kelley Point Park, was acquired by white settlers under that very act and the Court in this case should apply the rationale of *Ashton* here as well. To

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4 Act of September 27, 1850, ch 76, 9 Stat 496.

5 Hot Springs Cases, 92 U.S. 703, 23 L.Ed. Beecher v. Wetherbee, 95 U.S. 517, 24 L.Ed. 440.

state that the opening of lands for settlement by white farmers and homesteaders does not extinguish aboriginal title goes against the obvious intention of the Act. Congress clearly intended white men and their families to move to the Oregon Territories and establish communities there. It would be counter to that desire to allow native peoples to continue to exclude white men from the very areas they are being given by the government. While the nation maintained a policy of respecting native rights, they were not viewed as absolute and were subject to change at the will of the sovereign.[6]

Subsequent to the passing of the 'Oregon Donation Land Act', Congress began issuing deeds in fees simple to white settlers. These deeds granted land free of any other claims to settlers in exchange for their promise to reside upon and cultivate the land they have laid claim to. The surveyor general was charged with authenticating those statements and the Congress set out the manner by which that was to be accomplished. 9 Stat. 496-500. While the facts show that Mr. and Mrs. Meeks did not reside upon the land for the requisite four years, the surveyor general granted them a fee simple title to their lands anyway. Acting as a sovereign agent, the surveyor general made the determination that the Meeks qualified for the land grants at that time. It was obvious by the terms of the Act that a settlement of white people was being established by the sovereign and the issuing of deeds, including the one to

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6 *See* "In Plamondon ex rel. Cowlitz Tribe of Indians v United States (1972) 199 Ct Cl 523, 467 F2d 935, the court determined that (1) the fact that while Congress originally expressed its intent that the claims to land of all tribes west of the Cascade Mountains should be extinguished by treaty (Act of June 5, 1850, 9 Stat 437), there was a gradual change in the attitude of Congress, which declared that, as of April 1, 1855, all lands west of the Cascades would be subject to public sale (Act of February 14, 1853, 10 Stat 158), and (2) a Presidential proclamation of March 20, 1863, placing 14 percent of the claimants' lands up for sale, together with a third factor, were sufficient, at least in combination, to extinguish aboriginal title to the land. The court stated that it was not necessary to determine whether either of these factors, taken alone, would have been sufficient to extinguish such title". 41 A.L.R. Fed. 425.

the Meeks, further indicates the intention to extinguish aboriginal title claims to the land.[7] If those grants are invalid then the title to the land would revert back to the sovereign who held title initially and not to the aboriginal use of the native peoples. The Cush-Hook has no claim to the lands in Kelley Point Park regardless of the validity of the deed to the Meeks.

C: **The Cush-Hook Nation voluntarily abandoned their exclusive occupancy and use of the land in 1850 and, as a consequence, lost any right to aboriginal title they may have held at that time.**

The Cush-Hook nation, without waiting for ratification of their treaty, voluntarily left their traditional lands in an effort to avoid the influx of white settlers and so forfeited any claims of aboriginal title at that time. The traditional method by which native peoples voluntarily cede lands is through treaty formation, and this has been recognized by courts as effectively eliminating aboriginal title to those lands.[8] In the case of the Cush-Hook, the cessation of lands was by their physically abandonment of those lands instead of by ratified treaty. It has been recognized in the courts that abandonment of exclusive use and occupancy of lands for any reason, even encompassing a reduction of population, constituted grounds for those lands to revert to the sovereign as public domain lands unencumbered by aboriginal title.[9] When the Cush-Hook chose, without forced removal by the sovereign, to vacate their

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7 "In dictum, the court in United States v Atlantic Richfield Co. (1977, DC Alaska) 435 F Supp 1009, stated that aboriginal title, as opposed to Indian title recognized by treaty or reservation, is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands, said the court. Thus, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land." 41 A.L.R. Fed. 425.

8 *See* Strong v. United States, 207 Ct.Cl. 254, 518 F.2d 556, *cert. den.* 423 U.S. 1015, 46 L.Ed.2d 386, 96 S.Ct. 448 (1975).

9 "Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or

traditional lands and take up residence in a new area of Oregon, they were ending their exclusive use and occupancy of the lands in question and extinguishing their claims to aboriginal title.

While only the sovereign can extinguish aboriginal title, native peoples can voluntarily abandon any land that doesn't fall within a federally recognized reservation.[10] The Cush-Hook has never been officially placed on a reservation and the land they abandoned, Kelley Point Park included, has never been a part of a reservation. The Cush-Hook was free at the time to move off the land and forfeit their rights without interference from the sovereign. In the case of the Cush-Hook, the settlement of the area by white men and the prospect of more settlements was enough to persuade the tribe to take it upon themselves to move to an area less affected by the encroaching white settlers. They freely gave up their exclusive use and occupancy of the area and moved to a new portion of land where they remain to this day.

D: **Aboriginal title, once extinguished, cannot be revived without a showing of continuous occupancy on the part of the tribe or individuals that can trace occupancy through lineal ancestry and so temporary housing does not qualify as continued 'occupancy and use' for purposes of establishing a claim for aboriginal title.**

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otherwise, to actually and exclusively occupy and use an area of land, clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full, beneficial interest and ownership to such land, said the court in Quapaw Tribe of Indians v United States 128 Ct.Cl. 45 (1954), 120 F.Supp. 283 (ovruled on other grounds United States v Kiowa, Comanche & Apache Tribes 143 Ct.Cl. 545, 166 F.Supp. 939, *cert den* 359 US 934, 3 L.Ed. 636, 79 S.Ct. 650)." 41 A.L.R. Fed. 425.

10 A tribe may also voluntarily abandon aboriginal land not included within the reservation. Hualpai Indians, 314 U.S. at 356–58, 62 S.Ct. At 256–57 United States v. Pend Oreille County Pub. Util. Dist. No. 1, 585 F. Supp. 606, 610 (E.D. Wash. 1984).

When the Respondent set up temporary housing in Kelley Point Park he did not revive any claims to the land that may have previously existed. While in some instances individual aboriginal rights have been proven by the continuous use and occupancy of land even when tribal rights are extinguished[11], it is not enough to merely erect temporary housing on ancestral land and claim rights. In United States v. Kent, the Court held that , though the defendant lived in a trailer on the site she claimed, failure to enclose an area and erect permanent structures was one of the factors used to determine a failure to establish individual claim to area under aboriginal title. United States v. Kent, 679 F. Supp. 985, 987 (E.D. Cal. 1987) aff'd in part, rev'd in part, 912 F.2d 277 (9th Cir. 1990) opinion withdrawn and superseded on reh'g, 945 F.2d 1441 (9th Cir. 1991). Respondent presents no evidence that he has erected any permanent or lasting housing within Kelley Point Park. There is no evidence that he, at any point, lived exclusively within the boundaries of Kelley Point Park for an appreciable length of time at all.

The second factor in *Kent* was the requirement that the occupancy of the land in question be traceable, by lineal ancestry, back to the time prior to the area being closed for settlement. Kent, 679 F. Supp. 985, 987.[12] Respondent offers no evidence that any member of his ancestral line has occupied the area in Kelley Point Park for any of the years following their voluntary cession of those lands to the sovereign. He has made no claim of individual aboriginal rights to the area at this time and he is not able to revive those rights at this time. Further, even if he were to obtain fee simple rights to the land in question he would still not

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11 Cramer v. United States, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923).

12 *See also* "individual aboriginal rights can be established under controlling precedent when Indian can show that she or her lineal ancestors has continuously occupied parcel of land, as individuals, and that period of continuous occupancy commenced before land in question was withdrawn from entry for purposes of settlement" United States v Kent (1990, CA9 Cal) 945 F2d 1441, 91 Daily Journal DAR 11943. 41 A.L.R. Fed. 425.

be able to revive his aboriginal rights after they've been extinguished.[13] Once individual or tribal aboriginal rights have been extinguished they are unable to be rekindled and so Respondent's attempt to reside within Kelley Point Park, while purportedly grounded in a desire to protect his heritage, is not a legal action and constitutes a trespass on land owned by the State.

II: **NOTWITHSTANDING OWNERSHIP, THE COURT SHOULD FIND THE STATE HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION.**

The State has established laws in order to control the uses of, and to protect, archaeological, cultural, and historical objects on the lands of the state. According to state law, "'[a]rchaeological object' means an object that: (a) [i]s at least 75 years old; (b) [i]s part of the physical record of an indigenous or other culture found in the state or waters of the state; and (c) [i]s material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products." Or. Rev. Stat. § 358.905 (1)(a).

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13 "The United States Supreme Court in City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386, 35 Envtl. L. Rep. 20065 (2005), has held that the Oneida Indian Nation of New York could not "unilaterally revive its ancient sovereignty," ... Writing for an 8-1 majority, Justice Ginsburg stated that standards of federal Indian law and federal equity practice precluded the Tribe "from rekindling embers of sovereignty that long ago grew cold." She gave "heavy weight" to justifiable expectations, grounded in two centuries of New York's regulatory jurisdiction over the properties, which until recently was uncontested by the Oneidas. The principle that the passage of time can preclude relief has deep roots in our law, Justice Ginsburg said. Furthermore, the Supreme Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. Justice Ginsburg noted that most of the Oneidas have resided elsewhere since the middle of the 19th Century. "Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue," 41 A.L.R. Fed. 425.

Additionally, "'Site of archaeological significance' means: [a]ny archaeological site that has been determined significant in writing by an Indian tribe." Or. Rev. Stat. § 358.905 (1)(b). Lastly, "'Archaeological site' means a geographic locality in Oregon... that contains archaeological objects and the contextual associations of the archaeological objects with: (i) [e]ach other; or (ii) [b]iotic or geological remains or deposits. Or. Rev. Stat. § 358.905 (1)(C)(a)(i-ii).

In 1953, Congress enacted PL 280. Act of August 15, 1953, ch. 505, 67 Stat. 588-90 (Codified as amended in scattered sections of 18, 28 U.S.C.). "Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian county by the grant of exclusive criminal jurisdiction therein to five designated states." Anderson v. Gladden, 293 F.2d 463, 466 (9th Cir. 1961) (see also 18 U.S.C.A. § 1162). Oregon is one of the states that Public Law 280 was applied to. Id. Therefore, all of the state, with the exception of the Warm Springs Reservation, was governed by state, and not federal, law. Id.

"If intent of a state law is to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction... but if the state law generally permits conduct at issue, subject to regulation, it must be classified as "civil/regulatory" and Public Law 280 does not authorize its enforcement..." 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360. Essentially, the Court must determine "whether the conduct at issue violates State's public policy." Id.

Notwithstanding ownership of the land in question, the state has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on said land. Because the State, and not the Cush-Hook Nation, owns the land in question, for reasons previously stated, the State has criminal jurisdiction over everyone, including

Indians. Should the Court find the Cush-Hook Nation holds aboriginal title to the land in question, the State has criminal jurisdiction under Public Law 280.

A: **Because the State, and not the Cush-Hook Nation, owns of the land in question, the State has criminal jurisdiction on said land.**

When outside Indian country, the state has criminal jurisdiction over everyone, including Indians. Hagen v. Utah, 510 U.S. 399, 115 S.Ct. 958 (1994). In Hagen, the petitioner was charged in Utah state court for distribution of a controlled substance. The incident occurred in a town that lies within the original boundaries of the Uintah Indian Reservation that was open to non-Indian settlement in 1905. Id. at 959. Petitioner initially plead guilty. Id. at 964. However, because he was an Indian and believed the crime to have occurred within Indian country, petitioner subsequently filed a motion to withdraw his guilty plea on the basis that the Utah state court lacked jurisdiction over him. Id. The trial found the petitioner was not and Indian and denied the motion. Id. The state appellate court reversed finding that petitioner is an Indian and the crime occurred in Indian country. Id. Congress has not granted Utah criminal jurisdiction over crimes committed by Indians within Indian Country; so, the appellate court held that Utah courts did not have jurisdiction over the petitioner, and the court vacated petitioner's conviction. Id. The Utah Supreme Court reversed finding that, because the reservation no longer existed at the time the crime occurred, the town where the crime was committed was outside of Indian country and reinstate petitioner's conviction. Id. The U.S. Supreme Court granted cert., and held that the Uintah Indian Reservation no longer existed. Id. at 970. Therefore, it reasoned that the town where the crime was committed was no longer within Indian country and found the Utah courts had criminal jurisdiction over the petitioner. Id.

Like the petitioner in Hagen who was found to be an Indian, the Respondent may be found to be an Indian, even though his tribe is not currently federally recognized. Additionally, like in Hagen where it did not matter that the petitioner was an Indian because his crimes were committed outside of Indian country, it is irrelevant in the present case that Respondent may or may not be an Indian because his crimes were committed outside of Indian country.

The State, and not the Cush-Hook Nation, is the owner of the land in question. Therefore, the State has criminal jurisdiction on said lands.

B: **Should the Court find the Cush-Hook Nation is the owner of the land in question, it should also find the State has criminal jurisdiction on said land under Public Law 280.**

If the Court should find the Cush-Hook Nation holds aboriginal title to the land in question, the state still has criminal jurisdiction under Public Law 280. . "...'Indian country'... means... (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished..." 18 U.S.C.A. § 1151. As previously mentioned, Public Law 280 only exempts the Warm Springs Reservation from Oregon's jurisdiction. 18 U.S.C.A. § 1162. Therefore, even if the land in question is owned by the Cush-Hook Nation and considered "Indian country," the State still has criminal jurisdiction under Public Law 280. "... [T]he 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..." Id.

"When a State seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, 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, 107 S.Ct. 1083, 1085, 480 U.S. 202. In Cabazon, "[t]he Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, were occupying reservations in Riverside County, California." Id. at 1086. Pursuant to federally approved ordinances by the Secretary of Interior, these Indian Bands were conducting bingo games on their reservations that were open to the public. Id. Additionally, the Cabazon Band was operating a card club for playing card games on its reservation. Id. California attempted to apply to the Indian Bands its statute governing the operation of bingo games. Id. Additionally, Riverside County attempted to apply to the Indian Bands its ordinances for regulating bingo and prohibiting card games. Id. The Tribes instituted an action for declaratory relief in Federal District Court, "alleging that county had no authority to apply ordinances regulating bingo and prohibiting playing of... card games inside reservations." Id. The Federal District Court entered Summary Judgment for the Tribes, "holding that holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations." Id. The Court of Appeals Affirmed. Id. The U.S. Supreme Court affirmed and remanded the case. Id. at 1095. It held that the State was trying to prevent the infiltration of organized crime through the regulation of bingo and was, therefore, an infringement on the rights of the Tribes, including the counties attempt to regulate the bingo and card games. Id.

Unlike the federally recognized tribe found in Cabazon, the Cush-Hook Nation is not a federally recognized tribe, and their lands are not federally recognized as a reservation,

especially the land in question. However, should the Court find that the land is question is Indian land, the State still has criminal jurisdiction. Unlike in Cabazon where the state of California was merely trying to regulate in order to prevent a greater crime, organized crime, the State in the present case is prohibiting conduct that is criminal and against the public policy of their state. Not only does State not want Indians destroying archaeological, cultural, and historical objects, it does not want anyone destroying them. The fact that the state has not been able to punish anyone else for vandalizing the trees within the park is irrelevant. Perhaps the state does not have enough manpower to have someone in the park at all times. Or perhaps the state is unaware of the vandalism that is occurring to the trees. Regardless of what the state has done in the past, the state has the authority to prohibit persons, Indian or not, from destroying these historical and archaeological sites.

The State is trying to prohibit, and not regulate, certain conduct. The State, therefore, has criminal jurisdiction on said land under Public Law 280.

CONCLUSION

The Court should find that the aboriginal title purportedly held by the Cush-Hook Nation has been extinguished and that said land is rightfully possessed by the State of Oregon. The United States, acting as the sovereign nation, had the exclusive right and power to terminate the aboriginal title by any means they deemed appropriate under the Doctrine of Discovery. Like in the case of the Tillamooks where the Court fully recognized the authority of Congress to terminate aboriginal title, the Court in the present case should find that Congress terminated the Cush-Hook's aboriginal title. Congress showed a clear intent to extinguish aboriginal title by passing the 1850 'Oregon Land Donation Act' and, subsequently, issuing deeds in fee simple to non-Indian settlers. Like the court in Ashton that

determined the 'Oregon Donation Land Act' constitutes a complete and total extinguishing of aboriginal rights and leaves no question as to the intention of the sovereign's will, the Court in the present case should find the same. Not to mention, the Cush-Hook Nation voluntarily abandoned their exclusive occupancy and use of the land in 1850 and, as a consequence, lost any right to aboriginal title they may have held at that time. Therefore, aboriginal title, once extinguished, cannot be revived without a showing of continuous occupancy on the part of the tribe or individuals that can trace occupancy through lineal ancestry and so temporary housing does not qualify as continued 'occupancy and use' for purposes of establishing a claim for aboriginal title.

The State, and not the Cush-Hook Nation, is the owner of the land in question. Therefore, like in Hagen where the State has criminal jurisdiction because the crime committed was not committed in Indian country, the Court in the present case should find that the crime was not committed in Indian country. Therefore, the State has criminal jurisdiction. In the alternative, should the Court find the Cush-Hook Nation still holds aboriginal title to the land in question, the state still has criminal jurisdiction on said land under Public Law 280. Unlike Cabazon where the state was using regulation to prevent organized crime, the State in the present case is prohibiting the conduct that the law is aimed at according to public policy of the State. Therefore, if the Court finds the Cush-Hook Nation is owner of the land in question and the crime was committed in Indian country, the Court can find that the law was prohibiting conduct and the State has criminal jurisdiction.

In conclusion, the State requests that this court find that the State is the lawful owner of the land in question. Furthermore, this court should find that the State has criminal jurisdiction upon said land.