

No. 11-0274

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON, PETITIONER

v.

THOMAS CAPTAIN, RESPONDENT

ON WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

BRIEF FOR PETITIONER

Team Number Fifty-eight

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QUESTIONS PRESENTED

- I. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelly Point Park?
- II. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe?

STATEMENT OF CASE

STATEMENT OF THE PROCEEDING

The decision of the Oregon Circuit Court for the County of Multnomah is not officially reported. The Oregon Circuit Court for the County of Multnomah found that:

1. Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States.
 2. The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by Johnson v. M'Intosh because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land.
 3. The United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void *ab initio* and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void.
 4. The Cush-Hook Nation owns the land in question under aboriginal title
 5. Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not.
- Thus, Oregon properly brought this criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

The Oregon Court of Appeals affirmed the findings without writing an opinion. The Oregon Supreme Court denied review. Thereafter, the State filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court. The United States Supreme Court granted certiorari.

STATEMENT OF THE FACTS

Kelley Point Park is an Oregon state park located at the confluence of the Columbia and Willamette Rivers, inside the present day limits of Portland, Oregon. (R. at 1). The Park is part of a much larger area that encompasses the original homelands of the Cush-Hook Nation of Indians. The Nation is a tribe of Indians, but at this time it is not politically recognized by either the United States or Oregon. (R. at 1). The Cush-Hook Indians occupied the area since time immemorial and they lived by growing some crops and by harvesting many wild plants, such as wapato, and by hunting and fishing. (R. at 1). The Cush-Hook's permanent village was located in the area that is now enclosed by Kelley Point Park's boundaries. (R. at 1).

In April of 1806, William Clark, of the Lewis & Clark expedition, encountered the Cush-Hooks and visited their village. (R. at 1). He recorded these interactions in the Lewis & Clark Journals. On April 5, 1806, Clark turned south from the Columbia River and entered the Multnomah (modern-day Willamette) River. (R. at 1). He then encountered some Multnomah Indians fishing and gathering wapato on the bank of the Multnomah (Willamette) River near the Cush-Hook village. The Multnomah Indians pointed out the Cush-Hook Nation village and longhouses to Clark. (R. at 1).

Clark later drew a sketch of the village and the longhouses in the journals and recorded some ethnographic materials about Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. (R. at 1).

Thereafter, the Cush-Hooks continued to live in their village on this point of land and engaged in their traditional ways of life across their territory. (R. at 1). In 1850, the Nation signed a treaty with and agreed to relocate. (R. at 2). Subsequent to the treaty signing, the

entire Cush-Hook Nation relocated to the coast range to avoid the encroaching Americans, and a majority of the Nation's citizens have continued to eke out a bare existence there ever since. (R. at 2). In 1853, however, the U.S. Senate refused to ratify the Cush-Hook treaty. Thus, the Nation and its citizens never received any of the promised compensation for their lands in and around modern-day Kelley Point Park. (R. at 2). Furthermore, since the treaty was not ratified, and the United States has not since undertaken any other act to "recognize" the Cush-Hooks, the Nation has remained a non-federally recognized tribe of Indians. (R. at 2).

After the Cush-Hooks relocated, two American settlers moved onto what is now Kelley Point Park and ultimately received fee simple titles to the land from the United States under the Oregon Donation Land Act of 1850. (R. at 2). The Act required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500. Joe and Elsie Meek claimed the 640 acres of land, that today comprises Kelley Point Park, and they received fee title from the United States. The Meeks, however, never cultivated or lived upon the land for the required four years. (R. at 2). Their descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park.

In 2011, Thomas Captain, a Cush-Hook citizen, moved from the tribal area in the coast range of mountains to Kelley Point Park. (R. at 2). He occupied the Park to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over three hundred years. (R. at 2). The trees are very important to the Cush-Hook religion and culture because tribal shamans/medicine men carved sacred totem and religious symbols into living trees hundreds of years ago. (R. at 2).

In fact, in 1806, William Clark noted this practice in the Journals. Now, over three hundred years later, the carved images are at a height of 25-30 feet from the ground. (R. at 2).

Incredibly, vandals have recently begun climbing the trees to deface the images and in some cases to cut them off the trees to sell. (R. at 2). The state has done nothing to stop these acts. Thus, Thomas Captain occupied the Park to protect and preserve these crucial tribal objects. (R. at 2). In order to restore and protect a vandalized image that had been carved by one of his ancestors, Thomas cut the tree down and removed the section of the tree that contained the image. (R. at 2). He was returning to his Nation's location in the coastal mountain range when state troopers arrested him and seized the image. (R. at 2).

The State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). (R. at 2). Captain consented to a bench trial. (R. at 2).

ARGUMENT

I. THE CUSH-HOOK NATION DOES NOT OWN ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK BECAUSE THEY HAVE NOT SHOWN THAT THEY OCCUPIED THE LAND EXCLUSIVELY, AND THE NATION VOLUNTARILY RELINQUISHED THEIR RIGHTS TO THE LAND THEREBY EXTINGUISHNG ABORIGINAL TITLE.

Generally known as one of the earliest case statements by the Supreme Court as to the nature of aboriginal title is Johnson v. M'Intosh, 21 U.S. 543 (U.S. 1823). In M'Intosh, Chief Justice Marshall speaking for the Court, pointed out that the Indians only have a right of occupancy to the land on which they reside, therefore, developing the term Doctrine of Discovery. Id. The Doctrine of Discovery gives European nations the right to acquire

indigenous lands against all European Christian nations. The right of occupancy only gives Indians the right to reside and use the land, excluding the right to sell their land to anyone but the discovering nation. This means that Indians are capable of possessing only a right of occupancy to the land, also known as aboriginal title. Id.

Since the rights relating to aboriginal title are those derived from being the original inhabitants upon the land, one way to establish aboriginal title is by treaty. However, another way is by proving the exclusive use and occupancy of a definable portion of the land for a long period of time. Sac & Fox Tribe of Oklahoma v. United States, 383 F.2d 991(Ct. Cl. 1967). “[T]he villages have the burden of proving actual, exclusive, and continuous use and occupancy ‘for a long time.’” Id. at 998. The Cush-Hook Nation does not own aboriginal title to the land in Kelley Point Park due to the fact that the Cush-Hook Indians failed to occupy the land exclusively. Furthermore, even if the tribe can show that they exclusively used and in fact did have aboriginal title to the land at one point, the facts show that the Nation voluntarily relinquished their rights to the land by relocating, thereby losing aboriginal title to the land.

A. There Is No Evidence On The Record Which Suggest That The Cush-Hook Nation Held The Land In Kelley Point Park Exclusively Against All Others, As A Means To Establish Aboriginal Title.

Determining whether the Cush-Hook Nation holds aboriginal title to Kelley Point Park will be based on: 1) whether there is evidence that the Cush-Hook Nation had exclusive use and occupancy to Kelley Point Park, 2) for a long period of time, and 3) prior to the loss of the land to the United States. United States v. Sante Fe P. R. CO., 314 U.S. 339 (1941). Whether or not there was a treaty is questionable (a treaty being one way to establish aboriginal rights) and looking to the factors such as occupancy and exclusivity is one way

Courts have determined whether an aboriginal right exists. “Aboriginal rights don’t depend on a treaty or an act of congress for their existence.” Id. at 347.

In order to determine whether a tribe has actually occupied and used the land in such a way that satisfies the occupancy and use requirements, the Court must look to the typical customs of the particular Indian group in question. “The use and occupancy requirement is measured in accordance with the way of life, habits, customs, and usages of the Indians who are its users and occupiers.” Sac & Fox Tribe of Oklahoma, 383 F.2d at 998. In determining whether the land has been used in accordance with a particular tribe’s way of life, the Court in the Ninth Circuit stated that there must be a liberal approach taken. Native Village of Eyak v. Blank, 668 F.3d 619 (9th Cir. Alaska 2012). In this case, the Court found that even an irregular, temporary use, of a piece of land can still satisfy the use and occupancy requirement. Id. at 623. This can be done if the irregular use is in accordance with the tribes way of life, habits, and customs. Id. at 623. In this case, the Court found that because the sporadic use of the outer continental shelf (OCS) by the Village was acceptable. Id. The Court established that because their sustenance was largely in marine water and the Village were skilled marine hunters and fishermen, their use of the OCS was analyzed in accordance with this particular way of life. Id. “The record supports the finding that the Villages’ ancestors made seasonal use of portions the OCS nearest their respective village when traveling to the outlying in lands.” Id.

In the current case, the facts state that the journal kept by Clark recorded some of the ethnographic materials about the Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. (R. at 1). If the journal kept by Clark indicated the Cush-Hooks use of the land was in accordance with their customs, it may be

likely for the court to conclude that the Nation validly occupied and used the land accordingly, however, there are no facts which support this conclusion. The recordings written in the journal by Clark are vague and give little detail about the Cush-Hook Nations customs and ways of life. It gives only a description of what Clark saw once he was on the Cush-Hook land. There have been no facts, according to the finding of facts by the Oregon Circuit Court, which would suggest anything more than the mere fact that the Cush-Hooks occupied the land in Kelley Point Park. However, even if by the journal the Court is able to conclude that the land in question was validly occupied and used, it is unlikely that there are enough facts to support the second prong of the test, which states that the land must have been held exclusively to all others.

“Exclusivity is established when a tribe or group shows that it used and occupied the land to the exclusion of other Indian groups.” United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Use of a specific piece of land is not sufficient to prove exclusivity. Native Village of Eyak, 668 F.3d 619 at 623. “The tribe or group must exercise full dominion and control over the area, such that it possesses the right to expel intruders, as well as the power to do so.” Id. at 623. In Eyak, the Court rejected the argument that the lack of evidence that any other tribe hunted or fished in the claimed areas was enough to establish exclusive control. The court found that “More likely than not, these areas were fished and hunted on a seasonal basis by all of the Koniag, the Chugach, the Eyak and the Tlingit.” Id. at 625. “None of these villages was in a position to occupy or exercise exclusive control over any party of the outer continental shelf on a substantial basis.” Id. The Court further found evidence that another tribe fished on the land, thereby showing the land was unlikely to have been in the exclusive dominion of the Eyak. The Eyak tribe argued that low population

density could not defeat exclusivity, however, the Court found otherwise. “The Villages low population, which was estimated to have been between 400 and 1500, suggest that the Villages were incapable of controlling any part of the outer continental shelf.” *Id.* at 624.

In the current case, Clark noted his first interaction with Indians once he entered the Multnomah River. His first interaction was with the Multnomah Indians, who were fishing and gathering on the bank of the river near the Cush-Hook Village. (R. at 1). These facts indicate that it is unlikely the Cush-Hook Nation were the exclusive owners of the territory of Kelley Point Park. “Ownership of land by a tribe is called into question where the historical record on the region indicates that it was inhabited, controlled, or wandered over by many tribes or groups. . .” Michael J. Kaplan, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425. Although it has been found to be possible for two or more tribes to inhabit a defined area in joint and amicable possession, there are no facts in the present case that the Cush-Hook Nation and the Multnomah Indians had such an agreement. *Sac & Fox Tribe of Indians v United States*, 161 Ct. Cl. 189, 315 F.2d 896 (Ct. Cl. 1963). It is more likely to conclude that because the Multnomah Indians were the first set of Indians Clark encountered as soon as he turned south from the Columbia River, the Cush-Hook Nation did not exclusively occupy the land.

The final element left to prove is whether the land was occupied ‘for a long time’ by the Cush-Hook Nation. According to the Journal by Clark, he estimated roughly 250 souls occupied the Cush-Hook village at the time of their visit.¹ Similar to the finding in Eyak, it is unlikely that such a small tribe would have the ability to exclusively control the large land of Kelley Point Park, therefore, making it even more unlikely that the Cush-Hook Nation was able to exclusively own the land in question. Even if the Court was to find that the Cush-

¹ The Journals of the Lewis and Clark Expedition (1/14/13), <http://lewisandclarkjournals.unl.edu>.

Hooks held the land in Kelley Point Park exclusive to any others, we must determine if the Cush-Hooks held the land for a long time.

Before reaching the inevitable conclusion that the Cush-Hook Nation did not own aboriginal title to the land in Kelley Point Park, we must complete the final prong of the test and determine whether or not the Cush-Hooks occupied the land for a long time. Case law covering this point has typically found that in order to determine ‘for a long time’ all the factors taken together must be taken into account. “[T]he time requirement as a general rule, cannot be fixed at a specific number of years. It must be long enough to have allowed the Indians to transform the area into domestic territory. . .” Confederate Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184 (Ct. Cl.1966).

In this case, there is some evidence which shows that the Cush-Hooks occupied the land for a long period of time. According to the journal by Clark, his first encounter with the Cush-Hooks was in 1806, however, they did not leave the land until 1850. (R. at 1). According to the journal, Clark also noted housing and burial traditions by the Cush-Hook Nation, which is likely to be another indication that they domesticated the area. Even if there is evidence to show that the Cush-Hook Nation used and occupied the land for a long period of time, there are insufficient facts to show that the Cush-Hook Nation were the exclusive owners of the land inside Kelley Point Park. The argument, and thus conclusion that the Cush-Hook Nation owns aboriginal title to the land is flawed.

- B. Even If The Court Determines That The Cush-Hook Nation Can Prove That They Used And Occupied The Land In Kelley Point Park To The Exclusion Of Other For A Long Period Of Time, The Cush-Hook Nation’s Decision To Relocate Shows That They Relinquished Their Rights To The Land, Thereby, Abandoning Their Aboriginal Title To The Land.

The Ninth Circuit Court of Appeals concluded that Indian title may be extinguished by the Federal Government at any time. United States v. Gemmill, 535 F.2d 1145 (9th Cir. Cal. 1976). The Court has found that aboriginal title once held by Indians had been extinguished by the migration of white settlers into the claimed area. Alabama-Coushatta Tribe v. United States, 28 Fed. Cl. 95, (Fed. Cl.1993). The Supreme Court has found that where a settler has made improvements to land, the title to the settlement was established even in the existence of Indian aboriginal title to the same land. Marsh v. Brooks, 55 U.S. 513 (U.S. 1853). In Ildefonso, the court stated that Indian settlement on a reservation should be seen as abandonment, only when the specific circumstances warrant that conclusion. Pueblo of San Ildefonso, 513 F.2d 1383 (1975). The Court further stated that there was no indication that congress had in mind the extinguishment of the aboriginal title. Id. Although an extinguishment may not be lightly implied, when the Government clearly intends to extinguish Indian title, the courts will not inquire into the means of the action. Id. The Court further stated that the question is not whether the governmental action was intended to be a revocation of Indian occupancy rights, but whether revocation was effectuated by permissible means. Id. In Sante Fe Pacific Railroad Company, the United States Supreme Court reached a similar decision.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. As stated by Chief Justice Marshall in Johnson v. M'Intosh, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."

Sante Fe P. R. Co. 314 U.S. at 347.

The actions of both the United States and the Cush-Hook Nation show that the intent to move the Nation was clear. As stated above, there are several ways to extinguish title, and the failure to exercise complete dominion over a piece of land is adverse to the right of occupancy, and is therefore an extinguishment of aboriginal title. In this case, the facts state that shortly after signing the treaty the Cush-Hook Nation relocated, therefore, they were no longer in control of Kelley Point Park, thereby losing whatever claims they may have potentially had to the land. (R. at 2). Unlike the finding in *Ildefonso*, the intention to extinguish aboriginal title was clear and consented to by the Cush-Hook Nation. The Nation moved under the assumption that the treaty would be ratified and they would be paid for their land. (R. at 2). Regardless as to whether or not the treaty is valid, evidence that the Cush-Hook Nation decided to turn over their aboriginal title to the United States shows the Cush-Hook Nations intent to extinguish their rights to the land. Furthermore, relocation and subsequent settlement of the Cush-Hook Nation from 1850 until now warrants the conclusion of the Cush-Hook Nations intent. (R. at 2).

C. Because the Cush-Hook Nation Has Not Been Recognized, Compensation For The Taking Of Kelley Point Park Was Not A Requirement For The Tribe To Be Extinguished From The Land.

Courts in numerous cases have determined that aboriginal title is merely a permissive right of use and occupancy which the United States may terminate without any obligation to compensate the Indians. Michael J. Kaplan, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425. Aboriginal title may be extinguished with no liability for compensation. Prairie Band of Potawatomi Indians v. United States, 143 Ct. Cl. 131, (Ct. Cl. 1958). The power of the United States to extinguish aboriginal title is exclusive. “Indian title, unrecognized by the United States by treaty or patent, covers the right to use only,

which is a right that may be withdrawn by the Government at any time without liability of compensation.” Id. It has also been recognized that Indian occupancy of land without governmental recognition of ownership is not a constitutionally protected interest, and therefore may be terminated by Congress at will, without compensation. United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977). The Supreme Court has also noted that compensation is not a requirement for extinguishing title. “[I]ndian occupation of land without government recognition of ownership creates no right against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.” Tee-Hit Ton Indians v. United States, 348 U.S. 272 (U.S. 1955).

The facts in this case state the tribe engaged in treaty making with the United States, and subsequent to the treaty, the entire Cush-Hook Nation relocated. (R. at 2). The issue is that the United States Senate refused to ratify the treaty and the Cush-Hooks did not receive compensation for their move. According to the case law above, the lack of compensation alone is not a sufficient argument against the possibility of the validity of the extinguishment. Prairie Band of Potawatomi Indians, 143 Ct. Cl. 131. Accordingly, the Oregon Circuit Court erred in concluding that the Cush-Hooks Nations aboriginal title had never been extinguished due to the failure to ratify and compensate the tribe.

D. Congress Did Not Err In The Oregon Donation Land Act When It Described All The Lands In The Oregon Territory As Being Public Lands Of The United States.

According to the reasoning given above, it has been established in several ways that the Cush-Hook Nation did not own aboriginal title to the land in Kelley Point Park. For these reasons, it is likely that the land referred to in The Oregon Donation Land Act belonged to the United States, and was therefore correctly classified. The Act states,

That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, 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 declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, 1850. . . .

Oregon Donation Act, 9 Stat. 496 § 4.

The United States Supreme Court has concluded that a person who failed to uphold the requirements set forth by the statute due to dying only after a year of receiving the land did not have the requisite title to pass along. Hall v. Russell, 101 U.S. 503 (U.S. 1880).

Because it can be inferred that the Cush-Hooks did not own aboriginal title to the land, it is plausible to assume that the sale of the land to the Meeks was a valid sale under the Oregon Donation Land Act because the land was properly classified as public lands.

According to the facts, it can be concluded that the aboriginal title belonging to the Cush-Hooks was extinguished, and based on the theory stated above, the lawful conveyance of the land to the Meeks further demonstrates the Cush-Hook's lack of aboriginal title.

Consequently, because the title held by the Meeks was not fully satisfied as according to the statute, it is unlikely that the conveyance from the Meeks descendants to the State of Oregon was not a valid sale. Therefore, the Oregon Circuit Court was correct in determining that the sale from the Meeks to the state of Oregon was void. However, the court was incorrect in finding that the sale was void because the land in Kelley Point Park was not public land.

Largely, the court erred in finding that because the Cush-Hook Nation was found on the land inside of Kelley Point Park before the arrival of Euro-Americans, the Cush-Hook

Nation owns aboriginal title to the land. There have been several events which have been held to constitute extinguishment of aboriginal title.

II. OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION NOTWITHSTANDING ITS PURPORTED OWNERSHIP BY A NON-FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE.

The state of Oregon does have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe. The state of Oregon is a Public Law 280 state, therefore, retaining jurisdiction over all lands, including Indian country, except the Warm Springs Indian Reservation. Oregon properly brought the criminal action against the Respondent under Oregon Revised Statute sections 358.905-358.961 *et seq.* and Oregon Revised Statute section 390.235-390.240 *et seq.* for damaging an archaeological site and a cultural and historical artifact.

A. Oregon As A Public Law 280 State.

The state of Oregon has criminal jurisdiction over offenses committed by or against Indians in the areas of Indian country and throughout Oregon territory, except the Warm Springs Reservation. 18 U.S.C. § 1162. The criminal laws of the state of Oregon have the same force and effect within Indian country as they would have elsewhere within the state. Id. Therefore, Or. Rev. Stat. § 358.905-358.961 *et seq.* and Or. Rev. Stat. § 390.235-390.240 *et seq.* can be enforced anywhere within the state of Oregon, whether the land in question is Indian country, private land, public land (except the Warm Springs Reservation).

Public Law 280 was passed in 1953 and is an exception to the jurisdictional structures in Indian country. Id. Public Law 280 allows the state of Oregon to have criminal

jurisdiction over all areas in the state, and to enforce state laws against all who commit crimes within the state territory (except the Warm Springs Reservation). Respondent committed a crime within Oregon territory by damaging an archaeological site and a cultural and historical artifact that was located in Kelley Point Park in Portland, Oregon. Notwithstanding the purported ownership of Kelley Point Park by a non-federally recognized American Indian tribe, Oregon retains prosecuting authority over the crimes committed by the Respondent because of Public Law 280. "Traditionally, courts of the state in which a crime was committed have jurisdiction to prosecute the violator." United States v. Strong, 778 F.2d 1393, 1395 (9th Cir. 1985). Therefore, the Respondent can be criminally prosecuted by the state of Oregon for the crimes committed in Kelley Point Park.

B. Defining An Archaeological Object, Site Of Archaeological Significance, And Archaeological Site.

According to O.R.S. § 358.905(a), an archaeological object is defined as:

- (A) Is at least 75 years old;
- (B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and
- (C) Is 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.

The Respondent cut down an archaeologically, culturally, and historically significant tree in Kelley Point Park containing a tribal cultural and religious symbol, which is important to the Cush-Hook Nation. The Cush-Hook tribal shamans/medicine men carved sacred totem and religious symbols into trees that had grown in Kelley Point Park. (R. at 2). The sacred totem and religious symbols can be dated back over three hundred years and can be proven by looking at the 1806 William Clark Journals. (R. at 2). These journals describe the cultural

and religious practices of the Cush-Hook tribal shamans/medicine men and their carving of religious symbols into the trees. The location of the trees that contain the archaeological object is in the state of Oregon. The religious symbols and sacred totem are material remains of past human life and activity that are of archaeological significance to the Cush-Hook Native American tribe. They are of significant to the Cush-Hook tribe because they were carved by the medicine men for religious purposes. Therefore, the state of Oregon can prove that the archeological object in question is at least seventy-five years old, is part of a physical record of an indigenous or other culture found in the state of Oregon, and is material remains of past human life or activity that are of archaeological significance.

According to O.R.S. § 358.905(b), a site of archaeological significance means: "(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or (B) Any archaeological site that has been determined significant in writing by an Indian tribe." Or. Rev. Stat. § 358.905.

The sacred totem and religious symbols are eligible for inclusion on the National Register of Historic Places according to the United States Department of Interior. According to the national register's criteria:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and: **B.** That are associated with the lives of significant persons in or past; or **D.** That have yielded or may be likely to yield, information important in history or prehistory.²

² National Park Service, National Register Bulletin: How to Apply the National Register Criteria for Evaluation (January 13, 2013), http://www.nps.gov/history/nr/publications/bulletins/nrb15/nrb15_2.htm. This website provides the criteria on how to apply for the national registrar and other considerations to the registrar.

The Cush-Hook Nation of Indians archaeologically significant tree containing a religious/cultural symbol is of quality significance to American history. The Lewis and Clark journals contain sketches of the Cush-Hook villages and longhouses. (R. at 1). These journals also contain ethnographic materials about tribal governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. (R. at 1). These journals are important to American history and prove that Native American culture was present in the location of Kelley Point Park. The Cush-Hook culture is present in Kelley Point Park and the tree containing a religious symbol possesses integrity of design. The religious symbols are associated with the lives of Native Americans who are considered significant persons. The tree in Kelley Point Park containing the Cush-Hook's religious symbols could likely yield information that is important to the rich history of Native American culture throughout Oregon. Additionally, the trees are at least three hundred years old, according to the Respondent. (R. at 2). Therefore, it is likely that the Cush-Hook Nation of Indians site will be eligible for inclusion on the National Register of Historic Places.

According to O.R.S. § 358.905(c), an archaeological site means:

- (A) "Archaeological site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with:
 - (i) Each other; or
 - (ii) Biotic or geological remains or deposits.
- (B) Examples of archaeological sites described in subparagraph (A) of this paragraph include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.

Or. Rev. Stat. § 358.905.

The Cush-Hook village, formally located in Kelley Point Park, is considered an archaeological site according to the statute cited above. The Cush-Hook village in Kelley Point Park is located in Oregon, within the state's jurisdiction, that contains archaeological

objects (the tree containing religious symbols), and are contextually associated with the village. The tree containing religious symbols were carved by Cush-Hook medicine men, and are located within the parameters of the village which are associated with the tribe's historical and cultural objects. Therefore, according to O.R.S. § 358.905(c), the Cush-Hook village located in Kelley Point Park is an archaeological site, within the state of Oregon, containing archaeological objects.

C. The State Of Oregon Has Criminal Jurisdiction To Prosecute The Respondent.

The state of Oregon has criminal jurisdiction to prosecute the Respondent under O.R.S. § 358.920, which states:

(1)(a) A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235.

(b) Collection of an arrowhead from the surface of public or private land is permitted if collection can be accomplished without the use of any tool.

(c) It is prima facie evidence of a violation of this section if:

(A) A person possesses the objects described in paragraph (a) of this subsection;

(B) A person possesses any tool that could be used to remove such objects from the ground; and

(C) A person does not possess a permit required under ORS 390.235.

(5) A person may not excavate an archaeological site on privately owned property unless that person has the property owner's written permission.

(8) Violation of the provisions of this section is a Class B misdemeanor.

Or. Rev. Stat. § 358.920.

The Respondent destroyed an archaeological object on public or private lands in Oregon without a permit in violation of O.R.S. § 358.920(1)(a). The Respondent did not have a permit to cut down or destroy the tree in Kelley Point Park which contained an archaeological object. The Respondent occupied himself in the Park to cut down the tree

containing a religious image and destroyed the historical symbol by removing a section of the tree. (R. at 2).

The Respondent was stopped by Oregon state troopers while he was on his way back to his Nation's homeland. (R. at 2). While stopped by police officers, the Respondent was found to be in possession of the archaeological object/image and was arrested. (R. at 2). The Respondent cut down the tree and removed a section of the tree with a tool strong enough to go through wood. (R. at 2). There is no evidence that the Respondent possessed a permit to cut down the archaeological object in question. Additionally, the Respondent did not have permission from Kelley Point Park or any other land owner to cut down the tree and remove the religious symbols. Therefore, Oregon has criminal jurisdiction to prosecute the Respondent under O.R.S. § 358.920(1)(a)-(c)(A-C) because prima facie evidence of the violation is established. Due to the Respondent violating the above statute, he can be prosecuted by Oregon for a Class B misdemeanor.

Similar to the O.R.S. § 358.920, California has a statute which protects archeological objects, giving their state jurisdiction to prosecute anyone who violates the law.

California Public Resources Code § 5097.9 which prevents interference with Native American religion or damage to places of worship; § 5097.5 which prevents excavation, removal or destruction of historic ruins except with the permission of the public agency with jurisdiction over the land; § 5097.995 renumbered to 5097.993 makes it a misdemeanor to unlawfully excavate, remove, or destroy a Native American historic site listed or eligible for listing in the California Register of Historic Resources.

Quechan Indian Tribe v. United States, 535 F. Supp. 2d 1072, 1106 (S.D. Cal. 2008).

Oregon and California have similar statutes and both states retain jurisdiction to prosecute anyone who violates states law, no matter the location of the land, or the person who commits the crime.

O.R.S. § 358.915 does not apply to the Respondent because he did not unintentionally discover the archaeological object in question. This statute states:

The provisions of ORS 192.005, 192.501 to 192.505, 273.990, 358.905 to 358.961 and 390.235 do not apply to a person who unintentionally discovers an archaeological object that has been exposed by the forces of nature on public land or private property and retains the object for personal use, except for sacred objects, human remains, funerary objects or objects of cultural patrimony.

Or. Rev. Stat. Ann. § 358.915.

The Respondent was not exposed to the forces of nature on public or private land when he destroyed an archaeological object. Respondent intentionally placed himself in the Park and cut the tree down in order to obtain the religious symbols located thereon. The tree was still standing tall at over 25-30 feet before it was cut down by the Respondent, making his actions intentional. (R. at 2).

Respondent also violated O.R.S. § 358.950 and is subject to the criminal jurisdiction of Oregon to be prosecuted. The statute states:

- 1) Any person who conducts an archaeological excavation associated with a prehistoric or historic American Indian archaeological site shall notify the most appropriate Indian tribe. The notification shall include, but not be limited to:
 - (a) The location and schedule of the forthcoming excavation;
 - (b) A description of the nature of the investigation; and
 - (c) The expected results of the investigation.
- (6) Failure to notify the appropriate Indian tribe as required by subsection (1) of this section is a Class B misdemeanor.

Or. Rev. Stat. § 358.950.

There is no evidence that the Respondent notified the Cush-Hook Nation of Indians that he was going to conduct an archaeological excavation associated with an American Indian archaeological site. There is no evidence of notification to the Cush-Hook Nation that

included any of the requirements set forth in the above statute. Due to the Respondent's failure to notify the appropriate Indian tribe, he is subject to the jurisdiction of Oregon to be criminally prosecuted for a Class B misdemeanor under O.R.S. § 358.950.

Additionally, the Respondent violated O.R.S. § 390.235 by excavating or removing archaeological or historical material. This statute states:

(1)(a) A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department.
(7) Violation of the provisions of subsection (1)(a) of this section is a Class B misdemeanor.

Or. Rev. Stat. § 390.235.

The Respondent altered an archaeological site on public lands and removed an archaeological object without first obtaining a permit issued by the State Parks and Recreation Department of Oregon. There is no evidence in the record that the Respondent obtained a permit from anyone to alter the archaeological lands in Kelley Point Park. Therefore, Respondent is subject to the criminal jurisdiction of Oregon and can be prosecuted for a Class B misdemeanor.

D. Policy Of The Oregon Legislature.

The state of Oregon has a duty to preserve and protect sites and objects that are of archaeological significance. O.R.S. § 358.910 address the policy behind the protection of archaeological sites and states:

The Legislative Assembly hereby declares that:

(1) Archaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon. As such, archaeological sites and their contents located on public land are under the stewardship of the people of

Oregon to be protected and managed in perpetuity by the state as a public trust.

(2) The State of Oregon shall preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance.

Or. Rev. Stat. § 358.910.

The state of Oregon has criminal jurisdiction to prosecute the Respondent for damaging an archaeological site and a cultural and historic artifact. The policy of Oregon is to protect the irreplaceable artifacts of the Cush-Hook Nation. The state of Oregon under the stewardship of its people, are to protect and managed archaeological sites that are an important part of our state's heritage. Therefore, Oregon will continue to protect and preserve the cultural objects found throughout this state that have archaeological significance to our people.

Based on the facts stated above and policy reasons, Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe. Furthermore, the Respondent is guilty of violating O.R.S. § 358.905-358.961 *et seq.* and O.R.S. § 390.235-390.240 *et seq.* for damaging an archaeological site and a cultural historical artifact.

CONCLUSION

For the reasons set forth, the state of Oregon requests that the judgment of the Oregon Circuit Court for the County of Multnomah be reversed in part and affirmed in part.

Respectfully Submitted,

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