No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,
Petitioner

v.

THOMAS CAPTAIN,
Respondent, Cross-Petitioner

ON WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR THE PETITIONER

TEAM # 64

Counsel for Petitioners

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QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

In 2011, Respondent Thomas Captain ("Captain"), a Native American of the non-federally recognized Cush-Hook Nation, criminally trespassed onto Kelley Point Park, which is an Oregon state park located at the confluence of the Columbia and Willamette Rivers, inside the present day limits of Portland, Oregon. The same year, Captain chopped down an archaeologically, culturally, and historically significant tree containing a Cush-Hook cultural and religious symbol. The trees are very important to the Cush-Hook religion and culture because tribal shamans and medicine men carved sacred totem and religious symbols into the trees hundreds of years ago. Such sites are protected by Oregon state law under Or. Rev. State. 358.905-358.961 (Archaeological sites) and Or. Rev. State. 390.235-390.240 (Historical materials). In chopping down the significant tree, Captain also violated Oregon state law by failing to obtain a permit before cutting timber in a state park.

Although what is now known as Kelley State Park was once an area of heavy Cush-Hook Nation use, it has long been abandoned by the tribe. In 1850, the Cush-Hook Nation were originally to relocate to the foothills of the Oregon coast range of mountains pursuant to an 1850 treaty that provided for their removal in exchange for tribal federal recognition, compensation, and title to lands in the coast range mountains. However, before the treaty was ratified, the entire Cush-Hook Nation relocated to their new lands for a different reason

of avoiding impending white settlement. Congress never ratified the treaty and consequently the Cush-Hook Nation is not federally recognized as an American Indian Tribe to this day. The majority of Cush-Hook members continue to reside in the Oregon coast range of mountains.

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 pursuant to the Oregon Donation Land Act of 1850. The Act offered the fee simple title of the land question to "every white settler" who had "resided upon and cultivated the [land] for four consecutive years." 9 Stat. 496-500. Although the Meek's did not cultivate or live upon the land for the required four years, the United States nonetheless decided to convey to Joe and Elsie 640 acres of fee simple title to land. Subsequently, their descendants sold the land to Oregon in 1880 and Oregon created what is now Kelley Point Park.

In 2011, Captain created a temporary home in Kelley Point Park in a futile attempt to reassert his tribe's ownership in the land. Subsequently, vandals had recently begun climbing the significant trees to deface the images and in some cases cut them off the trees to sell. In response, Captain took it upon himself to cut down one of the trees to restore it. Captain was arrested as he was taking the tree back to his tribe's current homeland in the coastal mountains.

Consequently, the State of Oregon brought a criminal action against Captain for trespassing on state lands, cutting timber in a state park without a permit, and desecrating an archaeological site and historical material under Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240. Captain consented to a bench trial. The Oregon Circuit Court for the County of Multnomah improperly held that the Cush-Hook Nation still owned the land

within the Park under aboriginal title and therefore found that Captain was not guilty of trespass or cutting timber without a state permit. The court also found that despite the tribe's aboriginal title in the park, Oregon has criminal jurisdiction in the land pursuant to Public Law 280, and subsequently found Captain guilty of violating Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 for damaging an archaeological site and a cultural and historical artifact. The Oregon Court of Appeals affirmed the lower court's decision without writing an opinion, and the Oregon Supreme Court denied review.

SUMMARY OF ARGUMENT

The United States has sole authority to extinguish aboriginal title and can do so without tribal consent or compensation. The United States exercised such authority in this case and, thus, the Cush-Hook Nation no longer not own aboriginal title to the land in Kelley Point Park. Petitioner contends that the Federal Government extinguished aboriginal title: 1) upon the congressional passage of the Oregon Donation Land Act of 1850; 2) upon the valid United States conveyance of Fee Simple to Joe and Elsie Meek; and 3) by the weight of historical conduct demonstrating complete federal dominion adverse to the right of Cush-Hook occupancy.

In passing the Oregon Donation Land Act of 1850, Congress intended to convey a substantial portion of Oregon Territory to white settlers, specifically the area which makes up Kelley Point Park today. Extinguishment may implicitly be found when Congress treats previously tribally owned lands as public lands, and opens such land up for white settlement, which is the case here. Congress expressly coined the areas open for donation as "public lands" and allowed for the donation of land to white settlers. Furthermore, the fact that the Treaty of 1850 was not ratified implies that Congress intended to extinguish aboriginal title without compensation, which is not required under law. Thus, the passage of the Oregon

Donation Land Act of 1850 constitutes the requisite Federal Government intent to extinguish aboriginal title because it is wholly inconsistent with the exclusive use and occupancy by the Cush-Hook Nation.

Even if the passage of the Oregon Donation Land Act of 1850 does not alone constitute extinguishment, the valid conveyance of fee simple title to previously Cush-Hook owned lands does constitute extinguishment. Courts have held that federal conveyances of land may constitute extinguishment of aboriginal title. Although the Meek's did not satisfy the requirements of the Act to receive title, the Federal Government still expressly gave them title to the land that became known as Kelley Point Park. There are safeguards in the Act giving the surveyor general and commissioner the final say in determining whether an applicant is to receive fee simple donation. Further, the fact that the sale has been uncontested by the United States for over 150 years implies that the United States validated the conveyance. Thus, Cush-Hook aboriginal title was extinguished upon the initial conveyance to the Meek's and the State of Oregon currently holds title to the land.

Even if neither Federal action alone constitutes extinguishment, a series of Federal actions under the weight of history may constitute extinguishment. In the present case, by examining the history of Federal Government actions regarding the land in question, it is more than apparent that there was a Federal intention to extinguish the Cush-Hook Nation's aboriginal title. First, the Federal Government passed the Oregon Donation Land Act of 1850 during a historical time of Indian removal, relocation, and white settlement. Second, this Act demonstrate a clear domination inconsistent with the exclusive use and occupancy of the Cush-Hook Nation because the Act widely opened up settlement lands to whites, and excluding Indians who were not at least half-white. Third, the Federal Government validly

granted a donation of fee simple title to the Meek Family. Fourth, 161 years have passed without any Federal Government objection regarding any of the conveyances, which reaffirms the Federal Government's treatment of the former Cush-Hook land as "public lands." Fifth, there has been no Cush-Hook presence in Kelley State Park for approximately 161 years, notwithstanding Captain's trespassory residence, which demonstrates that Congress more than "expected" white settlement, but rather Federally initated white settlement by offering the land and conveying land to the Meek's.

A tribe may also lose aboriginal title to land by voluntarily abandoning that land. Thus, even if there was no Federal Government extinguishment of aboriginal title, the Cush-Hook Nation's voluntary abandonment of their aboriginal homeland constitutes extinguishment. The facts demonstrate that the Cush-Hook Nation relocated *before* the 1850 signed treaty was ratified. This demonstrates voluntary relocation because the Cush-Hook Nation was not forcibly removed and did not move pursuant to the 1850 Treaty because it had not yet taken effect when the Cush-Hook Nation decided to relocate. Thus, approximately 161 years have passed from the 1850 relocation of the tribe and the one temporary housing of Captain on Kelley Point Park. The temporary housing of Captain does not constitute adequate use to defeat abandonment since there was no activity for 161 years and because the facts show that Captain was the only Cush-Hook citizen to reside on the land. Thus, because there was no individual or tribal aboriginal title, Captain committed criminal trespass by illegally living within the boundaries of Kelley Point Park.

The Oregon Circuit Court for the County of Mulnomah was correct in holding that the State of Oregon properly exercised its jurisdictional authority over Captain. In 1953, Congress passed Public Law 280, 67 Stat. 588, which gave five, and later six states extensive

criminal and civil jurisdiction over Indian country, and permitted all other states to acquire it at their option. Under Public Law 280, all Indian Country within the State of Oregon, except the Warm Spring Reservation, is subject to Oregon criminal jurisdiction. Under 18 U.S.C.A. § 1162(a), "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." Thus, Oregon and other PL 280 states may enforce their regular criminal laws inside Indian country that they had always exercised outside of it. Kelley Point Park is clearly located within the borders of the State of Oregon, so the state should have inherent jurisdiction to criminally prosecute Captain. Thus, while neither Cush-Hook Nation nor Captain owns aboriginal title to the lands, Oregon has criminal jurisdiction over these lands regardless of whether they are tribally owned because criminal jurisdiction over tribal lands was conferred to the state through Public Law 280.

ARGUMENT

I. THE CUSH-HOOK NATION DOES NOT OWN ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK BECAUSE ABORIGINAL TITLE WAS EXTINGUISHED BY THE FEDERAL ACTION AND BY TRIBAL ABANDONMENT

Original Indian title, also known as aboriginal title, refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any other formal conveyance. Cohen's Handbook of Federal Indian Law § 15.04 [2]. Aboriginal title arose from Chief Justice Marshall's recognition that as discoverers, the United States has ultimate title to land, "subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 592 (1823). Thus, aboriginal title gives members of a Native American tribe a right of occupancy to lands that is protected against claims by anyone else unless the

United States extinguishes the right or the tribe abandons the lands. United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345-47 (US 1941).

Extinguishment terminates corresponding use and occupancy rights, including fishing rights, except where such rights are expressly or impliedly reserved in a treaty, statute or executive order. Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 202-03 (9th Cir.1991). A group making a claim under the doctrine must present sufficient proof that they have constituted a tribe throughout relevant history and have never voluntarily abandoned their tribal status. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 586-87 (1st Cir.1979). The occupation must have been of an exclusive nature. United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345 (US 1941). Federal extinguishment of aboriginal title by the Federal Government is a political matter and that it is nonjusticiable in the absence of a statute providing otherwise. Id. at 347.

According to Pueblo of San Ildefonso v. United States, 513 F.2d 1383, 1390 (Ct. Cl. 1975), "there are no fine, spun of precise formulas for determining the end of aboriginal ownership." Generally, the Federal Government's intent to extinguish need not be express, but there must be evidence that it demonstrates a "plain and unambiguous" intent to extinguish exclusive aboriginal rights. Oneida County, NewYork v. Oneida Indian Nation of NY. State, 470 U.S. 226, 248 (US 1985). However, a historical event may contribute to a finding of extinguishment when analyzed together. United States v Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976) (ambiguity in single act of federal government is not fatal to claim of extinguishment when series of subsequent acts resolves ambiguity to demonstrate extinguishment); State of Vermont v. Elliott, 159 Vt. 102, 114 (VT 1992) (Extinguishment may be established by the increasing weight of history).

In the present case, Petitioner is not contending that the Cush-Hook Nation had aboriginal title before 1850. The Cush-Hook Nation occupied the area since time immemorial and they lived by growing crops, harvesting wild plants, hunting, and fishing. However, Petitioner contends that this aboriginal title was extinguished: 1) upon the congressional passage of the Oregon Donation Land Act of 1850; 2) upon the valid United States conveyance of Fee Simple to Joe and Elsie Meek; 3) upon consideration of the weight of history; and 4) by the Cush-Hook Nation's voluntary abandonment of the land that is now Kelley Point Park.

A. ABORIGINAL TITLE WAS EXTINGUISHED UPON THE CONGRESSIONAL PASSAGE OF THE OREGON DONATION LAND ACT OF 1850 BECAUSE THE ACT WAS INCONSISTENT WITH THE EXCLUSIVE USE AND OCCUPANCY OF THE CUSH-HOOK NATION

The Federal Government may extinguish aboriginal title by taking actions that are inconsistent with and terminate the actual, exclusive, and continuous use of the land by the Indians. U.S. v. Pueblo of San Ildefonso, 206 Ct.Cl. 649, 661 (1975). White encroachment causing Indian withdrawal is not, in itself, effective to extinguish aboriginal rights. Id. at 1389 (Federal "bare expectation" of white settlement does not constitute extinguishment); *but see* Vermont v. Elliott, 159 Vt. 102, 114 (VT 1992) (finding more than an "expectation" where there was actual settlement and appropriation to the exclusion of other competing claims, and ratification by Congress when it admitted Vermont to the Union). However, a Federal action making lands available for white settlement may constitute extinguishment of aboriginal title. Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386, 1391 (Ct. Cl. 1974) (authorizing white settlement is one factor in determining when aboriginal title ceased); Confederated Tribes of Chehalis Indian Reservation v. State of Wash., 96 F.3d 334 (9th cir. 1996) (affirming a lower court finding that an 1863 executive

order opening lands for settlement by non-Indians was inconsistent with exclusive use and occupancy of any of the local tribes and therefore extinguished any remaining aboriginal title in the region). Furthermore, when the United States regards and treats land as "public lands," this is further evidence of the Federal intent to extinguish aboriginal title. Nooksack Tribe of Indians v. U.S., 162 Ct. Cl. 712, 715 (Ct. Cl. 1963).

In the present case, Congress passed the Oregon Donation Land Act of 1850 to convey fee land to "all white settlers." By plain language, Congress was purposefully intending to convey a large portion of Oregon Territory to non-Indians. While there is a half-breed exception, there was also a requirement to commit to becoming an American citizen, which many Indians could not attain. Thus, this is a federal action that opened lands for settlement by non-Indians and is inconsistent with the exclusive use and occupancy of the Cush-Hook Nation, much like in Confederated Tribes of Chehalis Reservation. Accordingly, extinguishment should be found.

Additionally, Congress expressly labeled the area within Kelley Point Park as "public lands" available for "donation." Oregon Donation Land Act of 1850, 9 Stat. 496-500. Under Nooksack Tribe of Indians v. U.S., 162 Ct. Cl. 712, 715 (Ct. Cl. 1963), extinguishment may be found when Congress treats previously tribally owned lands as public lands. Importantly, because Congress has plenary power over tribal affairs under the Indian Commerce Clause, they had the authority to call it such, and such use of express language implies an intent to extinguish Cush-Hook Nation aboriginal title of the land that is now Kelley Point Park. Furthermore, it is immaterial that the Cush-Hook Nation did not receive compensation for the federal taking of land because compensation is not required under Tee-Hit-Ton Indians v.

United States, 348 U.S. 272, 289 (1955). Thus, the passage of the Oregon Donation Land Act of 1850 alone constitutes the requisite Federal intent to extinguish aboriginal title.

B. ABORIGINAL TITLE WAS EXTINGUISHED UPON THE VALID UNITED STATES CONVEYANCE OF FEE SIMPLE TITLE TO JOE AND ELSIE MEEK

The requisite intent to extinguish aboriginal title to lands may be demonstrated in a conveyance of the lands by the Congress, such as by homestead. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391-92, (Ct. Cl. 1975) (conveyances made to various grantees at different times, was evidence supporting a finding of extinguishment of aboriginal title). In Lyon v. Gila River Indian Community, 626 F.3d 1059, 1079 (9th Cir. 2010), the court held that an Indian tribe's aboriginal title to a parcel of land was extinguished in 1877 when the federal government conveyed the land to Arizona as part of a school land grant.

In the present case, pursuant to the Oregon Land Donation Act of 1850, the Federal Government validly conveyed a patent of fee simple title of 640 acres of land to Joe and Elsie Meek. The descendants of the Joe and Elsie Meek validly sold the land to the State of Oregon, which now exists as Kelley Point Park. When the Federal Government conveyed fee simple title to the Meek's, they intended to extinguish aboriginal title, just like in the the conveyance of land to Arizona in Lyon v. Gila River Indian Community, 626 F.3d 1059, 1079. The fact that Joe and Elsie Meek's did not cultivate or live on the land for four years is immaterial because the Federal Government knowingly, and without objection, issued the patent of fee simple title. Under Sec. 7., the Act provides:

> "[E]ach person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act has been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late

> provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts of the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objections thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof." Oregon Donation Land Act of 1850, 9 Stat. 496-500 §7.

The plain language use of the word, "donation" and the application process is important here because it implies the Federal Government's intent to give away the land as long as the Federal Government is satisfied with the applicant. Thus, given that the donation of fee simple title was granted, the surveyor-general and commissioner, without objection, approved Joe and Elsie Meek's claim to the 640 acres. Thus, this valid conveyance of land alone demonstrates the requisite Federal intent to extinguish aboriginal title.

C. EVEN IF NEITHER FEDERAL ACTION ALONE CONSTITUTES EXTINGUISHMENT, THE HISTORICAL COURSE OF CONDUCT CONSTITUTES COMPLETE FEDERAL DOMINION ADVERSE TO THE CUSH-HOOK RIGHT OF OCCUPANCY

When one Federal Government action alone fails to constitute extinguishment of aboriginal title, a series of Federal Actions under the weight of history may constitute extinguishment. United States v Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976) (ambiguity in single act of federal government is not fatal to claim of extinguishment when series of subsequent acts resolves ambiguity to demonstrate extinguishment); State of Vermont v. Elliott, 159 Vt. 102, 114 (VT 1992) (Extinguishment may be established by the increasing weight of history). Importantly, the Federal Government may exercised their right to extinguish aboriginal title by the exercise of complete dominion adverse to the right of occupancy. United States v Santa Fe P.R. Co. (1941) 314 US 339, 86 (US 1941); Idaho v.

Andrus, 720 F.2d 1461 (Idaho 1983); Northwestern Bands of Shoshone Indians v. United States, 95 Ct. Cl. 642 (Ct. Cl. 1942). This "complete dominion" theory was applied in United States v. Gemmill, 535 F.2d 1145 (1976, CA9 Cal), where the court held that a century–long course of conduct may extinguish aboriginal title de jure even though any one of the specific federal actions, examined in isolation, may not provide an unequivocal answer to the question of extinguishment.

In Plamondon ex rel. Cowlitz Tribe of Indians v United States, 199 Ct. Cl. 523 (Ct. Cl. 1972), the court determined that a series of historical events established the requisite Federal intent to extinguish aboriginal title. Congress first expressed its intent that the claims to land of all tribes west of the Cascade Mountains in Oregon territory should be extinguished by treaty (Act of June 5, 1850, 9 Stat. 437). Id. at 526. However, Congress later 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). Id. Further, a Presidential proclamation of March 20, 1863, placing 14 percent of the claimants' land up for sale. Id. at 527. The court cited the Indians Claims Commission, "[i]t is clear that Congress anticipated that Indian title would be extinguished by 1855, because offering lands for public sale is totally inconsistent with the continued existence of Indian title in that land." Id. at 526. With a third factor, the establishment of a reservation, the court agreed with the Indian Claims Commission that the course of federal actions were sufficient, in combination to extinguish aboriginal title to the land. Id. at 527.

Importantly, the court stated that it was not necessary to determine whether any one factor, taken alone, would have been sufficient to extinguish such title. Id. However, the court did agree with the Commission's holding that limited settlement was not itself

sufficient to constitute extinguishment, but importantly noted that the United States had not issued any patents to donation claimants on Cowlitz lands prior to March 3, 1855. Id. at 529. Lastly, the court cited to a Indian Claims Commission decision, Chinook Tribe v. United States, 6 Indian Cl. Comm'n 177 (1958), where the tribe in question signed a treaty of cession which was never ratified by the United States. Id. The Commission found that notwithstanding the failure to ratify, the United States assumed control over the aboriginal title area thereby depriving the Chinook of their lands. Id. at 529-530.

In the present case, by examining the history of Federal Government actions regarding the land in question, it is more than apparent that there was a Federal intention to extinguish the Cush-Hook Nation's aboriginal title. First, the Federal Government passed the Oregon Donation Land Act of 1850 during a historical time of Indian removal, relocation, and white settlement. Second, this Act demonstrate a clear domination inconsistent with the exclusive use and occupancy of the Cush-Hook Nation because the Act widely opened up settlement lands to whites, and excluding Indians who were not at least half-white.

Third, the Federal Government validly granted a donation of fee simple title to the Meek Family. In Plamondon ex rel. Cowlitz Tribe of Indians, the court agreed with the Indian Claims Commission's finding that limited settlement was insufficient by itself to constitute extinguishment, but that, at the time period in question, the United States had not donated any title as of yet. Thus, Plamondon ex rel. Cowlitz Tribe of Indians is wholly distinguishable from this case pursuant to the Federal granting of donation to the Meek family. This intent is bolstered by the fact that there have been two valid sales among non-Indian parties since the original Federal Government conveyance to the Meek's.

Fourth, 161 years have passed without any Federal Government objection regarding any of the conveyances, which reaffirms the Federal Government's treatment of the former Cush-Hook land as "public lands." Fifth, there has been no Cush-Hook presence in Kelley State Park for approximately 161 years, notwithstanding Captain's trespassory residence there, which demonstrates that Congress more than "expected" white settlement, but rather Federal initiation of white settlement by offering the land and conveying land to the Meek's. The present case is analogous to an administrative case, Chinook Tribe v. United States, 6 Indian Cl. Comm'n 177 (1958), that despite the Federal failure to ratify a signed treaty ceding tribal land to the United States, the United States nonetheless assumed control over the aboriginal title area thereby depriving the Chinook of their lands. From the examination of the weight of history in the present case, it is clear that regardless of treaty ratification, the United States nonetheless assumed control over the Cush-Hook Nation's aboriginal title area, thereby depriving the Cush-Hook Nation of their land.

D. THE CUSH-HOOK NATION HAS VOLUNTARILY ABANDONED ABORIGINAL TITLE TO THE LAND BECAUSE THERE HAS BEEN NO CUSH-HOOK PRESENCE THERE SINCE 1850

A tribe may extinguish its aboriginal title in land by voluntarily abandoning its homeland. Wichita Indian Tribe v. U.S., 696 F.2d 1378, 1380 (Fed. Cir. 1983). However, a forced abandonment of a tribe's ancestral home is not considered "voluntary." U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 356 (U.S. 1941). Upon abandonment, all legal right or interest which both a tribe and its members had in a territory comes to an end. Williams v. City of Chicago, 242 U.S. 434, 437 (U.S. 1917). A tribe can implicitly abandon its aboriginal title in lands by acquiescing to an agreement by which white settlers are allowed to settle in the tribe's homelands if the tribe agrees to relocate. U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 358 (U.S. 1941). Additionally, in the absence of a treaty reservation, tribes have only a right

of occupancy and use in their lands, with the fee being held in the United States. Quapaw Tribe of Indians v. United States, 120 F Supp 283, 286 (Ct. Cl. 1954). When an indian tribe ceases for any reason to exclusively use and occupy an area of land, it becomes the exclusive property of the United States as public lands, and the tribe loses its right to assert interest and ownership to such land. Id.

In the present case, the Cush-Hook Nation abandoned their aboriginal title pursuant to a treaty, whereby they would acquiesce their aboriginal lands to white settlers in exchange for compensation and title to new land in the Oregon coast range mountains. Subsequent to signing the treaty, the Cush-Hook relocated without being forced to move by the federal government, as they wanted to avoid the encroaching Americans. In fact, the entire Cush-Hook nation moved to the coast range mountains before they had even received compensation for their aboriginal land or received title to the new lands. Surprisingly, when Congress failed to ratify the treaty and the Cush-Hook never received title to their new lands or compensation for their original lands, the tribe never returned to its aboriginal homeland, as is illustrated by the fact that the majority of its citizens still live in the coast range mountains. Consequently, the actions of the tribe and its members not returning to their homeland or waiting to receive compensation before initially moving demonstrates that they voluntarily abandoned their aboriginal homeland and any legal rights or interests associated with the land.

The Cush-Hook's abandonment of their aboriginal title is further demonstrated by the fact that no Cush-Hook member could claim individual aboriginal title to any lands within Kelley Point Park, especially Captain. United States v. Kent, 945 F.2d 1441, 1443-1444 (9th Cir. 1991) (Affirming a lower court decision that defendant had voluntarily abandoned

individual aboriginal title in the lands in question because no blood relative of defendant had lived on the land between 1870 and when defendant attempted to reassert her claim to the land in 1984). In the present case, there is no evidence that a Cush-Hook tribal member has lived within Kelley Point park for at least 150 years after the tribe voluntarily abandoned the land. Thus, the fact that no Cush-Hook tribal member could conceivably claim individual aboriginal title to the park makes an obvious showing that the tribe as a whole should not be able to establish aboriginal title in the park given their complete and voluntary absence from it for over 150 years.

II. THE STATE OF OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON KELLEY STATE PARK LANDS

The Oregon Circuit Court for the County of Mulnomah was correct in holding that the State of Oregon properly exercised its jurisdictional authority over Captain. In 1953, Congress enacted Public Law 280, which granted certain states criminal and civil jurisdiction over Indian country. 67 Stat. 588. Under Public Law 280, all Indian Country within the State of Oregon, except the Warm Spring Reservation, is subject to Oregon criminal jurisdiction. 18 U.S.C.A. § 1162(a). Further, the criminal law of Oregon has the same force and effect within Indian country as they have elsewhere within the State. Id. Under federal statute, "Indian country" refers to: a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, 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 limits of a state, and c)

all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C.A. § 1151 (a)-(c).

A. OREGON VALIDLY EXERCISED ITS CRIMINAL JURISDICTION ON STATE-OWNED LANDS BECAUSE THE CUSH-HOOK NATION DOES NOT OWN ABORIGINAL TITLE TO THE LANDS ON KELLEY STATE PARK

The facts provide that Kelley Point Park is located within the borders of the State of Oregon. Because neither the Cush-Hook Nation nor Captain owns aboriginal title to the land of Kelley Point Park for the reasons discussed above, the State of Oregon validly exercised criminal jurisdiction over Oregon crimes occurring on Oregon-owned property, not Indian country. In the present case, Captain damaged an archeological site and a cultural and historical artifact by cutting down a 300 year old tree and removing it from an Oregon state park. The plain language of Or. Rev. Stat. 358.905-358.961 broadly defines "archaeological site" as a geographic locality within Oregon that contains "archeological objects." In the present case, Kelley Point Park is an Oregon state park that contains several hundred year old trees with religious and culturally significant carvings. Additionally, the plain language of Or. Rev. Stat. 390.235-390.240 clearly states that a person may neither alter an archaeological site on public lands nor remove from it any material of archaeological or anthropological nature without first obtaining a permit. Based on this plain language of the two Oregon statutes, Kelley Point Park was clearly intended to fall within the criminal jurisdiction of the State of Oregon. Thus, Captain was properly fined for his crimes under Or. Rev. Stat. 358.905 -358.961 and Or. Rev. Stat. 390.235-390.240.

B. EVEN IF THE CUSH-HOOK TRIBE OWNS ABORIGINAL TITLE TO THE LANDS ON KELLEY STATE PARK, PUBLIC LAW 280 CONFERRED CRIMINAL JURISIDCTION OVER THE LAND

Even if the Cush-Hook Nation does own aboriginal title to Kelley Point Park land, the aboriginal title constitutes "Indian country" as defined in 18 U.S.C.A. § 1151 (c) as "the Indian titles to which have not been extinguished." This would be true regardless of whether the Cush-Hook Nation was a federally recognized American Indian Tribe. Public Law 280 granted Oregon criminal jurisdiction over "Indian country" and provides for the law of Oregon to have the same force and effect within Indian country as they have elsewhere within the State. 18 U.S.C.A. § 1162(a). Thus, pursuant to state law, Oregon properly exercised criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question. Or. Rev. Stat. 358.905 -358.96; Or. Rev. Stat. 390.235-390.240.

CONCLUSION

For the reasons discussed, Petitioner respectfully requests that this Court reverse the Oregon Court of Appeals decision finding that the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park. Further, Petitioner respectfully requests that this Court affirm the Oregon Court of Appeals decision that Oregon has criminal jurisdiction to control the uses of, and to protect, archeological, cultural, and historical objects on the land in question.

DATED: January 14, 2013

Respectfully submitted,
Team #64
Counsel for Petitioner