No. 11-0274

IN THE

Supreme Court of the United States

_____

STATE OF OREGON,
Plaintiff-Appellant,
v.

THOMAS CAPTAIN,
Defendant-Appellee.

_____

BRIEF ON THE MERITS FOR RESPONDENT

_____

TEAM 67
COUNSEL FOR APPELLEE

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QUESTIONS PRESENTED

1 Does the Cush-Hook Nation own the aboriginal title to the land in Kelley Point Park?

2 Does Oregon 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?

STATEMENT OF THE CASE

1. STATEMENT OF THE FACTS

Since time immemorial, the Cush-Hook Nation village was located in the present day Kelley Point Park area of the City of Portland, Oregon. In April of 1806, William Clark, of the Lewis and Clark expedition, encountered the Cush-Hooks and visited their village. Clark was introduced to the Cush-Hook headman/chief by the Multnomah Indians, who were near the Cush-Hook village. Clark recorded his interactions and ethnographic information on the Cush-Hook Nation in his journals.

From 1806 to 1850, the Cush-Hooks continued to live in their village. In 1850 the Nation signed a Treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. The Cush-Hook Nation agreed to relocate 60 miles westward to a specific location in the foothills of the Oregon coast range of Mountains. Dart wanted to move the Nation away from their ancestral land in order to open up the Cush-Hook Nation's valuable farming lands on the river to American settlers. However, in 1853, after the Cush-Hook had moved in anticipation of the signing of the Treaty, the U.S. Senate refused to ratify the Cush-Hook Treaty. The Cush-Hook Nation never received compensation promised for their lands. Consequently, the treaty not being signed left the Nation without compensation for their land, without promised benefits from the treaty, or recognized ownership of the lands in the

mountains they moved to. The United States has not federally recognized the Cush-Hook Nation.

After the Cush-Hook Nation was relocated their land was settled by two Americans, who received fee simple titles to the land under the Oregon Donation Land Act of 1850. The 640 acres of land is the land today that makes up Kelley Point Park. However, the Act required residence and cultivation for four consecutive years in order to be granted fee simple title. This requirement was not met, and the descendants of the two Americans sold the land to Oregon in 1880.

In 2011, Thomas Captain, a Cush-Hook citizen, moved into and occupied the land in Kelley Point Park to reassert his Nation's ownership. He also occupied the land to protect culturally and religiously significant trees that were in the park. The trees had recently been vandalized and defaced, with nothing done by the State to stop the acts. In his action of restoring and protecting a vandalized image, Captain cut the tree down and removed the section of the tree that contained the image. En route to his Nation with the image Oregon State Troopers arrested Captain, seized the image, and charged him with a criminal action under Oregon State Law.

In deciding Captain's case, the Circuit Court of Oregon made the following findings of fact:

1. Expert witnesses in history, sociology, and anthropology establish that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans.

2. Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, signed a treaty with the Cush-Hook Nation in 1850 in which the Nation agreed to sell its land and relocate to a reservation in the Oregon coast range of mountains.
3. The U.S. Senate refused to ratify the Cush-Hook Treaty in 1853, and thus the United States never paid the Cush-Hook Nation for its lands, nor did it provide the Nation with any of the other promised benefits for leaving their aboriginal territory.
4. In 1850, Congress enacted the Oregon Donation Land Act and thereafter both Joe and Elsie Meek applied for and received fee title to the land that encompassed the Cush-Hook village.
5. The Meeks did not live on this land for more than two years and they never cultivated the land at this site.
6. In 2011, Thomas Captain of the Cush-Hook Nation erected temporary housing in Kelley Point Park at the site of the ancient Cush-Hook village.
7. Thomas Captain cut down an archeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol.
8. The Cush-Hook Nation is not on the list of federally recognized Indian tribes, complied pursuant to the 1994 tribal list act.

2 STATEMENT OF THE PROCEEDINGS

The State of Oregon arrested Thomas Captain, and brought this criminal action against him for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site as defined and prohibited by Or. Rev. Stat. 358.905-358.961 (2011) and Or. Rev. Stat. 390.235-390.240 (2011).

Captain consented to a bench trial, waving his right to a trial before an impartial jury of his peers as guaranteed by Article I, Section 11 of the Constitution of Oregon according to the procedures outlined in that same section. Ore. Const. art I, § 11. His trial took place in the Oregon Circuit Court for the County of Multnomah, which ruled that the Cush-Hook Nation, of which Thomas Captain is a member, were the proper owners of the state park which Captain is alleged to have trespassed upon, and subsequently Captain was not guilty of trespass or cutting timber in a state park without a permit.

The Circuit Court did find Captain guilty of violating Or. Rev. Stat. §§ 358.905-358.961 *et seq* and Or. Rev. Stat. §§ 290.235-390.240 *et seq*, however, holding that Public Law 280 gave the State of Oregon criminal jurisdiction over all lands within the state of Oregon whether they are tribally owned or not.

In deciding Captain's case, the Circuit Court of Oregon made the following conclusions of law:

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. Oregon Donation Land Act, ch. 76, 9 Stat. 496-500 (1850).

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 Nations 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.

Both the State of Oregon and Thomas Captain appealed the decision of the circuit court. The Oregon Court of Appeals affirmed the lower court's decision without writing an opinion. That decision was appealed once again by both the State and Captain, and the Oregon Supreme Court denied review. The State of Oregon filed a petition and cross-petition for certiorari, and Thomas Captain filed a cross-petition for certiorari to the United States Supreme Court, which has granted certiorari to answer the questions presented above.

ARGUMENT

A. THE OREGON CIRCUIT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE CUSH-HOOK NATION'S ABORIGINAL TITLE HAS NEVER BEEN PURCHASED OR EXPRESSLY EXTINGUISHED BY THE UNITED STATES AS REQUIRED BY *JOHNSON V. McINTOSH.*

The Cush-Hook Nation holds the aboriginal title to the lands currently encompassed in Kelley Point State Park, and has never had that aboriginal title extinguished by the express act of the federal government. This section of the brief will cover the rules by which aboriginal title is established, and the ways in which the evidence shows the Cush-Hook Nation has satisfied those rules. This section will also show the rules by which the federal government may extinguish aboriginal title claims, and show that the federal government has

never undertaken any of these actions, thereby failing to extinguish the Cush-Hook Nation's aboriginal title claim.

Finally, this section of the brief will explain why the equity defense of laches, instinctively applicable to such aboriginal title claims as that of the Cush-Hook Nation, should continue to not be applied to claims such as that of the Cush-Hook Nation.

1 The Cush-Hook Nation's claim to aboriginal title of the land encompassed in Kelley Point State Park is sufficiently established by the historical record.

The existence of aboriginal title to the ancestral homelands of the indigenous peoples of North America has been considered since the first encounters between Europeans and Native Americans. The natives "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823). However, the right to absolute sovereignty over the lands of the New World was, to the Europeans, held in themselves according to the principles of discovery. *Id.* The nations of Europe asserted in themselves, and recognized in each other, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. *Id.* at 584.

Establishing the location of a tribe's aboriginal title, from a legal standpoint, required more development in the wake of the various abuses the federal government made, intentionally and accidentally, in acquiring the lands of the Indian tribes. In order to determine the boundaries, it is necessary for the court to examine the evidence to determine whether or not the tribe had "actually, exclusively, and continuously used and occupied for a long time" the land in question. *Sac and Fox Tribe of Indians of Okl. v. U.S.*, 383 F.2d 991, 998 (Ct. Cl. 1967), *quoting Sac and Fox Tribe of Indians of Okl. v. U.S.*, 315 F.2d 896,903.

The terms ‘use and occupancy’, as used in this test of the evidence in claiming aboriginal title, are interpreted to mean the use and occupancy of the land in accordance with the way of life, habits, customs, and usages of the Indians who are its users and occupiers. 383 F.2d 991, 998. *See also Confed.Tribes of the Warm Springs Rsvn of Or. v. U.S.*, 177 Ct.Cl. 184 (1966).

The landmark case of *Johnson & Graham’s Lessee v. McIntosh (Johnson v. McIntosh*) was not the first case to deal with the matter of aboriginal title[1], but it is certainly the foundation upon which later Federal Indian Law, particularly that law concerned with aboriginal title, was built. *Johnson* dealt with the competing claims of the plaintiffs, being the successors to William Murray and other parties who purchased the land in question directly from the Plankeshaw and Illinois as private citizens in 1773, and the defendant, who owned the land as successor to the title procured from the same Indians in 1775 by Louis Viviat on behalf of the governor of Virginia (and, thus, King George III). *Johnson* at 550-558. The Court was asked, therefore, to decide between an earlier claim, not backed by the government, and a later claim, supported by the government which the United States government had become the heir to according to the terms of the Treaty of Paris. *See* Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View From the Common Law*, 31 U. Tol. L. Rev. 1, 5-8 (1999) (Discussing the relationship of the various titles to one another in the abstract, and also summarizing Chief Justice Marshall’s motives on this

[1] That distinction lies with *Fletcher v. Peck*, 10 U.S. 87 (1810). *Fletcher* concerned the sale of a large tract of land west of Georgia which Georgia claimed it was seised in fee of. *Johnson* at 592. The case was decided on the basis of the Contract Clause in Article I, Section 10 of the Constitution. *Fletcher* at 139. Chief Justice Marshall stated that “the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.” *Fletcher* at 142-43. This aspect of the decision is certainly overruled immediately by *Johnson*’s holding that only the Federal Government may purchase or otherwise extinguish land which the tribes hold according to the principle of aboriginal title.

subject in a historical and modern context). Chief Justice Marshall delivered the opinion of the Court, first establishing that the "Indian title of occupancy" was recognized from the first discovery of the non-Christian new world by the Europeans, as "[Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . ." Though the case is chiefly concerned with whom has the power to purchase the title of the Indian occupied land from the tribes, it is nonetheless fundamental to the concept of recognized Indian title in the United States.

After *Johnson*, the Supreme Court considered the nature of aboriginal title (still referred to as Indian title) in the case of *Mitchel v. U.S.*, 34 U.S. 711 (1835). *Mitchel* concerned a land ownership dispute between Colin Mitchel, having purchased the land from a company which had purchased the disputed land from the Seminole tribe in Florida, with the approval of the Captain-General of Cuba, while that territory was still controlled by Spain, and the United States, which was granted ownership of the land under the Adams-Onis treaty of 1819. *Mitchel* at 737-738. In discussing the claim of Indian title, the court identifies "one uniform rule" - "that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots." *Id.* at 745. "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." *Id.* at 746. To the Supreme Court, when

deciding *Mitchel*, it was a "settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites."

However, the relationship between the Indian tribes and the federal government slowly changes as the white settlers began expanding westward, pursuing the Manifest Destiny of the Americans in spreading their nation from coast to coast. Indian tribes were displaced from their homelands, by treaty or force ("purchase" and "conquest" in the terminology used in *Johnson v. McIntosh*. *Johnson* at 587) throughout the nineteenth century. Unfortunately, many agreements between the Indian Tribes and the Federal government - in the form of treaties - ended up remaining unratified, and no federal court existed with the jurisdiction to settle these claims. That changed with the passage of the Indian Claims Commission Act of 1946, which established the Indian Claims Commission to hear all suits brought by the tribes, including claims which "[arose] from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." Indian Claims Commission, ch. 959, 60 Stat. 1049 (1946).The Commission was given jurisdiction to hear claims which began before the passage of the act, with all cases after August 13, 1946 subject to jurisdiction in the Court of Claims, pursuant to the guidelines espoused in 25 U.S.C § 1505. Appellate jurisdiction over the decisions of the Commission was given to the Court of Claims, and with the Supreme Court by writ of certiorari. Indian Claims Commission, *supra*. The cases heard before the Commission, and more importantly before the Court of Claims, give further definition of the means by which aboriginal title could be established as a historical thing, since extinguished improperly by the federal government.

In 1966, the Court of Claims reviewed *Confederated Tribes of the Warm Springs Reservation of Oregon v. U.S.*, 177 Ct.Cl. 184 (1966). Twenty years of claims had given the Court sufficient space in which to define the territory held by aboriginal title. The confederated tribes brought suit under the Indian Claims Commission Act to recover the value of lands in north central Oregon which were ceded to the United States under the Treaty of June 25, 1955, 12 Stat. 963. *Confed'd Tribes* at 184. In order to present sufficient proof that the tribe had Indian title to the land, a tribe must show actual, exclusive, and continuous use and occupancy of the land 'for a long time' prior to the loss of the land. *Confed'd Tribes* at 194 (quoting several cases). Continuous use is not limited to areas where the tribe had permanent villages, but also includes seasonal or hunting areas over which the Indians had control. *Id.* The time requirement was not able to be fixed at a specific number of years, requiring only that it was occupied long enough to have allowed the Indians to transform the area into domestic territory so as not to the Claims Commissions Act "an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before." 315 F.2d 896 at 905.

The very next year, the Court of Claims reviewed *Sac and Fox Tribe of Indians of Okl. v. U.S.*, 383 F.2d 991 (Ct. Cl. 1967). In addition to applying the full test explained in *Confederated Tribes* from the year before in defining the regions encompassed by aboriginal title, the court determined that the extents of Indian title could be frozen neither with the Declaration of Independence in 1776, nor at a later time at which the United States acquired sovereign or legal title to the land. *Id*. at 998-99. The court held that "it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise." *Id.* at 999.

Any doubts as to whether the Cush-Hooks were independently sovereign over their land must be vacated when examining the first interactions of the tribe with the United States in their encounters with William Clark of the Lewis and Clark expedition. *Johnson v. McIntosh* held that the United States was the inheritor of the sovereign title of the European Nations which preceded it in controlling its portion of North America, but that the rights of the indigenous people of the region were not negligible with regard to actual title of occupancy of the region. Though preceding the decision, this belief was certainly clear from the actions of the Lewis and Clark expedition when exploring the land obtained via the Louisiana Purchase. They believed that the President Thomas Jefferson peace medals, called "sovereignty medals" by historians, showed that the tribes desired to engage in political and commercial relations with the United States, and that the medals demonstrated which tribes would be recognized by the United States. The mere presence of these medals and the purpose to which Lewis and Clark put the medals indicates an understanding by the government that they were not completely sovereign over the territory of the western tribes simply by purchase of the sovereign title of the territory. From these actions, undertaken by an expedition sanctioned by the President of the United States, it is certainly inferred that the principles espoused later in *Johnson v. McIntosh* were already accepted as true by the government of the United States at the time they first encountered the Cush-Hook Nation, and therefore the Cush-Hook Nation must have possessed aboriginal title, recognized by the United States, over at least some territory.

It is clear that the evidence supports the Cush-Hook Nation's claim to aboriginal title over the lands currently comprising Kelley Point Park in Portland, as outlined by the tests in *Confederated Tribes*. According to this test, the tribe must show actual, exclusive, and

continuous use over the land in question 'for a long time' prior to the date the Indians lost the land through treaty or otherwise. *Confed'd Tribes* at 194, 383 F.2d 991 at 999. Since time immemorial, the Cush-Hooks had occupied this land, including their permanent village, located in the area that is now enclosed by Kelley Point Park's boundaries. That this land was exclusively theirs, and not shared or otherwise occupied by the nearby Multnomah Indians is clear from the contents of the Lewis and Clark Journals which concern the tribe, where William Clark detailed various ethnographic materials about the Cush-Hook lifestyle and hunting practices, separate from that of the same materials related to the Multnomah. At trial, expert witnesses in history, sociology, and anthropology established that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of European-Americans. The land was used by the Cush-Hook Nation, as detailed by William Clark, "in their own way and for their own purposes," until that point in time in which they ceased to be in possession of it, the legality of which is challenged in the next section. *Mitchel* at 746.

2 <u>The Cush-Hook Nation's aboriginal title claim was not extinguished by purchase or the express intent of Congress, because the Cush-Hook Nation never received the payment promised it by treaty, and the Oregon Land Claim Act does not expressly extinguish the Nation's claim.</u>

It has always been unquestioned, in the minds of the European settlers in North America that they have had the power, via right of discovery, to sovereign title over the lands of the New World, but that this sovereign title did not, by default, override the indigenous people's right of occupancy. Instead, "all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians." *Johnson* at 584. The

first of the Trade and Intercourse Act made it illegal for non-Indians to acquire lands from Indians except where it "shall be made and duly executed by some public treaty, held under the authority of the United States." Trade and Intercourse Act, Ch. 33, 1 Stat. 137 (1790). The United States government is able to extinguish aboriginal title via either 'purchase or conquest.' *Johnson* at 587.

The doctrine of extinguishment, obviously, moved away from the 'conquest' prong which Chief Justice Marshall described in *Johnson v. McIntosh*, and towards purchasing the land from the tribes via agreement, or simply exercising national sovereignty and taking the land from the Indians. The tribes were categorized as 'domestic dependent nations,' and the relationship between them as that of a guardian (the federal government), and his ward (the Indian tribes). *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Eventually, the United States would exercise the right, therefore, to extinguish this relationship, and the aboriginal title this ward relationship protected, when the interests of the government dictated. Such a taking will not be lightly implied, and any ambiguous wording in acts purported to effect such a taking will be interpreted in favor of the Indian tribes. *U.S. v. Santa Fe Pac. R. Co*, 314 U.S. 339, 353 (quoting *Choate v. Trapp*, 224 U.S. 665, 675). However, the taking of the land in a manner wholly inconsistent with tribal occupancy may be sufficient to establish successful extinguishment of aboriginal title. *See U.S. v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

In 1850, the United States Congress passed the Donation Land Claim Act, which established a means by which white settlers could establish a claim to the lands throughout the Oregon territory (most of the American West). Donation Land Claim Act, ch. 76-9, 9 Stat. 496. With this act, all of the public lands of the United States were available to be

divided up by settlers according to its provisions, with limited exceptions which were spelled out within the act. *Id.* No mention of Indian territory is made in the entirety of the act. *Id.*

With any discussion of aboriginal title, including a discussion of extinguishment of such title, it is necessary to begin with the case of *Johnson v. McIntosh*. Chief Justice John Marshall summarized means by which aboriginal title could be extinguished in *Johnson v. McIntosh*, stating "[t]hey maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Johnson* at 587. The United States, in the view of the Court, was a conqueror and the courts of the conqueror could not question the validity of the title originating in the conquest of the area, and could not sustain a view of the title which was incompatible with the existence of the sovereign title of the conqueror. *Johnson* at 588-589.

Since *Johnson*, there have been many cases dealing with alleged lapses on the part of United States in properly extinguishing aboriginal title claims. Many of the cases discussed in subsection 1 of this section were brought under such circumstances. *E.g.*, *Confed'd Tribes*, 177 Ct.Cl. 184; *Sac and Fox*, 383 F.2d 991. However, this section must deal directly with the means by which such title might be extinguished, and examination of separate cases is necessary to fully examine

In 1941, the United States Supreme Court decided the case of *U.S. v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). The United States, on behalf of the Hualapai Tribe in Arizona, sued the railroad to enjoin the railroad from interfering with the inhabitation and possession of the Hualapai of lands which the railroad owned the title to as successors to a grant held by the Atlantic and Pacific Railroad Co. *Santa Fe Pac. R. Co* at 343. After discussing the principles of establishing the Hualapai's aboriginal title claim to the land, the

Court examined whether the aboriginal title claim had been sufficiently extinguished by the actions of the federal government. The court applied the reasoning that extinguishment could not "be found lightly" in light of the special trustee relationship the government had with the Indian tribes. *Id.* at 354. Accordingly, "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [the Indian tribes], who are wards of the nation, and dependent wholly upon its protection and good faith." *Id.* The Court held that the land grant which Congress had made had not, therefore, extinguished the aboriginal title of the Hualapai to the land in question, but that a later executive order creating a reservation, in order to protect the Hualapai's rights from encroaching white settlers had sufficiently extinguished their aboriginal title claim to that land, as "acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others." *Id.* at 358. *See also Cnty of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247.

Later, the Ninth Circuit court considered a dispute over National Forest land, after members of the Pit River Indian tribe were found guilty of trespass and illegal occupation of the land, in *U.S. v. Gemmill*, 535 F.2d 1145, 1146-7 (9th Cir. 1976). The dispute in the case was not whether the Pit River Indians had owned aboriginal title to the forest land in question, but whether that claim had been extinguished by the federal government. *Id.* at 1148. The accused held that their aboriginal claim to the land had not been extinguished under the California Land Claims Act of 1851, which required "every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to register their claim with the United States government. *Id.* (quoting Act of March 3, 1851, ch. 41, 9 Stat. 631 § 8). The Pit River tribesmen argued that their tribe's right or title had not

derived from the Spanish or Mexican government, but from their aboriginal claim to the land as their homeland, and the Ninth Circuit agreed. *Gemmill* at 1148. However, the Ninth Circuit did hold that the aboriginal title had been extinguished by a successful military campaign by the United States against an assortment of tribes, including the Pit River Indians, later in 1851, and that accordingly the federal government had extinguished the aboriginal claim by force. *Gemmill* at 1149. The court held that the successful military campaign against the tribe was a strong indication of the sovereign United States' intent to deprive the Indians of the land in question. *Id.* Further, "[t]he continuous use of the land to the present time for the purposes of conservation and recreation, after the Indians had been forcibly expelled, leaves little doubt that Indian title was extinguished." *Id.* To cap it off, the federal government had compensated the Pit River Indians for the land in 1964. *Id.* at 1149 (citing Act of October 7, 1964, Pub.L. No. 88-635, ch. 11, 78 Stat. 1033). With all of these things together, the Ninth Circuit held it was clear that the aboriginal title of the Pit River Indians had been extinguished. *Gemmill* at 1149.

The Supreme Court of Vermont reviewed a decision by the lower state court on a criminal case where thirty-six Indians, many of whom were members of the Missisquoi tribe, were charged with fishing without a license. *State v. Elliott*, 616 A.2d 210, 211 (Vt. 1992). The trial court agreed with the tribe members' assertion that they held aboriginal title which had not been extinguished, but upon the state's appeal, the state's highest court reviewed the case. In determining whether the tribe's aboriginal title had been extinguished, the court explained that "[t]he legal standard does not require that extinguishment spring full blown from a single telling event. Extinguishment may be established by the increasing weight of history." *Id.* at 218. The state Supreme Court agreed that non-Indian encroachment which

caused Indian withdrawal is not, by itself, sufficient to extinguish aboriginal title. *Id.* at 219. However, the "phenomenon of white settlement" was, in the eyes of the Vermont high court, one of the factors to be considered in determining whether the sovereign had an intent to extinguish the aboriginal title. *Id.* The Supreme Court, therefore, considered the myriad of actions taken by the governor of New York in the time before the formation of the United States, when the governor was the sovereign over New York Territory, and found them to be sufficient to allow the state court to find sufficient intent to extinguish aboriginal title over the lands in question. *Id.*

With these legal principles established by the common law of the United States, we turn now to the issue at hand - has the federal government extinguished the aboriginal title claim of the Cush-Hook nation?

From its first contact with European-Americans, the Cush-Hook Nation was at peace with them. William Clark, in his dealings with the Cush-Hook, gave them one of the President Thomas Jefferson peace medals, an act which he believed showed the tribal leaders were willing to engage in political and commercial relationships in the United States. The circumstances of the Cush-Hook certainly must be distinguished from those in *Gemmill*, as unlike the Pit River Indians, the Cush-Hook Nation never warred against the United States. *Gemmill* at 1149. The aboriginal title of the Cush-Hooks, therefore, could certainly not have been extinguished 'by the sword.' *Santa Fe* at 347.

But has their aboriginal title claim been distinguished by peaceful means - that is, by treaty or another overt act by the federal government? If the claim of the Cush-Hook Nation has been extinguished, it was certainly extinguished no earlier than the treaty which the Nation signed with Anson Dart in 1850. Here, the intent of Anson Dart, the superintendent of

Indian Affairs for the Oregon Territory, to extinguish the aboriginal claim of the Cush-Hook Indians was clear. However, any treaties made by Anson Dart needed to be ratified by the U.S. Senate. U.S. Const. art. II, § 2, cl. 2. Without the ratification of the treaty, it is difficult to say that this treaty shows a clear purpose, and "doubtful expressions" - an unratified treaty should certainly be considered in this category - are to be resolved in favor of the Indian Tribes. *Santa Fe* at 354. Interpreting an unratified treaty in favor of the tribe certainly follows the advice of the Court in *Santa Fe*, and applying that reasoning in the instant case would certainly show that the treaty signed between the Cush-Hook Nation and Anson Dart did not sufficiently extinguish the aboriginal title of the Cush-Hooks to the lands currently comprising Kelley Point Park. Naturally, things would be considerably different had the tribe actually received the payment promised them by the treaty. *See Gemmill* at 1149.

The next potential extinguishment of the Cush-Hook's aboriginal title claim may be the Donation Land Claim Act of 1850, by which white settlers first made a claim to ownership of the lands which currently comprise Kelley Point State Park. However, this act gave the surveyor-general of the Territory of Oregon authority only over the 'public lands and private land claims' in the territory, which certainly referred only to those lands owned by the United States, or those land claims which had already been made by white settlers in the territory. Donation Land Claim Act, *supra*. The act makes no mention at all of authority to distribute Indian territory - indeed, it does not mention the lands owned by Indians at all, except in stating that "American half-breed Indians" are also allowed to make claims to land under the provisions of this act. *Id.* An expressed intent by Congress to extinguish the Indian title in the Oregon Territory can certainly not be found in these acts. *See also Sac and Fox,* 383 F.2d 991; *State v. Elliott, supra*. Accordingly, any title deriving from a claim to the lands

of Kelley Point Park based on these lands must be void, or at the very least, "subject to the encumbrance of Indian title." *Santa Fe* at 347. The State of Oregon's title to the park lands is, therefore, void, being the successor to a title obtained via the Donation Land Claim Act of 1850 by Joe and Elsie Meek - a title which they never properly obtained in the first place, having failed to "reside upon and cultivate" the land for four years, as required by the Act. Donation Land Claim Act, ch. 76, 9 Stat. 496 § 4. As such, the State's title is certainly void, but at the very least subject to the encumbrance of Indian Title.

Assuming, *arguendo*, that the State's claim is not void, one may argue that the encumbrance of Indian Title has been lifted, as the Cush-Hooks abandoned the land after signing the treaty with Anson Dart and moving to the area dictated by that treaty (roughly 60 miles to the west, in the foothills of the Oregon Coastal Range). In doing so, they could obviously point to the language in *Gemmill* and *Elliott*, which states that, though evacuation by Indians of the land in order to avoid non-Indian encroachment is not enough, continuous use of the land for non-Indian purposes may be enough to show the extinguishment of aboriginal title. *Gemmill* at 1149; *see Elliott* at 219. Like those cases, this, too is a case which concerned an allegedly criminal act by an Indian on his ancestral lands, and so - as a matter of public policy, it might be argued to apply the rationale in those cases and find aboriginal title extinguished in these cases. However, the reasoning in those two cases flies in the face of the earliest case law, assembled and applied in *Santa Fe*, which states it must be the expressed intent of Congress (or the Department of the Interior, or the President) to extinguish aboriginal title. *See Santa Fe* at 354. Inferring the extinguishment of aboriginal title from white settlement, when that settlement occurred illegally, flies in the face of

America's historical treatment of aboriginal title, as old as the Non-Intercourse Acts and *Johnson v. McIntosh*.

3. The Cush-Hook Nation's claim has not expired by laches or acquiescence, because the Cush-Hook Nation treaty was not ratified as promised and the land has not been developed with considerable equity investment.

The doctrine of laches, an affirmative defense in equity, has been asserted by States, counties, and other, private, entities to bar rewards in aboriginal title claims. Laches, is an "[u]nreasonable delay in pursuing a right or claim — almost always an equitable one — in a way that prejudices the party against whom relief is sought." Black's Law Dictionary (9th ed. 2009). Although similar to a statute of limitations in purpose, the difference is that laches may bar a claim brought in equity where there is not a statute of limitations-such as many aboriginal title claims. "[L]aches is not…a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced-an inequity founded upon some change in the condition or relations of the property or the parties." *City of Sherrill, N.Y. v Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-218 (2005) (quoting *Galliher v. Cadwell,* 145 U.S. 368, 373 (1892)).

Interestingly, the doctrine of laches has been applied inconsistently to aboriginal title land cases. In *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 277 (2nd Cir. 2005), the Second Circuit considered there to be four factors in considering whether the doctrine of laches should be applied to aboriginal title cases: (1) Non-Indian development of the land in question, (2) whether the tribe has resided elsewhere, (3) the character of the land and its inhabitants, and (4) the time elapsed between the present and the time when the land was

'lost'.[2] Laches are also not applied to protect land title claims which have been obtained illegally from attempted assertions of aboriginal title. *See Ewert v. Bluejacket*, 259 U.S. 129 (1922).

In *Felix v. Patrick*, 145 U.S. 317 (1892), the United States Supreme Court reviewed a case of aboriginal title where the land is situated in the middle of the city of Omaha, Nebraska. *Id.* at 318. Due to location, in the time period from when Matthewson T. Patrick obtained the scrip for the 120 acres until the suit, the land had undergone considerable development. *Id.* at 320. "[T]hat which was wild land 30 years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have brought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases." *Id.* at 334 Laches was applied and the Court reasoned that too much time had passed and that considerable equity in the land had been built in that time period. *Id.* at 330 "…28 years elapsed from the time the scrip was procured of Sophia Felix, and nearly 27 years from the time it went into the possession of Patrick, before the bill was filed." *Id.* The Court applied the laches doctrine, reasoning that "[t]he decree prayed for in this case, if granted, would offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the western territories, (Felix herself having receive scrip to the amount of 480 acres, only 120 of which are accounted for,) and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation" *Id.*

[2] The court actually identifies six items of consideration, however the final two (delay in bringing the suit, and developments to the land) are certainly repeats of the first and fourth factors identified in this brief.

Thirty years later, the Supreme Court of the United States reviewed *Ewert v. Bluejacket, supra*. The case centered around the actions of Paul A. Ewert who, while working for the Attorney General of the United States 'to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency,'purchased statute-restricted lands owned by Charles BlueJacket, a full-blood Quapaw Indian. *Id.* at 133-134. In determining whether the laches doctrine applied, the Court stated "the equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.* at 138. Because of Ewert's position and interaction with the Indians he was assigned to work with, his land purchase was prohibited by Statute R.S. § 2078 and therefore void. *Id.* at 135 The Court refused to apply the doctrinal defense of laches to protect a title which had not been legally obtained. *Id.*[3]

More recently, a series of cases with the Oneida Indian Nation of N.Y. State have given a new look at the controversy in the application of laches to aboriginal title claims. The first Oneida case (Oneida I), *Oneida Indian Nation of N.Y. State v. Oneida County, New York,* 414 U.S. 661, (1974), was originally a claim for fair rental values of certain lands ceded in 1795 by Indians to the State, on theory that the cession was invalid under treaties and laws of the United States. After a discussion on whether the state court had jurisdiction to hear the case, it was found jurisdiction did exist and the case was remanded back to State

[3] Statute R. S. states: 'No person employed in Indian affairs shall have any interest or concern in any trade with Indians, except for, and on account of the United States; and any person offending herein, shall be liable to a penalty of $5,000 and shall be removed from his office.'

Court. In the second hearing of this case before the Supreme Court (Oneida II), *Oneida County N.Y. v. Oneida Indian Nation of N.Y. State,* 470 U.S. 226, (1985), was a claim seeking damages representing fair rental value of land presently owned and occupied by two New York counties. "While petitioners argued at trial that the Oneidas were guilty of laches, the District Court ruled against them and they did not reassert on appeal. As a result, the Court of Appeals did not rule on this claim, and we likewise decline to do so." *Id.* at 245. The Court held that, "One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied." Id. at 253. Unlike the previous cases, the Oneida were not asking for aboriginal title and possession of the land in question, but compensation.

The most recent Oneida case (Oneida III) is, *City of Sherrill, N.Y. v Oneida Indian Nation of N.Y.,* 544 U.S. 197, 221 (2005), where the Oneida brought action against city and county, alleging that parcels of land which the tribe purchased and which were within boundaries of former reservation were exempt from taxation. Unlike the previous Oneida case, the Court held "In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*. However, the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and development in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* The Oneida were asking for much more in equity than the compensation in *Oneida II*. In addition

to laches, the Court also applied acquiescence and impossibility, both of which are new to the scene.

Around the same time of *Oneida III*, the Second Circuit reviewed *Cayuga Indian Nation of N.Y. v. Pataki*, *supra*. Similar to the *Oneida III* case, the Cayuga Indian Nation sought much more than compensation - they sought ejectment and constructive possession for the late eighteenth century dispossession of their land, stating it had been obtained a violation of the Nonintercourse Act. *Cayuga* at 268. The same six factors that doomed the Oneida's claim for aboriginal title in *Oneida III* were applied to this case: (1) "[g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservations," (2) "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere," (3) "the longstanding, distinctly non-Indian character of the area and its inhabitants," (4) "the distance from 1805 to the present day," (5) "the [Tribe's] long delay in seeking equitable relief against New York or its local units," and (6) "developments in [the area] spanning several generations." *Id.* at 277. The Second Circuit summarized its views, "the import of Sherrill is that "disruptive" forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Id.* The court applied the precedent set by the Supreme Court in *Oneida III*, holding "[b]ased on *Sherrill*, we conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied." *Id.* at 268.

In the present case, the Cush-Hook Nation stakes a claim to land which is completely dissimilar to the land which the Oneidas or Cayuga attempted to reclaim. Kelley Point Park is currently a State Park, not an enormous conglomeration of land which has been developed over the past two centuries. Considering this first factor of determining whether to apply the

laches doctrine described in *Cayuga*, non-Indian development of the land in question, we see land which is relatively undeveloped, maintained instead for wilderness enjoyment on the edges of a metropolitan area. The state of this land is, essentially, little different than the state of the land when the Cush-Hooks were duped into abandoning it on the pretense they would receive payment in exchange for it. With no development, this first factor's consideration certainly would not indicate that the equity defense doctrine of laches apply to extinguish the Cush-Hook's Claim.

The second factor explained in *Cayuga*, the location of residence of the majority of the tribe, is perhaps the strongest argument to indicate that the doctrine of laches should apply. The majority of the Cush-Hook Nation resides sixty miles to the west, in lands that were to be theirs, promised by an unratified treaty. With the exception of Thomas Captain, no tribal member is known to have inhabited Kelley Point Park since their exodus in 1850. However, this factor should be treated as primarily concerned with the the impossibility of returning land which has long since belonged to numerous private owners. *See Cayuga* at 277 (citing *City of Sherrill* at 1492-3). Here, the land is solely in the possession of the State of Oregon - there are no numerous private owners making it difficult to cloud the title of the Park. Applying laches to this case, based solely on this factor, seems to be an abuse of the power.

The third factor proposed by *Cayuga* for consideration in determining whether to apply the doctrine of laches is the longstanding, non-Indian nature of the land and its inhabitants. *Cayuga* at 277. There are no inhabitants of Kelley Point Park, so that aspect of this factor is negligible. Even the white settlers who purported to own the land via the Donation Land Claim Act did not live on and cultivate this land for the four years the Land

Claim Act required. This land does not have, as sought by this factor, a longstanding, non-Indian useage of the land. A State Park is not in many ways different from the way in which the Cush-Hook land was used when they first encountered the Europeans, save alone that their village was located on this particular stretch and is no longer. The effect of this factor in applying the doctrine of laches is negligible, at best.

Which takes us, finally, to the fourth factor in considering whether to apply the doctrine of laches: the amount of time between the present and when the land was 'lost'. Here, the Cush-Hook claim is nearly as weak as that of the Oneida in the *Oneida* cases - having abandoned the land, albeit under false pretenses, in the year 1850, it has been nearly 163 years since the Cush-Hooks have inhabited the land which currently comprises Kelley Point Park. No living Cush-Hook lived in their ancestral home - indeed, it has been several generations since the Cush-Hooks called this land home. However, applying the doctrine of laches here, based solely on this factor, or even largely on this factor, and partially on the second factor considered above, flies against the purpose of the laches defense in equity.

The doctrine of laches is not intended to protect claims which have been procured through illegal means. *See* at 153. Similarly to Paul Ewert in *Ewert v. Bluejacket*, The Meeks family obtained title to the lands currently containing Kelley Point Park in violation of federal statute. The Cush-Hook lands should not have been made available under the Donation Land Claim Act of 1850 (as argued above), but assuming, again *arguendo*, that the lands were 'public' territory, owned by the United States at the time the Act was passed, the Donation Land Claim Act clearly stated that, in order to obtain land title based on the provisions of the act, the claimant must have "resided upon the land and cultivated same for four consecutive years." The Meeks only lived on the land in question for two years, not

satisfying the requirements of the statute-they should never have been issued the title to the land in the first place. As such, their claim to the title, obtained without satisfying the requirements of the statute by which they claimed the land, was given to them illegally. The State of Oregon, as successor to the Meeks's title, are successors only to a title obtained by illegal means, which puts them in an embarassing position. The laches doctrine should never be applied to protect land claims which were obtained by illegal or nefarious means, whether or not they involve aboriginal title claims. With no legal extinguishment of the Cush-Hook Nation's aboriginal title claim to the land, Kelley Point Park should certainly revert to the possession of the Nation.

B. THE JURISDICTION OF OR. REV. STAT. §§ 358.905-358.961 AND OR. REV. STAT. §§ 290.235-390.240 SHOULD NOT BE EXTENDED OVER INDIAN OWNED LANDS BY SECTION TWO OF PUBLIC LAW 280 BECAUSE THEY ARE NOT OF A CRIMINAL, PROHIBITIVE NATURE BUT ARE INSTEAD OF A CIVIL, REGULATORY NATURE WHOSE JURISDICTION IS NOT GRANTED TO THE STATE BY PUBLIC LAW 280.

On tribal lands, a State's criminal jurisdiction usually only extends over non-Indians who commit crimes against other non-Indians. 41 Am. Jur. 2d Indians; Native Americans § 172 (2012). This jurisdiction exists because the exercise of jurisdiction over non-Indians on the reservation is perceived to not interfere with the tribe's rights to exercise its sovereignty over its members or its territory. *Id.* However, states do not, traditionally, have jurisdiction over the acts of Indians in Indian territory, or those crimes where Indians were the victims. *See Worcester v. Ga.*, 31 U.S. 515 (1832).

However, in 1953, Congress passed Federal Public Law 280 (PL 280), the second section of which extended criminal jurisdiction over Indians within six States to those State governments: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162 (2010). PL 280 § 2, codified as 18 U.S.C. § 1162, states that the six states "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." *Id*. However, this law has not been interpreted to have extended complete criminal jurisdiction over Indian territory - "when a State seeks to enforce a law within an Indian reservation under the authority of [PL 280], it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court" *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987). This determination lies at the heart of this question - are Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 criminal / prohibitive in nature, or are they civil / regulatory, and thus fall outside the scope of section two of PL 280?

Oregon Statute 358 states that a person may not excavate, injure destroy or alter an archeological site or object or remove an archeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under Or. Rev. Stat. § 390.235. Or. Rev. Stat. § 358.920 (2012). Oregon Statute 358.905 defines an archeological object as an object that is at least 75 years old, is part of the physical record of an indigenous or other culture found in the state, and is material remains of past human life or activity that

are of archeological significance including, but not limited to, monuments, symbols, etc.[4] Or. Rev. Stat. § 358.905. Violation of Oregon Statute 358 is a class B misdemeanor. Or. Rev. Stat. § 358.950 (2012). Seized artifacts forfeited due to a violation of Or. Rev. Stat. §§ 358.920 to 358.955 or 390.235 are subject to civil forfeiture to the appropriate Indian tribe under Or. Rev. Stat. § 358.928 (2012). Further, any native Indian sacred object, object of cultural patrimony or native Indian funerary object shall be reported to the appropriate Indian tribe and the Commission of Indian Services. Or. Rev. Stat. § 358.940 (2012).

The Oregon Statute that regulates the permit is Or. Rev. Stat. § 390.235, which states that a person may not excavate or alter an archeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archeological site or remove from public lands any material of an archeological, historical, prehistoric or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department. A person who obtains a permit under this section must submit evidence to the State Historic Preservation Office that the Oregon State Museum of Anthropology and the appropriate Indian tribe have approved the applicant's curatorial facilities. Or. Rev. Stat. § 390.235. Or. Rev. Stat. § 390.237 defines an exception to the removal of archaeological material without a permit. It states that if any individual excavates or removes from the land any materials of archaeological, historical, prehistoric or anthropological nature without obtaining the permit required in ORS 390.235, all materials

[4] It further defines a archeological significance as: "any archeological site that has been determined significant in writing by an Indian tribe; public lands mean: any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon; sacred object means: an archeological object or other object that is demonstrably revered by any ethnic group or Indian tribe as holy; is used in connection with the religious or spiritual service or worship of a deity or spirit power; or was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion." Or. Rev. Stat. § 358.905

and collections removed from such lands are under the Stewardship of the State and shall go to the State's Museum of Anthropology, with the exception of native Indian sacred objects or human remains which shall go directly to the appropriate Indian tribe. Or. Rev. Stat. § 390.237.

It is convenient to begin this investigation by examining the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians, supra*. This case came about as the State of California, attempting to enforce its anti-gambling laws under the provisions of PL 280, attempted to apply a state law which, while not forbidding bingo games within the state, restricted them to being operated by unpaid charity employees, with all profits from the events being used for charitable purposes. *Cabazon* at 205-6. The Court explained in clear terms that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil / regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209. The Court explained that, because the State of California sanctioned not only bingo (under regulated circumstances), but also other forms of gambling, including the state lottery, the State's law was regulatory in, and not prohibitive. *Id.* at 211.[5]

Various courts have expanded upon the *Cabazon* test, though few have dug into the test so thoroughly as *State v. Stone*, 572 N.W.2d 725 (Minn. 1997). In *Stone*, Minnesota had

[5] In deciding *Cabazon*, the Supreme Court adopted the rule applied to interpreting PL 280 cases which had been developed by the Ninth Circuit in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, California v. Duffy*, 694 F.2d 1185, (9th Cir. 1982). Though the test applied in this test is known as the *Cabazon* test, the test was clearly developed by the Ninth Circuit, and not the Supreme Court.

charged various Indians with various traffic offenses.[6] The State Supreme Court reviewed the consolidated appeals of the Indians, and applied the *Cabazon* test to examine further whether the State's laws, including the law requiring a license to drive, were regulatory or prohibitive in nature. *Id.* at 729. The Court noted that, though section 4 of PL 280 permits the State to exercise jurisdiction over civil litigation arising from the acts of Indians in Indian territory, it does not grant complete civil regulatory powers over Indian Territory to the State. *Id.* The Court noted the ambiguity around whether this test applied to the 'broad' conduct, such as driving, or the narrow conduct, such as driving without a license, and felt, correctly, that applying the test to only the broad conduct would predictably result in no traffic laws being found to be criminal, while applying it only to the narrow conduct would result in every single traffic law being criminal. *Id.* Obviously, such an interpretation of the *Cabazon* test does not serve principle interests of public policy, so the Court in *Stone* breaks the *Cabazon* test into two parts: (1) If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory, if the conduct is generally prohibited, the law is criminal/prohibitory; (2) the law is criminal if it violates the state's public criminal policy. *Id.* at 730. The Court found four factors useful in determining whether the conduct violates the state's public criminal policy: (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; (4) the nature and severity of the potential penalties for a violation of the law. *Id.* The Court, in

[6] The offenses were: no motor vehicle insurance and no proof of insurance; driving with an expired registration; driving without a license; driving with an expired license; speeding; no seat belt; and failure to have child in a child restraint seat. *Stone* at 728.

determining whether the conduct should be interpreted broadly or narrowly, asked whether the statutes in question served a specific public policy interest besides the general public policy of the broad activity, driving. *Id.* The Court felt the laws in question in *Stone* did not serve a public policy interest separate from that of the broad interest in safe driving, and as driving is permitted in the state of Minnesota, the laws challenged were regulatory in nature and such jurisdiction was not granted under PL 280. *Id.* at 731. The Court, however, noted that traffic laws prohibiting reckless driving, or driving while intoxicated, presented a greater risk of injury in others, and therefore were criminal in purpose and could be applied to Indians on Indian territory under PL 280. *Id.*

In order to determine whether Oregon Statutes 358.905-358.961 and 290.235-390.240, they must be run through the rigors of the *Cabazon* test, as described in *Stone*. If the purpose of these statutes is to prohibit criminal conduct, then the State may exercise jurisdiction over Indian Territory under the grant of PL 280; if the purpose of the statute is to regulate otherwise approved behavior, than it may not. *Cabazon* at 209. Under the guidance of *Stone*, we must first look to the broad purpose of the statutes, which is quite obviously to protect the archaeological treasures of the State of Oregon. As it is unclear whether this goal is a criminal or civil goal, it is necessary to investigate whether protecting these treasures is an issue of criminal policy. In order to determine this, the factors used by the Minnesota Supreme Court should be applied to the facts of this case: (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; (4) the nature and severity of the potential penalties for a violation of the law. *Stone* at 730.

The damaging of archaeological objects or historical sites does not present a great threat of physical harm to persons - that much is quite clear. The most serious and obviously

criminal crimes have always concerned the threat of physical harm to another human being, and that aspect of the first factor is clearly not satisfied here. However, the potential for damage to property certainly exists, as most archaeological objects are going to be on somebody's property, either private property or the property of the state. However, most people who attempt to remove objects from historical sites or excavate archaeological objects are doing so to possess the property, and many of them will be capable of violating this statute without harming the object or property which the statute protects. Physical harm to the property of others is also not inherent to this violation.

The second factor is perhaps the strongest in support of the law being a civil, regulatory statute. The statute makes it quite clear that exceptions to the general rule (do not excavate on historical sites or take and possess archaeological objects) exist. Both statutes immediately explain the means by which any person may obtain a permit to violate this law, and the procedures which those who possess a permit must follow as they proceed with their excavation or other archaeological pursuit. Indeed, the statutes appear not to prohibit the excavation, but merely regulate behavior they otherwise approve of. *See* Or. Rev. Stat. §§ 358.905-358.961 (2012); *see also* Or. Rev. Stat. §§ 390.235-390.240 (2012). Successful excavations are to be offered to the Oregon State Museum of Anthropology, or to the Indian Tribe who would otherwise be the rightful owner of the artifact or site. Or. Rev. Stat. § 390.235 (2012). These statutes make it appear that protecting the artifacts by removing them is a condoned action of the state, subject only to the regulation of the means by which such action is undertaken. Exceptions to the statute not only abound, they are explicitly provided by the statute. The second factor does make it appear that this law is a criminal one.

The third factor is slightly trickier to apply. The moral blameworthiness of the actor can be either a subjective or objective test. If applied as a subjective investigation to the precise circumstances of Thomas Captain, then he clearly is not moral blameworthy in the least - he cut down the 'archaeological object' only to protect it from being defaced, or cut away and sold for personal profit. He clearly was acting only in the spirit of the statute. However, if one applies an objective test, that is "a reasonable person" who is violating the statute, it is, perhaps, not as cut and dry. One cannot assume that all people violating the statute are doing it with innocent intentions - for example, Thomas Captain's actions were done to protect idols cut into the tree which were sacred to his people from being defaced and damaged from people who were violating the two statutes in order to do so. It might certainly be the case that such acts are precisely those which are looking to be prevented by the Oregon Statutes, but it seems that the vast majority of offenders would be those with otherwise innocent intentions, simply curious about history, or seeking to possess the objects for personal or commercial purposes. An objective theory of criminal culpability might very well find this law criminal in purpose, but Oregon has adopted many of the provisions of the Model Penal Code. The Model Penal Code is known for its subjective view towards criminal culpability. Accordingly, a subjective test is better applied to this factor when considering culpability of an Oregon statute - and the blameworthiness of Mr. Captain is certainly negligible.

The final factor is the severity and penalty imposed for violating the statute. The penalty for violating Or. Rev. Stat. §§ 358.905-358.961, or Or. Rev. Stat. §§ 390.235-390.240 is a misdemeanor. It is not a certainty that a crime which qualifies as a misdemeanor - many of the crimes present in *Stone* were either minor traffic violations or misdemeanor

violations. *See State v. Stone*, *supra*. When one examines the fine levied upon Captain for violation of these statutes, a mere $150.00, one cannot help but feel the fine is equivalent to a speeding ticket, or other minor violation - and therefore not the sort of penalty present in prohibitive statutes. One would think that, if the intent was to prohibit the conduct, violation of this statute would constitute more than a small fine and a misdemeanor. A second part of the punishment is that any archaeological object recovered as part of a violation of either of these acts which originally belong to an Indian tribe must be returned to that tribe - this is exactly what Thomas Captain's purpose was in violating the act. Or. Rev. Stat. § 358.940. Any punishment for a crime which satisfies the purpose of the actor in violating the statute and completes his violatory goals can truly is no punishment, at all. Therefore, the fourth factor is not satisfied.

With none of the four factors more than nominally indicating either of these statutes to be prohibitive in nature, these statutes must then be found to be regulatory in nature, and thus criminal jurisdiction is not granted to the State of Oregon by PL 280, § 2.

CONCLUSION

The Cush-Hook Nation still holds the title to the lands of Kelley Point Park, as holders to an unextinguished aboriginal title claim to the lands. The Donation Land Act of 1850 did not sufficiently extinguish the Nation's Claim, as it did not grant authority over Indian territory to the Surveyor-General of the Oregon Territories. Neither did the treaty signed between Anson Dart and the Nation extinguish the title, as the treaty so signed was never ratified by the United States Senate. The extinguishment of aboriginal title shall not be "lightly implied", and any gray area of possible extinguishment should be interpreted in the Indians' favor. *Santa Fe* at 353. The State of Oregon is successor to an illegally obtained title, of the sort not normally protected by the laches doctrine in equity disputes.

Section Two of Public Law 280 does grant the State of Oregon jurisdiction to enforce Or. Rev. Stat. §§ 358.905-358.961, or Or. Rev. Stat. §§ 390.235-390.240. These statutes are of a civil, regulatory nature. The statutes regulate conduct which is generally permitted by the state of Oregon, but which is viewed as needing to be regulated not because of any inherent physical threat or culpability on the part of those violating the statute, but in order for all the people of Oregon to be able to preserve their history. The statutes primarily deal with exceptions to themselves, and the punishment for violating these statutes is small by comparison.