

2013 NATIONAL NALSA MOOT COURT QUESTION

State of Oregon, Petitioner v. Thomas Captain, Respondent and cross-petitioner, No. 11-0274.

Kelley Point Park is an Oregon state park located at the confluence of the Columbia and Willamette Rivers, inside the present day limits of Portland, Oregon.

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

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

Clark later drew a sketch of the village and the longhouses in the journals and recorded some ethnographic materials about Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. He also gave the headman/chief one of the President Thomas Jefferson peace medals that Clark and Meriwether Lewis handed out to chiefs during their expedition. Lewis and Clark believed that the tribal leaders who accepted these medals showed they desired to engage in political and commercial relations with the United States; and that, in essence, acceptance of the objects demonstrated which tribal leaders and governments would be recognized by the United States. In fact, the objects that Lewis and Clark distributed to Indian chiefs are called "sovereignty tokens" by historians because of the political and diplomatic significance of the items.

Thereafter, the Cush-Hooks continued to live in their village on this point of land and engaged in their traditional ways of life across their territory. In 1850, the Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. Dart wanted to move the tribe so that American settlers could occupy the valuable farming lands on the river. The Nation agreed to relocate 60

miles westward to a specific location in the foothills of the Oregon coast range of mountains. Subsequent to the treaty signing, the entire Cush-Hook Nation relocated to the coast range to avoid the encroaching Americans, and a majority of the Nation's citizens have continued to eke out a bare existence there ever since. In 1853, however, the U.S. Senate refused to ratify the Cush-Hook treaty. Thus, the Nation and its citizens never received any of the promised compensation for their lands in and around modern-day Kelley Point Park, nor did they receive any of the other promised benefits of the treaty, or the recognized ownership of the lands they moved to in the coast range of mountains. Furthermore, since the treaty was not ratified, and the United States has not since undertaken any other act to "recognize" the Cush-Hooks, the Nation has remained a non-federally recognized tribe of Indians.

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

In 2011, Thomas Captain, a Cush-Hook citizen, moved from the tribal area in the coast range of mountains to Kelley Point Park. He occupied the Park to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over three hundred years. The trees are very important to the Cush-Hook religion and culture because tribal shamans/medicine men carved sacred totem and religious symbols into living trees hundreds of years ago. In fact, in 1806, William Clark noted this practice in the Journals. Now, over three hundred years later, the carved images are at a height of 25-30 feet from the ground. Incredibly, vandals have recently begun climbing the trees to deface the images and in some cases to cut them off the trees to sell. The state has done nothing to stop these acts. Thus, Thomas Captain occupied the Park to protect and preserve these crucial tribal objects. In order to restore and protect a vandalized image that had been carved by one of his ancestors, Thomas cut the tree down and removed the section of the tree that contained the image. He was returning to his Nation's location in the coastal mountain range when state troopers arrested him and seized the image.

The State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961

(Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). Captain consented to a bench trial.

The Oregon Circuit Court for the County of Multnomah made the following findings of fact and conclusions of law:

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 archaeologically, 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, compiled pursuant to the 1994 tribal list act.

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.
2. The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. M'Intosh* because the

U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land.

3. The United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void *ab initio* and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void.

4. The Cush-Hook Nation owns the land in question under aboriginal title.

5. Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not. Thus, Oregon properly brought this criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

Consequently, the court held that the Cush-Hook Nation still owned the land within the Park and found Thomas Captain not guilty for trespass or for cutting timber without a state permit. However, the court found him guilty for violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* for damaging an archaeological site and a cultural and historical artifact and fined him \$250.

The State and Thomas Captain appealed the decision. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review.

Thereafter, the State filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court.

The Court granted certiorari on two questions:

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?