No. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES

State of Oregon,

Petitioner

v.

Thomas Captain,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE STATE OF OREGON

BRIEF FOR THE PETITIONER

TEAM 4

QUESTIONS PRESENTED

1) Under the doctrine of aboriginal title an Indian tribe has a possessory right to lands they have occupied since time immemorial unless the federal government extinguishes the right or the Indian tribe abandons the lands. The United States Government sold an Indian tribe's land held under aboriginal title and the tribe left the lands more than 150 years ago. Does the Indian tribe still have aboriginal title to the lands?
2) The National Historic Preservation Act lays the foundation for each state to promulgate rules and regulations for the protection of archaeological sites and objects within its boundaries. The State of Oregon brought criminal actions against a member of non-federally recognized tribe that purports ownership of the site in which the individual excavated and removed items. Does the State of Oregon have criminal jurisdiction over the land and objects at issue?

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STATEMENT OF THE CASE

Statement of the Facts

Kelley Point Park is an Oregon State Park situated in Portland, Oregon at the meeting point of the Columbia and Willamette Rivers. The Park is part of an area that was once occupied by the Cush-Hook Nation of Indians (Nation). The Nation lived on the land since time immemorial where its members sustained themselves by growing crops, hunting, and fishing. In April of 1806, William Clark, of the Lewis and Clark expedition, made peace with the Multnomah Indians who then introduced Clark to the Chief of the Cush-Hook Nation. Clark recorded details of the Nation such as governance, religion, and culture.

In 1850 the superintendent of Indian affairs for The Oregon Territory, Anson Dart, negotiated with the Nation about relocating its members to the foothills of the Oregon Coast mountain range. Anson Dart wanted the lands to be occupied by white settlers moving to the Oregon Territory. The Nation agreed to relocate and signed a treaty to leave its lands for compensation and federal recognition. Shortly after the Nation signed the treaty its members left the area encompassing Kelley Point Park. In 1853 Senate did not ratify the treaty with the Nation and therefore its members did not receive compensation for their lands or federal recognition as an Indian tribe. The Cush-Hook's members never returned to their lands in Kelley Point Park nor did they try to reassert their rights to the lands.

Shortly after the Nation left the area the United States sold the lands to Joe and Elise Meek under the Oregon Donation Land Act. Under the Act the Meeks were to obtain fee simple in the lands after they cultivated the lands for four years. However, the Meeks only kept the lands for two years and then sold the land to the State of Oregon. Oregon then created Kelley Point Park and the area has remained a park for over 130 years.

In 2011, Thomas Captain, a Cush-Hook Indian, traveled to Kelley Point Park to acquire certain carvings made by the Nation on the trees in Kelley Point Park. He occupied the Park in order to reassert the Nation's ownership over the lands and protect the trees. In order to protect one of the carvings, Captain cut down part of a tree and intended to take it back with him to the tribe's new location. On his way back to the coastal mountain range, Captain was pulled over and arrested for cutting the image out of the tree.

Statement of the Proceedings

Petitioner, the State of Oregon, brought a criminal action against Thomas Captain, a member of the Cush-Hook Nation. The State of Oregon claimed that Captain had trespassed on state land, cut timber in a state park without a permit, and desecrated an archeological and historical site under Or. Rev. Stat. 358.905-358.961 when Captain cut down trees in Kelley Point Park containing the Nation's carvings. The Oregon Circuit Court for the County of Multnomah held that the Nation still owned the land within Kelley Point Park and that Captain was not guilty for trespass or cutting timber without a state permit. However, the Circuit Court found fined Captain $250 after finding him guilty for damaging an archaeological site and desecrating a cultural and historical artifact. Both the State and Captain appealed the decision. The decision of the Circuit Court was affirmed in the Oregon Court of Appeals without a written opinion and the Oregon Supreme Court denied review of the case. The State then filed a petition and cross petition for certiorari and Captain filed a cross petition for certiorari to the United States Supreme Court.

ARGUMENT

I. The Cush-Hook Nation no longer owns aboriginal title to the land in Kelley Point Park.

When European nations traveled across the Atlantic Ocean in search for new territory they were confronted with vast numbers of Indian tribes. Through the doctrine of discovery, the nations of Europe conquered North American lands inhabited by Indians. The new sovereign was forced to make a decision about what to do with the Indians residing on this newfound territory. Indian tribes entered into treaties with the federal government establishing reservations on which the Indians were to reside. Additionally, through the doctrine of aboriginal title, the sovereign allowed many tribes to hold a possessory right to lands they occupied since time immemorial. Chief Justice Marshall discussed the doctrine of aboriginal title in the Supreme Court case, *Johnson v. M'Intosh*. Under aboriginal title the federal government did not recognize a property right but a possessory right, which the sovereign could extinguish at any time.[1]

The Cush-Hook's case presents an instance where an Indian tribe held aboriginal title to lands the Indians inhabited since time immemorial, but the federal government extinguished the right. The Cush-Hook Nation of Oregon lived on the lands of Kelley Point Park continuously and exclusively since time immemorial until they left in 1850. The Cush-Hook Nation no longer has aboriginal title to the lands because the United States Government extinguished the right when it sold the land to Joe and Elise Meek. Furthermore, if it is found that the federal government did not extinguish aboriginal title to the land in Kelley Point Park, the Cush-Hook Nation still does not have aboriginal title because they abandoned the land when they left and did not return for over 150 years.

[1] *Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823).

The court's decision below should be overturned for three reasons. First, although the Cush-Hook Nation once held aboriginal title to the lands in Kelley Point Park, this right was extinguished because the federal government exercised complete dominion adverse to the right of occupancy.[2] Second, irrespective if the Court finds that the federal government did not extinguish the Cush-Hook Nation's aboriginal title, the Indian tribe abandoned the land therefore losing aboriginal title.[3] Last, the Cush-Hook Nation's claim to aboriginal title should be barred by the doctrine of laches.[4]

A. The Cush-Hook's aboriginal title to the land in Kelley Point Park was extinguished when the federal government exercised complete dominion adverse to the right of occupancy.

Aboriginal title is an occupancy right and can be extinguished by the sovereign at any time. The Cush-Hook's aboriginal title to the land in Kelley Point Park was extinguished when the sovereign "exercised complete dominion adverse to the right of occupancy" by selling the land to the Meek's under the Oregon Donation Land Claims Act.[5]

In *Johnson v. M'Intosh,* Chief Justice Marshall stated that aboriginal title is an Indian tribes' right to occupy lands that they have continuously occupied before the arrival of the Europeans.[6] In *Robinson v. Salazar,* the Court noted that in order to invoke aboriginal title Indians must prove "actual, exclusive, and continuous use of the lands" before the arrival of white settlers.[7] Congress does not see this occupancy right as ownership in the land but merely a grant from the sovereign to occupy the land and to protect the Indians from

[2] *U.S. v. Santa Fe Pac. R. Co*., 314 U.S. 339, 347 (1941).
[3] *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 110 (N.D.N.Y. 1991)
[4] *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 217 (2005)
[5] *Santa Fe*, 314 U.S. at 347.
[6] Johnson, 21 U.S. at 574.
[7] *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1016 (E.D. Cal. 2012)

intrusion of third parties.[8] No entity is permitted to buy the land under aboriginal title without consent of the sovereign or until the sovereign has extinguished aboriginal title.[9]

Once the sovereign extinguishes aboriginal title Indian tribes lose claim to their occupancy right. The framework for extinguishment of aboriginal title was set forth by Chief Justice Marshall in *Johnson v. M'Intosh* and reaffirmed in *United States v. Santa Fe Pacific Railroad*. Chief Justice Marshall stated "the exclusive right of the United States to extinguish Indian title has never been doubted." Whether it be done "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."[10] Additionally, extinguishing aboriginal title does not require compensation to be paid to the Indians.[11] The rule derived from *Johnson v. M'Intosh* and *Santa Fe* was both illustrated and expanded upon in *U.S. v. Gemmill* and *Lipan Apache Tribe v. U.S.*

In *US v. Gemmill* the United States Court of Appeals for the Ninth Circuit made clear that the "manner, time, and conditions" of extinguishment are up to the federal government and that extinguishment need not be accomplished by treaty or voluntary cession. The court further noted on extinguishment that the "relevant question is whether the government action was intended to be a revocation of Indian occupancy rights, not whether the revocation was effected by permissible means."[12] In *Lipan Apache Tribe v. U.S*. the court recognized that extinguishment of Indian title could take several forms. While it is up to the federal government how to extinguish aboriginal title of a tribe "the actual act of extinguishment

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[8] *Robinson*, 838 F. Supp. 2d at 1017.
[9] Gene Bergman, *Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"*, 18 Am. Indian L. Rev. 447, 450-51 (1993).
[10] *Johnson*, 21 U.S. at 586.
[11] Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* vol. 1, §15.09[1][b],1053 (2012 ed., Lexis 2012)
[12] *U.S. v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976).

must be plain and unambiguous. And in the absence of 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the claimants' rights' to their property, Indian title continues."[13]

In an American Law Report on extinguishment of aboriginal title, written by Michael J. Kaplan, it notes that aboriginal title can be extinguished by complete dominion adverse to the Indian's right of occupancy. The report notes that the *Gemmill* case is an illustration of a situation where Indian title was extinguished by the federal government's complete dominion adverse to the right of Indian occupancy.[14] In *Gemmill,* the court noted that aboriginal title of the Pit River Indians was not extinguished by a treaty but by a series of federal actions intending to revoke the Indians aboriginal title. The federal government took military action against the Indians in the 1850's and 60's. Furthermore, in the early 1900's the federal government included the land in two national forests. The court noted that the continued use of the lands for conservation and recreation left little doubt that the federal government meant for aboriginal title to be extinguished. Finally, any doubt as to whether aboriginal title was extinguished was resolved by the fact that the Pit River Indians received compensation for the lands.[15]

In the *Lipan* case, it was established that the Lipan Apache Tribe of Texas held aboriginal title to lands they occupied for "many years" and the federal government never extinguished the title.[16] The federal government argued that aboriginal title was extinguished because of various events that occurred at the time when Texas became an independent country. There was evidence of hostile words from President Lamar, as well as evidence that

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[13] *Lipan Apache Tribe v. U. S.*, 180 Ct. Cl. 487, 492 (Ct. Cl. 1967).
[14] Michael J. Kaplan, J.D., *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, §15 (Originally published in 1979).
[15] *Gemmill*, 535 F.2d at 1149.
[16] Lipan Apache, 180 Ct. Cl. at 491.

the Republic would not ratify a treaty with the Cherokee Nation. These events however did not lead to the conclusion that the Republic of Texas wanted to extinguish all aboriginal title. In fact, there is evidence that the Republic of Texas obtained consent from tribes before relocating them.[17] In this case there was no clear and plain indication that Texas, when it was sovereign over the lands in question, wanted to extinguish Indian title of the Lipan Apache Tribe.

The Cush-Hook Nation's aboriginal title was extinguished when the federal government sold the lands to the Meeks under the Oregon Donation Land Act. Just as the *Gemmill* case presents an illustration of a situation where Indian title was extinguished by conduct of the federal government, the Cush-Hook's case a situation where aboriginal title was extinguished because of actions taken by the federal government.[18] Although the government never entered into a treaty with the Cush-Hook Nation to extinguish their aboriginal title, it intended to revoke the Cush-Hook Nation's occupancy right to the lands in Kelley Point Park when it sold the lands to the Meeks. Under the Oregon Donation Land Act Congress allowed the passing of fee simple from the federal government to settlers in the Oregon Territory and the federal government would not have sold the lands to the Meeks if they intended the Cush-Hook Nation to have an occupancy right to the lands.

It may be argued that the Cush-Hook Nation's aboriginal title was never extinguished because their treaty with the federal government was not ratified and they received no compensation for the land. However, the court made clear in *Gemmill* that acts other than treaties could show Congress' intent to extinguish aboriginal title. The manner in which to extinguish aboriginal title is up to the federal government and not for the court to determine

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[17] *Lipan*, 180 Ct. Cl at 495.
[18] Kaplan, 41 A.L.R. Fed at §15.

its justness. Additionally, Cohen writes in the Federal Indian Handbook that compensation is not necessary to extinguish aboriginal title.[19]

Although the court in *Lipan* determined that the Lipan Apache Tribe's possessory rights to their lands through aboriginal title was not extinguished, it did acknowledge the fact that extinguishment can take many forms. Unlike the *Lipan* case, the Cush-Hook Nation lost title to their lands when the federal government clearly and plainly sold the lands to the Meeks. In the *Lipan* case there was nothing in the public record that lead the court to believe that the sovereign intended to extinguish the aboriginal title of the Lipan Apache Tribe. The opposite is true in this case because the federal government made clear through the public record that the land was being sold under the Oregon Donation Land Act and this is adverse to the occupancy right of the Cush-Hook Nation.

The Cush-Hook Nation's aboriginal title to the lands in Kelley Point Park was extinguished when the federal government intended to revoke the Nation's aboriginal title by selling the lands to the Meeks.

B. If the Court finds that the sovereign did not extinguish the Cush-Hook's aboriginal title to the land in Kelley Point Park, it should be found that aboriginal title was extinguished by abandonment.

The Cush-Hook Nation lost aboriginal title to the lands in Kelley Point Park when they voluntarily abandoned the lands in 1850.

Aboriginal title is based on "actual, continuous, and exclusive possession of the land" by an Indian tribe.[20] In *Cohen's Handbook of Federal Indian Law, Cohen*, points out that aboriginal title can be extinguished by the sovereign as well as abandoned by the Indian

[19] Cohen, *supra* n. 11, at 999.
[20] *Robinson*, 838 F. Supp. 2d at 1016.

tribe.[21] Further, *Cayuga Indian Nation of New York v. Cuomo* states that when an Indian tribe voluntarily abandons their lands the government may use this as a defense against the tribe for aboriginal title.[22]

In *Cayuga,* the Cayuga Nation of New York brought a suit alleging ownership to certain lands in the state of New York. The Indian Nation claimed that they had aboriginal title to the lands as well as recognized title. The State of New York argued that the Indian Nation had lost their possessory right because they voluntarily abandoned their lands. The Court held that although the Cayuga Indians did abandon their lands in the late 1700's, the defense of abandonment is only a defense to aboriginal title and the Cayuga Indians also had recognized title to the land through a treaty.[23]

Another case addressing abandonment of aboriginal title is *Williams v. City of Chicago.* In *Williams* the Supreme Court found that the Pottawatomie Indian Tribe had abandoned their lands. The Pottawatomie Nation was given a possessory right over certain lands around Lake Michigan and in 1833 the tribe abandoned their lands when they migrated west of the Mississippi River. The Court, speaking of the Indian Tribe, held that "for more than half a century it has not even pretended to occupy" the land in question. The Court concluded by noting that any occupancy right the tribe or its members had came to an end when the tribe abandoned the lands.[24]

The Cush-Hook's case is different from the *Cayuga* case because the Cush-Hook Nation only had aboriginal title to the lands encompassing Kelley Point Park and never had

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[21] Cohen, *supra* n. 11, at 1053.
[22] *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 110 (N.D.N.Y. 1991).
[23] Cayuga Indian Nation 758 F. Supp. at 110.
[24] *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917).

recognized title. Both tribes abandoned the lands they once occupied however, Cayuga Tribe still had a right to its lands under recognized title. The court in the *Cayuga* case noted that if the Cayuga tribe only held aboriginal title to the lands in question then the right could be abandoned. The Cush-Hook Nation only had aboriginal title to the lands encompassing Kelley Point Park and therefore the possessory right was abandoned.

The Cush-Hook's situation is similar to the situation of the Pottawatomie Indians in the *Williams* Case. In the *Williams* case, the Indian tribe only had a possessory interest in the lands in question and they migrated away from these lands. Just as in the *Williams* case, the Cush-Hooks voluntarily left the lands in Kelley Point Park and relocated to an area around the Oregon Coast. Although the Cush-Hooks believed they would be receiving compensation for their lands, only three years after relocating, the federal government refused to ratify the Cush-Hook treaty. The tribe did not move back to the lands in Kelley Point Park or make an effort to retain their lands. The Court noted in the *Williams* case that Pottawatomie tribe had not pretended to own a possessory right to the lands in question for half a century and thus abandoned their lands. In this case the Cush-Hook did not return to the lands in Kelley Point Park for more than 150 years, never pretended to live or hold title to the lands, and therefore abandoned the lands.

Although a tribe cannot be said to have abandoned their lands unless they did so voluntarily, it cannot be argued that the Cush-Hook Nation was forced from their lands. The Indian tribe agreed to relocate to the foothills of the mountains by the Oregon Coast and although they never received the compensation they were promised, they never returned to the land in Kelley Point Park and never tried to reclaim the lands.

The Cush-Hook Nation abandoned the lands that encompass Kelley Point Park when they moved to the foothills of mountains around the Oregon Coast and never returned.

C. The Cush-Hook Nation's claim for aboriginal title should be barred by the doctrine of laches.

In 1850, the Cush-Hook Nation moved away from their lands in Kelley Point Park. Three years after the tribe relocated Congress refused to ratify their treaty and thus the tribe was never compensated for their land and never received the benefits they were promised. Because the tribe has waited over 150 years to assert their possessory rights to the land they are barred by the doctrine of laches.

For many years courts considering Indian land claims refused to allow delay-based defenses.[25] This all changed in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York* when the Supreme Court held that equitable doctrines, such as the doctrine of laches, could be used as a defense to dismiss Indian land claims. In *Cayuga Indian Nation of New York v. Pataki* the Court took the holding of *Sherrill* to mean that equitable doctrines could be applied to Indian land claims, "even when such a claim is legally viable and within the statute of limitations."[26] In *Cayuga Indian Nation,* the Second Circuit affirmed the ruling in *Sherrill* and held that the doctrine of laches may be applied to dismiss an Indian land claim in situations where an Indian tribe has caused unreasonable delay in asserting a claim to a possessory interest of land.[27]

In *Cayuga Indian Nation,* the tribe asserted possessory rights over certain tracts of land in New York State, alleging that they had occupied the area since time immemorial. In the early 1800's the Indians had sold the land to the State of New York but the treaty was

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[25] *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 123 (N.D.N.Y. 2002).
[26] *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005).
[27] *Cayuga Indian Nation*, 413 F.3d at 274.

never ratified so the Nation argued it still owned equitable title and the right of possession. The Nation wanted people living on the land to be ejected and their possessory right to the land restored. Bringing the claim to court in the 1980's the court determined that the action brought by the Indian tribe was barred by the doctrine of laches. The Second Circuit Court looked to the holding in *Sherrill* and held that, just as in the *Sherrill* case, to give the Cayuga Indian Nation possessory interest in the land would be unquestionably disruptive. The court noted, "generations have passed during which non-Indians have owned and developed the area" that was once held by the Indian tribe.[28] Additionally, for many years the tribe has resided elsewhere.

In *Sherrill,* the Oneida Indian Nation of New York entered into a treaty with the State of New York in 1788 ceding all of their lands to the state of New York and leaving 300,000 acres for a reservation. In 1790, Congress passed the first Nonintercourse Act, which barred selling Indian lands without the federal government's consent. Despite the Act, the State of New York continued to buy land from the Oneida Nation until the tribe retained only 32 acres of land. In the 1990's, the Tribe bought parcels of land on the open market, which were part of their historic reservation. The Tribe claimed they did not have to pay taxes on these lands because they were tribal lands. The Supreme Court held that the Oneida Nation did not regain tribal sovereignty over their lands when they purchased them again in the 1990's. The Tribe had waited about 200 years during which they never tried to regain title to the land. Thus, the Oneida Indian Nation was barred from title to the land through the equitable doctrine of laches.

When an Indian tribe does not assert their right to a possessory land interest they can be barred from bringing a claim if too much time has lapsed. The Cush-Hook Nation has

[28] *Cayuga Indian Nation*, 413 F.3d at 275.

waited over 150 years to bring a claim of aboriginal title to the lands in Kelley Point Park. Both the Cayuga tribe and the Cush-Hook Nation lived on the land in question since time immemorial. However, both tribes moved from the lands many years prior to the court actions they commenced. Just as the court determined that giving possessory title to the Cayuga Nation would be disruptive, it would it be disruptive to give the Cush-Hook Nation aboriginal title of the lands in Kelley Point Park. In both cases the lands have passed from generation to generation being utilized for different purposes. The land in which the Cush Hook Nation lived has been owned by the State of Oregon for many years and Oregon has maintained a park on the lands. The Cush-Hook Nation should be barred from a raising a possessory right to the lands in Kelley Point Park just as the Cayuga Indians were barred by the doctrine of laches from asserting a possessory right over the lands they once lived in New York.

The situation in *Sherrill* is different than the situation involving the Cush-Hook Nation. In *Sherrill,* the Oneida Indian Tribe claimed that they should not have to pay taxes on the land they purchased from the State because the lands were once tribal land. In this case Thomas Captain is arguing that he did not trespass because his tribe has aboriginal title to the lands in Kelley Point Park. Although the facts in the two cases are different they both turn on the fact of whether the tribe has lost their rights to the land in question. In *Sherrill,* the Oneida Indians argued that they should still have title to the land because the sale of the land to the State of New York was a violation of the Nonintercourse Act. Similarly, in this case the Senate did not sign the Cush-Hook Treaty giving them compensation for their lands. Both tribes allege a wrong that occurred many years ago and wrongs that the tribes

did not try to alleviate until over 150 years later. Just as the Oneida Indians were barred by the doctrine of laches the Cush-Hook Nation should be barred by the doctrine of laches.

It may be argued that precedent would show that the doctrine of laches should not be used in Indian land claims. However, in 2005 the Supreme Court held that equitable doctrines such as the doctrine of laches could be used in Indian land claims including possessory land claims.

The doctrine of laches holds that a claim may be barred for undue delay. The doctrine of laches applies to Indian land claims such as the claim by the Cush-Hook Nation for aboriginal title. Because the Cush-Hook Nation slept on their aboriginal right to their historic lands for more than 150 years their claim is barred by the doctrine of laches.

II. The State of Oregon has criminal jurisdiction to control the uses of, and to protect, archeological, cultural, and historical objects on private and public lands, notwithstanding the purported ownership of the land in question by a non-federally recognized American Indian tribe.

The State of Oregon brought criminal action against Thomas Captain, a member of a non-federally recognized American Indian tribe. The cause of action was a result of his conduct taking place on state property, a park named Kelley Point Park. Captain intentionally cut down a tree with historical and cultural significance. One of the causes of actions against Captain asserts that he desecrated an archeological and historical site under ORS 358.905-358.961. Oregon properly asserted criminal jurisdiction over Captain because of its statutory authority to control the uses of, and to protect, archeological, cultural, and historical objects within its boundaries. The series of statutes, ORS 358.905 to 358.961 give authority for the protection of and prohibits certain conduct related to archeological objects and sites, whether on public or private land.[29] Oregon Historical and Heritage Agencies have set forth

[29] *Murray v. State*, 203 Or. App. 377 (Or. App. 2005).

definitions and requisites for determining whether an object or site is protected under Oregon law.[30]

Statutory analysis will show first, the tree cut down by Captain and the segment he removed from Kelley Point Park falls expressly within the statutory definitions defining protected sites and objects. Second, the National Historic Preservation Act has empowered each state to initiate rules and regulations for the protection of archaeological sites and objects within state boundaries with violators subject to civil and criminal penalties. Lastly, ownership of the land in question does not change the outcome of the case at hand because had the Cush-Hook tribe obtained tribal ownership of the land, Oregon has criminal jurisdiction over tribal reservations pursuant to Public Law 280. Thus, only in the event that the land in question is owned by the federal government, will the State of Oregon be deprived of its criminal jurisdiction, and Captain would then be subject to felony penalties.

A. The segment of tree excavated and removed from the land in question by Thomas Captain, qualifies as an object and site under multiple statutory definitions under Oregon law, and thus protected by it.

The area in which Captain cut down the tree satisfies the statutory definition of an archeological site. Further, the segment of the tree Captain removed from the area satisfies multiple statutory definitions including archeological object, sacred object, and an object of cultural patrimony. ORS 358.920 prohibits the excavation of a known archaeological site on both public and private land. Also, when archaeological objects, sacred objects and objects of cultural patrimony are held in violation of the provisions of ORS 358.920 or 390.235, the objects are considered contraband as stated in ORS 358.924, and are subject to mandatory seizure and civil and criminal penalties.

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[30] John Pouley, Assistant State Archeologist., *The Role of the State Historic Preservation Office in Federal and State Cultural Resource Protection*. www.oregon.gov/oprd/HCD/SHPO/

An "archaeological site" means a site with geographic locality in Oregon that contains archaeological objects and the contextual associations of the archaeological objects with each other or biotic or geological remains or deposits.[31] Examples of archaeological sites include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.[32] An archeological "object" has three statutory requirements and means 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 or waters of the state; and is material remains of past human life or activity that are of archeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products. [33] An "Object of cultural patrimony" is an object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore, cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object must have been considered inalienable by the native Indian group at the time the object was separated from such group. The definition does not include unassociated arrowheads, baskets or stone tools or portions of arrowheads, baskets or stone tools.[34] Lastly, a "sacred object" is an archaeological object or other object that is demonstrably revered by any ethnic group, religious group or Indian tribe as holy; is used in connection with the religious or spiritual service or worship of a deity or

[31] ORS 358.905(1)(c)(A)(i)(ii).
[32] ORS 358.905(1)(c)(B).
[33] ORS 358.905(1)(a)(A)(B)(C)
[34] ORS 358.905(1)(h)(A)(B)

spirit power; or was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion.[35]

It is undisputed that the Cush-Hooks, as recorded by William Clark, occupied the land in question which is geographically located in Oregon. Further, for a substantial amount of time the Cush-Hooks developed, cultivated, and engaged in cultural activities on the land. The facts indicate that the medicine men carved many of the trees in the area. Thus, it is reasonable to conclude that there are other archaeological objects with contextual association to the tree Captain cut down. Therefore, the land in question is an archaeological site as defined in ORS 358.905. The facts also support that the segment of tree containing the carvings is an archaeological object, an object of cultural patrimony, and a sacred object. The object is an archaeological object because it is at least 75 years old. The trees have grown on the site for over three hundred years. The practice of carving the trees is in the physical record of the Cush-Hook tribe as a common ritual and was continually practiced by Cush-Hook medicine men, as recorded by William Clark in 1806. The final requirement is satisfied as the statute itself provides the example of a "symbol" giving rise to archeological significance.[36]

The object can also be considered an object of cultural patrimony because the carvings on the trees were not individually owned by any one member of the Cush-Hook tribe, nor were they moveable or concealable; they were worshiped by all the members of the tribe and were not alienable by an individual. The carvings were used for religious purposes and the facts support that the carvings had great religious significance that is ongoing and presently impacts the Cush-Hook tribe. Therefore the segment of the tree taken by Captain

[35] ORS 358.905(1)(k)(A)(B)(C)
[36] ORS 358.905(1)(a)(C)

satisfies the statutory definition as an object of cultural patrimony. Similarly, because the carvings were revered by the Cush-Hook tribe and were connected to the tribe's religious and spiritual service, the segment of tree also satisfies the statutory definition of a sacred object.

The provisions governing archaeological sites and objects are clear on their face and expressly define what they govern. Captain was prohibited from excavating the archaeological site and removing an object that fits within the definitions of an archaeological object, sacred objects and object of cultural patrimony. Therefore, this court should find that Thomas Captain is within the criminal jurisdiction of the State of Oregon for violation of ORS 358.920

B. The State Historic Preservation Office administers the National Historic Preservation Act at the Oregon State level to ensure permits are properly given, and subjects violators to civil and criminal penalties.

Captain did not obtain a permit from the Oregon State Historic Preservation Office before he cut down the tree in Kelley Point Park and removed a segment of it, taking it off the property. Failure to obtain a permit in the course of conducting an archeological act, such as cutting down a tree and removing parts of it, will result in civil and criminal penalties under Oregon law. The State Historic Preservation Office (SHPO) was established after the passage of the National Historic Preservation Act (NHPA) in 1966 to assist in the review of potential effects on historic sites and objects during federally assisted projects. Each state agency is responsible for establishing rules regarding historic resources under their jurisdiction, which address National Register eligibility, appropriate permitting procedures and other historic preservation goals. SHPO administers the national historic preservation program at the State level and consults with federal and state agencies during project developments. More importantly, with regard to the case at hand, the SHPO oversees the

distribution of permits for archaeological purposes and assists in investigations when permits have not been obtained and/or archaeological sites and objects have been harmed.
ORS 358.920 prohibits the excavation of a known archaeological site on both public and private land or to conduct exploratory excavations to determine the presences of a site without first obtaining a permit from SHPO.[37] Further, after a permit is granted, consultation is required with appropriate tribes and public agencies before any archaeological undertaking.[38]

Captain was not with legal authority when he chose to cut down the tree containing religious carvings meaningful to his tribe. Captain did not apply for a permit with SHPO prior to cutting down the tree. As a result Captain is in violation of ORS 358.920 for the unauthorized excavation of an archeological site and the removal of an archeological object from the site. ORS 358.920(8) unambiguously states that violation of these provisions is a Class B misdemeanor. Further, when police seized the object from Captain pursuant to ORS 358.924, if they found the tool in which Captain used to cut down the tree, Oregon would have prima facie case pursuant to ORS 358.920(c)(A)(B)(C) requiring a person possessing the objects, possessing any tool that could be used to remove such objects from the ground, and the person not possessing a permit as required by under ORS 390.235.

The facts show Thomas Captain was engaged in excavating an archeological site and taking archaeological objects specifically mentioned in the definitions provided in the statute. The statutory language is sufficient to put ordinary citizens on notice that such conduct is prohibited and thus this court should find Thomas Captain is properly within the criminal jurisdiction of the State of Oregon.

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[37] ORS 358.920(1)(a)
[38] ORS 358.950

C. The Cush-Hook's purported ownership of the land in question, if successful, does not deprive the State of Oregon of its criminal jurisdiction because of Public Law 280.

Federal laws are applicable on federal lands as well as any project with a federal nexus (i.e., federal permit, federal funding, federal agency involvement). State laws are applicable on all non-federal public (e.g., city, county, state) and private lands. As to tribal lands, Oregon is one of six states that mandatorily conferred Indian country criminal jurisdiction to the state pursuant to Public Law 280 giving Oregon certain civil and criminal jurisdiction over tribes, with the exception of the Confederated Tribes of Warm Springs and the Confederated Tribes of Umatilla. ORS 358.920 expressly states that a person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235, and violation of this section is a Class B Misdemeanor. Therefore, Oregon has criminal jurisdiction on public, private, and tribal lands in the State of Oregon. Only will federal ownership of the land in question will deprive Oregon of its criminal jurisdiction in this matter.

The facts do not suggest that the land in question is federally owned. Any argument suggesting private or tribal ownership will not impact the ability of the State of Oregon to assert criminal jurisdiction over the land in question and the historic objects therein. Therefore, this court should find the land in question and its objects within the criminal jurisdiction of the State of Oregon.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower courts holding and conclude that the Cush-Hook Nation does not own aboriginal title to the lands in Kelley Point Park, and affirm the criminal jurisdiction of the State of Oregon.

APPENDIX A – STATUTES INVOLVED

Oregon Revised Statutes
Title 30. Education and Culture
Chapter 358. Oregon Historical and Heritage Agencies; Archeological Objects and Sites

ORS § 358.905 Definitions; Interpretation

(1) As used in ORS 192.005, 192.501 to 192.505, 358.905 to 358.961 and 390.235:

(a) "Archaeological object" means an object that:

(A) Is at least 75 years old;

(B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and

(C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.

(b) "Site of archaeological significance" means:

(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or

(B) Any archaeological site that has been determined significant in writing by an Indian tribe.

(c)(A) "Archaeological site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with:

(i) Each other; or

(ii) Biotic or geological remains or deposits.

(B) Examples of archaeological sites described in subparagraph (A) of this paragraph include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.

(d) "Indian tribe" has the meaning given that term in ORS 97.740.

(e) “Burial” means any natural or prepared physical location whether originally below, on or above the surface of the earth, into which, as a part of a death rite or death ceremony of a culture, human remains were deposited.

(f) “Funerary objects” means any artifacts or objects that, as part of a death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.

(g) “Human remains” means the physical remains of a human body, including, but not limited to, bones, teeth, hair, ashes or mummified or otherwise preserved soft tissues of an individual.

(h) “Object of cultural patrimony”:

(A) Means an object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore, cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object shall have been considered inalienable by the native Indian group at the time the object was separated from such group.

(B) Does not mean unassociated arrowheads, baskets or stone tools or portions of arrowheads, baskets or stone tools.

(i) “Police officer” has the meaning given that term in ORS 181.610.

(j) “Public lands” means any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon.

(k) “Sacred object” means an archaeological object or other object that:

(A) Is demonstrably revered by any ethnic group, religious group or Indian tribe as holy;

(B) Is used in connection with the religious or spiritual service or worship of a deity or spirit power; or

(C) Was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion.

(L) “State police” has the meaning given that term in ORS 181.010.

(2) The terms set forth in subsection (1)(e), (f), (g), (h) and (k) of this section shall be interpreted in the same manner as similar terms interpreted pursuant to 25 U.S.C. 3001 et seq.

ORS § 358.920 Conduct Prohibited

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

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

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

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

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

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

(2) A person may not sell, purchase, trade, barter or exchange or offer to sell, purchase, trade, barter or exchange any archaeological object that has been removed from an archaeological site on public land or obtained from private land within the State of Oregon without the written permission of the landowner.

(3)(a) A person may not sell, trade, barter or exchange or offer to sell, trade, barter or exchange any archaeological object unless the person furnishes the purchaser a certificate of origin to accompany the object that is being sold or offered. The certificate shall include:

(A) For objects obtained from public land:

(i) A statement that the object was originally acquired before October 15, 1983.

(ii) The location from which the object was obtained and a brief cumulative description of how the object had come into the possession of the current owner in accordance with the provisions of ORS 358.905 to 358.961 and 390.235.

(iii) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.

(B) For objects obtained from private land:

(i) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.

(ii) A copy of the written permission of the landowner to acquire the object.

(b) As used in this subsection, “certificate of origin” means a signed and notarized statement that meets the requirements of paragraph (a) of this subsection.

(4)(a) If the archaeological object was acquired after October 15, 1983, from public lands, any object not described in paragraph (b) of this subsection is under the stewardship of the state and shall be delivered to the Oregon State Museum of Anthropology. The museum shall work with the appropriate Indian tribe and other interested parties to develop appropriate curatorial facilities for artifacts and other material records, photographs and documents relating to the cultural or historic properties in this state. Generally, artifacts shall be curated as close to the community of their origin as their proper care allows. If it is not feasible to curate artifacts within this state, the museum may after consultation with the appropriate Indian tribe or tribes enter into agreements with organizations outside this state to provide curatorial services; and

(b) If the object is human remains, a funerary object, a sacred object or an object of cultural patrimony, it shall be dealt with according to ORS 97.740, 97.745 and 97.750.

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

(6) If human remains are encountered during excavations of an archaeological site on privately owned property, the person shall stop all excavations and report the find to the landowner, the state police, the State Historic Preservation Officer and the Commission on Indian Services. All funerary objects relating to the burial shall be delivered as required by ORS 358.940.

(7) This section does not apply to a person who disturbs an Indian cairn or burial. Any person who disturbs an Indian cairn or burial for any reason shall comply with the provisions of ORS 97.740 to 97.760.

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

ORS § 358.924 Unlawfully held objects considered contraband; seizure; procedure; disposition

(1) Archaeological objects, funerary objects, human remains, sacred objects and objects of cultural patrimony that are held in violation of the provisions of ORS 358.920 or 390.235 are contraband. A police officer shall seize all items declared to be contraband under the provisions of this section if the police officer has reasonable cause to believe the items are held in violation of the provisions of ORS 358.920 or 390.235.

(2) A law enforcement agency employing a police officer who seizes contraband items under this section shall give notice of the seizure to the district attorney for the county in which the items are seized. The district attorney shall promptly investigate to determine whether any person claims the items seized.

(3) If any person claims items seized under this section, the district attorney shall file a petition with the circuit court for the county for an expedited hearing on the claim. The court shall conduct a hearing for the sole purposes of determining:

(a) Whether the items are archaeological objects, funerary objects, human remains, sacred objects or objects of cultural patrimony;

(b) Whether any arrowheads seized under this section were collected in compliance with ORS 358.920 (1)(b); and

(c) Whether a person claiming an item other than an arrowhead can lawfully possess the item under ORS 358.905 to 358.961.

(4) If items seized under this section are not claimed by any person, or the circuit court determines that the items may not be returned to the claimant under the provisions of subsection (3) of this section:

(a) Archaeological objects shall be delivered to the Oregon State Museum of Anthropology and curated as described in ORS 358.920 (4)(a).

(b) Funerary objects, human remains, sacred objects and objects of cultural patrimony shall be returned to the appropriate tribe for reinterment or other disposition as provided in ORS 358.940.

O.R.S. § 358.950 Notification to Indian tribe required; report

(1) Any person who conducts an archaeological excavation associated with a prehistoric or historic American Indian archaeological site shall notify the most appropriate Indian tribe. The notification shall include, but not be limited to:

(a) The location and schedule of the forthcoming excavation;

(b) A description of the nature of the investigation; and

(c) The expected results of the investigation.

(2) After notifying the appropriate Indian tribe under subsection (1) of this section, the person conducting the archaeological excavation shall consult a representative of the tribe to establish a procedure for handling sacred objects recovered during the archaeological excavation.

(3) A delegate from the appropriate Indian tribe may be present during the excavation.

(4) If requested, the Commission on Indian Services shall assist a person in locating the appropriate Indian tribe.

(5) At the conclusion of the investigation, the person conducting the excavation shall prepare and forward a copy of a report on excavation findings to the Commission on Indian Services and to the appropriate Indian tribe.

(6) Failure to notify the appropriate Indian tribe as required by subsection (1) of this section is a Class B misdemeanor.

ORS § 390.235 Excavation or removal of archaeological or historical material; permits; penalties

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

(b) If a person who obtains a permit under this section intends to curate or arrange for alternate curation of an archaeological object that is uncovered during an archaeological investigation, the person must submit evidence to the State Historic Preservation Officer that

the Oregon State Museum of Anthropology and the appropriate Indian tribe have approved the applicant's curatorial facilities.

(c) No permit shall be effective without the approval of the state agency or local governing body charged with management of the public land on which the excavation is to be made, and without the approval of the appropriate Indian tribe.

(d) The State Parks and Recreation Director, with the advice of the Oregon Indian tribes and Executive Officer of the Commission on Indian Services, shall adopt rules governing the issuance of permits.

(e) Disputes under paragraphs (b) and (c) of this subsection shall be resolved in accordance with ORS 390.240.

(f) Before issuing a permit, the State Parks and Recreation Director shall consult with:

(A) The landowning or land managing agency; and

(B) If the archaeological site in question is associated with a prehistoric or historic native Indian culture:

(i) The Commission on Indian Services; and

(ii) The most appropriate Indian tribe.

(2) The State Parks and Recreation Department may issue a permit under subsection (1) of this section under the following circumstances:

(a) To a person conducting an excavation, examination or gathering of such material for the benefit of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology;

(b) To a qualified archaeologist to salvage such material from unavoidable destruction; or

(c) To a qualified archaeologist sponsored by a recognized institution of higher learning, private firm or an Indian tribe as defined in ORS 97.740.

(3) Any archaeological materials, with the exception of Indian human remains, funerary objects, sacred objects and objects of cultural patrimony, recovered by a person granted a permit under subsection (2) of this section shall be under the stewardship of the State of Oregon to be curated by the Oregon State Museum of Anthropology unless:

(a) The Oregon State Museum of Anthropology with the approval from the appropriate Indian tribe approves the alternate curatorial facilities selected by the permittee;

(b) The materials are made available for nondestructive research by scholars; and

(c)(A) The material is retained by a recognized scientific, educational or Indian tribal institution for whose benefit a permit was issued under subsection (2)(a) of this section;

(B) The State Board of Higher Education with the concurrence of the appropriate Indian tribe grants approval for material to be curated by an educational facility other than the institution that collected the material pursuant to a permit issued under subsection (2)(a) of this section; or

(C) The sponsoring institution or firm under subsection (2)(c) of this section furnishes the Oregon State Museum of Anthropology with a complete catalog of the material within six months after the material is collected.

(4) The Oregon State Museum of Anthropology shall have the authority to transfer permanent possessory rights in subject material to an appropriate Indian tribe.

(5) Except for sites containing human remains, funerary objects and objects of cultural patrimony as defined in ORS 358.905, or objects associated with a prehistoric Indian tribal culture, the permit required by subsection (1) of this section or by ORS 358.920 shall not be required for forestry operations on private lands for which notice has been filed with the State Forester under ORS 527.670.

(6) As used in this section:

(a) “Private firm” means any legal entity that:

(A) Has as a member of its staff a qualified archaeologist; or

(B) Contracts with a qualified archaeologist who acts as a consultant to the entity and provides the entity with archaeological expertise.

(b) “Qualified archaeologist” means a person who has the following qualifications:

(A) A post-graduate degree in archaeology, anthropology, history, classics or other germane discipline with a specialization in archaeology, or a documented equivalency of such a degree;

(B) Twelve weeks of supervised experience in basic archaeological field research, including both survey and excavation and four weeks of laboratory analysis or curating; and

(C) Has designed and executed an archaeological study, as evidenced by a Master of Arts or Master of Science thesis, or report equivalent in scope and quality, dealing with archaeological field research.

(7) Violation of the provisions of subsection (1)(a) of this section is a Class B misdemeanor.