No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,
Petitioner
v.
Thomas CAPTAIN,
Respondent and cross-petitioner

On a Petition for Writ of Certiorari to the Supreme Court of Oregon

RESPONDENT'S CROSS-PETITION FOR A WRIT OF CERTIORARI

TEAM 25
Counsel for Respondent
January 14, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

OREGON STATE STATUTES

OTHER SOURCES

QUESTIONS PRESENTED

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

2. Does the state of Oregon have jurisdiction over the uses or protection of cultural resources that are significant to a non-federally recognized tribe, on land that may still be under aboriginal title?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

Thomas Captain was tried in Oregon state court 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 and Or. Rev. Stat. 390.235-390.240. The court found him guilty and fined him $250 for "damaging an archaeological site and a cultural and historical artifact." The Oregon Court of Appeals affirmed without a written opinion and the Oregon Supreme Court denied review. The state subsequently filed a petition and cross-petition for certiorari to the United States Supreme Court, and Captain filed a cross-petition. This Court has federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331.

II. STATEMENT OF THE FACTS

The Cush-Hook Nation of Indians is a tribe of Indians whose aboriginal territory encompassed much of the area surrounding Portland, Oregon. In 1806, William Clark of the Lewis and Clark expedition recorded his encounter with the Cush-Hook Village, including his observations about their livelihood and culture. During this visit, Clark presented one of the Cush-Hook leaders with a President Thomas Jefferson peace medal. The Lewis and Clark expedition presented these medals, often referred to as "sovereignty tokens" by historians, with the understanding that acceptance of the medals indicated a tribe's

willingness to engage in commercial and domestic relations with the United States government. Essentially, when Clark presented the Cush-Hooks with a sovereignty token, it was with the understanding that the Cush-Hooks would be recognized as a tribal government by the United States.

In 1850, the Cush-Hook Nation signed a treaty with Anson Dart, the Superintendent of Indian Affairs for the Oregon Territory. In the treaty, the Nation agreed to relocate 60 miles westward into the Oregon coastal range of mountains, which the Nation undertook. In exchange, the treaty promised monetary compensation for the lands ceded by the Cush-Hook Nation, including what is now Kelley Point Park, which is located at the confluence of the Willamette and Columbia rivers in Portland, Oregon. In 1853, Congress refused to ratify the Cush-Hook treaty, and as a result the Nation has never received title to the lands to which it relocated, nor compensation for the lands it ceded, including Kelley Point Park.

In 1850, Congress enacted the Oregon Land Donation Act, 9 Stat. 496-500. This Act permitted settlers to claim state lands and receive fee simple title to them once they had resided upon and cultivated them for four consecutive years. Under this statute, Joe and Elsie Meek claimed the 640 acres that now comprise Kelley Point Park. The Meeks never lived upon or cultivated the land as required by the statute, but they nonetheless received fee title. The Meeks' descendants sold the land to the state of Oregon in 1880, and Oregon has administered it as a state park since.

In 2011, Thomas Captain, a member of the Cush-Hook Nation and resident of the tribal area in the coast range of mountains, returned to Kelley Point Park to reassert his tribe's ownership of the land, and to protect culturally and religiously important trees that had

grown in the park for hundreds of years. Prior to the removal of the Cush-Hook Nation, Cush-Hook shamans carved culturally and religiously significant symbols into the trees. Recently, vandals have climbed the trees and begun to deface and remove the symbols. In order to protect and restore one of these important tribal religious and cultural objects that had been carved by one of his ancestors, Captain cut down one of the trees in Kelley Point Park and removed the image. He was stopped and arrested by a state trooper, and the image was seized, during his return to the coast range of mountains.

ARGUMENT

I. THE CUSH-HOOK NATION HAS A TRUST RELATIONSHIP WITH THE UNITED STATES REGARDING THE LAND IT OWNS UNDER ABORIGINAL TITLE.

The Cush-Hook Nation is a tribe of Indians—this much is without question. While the Cush-Hook Nation is not federally recognized or recognized by the state of Oregon, the tribe still retains certain rights afforded to all tribes. The protection of the United States' trust obligations regarding Cush-Hook lands is one. This protection is embodied in the Nonintercourse Act, codified at 25 U.S.C. § 177.

In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the Passamaquoddy Tribe (Tribe) sought the protection of the Nonintercourse Act (Act) despite never being federally recognized. The Tribe needed to have the Act protections in order to compel the United States to sue the state of Maine to compensate the Tribe for the extinguishment of aboriginal title lands. The Act's protection was extended for a number of reasons. First, the court found that the "policy and purpose" of the Act were, respectively, "to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any

treaty," and "to prevent the unfair, improvident, or improper disposition of Indian lands." In finding that the Act applied to the Passamaquoddy, the court accepted the district court "plain meaning" interpretation "any. . . tribe of Indians."

The Secretary of the Interior and the state of Maine (collectively defendants) vigorously opposed this finding. Defendants argued that a number of facts precluded such a finding. The court found that "the federal government . . . has never . . . entered into a treaty with the Tribe, nor has Congress ever enacted any legislation mentioning the Tribe." This finding, in turn, led to the finding that the United States had a trust relationship with the Passamaquoddy. The act "imposes upon the government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act . . . . The Purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy." The *Passamaquoddy* court related "right of occupancy" to "the Indian tribes' aboriginal title to land which predates the establishment of the United States." This same relationship, which imposes upon the United States to act as fiduciary regarding land transfers, operates in favor of the Cush-Hook Nation.

A. The Cush-Hook Nation has aboriginal title to the land of Kelley Point Park.

The test for a party claiming aboriginal title to land requires the party to establish two facts. First, the claimant must prove having "actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." *Unitah Ute Indians of Utah v. U.S.*, 28 Fed.Cl. 768, 784 (1993) (citations omitted). Second, the claimant must prove that it used that parcel of land exclusively, that is "to the exclusion of other Indian groups." *Id*. (citations omitted). This test may be considered satisfied if a claimant can alternatively establish that

the federal government of the United States has "recognized" the claimant's aboriginal title to the land. In this case, "there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways." *Miami Tribe of Oklahoma v. U.S.*, 146 Ct.Cl. 421 (1959) (citations omitted). The Cush-Hook Nation land claims to Kelley Point Park satisfy either test. The Cush-Hook Nation occupied the Kelley Point Park land parcel for a long time prior to its loss and it occupied and used that land to the exclusion of other Indian groups. Additionally, while the federal government has not entered into a government-to-government relationship with the Cush-Hook by officially recognizing them, there is factual evidence that proves that the federal government recognized the aboriginal title of the Cush-Hook Nation in the Kelly Point Park land parcel. Therefore, whatever test is applied, the Cush-Hook Nation satisfies the test for aboriginal title to the Kelly Point Park land parcel.

1. The aboriginal title of the Cush-Hook in the Kelley Point Park land has been previously recognized by the United States.

The first factor of the aboriginal title test, which requires proving that a claimant had "actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land," can be alternatively satisfied by evidence showing that the United States has recognized the aboriginal title of a claimant. The Cush-Hook Nation was recognized by the United States in this regard, starting with the actions of the Lewis and Clark expedition in 1806.

a) Sovereignty tokens provided initial recognition by the United States.

The record is clear that the Cush-Hook Nation welcomed the Lewis and Clark expedition in 1806. During the course of their contact, the early American emissaries and

explorers recorded a number of observations about the Cush-Hook Nation and presented the chief of the tribe a Thomas Jefferson peace medal or "sovereignty token." The Cush-Hook chief accepted the gift, which Lewis and Clark understood as a sign of a tribe's desire to "engage in political and commercial relations with the United States." Conversely, Lewis and Clark understood that this "acceptance of the [sovereignty tokens] demonstrated which tribal leaders and governments would be recognized by the United States" (R., ¶3).

Some of the observations taken by the Lewis and Clark expedition included "a sketch of the village and longhouses" and "ethnographic materials about Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices." These observations likely took weeks if not months to complete. In addition to the presentation of the Thomas Jefferson "sovereignty token," the extended contact between the American emissaries and explorers and the Cush-Hook Nation give rise to a circumstance that supports an early recognition of the United States of the aboriginal title of the Cush-Hook Nation.

b) The Act of Aug. 14, 1848, or "An Act to establish the Territorial Government of Oregon."

The United States passed the Act of Aug. 14, 1848 in order to two years before the Cush-Hook Naiton negotiated its treaty with the United States. In Section 1 of the Act, it states:

> [N]othing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in [the Territory of Oregon], so long as such right shall remain unextinguished by treaty between the United States and such Indians.

The section provides a great deal of protection to the Indian tribes of the Oregon Territory by requiring that their land title be protected until such time that a treaty could be satisfactorily negotiated. This protection of the rights of Indian nations was reiterated in Section 14, which states that:

> [A]ll laws heretofore passed in [the Oregon Territory] making grants of land, shall be, and are hereby declared to be, null and voide; and the laws of the United States are hereby extended over, and declared to be in force in , [the Oregon Territory] so far as the same, or any provision thereof, may be applicable.

This section serves to put the Nonintercourse Act, passed on June 30, 1834, into effect in the Territory of Oregon. Therefore, during the time that the Cush-Hook Nations was negotiating with Anson Dart, its aboriginal title lands were restricted against alienation. In addition to the Nonintercourse Act, the Act of Aug. 14, 1848 also "secured to the inhabitants of the new territory all the rights and privileges guaranteed by the Ordinance of 1787," which "declared, 'the utmost good faith shall be always observed toward the Indians; their land and property shall never be taken from them without their consent." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48 (1946). Therefore, no land under aboriginal title could be taken from a tribe without both federal governmental and tribal approval.

c) The 1850 Treaty Negotiated with Anson Dart.

The 1850 treaty negotiated with Anson Dart fully recognized the Cush-Hook Nation as having title by offering federal compensation in the form of reservation land. This negotiated treaty did not extinguish title because Congress never approved it. An unratified treaty has no force until ratified by 2/3rds vote of the Senate. U.S. Const., Art. II, cl. 2; *S.E.C. v. Int'l Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990).

2. The Cush-Hook Nation has occupied Kelley Point Park since time beyond memory.

The Oregon circuit court found that "[e]xpert witnesses in history, sociology, and anthropology establish[ed] that the Cush-Hook Nation occupied, used, and owned the [Kelley Point Park] lands . . . before the arrival of Euro-Americans." As a finding of fact, this determination is owed deference. A long time has been defined as long enough that the Indians have made the area into domestic territory. *Unitah*, 28 Fed.Cl. at 785 (citing *Confederated Tribes of the Warm Springs Reservation v. U.S.*, 177 Ct.Cl. 184, 194 (1966)). Above, it is mentioned how the Lewis and Clark expedition journal recorded all of the substantial buildings and unique cultural practices in the Cush-Hook Nation. And while additional research into the Lewis and Clark expedition journals would turn up additional information regarding the establishment of the Cush-Hook Nation in Kelley Point Park, the record provides more than adequate information to establish the Cush-Hook Nation's transformation of the Kelley Point Park area into a domestic territory.

3. The Cush-Hook occupied and used the land of Kelley Point Park exclusive to other tribal nations.

"A tribe must prove exclusive possession of a parcel, i.e., that it used and occupied the land to the exclusion of other Indian groups." *Unitah*, 28 Fed.Cl. at 784-85 (citations omitted). On the trip to the Cush-Hook Nation's territory, a Multnomah Indian tribal member guided Clark, in what was to Clark unknown territory. This Multnomah Indian tribal member first "pointed out the Cush-Hook Nation village and longhouses." Then, "[a]fter making peace signs, the [guide] took Clark to the Cush-Hook village, and introduced him to the headman/chief of the Cush-Hook Nation." A demonstration of peace signs demonstrates that

the Multnomah and the Cush-Hook tribal nations had developed a code for interaction. This is undoubtly an effort to reduce any needless violence between the two when a member from one tribe is in the territory of the other tribe. This clearly demonstrates that at the time of the Lewis and Clark expedition, the Cush-Hook Nation had a definite territory that was occupied and used to the exclusion of other Indian groups.

B. The aboriginal title of the Cush-Hook Nation has never been extinguished by the United States.

Throughout the time that the United States has had a trust responsibility to the Cush-Hook Nation respecting their land, the United States has never taken the necessary "affirmative action . . . to extinguish the right of occupancy . . . ." *Alcea*, 329 U.S. at 46.

1. The United States is the only sovereign with the power to extinguish aboriginal title.

In the analysis of extinguishment, the "threshold rule, of course, is that termination of Indian title is exclusively the province of the United States." *United States v. Pueblo of San Ildefonso*, 26 Ct. Cl. 649, 655 (1975). The United States in *San Ildefonso* ultimately extinguished aboriginal title by creating a forest reserve on parcels of land theretofore encumbered by aboriginal title. While Oregon took a very similar step in creating Kelley Point Park, as a mere state, it does not have the authority to extinguish aboriginal title.

2. The extinguishment of aboriginal title is not lightly implied.

In *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941), the Supreme Court of the United States clarified which particular actions do and do not extinguish aboriginal title to lands. In addressing each action, the Court established a framework that would inform their merits considerations. The framework consists of two principal guidelines. First, "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal

Government for the welfare of its Indian wards." *Id.*, at 354. Second, "the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of" the Indian tribes. *Id.* (citing *Choate v. Trapp*, 224 U.S. 665). Using these two fundamental principles, the Court found that none of the following circumstances, either alone or in combination, demonstrated the required affirmative action to extinguish aboriginal title: (1) the tribe's lack of federal recognition, *id.*, at 347 (citing *Cramer v. U.S.*, 261 U.S. 219, 229); (2) the tribe's lack of a treaty with the U.S., *id*.; (3) an 1854 act creating a surveyor of New Mexico, *id.* at 350; (4) an 1865 statute creating the Colorado River Indian Reservation, which the Court characterized as "an offer to the Indians," *id.* at 353; or (5) the involuntary removal of tribe in 1874 to said reservation, *id.*, at 355-56. Only when another reservation was created "at the request" of the tribe, and "accept[ed] by them," did that "amount[] to a relinquishment of [all] tribal claims to lands which [the tribe] may have had outside that reservation." *Id.*, at 357-58.

This case has striking similarities to the *Santa Fe* case, in that, a number of circumstances are identical. The Cush-Hook Nation has no federal recognition and no ratified treaty with the United States. Likewise, the Cush-Hook Nation was present in a territory for which Congress created a surveyor. *See* Act of Aug. 14, 1848, sec. 24, 25. The Anson Dart treaty can be fairly characterized as "an offer to the Indians" of the Cush-Hook Nation for reservation lands. However, as this treaty was not ratified, it cannot be held to have any effect on the aboriginal title of the Cush-Hook Nation. In fact, the tribulations faced by the tribe in *Santa Fe* were more pointed than those faced by the Cush-Hook Nation.

3. No action of the United States has unequivocally extinguished the aboriginal title of the Cush-Hook Nation.

Aboriginal title exists "at the pleasure of the United States, and may be extinguished 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . .'" *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 341 (9th Cir. 1996) (quoting *Santa Fe Pac. R. Co.*, 314 U.S. at 347). However, "the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid." *Alcea*, 329 U.S. at 47.

The Ninth Circuit Court of Appeals, in *United States v. Gemmill*, 535 F.2d 1145, 1148 (2000), stated that, in the analysis of whether aboriginal title has been extinguished, the "relevant question is whether the governmental action was intended to be a revocation." However, the Supreme Court of the United States in *Arizona v. California* stated, "the [Gemmill case] cited by the State parties (the correctness of which we do not address) . . . involved Indian Claims Commission Act petitions in which [a] tribe[] claimed no continuing title, choosing instead to seek compensation from the United States for the taking of their lands." 530 U.S. 392, 417 (2000). Therefore, the ruling of the *Gemmill* court is inapposite to the present case, where the Cush-Hook Nation is claiming continuing aboriginal title.

The facts in the record concerning the Oregon Donation Act and the improperly granted title of the Meeks had no effect on the aboriginal title of the Cush-Hook Nation. The Oregon Donation Act, or the Act of June 5, 1850, begins by stating:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be authorized to appoint one or more commissioners to negotiate the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; also, for attaining their assent and submission to the

> existing laws regulating trade and intercourse with the Indian tribes in the other Territories of the United States . . .

This language is protective of aboriginal title, as would be consistent with "the policy of the federal government from the beginning to respect the Indian right of occupancy." *Cramer v. United States*, 261 U.S. 219, 227 (1923). Requiring that the only avenue for extinguishment and removal be treaty negotiation provides robust protection. Simply stating that the lands west of the Cascades are "the public lands of the United States" is not sufficient to extinguish aboriginal title.

4. *United States v. Alcea Band of Tillamooks*.

As stated by the United States Supreme Court in *Alcea Band of Tillamooks*, "[i]n our opinion, taking original Indian title without compensation and without consent does not satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs" (citing *Santa Fe Pac. R. Co.*, 314 U.S. at 356); *see also Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902) ("[T]he Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."). *Alcea* concerned the "involuntary taking of lands held by original Indian title." *Id.* The lands in question were in Oregon Territory, much like the present case. The tribes at issue in *Alcea* also negotiated treaties in the 1850's that were never ratified. The *Alcea* case is substantially on all fours with the present case, and its analysis deserves great deference.

Any argument that the Cush-Hook Nation's aboriginal title was extinguished suffers fatally from the fact that the Cush-Hook Nation was never compensated for any alleged extinguishment.

5. The Act of Aug. 13, 1954.

The Act of Aug. 13, 1954 was entitled, "An Act to provide for the termination of Federal supervision over the property of certain tribes and bands of Indians located in western Oregon and the individual members thereof, and for other purposes." The Cush-Hook Nation is not among the "certain tribes" listed in Sec. 2(a). This demonstrates that the Cush-Hook Nation remained in a trust relationship with the United States pursuant to the Nonintercourse Act and conditioned by Ordinance of 1787.

II. OREGON DOES NOT HAVE CRIMINAL JURISDICTION OVER ARCHEOLOGICAL RESOURCES THAT ARE CULTURALLY SIGNIFICANT TO THE CUSH-HOOK TRIBE IN KELLEY POINT PARK.

However the Court rules on the status of Kelley Point Park, the Oregon trial court inappropriately convicted Captain of violating Or. Rev. Stat. §§ 358.235-358.9612 and Or. Rev. Stat. §§ 390.235-390.240. This is so because under Public Law 280,[1] Oregon law does not apply to land held by a tribe in aboriginal title, contrary to the holding of the trial court. Furthermore, the federal Native American Graves Protection Act ("NAGPRA")[2] is the appropriate statutory authority on lands held in aboriginal title, and binds the Oregon Parks and Recreation Department (hereinafter "Oregon Parks and Rec.") to repatriate culturally significant items to tribes. It was therefore inappropriate for the trial court both to find that the Tribe holds Kelley Point Park under aboriginal title, and to convict Captain of violating Oregon law. This Court cannot uphold the trial court's ruling.

A. Public Law 280 does not grant Oregon jurisdiction over tribal land that was not recognized at the time Public Law 280 was enacted.

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[1] Codified at 18 U.S.C. § 1162 (2010), 28 U.S.C. 1360.

[2] 25 U.S.C. §§ 3001-3013.

Prior to Public Law 280, criminal jurisdiction over Indians in Indian country was exclusively under the jurisdiction of the federal government and the tribe itself under the Assimilative Crimes Act[3] or the Major Crimes Act.[4] Congress, however, exercises "plenary power" over American Indian affairs,[5] and with the passage of Public Law 280 in 1953, Congress "conferred upon certain states, known as the 'mandatory states,' criminal jurisdiction over offenses committed by or against Indians in identified portions of Indian country." *United States v. Burch*, 169 F.3d 666, 669 (10th Cir. 1999). These "mandatory states" included Oregon, which was granted criminal jurisdiction over "[a]ll Indian country within the State, except the Warm Springs Reservation." 18 U.S.C. § 1162(a). Public Law 280 explicitly overrides federal and tribal criminal jurisdiction that would otherwise exist in Indian country. 18. U.S.C. § 1162(c) ("The provisions of sections 1152 [Assimilative Crimes Act] and 1153 [Major Crimes Act] of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction").

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[3] "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152 (1948).

[4] 18 U.S.C. § 1153 (1996) (naming 15 major crimes that are subject to exclusive federal jurisdiction in Indian country).

[5] *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) ("The 'central function of the Indian Commerce Clause,' we have said, 'is to provide Congress with plenary power to legislate in the field of Indian affairs.' *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); see also, *e.g., Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.,* 458 U.S. 832, 837, 102 S.Ct. 3394, 73 L.Ed. 2d 1174 (1982) ('broad power' under the Indian Commerce Clause); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (same, and citing *Wheeler, supra,* at 322-323, 98 S.Ct. 1079)").

This broad grant of jurisdiction is not without its limits, however, and, contrary to the trial court's holding, there is no certainty about its applicability to land upon which aboriginal title has not been extinguished. The present case is a case of first impression, as no court has previously been faced with determining Public Law 280's applicability to land that has never been divested of aboriginal title, and there are strong arguments against applying Public Law 280 in such a circumstance. First, land in tribal ownership that has not been divested of aboriginal title is not included in Public Law 280's statutory definition of "Indian country," and therefore such land remained under federal jurisdiction upon the enactment of Public Law 280. Second, Oregon has received specific jurisdictional grants over tribes that were not recognized at the time that Public Law 280 was enacted but have subsequently been recognized, indicating that Public Law 280 would not have automatically provided Oregon with the power to exercise such jurisdiction.

1. Federal law applies to Kelley Point Park.

The United States Code chapter which deals with criminal jurisdiction and Indians generally,[6] defines "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way through the same.

18 U.S.C. § 1151 (1948). This definition has been tested to some extent in the criminal context, but only in states where Public Law 280 does not apply, and the court is trying to

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[6] 18 U.S.C. Pt. I, Ch. 53 (addresses criminal matters in Indian country and includes the criminal portion of Public Law 280, as well as the Major Crimes Act and the Assimilative Crimes Act).

determine whether a crime falls under federal, tribal, or state jurisdiction. Generally on land is held in trust for a federally recognized tribe, the federal government and the tribe share criminal jurisdiction over Indians acting within its boundaries, unless Congress has explicitly granted jurisdiction to the state. *See United States v. John*, 437 U.S. 634 (1978) (holding that lands purchased for the benefit of a federally recognized tribe and taken into trust by Congress were a "reservation" for the purposes of federal criminal jurisdiction, therefore Mississippi could not prosecute the defendant); *United States v. McGowan*, 302 U.S. 535, 539 (1938) (Nevada "Indian colony" was "validly set apart for the use of the Indians . . . under the superintendence of the government" and therefore was "Indian country" for the purposes of federal jurisdiction). The Ninth Circuit has found that if an individual is a member of a tribe that has received only state recognition or whose federal recognition has been terminated, he or she is a "non-Indian" subject to state jurisdiction. *See, e.g.*, *United States v. Heath,* 509 F.2d 16, 19 (9th Cir. 1974) (member of a tribe whose federal recognition had been terminated was not an "Indian" for the purposes of federal criminal jurisdiction); *LaPier v. McCormick*, 986 F.2d 303, 304-06 (9th Cir. 1993) (member of a tribe recognized by the state of Montana but never federally recognized was not an "Indian" and was therefore subject to state criminal jurisdiction). Presumably, therefore, Public Law 280 does not apply because the Kelley Point Park is not "Indian country" within the meaning of 18 U.S.C. § 1151. However, unlike in *Heath* and *LaPier*, Kelley Point Park does not therefore fall under state jurisdiction because it is not currently a reservation. Rather, if it is found that the Cush-

Hook Tribe holds aboriginal title,[7] Kelley Point Park is a federal enclave "under the sole and exclusive jurisdiction of the United States" until aboriginal title is cleared in accordance with the Non-Intercourse Act.[8]

2. Oregon does not have jurisdiction over Indian country recognized as such after the passage of Public Law 280 barring an explicit Congressional grant.

Additionally, the state must receive an explicit grant of jurisdiction in order to exercise criminal and civil jurisdiction over "Indian country" within the meaning of 18 U.S.C. § 1551 if the land was taken into trust following the passage of Public Law 280. In 1977, Congress restored federal recognition of the Siletz Tribe,[9] and the restoration statute explicitly stated that Oregon would have criminal and civil jurisdiction according to Public Law 280 over the lands taken into trust at that time by Congress. 25 U.S.C. § 711e (1977). Similarly, the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians had their federal recognition restored in 1998,[10] and the enabling statute also explicitly granted criminal and civil jurisdiction to the state of Oregon under Public Law 280. 25 U.S.C. § 714e (1998). If, therefore, this Court concludes or Congress recognizes that Kelley Point Park is "Indian country" within the meaning of Public Law 280, Oregon must receive an explicit grant of

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[7] Even if this court finds that the Cush-Hook Tribe does not hold aboriginal title to Kelley Point Park, federal statutes of general applicability continue to apply even when broader federal jurisdiction is not found to exist. See discussion of the application of NAGPRA even if the state has jurisdiction over Kelley Point Park in Part B, *infra*.

[8] "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2012).

[9] The Siletz Tribe's federal recognition was terminated in 1954 by the Western Oregon Indian Termination Act, Public Law 533, 68 Stat. 724.

[10] The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians also had their federal recognition terminated in 1954 by the Western Oregon Indian Termination Act, Public Law 533, 68 Stat. 724.

criminal jurisdiction by Congress in order to exercise Public Law 280 jurisdiction over Kelley Point Park.

B. The Native American Graves Protection Act is the appropriate statutory authority in this case.

NAGPRA was enacted in 1990 in order to "correct past abuses to, and guarantee protection for, the human remains and cultural objects of Native American tribal culture." 173 A.L.R. Fed. 585 (2001). Along with the American Indian Religious Freedom Act, NAGPRA is part of a federal policy designed to protect American Indians' "inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996 (1978); *see also* Jack F. Trope & Walter R. Ecohawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 59 (1992) ("NAGPRA is, first and foremost, human rights legislation. It is designed to address the flagrant violation of the 'civil rights of America's first citizens'"). In this case, NAGPRA applies because: 1) the Carvings fall under the protection of NAGPRA as "cultural patrimony"; 2) NAGPRA applies to Kelley Point Park if it is held by the Cush-Hook Tribe under aboriginal title; 3) even if Kelley Point Park is not held by the Tribe under aboriginal title, Oregon Parks and Rec. is a "museum" under NAGPRA, and has failed to fulfill its obligations under the statute.

1. The Carvings are "cultural patrimony" within the meaning of NAGPRA.

NAGPRA protects items that are archeologically and culturally significant to Indian tribes, including "cultural patrimony" which is defined as:

> [A]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

25 U.S.C. § 3001(D) (1992); *see also* 43 C.F.R. § 10.2(d)(4). "[T]o be judged 'cultural patrimony' the object must have (1) ongoing historical, cultural or traditional importance; and (2) be considered inalienable by the tribe by virtue of the object's centrality in tribal culture." *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997). In *Corrow*, the 10th Circuit found that the ceremonial masks the defendant sold were, in fact, "cultural patrimony" and not something that could be individually owned. *Id.* at 798. ("Yei B'Chei or Yei B'Chei *jish* are ceremonial adornments, Native American artifacts whose English label, 'masks,' fails to connote the Navajo perception these cultural items embody living gods"). Similarly, in *United States v. Tidwell*, the 9th Circuit found that the ceremonial Hopi masks sold by the defendant were items of "cultural patrimony" not owned by individual Indians. 191 F.3d 976, 981 (9th Cir. 1999). In the present case, the trial court found that the Carvings were culturally and religiously significant to the Tribe, and historical records reveal that these were religious symbols created for the benefit of the tribe as a whole. Unlike a ceremonial mask, these totems were carved into trees and could not be kept or removed by an individual without deliberate and destructive action, indicating that the Carvings were never intended to be owned by individuals, but rather were meant to be inalienable by the Tribe or its individual members. Therefore, the Carvings are "cultural patrimony" entitled to protection under NAGPRA.

2. NAGPRA applies to Indian lands held under aboriginal title, even if the tribe that holds that title is not federally recognized.

NAGPRA defines "Indian tribe" as "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3001(7) (1992). Therefore, a group "need not be defined as a 'tribe' by the Secretary of the Interior under other statutes to be entitled to NAGPRA's protections." 173 A.L.R. Fed. 585 (*citing Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992), *order aff'd*, 990 F.2d 729 (2d Cir. 1993) (tribal group was not federally recognized but received federal services specific to Indian peoples, and was therefore an "Indian tribe" under NAGPRA)). If, as the trial court recognized, the Cush-Hook Nation is entitled to compensation for Kelley Point Park, it falls under the definition of "Indian tribe" for the purposes of NAGPRA despite not being a federally recognized tribe.

Therefore if this Court agrees with the trial court, and finds that Kelley Point Park remains under aboriginal title, items of cultural patrimony discovered on Kelley Point Park belong to the Cush-Hook Tribe. NAGPRA states that:

> The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed) . . . in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony--
> (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
> (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the

> Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe--
>
> > (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects.

25 U.S.C. § 3002(2) (1990). Kelley Point Park does not meet the definition of "tribal lands" under NAGPRA,[11] but it is "federal land"[12] under NAGPRA until it is divested of aboriginal title. Therefore, an object of cultural patrimony such as the carving that Captain removed from Kelley Point Park is owned by the Cush-Hook Tribe if Kelley Point Park is, in fact, held by the Tribe under aboriginal title both because the Cush-Hook Tribe has "the closest cultural affiliation" with those objects, and because it will have been "recognized as aboriginally occupying the area in which the objects were discovered."[13]

3. The Oregon Parks and Recreation Department is a "museum" obligated to repatriate "cultural patrimony" to tribes, and has therefore failed to appropriately fulfill its duties under NAGPRA in this instance.

NAGRPA obligates the Oregon Parks and Rec. to protect and repatriate cultural patrimony such as the Carvings to Indian tribes, even if this Court finds that Kelley Point Park is not "Federal land." The trial court found that Captain chose to remove the carvings

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[11] "'tribal land' means-- (A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3." 25 U.S.C. § 3001(15) (1992). Whether or not this Court determines that Kelley Point Park is under aboriginal title, the Park will not be "tribal land" unless and until Congress takes the land into trust for the Cush-Hook Tribe. *See* discussion of "tribal lands" in Part A *supra*. Even if Congress takes the land into trust in the future, a preemption analysis may reveal that NAGPRA preempts Oregon law on Kelley Point Park. *See, e.g.*, Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 Ariz. St. L.J. 151, 173 n. 89 (1992) ("federal law does not provide states with independent regulatory jurisdiction over the control and disposition of cultural items in Indian country").

[12] "'Federal lands' means any land other than tribal lands which are controlled or owned by the United States." 25 U.S.C. § 3001(5) (1992).

[13] Federal Regulations state: "No individual Indian may, without a permit under the Act, excavate or remove archaeological resources on any Indian lands (including his or her own) other than those on which the law of the tribe of which he or she is a member regulates such activity." 25 C.F.R. § 262.4 (1993). Therefore, if Kelley Point Park belongs to the Cush-Hook Tribe, tribal law may, in fact, govern.

because vandals were defacing them, the State had not taken action to stop the vandalism. As a state agency receiving federal funding,[14] Oregon Parks and Rec. is a "museum" under NAGPRA.[15] As a "museum," Oregon Parks and Rec. was obligated to inventory cultural patrimony in its possession[16] and return it to the appropriate tribe upon request[17] in order to avoid "claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter." 25 U.S.C. § 3005(f) (1990). Oregon Parks and Rec. therefore violated its obligations under NAGPRA with respect to the Carvings.[18] As such, NAGPRA is the appropriate statutory authority under which to analyze Captain's liability and Oregon's proper role in protecting the Carvings, and NAGPRA applies regardless of the status of Kelley Point Park.

C. It was inappropriate for the trial court to convict Captain under Oregon law before the status of the land on which he committed the alleged crime was resolved.

The trial court erred in holding both that Kelley Point Park remains under Cush-Hook aboriginal title, and that Captain could be convicted under Oregon law. As discussed in Part

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[14] Oregon Parks and Rec. administers the Certified Local Government program, which "is designed to promote historic preservation at the local level. It is a federal program (National Park Service) that is administered by the Oregon State Historic Preservation Office." Oregon Parks and Recreation Department, *Certified Local Governments*, http://www.oregon.gov/oprd/HCD/SHPO/pages/clg.aspx (last visited January 12, 2012). Oregon Parks and Rec. also receives federal funding to assist with compliance with Section 106 of the National Historic Preservation Act of 1966. Oregon Parks and Recreation Department, *Federal and State Compliance for Historic and Archaeological Resources*, http://www.oregon.gov/oprd/HCD/SHPO/pages/preservation_106.aspx (last visited January 12, 2012).

[15] "'museum' means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.". 25 U.S.C. § 3001(8) (1992).

[16] 25 U.S.C. § 3004 (1990).

[17] 25 U.S.C. § 3005 (1990).

[18] Or. Rev. Stat. § 358.940(2) echoes NAGPRA's requirement that "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 on Indian Services" and returned to the appropriate tribe.

II(A), *supra*, Public Law 280 does not apply to land not yet divested of aboriginal title, and cannot be applied to Cush-Hook land until Congress explicitly grants jurisdiction to Oregon. Furthermore, NAGPRA will apply to the case at hand in different ways based on the status of Kelley Point Park and, by extension, of the Cush-Hook Tribe. Therefore, this Court must either find that Kelley Point Park is under aboriginal title and reverse Captain's conviction, or dismiss the case pending the resolution of the Cush-Hook Tribe's land claims.

CONCLUSION

I. THIS COURT SHOULD UPHOLD THE LOWER COURT'S DETERMINATION THAT THE CUSH-HOOK NATION HOLDS ABORIGINAL TITLE TO KELLEY POINT PARK.

We ask that this Court affirm the ruling of the Oregon circuit court confirming the Cush-Hook Nation's aboriginal title to the land of Kelley Point Park.

II. THIS COURT SHOULD VACATE THE CONVICTION OF CAPTAIN UNDER OREGON STATE LAW.

The trial court erred in holding both that Kelley Point Park is under Cush-Hook aboriginal title, and that Captain could be convicted under Oregon state law. If Kelley Point Park is under aboriginal title, Public Law 280 does not apply barring an explicit jurisdictional grant by Congress, and NAGPRA is the appropriate statute to govern the situation. Until the status of Kelley Point Park is determined, Oregon cannot exercise jurisdiction over Captain. Therefore, regardless of the status of Kelley Point Park, the trial court's holding was improper, and Captain's conviction must be reversed.