No. 11-0274

In the

Supreme Court of the

United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent and Cross-Petitioner.

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

BRIEF FOR RESPONDENT

Team 29
Attorneys for Respondent

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QUESTIONS PRESENTED

1. Does the Cush-Hook Nation of Indians retain aboriginal title to its original homeland, considering the Senate never ratified the Cush-Hook Treaty relinquishing such title and the Nation was never compensated for relinquishing its land rights?
2. In light of the general rule prohibiting states from exercising jurisdiction over Indians in Indian country, can Public Law 280, a federal law granting some states criminal jurisdiction in Indian country, be interpreted to grant the State of Oregon jurisdiction over a Cush-Hook Nation citizen for removing his tribe's sacred totem from his tribe's aboriginal territory?
3. Did the State of Oregon violate Thomas Captain's constitutional right to freely exercise his religion by charging him with trespass and other offenses associated with engaging in his religion?

STATEMENT OF THE CASE

Statement of the Proceedings

For hundreds of years, trees carved with symbols and faces sacred to the Cush-Hook Nation have stood on that Nation's original homelands. In 1850, Oregon obtained defective title to these lands and established Kelley Point Park. (R. at 1, 4.)[1] Recently, these sacred totems have become the targets of vandalism and the State of Oregon has done nothing to curb such activities. (R. at 2.) In 2011, Cush-Hook Nation citizen Thomas Captain occupied the land in Kelley Point Park in order to protect these sacred totems and assert his Nation's claim to its aboriginal territory. (R. at 2.)

In order to restore a vandalized totem carved by his ancestor, Captain cut down the tree into which the totem was carved and attempted to remove it to his home village, where the Cush-Hook Nation now resides. As Captain transported the totem to safety, Oregon state troopers arrested him and seized the image his ancestor had carved. The State of Oregon then levied criminal charges against Captain for: (1) trespass on state lands, (2) cutting timber in a state park without a permit, and (3) desecrating an archaeological and historical site.

At a bench trial in Multnomah County Circuit Court, the court held that the Cush-Hook Nation retains aboriginal title to the land in Kelley Point Park. Accordingly, it found Captain not guilty of trespassing and cutting timber on state lands without a permit. (R. at 3–4.) Despite this, the court found Captain guilty of damaging an archaeological site and historical materials under Oregon law, and fined him $250. (R. at 4.)

Both sides appealed the Circuit Court decision. The Oregon Court of Appeals upheld the lower court's decision without opinion and upon further appeal the Oregon Supreme Court denied review. (R. at 4.)

[1] "R." citations denote the consecutively paginated appellate record of facts.

Thereafter, the State filed a petition and cross petition for certiorari to this Court. Thomas Captain filed a cross petition for certiorari to this Court. This Court has granted certiorari on two questions:

(1) Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park?

(2) Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe? (R. at 4.)

Statement of the Facts

Thomas Captain is a citizen of the Cush-Hook Nation of Indians. The Cush-Hook Nation occupied a fertile area of land at the confluence of the Columbia and Willamette Rivers from time immemorial. (R. at 1.) Before contact with Europeans, they subsisted by growing crops, hunting, and gathering. (R. at 1.) As part of the Cush-Hook Nation religion, medicine men carved sacred totems and religious symbols into some of the trees, which became part of their religious ceremonies. (R. at 2.) This reflects how Meriwether Lewis and William Clark found them in 1806 during their famed expedition.

Lewis and Clark studied the Nation's activities and recorded some ethnographic information about the tribe in the Lewis & Clark Journals. (R. at 1.) They also met with the Nation's tribal leader and gave him a so-called "sovereignty token." (R. at 1.) These tokens, created by Thomas Jefferson, were given to leaders of the tribes that Lewis and Clark thought would be interested in engaging politically and commercially with the United States government. (R. at 1.)

In 1850, the ever-increasing number of European and American settlers in the Oregon Territory induced the Cush-Hook Indians to enter into treaty negotiations with the United States. (R. at 2.) They negotiated a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. at 1.) In the treaty, the Cush-Hook Nation agreed to cede its lands in exchange for monetary compensation, a different parcel of land further west, and U.S. government protection. (R. at 2.) After signing the treaty, the Nation relocated to a nearby area in the foothills of Oregon's coastal mountain range. (R. at 2.)

However, three years later the Cush-Hook Nation still had not received their promised compensation. (R. at 2.) In that same year, the Senate refused to ratify the Cush-Hook treaty, rendering it void. (R. at 2.) Although this congressional action confirmed that the Cush-Hook Nation retained title to their original homeland, the tribe remained in their new home in the Oregon coastal range foothills. (R. at 2.)

Even though the United States Senate had failed to legitimately accept title to the Cush-Hook homeland on behalf of the government, the U.S. then attempted to alienate that land. (R. at 2.) Under the Oregon Donation Land Act of 1850, any white settler could receive free public land by living on and cultivating a plot of land for four consecutive years. Under that Act, Joe and Elsie Meek claimed a plot of land that contained the area where the Cush-Hook Nation's permanent village previously stood. (R. at 2.) However, the Meeks never legitimized their claim to the land by meeting the residence and cultivation requirements, so their title to the land was void. (R. at 2–3.) Thirty years later, their descendants sold to the State of Oregon the defective title to the land. (R. at 2.) Oregon then turned the land into Kelley Point Park in 1880. (R. at 2.)

Although the Cush-Hook Nation relocated to an area west of their original homeland, many of their totems still stand in present-day Kelley Point Park. (R. at 2.) Tragically, many of these totems have suffered vandalism by Park visitors and the State of Oregon has done nothing to slow this destruction. (R. at 2.)

In response to this unhindered vandalism and in order to reassert his tribe's claim to its aboriginal territory, Thomas Captain occupied the land in Kelley Point Park, protecting a tree that had been carved by one of his ancestors. (R. at 2.) In order to safeguard the totem, he removed the portion that had been carved by his ancestor and attempted to return it to his village. (R. at 2.)

While transporting the totem to safety, Captain was stopped by an Oregon state trooper, who seized the totem and arrested Captain. (R. at 2.) The State of Oregon then brought three criminal charges against Captain for (1) trespass on state lands, (2) cutting timber in a state park without a permit, and (3) desecrating an archaeological and historical site.

SUMMARY OF THE ARGUMENT

Thomas Captain may exercise full use and enjoyment of the land in Kelley Point Park because the Cush-Hook Nation retains aboriginal title to that land. Accordingly, the State of Oregon may not lawfully cite Captain for trespass or cutting timber without a permit on the lands in question.

The State of Oregon does not have the authority to enforce Or. Rev. Stat. § 358.905-358.961 and Or. Rev. Stat. § 390.235-390.240 against Thomas Captain within Cush-Hook territory. Generally, states are prohibited from exercising jurisdiction over Indians in Indian country. Public Law 280 does not grant the State the necessary authority to assert jurisdiction over a Cush-Hook Nation citizen for removing his tribe's sacred totem from its aboriginal territory, because the statutes at issue are civil rather than criminal.

Finally, because Captain was employing his right to freely exercise his religion, the First Amendment protects Captain from all charges levied against him.

ARGUMENT

I. THOMAS CAPTAIN MAY EXERCISE FULL USE AND ENJOYMENT OF THE LAND IN KELLEY POINT PARK BECAUSE THE CUSH-HOOK NATION RETAINS ABORIGINAL TITLE TO THAT LAND.

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

The Cush-Hook Nation lived on the land in question since time immemorial. (R. at 1.) The Nation's aboriginal title to the land in Kelley Point Park was established through all of the required elements, a fact that the United States government recognized continually through congressional actions and the actions of government agents. This title has never been extinguished, so the Cush-Hook Nation retains aboriginal title to the land.

1. The Cush-Hook Nation's aboriginal title was established hundreds of years ago.

a. The applicable standard of review requires that the lower court's finding of the Cush-Hook Nation's aboriginal title may only be reversed if clearly erroneous.

The occupancy necessary to establish aboriginal title is a question of fact. *U.S. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345, 359 (1941). This Court may not set aside the lower court's factual findings concerning the elements of aboriginal title unless they are clearly erroneous. Fed. R. Civ. P. 52(a)(6); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

b. The Cush-Hook Nation has fulfilled the requisite use and occupancy requirements to establish aboriginal title.

A tribe retains aboriginal title if it has continually possessed the land in question, used and occupied the land since time immemorial, and had the right to exclude others. *See Santa Fe Pac. R.R. Co.*, 314 U.S. 339; *Sac & Fox Tribe of Indians v. U.S.*, 315 F.2d 896, 903 (Ct. Cl. 1963). These elements are all questions of fact that the Circuit Court determined had been

met. Witnesses "establishe[ed] that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans." (R. at 3.)

A tribe can demonstrate the requisite use and occupancy by referencing its customs, ways of life, and activities on the land. *Mitchel v. U.S.*, 34 U.S. (9 Pet.) 711, 746 (1835). Since time immemorial, the Cush-Hook Nation resided on the land in question, grew crops, harvested plants, hunted, and fished. (R. at 1.) The Nation also exercised their religion on this land by carving sacred totems in the trees near their permanent village. (R. at 2.) Such activities display the necessary use and occupancy of the land to establish aboriginal title.

It is unclear whether the Multnomah Indians resided in the same area as the Cush-Hook Nation. (*See* R. at 1.) However, even if the Multnomah Indians also occupied the land in question, this fact does not preclude a finding of Cush-Hook aboriginal title. Joint aboriginal title can exist despite non-exclusivity if two or more tribes amicably inhabit an area. *See Sac & Fox Tribe of Indians*, 315 F.2d at 903 n.11.

These facts confirm what the lower court determined: the elements required to establish the Cush-Hook Nation's aboriginal title were fulfilled hundreds of years ago. The arrival of Lewis and Clark in 1806 provided documentation of Cush-Hook title that had existed since time immemorial.

2. The Cush-Hook Nation's aboriginal title was acknowledged by the United States government

Aboriginal title can exist without any formal government action recognizing it as such. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347 (citing *Cramer v. U.S.*, 261 U.S. 219, 229 (1923)); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). Though the Cush-Hook Nation's aboriginal title existed since time immemorial, it was first acknowledged in 1806 by Lewis and Clark. Governmental actions over several decades established a course of conduct that

served to acknowledge the Cush-Hook Nation's aboriginal title to its original homelands. Such acknowledgement serves as further evidence that the Cush-Hook Nation's aboriginal title to the lands in question was firmly established by the time of the Nation's first encounters with Europeans.

Government agents realized that the Cush-Hooks occupied, used, and owned the lands in question. With the presentation of sovereignty tokens, Lewis and Clark acknowledged the existence of another sovereign who occupied the lands in question. (R. at 1.) Additionally, these government agents made drawings of the Cush-Hook village and noted ethnographic information (R. at 1), providing a definitive record and acknowledgement of Cush-Hook occupation of original homelands.

Decades later, actions of Congress further served to acknowledge the Cush-Hook Nation's aboriginal title. In 1848, the Oregon Territorial Act instructed: "nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . . ." 30 Cong. Ch. 177, August 14, 1848, 9 Stat. 323. With this Act, Congress explicitly recognized aboriginal title in the Oregon Territory, and made clear that such title could only be extinguished by treaty.

The legislative history of the 1848 Oregon Territorial Act reveals that Samuel Thurston, a territorial delegate, advised "it was necessary to extinguish Indian title to land before it could become part of the public domain." William G. Robbins, *Landscapes of Promise* 84 (1997). Since the Cush-Hook treaty was never ratified and the tribe never received its promised compensation for relinquishing their rights to the land (R. at 2), aboriginal title was not extinguished. *See infra* Part I.B.

Two years after the passage of the Oregon Territorial Act, Anson Dart negotiated a treaty with Cush-Hook leaders whereby the government would purchase the Nation's original homeland in exchange for monetary compensation, a different parcel of land, and government protection. (R. at 1.) These negotiations with Cush-Hook leaders on the part of the superintendent of Indian affairs for the Oregon Territory revealed the government's belief that the Nation owned the lands in question. The Senate's refusal to ratify the treaty further shows the federal government's recognition of the Cush-Hook Nation's aboriginal title.

Taken together, executive and congressional actions throughout the early 1800s served as acknowledgement of the Cush-Hook Nation's aboriginal title. Though the government did not take any action to formally recognize the Cush-Hook Nation after 1853 (R. at 2) and the Nation is not on the list of federally recognized tribes (R. at 3), these facts do not determine whether the Cush-Hook Nation held aboriginal title to the lands in Kelley Point Park in the early 1800s. Rather, the government's course of conduct in dealing with the Nation acknowledged that its aboriginal title to the lands was well established. And since the U.S. government has taken no action to formally extinguish that title, it still exists today.

B. The Cush-Hook Nation still has aboriginal title to the land in Kelley Point Park because the United States government has never extinguished it.

By the 1800s, the Cush-Hook Nation's aboriginal title was clearly established. And because no action throughout history has "legitimately extinguished" such title, it still exists today. *See Johnson*, 21 U.S. (8 Wheat.) at 592. Extinguishment of the title, which is not to be lightly implied and can only be accomplished by the United States, can only occur in specific ways—most notably through purchase or conquest. *Id.* at 545. None of the actions taken by the United States government amounted to an extinguishment of the Cush-Hook Nation's title.

1. Once aboriginal title is established, it exists unless it is extinguished.

Once established, aboriginal title endures until it is extinguished. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 345; *Johnson*, 21 U.S. (8 Wheat.) at 587–88. This longstanding rule was first noted in *Johnson v. M'Intosh*, a case that "received universal assent" and has been continually recognized throughout history as outlining the legal framework of the doctrine of discovery. *Mitchel*, 34 U.S. (9 Pet.) at 746. The doctrine of discovery was developed as European nations "discovered" the lands inhabited by original occupants. Such nations acquired title and a right of pre-emption to the lands, but the original occupants retained aboriginal title. *See Johnson*, 21 U.S. (8 Wheat.) 543.

Under this firmly-grounded rule of aboriginal title, the fact that the Cush-Hook Nation has not resided in its original village for some time is immaterial. Because the Cush-Hook Nation's aboriginal title was established long ago and has never been extinguished, this Court must respect that title.

2. Only the federal government of the United States has the power to extinguish aboriginal title.

It has long been the policy of the United States to respect aboriginal title, which can only be extinguished by the United States federal government. *Cramer*, 261 U.S. at 227; *Oneida Indian Nation v. Oneida Cnty.*, 414 U.S. 661, 667–68 (1974); *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347; *Johnson*, 21 U.S. (8 Wheat.) at 585. In 1877, this Court explained that aboriginal title "could only be interfered with or determined by the United States." *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). Thus, neither a private party nor a state can extinguish aboriginal title. In fact, it is "rudimentary" that a state cannot extinguish aboriginal title without federal consent. *Oneida Indian Nation*, 414 U.S at 670.

While some courts have found extinguishment of aboriginal title when the U.S. designates land for another public use (*see U.S. v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1391 (Ct. Cl. 1975) (holding that the establishment of a national forest reserve extinguished aboriginal title)), that is not the case here. When the State of Oregon created Kelley Point Park in 1880 (R. at 2), it could not have extinguished the Cush-Hook Nation's aboriginal title to that land, even if that had been the State's intent.

Oregon is also precluded from raising an adverse possession argument, even though the land at issue has been used as a state park since 1880. As this brief explains, aboriginal title can only be extinguished by an *express* action of the *federal* government. Thus, mere occupation by a state government is not sufficient to meet the high standard required of a finding of extinguishment of aboriginal title.

3. Extinguishment of aboriginal title is not lightly implied.

A court must find explicit extinguishment of aboriginal title, which is not to be lightly implied. This requirement finds support both in the longstanding principles flowing from the doctrine of discovery as well as from the Indian law canons of construction. *See Santa Fe Pac. R.R. Co.*, 314 U.S. at 354. Moreover, case law and historical policies regarding aboriginal title require that extinguishment of aboriginal title must be express. Such extinguishment must involve congressional intent and usually requires the consent of affected Indians.

a. Extinguishment of aboriginal title will not be found absent express congressional intent.

In *Santa Fe Pacific Railroad Co.*, this Court reiterated the time-honored rule that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." 314 U.S. at 353–54. In that case, this Court

held that Congress's creation of a reservation for the Walapai Indians did not equate intent "to extinguish all of the rights which the Walapais had in their ancestral home." *Id.*

Here, Congress exhibited even less of a desire to extinguish aboriginal title. While Anson Dart may have intended to reserve specific lands—separate from those at issue here—for the Cush-Hook Nation, Congress refused to ratify that agreement. (R. at 2.) The Senate's refusal to ratify the Cush-Hook treaty suggests congressional intent *not* to extinguish the Nation's aboriginal title, especially since a few years prior Congress passed an act instructing that Indian title in Oregon may only be extinguished through treaty. *See* 1848 Oregon Territorial Act, 30 Cong. Ch. 177, August 14, 1848, 9 Stat. 323.

Absent a "clear and plain indication" that Congress intended to extinguish all of the original occupants' rights in the property, aboriginal title survives. *Lipan Apache Tribe v. U.S.*, 180 Ct. Cl. 487, 492 (1967) (citing *Santa Fe Pac. R.R. Co.*, 314 U.S. at 353). Additionally, any doubtful expression is to be resolved in favor of the Indians. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354.

b. Indian consent is usually required to find extinguishment of aboriginal title.

Just as the intent of Congress to extinguish must be express, historical policies demonstrate that extinguishment will not ordinarily be found without the express consent of the affected Indians. The Northwest Ordinance of 1787 explained: "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent . . . ." Section 14, Art. 3 of 1 Cong. Ch. 8, August 7, 1789, 1 Stat. 50. A few years later, in 1789, Secretary of War Henry Knox expressed similar sentiments:

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent . . . . To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.

Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 55 n.259 (citing Report of Henry Knox on the Northwestern Indians).

The Cush-Hook Nation did not consent expressly or otherwise to the extinguishment of their aboriginal title over the lands in Kelley Point Park. Though the Nation relocated following treaty negotiations with Anson Dart, they did so in anticipation of promised compensation and other benefits. (R. at 2.) Because the Nation never received any of these promised benefits, consent was not given to extinguish title to original Cush-Hook lands.

4. The United States has not extinguished the Cush-Hook Nation's aboriginal title to the land in present-day Kelley Point Park.

Historically, the United States' "exclusive right to extinguish the Indian title of occupancy" must have been achieved through either "purchase or conquest." *Johnson*, 21 U.S. (8 Wheat.) at 587. This rule was set out in *Johnson v. M'Intosh* but was established long before. In 1790, when Thomas Jefferson was the Secretary of State, he explained: "There are but two means of acquiring the native title. First, war . . . . Second, contracts or treaty." Miller, supra, at 80 (citing Thomas Jefferson, Opinion on Georgia's Grant of Indian Lands). Decades later, this Court expanded the ways to extinguish aboriginal title, explaining that such title could be extinguished by "treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347. As this brief explains, the U.S. did not extinguish the Cush-Hook Nation's aboriginal title in any of these permissible ways.

a. The Cush-Hook treaty did not extinguish the Nation's aboriginal title because the treaty was never ratified and the Nation never received payment.

In the 1848 Oregon Territorial Act, Congress determined that aboriginal title in the Oregon Territory could only be extinguished by treaty. *See* 30 Cong. Ch. 177, August 14, 1848, 9 Stat. 323. Accordingly, Anson Dart negotiated a treaty with the Cush-Hook Nation. (R. at 1–2.) The treaty was the sole attempt by the U.S. government to extinguish the Cush-Hook Nation's aboriginal title. However, the treaty was never ratified and was therefore void.

Because the treaty was never ratified, the Cush-Hook Nation never received any payment or other promised benefits. (R. at 2.) While several courts have held that a purchase of land may extinguish aboriginal title (*see U.S. v. Dann*, 470 U.S. 39 (1985); *U.S. v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976) ("[A]ny ambiguity about extinguishment . . . has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands.")), in the instant case there was no such purchase.

Nor did relocation pursuant to the treaty negotiations extinguish title to the Cush-Hook Nation's homelands. As noted above, once aboriginal title is established, it must be extinguished explicitly. *See supra* Part I.B.3. Thus, although the Cush-Hooks relocated pursuant to treaty negotiations, merely moving away could not extinguish the title to their original homelands.

b. The Oregon Donation Land Act of 1850 and subsequent settlement did not extinguish the Cush-Hook Nation's aboriginal title.

Besides the failed treaty negotiations, the U.S. took no actions to legally extinguish the Cush-Hook Nation's title. The Oregon Donation Land Act of 1850 did not extinguish the Cush-Hook Nation's aboriginal title because it did not do so expressly as is required by law. The sole time that "Indians" are mentioned in the Act is in a provision stating that half-blood

Indians could apply for a land grant. *See* 31 Cong. Ch. 76, September 27, 1850, 9 Stat. 496. And as mentioned above, legislation was passed before the 1850 Act for the sole purpose of appointing commissioners to negotiate treaties that would serve to extinguish title through purchase. *See* 1848 Oregon Territorial Act, 30 Cong. Ch. 177, August 14, 1848, 9 Stat. 323. The 1848 and 1850 laws demonstrate Congress's intent to extinguish aboriginal title only through treaty, which did not occur here.

Neither did actual settlement extinguish the Cush-Hook Nation's aboriginal title. Joe and Elise Meeks, who received title to the land in question under the Oregon Land Donation Act, did not fulfill the necessary requirements to gain fee title to the land. Section 4 of the Act states that white settlers will be granted title to land if they have "resided upon and cultivated the [land] for four consecutive years, and shall otherwise conform to the provisions of this act . . . ." 1 Cong. Ch. 76, September 27, 1850, 9 Stat. 496.

Although the Meeks were given fee simple title to the land by the United States, they did not meet the requirements of the Act, so their title was defective. Accordingly, they were unable to convey clean title to the State of Oregon and the lower court correctly held that their sale to the State was void. Yet, even if the Meeks had fulfilled the necessary requirements, their fee simple title still would have been subject to the Cush-Hook's aboriginal title, which had never been properly extinguished.

C. Captain cannot be lawfully prosecuted for trespass and cutting timber without a permit because the Cush-Hook Nation's aboriginal title affords him full use and enjoyment of the land.

1. Aboriginal title affords expansive property rights.

Thomas Captain's actions were within his rights as a member of a tribe with aboriginal title. In *U.S. v. Cook*, this Court stated that the "right of use and occupancy by the

Indians is unlimited. They may exercise it at their discretion." 86 U.S. 591, 593 (1873). The *Cook* Court went on to explain that Indians could cut timber in order to improve the land. *Id.* Here, Captain exercised his discretion and cut down a tree in order to protect his tribe's sacred totem. (R. at 2.) This Court has allowed similar practices in the past, and should continue to do so.

Applying these principles, this Court has stated that aboriginal title is "as sacred as the fee simple title of the whites." *Santa Fe Pac. R.R. Co.*, 314 U.S.at 345 (citing *Mitchel*, 34 U.S. (9 Pet.) at 746). "This principle has been reaffirmed constantly." *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985). Here, following these longstanding principles of discovery, the Cush-Hook Nation and its members retain important property rights to the land in question.

In 1955, the *Tee-Hit-Ton* Court expressed the idea that aboriginal title "is not a property right but amounts to a right of occupancy." 348 U.S. 272, 279 (1955). The Court made this observation in order to determine that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States." *Id.* at 285. Accordingly, "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." *Id.* at 288–89.

Applying the rule in *Tee-Hit-Ton* to this case is problematic for several reasons. First, the land involved in that case had never been recognized as belonging to that tribe. Here, on the other hand, the Cush-Hook's aboriginal title to the land in question has been acknowledged time and time again by the U.S. government. *See supra* Part I.A.2.

Second, the *Tee-Hit-Ton* ruling seems to conflict with the vast majority of historical precedent on this issue. As the rulings in *Cook* and *Santa Fe Pacific Railroad* demonstrate, aboriginal title is more than a limited right of occupancy. This may be because *Tee-Hit-Ton* was decided during the Termination Era of Indian policy, which was a short and reviled period in this Court's history towards Indians that was characterized by the idea that reservations, Indian land, and even tribes, should cease to exist. In the present Era of Indian Self-Determination, such ideas must be met with skepticism.

A wider view of this Court's precedent expresses a more accurate understanding of the rights that accompany aboriginal title. Discovery did not give rights to tribes, but instead limited the rights tribes already had. The "discovering" nation gained the exclusive right to acquire the land through purchase or conquest, but the tribe retained most of the other rights associated with property ownership. *Johnson v. M'Intosh* explains that discovery extinguished the tribal right of alienation, giving to the sovereign both title and the right of pre-emption. 21 U.S. (8 Wheat.) at 574. But those inhabitants retained "a legal as well as just claim to retain possession of [the land] and to use it according to their own discretion." *Id.* When discussing the original title of the Cherokees, this Court stated: "Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States." *Holden v. Joy*, 84 U.S. 211, 244 (1872).

Cases after *Tee-Hit-Ton* also tend to discount the "mere occupancy" language. For instance, in 1974 this Court acknowledged that aboriginal title has been "recognized to be only a right of occupancy . . . ." *Oneida Indian Nation*, 414 U.S. at 667. However, Justice White continued on to explain the "essence" of the relevant aspects of aboriginal title, noting that "a unanimous Court" has determined that aboriginal title is "as sacred as the fee simple

title of the whites." *Id.* at 669 (quoting *Santa Fe Pac. R.R. Co.*, 314 U.S. at 345). More recently, courts have recognized that aboriginal title gives a tribe the right to full use and enjoyment of the land. For instance, the Ninth Circuit has described the rights accorded by aboriginal title, which "entitles the tribes to full use and enjoyment of the surface and mineral estate, and to resources, such as timber, on the land." *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986). This Court should follow these cases and interpret the rights that go along with aboriginal title expansively.

Indian law experts provide additional guidance in understanding the rights accompanying aboriginal title in light of the Self-Determination Era. Many of these scholars have long disputed the Court's idea that aboriginal title results in only a right to occupy the land. *See* Indian Law Resource Center, *Native Land Law* § 3.2 (2012 ed.). Other experts have alleged that the "mere occupancy" language from *Tee-Hit-Ton* is outright false (Miller, *supra*, at 74) and that this Court had to create new rules of property in order to justify the holding of the case (John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 Mich. J. Race & L. 323, 329 (2004)).

Accordingly, in light of the Cush-Hook Nation's existing aboriginal title, Captain is entitled to the full use and enjoyment of the land. He cannot be cited for trespassing, and he cannot lawfully be charged for cutting timber without a permit. Captain is permitted full use and enjoyment of the land to which his Nation holds aboriginal title. When considering a full examination of the historical principles, subsequent case law, and contemporary research concerning the issue of the rights that accompany aboriginal title, the lower court's determination on these points must be upheld.

2. Because the Cush-Hook Nation retains aboriginal title, its citizens must be allowed to access and use sacred sites.

The existence and survival of the Cush-Hook Nation is linked to its original homelands and its sacred objects. At the very least, actions by the U.S. government and international legal principals dictate that this Court must recognize Thomas Captain's entitlement to access the Cush-Hook Nation's sacred sites and objects.

Executive Order 13007 protects and affords access to Native American sacred sites on public lands. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996). The Ninth Circuit explained that this Executive Order "imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them." *S. Fork Band Council of W. Shoshone v. Dept. of Interior*, 588 F.3d 718, 724 (9th Cir. 2009). The government is required to "avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

Additionally, in 2010 President Obama pledged to support the United Nations Declaration for the Rights of Indigenous Peoples. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, *available at* http://www.state.gov/documents/organization/153223.pdf (last visited Jan. 13, 2012). This Declaration recognizes and affirms the rights of indigenous peoples to have private access to sacred sites. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007).

II. THE STATE OF OREGON CANNOT LAWFULLY CITE CAPTAIN FOR REMOVING HIS TRIBE'S SACRED TOTEM FROM KELLEY POINT PARK BECAUSE OF THE LONGSTANDING RULE PREVENTING STATES FROM EXERCISING JURISDICTION OVER INDIANS IN THEIR TRIBAL TERRITORY.

The State of Oregon cannot legally enforce Or. Rev. Stat. § 358.905-358.961 and Or. Rev. Stat. § 390.235-390.240 against Thomas Captain within Cush-Hook territory because they are civil regulations and the State of Oregon has no authority to enforce its civil laws against Captain. The State of Oregon has no inherent jurisdiction over Captain in his tribe's territory and Congress's grant of jurisdiction in Public Law 280 does not cover civil regulations. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2006)). United States law has established that federal and tribal governments retain exclusive authority over tribal members' actions in tribal territory unless Congress explicitly grants that power to a state. *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975); *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). In other words, unless a state is expressly granted authority to exercise jurisdiction over Indians in Indian country, the state has no authority over an Indian in his tribe's territory.

This case concerns the State of Oregon's attempt to exercise jurisdiction over an Indian in his tribe's own territory, which Oregon cannot do without express authority. The fact that Public Law 280 expressly grants the State of Oregon some *criminal* jurisdiction over Indians in Indian country is irrelevant, as Captain was actually fined for violating a *civil* regulation. Therefore, Oregon's exertion of jurisdiction over Captain was improper and his conviction should be overturned.

A. The Circuit Court's determination of this issue should be reviewed *de novo* because it is a mixed question of law and fact.

The issue here is whether either the well-established rules of jurisdiction in Indian law or the specific grant of jurisdiction within Public Law 280 give Oregon jurisdiction over Thomas Captain. This is a mixed question of law and fact. "Mixed questions of law and fact are those in which 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.'" *U.S. v. Bruce*, 392 F.3d 1215, 1218 (9th Cir. 2005) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982)). Indian country jurisdictional rules are well-established; the question is whether, given the facts of the case, Oregon may exert jurisdiction over Captain. This Court must review this issue, as all other issues of mixed law and fact, *de novo*. *Bruce* at 1218.

B. The State of Oregon lacks jurisdiction to enforce Or. Rev. Stat. § 358.905-358.961 and 390.235-390.240 against Thomas Captain in Kelley Point Park because it has neither inherent jurisdiction nor has Congress explicitly granted the necessary jurisdiction.

1. The State of Oregon had no inherent authority to exercise jurisdiction over Thomas Captain in Kelley Point Park.

Indian tribes historically existed as independent sovereign nations. Through treaties with the United States, tribes necessarily abrogated some of their independence to the United States, but Indian tribes retain the aspects of sovereignty not specifically abrogated by treaty or congressional act. *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Williams v. Lee*, 358 U.S. 217, 221–22 (1959); *Worcester v. Georgia*, 31 U.S. 515, 557 (1832).

In *Worcester*, the Supreme Court recognized that states have no authority in Indian country except that which is expressly granted by Congress, stating that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the

[United States] government." *Worcester*, 31 U.S. at 557. Though this rule was created by the Court long ago, it still applies today.

a. As a dependent Indian community, Kelley Point Park qualifies as Indian country under 18 U.S.C. § 1151.

The land in Kelley Point Park is "Indian country" under U.S. law. The pertinent parts of the federal definition of Indian country are provided in Title 18, Section 1151 of the U.S. Code: "'Indian country', as used in this chapter, means . . . (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 a state." While Section 1151 speaks directly to what constitutes Indian country for the purpose of criminal jurisdiction, it has been consistently applied to issues of civil jurisdiction as well. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). The land in Kelley Point Park was never established as a reservation, but it remains "Indian country" under 18 U.S.C. § 1151(b) because it is a dependent Indian community.

The codified definition of "Indian country" is derived from case law, so while the term "dependent Indian communities" is not defined in the statute, cases decided before the enactment of 18 U.S.C. § 1151 provide guidance as to the phrase's meaning. *Venetie* at 949.

The statutory phrase "dependent Indian community" is derived from cases such as *U.S. v. McGowan*, 302 U.S. 520 (1938). *McGowan* held that the land at issue constituted a dependent Indian community because "it had been validly set apart for the use of the Indians as [Indian country], under the superintendence of the government." *McGowan* at 538. In making its ruling, the Court relied on the legislative history of the term "Indian country" and the U.S. government's trust responsibility toward Indians. The statutory definition contained in 18 U.S.C. § 1151 codifies the reasoning found in *McGowan* and other cases.

In 1998, the Supreme Court addressed the issue of what constitutes a dependent Indian community under 18 U.S.C. § 1151(b) in *Alaska v. Native Village of Venetie Tribal Government.* 522 U.S. 520, 527 (1998). The Court held:

> '[D]ependent Indian communities' refers to a limited category of Indian lands that are neither reservations nor allotments . . . , and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Venetie at 525. Both of these requirements were satisfied as to the land in Kelley Point Park.

i. The land in Kelley Point Park was properly set aside as Indian land for the use of Indians.

The land was properly set aside when Congress refused to ratify the 1850 treaty negotiated between Anson Dart and the Cush-Hook Nation. Before the treaty was ever contemplated, William Clark and Meriwether Lewis first recorded the Cush-Hook Nation's dominion over the land at issue. (R. at 1.) As agents of President Thomas Jefferson, Lewis and Clark were charged with forming relationships with Indian tribes in the Pacific Northwest in order to bring them within America's "political and commercial orbit." Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 77 (2005). Lewis and Clark recorded the Cush-Hook Nation's dominion over the land in question for the federal government's benefit in the Lewis and Clark Journals. (R. at 1.)

Another federal agent, Anson Dart, later relied on this recognition when negotiating the 1850 treaty with the Cush-Hook Nation. Therein, the Nation agreed to relinquish its title to the land at issue and relocate to another location in exchange for promised benefits. (R. at 1–2). But in 1853, Congress refused to ratify the treaty. (R. at 2.) This refusal nullified the treaty and amounted to further recognition of the Cush-Hook Nation's continued authority over their original territory. Since no other government action has extinguished the Nation's

aboriginal title to the land in present-day Kelley Point Park, it still exists. *See supra* Part I.B.

ii. The land in Kelley Point Park is under federal superintendence.

Because the Cush-Hook Nation has retained aboriginal title, it has necessarily remained under federal superintendence. The federal government's trust responsibility to tribes requires that they exercise jurisdiction over tribes' territory. *See Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Although the State of Oregon established Kelley Point Park on the Cush-Hook Nation's aboriginal territory, the State's occupation of the land is illegitimate. As the Circuit Court rightfully held, Joe and Elsie Meek never satisfied the requirements necessary to receive good title to the land in question. (R. at 4.) Therefore, the sale from which Oregon received the land in question was void from the beginning. (R. at 4.) So, the State of Oregon has never gained lawful ownership over the land within Kelley Point Park, meaning the land never rightfully passed from federal supervision.

Since the land within Kelley Point Park is "Indian country," the State of Oregon may not exercise jurisdiction over Indians there without an explicit congressional grant. Accordingly, the State of Oregon's attempt to exert jurisdiction over Captain in this case was improper, since he was an Indian in his Nation's territory.

b. Thomas Captain is an Indian.

Thomas Captain is a Cush-Hook citizen. (R. at 2.) As such, the State of Oregon improperly cited him for activity that occurred in his tribe's territory. In Felix Cohen's definitive treatise on Federal Indian Law, he explains that for general federal purposes, a person qualifies as legally "Indian" if: (1) he has ancestors whose existence in America predated European contact and (2) he is considered "Indian" by his community. Felix S.

Cohen, Cohen's Handbook of Federal Indian Law 3. The facts indicate that Captain is "a Cush-Hook citizen," (R. at 2) which confirms that he is Indian.

As is evident from the rule described by Cohen, the Cush-Hook Nation's lack of federal recognition by the United States is irrelevant in determining Thomas Captain's Indian status. There are some federal statutes that might apply only to those who are members of a federally recognized tribe. However, this case does not rest on any such requirement but instead rests on jurisdictional rules created in the common law when a person's Indian identity did not rely on official membership in certain tribes. As such, the Cush-Hook Nation's lack of federal recognition has no impact on whether Oregon can exert civil jurisdiction over Captain. Since he is an Indian in his own Nation's territory, the State of Oregon may not exercise jurisdiction without an explicit Congressional grant of authority.

2. The federal government has not delegated jurisdiction over this situation to Oregon. Congress's grant of criminal jurisdiction to Oregon under Public Law 280 does not apply because the Oregon statutes at issue here are civil regulations rather than criminal prohibitions.

a. The State of Oregon's attempted exertion of criminal jurisdiction over Thomas Captain was improper because the statutes Oregon applied are civil regulatory statutes and cannot be applied to Thomas Captain by the State of Oregon in his Nation's aboriginal territory.

Public Law 280 explicitly grants *criminal* jurisdiction over Indians in Indian country to Oregon. 18 U.S.C. § 1162(a). Thus, Captain is subject to Oregon criminal laws in Kelley Point Park in spite of his tribe's dominion over the land there. However, P.L. 280 does not grant states civil regulatory authority over Indians in their tribal territory. *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976). Or. Rev. Stat. § 358.905-358.961, which regulates damage to archeological sites, and Or. Rev. Stat. § 390.253-390.240, which regulates damage to

historical materials, are civil regulatory statutes, and therefore cannot be applied to Captain by the State of Oregon in his tribe's aboriginal territory.

It is not always clear which statutes are enforceable in Indian country by states with delegated criminal authority under P.L. 280, as this determination often hinges on whether a statute is criminal/prohibitory or civil/regulatory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987). In determining P.L. 280's applicability, one must look to the law's intent:

> If the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement [in Indian country] . . . The shorthand test is whether the conduct at issue violates the State's public policy.

Cabazon at 209. This inquiry involves a detailed, fact-specific examination of the law in question. *Id.* at 11.

This Court has not set out a list of factors to be considered when determining whether a law is regulatory or prohibitory, but many lower courts have employed certain factors in making this determination. One commentator conducted a survey of pertinent cases and found that four factors appear to influence courts' decisions: (1) whether violation of the law results in a criminal or civil penalty; (2) whether the title of the code identifies it as civil or criminal; (3) the number of exceptions to the prohibited conduct; and (4) issues of tribal sovereignty. Arthur R. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 U.C.L.A. L. Rev. 1333 (1999). Subjecting the statutes at issue to this analysis shows that these regulations are civil in nature and therefore unenforceable against Captain in Kelley Point Park.

i. Although these statutes result in criminal penalties, when this fact is considered with the other relevant factors, it is not enough to change the classification of these laws to criminal/prohibitory.

The laws at issue here are regulatory in spite of the criminal penalty imposed. Thomas Captain was charged with a violation of two sections of Oregon code: Or. Rev. Stat. § 358.905-961 ("Archeological Objects and Sites") and Or. Rev. Stat. § 390.235-240 ("State and Local Parks"). A violation of either section results in a Class B Misdemeanor, but this fact is not determinative. "[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." *Cabazon* at 211. If states could simply impose criminal penalties for any law, then Congress's intent to give states only criminal authority over Indians in Indian country would be completely undermined. Moreover, in the instant case, Captain's "guilty" verdict only resulted in a $250 fine. The lack of other punishment and the insignificant amount of the fine (he could have been fined up to $2,500) show that Captain was being fined for a civil violation and not for a bona fide crime.

ii. These laws are classified as civil and are filed under titles and sections of Oregon code that are concerned with civil regulation in Oregon, which shows they are civil/regulatory in nature.

The titles of these two sections of code and their categorization within the Oregon code confirm they are actually civil regulations. Or. Rev. Stat. § 358.905-961 ("Archeological Objects and Sites") is under *Title 30: Education and Culture*, *Chapter 358: Oregon Historical and Heritage Agencies, Programs and Tax Provisions; Museums; Local Symphonies and Bands; Archaeological Objects and Sites*. The Oregon legislature's grouping of this law with others in Chapter 358 that provide for public programs such as local bands and public museums shows that it is civil/regulatory nature.

Likewise, Or. Rev. Stat. § 390.235-240 ("State and Local Parks") is under *Title 31: Highways, Roads, Bridges, and Ferries, Chapter 390: State and Local Parks; Recreation Programs; Scenic Waterways; Recreation Trails*. This law is grouped with others that regulate Oregon public land, including the provision of state-funded recreation resources, issuance of commemorative coins, and maintenance of recreation trails. *See* Or. Rev. Stat. §§ 390.010, 390.245-247, and 390.950-989. The identification and categorization of these laws suggest that they are not meant as genuine criminal penalties, but are merely civil regulations made to look like criminal laws, which does not make them enforceable under P.L. 280.

iii. The many exceptions to these laws show that they are not genuine criminal prohibitions.

A "prohibition" that allows for multiple exceptions demonstrates that the law's actual intent is to regulate activity civilly. A law prohibiting assault, for example, would not be subject to exceptions. Conversely, each of the laws Captain was charged under allows multiple exceptions. For example, the Oregon law regulating archeological objects and sites proscribes excavation, alteration, and destruction of archaeological sites and objects. However, it contains an outright exception for any person who unintentionally discovers an archeological object and retains it for personal use and allows such activity as long as it is conducted with a permit. Or. Rev. Stat. §§ 358.915; 390.235. The section pertaining to public parks is even more permissive, as it only regulates archaeological activities on public land. Or. Rev. Stat. § 390.235-390.240. Those wishing to excavate archeological sites on private land are not subject to its restrictions at all. *Id*.

iv. Issues of tribal sovereignty dictate that these be considered civil/regulatory laws.

Finally, this Court must consider issues of tribal sovereignty, especially as they overlap with the federal government's interest in tribes' sovereignty. *See* Matthew L.M. Fletcher, *California v. Cabazon Band a Quarter-Century of Complex, Litigious Self-Determination*, Fed. Law., April 2012, at 50 (noting that *Cabazon* hinged on the degree to which tribal and federal interests coincided regarding the need for Indian gaming). This scenario implicates issues of tribal sovereignty in two ways. First, tribes should be able to protect cultural objects within their territory from vandals. Second, tribes need access to and control over their cultural and sacred objects, as these are crucial to their identities as tribes.

The State of Oregon allowed totems sacred to many Cush-Hook people to be vandalized and destroyed by visitors to the Kelley Point Park. Because tribes have maintained "attributes of sovereignty over both their members and their territory," *Mazurie*, 419 U.S. at 557, Thomas Captain properly exercised his Nation's sovereignty over its territory to save the sacred totem that was carved by his ancestor. The federal government also has an interest in allowing tribes to protect their territory because of the special obligation they have towards Indian tribes. *Choate*, 224 U.S. at 675.

Additionally, Indians should have access to and control over their tribe's objects of cultural patrimony. Many traditional Indian religions are connected to specific sites. Cultural and religious ceremonies are crucial to tribes' survival and wellbeing. These principles are recognized by the federal government. For instance, the Native American Grave Protection and Repatriation Act (NAGPRA) demonstrates the federal government's support for Indian control over objects of cultural patrimony. *See* 25 U.S.C. §§ 3001-3013.

III. THE STATE OF OREGON VIOLATED THOMAS CAPTAIN'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE HIS RELIGION BY CHARGING HIM WITH TRESPASS AND CONFISCATING THE SACRED TOTEM CARVED BY HIS ANCESTOR.

The First Amendment of the U.S. Constitution guarantees: "Congress shall make no law . . . prohibiting the free exercise [of religion]." This has been incorporated as to the states through the 14th Amendment and "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398 (1963). Oregon violated Thomas Captain's constitutional rights by punishing him for exercising his religion.

A. This Court must consider this issue only if it determines that the Cush-Hook Nation does not retain aboriginal title to the land in Kelley Point Park.

It is a well-established principal that this Court should not address constitutional issues unless it is necessary to the disposition of the case. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). This Court need only reach this argument if it fails to find that the Cush-Hook Nation did not retain aboriginal title to the land.

The Court should consider this issue either because it was brought in the lower court or because justice so requires. It is unclear from the record whether the Respondent has previously brought this argument. Because the Oregon Circuit Court for the County of Multnomah found that the Cush-Hook Nation retained aboriginal title to the lands in Kelley Point Park, it was not necessary to consider the possible violation of Captain's constitutional rights. However, it is necessary for this Court to protect Captain's freedom to exercise religion if it overturns the lower court's decision concerning aboriginal title.

In that situation, the Court must consider this issue in order to achieve justice. *Hormel v. Helvering* explained that "[o]rdinarily an appellate court does not give consideration to

issues not raised below," although this is not an "inflexible practice" because courts must sometimes consider such issues, "as justice may require." 312 U.S. 552, 556 (1941). This Court has further held that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121(1976). The facts of this case require consideration of this issue. The freedom to exercise one's religion is a foundational concept of the American Constitution and one that is necessary to preserve individual liberty. Because Oregon infringed Captain's right to freely exercise his religion and because the State had no compelling government interest to do so, justice requires this Court to consider this constitutional issue regardless of whether it was raised in the lower court.

B. <u>This issue should be reviewed *de novo*.</u>

This is a question of the applicability of the First Amendment, which should be considered *de novo*. "While the district court's findings of fact are subject to a clearly erroneous standard of review, the ultimate conclusion as to whether the regulation deprives Hamilton of his free exercise right is a question of law subject to de novo review." *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996).

C. Oregon violated Thomas Captain's right to freely exercise his religion.

1. Oregon infringed Thomas Captain's right to freely exercise his religion by charging him with trespass and confiscating the sacred totem.

The land in Kelley Point Park and the totem confiscated by the State of Oregon are sacred to the Cush-Hook Nation. (R. at 2.) The State of Oregon imposed a substantial burden on Captain's religious exercise by charging him with trespass for entering sacred land and by confiscating the totem.

Charging Captain with trespass infringed on his ability to visit a sacred site to and necessary to the practice of his religion. "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred." *Lyng*, 485 U.S. at 453. While *Lyng* held that government action negatively affecting Indian sacred sites did not implicate tribal members' constitutional right to freely exercise their religion, the alleged infringement in that case differs from Oregon's actions in this case.

In *Lyng*, tribal members challenged the government's proposal to build a road that would interfere with religious practices at Chimney Rock, a place sacred to their religion. The government action challenged in *Lyng* would "diminish the sacredness of the area." *Lyng*, 485 U.S. at 448. There, this Court held that the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." This holding was based on the concept that the Constitution protects individuals from government compulsion that interferes with their religion but does not allow individuals to "dictate the conduct of the Government's internal procedures." *Lyng*, 485 U.S. at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)). Captain, however, is not attempting to compel or prevent any government action but is merely attempting to practice his own religion.

In *Lyng*, this Court recognized the type of government interference with religion as an impermissible infringement on an individual's religious practice in dicta: "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and *a law prohibiting the Indian respondents from visiting the Chimney Rock area* would raise a different set of constitutional questions." *Lyng*, 485 U.S. at 453 (emphasis added). This indicates that Oregon's trespass claim against Captain interfered with his Constitutional right to freely exercise his religion.

2. *Oregon's infringement of Thomas Captain's freedom to exercise his religion is not justified by a compelling government interest.*

This infringement on Captain's ability to freely exercise his religion would only have been permissible under the First Amendment if it were justified by a compelling government interest, which it was not. While an individual's religious practices are not automatically free from all government restrictions, permissible regulations on religious activities "have invariably posed some substantial threat to public safety, peace, or order." *Sherbert*, 374 U.S. at 403. Such legitimately regulated activities have included bigamy, *Reynolds v. U.S.*, 98 U.S. 145 (1878), child labor, *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), and the refusal of vaccinations necessary to protect public health. *Prince v. Massachusetts*, 321 U.S. 158 (1944). Captain's presence in Kelley Point Park and removal of his tribe's totem from such land do not raise any such threat to public safety, peace, or order that would legitimize Oregon's infringement on his constitutional rights.

CONCLUSION

Because the Cush-Hook Nation's aboriginal title to the lands in question was established long ago and has never been extinguished, this Court must affirm the lower court's holding that the Cush-Hook Nation retains aboriginal title to the land in Kelley Point Park. As such, this Court should uphold the lower court's determination that Thomas Captain was not guilty of trespassing and of cutting timber without a permit.

The foundational principals of federal Indian law dictate that a state has no jurisdiction over an Indian in his tribe's own territory. Although Public Law 280 grants the State of Oregon criminal jurisdiction in Indian country, Oregon's prosecution of Thomas Captain actually amounted to the enforcement of civil citations. Therefore this Court must reverse the lower court's holding that Captain was guilty of violating Or. Rev. Stat. § 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 for his actions pertaining to the sacred totems in Kelley Point Park.

By accessing his tribe's sacred totem, Captain was attempting to freely exercise his religion. This right is fully protected under the First Amendment. This Court should vacate Captain's convictions in order to protect his First Amendment right to freedom of religion.

Dated this 14th day of January, 2013

Respectfully submitted,

Team #29

Attorneys for Respondent