SUPREME COURT OF THE UNITED STATES
Case No. XX-XXX

STATE OF OREGON,
Appellant/Petitioner
-v-
THOMAS CAPTAIN
Appellee/Respondent

On Writ of Certiori
To the United States Court of Appeals
For the Oregon Court of Appeals

PETITIONER'S BRIEF

January 14, 2013

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STATEMENT OF THE CASE

The State of Oregon initiated a criminal action against the defendant, Thomas Captain, a member of the non-federally or state recognized Cush-Hook Indian nation, for trespass on state land, cutting timber in a state park without a permit, and desecrating an archaeological site under Or. Rev. Stat. 358.905-358.969 and destroying an historical site under Or. Rev. Stat. 390.235-390.240.

The Oregon Circuit Court for the County of Multnomah found that the Cush-Hook nation owned the land in question and found the defendant not guilty of trespass or cutting timber without a permit. However, defendant was found guilty of damaging an archaeological site and a cultural and historical artifact. The defendant was fined $250. Both the State of Oregon and defendant Thomas Captain appeal.

The Oregon Court of Appeals affirmed the decision of the Circuit Court but did not issue an official opinion. Upon this ruling the State of Oregon filed a petition and cross-petition for certiorari with the United States Supreme Court. Defendant, Thomas Captain filed a cross petition for certiorari with the United States Supreme Court. The Supreme Court granted certiorari on the following questions:

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

(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.

STATEMENT OF FACTS

In 2011, Thomas Captain, a citizen of the Cush-Hook Nation of Oregon, left that tribe's reservation lands and relocated in Kelley Point Park. The park is situated on lands once occupied by the Cush-Hook. Mr. Captain's stated intention in moving to the land was to re-assert the tribe's ownership and to protect culturally and religiously significant trees located in the park.

There is no information regarding Mr. Captain's relationship to the tribe, except that he is a "citizen." No authorization for Mr. Captain to act on behalf of the tribe has been established.

The Cush-Hook have resided in what is now the state of Oregon since time immemorial. Their presence in the area surrounding and including Kelly Point Park can be established as early as April of 1806 when William Clark of the Lewis & Clark expedition visited their village. Clark's journals help to locate the Cush-Hook. He recorded turning south from the Columbia River and entering the Multnomah (modern-day Willamette) River. Local Multnomah Indians directed him to the Cush-Hook village and long houses.

The materials left by William Clark provide useful information about the tribe as it existed at that time. These materials include a sketch of the village and ethnographic materials about the tribe's governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. Clark also presented the tribe's leader with a President Thomas Jefferson peace medal. The explorers presented these tokens to leaders they believed desired to engage in political and commercial relations with the United States. These medals are called "sovereignty tokens" by historians because of their political and

diplomatic significance.

The Cush-Hook continued in the area throughout the first half of the Nineteenth Century. They maintained a permanent village within the current boundaries of Kelley Point Park and practiced agriculture and hunted and fished on their ancestral lands on the Multnomah River. Throughout this time, however, the tribe experienced the growing pressures from European settlers migrating into the area. In 1850 the Nation signed a treaty with Anson Dart, then the superintendent of Indian Affairs to the Oregon Territory. The goal of the federal government was to remove the tribe and open the valuable arable lands to settlers.

The Cush-Hook, motivated by their desire to avoid the settlers, agreed to the treaty which created a reservation for the them sixty miles west in the foothills of the Oregon coastal mountains. The U.S. Senate refused to ratify the treaty, however, and the tribe never received any of the compensation promised them by Dart, including compensation for their lands and additional benefits. Further, they were never federally recognized and Congress has never formally granted them any permanent title to the lands on which the reservation was situated. On the reservation, the Cush-Hook have struggled to survive and to maintain their tribal identity.

Against this background, Thomas Captain took it upon himself to act. Mr. Captain was apparently motivated by the actions of vandals removing from his ancestral lands artifacts sacred to the Cush-Hook. Certain trees within Kelley Point Park are hundreds of years old, dating back to the period when the Cush-Hook occupied the area. These trees were important to the Cush-Hook's religion and culture. Their shamans (or medicine men) had carved sacred totem and religious symbols into the living trees. Over the centuries, as the

trees grew, the images were lifted 25 to 30 feet from the ground.

The state of Oregon failed to act to protect the images. When vandals began to deface the trees and to even cut them down to sell, the state did nothing. It was then that Thomas Captain relocated to the area to do what he could to protect the sacred objects. But then he took it upon himself to cut down a tree into which an image had been carved by his ancestors, remove the section containing the image, and attempt to transport it back to the Cush-Hook reservation. It was then that the state acted. Thomas Captain was arrested by state troopers while returning to the reservation with the carved image

ARGUMENT

III. THE CUSH-HOOK NATION OF OREGON HELD ABORIGINAL TITLE TO THE LAND WHICH IS CURRENTLY THE SITE OF KELLEY POINT STATE PARK. HOWEVER, THE TRIBE'S TITLE WAS EXTINGUISHED BY THEIR VOLUNTARY RELOCATION TO A RESERVATION WHERE THEY CONTINUE TO RESIDE TODAY.

The Cush-Hook nation has, without argument, occupied the land in question from "time immemorial" until they relocated to a reservation created for them in coastal range. The records of William Clark of the Lewis & Clark expedition document the presence of the tribe's village. Clark has left us with additional evidence of Cush-Hook governance, religion, culture and tradition, and agriculture and hunting practices, all of which appear to establish their presence in the area sufficiently to show actual, exclusive and continuous use of the land. The nature of the title held was articulated early in our nation's history in *Johnson v. McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823).

Indeed, the federal government, or at least the Bureau of Indian Affairs (BIA) evidently considered the Cush-Hook's presence in the area as conspicuous enough to necessitate negotiation of a treaty to provide for the tribe's removal to the reservation. But the Cush-Hook never achieved federal recognition, and the federal government never endowed them with title beyond the right of occupancy. And when the tribe "voluntarily" – and certainly the pressures faced and the realities endured by the tribe make that term problematic at best – relocated, the limited rights they possessed to lands not part of the reservation were extinguished.

The "occupation" of the land in 2011 by Thomas Captain, described only as a Cush-Hook citizen, does nothing to alter the status of aboriginal title as extinguished. His presence

for a period of around one year falls far short of establishing a continuous presence. Additionally, Mr. Captain has indicated no authorization for his actions by the tribe.

The question considered here, whether the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park, stated as it is in the present tense, must necessarily be answered in the negative. This is not to argue that such title never existed; it did. Nor is there any implication that the tribe has no grounds or recourse for claims of past mistreatment; they do. But a finding of existing aboriginal title is inappropriate as regards the Cush-Hook and Kelly Point State Park.

In undertaking this case, the Court should adopt Rational Basis scrutiny. This level of review would mandate that a legitimate government interest exist and that the law in question in rationally related to that interest. The precedent for using rational review was established in *Morton v. Mancari*,417 U.S. 535, 1974. In that case, the Court upheld Indian preference in hiring at the Bureau of Indian Affairs. The Court reasoned that such preference was not racial preference but rather substantive preference for the federal tribal relationship and that the criteria were designed to make the agency more responsive to its constituent groups. Here, because there is no federally-recognized Cush-Hook national government there is no reason to apply the added protections accorded to members of federally recognized tribal groups. In short, Mr. Captain is a citizen of the state of Oregon and is entitled to no higher level of scrutiny as a result of his membership in the Cush-Hook Nation. As the Court found in *Mancari* being Indian is a political classification, not a racial one. As a result, rational basis of review is the appropriate standard to be applied in this case.

A. **The title held by the Cush-Hook at the time of their initial contact with European explorers over the land occupied by Kelley State Park was aboriginal title, meaning it carried with it only a right of occupancy as there was no Congressional intent to accord the tribe any other legal title.**

The process of determining whether a specific tribe occupied a particular area, and its incumbent difficulties, is spelled out in *Confederated Tribes of Warm Springs Reservation of Oregon v. U. S.*, 177 Ct. Cl. 184, 201 (1966), which reviews findings by the Indian Claims Commission as to the title held by seven bands in north central Oregon. The reviewing court was obligated to uphold the findings of the Commission when supported by "substantial evidence." Such evidence in that case consisted of testimony of expert witnesses, contemporary accounts, and oral testimony "descendants of members of the tribe who had actual knowledge of the extent of the use and occupancy of the land claimed by the tribe, which knowledge had been passed on by word of mouth."

The Cush-Hook Nation is greatly assisted in establishing their continuing presence in the area thanks in large part to the Lewis & Clark expedition. Not only did William Clark record his interactions with the Nation, but the explorers also gave the tribe's chiefs Thomas Jefferson peace medals. The journals of Lewis and Clark were also instrumental in *Warm Springs,* providing contemporaneous accounts which were to be "given some weight" in that case's determination of Indian occupancy. Additionally, the Cush-Hook's particular situation does not appear to have the additional impediment of competing claims faced in *Warm Springs.*

Assuming that the Cush-Hook could produce the necessary substantial evidence to establish their right of occupancy, it is important to keep in mind just what that right does and does not entail. The U.S. federal government's policy toward Native Americans has its origins in the interactions between original thirteen colonies and the East Coast tribes and Supreme Court's early formulation of the principles governing those interactions.

Specifically, in *Johnson v. McIntosh,* 21 U.S. 543, 5 L. Ed. 681 (1823), Chief Justice John Marshall articulated the Doctrine of Discovery – "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Id.* at 573.

This right of discovery, held by the British crown, was relinquished to the United States by treaty after the revolution. "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy." *Id.* at 574.

The Northwestern counterpart of this process was the acquisition of the northwest coast from Britain and Ireland, the "discoverers" by virtue of the fur traders who had established a European presence in the area, and the United States by treaty. The Oregon Treaty of 1846 established the boundaries between the U.S. and Canada.[1] It also conveyed to the federal government full title to the lands and subjugated the native tribes with their diminished "right of occupancy" to federal sovereignty.

The limited nature of aboriginal title is made clear in *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314 (1955). That case makes explicit the distinction between aboriginal title and a legal right to permanent occupancy. "It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed

[1] The text of the treaty is available on the website of the Center for Columbia River History at http://www.ccrh.org/comm/river/docs/ortreaty.htm.

original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress." *Id* at 279.

The right of occupancy (as opposed to "permanent occupancy") was due the tribes simply by virtue of their established presence on the land. "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned." *Johnson* at 603. The superior right of the federal government and the permissive nature of aboriginal title mean that establishing aboriginal title is of dubious consequence.

Aboriginal title carries no right to compensation for taking. Since occupancy is permissive, this permission can be withdrawn. In *Tee-Hit-Ton,* the tribe sought compensation from the federal government for timber taken from land the tribe occupied. "The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States." *Id* at 277.

Likewise, the government has never adequately recognized legal title of the Cush-Hook. The factors enumerated above which may establish aboriginal title of the tribe are not sufficient to establish a compensable legal interest. There is one decisive factor absent from the claims of the Cush-Hook. *Tee-Hit-Ton* articulates the requirement. "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id* at 278-279.

The Cush-Hook have not proven any Congressional intent that they were ever accorded a right of permanent occupation. The distinction is critical to the current discussion, first because of the implications for the following discussion of extinguishment and second because in establishing that the Cush-Hook have at some point held title to the land in question, the nature of that title and the recourse it allows the tribe should be made clear.

The burden of proving that there was Congressional intent by Congress to recognize title held by the Cush-Hook would fall on the tribe, but there are indicators that no such intent existed that can be discussed here. First, the presentation of the Thomas Jefferson peace medals did not carry any authoritative weight. Lewis's and Clark's beliefs notwithstanding, the medals created no obligation on the part of Congress to formally recognize the tribe. The medals can be understood to represent a desire to engage in political and commercial relations with the United States, but that desire does nothing to compel a formalization of those relations. Lewis and Clark had no capacity to act for Congress.

Second, the fact that the BIA negotiated a treaty with the Cush-Hook does not indicate recognition by Congress. In fact, Congress's failure to ratify the treaty would be evidence that they specifically did not intend such recognition. The Supreme Court has even stated, rather brusquely but explicitly in a claim by the Shoshone for compensation for land in the Utah territory taken by treaty, "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy." *Nw. Bands of Shoshone Indians v. United States,* 324 U.S. 335, 338, 65 S. Ct. 690, 692, 89 L. Ed. 985 (1945). The treaty in that case, the Box Elder Treaty, had in fact been ratified by the Senate, but the Court found no intent to recognize a greater right than the right of occupancy.

The Cush-Hook could probably, with the testimony of experts and the historical record available, establish aboriginal title to the current site of Kelly Point Park. However, that title is of the nature of a very limited right of occupancy and lacks any indication of Congressional intent to recognize any legal title of permanent occupation.

B. **Absent any legal title in the land beyond a right of occupancy, the tribe relinquished all claim to the land when they voluntarily relocated to a reservation created for them abandoning any claims of exclusive and continuous occupation.**

Any title that the Cush-Hook did possess as to the land at issue was extinguished when they removed to the reservation in the foothills of the Oregon coast mountains. While the Native American right of occupancy is a permissible right, it can only be extinguished by the Federal government. "It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it. *Johnson,* at 584-85. Further, any extinguishment must be explicit. Justice Douglas, in his opinion regarding title held by the Hualpai tribe of Arizona, acknowledges the clear right of the federal government to extinguish title, but maintains, "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *U. S. v. Santa Fe Pac. R. Co.,* 314 U.S. 339, 354, 62 S. Ct. 248, 255, 86 L. Ed. 260 (1941).

The plight of the Hualpai in *Santa Fe* is largely analogous to that of the Cush-Hook. Like the Cush-Hook, the Hualpai were faced with increasing encroachment on their tribal lands by white settlers. Particularly important in the arid Southwest was the appropriation by

those settlers of nearly all the water sources in the area as well as any arable land. One potentially important distinction is that the Hualpai actually requested that the federal government create a reservation. But the circumstances facing the tribe indicate that request was more an act of desperation than a reflection of any real desire to relocate. The "voluntary" nature of their removal is as questionable as that of the Cush-Hook.

The Hualpai reservation was created by executive order, not by treaty as the Cush-Hook reservation. But the Justice Douglas does not point to the actions of the federal government, but rather to those of the tribe. "But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of s 2 of the Act of July 27, 1866." *Id.* at 357-358.

It is this focus on the actions of the tribe and not those of the government that make irrelevant the fact that the treaty removing the Cush-Hook was never ratified. The failure of the government to abide by its promise, made as it was by their representative, Anson Dart, who was superintendent of Indian Affairs, is reprehensible. Failures such as this have given rise to successful claims of compensation, and, were that the issue here the Cush-Hook would undoubtedly stand on very solid ground. But that does not impact the voluntary nature of the tribe's relocation.

There is no indication that the tribe maintained any presence on the land in question after their relocation to the reservation. In fact, the state government's creation of Kelley Point Park may signal the demise of any claim the tribe may have maintained. In a case involving the Uintah Utes of Utah's claim to the site of a military fort on land to which they

may have previously possessed aboriginal title, the very establishment of the fort destroyed the tribe's chance to assert title. "Generally, the failure of an Indian tribe to satisfy any of the elements of aboriginal possession will defeat an aboriginal title claim. In particular, a tribe must demonstrate actual and continuous possession up until the date of the alleged taking. Therefore, the sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title." *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 787 (Fed. Cl. 1993).

The date of the "taking" (the issue of compensability notwithstanding) was the date of the removal of the Cush-Hook to the reservation created for them. Their continued presence to that date is not disputed here. Since then, until 2011, the Cush-Hook maintained no presence in Kelley Point Park. In 2011, Thomas Captain, apparently a citizen of the tribe, occupied the park for the stated purpose of reasserting the Nation's ownership of the land. Mr. Captain failed in that purpose.

Thomas Captain failed to establish fee simple title under the Oregon requirements for adverse possession. The only prong of the test for adverse possession satisfied by Mr. Captain is his "honest belief that the person was the actual owner of the property …" Or. Rev. Stat. Ann. § 105.620 (West). His claim would fail most conspicuously based on the fact that his possession of the land did not meet the requirements that it be maintained for ten years. Additionally, there is no evidence that his presence was exclusive or hostile – this is after all a state park – or whether it was open and notorious enough for the state to have received notice of his claim.

Mr. Captain also fails in his attempt to establish tribal aboriginal title. There simply is no mechanism available by which an individual can "re-establish" aboriginal title on land

now owned by the state. As *Johnson v. McIntosh* made clear, aboriginal title was the "title of occupancy." The courts have consistently required that "There must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." *Confederated Tribes of Warm Springs Reservation of Oregon v. U. S.*, 177 Ct. Cl. 184, 194 (1966) quoting *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 161 Ct. Cl. 189, 315 F. 2d 896, *cert. den.* 375 U.S. 921 (1963). The plain meaning of the term "extinguish" is to end.[2] Extinguishment, always the sole prerogative of the federal government made the property available for conveyance by full fee simple title to non-Indians. As the Oregon Supreme Court has stated, "once an easement is extinguished, it is gone forever." *Faulconer v. Williams*, 327 Or. 381, 395, 964 P.2d 246, 254 (1998).

C. Federal policy towards the Native Americans has advanced greatly and there are in place apparatuses for formal recognition and for compensation for past mistreatment which would better serve the tribe than any ad-hoc action by an individual acting on their own.

When Thomas Captain cut down the trees at Kelly Point Park to retrieve the ancient and sacred totems of the Cush-Hook people, it notable that his intention was to transport the images back to the coastal range where the Nation now resides. Thomas Captain recognized that, unfortunately, there is often a wide gap between the cultural, historical and religious connection a people feel toward a location and the legal rights they have to those same lands. It is a sad and shameful fact that the lands received by Native Americans in treaties with the federal government have not been the most desirable and are often marginal, offering scant resources for even a subsistence existence. The Cush-Hook have certainly had to contend with this reality. But they are fortunate. The land has provided a base on which

[2] See http://www.merriam-webster.com/

they can hinge their tribal identity. In fact, apparently, the tribe "can establish a substantially continuous tribal existence and [has] functioned as autonomous entities throughout history until the present," 25 C.F.R. § 83.3, which are the criteria necessary to apply for federal recognition.

The advantages of federal recognition are spelled out in the statute which states the purpose of the recognition process, "Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 25 C.F.R. § 83.2. By all accounts, the federal recognition process is grueling, expensive and takes an indefensible amount of time.[3] Any suggestion that tribes seek such recognition and the benefits of the federal trust relation should be accompanied by a dedication to improve this system and get these protections to the people most in need of them.

The extinguishment of the Cush-Hook title to the Kelly Point Park land should not be seen at all as an end to the tribe's right to be involved in decisions about the land's use and particularly the preservation of the sacred totems on the land. But the Cush-Hook also have a land base in their reservation. The importance of that fact has been eloquently stated by Timothy C. Seward, former general counsel for the Washoe Tribe of California and Nevada. He writes, "The survival of Indian tribes, like other nations, depends in part upon the retention of a viable land base. For most Indian tribes, culture is inextricably intertwined

[3] For numerous examples of the inefficiencies of the process, one need only look to the meetings of the Senate Committee on Indian Affairs. See Process of Federal Recognition of Indian Tribes: Hearing before the S. Comm. on Indian Affairs, 110th Cong. 1 (2007).

with the tribe's aboriginal homeland. The usurpation of Indian lands pushed many tribes to the brink of extinction. The very survival of nationhood and culture is, therefore, the paramount concern for many tribal leaders, and the repatriation of tribal homelands is often a crucial element in that battle for survival." *Survival of Indian Tribes Through Repatriation of Homelands*, Nat. Resources & Env't, Winter 2007, at 32.

The Cush-Hook Nation faces many challenges. The courts cannot remedy past injustices with a finding that the nation has retained title to lands that they have not occupied for decades. Justice Clarence Thomas, writing in *Carcieri v. Salazar,* has made clear that policy implications, no matter how valid and honorable, cannot guide the Courts' actions, stating succinctly, "We need not consider these competing policy views," 555 U.S. 379, 392, 129 S. Ct. 1058, 1066, 172 L. Ed. 2d 791 (2009). *Carcieri* involved the Indian Reorganization Act and its goal of reversing the effects of allotment and the resulting loss of Indian lands. The court refused to find that the Act included tribes not recognized at the time of its passage, because "Congress' use of the word 'now' in § 479 speaks for itself and 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id.* at 392-393 quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

It is true that the requirement of "occupation" to establish aboriginal title does not come from Congressional statute, but rather from a long line of court decisions which developed a standard used consistently in claims cases involving Indian lands. There is no indication, however, that the Courts would allow any more liberal an interpretation of "occupied" than it did of "now" in *Carcieri*. And certainly, there is no basis for believing they would allow it to be stretched to include the lands of Kelly Point Park.

In *Tee-Hit-Ton*, the court wrote

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.

Tee-Hit-Ton at 281-82. The timing of the opinion, written as it was in 1955, during the disastrous allotment era, makes it tempting to read these words ironically. But there is hope that the nation is progressing, not just riding the swing of the pendulum, in its policies toward Native Americans. The "grace" of which the Court speaks has been a worthy motivator for acts recognizing the rights of individual tribes. The correct course, as has been made clear by court opinions, is legislative, not judicial, and at the tribal level, not one taken by individuals who, frankly, may or may not speak for the interests of the tribe.

II. OREGON HAS CRIMINAL JURISDICTION TO CONTROL USE OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND NOTWITHSTANDING IT PURPORTED OWNERSHIP BY A NON-FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE.

A. Public Law 280 gave the State of Oregon jurisdiction over Indian affairs when it passes a law of general applicability.

American Indian tribes are sovereign nations with the rights and powers to regulate their own internal affairs. However, tribal authority is subject to the overriding power of Congress to regulate Indian affairs. In *United State v. Kagama*, 118 U.S. 375,1886, the Court held that Congress had the power to assume criminal jurisdiction over Indian tribes. Because the United States government claimed ownership of the land and because Indians were "wards" of the government, the Court found that Congress had the authority to regulate crime in

Indian Country. The Court reasoned that the federal government filled a vacuum left by the diminishment of the Indian nation. The extension of Congress authority over Indian tribes was furthered in *Lone Wolf v. Hitchcock,* 187 U.S. 553,1903. In *Lone Wolf,* the court held that Congress had the authority to abrogate Indian treaties at any time. This means that Congress has the power to cancel Indian treaties as they see fit.

These cases established the doctrine of plenary power. As applied to American Indian law, plenary power means that Congress can make any law concerning Indians that Congress sees fit. One such law is known colloquially as Public Law 280, 18 U.S.C. 1162; 28 U.S.C. 1360; and 25 U.S.C. 1321-1326; was passed by Congress in 1953. Public Law 280 created a "method whereby States may assume jurisdiction over reservation Indians." (See *McClanahan v. State Tax Commission of Arizona.* 411 U.S. 164, 177,1973). The law mandated that the states of California, Minnesota, Nebraska, Oregon (except the Warm Springs reservation), Wisconsin, and Alaska assume law enforcement authority over Indian lands. In full effect, Public Law 280 eliminated federal jurisdiction in Indian Country, authorized state criminal jurisdiction, and opened state civil courts to suits against Indians. 25 U.S.C. 1321-1326.

Public Law 280 was not an unlimited jurisdictional handover to the states. In *Santa Rosa Band of Indians v. King County,* 532 F.2d 655, 1975, the Court held that Public Law 280 subjected Indian tribes to state laws but not local ordinances. In short, the state assumed jurisdiction over Indian Country only when it passed laws of general application, or laws applicable to everyone, not only specific subjects. (See *Bryan v. Itasca County,* 426 U.S. 373 (1976); *Fort Mojave Tribe v. County of San Bernadino,* 543 F.2d 1253, 1257 (9th Cir. 1976); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463,

1979)

Two cases from the Minnesota Supreme Court help better explain the scope of P.L. 280. In *State v. Stone,* 572 N.W.2d 725,Minn. 1997, the Court held state laws regarding speeding, driver licensing, vehicle registration, seatbelt use, child restraint seats, car insurance, and proof of insurance were civil regulations for Public Law 280 purposes. The Ninth Circuit reached a similar decision in *Confederated Tribes of the Colville Reservation v. State of Washington,* 938 F.2d 146, 1991. In that case, the Court held that laws regarding speeding were local regulations rather than laws of general applicability. In *State v. Robinson,* 572 N.W.2d 720, Minn. 1997, the Court held that failure to yield to an emergency vehicle was a local ordinance and could not be enforced on tribal land. However, the Court held that the state did have jurisdiction to enforce the law dealing with underage drinking, reasoning that it was a law of general applicability and not a state regulatory law. In order to fill the void provided by the "local ordinance" string of cases, tribal governments have passed their own laws dealing with civil regulations. Determining what constitutes a state law of general applicability and a state regulatory ordinance must be determined by the Court on a case-by-case basis. (See *Santa Rosa Band of Indians v. King County* (532 F.2d 655, 1975).

B. Oregon Statutes concerning the protection of archaeological resources and historical objects constitute laws of general applicability.

The protection of archaeological resources is a law of general applicability. A statewide protection as codified in Or. Rev. Stat. 358.920 (1)(a) clearly states that a person may not "excavate, injure, destroy, or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit." Or. Rev. Stat. 358.920 (C) makes actions outlined in 358.920(1)(a) a Class B misdemeanor in the state. These statutes fill a void left by federal authorities who

sought to protect archaeological resources in 1979 when Congress passed the Archaeological Resources Protection Act, 16 U.S.C. 470aa-470mm. In that act, Congress recognized that the several states may choose to enact laws stiffer than those outlined. The State of Oregon is one such state. In addition to the federal protections provided by the federal Archaeological Resources Protection Act, Oregon adopted their own statutes for the protection of these priceless, non-renewable resources. Courts across the nation have held that these state laws, that go beyond the baseline established by the federal government, were valid unless Congress intended only its legislation to be valid. (See *California Coastal Commission v. Granite Rock Co.* 480 U.S. 572, 1987).

The Oregon laws enacted to protect the archaeological resources of the state were designed to go beyond the federal laws and, thus, establish fuller protections for resources that are often the targets of looters. Although done with different intentions, the actions of Mr. Thomas Captain are similar to those of the very vandals he acted to stop. In short, Mr. Captain's action of cutting down the sacred trees in order to protect the ancient carvings from modern vandals, he is no better than those very vandals. Mr. Captain's actions are similar to those taken by defendant John Ligon in *United States v. Ligon,* 440 F.3d 1182 (9th Cir.) 2006. In that case, the court held that petroglyphs carved out of the rock in a Nevada national forest were the property of the United States Forest Service and that the defendant was responsible for more than $20,000 in damages for removing the petroglyphs. Here, Mr. Captain cut down the sacred trees in order to return the carved images to his tribe and was stopped in route by members of the Oregon State police. Although Mr. Captain may have had a different intention when he cut down the trees than Mr. Ligon who carved out the petroglyphs their actions are the same. Mr. Captain destroyed trees protected by as an

archaeological resource in violation of a state statute deeply rooted in a federal statute. Because the Oregon statutes at question are rooted in a federal statute that does not preempt the state law, the Oregon law constitutes a civil law of general application.

If the Court were to find that these statutes constitute a local regulatory scheme rather than a law of general application, the question remains what recognized tribal court would hear this issue? The actions of Mr. Captain took place on land administered by the State of Oregon. He is not a member of a tribe with a recognized governmental body and no court system designed to handle issues such as the one in question. As the Oregon statutes are rooted in the federal statute and there is no recognized tribal court system to hear this case, only the Oregon criminal courts are equipped to hear this case involving a law of general application.

Because Or. Rev. Stat. 358.905-358.961 and 390.235-390. 240 are laws of general application and Public Law 280 established jurisdiction for the State of Oregon, the trial court's decision to fine Mr. Captain for damaging an archaeological site and a cultural and historical artifact was not in error. In the case at hand, Mr. Captain occupied land inside of Kelley Point Park and cut down trees that had grown on the site for more than 300 years. Although Mr. Captain's motives were those of a member of the Cush-Hook tribe seeking to protect totems and carvings sacred to his tribe and to stop local vandals from damaging the tree and profiting from the sale of those carvings, his actions were as illegal as those of the very vandals he was trying to stop. When Mr. Captain cut down one of the tree and removed a carving to take back to his nation's coastal mountain range home, he was in violation of the Oregon statutes, rooted in federal legislation, that protected the sacred grove and the images carved on the trees. The charges for violation of Or. Rev. Stat. 358.905-358.961 and

390.235-390.240 must stand.

There are avenues and ways to address this type of claim and laws available to protect the archaeological and historical value of the site located inside Kelley Point Park. A concerted action on the part of the tribe addressed to the federal claims courts and the Bureau of Indian Affairs are those avenues. The path to federal recognition is long and hard, the desire to claim and protect a sacred area is equally fraught with numerous pitfalls. However, the way to address those pitfalls is not for one man to take matters into his own hands, occupy a state park, destroy sites and items of specific archaeological and historical value, and remove items from that site. Mr. Thomas Captain was in violation of Oregon law when he cut down 300 year old trees and cut sections of those felled trees in order to take sacred carvings back to his tribe. The claim of the Cush-Hook nation to the land of Kelley State Park is a matter that can only be properly addressed by the Department of the Interior through the Bureau of Indian Affairs; a body that would also handle the issue of official recognition for the tribe. Vigilante action, however, is not the answer to the legitimate claims of the Cush-Hook Nation.

CONCLUSION

The District Court and Oregon Court of Appeals were in error when they found that the Cush-Hook Nation owned the land inside of Kelley Point State Park by aboriginal title. The Cush-Hook Nation gave up any and all claims to that land when they voluntarily vacated the area and established themselves on a reservation 60 miles to the west in the foothills of the Oregon coastal range. Although the nation's treaty with the United States was never ratified, the actions of the tribe, rather than the United States, have been found to be pivotal

to determining land claims. When the Cush-Hook left the land that now constitutes Kelley Point State Park, they gave up their title.

The passage of Public Law 280 in 1953 gave the State of Oregon jurisdiction over Indian people when it passes laws of general applicability. The statutes regarding the protection of the state's archaeological and historical resources constitute laws of general applicability and are, therefore, valid as applied to members of the Cush-Hook Nation and the land of Kelley Point State Park. The Appeals Court was not in error when it found that Mr. Thomas Captain was guilty of desecrating an archaeological site and destroying an historical artifact.

Mr. Thomas Captain, a citizen of the Cush-Hook Nation, took matters into his own hands when he illegally occupied Kelley Point State Park and cut down ancient trees because of their value to the Cush-Hooks. The Court should reserve the decision of the District and Appeals Courts in regard to the title to the land of Kelley Point State Park and uphold the fines against Mr. Captain for his destruction of an important archaeological and historical site that has value to all of the citizens of Oregon.