No. 2013-40

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner

v.

THOMAS CAPTAIN,

Respondent and cross-petitioner

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF UNITED STATES

BRIEF FOR THE PETITIONERS

TEAM NO: 40

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

I. Did the United States extinguish the Cush-Hook Nation's aboriginal title to the land in Kelley Point Park?

II. Does the State of Oregon have 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 THE CASE

I. STATEMENT OF THE PROCEEDINGS

Petitioner, State of Oregon, brought criminal action against respondent, Thomas Captain, in the Oregon Circuit Court for the County of Multnomah ("Circuit Court") for (1) trespassing on state lands, (2) cutting timber in a state park without a permit, and (3) desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961 *et seq.* (2012) and Or. Rev. Stat. 390.235-390.240 *et seq*. (2012). Record on Appeal ("ROR") at 2-3. After a bench trial, the Circuit Court found Captain not guilty of count one (trespass) and count two (cutting timber) and guilty of count three (desecration). ROA 3-4.

In its conclusions of law, the Circuit Court held that: the Oregon Donation Land Act, 31 Cong. Ch. 76, 9 Stat. 496-500 (1850) ("ODLA"), erred by describing all lands in the Oregon Territory as "public lands," the Cush-Hook Nation ("Cush-Hook") owns the land in question because its aboriginal title was never extinguished, and as a result, the State's ultimate acquisition of the land was void. ROR at 3-4. The Circuit Court further held that the State properly brought criminal action for count three because Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.*, both apply under Public Law 280, 18 U.S.C. §1162 (2012) ("Public Law 280") regardless of whether the land was tribally owned or not. *Id.* at 4.

Both the State and Captain appealed the Circuit Court's decision to the Oregon Court of Appeals, which affirmed without writing an opinion. *Id.* at 4. The Oregon Supreme Court subsequently denied review. *Id.* The State and Captain then both filed petitions for certiorari to the United States Supreme Court. *Id.*

II. STATEMENT OF FACTS

Kelly Point Park is part of a much larger area that encompasses the original homelands of the Cush-Hook Nation of Indians. ROA at 1. The Cush-Hook Indians occupied the area since time immemorial. *Id.* The Cush-Hook's permanent village was located in the area that is now enclosed by Kelley Point Park's boundaries.

In 1806, Clark of the Lewis & Clark expedition, encountered the Cush-Hooks and gave the headman/chief one of the President Thomas Jefferson peace medals. *Id.* When the Cush-Hook Nation received the peace medal, it merely indicated that the United States wished to engage in political and commercial relations at some point in the future. *Id.* Furthermore, the peace medals only symbolized the potential for future recognition of the tribe by the United States. *Id.*

In 1850, the Cush-Hook Nation entered into a treaty-agreement with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, to remove the entire tribe from its village within the boundaries of present day Kelley Point Park to a reservation area sixty miles westward. ROA 1-2. Prior to the non-ratification of the treaty by the United States Senate, the Cush-Hook relocated from their aboriginal homeland to the newly formed reservation area in the foothills of the Oregon coast range of mountains, where they reside presently. *Id.* at 2. The Senate ultimately refused to ratify the treaty-agreement and the Cush-Hook Nation subsequently only received the designated lands in the foothills of the Oregon coast range of mountains. *Id.* Pursuant to the Dart treaty-agreement, the tribe relocated and has remained there ever since. *Id.* The Cush-Hook Nation of Indians is not politically recognized by either the United States or Oregon. ROA at 1. Furthermore, there

has been no subsequent attempt made by the United States to "recognize" the Cush-Hook Nation. ROA at 2.

In 1850, Congress enacted ODLA, which decreed a grant of fee simple title to "every white settler" who "resided upon and cultivated the [land] for four consecutive years." *Id.* (*quoting* 9 Stat. at 496). Through ODLA, Joe and Elsie Meek applied for and claimed the land that now comprises Kelley Point Park. ROR at 2, 3. The Meeks did not cultivate nor did they live upon the land for the required four years. Nevertheless, the Meeks received fee title to the land in question and bequeathed title to their descendants. *Id.* In 1880, the Meeks' descendants sold the land to the State of Oregon. *Id.* The state of Oregon thereby created present day Kelly Point Park within the limits of Portland, Oregon. ROA at 1.

In 2011, Thomas Captain, a Cush-Hook citizen, moved from the Cush-Hook Nation's coast range land to Kelley Point Park; where he erected temporary housing within Kelley Point Park. ROA at 2, 3. In violation of State law, Captain proceeded to occupy the park and cut down a tree containing ancestral carvings. *Id.* State troopers detained Captain while he was returning to the Cush-Hook Nation's territory in the coastal mountain range with possession of the section of the tree that contained the carving. *Id.*

STANDARD OF REVIEW

The standard of review for an interpretation of whether aboriginal title has been extinguished by treaty or statute is *de novo*. "We review de novo the district's interpretation of treaties, statutes and executive orders." *See United States v. State of Washington,* 969 F.2d 752, 754-55 (9th Cir. 1992), cert. denied, *Lummi Indian Tribe v. Washington,* 507 U.S. 1051 (1993).

ARGUMENT

I. The United States affirmatively extinguished the Cush-Hook Nation's Purported Aboriginal Title.

The United States extinguished, by way of treaty and statute, any aboriginal title that the Cush-Hook Nation may have held to the territory now identified as Kelley Point Park. As American colonists expanded the territory of the United States' Westward across North America, many Native Nations were displaced from their original homelands:

> Although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign-first the discovering European nation and later the original States and the United States-a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). In the present case, the United States, as opposed to the state of Oregon, extinguished the Cush-Hook Nation's aboriginal title to Kelley Point Park.

In 1823, this court held that the doctrine of discovery provided the means by which the United States acquired exclusive title to territory that had previously been held by Native Nations from time immemorial. *See Johnson v. M'Intosh*, 21 U.S. 534, 574 (1823). By exercising the doctrine of discovery, the United States reduced Indian held title to mere occupancy. *See*, *Id.* at 592. Furthermore, the court held that a Native Nation's aboriginal title may be extinguished at any time because "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. *Id.* at 587. This principle was later affirmed in 1831, when this court stated "The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government." *Cherokee*

Nation v. State of Georgia, 30 U.S. 1, 2 (1831). Furthermore, this court held that "An extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941). The United States exercised its sovereign right to extinguish aboriginal title when it entered into a voluntary treaty-agreement with the Cush-Hook Nation. Furthermore, the United States took affirmative steps to quell any doubt that aboriginal title was extinguished when it enacted the Oregon Donation Land Act hereinafter ("ODLA").

A. The Cush-Hook Nation's Purported Aboriginal title was extinguished pursuant to receipt of consideration in the treaty-agreement with the United States.

The Cush-Hook Nation's aboriginal title to their original homelands in Kelley Point Park was voluntarily extinguished as a result of their treaty with the United States that relocated their settlement away from the westward expansion of American settlers. ROA at 1,2. Treaties formed between the United States and Indian tribes are viewed as "contracts" between sovereigns. CAROLE E. GOLDBERG, ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 9 (6th ed. 2010).

The agreement that the United States and the Cush-Hook Nation entered into cannot be described as an involuntary agreement on behalf of the Cush-Hook Nation. Involuntary extinguishment of aboriginal title has occurred as Indian tribes were forcibly removed by the United States from the land that they occupied. *See Santa* Fe, 314 U.S. at 356. In the present case, however, the Cush-Hook Nation was not forcibly removed from their aboriginal lands in Kelley Point Park. In the *Santa Fe* case, the Walapai tribe observed that encroaching settlers were quickly populating the surrounding territory and the tribe "wanted a reservation while there was still time to get one." *Santa Fe*, 314 U.S. at 359. The court viewed the

encroaching settlers and recurring tension between the tribe and settlers not as forcible removal but as voluntary cession via treaty. *See Id.* As in *Santa Fe*, the Cush-Hook Nation voluntarily agreed to the extinguishment of aboriginal title in Kelley Point Park when it moved westward to its new reservation pursuant to the treaty agreement and remained there for over one hundred and fifty years without reasserting occupancy.

The Cush-Hook Nation's purported aboriginal title is merely a right to occupy the land, subject to the Federal Government's will, because "it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer v. United States*, 261 U.S. 219, 227 (1923). In the present case, the will of the United States was to extinguish aboriginal title. Because a treaty is "essentially a contract between two sovereign nations," the treaty is valid if proper consideration is tendered. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). The treaty-agreement between Cush-Hook Nation and the United States was nothing more than a title swap, whereby Cush-Hook Nation received equivalent aboriginal title in the new territory in exchange for the extinguishment of aboriginal title in Kelley Point Park. The aboriginal title that Cush-Hook Nation received for lands West of Kelley Point Park was valid voluntary consideration to effectuate extinguishment. Furthermore, it has been held that Aboriginal title to land may be extinguished even though it is not expressed in the treaty "The Tribe signed the 1854 Treaty which created the Wolf River reservation and extinguished any aboriginal rights the Menominee possessed, including aboriginal rights in land or water not specifically mentioned in any treaty." *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 462 (1998). Therefore, the United States superintendent of Indian Affairs for

the Oregon Territory entered into a treaty agreement whereby the Cush-Hook Nation received aboriginal title to the new territory that extinguished aboriginal title to Kelley Point Park.

An Indian tribe's aboriginal interest in land is of lesser quality "[Aboriginal title] means mere possession not specifically recognized as ownership by Congress." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Arguing in the alternative, but not conceding the fact that the Cush-Hook Nation received compensation under the treaty by way of a title-swap, the United States was not obligated to compensate Cush-Hook Nation pursuant to the treaty agreement. In a similar case concerning the compensation for extinguishment of aboriginal title, this court held that "This leaves unimpaired the rule derived from *M'Intosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment." *Tee-Hit-Ton*, 348 U.S. at 284-285. Furthermore, the United States is required to compensate a taking of aboriginal title only when there is specific legislative direction. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106 (1949). In the present case, the United States was not required to compensate the Cush-Hook Nation for the extinguishment of their aboriginal title in Kelley Point Park because aboriginal title is a lesser form of title that is not protected by the Fifth Amendment. Furthermore, there is no indication in the record that Congress directed the compensation of Cush-Hook Nation for Kelley Point Park. Even if the treaty-agreement between the Cush-Hook Nation and the United States could be construed as directing compensation, nevertheless, the treaty was not ratified by Congress. ROA at 2. Therefore, the treaty is not an act of Congress that would have required compensation under *Hynes* to effectuate the extinguishment of aboriginal title.

B. The Oregon Donation Land Act was adverse to the Cush-Hook Nation's Purported Aboriginal Title.

In 1850, Congress enacted the ODLA, which provided for the creation of a surveyor-general who carried out the demarcation of the boundaries of public land in the Oregon Territory. Oregon Donation Land Act, ch, 76 9 Stat. 496-500 (1850). The State Circuit court erred when it concluded that the ODLA described all lands in the Oregon Territory as public lands of the United States. *See Id.* Nevertheless, the State Court found that Joe and Elsie Meek received fee title to the land that encompassed the Cush-Hook Nation village pursuant to the ODLA. Therefore, the surveyor-general demarcated Kelley Point Park as public land pursuant to ODLA and extinguished any aboriginal title to the land.

This court has long held that the canon of construction for Congressional acts involving Indians is that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation . . . ." *Choate v. Trapp*, 224 U.S. 665, 675 (1912). The ODLA was not a doubtful expression of Congressional intent and should not be construed as accomplishing anything less than the complete extinguishment of aboriginal title on territory surveyed as public land. This court has held that purchase and conquest are not the sole methods by which the United States may extinguish aboriginal title "'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, *by the exercise of complete dominion adverse to the right of occupancy*, or otherwise, its justness is not open to inquiry in the courts." *Santa Fe*, 314 U.S. at 347 (emphasis added) (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)). The ODLA extinguished aboriginal title to Kelley Point Park because Congress exercised complete

dominion over the Oregon Territory. Furthermore, the ODLA also granted fee title to settlers, which cannot be construed as anything but adverse to the Cush-Hook Nation's purported right of aboriginal occupancy. Therefore, the ODLA was not a "doubtful expression" because it left no doubt that the land it granted to settlers was free from any aboriginal title.

Where tribal members were allowed to "harvest timber" and use the land in other ways is evidence that the former reservation land was not diminished by Congressional act. *See Solem v. Bartlett*, 465 U.S. 463, 475 (1984). However, there is no language in the ODLA that reserved any use by the Cush-Hook Nation to former reservation land. This court concluded that Indian country was extinguished when a reservation was diminished and later re-opened for settlement by non-Indians. *See Hagen v. Utah*, 510 U.S. 399, 401 (1994). The ODLA created public land in the Oregon Territory and granted fee title to "every white settler or occupant of the public lands … being a citizen of the United States," which meets the requirement under *Hagen* for extinguishment of aboriginal title. Congressional intent may be interpreted by evaluating the justifiable expectations of the ODLA:

> The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land, use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress ...

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977). If there were any doubt that Congress had not extinguished aboriginal title in the treaty-agreement, there certainly was no doubt that the justifiable expectation of the ODLA was to extinguish aboriginal title when it granted settlers fee title to public lands.

The original homelands of the Cush-Hook Nation encompassed an area of land that was larger than Kelley Point Park. ROA at 1. This fact suggests the possibility of private fee owners that would be directly affected by the non-extinguishment of aboriginal title. To construe the ODLA as a non-extinguishment of aboriginal title would render a devastating consequence to the fee owners of land granted under the act and this court has held that "nothing remains but to sanction a great injustice . . . ." *See Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357 (1926). Therefore, the State Court erred as a matter of law when it concluded that the United States had not extinguished aboriginal title.

C. The extinguishment of aboriginal title is a non-justiciable political question.

The Constitution grants Congress plenary power over Indian affairs, which includes the power to enact laws, ratify treaties, and extinguish the aboriginal title held by Indian tribes. U.S. Const., Art. I, § 8, cl. 3; *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-565 (1903); *Nadeau v. Union Pac. R.R.*, 253 U.S. 442, 446 (1920); *Quinault Allottee Assn. v. United States*, 485 F.2d 139, 202 (Ct.Cl. 1973); *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974). Furthermore, it has been consistently held that Congress' plenary authority over the tribal relations "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf*, 187 U.S. at 565.

In the present case, Congress passed the ODLA that allowed American settlers to take fee title to land in the Oregon Territory upon which they resided and cultivated for a period of time. Oregon Donation Land Act, ch, 76 9 Stat. 496-500 (1850). Regardless of whether actual settlement occurred, aboriginal title had been extinguished and has since been treated as extinguished for over one hundred and fifty years by the fact that the state has taken

jurisdiction over Kelley Point Park. ROA at 2. The relationship between Indian tribes and the United States has been deemed to be political in nature and subject to Congress' plenary authority, therefore the "extinguishment of Indian title based on aboriginal possession is of course a different matter … The manner, method and time of such extinguishment raise political not justiciable issues." *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 66 (1886). Whether the ODLA extinguished aboriginal title is a non-justiciable political question and the fact remains that the United States offered fee title to lands under the ODLA, an action that cannot be deemed anything but an extinguishment of aboriginal title.

D. The abandonment of Kelley Point Park by the Cush-Hook Nation was an extinguishment of any purported aboriginal title.

In order to establish and maintain a claim of aboriginal title, the Indian tribe must show proof of continuous possession. FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.09 (2005). In the present case, the Cush-Hook Nation has not been in continuous possession so as to maintain a claim of aboriginal title. Therefore, the State Court was wrong as a matter of law when it concluded that aboriginal title was not extinguished.

If the Cush-Hook Nation initially established aboriginal title by occupying the greater territory of Kelley Point Park, then it might be possible to establish aboriginal title by "showing that it has inhabited the land 'from time immemorial.'" *Greene v. Rhode Island*, 398 F.3d 45, 49-50 (1st Cir. 2005); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 481-82 (1st Cir. 1987) (quoting *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-35 (1985)). However, since abandoning Kelley Point Park, the Cush-Hook Nation made no further attempt to re-assert its purported aboriginal right to occupy the land. Continuous possession does not manifest and thereby does not warrant revival of aboriginal title when:

> This long lapse of time, during which the [Tribe] did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks.

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 216-17, (2005). The one hundred and fifty year abandonment of Kelley Point Park certainly amounts to an extinguishment of aboriginal title under *Sherrill*. This court has also concluded that when a tribe ceased to possess its aboriginally held property for more than half a century, without any factual finding of an attempt to reassert title, the title was abandoned. See *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917). Therefore, the State Court erred as a matter of law when it concluded that Cush-Hook Nation's purported aboriginal title had not been extinguished by abandonment.

Evidence of voluntary abandonment is one factor that this court has used to conclude that a tribe has abandoned its aboriginal title "Indian settlement on a reservation should be seen as an abandonment of claims only when the specific circumstances warrant that conclusion." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 946 (Ct. Cl. 1974). Thus, the court often evaluates "all of the circumstances" when concluding that aboriginal title was abandoned. *Turtle Mountain*, 490 F.2d at 946-47 (quoting *Santa Fe*, 314 U.S. at 357-58). The fact that the Cush-Hook Nation voluntarily entered into a treaty with the United States, moved west from Kelley Point Park, and never attempted to reassert occupancy rights to the land, is evidence of cumulative circumstances that amount to an abandonment of aboriginal title. Furthermore, there is no evidence that the Cush-Hook Nation sanctioned Thomas Captain's attempt to reassert the tribe's occupancy rights, if any, to Kelley Point Park. ROA at 2. Therefore, the State Court erred when it

concluded that the Cush-Hook Nation's aboriginal title had never been extinguished, because there are no facts in dispute to the contrary.

Furthermore, arguing without conceding that aboriginal title was abandoned, the passage of time precludes the tribe from re-asserting the remedy it seeks. The doctrine of laches prevents the Cush-Hook Nation from re-asserting its possession of Kelley Point Park because "It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *See Badger v. Badger*, 69 U.S. 87, 94 (1864). In the present case, the State of Oregon has legitimately relied on the Cush-Hook Nation's abandonment of its right of occupancy in and around Kelley Point Park. Therefore, the doctrine of laches would prevent the assertion of any un-extinguished aboriginal right to Kelley Point Park.

II. Under the Oregon Donation Land Act and Public Law 280, 18 U.S.C. §1162, the State of Oregon has criminal jurisdiction over the land in question regardless of the Cush-Hook Nation's claim of aboriginal title over the land.

A. The State of Oregon owns the land and thereby may assert jurisdiction over it.

For over one hundred and fifty years, Oregon has maintained possession of and jurisdiction over Kelley Point Park. As established in Section I, the Cush-Hook Nation does not own aboriginal title to Kelley Point Park. Therefore, Oregon retains title and jurisdiction over the land in question. A showing of long-standing assumption of jurisdiction is, in state boundary disputes, entitled to considerable weight. *Rosebud Sioux,* 430 U.S. at 605 n.28 (1977); *see Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); *Arkansas v. Tennessee*, 310 U.S. 563, 569 (1940). The Meeks "received fee title" to

the land now known as Kelley Point Park and their descendants properly conveyed the land to the State of Oregon. ROA at 2,3.

Even if this Court were to assume, as insinuated by the lower court, that the United States conveyed the land to the Meeks in error, then the land would have remained as public surplus land of the Oregon territory pursuant to the ODLA. As a result, the land would have then transferred to the State of Oregon as public land upon its admission to the Union in 1859. Therefore, the State of Oregon properly asserted its criminal jurisdiction when it convicted Thomas Captain for damaging an archaeological site and a cultural and historical artifact under Or. Rev. Stat §358.920(1)(a) and §390.235(1)(a).

B. The State of Oregon has jurisdiction over the land because the Cush-Hook Nation is not a federally recognized tribe with criminal jurisdictional authority.

Assuming *aruguendo* that the Cush-Hook Nation has aboriginal title to the land in question, this Court must determine whether the Cush-Hook Nation, the Federal government, or the State of Oregon may assert criminal jurisdiction over the land. Here, even if the Cush-Hook Nation is determined to hold aboriginal title, it is not a federally recognized tribe capable of asserting criminal jurisdiction. Only federally recognized tribes may assert concurrent criminal jurisdiction with the Federal Government over tribal lands. In the absence of tribal authority, the federal government would assume exclusive jurisdiction over the land.

i. An Indian tribe derives its jurisdiction from inherent authority.

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie* 419, U.S. 544, 557 (1975) (*quoting Worcester v. Georgia*, 31U.S. 515, 557 (1832)). Indians are "a separate people

possessing the power of regulating their internal social relations." *Mazurie* 419 U.S. at 557 (*quoting United States v. Kagama*, 118 U.S. 375, 381-381 (1886)). In *Worcester*, this Court stated that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . ." 31 U.S. at 559. The issue in *Worcester* was whether state law could be imposed on Indians living within a reservation. *Id.* at 594. This Court held that States do not have the authority to impose their laws over the Indian Nations and that any such authority was reserved to the federal government. *Id.* at 559; *see also* S. Rep. No. 268, 41st Cong., 3d Sess., 10 (1870) ("Their right of self government, and to administer justice among themselves . . . has never been questioned."). In *United States v.Wheeler*, 435 U.S. 313, 322-23 (1978), this Court stated:

> The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. Before the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

However, inherent tribal sovereignty is not absolute and is subject to the dominion of the federal government through Congressional plenary power. Congressional power over Indian affairs exists under the Indian Commerce Clause, U.S. Const., Art. I sec 8, cl. 3, which grants Congress the power "[t]o regulate Commerce . . . with the Indian tribes." *United States v. Lara*, 541 U.S. 193, 200 (2004); *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (The Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs.); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (The right of tribal self-government depends on and subject to the broad power of Congress.). This regulatory power grants Congress "plenary

and exclusive authority over Indian affairs." *Lara*, 541 U.S. at 200. Congress and this Court have interpreted this power as authorizing Congress, through legislation, to relax or restrict tribal sovereign authority. *Id.* at 202.

One aspect of tribal governance that both Congress and this Court have recognized is that tribes inherently retain jurisdiction over criminal offenses that take place within their tribal territory. However, this right is subject to the ultimate power of Congress to lift or relax restrictions on criminal jurisdiction. *Id.* at 200-01. Tribal criminal jurisdiction is demarcated by two factors, (1) the status of the individuals involved (i.e. Indian tribal member, non-member, or non-Indian) and (2) the status of the land where the offense occurred.

The inherent right of tribes to assert criminal jurisdiction is limited to the enforcement of criminal laws against tribal members on tribally held lands. *Wheeler,* 435 U.S. at 322. (Indian tribes have power to enforce their criminal laws against tribe members.). Tribal inherent authority does not grant jurisdiction over non-Indians. A claim of inherent authority to assert jurisdiction over non-Indians contravenes the dependent status of Indian nations. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 197-203 (1978). Because Indians did not have recognized criminal jurisdiction over non-Indians prior to their designation as "domestic dependents" in, they are precluded from asserting that jurisdiction thereafter. *Cherokee Nation*, 5 Pet. at 17; s*ee Wheeler,* 435 U.S. at 326. In 1885, Congress enacted the Major Crimes Act, 18 U.S.C. §1153 (2012). The Major Crimes Act placed 13 types of "major" crimes, such as murder, arson, and robbery under federal criminal jurisdiction if they are committed by an Indian in tribally held territory.[1] This act functioned as a divesture of

[1] Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 U.S.C. §§2241

exclusive tribal jurisdiction over major offenses in Indian country pursuant to Congressional plenary power. This Court recognized this subjugation of Indian jurisdictional authority, stating, "[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977). *Antelope* suggests that the tribal right to prosecute Indians within Indian territory was one of inherent authority of the tribe, subject only to divestment by an act of Congress. By identifying the crimes in which the federal government will encroach on a tribe's inherent right to govern itself through the prosecution of criminal offenses, the federal government also recognized the jurisdictional domain of Indian tribes over all other areas of criminal prosecution.

For Indian tribes, the other major demarcation of jurisdictional authority is territorial. Indian tribes may only assert jurisdiction over Indians where the offense occurred on tribal lands. *See Worcester*, 31 U.S. at 561 (Cherokee nation was a distinct community occupying its own territory in which the laws of Georgia can have no force.). As *Antelope* indicated, tribal courts have jurisdiction over all crimes committed by enrolled Indians *within Indian country* with exception of major crimes. 430 U.S. at 643 n.2. Because many tribes do not reside on traditional reservations, Congress and the Courts have attempted on several occasions to qualify tribally owned lands to establish jurisdiction. See *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. McGowan*, 302 U.S. 535

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et seq.], assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title [18 U.S.C. §1365], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [18 U.S.C. §661] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. §1153

(1938). As discussed *infra*, if aboriginally held, the land in question is "Indian country" according to 18 U.S.C. §1151(a) (2012). In 18 U.S.C. §1152, Congress asserted federal jurisdiction over criminal offenses committed in "Indian country" *except* for crimes committed by Indians against Indians, and Indian offenses committed in "Indian country" which has been punished by the local law of the tribe. This again is an example of Congressional recognition that within Indian country, tribes retain inherent jurisdiction over Indians.[2]

ii. The Cush-Hook Nation is not a federally recognized tribe.

Federal recognition imposes on the federal government a fiduciary trust relationship that "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, *and to establish a separate judiciary*." H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994). The "traditional understanding" of a tribe is that of a distinct political society, separated from others, capable of managing its own affairs and governing itself. *Lara*, 541 U.S. at 204-205 (*quoting Cherokee Nation*, 30 U.S. at 1.).

The Cush-Hook Nation is not a federally recognized Indian tribe. According to 25 U.S.C. §479a-1(a) (2012), the Secretary of the Interior must publish a list of all Indian tribes "which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Cush-Hook Nation is not on that list. ROA at 3; §479a-1(a). Therefore, the Cush-Hook Nation is not endowed with the political status of other federally recognized Indian tribes.

[2] Congress amended the Indian Civil Rights Act of 1968 to expand tribal criminal jurisdiction over both member and non-member Indians. 25 U.S.C. §1301(2) (2012).

An Indian tribe does not exist as a legal entity unless the federal government decides it exists. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) *cert denied*, 125 S.Ct. 2902 (2005). Non-recognized tribes suffer from a lack of federal respect for their sovereignty and land bases, lack of protection from state jurisdiction, lack of access to repatriation rights and other forms of cultural protection under federal law, and denial of most benefits available to tribes that enjoy a government-to-government relationship with the United States. COHEN at § 3.02[3]*; see* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271, 276-279 (2001). They do not enjoy the same status, rights and privileges accorded federally recognized tribes. *Kahawaiolaa*, 386 F.3d at 1273 n.1; *see e.g.* 25 C.F.R. §83.2 (2012). The lack of federal recognition does not deny the existence of an Indian tribe, but it does preclude their acknowledgement for legal purposes. *See Kahawaiolaa*, 386 F.3d. at 1273 n.1; *Montoya v. United* States, 180 U.S. 261, 265-66 (1901).

iii. The Cush-Hook Nation may not assert its inherent authority because it is not a federally recognized tribe.

The right of an Indian tribe to assert criminal jurisdiction over its lands derives from its retained inherent authority to govern itself within its territory. However, Congress maintains the right to restrict tribal expressions of inherent authority under its plenary power over Indian affairs. Because federal recognition is a precondition to federal acknowledgement of tribal legal existence, a non-recognized tribe may not assert criminal jurisdiction to the detriment of the state or federal authority. The Cush-Hook Nation is not a recognized Indian tribe. Therefore, the lack of federal recognition precludes the Cush-Hook Nation from asserting criminal jurisdiction over the land in question.

C. The federal government ceded criminal jurisdiction over the land in question to the State of Oregon in Public Law 280, 18 U.S.C. §1162.

In the absence of tribal jurisdiction over aboriginally held land, the federal government necessarily assumes jurisdiction over the land pursuant to Congress' plenary authority. U.S. Const. Art. I, §8, cl. 3. However, Indian lands in the State of Oregon are subject to state criminal jurisdiction pursuant to Public Law 280, 18 U.S.C. §1162 ("Public Law 280") (2012). With the enactment of Public Law 280, Congress expressly delegated criminal jurisdiction in Indian country to the State of Oregon. No federal statute exists that divests Public Law 280 states of jurisdiction over Indian country. Therefore, even if the this Court finds that the land in question is aboriginally held *and* that the inherent rights of the Cush-Hook entitle them to criminal jurisdiction, Congress' express delegation of jurisdictional authority in Public Law 280 still grants the State of Oregon criminal jurisdiction over the land in Kelley Point Park.

i. Public Law 280 applies to the land within Kelley Point Park.

According to Public Law 280, Congress granted the State of Oregon jurisdiction "over offenses committed by or against Indians in all areas of *Indian country*" in Oregon, except the Warm Springs reservation. (emphasis added). Public Law 280 states, "the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." §1162(a). In this case, there is no dispute that Thomas Captain is a member of the Cush-Hook Nation. ROA at 2. However, clarification of the status of the land in Kelley Point Park is necessary to determine the applicability of Public Law 280. Assuming the Cush-Hook own aboriginal title to the land, Public Law 280 will only apply to the land if it is "Indian country" as defined by 18 U.S.C.

§1151. *United States v. John*, 437 U.S. 637, 647 (1978) (The definition of "Indian country" as used here and elsewhere in chapter 53 of Title 18 is provided in §1151.); *see also Alaska Venetie*, 522 U.S. at 527.

According to 18 U.S.C. §1151, Congress defined "Indian country" as:

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

In *Donnelly v. United States*, 228 U.S. 243, 269 (1913), this Court concluded that "nothing can more appropriately be deemed 'Indian country,' within the meaning of those provisions . . . than a tract of land . . . lawfully set apart as an Indian reservation." Federal criminal jurisdiction also extends to informal reservations. In *Oklahoma Tax Comm'n v. Chickasaw Nation*, this Court recognized that Congress defined §1151 broadly to include "formal and *informal* reservations." *Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995) (emphasis added) (*quoting Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1985)). In *Mattz v. Arnett*, 412 U.S. 481, 490 (1973), this Court noted the "de facto existence" of the Klamath River Reservation from 1864 to 1891 despite any formal recognition of the existence of the reservation by the federal government. In *Sac and Fox Nation*, 508 U.S. at 123-124, this Court described the "doctrine of tribal sovereignty" as a deeply rooted policy of leaving Indian tribes free from state jurisdiction and control. This doctrine, the Court said, serves as a backdrop from which applicable treaties and federal

statutes are read. *Id.* at 124. *See also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (Recognizing that a presumption against state tax jurisdiction only applies when income is earned from reservation sources by a tribal member residing on the reservation.).

The present case resembles the experience of those on the Klamath river reservation. If the Court finds that the Cush-Hook have aboriginal title to the land, it will thereby acknowledge the "de facto existence" of a land claim that is over 150 years old. This would occur despite any formal recognition of the existence of an Indian reservation by Congress. Applying the doctrine of tribal sovereignty to this case, §1151(a) should then be read in view of the policy of freeing Indian tribes from state jurisdiction. In doing so, a broad reading of §1151(a) would identify the land in question as an informal reservation, thereby qualifying the land as Indian country under §1151(a). This is distinguishable from a narrower reading of §1151(a) requiring that only formal reservations fall under the definition in §1151(a).[3]

In section 1151(b), the term, "dependent Indian community" further expands the statutory definition of Indian country by incorporating Indian communities located outside of the boundaries of the reservation that are considered dependent. In *Venetie*, this Court concluded that the term "dependent Indian community" in §1151(b) referred 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." 522 U.S. at 527. The Cush-Hook fail to satisfy both requirements and therefore are not a dependent Indian community under §1151(b). First, assuming the Cush-Hook maintain aboriginal title to the land in question, then the Federal government did not "set aside" the land in Kelley

[3] As discussed *infra*, if the area does not meet the definition of "Indian Country," in §1151(a), then state jurisdiction will prevail.

Point Park. Aboriginal title claims derive from the historical occupation of land *independent* of recognition by the Federal government. *See M'Intosh*, 21 U.S. at 574; *Holden v. Joy*, 84 U.S. 211, 244 (1872). Therefore, aboriginal title does not qualify as a "set aside" for the purposes of §1151(b). Second, the land in question is not under federal superintendence. The only evidence in the record of federal superintendence over the land ended with the enactment of ODLA and the conveyance of the land to the Meeks in 1850. ROA at 2.

Finally, 1151(c) pertains to allotments, which were individually assigned tracts of land that tribal members received in return for relinquishment of their undivided interest in tribal territory. *Yankton Sioux*, 188 F.3d at 1022; COHEN, at §1.04. If the Indian titles to the allotments were not extinguished by alienation, then those lands are considered "Indian country." The record indicates that the land in question was ceded by the entire tribe and not any individual Indian, and therefore §1511(c) does not apply.

Therefore, if the respondents contend that the Cush-Hook Nation holds aboriginal title to the land in Kelley Point Park, then that land qualifies as "Indian country" because it is an informal reservation pursuant to §1151(a). In the alternative, if the land does not meet the definition of "Indian Country," in §1151(a), then state jurisdiction will prevail. *See John* 437 U.S. at 647. (Implying that if a criminal offense was committed on land that was not Indian country, then federal criminal jurisdiction over the offense would not exist.); *Sac and Fox Nation*, 508 U.S. at 123-124 (Within a tribe's "territorial boundaries," state has no role to play.); *McClanahan*, 411 U.S. at 164; CAROLE E. GOLDBERG, ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 146 (6th ed. 2010).

ii. No federal authority preempts state court jurisdiction asserted pursuant to Public Law 280.

Congress enacted Public Law 280 as a response to the inability of some tribes to maintain law and order on their lands. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 471 (1979) (*quoting Bryan v. Itasca County*, 426 U.S. 373, 379 (1976)). The legislative history of the Public Law 280 reflects Congress' understanding of this situation:

> These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country . . . the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

H.R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953).

However, the criminal jurisdiction bestowed on states in Public Law 280 is not exclusive. Notwithstanding Public Law 280, the federal government reserves concurrent jurisdiction over offenses contained in laws of nationwide applicability, such as those listed in the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470ll (2012) ("ARPA").

According to §470ee(a) of ARPA, "[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands . . . ." unless an individual obtains a permit from either the federal land manager of that property or if they are a member of an Indian tribe that regulates the excavation or removal of archaeological resources on Indian lands. §470cc(g)(1-2).[4]

[4] There is no evidence in the record that the Cush-Hook Nation enacted regulations relating to the excavation and removal of archaeological resources, nor is there evidence that Cush-Hook Nation intended to assert jurisdiction over the land in question.

Congress' reasoning for enacting ARPA is comparable to the impetus for enactment of the Major Crimes Act. With the Major Crimes Act, Congress assumed control of the prosecution of Indians for major crimes committed in Indian country because of the numerous instances where tribal governments in Indian country were incapable of prosecuting those crimes. *Keeble v. United States*, 412 U.S. 205, 209 (1973). Similarly, Congress enacted ARPA to account for the lack of archaeological resource protection statutes in some states. *United States v.Gerber*, 999 F.2d 1112, 1119 (7th Cir. 1993) *cert denied* 510 U.S. 1071 (1994). Oregon is distinguishable from these states because it enacted archaeological resource protections in Or. Rev. Stat §358.920(1)(a) and §390.235(1)(a).

In 1986, Oregon enacted Or. Rev. Stat §358.920(1)(a), which states, "[a] person may not excavate, injure, destroy, or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235." An "archaeological site" means "a geographic locality in Oregon . . . that contains archaeological objects and the contextual association of the archaeological object with . . . (ii) [b]iotic or geological remains or deposits." Or. Rev. Stat § 358.905(c)(A). In 1993, Oregon enacted Or. Rev. Stat. §390.235(1)(a), "[a] person may not excavate or alter an archaeological site on public lands . . . or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department."

The presence of criminal provisions in ARPA and the counterpart provisions in Or. Rev. Stat §358.920(1)(a) and §390.235(1)(a) require clarification of jurisdictional authority in light of Public Law 280. The criminal provisions in ARPA do not implicitly repeal or pre-

empt Congress' delegation of criminal jurisdiction to the State of Oregon. Nor does Public Law 280 diminish the application of ARPA in the State of Oregon. *United States v.Anderson*, 391 F.3d 1083, 1086 (9th Cir. 2004) (Provisions in Public Law 280 have no affect on federal laws of nationwide applicability.); *United States v. Pemberton*, 121 F.3d 1157, 1164 (8th Cir. 1997). When two statutes are capable of co-existence, it is the duty of the courts to regard each as effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Furthermore, the *Lanza* principle and the doctrine of primary jurisdiction grant the State of Oregon criminal jurisdiction over Thomas Captain notwithstanding the ARPA. The *Lanza* principle allows prosecution of the same offense concurrently under state and federal law without violating the fifth amendment. *Heath v. Alabama*, 474 U.S. 82, 95 (1985); *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *United States v. Lanza*, 260 U.S. 377 (1922). The doctrine of primary jurisdiction allows the sovereign who asserted custody over an offender first to proceed in the trying the offense before transferring custody to a sovereign asserting concurrent criminal jurisdiction. *Pan Am. World Airways, Inc*. v. U.S. 371 U.S. 296, 330 (1963). Therefore, the presence of ARPA does not divest the State of Oregon of the criminal jurisdiction bestowed on it through Public Law 280.

iii. The absence of judicial action by the Cush-Hook Nation necessitated action by the State of Oregon.

The unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched. COHEN at §6.04[3][c]. In *Keeble*, 412 U.S. at 209, this Court characterized the Major Crimes Act as "a carefully limited intrusion of federal power in to the otherwise

exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *See also Antelope*, 430 U.S. at 643 n.2 ("[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts.").

In this case, the lack of any attempt by the Cush-Hook Nation to assert tribal jurisdiction over the land in question required the State of Oregon to step in and enforce its protections of the trees in Kelley Point Park. There is no evidence in the record to suggest that the Cush-Hook Nation has enacted criminal provisions analogous to the archaeological protections in ARPA and the Oregon statutes. There is also no evidence in the record to indicate that the Cush-Hook assumed, intended, or even attempted to enforce tribal criminal provisions on the land in question, on Thomas Captain, or on the vandals who allegedly defaced the trees in Kelley Point Park. This is significant because the purpose of Public Law 280, and the ultimate delegation of jurisdictional authority which allowed the State of Oregon to prosecute this case, was to ensure that offenses like those committed by Thomas Captain would be prosecuted despite the lack of tribal judicial capacity demonstrated by the Cush-Hook Nation.

The Cush-Hook Nation is legally and functionally incapable of enforcing criminal law on the land in question. No authority exists that requires this Court to withdraw Oregon criminal jurisdiction in this case, and doing so would circumvent the clear intent of Congress as expressed in Public Law 280. For these reasons, the State of Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question.

CONCLUSION

The State Court erred as a matter of law when it held that the Cush-Hook Nation's aboriginal title to Kelley Point Park was not extinguished. If there is any merit to the claim that the Cush-Hook Nation had Aboriginal title to Kelley Point Park, it was certainly extinguished by the treaty-agreement, the enactment of the ODLA, or the voluntary abandonment of the lands in question. The United States extinguished aboriginal title to the lands formerly held by the Cush-Hook Nation when it effectuated the Dart treaty-agreement by tendering valid consideration in the form of a new reservation land in the foothills of the Oregon coast range. The ODLA extinguished aboriginal title because it was the manifestation of the Congress' complete dominion adverse to any purported occupancy rights that the Cush-Hook Nation may have had to Kelley Point Park. Given Congress' plenary power over Tribal relations and Indian affairs, the issue of whether the ODLA extinguished aboriginal title is a non-justiciable political question. Therefore, history has shown that the Cush-Hook Nation, the State of Oregon, and the United States have interpreted the circumstances giving rise to this conflict as an extinguishment of aboriginal title. Furthermore, the State Court erred when it concluded that aboriginal title was not extinguished because the Cush-Hook Nation abandoned their original homelands by not maintaining continuous possession of Kelley Point Park.

Because the Cush-Hook Nation has no claim to aboriginal title to the land, the State of Oregon maintains jurisdiction over the land pursuant to its fee ownership. The State of Oregon is fee owner of the land whether the Meeks acquired proper title or not. If this Court finds that the Meeks' receipt of the ODLA land grant was valid, then their subsequent conveyance to the State of Oregon was valid. Conversely, if this Court finds that the grant

was invalid, then the land would have transferred to the State of Oregon as public land pursuant to its admission into the Union.

In the alternative, if this Court determines that the Cush-Hook Nation owns aboriginal title to the land, criminal jurisdiction would revert to the State of Oregon because the Cush-Hook are not a federally recognized tribe. Indian tribes derive judicial authority over members who reside on historically held tribal lands through their inherent sovereign powers. However, tribes cannot assert inherent sovereign powers unless the federal government has formally recognized the legal existence of the tribe. The Cush-Hook Nation is not federally recognized and therefore may not assert criminal jurisdiction over their lands. As a result, criminal jurisdiction falls to Oregon under Congressional delegation of jurisdictional authority pursuant to Public Law 280.

Lastly, Public Law 280 authorized the State of Oregon to prosecute Thomas Captain. No federal enactment or other authority divested the State of Oregon of criminal jurisdiction in this case. Although the federal government expressed its right to prosecute Thomas Captain through ARPA, jurisdiction through that act exists concurrently with the jurisdiction of the State of Oregon. ARPA does not preempt Public Law 280's delegation of criminal jurisdiction to the State of Oregon. As result, the State of Oregon is entitled to assert criminal jurisdiction over the lands in Kelley Point Park regardless of the ownership claims of the Cush-Hook Nation.