

No. 11-0274

IN THE
Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent

On Writ of Certiorari to the
Oregon State Court of Appeals

BRIEF FOR RESPONDENT

TEAM # 41

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park based on their history of occupying the land prior to settlement of the area by Euro-Americans and lack of affirmative extinction of aboriginal title as required by *Johnson v. McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823)?
2. Whether Oregon has criminal jurisdiction to control archaeological, cultural, and historical objects on the land in Kelley Point Park notwithstanding the Cush-Hook Nation's purported ownership and given the illegitimate settlement of the land under the Oregon Donation Land Act?

STATEMENT OF THE CASE

I. Statement of the Facts

Since time immemorial the Cush-Hook Nation of Indians has inhabited lands in what is now the state of Oregon. R at 1. Their permanent village existed on the area now enclosed by Kelley Point Park. *Id.* The Cush-Hook Nation hunted, fished, grew crops, and harvested wild plants on their lands. *Id.*

William Clark, of the Lewis and Clark expedition, first encountered the Cush-Hooks in 1806, when the Multnomah Indians directed him to the Cush-Hook Village. *Id.* After exchanging peace signs, Clark met with the chief of the Cush-Hooks. *Id.* Clark later bestowed a President Thomas Jefferson peace medal, otherwise known as a “sovereignty token” on the chief. *Id.* Lewis and Clark believed the bestowal and acceptance of “sovereignty tokens” indicated “which tribal leaders and governments would be recognized by the United States.” *Id.* Clark also detailed his interactions with the Cush-Hooks in the Lewis and Clark Journals. *Id.* He documented the various aspects of the tribe’s culture, such as their “governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices.” *Id.* Clark also drew sketches of the village and the longhouses. *Id.*

In 1850, the Cush-Hook Nation entered into negotiations with the superintendent of Indian Affairs for the Oregon Territory, Anson Dart, who convinced the Cush-Hook Nation to agree to relocate to a reservation in exchange for monetary compensation. R at 1-2. The Cush-Hooks, intent on fulfilling their treaty obligations, relocated to the agreed upon lands. R at 2. It was not until three years later, in 1853, that U.S. Senate refused to ratify the treaty. *Id.* Thus the Cush-Hook Nation, who had fully complied with the terms of the treaty and relocated their entire tribe, received nothing. *Id.*

Meanwhile, in an effort to promote further white settlement, Congress enacted the Oregon Donation Land Act of 1850. *Id.* Under this Act, Joe and Elsie Meek moved onto the Cush-Hooks land and applied to receive fee simple titles. *Id.* The Act granted fee simple title only to those settlers who had “resided upon and cultivated the [land] for four consecutive years.” Oregon Donation Land Act, 9 Stat. 496-500. The Meeks failed to cultivate the land and did not live upon the land more than two years. R at 2. In 1880 descendants of the Meeks sold the land to Oregon, who in turn created Kelley Point Park. *Id.*

Hundreds of years later, the Cush-Hook Nation continues to reside in a separate tribal area where they maintain the traditional Cush-Hook way of life. *Id.* An important aspect of the Cush-Hook religion and culture are the sacred trees that remain in Kelley Point Park. *Id.* William Clark himself noted the significant religious and cultural value of these trees to the Cush-Hooks. *Id.* Cush-Hook tribal shamans or medicine men carved totems and religious symbols into these living trees. *Id.* Recently, however, vandals have begun to deface the sacred Cush-Hook trees in Kelley Point Park. *Id.* After Oregon failed to address these crimes, Thomas Captain, a Cush-Hook citizen, attempted to preserve and protect the sacred trees by occupying the site of the ancient Cush-Hook village and restoring the images. *Id.*

II. Statement of the Proceedings

After cutting down a tree from Kelley Point Park to restore the vandalized image carved upon that tree, Thomas Captain was arrested while returning to the Cush-Hook people with the image. The state troopers that arrested him seized the image. R at 2. Oregon brought criminal charges against Mr. Captain for (1) trespass on state lands, (2) cutting timber in a state park without a permit, and (3) desecrating an archaeological and historical site. *Id.* The criminal charges for desecrating an archaeological and historical site fall under

Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240. R at 2-3. Following his arrest Mr. Captain consented to a bench trial. R at 3.

Mr. Captain's case was tried by the Oregon Circuit Court for the County of Multnomah. *Id.* The Circuit Court concluded, as a matter of law, that:

1. Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States. *Id.*
2. The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. McIntosh* because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land. *Id.*
3. The United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void *ab initio* and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void. R at 4.
4. The Cush-Hook Nation owns the land in question under aboriginal title. *Id.*
5. Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not. Thus, Oregon properly brought this criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object. *Id.*

The court held that the Cush-Hook Nation still owned the land within the Park and as a result found Thomas Captain not guilty for trespass or cutting timber without a state permit. However, the court did find him guilty of violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* for damaging an archaeological site and a cultural and historical artifact. The court fined him \$250.00. *Id.*

Following the trial, both Oregon State and Thomas Captain appealed the decision. *Id.* The Oregon Court of Appeals affirmed but declined to write an opinion. *Id.* The Oregon Supreme Court denied review. *Id.* The State then filed a petition and cross petition for

certiorari to the United State Supreme Court. *Id.* Thomas Captain also filed a cross petition for certiorari with the United States Supreme Court. *Id.* United States Supreme Court granted certiorari on two questions: 1. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park, and 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.

Respondent now appeals to this court.

SUMMARY OF THE ARGUMENT

Respondent requests that this honorable Court affirm Oregon Circuit Court's ruling that the Cush-Hook Nation holds aboriginal title to the land in Kelley Point Park. Aboriginal title, or right of occupancy, has been recognized as an inherent right of Native Americans as the original occupiers of the land settled by Euro-Americans. This case turns upon the aboriginal title that the Cush-Hooks possess over the land of Kelley Point Park and the legal rights afforded by their ownership of that title.

The Cush-Hook Nation meets all requirements necessary to establish aboriginal title. They are a tribe of Indians who exclusively used and occupied the land in question, as evidenced by historical records and their interactions with the Lewis and Clark expedition of 1806. Their aboriginal title, established through their ongoing occupation of the land, has not been extinguished. The law requires that aboriginal title be affirmatively extinguished by either compensation or conquest, neither of which is present in the case of the Cush-Hook Nation. Therefore, the Cush-Hook Nation possesses full aboriginal title to Kelley Point Park.

Respondent also requests that this Court find that Oregon State does not have criminal jurisdiction to control the use of archaeological, cultural, and historical objects on the land known as Kelley Point Park. The United States, not Oregon, owns the land on which the park is located. The individuals that settled the land under the Oregon Donation Land Act did so improperly, and therefore their ownership of the land is void and all subsequent sales of the land, including to the State of Oregon, are null and void. The land was therefore public, and reverted to the United States under the act admitting Oregon as a state. Federal law, not State law, governs the park and all historically significant artifacts in the park. Therefore, Public Law 280 does not apply to this case.

ARGUMENT

This Court should affirm the Oregon Court of Appeals' ruling that the Cush-Hook Nation holds aboriginal title to the land in Kelley Point Park because the Cush-Hook Nation are a (A) tribe of Indians who have (B) exclusively used and occupied the land in question (C) whose aboriginal title has never been affirmatively extinguished.

This Court should reverse the Oregon Court of Appeals' ruling that Thomas Captain violated Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 because the state of Oregon cannot maintain jurisdiction over federal lands. The land in Kelley Point Park remains (A) federal land because the Meeks' title did not vest making their (1) sale to the state of Oregon void and (2) additionally causing the title to revert to the US government. In addition, (B) Oregon cannot apply Public Law 280 to Kelley Point Park.

I. The Cush-Hook Nation Holds Aboriginal Title to the Land in Kelley Point Park.

The Cush-Hook Nation holds aboriginal title to the land in Kelley Point Park because they (A) retain their tribal identity as direct lineal and cultural descendants of the original Cush-Hook tribe, (B) exclusively used and occupied this land from time immemorial and (C) their aboriginal title has never been affirmatively extinguished.

A. The Cush-Hook Nation Retains Their Aboriginal Title to the Land in Kelley Point Park by Maintaining Their Tribal Culture and Identity.

In *Johnson v. McIntosh*, Chief Justice Marshall traced the origins of aboriginal title to the time of European discovery of 'new' lands. *Johnson v. McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823). The potentates of Europe relied the concept that discovery granted ownership of the land to the discovering nation against all others. *Id.* at 573. It did, however, attempt to account for the rights of the original inhabitants by conceding that the original inhabitants

were “the rightful occupants of the soil” with a “legal as well as just claim to retain possession” of the land and use it at their discretion. *Id.* at 574. Despite this right of occupancy, the European nation still held absolute title with the exclusive power to sell or convey the land, as well as the power to extinguish the original inhabitant’s aboriginal title to the land. *Id.* Land title, subject only to the native aboriginal right of occupancy, became vested in the United States as the natural successor to the previous European rule. *Id.*

The nature of aboriginal title, as derived from concepts espoused in the Doctrine of Discovery, is solely predicated upon status as the original inhabitants of the land. This right of occupancy does not need to be based on statute, treaty, federal recognition, or any other government action. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 1247, 84 L. Ed. 2d 169 (1985). Hence, federal recognition of an Indian group as a tribe does not obviate claims based on aboriginal title. Such federal recognition only relates to “how [aboriginal] title is to be proved.” *Crow Tribe of Indians v. United States* (1960) 151 Ct Cl 281, 284 F.2d 361, cert den 366 US 924, 6 L Ed 2d 383, 81 S Ct 1350. A federally recognized tribe does not need to prove exclusive use and occupancy of the land, but this recognition “is not necessarily a determination that aboriginal title existed.” *Minnesota Chippewa Tribe v. U. S.*, 315 F.2d 906, 911 (Ct. Cl. 1963).

Relying on historic record, expert testimony, and the Lewis and Clark Journals, the Oregon Circuit Court concluded, as a matter of fact, that the Cush-Hook Nation “occupied, used, and owned the lands in question before the arrival of Euro-Americans.” R. at 3. Currently, the Cush-Hook Nation lives in a tribal area where they continue to fish, hunt, grow crops, and harvest wild plants as their ancestors did. *Id.* at 1. They have also retained their distinct tribal culture by continuing to practice their religion. *Id.* at 2. The Cush-Hook

Nation still reveres the sacred trees that have grown on their land for hundreds of years, as evidenced by the actions of Thomas Captain. *Id.*

B. The Cush-Hook Nation Retains Their Aboriginal Title by Demonstrating Ongoing Use of the Land by Their Presence on the Land from Time Immemorial and the Continued Significance of the Land to the Tribe Both Culturally and Spiritually.

The Cush-Hook Nation exhibits an ongoing relationship with the land, thereby satisfying the second requirement of aboriginal title. Exclusive and ongoing use of the land is essential to aboriginal title. The record in this case demonstrates ongoing and exclusive use of the land now known as Kelley Point Park. Ongoing use is further reinforced by the spiritual significance of both the land and the trees upon it to the Cush-Hook Tribe.

Occupancy for the purpose of aboriginal title must be exclusive, ongoing and predate Euro-American arrival. Native occupancy has been recognized from before the United States was formed, during the conquering and exploration of North America by Europeans.

Johnson v. McIntosh, 21 U.S. 543, 581. In order to claim aboriginal title, a tribe must be able to demonstrate their occupancy prior to Euro-American arrival, or from “time immemorial”.

Greene v. Rhode Island, 398 F.3d 45, 49 (1st Cir. 2005). See also *Mashpee Tribe v.*

Secretary of the Interior, 820 F.2d 480, 481-482 (1st Cir. 1987). Exclusive presence on the land from time immemorial is essential to the right of occupancy that is aboriginal title.

United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975).

The issue of occupancy for the purpose of aboriginal title is a question of fact. *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941). It is not necessary to demonstrate a tribe’s presence on the land with official written documents or

land grants. *Greene v. Rhode Island*, 398 F.3d 45, 50. Instead, tribes may utilize many different forms of historical evidence. *Id.* One form of evidence accepted by the U.S. Supreme Court is records from the Lewis and Clark expedition. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012) [2012 BL 42478] (using journals from the Lewis and Clark expedition to provide description of waterways prior to Montana statehood.)

In this case expert testimony, historic record, and William Clark's journals show that the Cush-Hush Nation occupied, and exclusively used the land that Kelley Point Park is on from time immemorial. R at 3. Their original homelands encompassed a much larger area, where they supported themselves by growing crops and harvesting both wild plants and animals. *Id.* William Clark recorded his interactions with the Cush-Hook Nation, as well as a sketch of the village and information regarding their social, religious, and hunting and fishing customs. *Id.* at 1. His record correlates with the expert testimony given at trial in the Oregon Circuit Court. *Id.* at 3.

Since occupancy is a question of fact, the standard of review for this case does not require the Supreme Court to reconsider the evidence presented to the Circuit Court. Rather, findings of fact from the court are accepted as correct for the purpose of determining aboriginal title. Further, this claim arises out of one tribal member's actions to preserve sacred tree carvings. It is evident that the area now known as Kelley Point Park is still culturally and spiritually significant to the Cush Hook Nation. Therefore, the second requirement of aboriginal title is met.

C. The Cush-Hook Nation Retains their Aboriginal Title Due to the Lack of Purposeful Extinction of that Title by Congress.

The Cush-Hook Nation maintains their aboriginal title due to the lack of affirmative, or purposeful, extinction of that title by Congress. Loss of aboriginal title cannot be lightly implied. It can only be extinguished through conquest of land or compensation for the land. Furthermore, Congress retains the exclusive right to affirmatively extinguish aboriginal. In the case of the Cush-Hook Nation, there has been no affirmative extinguishment of their aboriginal title and therefore they possess right of occupancy to the land on which Kelley Point Park resides.

A tribe loses their aboriginal title when it is purposefully and deliberately taken by Congress, either by conquest or by purchase. *Johnson v. McIntosh*, 21 U.S. 543, 587. Congress, and only Congress, can extinguish aboriginal title. This is emphasized most in *U. S. v. Santa Fe*, where the courts holds that “The power of Congress in that regard is supreme.” *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347. Furthermore, the taking of aboriginal title cannot be “lightly implied”. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 248. Taking of aboriginal title does not require agreement from the tribe, nor does it require compensation. However, it must be clear and definite.

Congress’s plenary power to extinguish aboriginal title precludes any other governmental entity from doing so. Therefore, no action by the state can take aboriginal title, nor action by individuals appointed as federal officials to negotiate with tribes. For this reason, treaties were required to be ratified by Congress. *Johnson v. McIntosh*, 21 U.S. 543. In *Johnson v. McIntosh* the court is explicit that the right of occupancy is the basis of aboriginal title. As sovereign, Great Britain and later the United States was the only power

that could grant the land. *Id.* However, the land was granted subject to the preexisting right to occupy that was held by the native population. Therefore, granting or settling the land was not enough to extinguish aboriginal title. It had to also be affirmatively extinguished by Congress.

The Cush-Hook Nation's aboriginal title has never been extinguished by Congress. In 1850, the Cush-Hooks signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, agreeing to relocate. R at 1. They then relocated, in accordance with the terms of the treaty. After their relocation, the United States Senate refused to ratify the treaty or compensate the Cush-Hook people. *Id.* at 2. Extinguishment of aboriginal title requires either conquest or compensation. *Johnson v. McIntosh*, 21 U.S. 543, 587. In the case of the Cush-Hooks, neither criteria were met. Since the treaty was never ratified, they were never compensated. Neither was their land taken by conquest. They peacefully relinquished the land under the belief that the treaty was valid.

Since aboriginal title cannot be "lightly implied," the Cush-Hooks maintain their aboriginal title until active extinguishment by Congress. The need for a clear and explicit extinguishment of aboriginal title was reemphasized recently by the US Court of Appeals. *Greene v. Rhode Island*, 398 F.3d 45. In that case, which also involved a non-federally recognized tribe, the court held: "It is well established that courts will not infer congressional intent to extinguish Indian claims to aboriginal rights to land absent plain and unambiguous statutory language making such an extinguishment." *Id.* at 54. In the case of the Cush-Hook Nation, aboriginal title has not been taken by conquest or compensation. Therefore, given the court's inability to infer loss of aboriginal title in lieu of affirmative extinguishment, the Cush-Hook Nation retains aboriginal title for their land, including Kelly Point Park.

II. Oregon State Does not have Criminal Jurisdiction to Control the Use of Archaeological, Cultural, and Historical Objects On the land Known as Kelley Point Park.

Notwithstanding aboriginal title, federal law governs the archaeological, cultural, and historical objects at Kelley Point Park. The land on which Kelley Point Park is located is (A) federal, not state, land because (1) fee title to the land was not obtained legally, as required by the Oregon Donation Land Act. Sale of the land by the settlers' descendants to Oregon State is subsequently void. Additionally, the (2) land reverted to the federal government under the act admitting Oregon as a state. Therefore, (B) Public Law 280 does not to the land Kelley Point Park.

A. The Land in Kelley Point Park Is Federal Land

Oregon State does not own the land on which Kelley Point Park is located. The state's ownership is based on purchase of the land from the Meeks' descendants. Since the ownership of that land by the Meeks was not achieved by the proper methods as outline in the Oregon Donation Land Act of 1850, their ownership of the land is void and any sale of the land by the Meeks is also void. Therefore, purchase of the land by Oregon State from the Meeks is void.

The Oregon Donation Land Act sets out express requirements for obtaining land. "That there shall be, and hereby is, granted to every white settler or occupant of the public lands ... and who shall have resided upon and cultivated the same for four consecutive years ..." Oregon Donation Land Act, 9 Stat. 496, Section 4. The main requirement under the act was that a settler must reside on the land and cultivate it for at least four consecutive years

before claiming title. Title could only legally vest to the settler after they had completed all requirements of the act. *Hall v. Russell*, 101 U.S. 503, 510, 25 L. Ed. 829 (1879).

The courts have held that lack of completion of the requirements barred legal title to the land, even in the event of a settler's death. In *Hall v. Russell*, the settler did not complete the four years of cultivation prior to his death and therefore his heirs were not able to inherit the land. *Id.* Similarly, in a case from that same year, the wife of a settler was prevented from inheriting the land that her husband was working to cultivate when he died before completing the requirement. *Vance v. Burbank*, 101 U.S. 514, 519, 25 L. Ed. 929 (1879). Enforcement of the requirements set out in the land donation act has been consistent in both Oregon courts as well as the U.S. Supreme Court.

**1. Joe and Elsie Meek Received Fee Title Incorrectly and Their
Ownership of Kelley Point Park is Null and Void, Rendering the
Purchase of the Park by Oregon State Null and Void.**

In this case the Meeks' ownership of the land upon which Kelley Point Park now sits is also invalid under the Oregon Donation Land Act. The trial court found that the Meeks did not live on the land more than two years. R at 3. They also never cultivated the land. *Id.* Therefore, they failed to meet the requirement for receiving fee title to the land under the Oregon Donation Land Act. Their ownership of the land was not obtained legally. As in the cases of *Hall v. Russell* and *Vance v. Burbank*, their heirs could not legally inherit the land.

The Oregon Circuit Court correctly held that the United State's grant to the Meeks of fee title to the land was void *ab initio* under the Oregon Donation Land Act. R at 4. They were also correct to hold that the subsequent sale of the land by the Meeks' descendants to

Oregon was also void. Oregon cannot have obtained valid ownership of Kelley Point Park because they did not purchase the land from its legitimate owner. The United States retained ownership of the land. The Meeks never properly received fee title to the land and therefore it is still the property of the United States government

2. The land in Kelley Point Park Revested to the United States upon Oregon's Admission as a State.

The Meeks sale to the state of Oregon was additionally void because the Meeks' land reverted to the United States upon Oregon's admission as a state. The land donated by the United States in the Oregon Donation Land Act was comprised of public federally owned lands that could be converted to private land. Eligible settlers obtained fee title to the land only after they met the requirements enumerated in the Oregon Donation Land Act. Any land donated under this Act to which private fee title did not vest remained as public land. This public land later revested in the United States rather than the state of Oregon under the Act of February 14, 1859, admitting Oregon as a state. 11 Stat. 383, 384. Issues regarding the ownership of these public lands arose in relation to railroad land grants made by the United States government. *Clackamas County, Or. v. McKay*, 226 F.2d 343 (D.C. Cir. 1955). The court held that "public domain in Oregon passed to the United States when Oregon was admitted. Such a provision was implicit in the Act of admission." *Id.* at 387.

When the Meeks failed to meet the requirements of the Oregon Donation Land Act, their tract of land remained in the public domain. Furthermore, upon Oregon's admission to the Union in 1859, the lands of the public domain, including those previously held by the Meeks' revested in the United States. Therefore, the sale of the Meeks land by their descendants was also void.

B. Public Law 280 Does Not Apply to this Case.

Regardless of whether Kelley Point Park exists on land owned by the State of Oregon, Public Law 280 does not apply to this case. Congress enacted Public Law 280 as a vehicle to extend both criminal and civil state jurisdiction into Indian Country. The extension of criminal jurisdiction requires that certain states including Oregon must accept criminal jurisdiction over offenses “committed by or against Indians in the areas of Indian country situated within such State.” 25 U.S.C.A. § 1321 (West). As a federally unrecognized tribe the Cush-Hook Nation’s lands, including those claimed by aboriginal title, do not meet the definition of “Indian country”. Indian country is limited to Indian reservations, dependent Indian communities, and Indian allotments. 18 U.S.C.A. § 1151 (West). Because Kelley Point Park cannot meet the required definition of Indian country the state of Oregon cannot invoke criminal jurisdiction over Thomas Captain under Public Law 280.

In the unlikely event that the state of Oregon is able to prevail in any attempts to apply Public Law 280 to Thomas Captain, the nature of Or. Rev. Stats. themselves can bar application of Public Law 280. The intent behind the state statutes must be prohibitory, intended to “prohibit certain conduct” to apply Public Law 280. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). If, however, “state law generally permits conduct at issue, subject to regulation,” the statute is considered civil or regulatory in nature, which bars state enforcement under Public Law 280. *Id.* Courts have relied on a shorthand test, “whether the conduct at issue violates the State’s public policy,” to determine whether the statute should be deemed prohibitory or regulatory *Id.*

The Or. Rev. Stats. applicable to Thomas Captain generally allow excavation of historical materials on archaeological sites with a proper permit. Or. Rev. Stat. § 390.235 (1)(a), cited in Or. Rev. Stat. § 358.920. In addition, the Oregon Legislative Assembly issued a policy statement included in O.R.S. 358.910 that vows to “preserve and protect the cultural heritage of this state.” Or. Rev. Stat § 358.910(2). In the present case, the permit and public policy statement serve a more regulatory rather than a prohibitory function. This regulatory function bars the extension of state criminal jurisdiction under Public Law 280.

CONCLUSION

The Oregon Court of Appeals properly affirmed the Circuit Court's ruling that the Cush-Hook Nation holds aboriginal title to the land in Kelley Point Park. The Cush Hook Nation is a tribe of Indians who exclusively used and occupied the land in question as evidenced by expert testimony and the historic record. They have maintained the Cush-Hook way of life for hundreds of years, including the veneration of sacred trees in Kelley Point Park. In addition, the Cush-Hook Nation's aboriginal title was never affirmatively extinguished by Congress as required by *Johnson v. McIntosh*.

The Oregon Court of Appeals incorrectly affirmed that Oregon has criminal jurisdiction over the archaeological, cultural, and historical objects on the land in Kelley Point Park because Congress erred when it included the Cush-Hook's lands in the Oregon Donation Land Act. Notwithstanding this error, the Meeks failed to fulfill the requirements of the Act to obtain fee title to the land. This failure subsequently caused Oregon's purchase of the land to be void. The purchase is additionally void because the lands remained in the public domain, which were revested to the United States under the act admitting Oregon as a state. Finally, Public Law 280 does not grant Oregon jurisdiction over the land in Kelley Point Park.

Respectfully submitted this 14th day of January, 2013.

TEAM #41
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