TEAM NO. 45

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,
Petitioner,

v.

Thomas CAPTAIN,
Respondent and Cross-Petitioner.

On Writ of Certiorari

BRIEF FOR RESPONDENTS

TEAM NO. 45
Counsel of Record

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QUESTIONS PRESENTED

I. Does the Cush-Hook Nation Own the Aboriginal Title to the Land in Kelley Point Park?

The Oregon Circuit Court for the County of Multnomah answered, "Yes." Respondent/Cross-Petitioner answers, "Yes."

II. Does 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?

The Oregon Circuit Court for the County of Multnomah answered, "Yes." Respondent/Cross-Petitioner answers, "No."

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

After he was charged by the State of Oregon with trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under state law, Mr. Captain consented to a bench trial. Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials).

Mr. Captain's bench trial was before the Oregon Circuit Court for the County of Multnomah. The judge found that expert witnesses in history, sociology, and anthropology had established that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans, and that the Cush-Hook Nation's aboriginal title to its homelands had never been extinguished by the United States as required by *Johnson v. M'Intosh* because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land. *Oregon Circuit Court for the County of Multnomah Conclusions of Law.*

Furthermore, the court concluded that 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, and that 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 and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void. *Id.* The court therefore held that the Cush-Hook Nation owns the land in question under aboriginal title. *Id.*

However, the court held that 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, and that the State of Oregon therefore properly

brought this criminal action against Mr. Captain for damaging an archaeological, cultural, and historical object.

Mr. Captain was therefore found not guilty for trespass or for cutting timber without a state permit, but was found guilty for 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. Mr. Captain was therefore fined by the court in the amount of $250.

The State of Oregon and Mr. Captain appealed the court's decision. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. Thereafter, the State of Oregon filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court, which was granted.

II. STATEMENT OF THE FACTS

The land where Mr. Captain allegedly violated Oregon law is within the original homeland of the Cush-Hook Nation of Indians and is within Kelley Point Park, an Oregon state park. The Cush-Hook Indians have occupied the area since time immemorial. They cultivated and lived off the land, growing crops, harvesting wild plants, hunting, and fishing. The Cush-Hook's permanent village was located in the area that is now enclosed by Kelley Point Park's boundaries.

Although the Cush-Hook Nation is not politically recognized by the United States or by Oregon and is not on the list of federally recognized Indian tribes, compiled pursuant to the 1994 tribal list act, the existence of the Cush-Hook Nation was documented by William Clark, who met the Cush-Hook chief in 1806 during the Lewis & Clark expedition. *Oregon Circuit Court for the County of Multnomah Findings of Fact.* The chief received from Clark

one of the President Thomas Jefferson peace medals, or "sovereignty tokens" that Clark and Meriwether Lewis gave chiefs during the expedition. These medals symbolized a desire to engage political and commercial relations with the United States, and acceptance of the peace medals demonstrated which tribal leaders and governments would be recognized by the United States.

After the Cush-Hook Nation signed a treaty in 1850 with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, wherein the Nation agreed to relocate 60 miles westward to the foothills of the Oregon coast range of mountains, the Cush-Hook Nation relocated to the coast range to avoid encroaching Americans. *Oregon Circuit Court for the County of Multnomah Findings of Fact.* However, in 1853 the U.S. Senate refused to ratify the Cush-Hook treaty, and it has never been ratified. *Id.* The Cush-Hook Nation therefore did not receive promised compensation for their lands, per the treaty, nor any benefits of the treaty or recognized ownership of the land they moved to in the coast range. *Id.* The Cush-Hook Nation therefore has remained a non-federally recognized tribe of Indians.

After the Cush-Hooks relocated to the coastal range, two American settlers (Joe and Elsie Meek) moved onto what is now Kelley Point Park. The Meeks claimed and ultimately received fee simple title to the 640 acres of land that today comprises Kelley Point Park from the United States under the federal Oregon Donation Land Act of 1850, even though the Meeks never cultivated or lived upon the land for the four years required by the Act. *Oregon Circuit Court for the County of Multnomah Findings of Fact.* The Meeks did not live on the land for more than two years and never cultivated the land at this site. *Id.* However, the transfer to the Meeks was approved anyway, and the Meeks' descendants sold the land to

Oregon in 1880 and Oregon created Kelley Point Park. *Id.*

In 2011, Thomas Captain, a Cush-Hook citizen, moved from the Cush-Hook tribal area in the coast range of mountains to Kelley Point Park and occupied the Park to reassert his Nation's ownership of the land. He also aimed to protect culturally and religiously significant trees that had grown in the Park for over three hundred years, and which the Park was inadequately protecting. The trees are very important to the Cush-Hook religion and culture because tribal shamans/medicine men carved sacred totem and religious symbols into living trees hundreds of years ago. Vandals had recently begun climbing the trees to deface the images and cut the images off the trees to sell, yet the state has done nothing to stop this vandalization of the sacred images on the trees.

To this end, Mr. Captain erected temporary housing in Kelley Point Park at the site of the ancient Cush-Hook village. *Oregon Circuit Court for the County of Multnomah Findings of Fact.*

To restore and protect a vandalized image carved by one of his ancestors, Mr. Captain cut a tree down and removed the section of the tree that contained the image of cultural and religious significance to the Cush-Hook Nation. While returning to the Cush-Hook Nation's location in the coastal range, state troopers arrested him and seized the image, and the State of Oregon brought criminal action against Mr. Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under state law. Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials).

SUMMARY OF ARGUMENT

Under *Johnson v. McIntosh*, the Cush-Hook Nation held aboriginal title to the land in Kelley Point Park, and fulfilled the three standards outlined in *Barber* for establishing aboriginal title. Because the United States has never extinguished their aboriginal title to the land, the Cush-Hook Nation retains ownership up to the present-day. In the alternative, if the tribe could not claim the land under aboriginal title, Oregon's claim under the fee simple title established by the Meeks and conveyed to the state by their descendants does not established title to the state.

Per Oregon's own statutes, the state does not contemplate protection of cultural objects of non-recognized tribes, thus the State does not have criminal jurisdiction over such items in Kelley Point Park under its own laws. Furthermore, PL 280 does not grant Oregon civil jurisdiction over Indian country, only criminal jurisdiction, and under *Cabazon* the relevant statutes are civil/regulatory in nature, and thus do not allow the state jurisdiction. Instead, the Cush-Hook Nation retains a limited sovereignty related to its rights under aboriginal title to use and occupy the land for religious purposes. In the alternative, the United States retains civil jurisdiction through RLUIPA.

ARGUMENT

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

A. The Cush-Hook Nation Possessed Original Aboriginal Title to the Land in Kelley Point Park

Under the doctrine of aboriginal title, the Court has held that although the United States was free to grant non-Indians land held by Indian tribes, grantees took title subject to the Indian "right of occupancy." *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823). The right of occupancy was granted to those Indians who occupied and used the land to the exclusion of all others from time immemorial. *Id.* at 555. The Court refused to recognize land grants from Indians to private parties, instead holding that legal title remained with the United States, since tribal aboriginal title can only be changed by the federal government. *Johnson v. McIntosh*, 21 U.S. 543. The federal government can extinguish aboriginal title by purchasing the land or by taking it, but it is only via the federal government's consent that aboriginal title can be extinguished. *Id.*

Even where it is not a tribe that is attempting to claim title over land, but instead, individuals, a claim of aboriginal title can be made. For example, in *Cramer v. United States*, the Court stated the federal government has a duty to protect the Indian land of tribes and the power to do so as Indian tribes are "wards of the nation" and that "[t]his duty of protection and power extend to individual Indians." 261 U.S. 219, 261 (1923) (granting a narrow interpretation of aboriginal right to occupancy by an individual and limiting individual Indians' aboriginal rights to that area clearly fixed by "enclosure, cultivation and improvements" where three Indians challenged a land patent given to the Central Pacific Railway Company of land the Indians claimed to have occupied since before 1859).

The Court has noted, however, that "individual aboriginal title is by no means a well-defined concept." *United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir.1989) (holding that "An individual might be able to show that his or her lineal ancestors held and occupied, as individuals, a particular tract of land, to the exclusion of all others, from time immemorial, and that this title had never been extinguished" in an action for trespass against two sisters who were members of the Western Shoshone Tribe and who grazed their cattle on public lands without a permit from the Bureau of Land Management. The Court held the sisters could show their ancestors held and occupied certain tracts of land from time immemorial and had always used the land for grazing, and therefore permitted the sisters a very precise area of aboriginal title for grazing of an exact number of cattle and horses.).

Even though aboriginal title is not a well-defined concept, courts have established three basic standards which must be met in order for aboriginal title to exist: (1) [the party's] ancestors must have lived on land in question from time immemorial to the exclusion of all others, (2) They must also have enclosed, cultivated and improved the land; and (3) They must have lived on the precise land for which aboriginal title is claimed. *Barber v. Simpson*, 2006 WL 6358357, at *2 (Inter–Tribal Court of Appeals of Nevada, October 3, 2006).

The Cush-Hook Nation meets these three requirements for establishing aboriginal title, which the Oregon Circuit Court for the County of Multnomah properly found. The Cush-Hook Nation has held the land to the exclusion of all others, from time immemorial, and this title had never been extinguished, thus meeting the first criterion. "To exclude someone from property would suggest some form of an affirmative action to make sure that others do not occupy it," and constructing a village, as the Cush-Hook did, meets this requirement of an affirmative action. *Barber v. Simpson*, 2006 WL 6358357, at *3 (Inter–Tribal Court of

Appeals of Nevada, October 3, 2006). Because Mr. Captain is a Cush-Hook citizen, he is a descendant of the tribe. The Cush-Hook Indians grew crops and harvested plants in the area, in addition to creating a village and constructing longhouses, which were documented by William Clark of the Lewis & Clark expedition, thus fulfilling the requirement of enclosing, cultivating, and improving the land. Because the lands that the Cush-Hook occupied extend beyond the park boundaries, but include the park, the third criterion is satisfied. As the Oregon Circuit Court for the County of Multnomah found, expert witnesses in history, sociology, and anthropology established that before the arrival of Euro-Americans, the Cush-Hook Nation occupied, used, and owned the land relevant to this dispute. *Oregon Circuit Court for the County of Multnomah Findings of Fact.*

While it has been suggested that because "original purpose" of aboriginal title, which "was to follow the public policy of assisting in the settlement of Indians [is] an issue which no longer exists," that "aboriginal title is not to be liberally endorsed," it is still to be found in rare circumstances such as that of the Cush-Hook Indians. *Barber v. Simpson*, 2006 WL 6358357, at *2 (Inter–Tribal Court of Appeals of Nevada, October 3, 2006). As found by the lower court, The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by *Johnson v. M'Intosh* because the U.S. Senate neither ratified the treaty nor paid Cush-Hook Nation for its land, and therefore, the Cush-Hook Nation owns the land in question under aboriginal title. *Oregon Circuit Court for the County of Multnomah Conclusions of Law.*

B. Aboriginal Title Was Never Properly Transferred by the Federal Government and Thus Remains With the Cush-Hook Nation

As held by the Supreme Court in *Johnson v. McIntosh*, tribal aboriginal title can only be changed by the federal government, which can extinguish aboriginal title either by

purchasing land or by taking it. 21 U.S. 543, 588 (1823). Therefore, it is only with the federal government's consent that aboriginal title can be extinguished. *Oneida Indian Nation of N. Y. State v. Oneida County, New York*, 414 U.S. 661. The United States also asserted the primacy of federal law in the Nonintercourse Act, first passed in 1790, "which provided that 'no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.' *Id.* In so doing, Congress established a trust relationship with tribes such as the Cush-Hook Nation, which can only be extinguished by Congress. It is important to note that there is "nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized," and instead courts have found "an inclusive reading consonant with the policy and purpose of the Act," that policy being "to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975). Thus, although the Cush-Hook Nation is not politically recognized by the United States or by Oregon and is not on the list of federally recognized Indian tribes, the existence of the Cush-Hook Nation is well-documented prior to Oregon's statehood, and the United States has interacted with the tribe, including negotiating a treaty, although it was never ratified. *Oregon Circuit Court for the County of Multnomah Findings of Fact.*

Although the superintendent of Indian affairs for the Oregon Territory signed a treaty with the Cush-Hook Nation in 1850 wherein the Nation agreed to sell its land and relocate to a reservation in Oregon's coastal mountain range, the U.S. Senate refused to ratify the treaty in 1853, and it was never ratified, the Cush-Hook have never been compensated for the land,

nor have any of the other benefits promised in the treaty come to fruition. *Oregon Circuit Court for the County of Multnomah Findings of Fact*. Although the Cush-Hook Nation moved to the Oregon coast in anticipation of the ratification of the treaty, this does not mean that the federal government extinguished the rights the Cush-Hook Indians have to their ancestral home. See *U. S. v. Santa Fe Pac. R. Co*., 314 U.S. 339, 353-54, 62 S. Ct. 248, 255, 86 L. Ed. 260 (1941) (finding "no indication that Congress by creating [a] reservation intended to extinguish all of the rights which the Walapais had in their ancestral home"). Although Congress could have effected such an extinguishment is true, however, "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.* There has therefore not been any extinguishment of aboriginal title by the federal government.

While it could be argued that Congress' passing of the Oregon Donation Land Act of 1850 constituted extinguishment of aboriginal title, the Act does not extinguish aboriginal title because it is not explicit in so doing. The Court requires language that "demonstrates a plain and unambiguous intent to extinguish Indian title." *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 248 (1985) (finding treaties relied on by petitioners insufficient to show that the U.S. ratified the unlawful purchase of land by the State of New York) (internal quotations omitted). It is true that Congress' power to extinguish aboriginal title is supreme, '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 . . .'" yet such extinguishing must be explicit. *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1017 (E.D. Cal. 2012) (quoting *United States v. Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 347 (1941)).

In addition, respondent's claim is not undermined by a statute of limitations because, as

in the *Oneida County* case, there is no "applicable statute of limitations or other relevant legal basis for holding the [respondent's] claims are barred or otherwise have been satisfied." *Oneida County*, 470 U.S. at 253.

C. In the Alternative, Even if the Land Could Have been Properly Transferred by the Federal Government, the Meeks Did Not Properly Come into Ownership Under the Oregon Donation Land Act of 1850

Even if the Oregon Donation Land Act had explicitly extinguished aboriginal title to the land, the Meeks did not meet the requirements of the Oregon Donation Land Act of 1850, and thus they did not properly come into ownership of the property. 31 Cong. Ch. 76, Sept. 27, 1850, 9 Stat. 496 ("That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included . . . who shall have resided upon and cultivated the same for four consecutive years . . . the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man . . . the quantity of one section, or six hundred and forty acres, one-half to himself and the other half to his wife . . ."). However, the Meeks did not cultivate the land nor do so for the four-year time period, as required by the Act, they merely lived on it for two years, instead of the required four years. *Oregon Circuit Court for the County of Multnomah Findings of Fact*.

Because transfer of the land to the Meeks was improper under the Oregon Donation Land Act, the Meeks did not hold title to the land and their transfer of the land back to the State of Oregon was improper.

II. Oregon Does Not Have Criminal Jurisdiction to Control the Uses of, and to Protect Objects on the Land in Question Notwithstanding Its Purported Ownership by a Non-federally Recognized American Indian Tribe

A. Oregon does not have jurisdiction within its own laws over the relevant archeological objects in Kelley Point Park

Although the State and the lower court contend that Oregon retains criminal jurisdiction over Kelley Point Park, this is not true for the criminal sanctions listed in this statute. Under ORS 358.905 an archeological object is one that is (A) at least 75 years old, (B) is part of the physical record of an indigenous or other culture found in the state, or (C) material remains of past human life or activity. Needless to say, this definition encompasses an almost infinite amount of objects, and is fairly vague. As will be argued below, the statute falls back on the qualification that the objects belong in some way to Indian tribes, which are, under state law, specifically state recognized tribes. Since the Cush-Hook Nation is not currently an Indian tribe recognized by Oregon, the culturally important objects "belonging" to it are ultimately not subjected to the criminal jurisdiction of the state.

ORS 358.920 requires a person who excavates an archeological site or object located on private lands to receive authorization by a permit issued under ORS 390.235. Clearly, as the lower court acknowledges, the Cush-Hook Nation owns Kelley Point Park through aboriginal title, thus making it a legal impossibility to charge Mr. Captain for trespass and cutting timber without a license. The state would thus argue that Mr. Captain violated ORS 358.905 – 358.91, however, this a legal impossibility since Mr. Captain is already not guilty of cutting timber without a state permit. All that ORS 390.235 requires for cutting timber on private land is filing notice with the State Forester under ORS 527.670, which in turn makes no specific reservations regarding Indian items. Thus, the only requirement Mr. Captain could be criminally liable for is a simple permit requirement, which the state already ruled Mr. Captain was not guilty.

The images that Mr. Captain removed clearly are not funerary objects, nor human remains, but may be "objects of cultural patrimony." ORS 358.905(h) defines "object of

cultural patrimony" as "having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself… which therefore cannot be alienated, appropriated or conveyed by an individual." Additionally, the statute makes clear it applies even to members of the Indian tribe [to which the object belongs]." The Cush-Hooks, however, are not a tribe within the meaning of the statute as defined in ORS 97.740, which lists only "any tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act, 25 U.S.C. 3564 et seq., or listed in the Western Oregon Indian Termination Act, 25 U.S.C. 3691 et seq., if the traditional cultural area of the tribe includes Oregon lands."

The statutory interpretation in context of the general scheme of tribal involvement in claims of cultural items adds further weight that only objects of state-recognized tribes are contemplated in ORS 358.905-358.961. Only state recognized tribes have representatives to the state and are consulted regarding state policy. The fact that ORS 97.740 only contemplates "objects of cultural patrimony" belonging to Indian tribes recognized by the state implicitly excludes unrecognized tribes such as the Cush-Hook Nation. Therefore, under ORS 358.905, Oregon does not have jurisdiction over objects of cultural patrimony in this case even within the logic of its own statutes. ORS 390.235 restricts removal of archeological objects from public lands, however Kelley Point Park is owned by the Cush-Hook Nation, and thus not a public land, *supra*. The State may point to ORS 390.235(5), the only section dealing with private lands as a basis for Oregon's criminal jurisdiction in this case. However, this section deals with forestry operations, and simply requires notice to be filed with the State.

While Mr. Captain's actions could be seen as forestry, it is a stretch to apply it to this case, and he was already acquitted of cutting timber without a license from the state. Additionally, ORS 390.325 (5) pertains only to sites that contain human remains, funerary objects or objects of cultural patrimony. Due to the ambiguity of ORS 358.905(h)(A) *supra*, the images Mr. Captain removed from Kelley Point Park are not covered under the statute as "objects of cultural patrimony." Nor are the images "associated with a prehistoric Indian TRIBAL culture," since the Cush-Hook Nation still exists and practices its religion. Oregon's criminal jurisdiction over cultural items on the Cush-Hook owned land goes against the state's policy outlined in ORS 358.905 – 358.961. These statutes are designed to prevent non-Indians from stealing tribal burial and ceremonial sites to sell items on the black market, not tribal members protecting their cultural sites.

B. The Oregon Statutes do not Encompass Criminal Action

Although Public Law 280 clearly mandated state jurisdiction over criminal matters in Oregon, except for the Warm Springs Reservation, the law did not give a similar grant over civil jurisdiction in reservations. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). Although the Congress never officially created a reservation for the Cush-Hooks, neither did they formally extinguish the tribe's aboriginal title to the land. Since "the Indian title had not been extinguished, it continued to be Indian country so long as the Indians had title to it." *Henry Claimont v. United States*, 32 S.Ct. 787, 788 (1912), referencing Indian intercourse act of 1834 (4 *269 Stat. at L. 729, chap. 161); see also *Donnelly v. U.S.*, 228 U.S. 243 (1912). Thus, Kelley Point Park is "Indian country" for purposes of 18 U.S.C.A. § 1151. This makes clear that Oregon has jurisdiction over criminal matters in Kelley Point Park, however leaves ambiguous the question of civil jurisdiction over the park.

Under PL 280, Congress mandated that Oregon assume criminal jurisdiction over "Indian country" in the state, with the exception of Warm Springs. 25 U.S.C.A. § 1321; 18 U.S.C.A. § 1162. However, the state does not have jurisdiction of conduct regarding civil/regulatory matters in Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Other federally-recognized tribes in Oregon and other mandatory PL-280 states thus retain their sovereignty over specific civil regulatory issues, subject to higher court decisions on the civil/regulatory or criminal/prohibitory nature of specific subjects. In applying the shorthand test, the 9th Circuit found that violations of state fireworks codes violates the California's public policy of "protecting life and property," *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 308 (9th Cir. 1993) (infractions of California fireworks laws considered criminal/prohibitory rather than civil/regulatory). *cifra U.S. v. Person*, 427 F. Supp. 2d 894 (D. Minn. 2006) (no state jurisdiction for drug charge that was civil/regulatory in nature rather than prohibitory/criminal). Additionally, PL 280 states have jurisdiction over individuals on reservations for welfare fraud charges, because generally prohibited, and thus criminal in nature. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002).

These examples elucidate the civil/regulatory nature of the statutes set forth by Oregon to prosecute Mr. Captain. Far from being prohibitory of the conduct he carried out, they set out detailed processes for state requirements and processes for obtaining state permits to excavate at sites and remove objects of cultural significance from those sites. Rather than prohibiting these activities like the fireworks codes of California, or the welfare fraud charges in *McMullen*, *supra*, the complex and exacting permit procedure clearly shows that Oregon is acting in a civil/regulatory nature in these statutes. ORS 390.235 requires

permits for archeological sites and historical material, with systems of approval including various bodies such as the Oregon State Museum of Anthropology, in-state Indian tribes recognized by Oregon, the State Parks and Recreation Director, and the Executive Officer of the Commission on Indian Services. ORS 390.235(1). This is a clear contrast from cases involving welfare fraud, where there is no possible permit to be issued, or committee to be inquired to.

Relinquishment of the state's inappropriate acquiring of civil jurisdiction over the Cush-Hook Nation's land also does not contradict Oregon's public policy, nor U.S. Congressional intent of PL 280. In fact, the spirit of PL 280 cuts against state jurisdiction over the alleged crimes listed in this indictment. With much greater manpower, judicial institutions, and expertise to deal with the misdemeanor crimes of vandalism, it would seem that the state of Oregon has left open a void of jurisdiction where crimes go unprosecuted. In a state park, Oregon may be more concerned about violent crimes against its citizens, however its lack of enforcement of its cultural heritage misdemeanors reveals a specific lawlessness and disregard for safety of the cultural heritage of the Cush-Hooks. Just as the original intent of PL 280 was to allow governments with proper resources to step in and confront lawlessness in certain areas they were barred from interfering with due to Indian reservations, the Cush-Hooks and other Indian tribes should be permitted, even encouraged, to step in and help the state protect their heritage and ceremonial sites.

Under PL 280, there is no state jurisdiction for an Indian offender in a victimless crime if it is a regulatory matter. Public Law 280, 18 U.S.C. §1162. As such, Oregon does not, in the matter before us, balance the safety and security of non-Indian Oregon citizens from possible civil jurisdiction of a tribe or a federal entity at Kelley Point Park. Rather, it is

overreaching its powers as a state to prevent its non-recognized Indian tribal members from practicing their religion. Rather than protecting their religious items, under the system set up in ORS 358.905-358.961, Oregon is in fact preventing non-recognized tribal members from accessing their religious and cultural items. Even when non-recognized tribal members act to protect these important sites, such as Mr. Captain has acted here, the items end up being acquired by the state for curating in its museums.

C. Protection of Cultural, Historical and Archeological Objects Comprise Civil Jurisdiction Under the Cush-Hook Nation, or the Federal Government

a. Federal Government Retains A Trust-Relationship with the Cush-Hook Nation

The Cush-Hooks do not at this time have federal recognition. 1994 list of tribes. To gain federal recognition, the tribe would have to go through the Federal Acknowledgement Process controlled by the Office of Federal Acknowledgment (OFA). 110 Interior Dep't Manual § 8.2 (April 21, 2003). Many tribes now in the final stages of the recognition process before the BIA began almost three decades ago.[1] 25 C.F.R. Part 83. Even if successful in this process, the tribe's religious and historical sites will likely already have been destroyed by vandals and Oregon's lack of adequate enforcement of Or. Rev. Stat. 390.235-390.240 on behalf of the Cush-Hooks. Thus, gaining federal recognition will not help protect their cultural sites from destruction. Congress never extinguished Indian title to Kelley Point Park, and only ceded criminal jurisdiction to Oregon under PL 280. Therefore, under *Cabazon*, jurisdiction of civil/regulatory matters should thus fall to the tribal government.

[1] http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm, Status Summary of Acknowledgment Cases as of July 31, 2012

In the case at bar, the Cush-Hooks lack the federal recognition necessary to obtain civil jurisdiction matters themselves. H.R. 4180 (103rd): Federally Recognized Indian Tribe List Act of 1994. However, the federal government still has a trust-relationship with the Cush-Hook Nation. Despite not being listed in the Federal Register as a recognized tribe,[2] the United States still has trust obligations established in the Non-Intercourse Act of 1790. 25 U.S.C.A. § 177. Under *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the court held "that the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe." 528 F.2d 379 (1975). The Nonintercourse Act includes "any… tribe of Indians," and therefore necessarily includes the Cush-Hook Nation. Id., at 376. "Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers," however neither branch has chosen to do so at this time. The Indian Reorganization Act of 1934 also reaffirmed the Cush-Hook's rightful ownership under their un-extinguished aboriginal title, declaring "the existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." Indian Reorganization Act, §2, 1934.

The Passamaquoddy claim led to the Maine Indian Claims Settlement Act of 1980. In the Act, Congress bestowed federal recognition upon the tribe and others in Maine, and appropriated $81.5 million to purchase land for their reservation. 25 U.S.C. § 1725. The Act also established tribal and state jurisdiction on the tribes' lands. Other similar claims have resulted in similar settlements, including the Rhode Island Land Claims Settlement passed in 1978, which resulted in recognition of the Narragansett Tribe, and the inapplicability of local,

[2] 47868 Federal Register/Vol. 77, No. 155/Friday, August 10, 2012/Notices

state and federal taxes on the land. 25 U.S.C. §§ 1701–16. In the Connecticut Land Claims Settlement of 1994, Congress extinguished aboriginal title of the Mohegan Tribe in exchange for the rights to build a casino after it received federal recognition from the Department of Interior earlier that year. 25 U.S.C. §§ 1741–50. Although no legal precedents resulted from these settlements per se given their culmination out of court, it is clear that aboriginal title does in fact merit more than mere fiduciary compensation.

In the case of the Cush-Hook Nation, which does not have the time go through the demanding federal recognition process under OFA in time to save its cultural sites, this Court can issue a limited acknowledgment of the Cush-Hook Nation's civil jurisdiction regarding cultural and religious matters of its land at Kelley Point, given the jurisdictional void created by the inability of the Federal government to establish a reservation for the Cush-Hooks and the lacking civil jurisdiction of the state of Oregon over the Indian land comprising Kelley Point Park.

Alternatively, the Court can order the federal government to fulfill its trust responsibilities to the Cush-Hook Nation to protect their cultural items until such time as the subsequent acknowledgment process more definitely establishes the exact responsibilities the federal government has to the Cush-Hooks, and the Nation's tribal status regarding federal recognition. This would be an extreme and completely unprecedented response however, and would likely set an unsustainable responsibility on the federal government in carrying out its federal acknowledgment process.

b. Cush-Hook Nation Retains Culturally Related Rights to Use and Occupy the Land In Question for Religious Purposes

This result is not precluded by recent cases in which the Court has limited extensions or revivals of tribal sovereignty. Importantly, this Court's decision in *City of Sherrill v.*

Oneida Indian Nation, limiting the civil/regulatory jurisdiction of tribe's newly purchased fee simple land is clearly distinguishable. 125 S.Ct. 1478 (2005). Although relief regarding "substantive questions of rights" should be evaluated in light of the long history of state sovereign control" of Kelley Point Park, the land in question was never properly placed into state jurisdiction. *Id*., at 1481. Even as late as 1934, during the drafting of 25 U.S.C.A. § 467, which authorizes the Secretary of the Interior to acquire new lands for Indian tribes, "jurisdiction was at the time essentially synonymous with Indian ownership." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir., 2010).

Thus, the damages to the Cush-Hook Nation are current and on-going, and therefore unlike the defendants in *Sherill*, no defense of laches is available. Second, the Cush-Hook Nation has not purchased land in fee simple to extend its tribal sovereignty and avoid state jurisdiction, but rather is reasserting its original claim under aboriginal title. Third, although much has changed around the Cush-Hook homeland since 1850, their claim would not be so "disruptive" as that in *Sherill*, given the land has consistently been used as a state park since 1880. Additionally, the "impossibility" doctrine as outlined in *Yankton Sioux* does not apply here. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926).

Acknowledgment of a limited civil jurisdictional power over their aboriginal land as a newly defined aspect of the tribe's right to use and occupancy of the land for their religion would not "seriously burde[n] the administration of state and local governments," but instead would help alleviate the state from using its resources to protect the Cush-Hook's land. *Hagen v. Utah*, 510 U.S. 399, 421 (1994), (quoting *Solem v. Bartlett*, 465 U.S. 463, 471–472 (1984)). Clearly, given the vandalism and destruction of the Cush-Hook cultural sites in the first place, the state is unable to sufficiently protect the lands in question.

Although "between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory," this dispute is not between two states, but between the state of Oregon and the United States. *City of Sherill v. Oneida Indian Nation*, 125 S.Ct. 1478, 1492 (2005). Since *Johnson v. M'Intosh*, "the exclusive right of the United States to extinguish [aboriginal] title, and to grant the soil, has never, we believe, been doubted." 21 U.S. 543, 586 (1823). More specifically, the "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). "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." *Beecher v. Wetherby*, 95 U.S. 517 (1877); see also *United States v. Santa Fe Pacific Railroad Co.*, 62 S.Ct. 248, 252 (1941) (Congress's power in extinguishing Indian title based on aboriginal possession is supreme and non-judiciable).

While the courts have often meant "justness" to mean the injustice done to American Indian tribes, the Cush-Hook claim represents an instance, similar to *Sherill*, of supposed 'injustice' to "the surrounding area are today overwhelmingly populated by non-Indians." *City of Sherill v. Oneida Indian* Nation, 125 S.Ct. 1478, 1481 (2005). Although in normal circumstances, "when a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations," the Cush-Hook Nation is not belatedly asserting its right to control its cultural sites and aboriginal land. Although historically the presence of the state park at Kelley Point did not threaten the Cush-Hook ceremonial sites, this situation has clearly changed. While from a common law theory perspective of property, the tribe is just now asserting damages from

1850. However, aboriginal title is *not* a common law form of ownership, which is merely analogous descriptions of aboriginal title.

For the Cush-Hook members though, who have been able to carry on practicing their religion for the last 162 years without asserting their aboriginal claims, and thus have been sufficiently able to use and occupy the land as necessary for ceremonial purposes, this form of redress is very recent indeed. For them, until the destruction of their ceremonial sites, their ability to use and occupy the land was not barred by the state of Oregon. Only recently did Mr. Captain, on behalf of the Cush-Hook Nation, physically "occupy Kelley Point Park to reassert ownership and protect culturally and religiously significant trees… [that] are very important to the Cush-Hook religion and culture." *Oregon Circuit Court for the County of Multnomah Conclusions of Law.*. Thus, in terms of aboriginal title to the 640-acres of Kelley Point Park, the tribe enjoyed sufficient "use and occupancy" of the land for their purposes under *M'Intosh*.

Lastly, while Congress has provided an alternative method for recognition in 25 U.S.C. § 465, the Federal Acknowledgment Process would take far too long for the Cush-Hooks to save their culture and religion given the continued unlawful, destructive intrusion onto their aboriginal lands. Generally, courts defer to OFA's acknowledgment process. See *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1094, 1102 (D.C. Cir. 2003) (courts before ruling on Nonintercourse Act claims should not make findings regarding tribal status before administrative process has a reasonable amount of time to make determinations). However, Congress has explicitly reaffirmed the courts' role and authority in determining whether tribes have federal recognition. 25 U.S.C. §§ 479a, 479a-1. Courts have been able to act on behalf of tribes in the face of the incredibly long delays inherent in the federal

recognition process where time is of the essence. See *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187 (D. Conn. 1999).

c. Even Lacking Tribal Jurisdiction over Kelley Point Park, the Federal Government Retains Jurisdiction

Even if the Cush-Hook tribe does not have civil jurisdiction over the land, the Federal government retains jurisdiction through the its trust relationship with the tribe. Additionally, several of its statutes preempt the Oregon laws regarding religious use of the land and repatriation of cultural items. Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C. § 2000cc. Under §2(A) of the Act, establishment of state parks receive Federal financial assistance, and (B) in the aggregate, a substantial burden on the more than 560 federally recognized tribes, and additionally non-recognized tribes practicing religious ceremonies on land that otherwise constitutes Indian country and which the federal government maintains a trust relationship over, like the Cush-Hook Nation, would affect commerce not only among the states, but also with Indian tribes. The amount of traveling between tribal homelands and of tribal members returning home for ceremonies in the aggregate is huge, not to mention the draw of tourism tribal religious ceremonies often attract in many parts of the country.

Even though the federal government may have ceded its criminal jurisdiction to Oregon through PL 280, its civil jurisdiction under RLUIPA is retained and preempts any criminal laws of the state of Oregon that conflict with it. Supremacy Clause, Article VI, Clause 2. Protection of Mr. Captain's actions to protect his tribe's unique and important religious site will be afforded under RLUIPA, even in spite of Oregon's general criminal jurisdiction under PL 280 over the land.

CONCLUSION

The aboriginal title of the Cush-Hook Nation has never been extinguished, and thus the tribe retains its right to use and occupy the land. Because aboriginal title was never extinguished, the tribe remains the owner of the land in Kelley Point Park.

Oregon's own state law does not contemplate protection of cultural items belonging to non-recognized tribes, and thus does not have criminal jurisdiction over such objects in Kelley Point Park. Furthermore, Oregon does not lawfully have related civil jurisdiction over the Cush-Hook Nation's land, but rather the tribe retains its ability to use and occupy the land for religious purposes through aboriginal title. Alternatively, the federal government preempts Oregon state law through its civil jurisdiction over Kelley Point Park, which is Indian country, under RLUIPA.

The judgment of the Court of Appeals that the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park should be affirmed, while the decision upholding Oregon's criminal jurisdiction of archeological, cultural and historical arguments should be reversed.