No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON, APPELLANT/PETITIONER,

v.

THOMAS CAPTAIN, APPELLEE/RESPONDENT AND CROSS-PETITIONER

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF OREGON

BRIEF FOR THE STATE OF OREGON

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QUESTIONS PRESENTED

I. May a state court recognize aboriginal title by a group of non-federally recognized Indians to state park land, when Congress in its plenary power extinguished aboriginal title and later mandated that subsequent related aboriginal title claims must be heard in the Indian Claims Court, and when the tribe relinquished and abandoned the land by choosing not to live on it in an actual, open, notorious, exclusive, continuous, and hostile manner, and always refusing to assert any claims at all to that land?

II. May a group of people which has not established federal recognition status as an Indian tribe restrict the state of Oregon from having criminal jurisdiction over the use and protection of archaeological, cultural and historical objects on land within state boundaries, regardless of any claims of aboriginal title?

STATEMENT OF THE CASE

I. Statement of the Proceedings

This appeal before the United States Supreme Court by the State of Oregon arises from a ruling from criminal conviction of Thomas Captain in a trial

court in Oregon. Moot Court Question, at 4. Captain's appeal was affirmed without a written opinion by the Oregon Court of Appeals. *Id.* After a denial of review by the Oregon Supreme Court, on the issues of whether a non-federally recognized group of American Indians retained aboriginal title to state park land, and then whether the State of Oregon has criminal jurisdiction to protect archaeological, cultural, and historical objects on the land in question, the State of Oregon as Petitioner and Cross-Petitioner filed for a Writ of Certiorari and Captain filed for Writ of Certiorari as a cross petition, which the U.S. Supreme Court granted. *Id.*

II. Statement of the Facts

Before 1806, the Cush-Hook Indians [*hereinafter* Cush-Hooks] lived in a village near the Willamette River, near the Pacific coast of the present state of Oregon. *Id.,* at 1. In 1806, the Cush-Hooks met William Clark, who had traversed the continent as part of the famous Lewis & Clark expedition. *Id.* Clark awarded President Thomas Jefferson Peace Medals to the main leader of the Cush-Hook group as a "sovereignty token," for the United States to assert its sovereignty over those Indians and that land as early as 1806. *Id.* There were two significant events in 1850 – a federal representative signed a treaty with the Cush-Hook Indians, and then Congress passed the Oregon Donation Land Act. *Id.,* at 2, *citing* 9 Stat. 496-500. The group of Cush-Hook Indians in that year agreed to leave that village and then relocated 60 miles away. *Id.* at 1-2. Since that day in

1850 – some 163 years later – we have no evidence in the record that the Indians as a group ever attempted to recover the land where the former village was located. This group of Indians has not been a party in this present case. The U.S. Senate never ratified a proposed treaty with the Cush-Hooks, which never has been federally recognized. *Id.* at 2. The Cush-Hooks are not a federally recognized tribe. *Id.*, at 3. Nothing in the record indicates the Cush-Hooks since has applied to be recognized in any way.

The State of Oregon purchased land in 1880 from the descendants of Joe and Elsie Meek, who had acquired the land under the Oregon Donation Land Act of 1850. *Id.* Thus, some 30 years after the Cush-Hooks as a group had left that land for good, the State of Oregon created what we now call Kelley Point Park. *Id.*

Some 131 years later, in 2011, Thomas Captain, an individual member of the Cush-Hook of Indians, decided to live by himself in Kelley Point Park, where he cut down a tree that was about three-hundred years old, with some ancient images, carved by Indians. *Id.,* at 2-3. The State of Oregon arrested Captain as he carried that chunk of tree to the group's location in the mountains, and then charged Captain with criminal trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 389.905-358.961 and 390-235-390.240. *Id.* The Oregon Circuit Court for the County of Multnomah County convicted Captain of damaging an

archaeological site and a cultural and historical artifact, fining him $250, but found him not guilty of criminal trespass or cutting timber without a state permit. *Id.* As explained, *supra*, this case now before this Court seeks to resolve the questions of whether the Cush-Hooks have aboriginal title in the land where Captain had committed the crimes for which he has been convicted, and whether the State of Oregon in fact had criminal jurisdiction to have arrested and convicted him for those crimes.

III. Standard of Review

The U.S. Supreme Court, as the highest court of review, "may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." S. Ct. Rule 24(1)(a). This is true especially when the matter "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993), *quoting United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985), *quoting United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous…." Fed. R. Civ. P. 52. *See also Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781 (1982).

SUMMARY OF THE ARGUMENT

An individual in a criminal defense case asked a state court, on behalf of a group of Indians not recognized by the federal or Oregon government, to allow aboriginal title of land for that group, as a way of claiming that the state had no criminal jurisdiction over state land where he had committed a crime. This claim was made even though the group of Indians never once in 160 years has filed the appropriate claim through federal courts, as mandated by Congress. Then, an Oregon trial court, without congressionally authorized jurisdiction, granted that aboriginal title. Even so, the state court did have jurisdiction to convict that individual of state crimes. That was not what Congress had intended as a way of resolving questions about Indian title in the State of Oregon, but now this Court has been asked to reconsider the decisions of state courts that have upheld that aboriginal title and but not given criminal jurisdiction to that tribe. Again, this is not what Congress had intended. Instead, Congress extinguished any possibility of a claim of aboriginal title of the Cush-Hooks. The doctrines of laches and estoppel prevent the Cush-Hooks from making a claim. In fact, the Cush-Hooks are not even a party to this action. Even adverse possession would quiet the title question, as Oregon has controlled the land since 1880.

The state of Oregon has criminal jurisdiction over the matter despite the lower court ruling that the land has aboriginal title because Oregon is a mandatory Public Law 280 state that has jurisdiction over all lands within state borders

tribally-owned or not absent express Congressional intent otherwise or if Oregon retroceded jurisdiction. The individual is a possible member of the non-federally recognized tribe and should be therefore treated like a non-Indian for purposes of jurisdiction. Even if the individual was a member of a federally recognized tribe and if the land was deemed to have aboriginal title, the state of Oregon would still have jurisdiction as a Public Law 280 state absent retrocession.

This Court, therefore, must find that the Cush-Hooks do not have aboriginal title or criminal jurisdiction on the land in question, and therefore dismiss the claim to aboriginal title and uphold criminal jurisdiction of the State of Oregon over the Respondent.

ARGUMENT

I. A STATE COURT MAY NOT GRANT ABORIGINAL TITLE TO A GROUP OF NON-FEDERALLY RECOGNIZED INDIANS TO STATE PARK LAND IN OREGON, WHEN CONGRESS IN ITS PLENARY POWER ALREADY SETTLED THE MATTER, AND WHEN THE TRIBE RELIQUISHED AND ABANDONED THE LAND BY CHOOSING NOT TO LIVE ON IT OR TO ASSERT ANY CLAIMS AT ALL TO THAT LAND DURING THE PAST 160 YEARS

A. Congress In Its Plenary Power as Sovereign Extinguished Aboriginal Title Claims By The Cush-Hooks By Mandating a Process That Required the Cush-Hooks to Assert a Claim or Forfeit It Forever

The Congress of the United States, in its plenary power, already answered the question of whether the Cush-Hooks have aboriginal title, criminal jurisdiction, or any other benefit it could enjoy in a special relationship with the United States, by mandating a process that required the Cush-Hooks either to assert a claim or forfeit it forever. There is nothing in the record to show Cush-Hooks did avail themselves of that process, *infra*, and therefore they cannot make a claim. They forfeited that right forever. We must remember this particular case is not even a claim by that group of Indians, but rather an attempt by an individual Cush-Hook to justify the destruction of a protected cultural artifact.

The Oregon trial court committed plain error when it held that the lands in the Oregon Territory were not all public lands of the United States, under the Oregon Donation Land Act. Moot Court Question, at 3. A fundamental, foundational principle in federal Indian law is that the title of the conqueror and discoverer remains superior to any claim of aboriginal inhabitant who had been conquered. *Johnson v. McIntosh,* 21 U.S. 543, 570, 5 L.Ed. 681 (1823). Lewis and Clark discovered the lands of Oregon in the early nineteenth century, and thus the Indians that inhabited them. Moot Court Question, at 1. At least at that point, the United States began to assert itself as sovereign and conqueror. These lands became the property of the United States, to handle as it would.

As we will see, *infra*, the Act of 1935 best reflects the intent of Congress for how to handle the disposition of any claims the Cush-Hooks might have had

about title of the land it once occupied. 49 Stat. 801 (1935). However, a historical background and pertinent precedents are necessary to understand why and how Congress approached that particular act. The United States has fee title to Indian land as sovereign, though Indians may have continuing rights of occupancy and use. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005). Any rights Indians might have may be extinguished by the federal government. *Oneida Indian Nation of N.Y. State v. Oneida County, New York*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); *Tee-Hit-Ton Indians v. U.S.*, 15 Alaska 418, 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314 (1955). Those title rights for Indians must be recognized by Congress to be valid. *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005). The tribe must have occupied the lands in question. *Northeastern Bands of Shoshone Indians v. U.S.*, 324 U.S. 335, 65 S. Ct. 690, 89 L. Ed. 985 (1945); *U.S. v. Santa Fe Pac. R. Co.,* 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941). And, that occupancy must have been actual, exclusive, and continuous "for an extended period of time." *Yankton Sioux Tribe of Indians v. State of S.D.*, 796 F.2d 241 (8th Cir. 1986); *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*. 126 S. Ct. 2351, 165 L. Ed. 2d 278 (2006). The federal government as the sovereign may extinguish aboriginal title. *Tee-Hit-Ton Indians*; *U.S. Ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). See also *U.S. v.*

Adair, 723 F.2d 1394 (9th Cir. 1983); *Blatchford v. Gonzales*, 100 N.M. 333, 670 P.2d 944 (1983). That extinguishment "may be by treaty, by sword, by purchase, by exercise of complete dominion adverse to the right of occupancy, or otherwise…." *State of Idaho v. Andrus,* 720 F.2d 1461 (9th Cir. 1983); *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 2351, 165 L. Ed. 2d 278 (2006). In fact, extinguishment is a political question, meaning that Congress gets to prescribe "[t]he manner, method and time" of the process. *U.S. v. Santa Fe Pac. R. Co*., 314 U.S. 339, 347, 62 S. Ct. 248 (1941), *citing Buttz v. Northern Pacific Railroad,* 119 U.S. 55, 66, 7 S. Ct. 100 (1886). No other governmental authority, whether a state trial court or even the President of the United States, can convey interests in tribal property without the authority of Congress, because of the U.S. Constitution's delegation of disposal of public lands to Congress. *Sioux Tribe of Indians v. U.S.*, 316 U.S. 317, 32662 S.Ct. 1095 (1942). Therefore, it was plain error for an Oregon court, without delegated authority, to award aboriginal title to a tribe not even a party to the case in question.

The Territorial Act of 1848 to organize the Oregon Territory specifically empowered authorities to enter into treaties to settle Indian land claims. 9 Stat. 323, Sess. I, Ch. 177 (Aug. 14, 1848). The statute does protect property rights of Indians in the Oregon Territory, "so long as such rights shall remain unextinguished by treaty between the United States and such Indians…." *Id.*

That is, to remain unextinguished, any property rights had to be approved by treaty. Just two years later, in 1850, Congress intended to negotiate treaties to extinguish title in the lands of Indians west of the range of the Cascade Mountains in Oregon. 9 Stat. 437, Sess. I., Ch. 16 (June 5, 1850). The Cush-Hooks at the time had moved to the west of that range, despite Congressional intent to keep them to the east. Their insistence to stay in the west and not assert their old claims, which the 1850 statute allowed if "expedient and practicable…." *Id*. Congress later refused to ratify the treaty with the Cush-Hooks, which meant any claims to aboriginal title were rejected. Also, the tribe moved before the treaty had been signed. Moot Court Question, at 2. The sovereign conquered the people and asserted dominion over the land, and the Cush-Hooks accepted that by moving and then doing nothing for 160 years about any potential claims.

When it entered the Union on Valentine's Day, 1859, Oregon was put on "equal footing" with other states already admitted. 11 Stat. 383, Ch. 33, 35 Cong. Sess II (Feb. 14, 1859). That means that it had "the same rights, sovereignty, and jurisdiction within its borders as did the original 13 states." *Black's Law Dictionary* (Bryan A. Garner, ed., 9th ed. 2009, Westlaw current through Jan. 14, 2013). In the past, this Court has looked to the equal-footing doctrine as a means of abrogating Indian rights. *See Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). However, as the Supreme Court of Washington noted *en banc*, the U.S. Supreme Court may well have overturned that case in

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 219, 119 S.Ct. 1187 (1999) (Rehnquist, C.J., dissenting). *State v. Buchanan*, 138 Wash.2d 186, 211, 978 P.2d 1070 (1999). Instead, "the Supreme Court now views the grant [of rights] as one from the Indians, with a reservation of rights not granted." *Id.*, *citing U.S. v. Winans,* 198 U.S. 371, 381, 25 S.Ct. 662 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680, 99 S.Ct. 3055 (1979). When you consider the Territorial Act of 1848 and the Act of 1850, *supra*, you see that Congress prepared for the entry of Oregon into the Union by extinguishing as much Indian land as it could. This is consistent even with the modern interpretation of the equal-footing doctrine, that both the treaty and the lack of a treaty during the nineteenth century were intended to extinguish any claims of aboriginal title for Oregon Indians. The only way Oregon Indians had reserved any rights, as well we will see, *infra*, is through specific legislation authorizing it. This situation is a particular application of federal Indian law to the entrance of Oregon into the Union.

Generally, Congress showed its intent to continue this process of taking Indian lands through acts like the General Allotment Act of 1887. 24 Stat. 388, ch. 119, 25 U.S.C.A. 331-333. Repealed. Pub.L. 106-462, Title I, § 106(a)(1), Nov. 7, 2000, 114 Stat. 2007. The Indian Reorganization Act of 1934 [*hereinafter* IRA] ended that era of allotment. 25 U.S.C.A. § 461. Also, the Secretary of Interior then got the authority to give back ownership of certain

surplus lands to tribes. 25 U.S.C.A. § 463 (repealed 1955). However, the IRA defined Indian as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Carcieri v. Salazar,* 555 U.S. 379, 129 S.Ct. 1058 (2009), *quoting* 25 U.S.C.A. § 479. In *Carcieri*, this Court held that a tribe must have been under Federal jurisdiction in 1934, the date of the passage of the IRA, for it to be able to get trust land from the Secretary of Interior.

It is significant that, throughout the twentieth century, there were tribes in Oregon like the Cush-Hooks that had not entered into treaties with the United States. This was not so with all tribes in Western Oregon. For instance, in 1894, Congress entered into an agreement with the Alcea Band of Tillamooks and other tribes on the Siletz Reservation. 28 Stat. 323, Sess. II, Ch. 290 (1894). Those with treaties had the opportunity to resolve their questions. However, in response to unanswered questions raised by unratified treaties with groups of Indians, like the Cush-Hooks, west of the Cascade Range in the State of Oregon, Congress temporarily waived its sovereign immunity in 1935 and gave special jurisdiction to the Indian Court of Claims to hear specific claims. 49 Stat. 801 (1935). There is no evidence that the Cush-Hooks ever filed suit under that limited waiver of sovereign immunity. They are not mentioned even in a treaty involving tribes from the Willamette Valley in Oregon. 10 Stat. 1125 (1854). Under another Congressional statute, they might have been able to by joined to claims by certain

tribes in Oregon, but the record does not show they ever asked. 45 Stat. 1257, § 3 (1959)

In the Act of 1935, Congress granted the Court of Claims specific jurisdiction to resolve "any and all legal and equitable claims" from tribes with treaties and tribes without treaties. 49 Stat. 801, 802, § 1 (1935). In fact, Congress said it was "the intention of this Act to include all the Indian tribes or their descendants, with the exceptions named, residing in the territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties…." *Id.* We now arrive at what perhaps is the most pertinent rule of law: "Any and all claims against the United States within the purview of this Act shall be **forever barred** unless suit be instituted or petition filed as herein provide in the Court of Claims within five years from the date of the approval of this Act [*emphasis added*]." *Id.*, at § 2. The Act was passed in 1935. The Cush-Hooks had until 1940. This is 2013, 78 years after passage of the Act designed to give them one last chance to make any claim for aboriginal title.

To build upon that argument, consider that this Court even has considered two cased involving unratified treaties from Oregon. *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40, 67 S. Ct. 167 (1946); *U.S. v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951). As the Oregon Circuit Court noted, the U.S. Senate never ratified a treaty negotiated in 1850 between the Cush-Hooks and Oregon Superintendent of Indian Affairs Anson Dart. Moot Court Question, at 1, 3. In

Alcea Band of Tillamooks, this Court noted how Congress expected Dart to negotiate those treaties. 329 U.S. at 43, *citing*, 9 Stat. 323. Unlike the Cush-Hooks in this present case, the Tillamooks were given reservation lands within their original lands. *Id.* Of particular note is how this Court in *Alcea Band of Tillamooks* recognized clear Congressional intent in the Act of 1935 for "judicial claims arising from original Indian title" involving unratified treaties with tribes in Oregon. *Id.*, at 46. The Court also recognized clearly the right of the sovereign to extinguish both aboriginal title *and* the right of occupancy by those Indians upon that original land. *Id.* The issue at hand was whether the Indians were due compensation, but the explicit presumption is that the Indians wanting compensation had asked for compensation under the Act of 1935.

So, the Tillamooks filed suit and got recognition of their title; the Cush-Hooks did not. Even the unratified treaty of the Cush-Hooks and the federal government is not sufficient for aboriginal title. "An unratified Indian treaty is not evidence of governmental recognition of Indian title to the lands described therein." *Coos Bay, Lower Umpqua and Sluslaw Indian Tribes v. U.S.* 87 Ct.Cl. 143 (U.S. Ct. Claims 1938), *citing Conley v. Ballinger*, 216 U.S. 84, 30 S. Ct. 224 (1910). Even a jurisdictional act allowing adjudication of claims for aboriginal title is not sufficient in itself of proving the title exists. *Id.*, *citing U.S. v. Mllle Lac Band of Chippewa Indians*, 229 U.S. 498, 500, 33 S.Ct. 811 (1913).

Even if the Cush-Hooks had not taken advantage of the Act of 1935, Congress gave even one more chance. The Indian Claims Commission Act of 1946 gave specific jurisdiction to the Indian Claims Commission to hear claims by tribes against the United States, but required those claims to be brought within 5 years. 60 Stat. 1052, § 12, Sess. II, Ch. 959, (Aug. 13, 1946). That would have been 1951. Again, it now is 2013, some 62 years later. Still, no claim by the Cush-Hooks.

It is not clear why the Cush-Hooks never made the decision to ask for their land. However, it is clear that Congress intended to take that land and never return it. Perhaps the Cush-Hooks have accepted that reality, unlike a state court in Oregon without jurisdiction to even consider the matter.

B. The Cush-Hooks Relinquished and Abandoned Their Property Rights In The Land In Question When They Moved and Refused to Take Tribal Action to Recover That Property.

Further, the Cush-Hooks relinquished and abandoned their property rights in the land in question when they moved and refused to take tribal action to recover that property. The Cush-Hooks relinquished the property, in that they permanently left it and never made any effort to regain it. "The relinquishing of or departing from a homestead, etc., with the present, definite, and permanent intention of never returning or regaining possession." *Black's Law Dictionary* (Bryan A. Garner, ed., 9th ed. 2009, Westlaw current through Jan. 14, 2013). The

Cush-Hooks abandoned the land and any claims to it when they left the land before the treaty was signed, and then refused for 163 years to assert any claims to that land. Abandonment is "[t]he relinquishing of a right or interest with the intention of never reclaiming it." *Id*. Further, it is "[t]he relinquishing of or departing from a homestead, etc., with the present, definite, and permanent intention of never returning or regaining possession." *Id*. Under Oregon law, "[a]bandonment is the voluntary relinquishment of the possession of an object by the owner with the intention of terminating his or her ownership. The intent to abandon must be clear and must be accompanied by some specific act of abandonment." *State v. Pidcock*, 89 Or. App. 443, 448, 749 P.2d 597, 599 *aff'd,* 306 Or. 335, 759 P.2d 1092 (1988), *citing Rich v. Runyon,* 52 Or.App. 107, 112–13, 627 P.2d 1265 (1981).

In this case, the Cush-Hooks moved from the land in 1850, and then never made a group effort to get the land. Only one member had done anything, and that much too late.

C. The Doctrines of Estoppel and Laches Prevent The Cush-Hooks From Taking Aboriginal Title

The State of Oregon asserts it has owned the property since 1880. Moot Court Question, at 3. However, the State also could quiet title with a claim of adverse possession, which raises the issue of equitable estoppel. In Oregon, one may have title by adverse possession when it proves "by clear and convincing

evidence that they had actual, open, notorious, exclusive, continuous, and hostile possession of the property for a 10–year period." *Hoffman v. Freeman Land & Timber, LLC*., 329 Or. 554, 558, 994 P.2d 106, 109 (Or. 1999), citing *Hoffman v. Freeman Land & Timber*, LLC, 156 Or.App. 105, 108, 964 P.2d 1144 (Or.App. 1998). See also O.R.S. § 105.620. Assume *arguendo* that this Court finds important the finding by the Oregon trial court that the fee title of Joe and Elsie Meek was not adequate under the Oregon Donation Land Act. Moot Court Question, at 3. Then, title could be quieted by the "actual, open, notorious, exclusive, continuous, and hostile possession" of Kelley Point Park by the State of Oregon between 1880 and 2013 – which far exceeds the 10-year requirement under Oregon law.

Therefore, anyone would be estopped from asserting title over the State of Oregon. Estoppel "prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Black's Law Dictionary* (Bryan A. Garner, ed., 9th ed. 2009, Westlaw current through Jan. 14, 2013). Moreover, when a tribe has waited far too long to assert any claims, this Court has invoked the doctrines of laches, acquiescence, and impossibility to address what it believed to be inequities in what had been requested. *City of Sherrill, N.Y., v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478 (2005). This desire for finality to conflict appears to be reflected in the Congressional actions taken about Indians, including those in

Western Oregon, *supra.* *See, also*, 28 U.S.C. 2415(a)(b), *citing* Indian Claims Limitation of 1982, P.L. 97-394. Some throughout history, like one federal district court in Oregon, might not think the doctrine of laches is fair to Indians. *U.S. v. Brookfield Fisheries, Inc., et al.*, 24 F.Supp. 712, 716 (D.Ore. 1938). However, the more recent holding in *Sherrill* shows how the federal government wants to settle these types of Indian claims.

As we see from the statutory requirements for when to file a claim, a tribe may not claim title outside of the statutory requirements. *See, e.g., Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455 (10th Cir. 1987). Moreover, an individual Indian is not able to make claims for a non-federally recognized group that has no property rights in the land, in part because an individual Indian does not have fee simple property rights on behalf of a tribe. *U.S. v. Felter*, 546 F. Supp. 1002 (D. Utah, 1982), ju*dgment aff'd*, 752 F.2d 1505 (10th Cir. 1985). *See also U.S. v. Jim*, 409 U.S. 80, 93 S. Ct. 261, 34 L. Ed. 2d 282 (1972). That is, the individual Indian only has rights to tribal property when the tribe itself has rights to that property. *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979).

The Cush-Hooks do not have aboriginal title, present title, future title or any title in Kelley Point Park. The group of Indians – a tribe for purposes of culture and history, but not recognized by the federal or Oregon governments – had more than one opportunity from Congress to assert title. Some tribes do. Some tribes do not. Those tribes who do not, like the Cush-Hooks, cannot

recover that land through aboriginal title actions. Congress has extinguished that title by giving the Cush-Hooks chances to prove that title and waiting until it got an answer from the Cush-Hooks. That answer was group silence.

II. THE LOWER COURT CORRECTLY RULED THAT OREGON HAS CRMINAL JURISDICTION OVER THE USE AND PROTECTION OF ARCHAEOLOGICAL, CULTURAL AND HISTORICAL OBJECTS ON LAND WITHIN STATE BOUNDARIES, REGARDLESS OF ANY CLAIMS OF ABORIGINAL TITLE BECAUSE OREGON IS A MANDATORY PUBLIC LAW 280 STATE THAT HAS CRIMINAL JURISDICTION OVER LANDS TRIBALLY-OWNED OR NOT.

Oregon has criminal jurisdiction over all land in the state of Oregon, tribally owned or not, except for the Warm Springs Reservation. There are tribes that have land placed into trust from the federal government, and the tribes have been federally recognized as a tribe. There is even the Klamath Tribe of Indians in Oregon that was unrecognized and fought to be re-recognized as a tribe as recently at 1986 and had land put in to trust for them. 25 U.S.C.A. § 566 (West).

In this case, the Cush- Hooks are not even a federally recognized tribe. Congress had no intention of making them a tribe, and the group has not even taken the steps necessary to try to become a tribe through Indian Claims Court or the federal recognition process. Even if the group was considered a federally

recognized tribe, which they are not, Oregon is a mandatory Public Law 280 state and they have jurisdiction over all tribally owned land except the Warm Springs Reservation and partial retrocession of Umatilla.

I. The Crime Occurred on State Land

The crime did not occur in "Indian Country," but on public state land. The state of Oregon has jurisdiction over their land that is not federally owned. U.S. Const. art. I, § 8, cl. 17. Even if the group of Cush-Hooks were a federally recognized tribe with aboriginal title, the state is a Public Law 280 state and has criminal jurisdiction over all of the tribal land except the Warm Springs Reservation. *State v. Smith*, 560 P.2d 1066, 1069 (Or. 1977).

Currently, Congress conferred criminal jurisdiction over all of the state except the Warm Springs Reservation. *State v. Jim*, 37 P.3d 241, 242 (Or. App. 2002). Criminal jurisdiction regarding Indians is complex in that it includes the nationalities of the defendant and victims, the nature and the location of the crime. Criminal jurisdiction over a crime in "Indian Country" committed by an Indian can be the jurisdiction of the state if Congress has granted such jurisdiction. *Langley v. Ryder*, 778 F.2d 1092, 1096 (5th Cir.1985). "In order for a state to exercise criminal jurisdiction within Indian country there must be clear and unequivocal grant of that authority." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n. 17, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

The definition of "Indian Country" is very important to this case as it establishes why this land is state land subject to the jurisdiction of the state:

> "(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 the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way through the same." 18 U.S.C. § 1151.

In this case, the land where the trespass occurred was on state land that was not put into trust for a tribe. The land in question has not been acknowledged as "Indian Country" by the state or federal government. The land is not an Indian allotment and does not have Indian title, and is therefore not considered Indian Country. The crime did not occur in "Indian Country" and was a violation of state law, not federal law, so state jurisdiction was proper. Now that we have established that the land is not Indian Country land, we continue to Congressional expression.

II. Oregon Has Criminal Jurisdiction Over Most Lands Regardless of Aboriginal Title

Even if the land in question was considered "Indian Country," Congress expressly gave Oregon criminal jurisdiction when Congress mandated Oregon as a Public Law 280 state. Public Law 280 gives six states, including Oregon, mandatory criminal jurisdiction over tribal land. 28 U.S.C.A. § 1360 (West).

Oregon has nine federally recognized tribes. Goldberg, *Final Report Law Enforcement and Criminal Justice Under Public Law 280*, https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf (May 2008). Out of the nine federally recognized tribes Oregon has, the Warm Springs Reservation is excluded from Public Law 280, and Oregon retroceded partial jurisdiction over the Umatilla tribe Public Law 280 in 1981. *Id.* at 21. Public Law 280 authorizes:

> "Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." 18 U.S.C.A. § 1162 (West).

Public Law 280 lists Oregon specifically and provides that the state's criminal jurisdiction extends to extends to "[a]ll Indian country within the [s]tate, except the Warm Springs Reservation." *Id*., at § 1162(a). The group of Cush-Hook Indians is not a federally recognized tribe, and therefore does not enjoy the special relationship between the federal government and tribes. 25 U.S.C.A. § 479a (West). The only tribes that have avoided criminal jurisdiction from Oregon are federally recognized and have either been excluded from state jurisdiction from the express intent of Congress (Warm Springs Reservation) or lobbied for retrocession (Umatilla). Goldberg, at 21. Congress expressly intended for Oregon

to have jurisdiction over most tribal lands of federally recognized tribes and all lands within the Oregon state borders.

The Oregon statutes define "Indian tribe" as any tribe recognized by the Secretary of the Interior, listed in the Klamath Termination Act or the Western Oregon Indian Termination Act. Or. Rev. Stat. Ann. § 97.740 (West). The Cush-Hook tribe is not listed anywhere in these laws and therefore cannot claim rights as an Indian tribe.

Some tribes who have not expressly been given land have received "de facto" reservation status. The Tejon/Sebastian Reservation, for instance, was deemed to have a "de facto" reservation even thought the reservation was not specified by treaty, statute or executive order. *U.S. v. Azure*, 801 F.2d 336, 338 (8th Cir.1986). The court found that the actions of the federal government, especially the Bureau of Indian Affairs expending funds and providing social services to the tribe, would be a key factor in finding for a "de facto" reservation. *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 149–50 (8th Cir.), *cert. denied*, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978). The Klamath River Reservation, also in Oregon, was regarded by the Court in a "state of reservation." *Mattz v. Arnett*, 412 U.S. at 490–491, 93 S.Ct. 2245. There were no attempts to sell the reservation, the military protected the land against trespass, and allotments were

proposed although "not reestablished by Executive Order or specific congressional action, continued, certainly, in de facto existence." *Id.*

Contrary to the Klamath River Reservation, the land that the Cush-Hook lived on over 163 years ago was sold to settlers and then sold to the state. There were multiple sales of land, and the federal government has not made any actions that would indicate that the land that is now Kelley State Park is land reserved for receive benefits from the federal government. The Cush-Hook Nation has also not made any claims to become a federally recognized tribe on record.

In order for the state of Oregon to not have jurisdiction, the Respondent would have to prove that there is a better jurisdiction. The Cush-Hook Nation would have to be a federal recognized tribe that the Kelley State Park land into trust. If the land in question was not in a Public Law 280 state, then the federally recognized tribe would have criminal jurisdiction over an Indian if they commit a criminal act on the reservation. The land in question is in a Public Law 280 state, so the state of Oregon has criminal jurisdiction over crimes in Indian land absent an agreement to retrocede jurisdiction. 25 U.S.C.A. § 1323 (West).

In some cases, courts have deferred to the Bureau of Indian Affairs to determine whether an unrecognized group is an "Indian tribe" although they are not required to do so. *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine,* 2010 WL 2674565 (D.N.J.2010). In other cases, there have been

courts that have declined to defer the issue of an "Indian tribe" to the Bureau of Indian Affairs and have held that despite the lack of federal tribal recognition, a tribe that presented evidence of the New York Legislature recognizing the tribe in 1792 and other acts of recognition of tribal status to present was an Indian Tribe. *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005). According to the record, the Cush-Hook Nation has never filed for tribal status and would not be an Indian Tribe because neither Oregon nor the United States recognized the Cush-Hook Nation as an Indian Tribe.

Lastly, there is no single definition of an individual "Indian," but most definitions require that in order to enjoy the political relationship between the United States and federally recognized tribes, you must be a member of a tribe under federal recognition. Under Indian Health Services, for instance, a person must be a member "of any recognized Indian Tribe now under Federal jurisdiction" or a descendant of members who resided within the present boundaries of an Indian reservation in June 1, 1934. 25 U.S.C.A. § 479 (West). The Indian Child Welfare Act defines "Indian" as any person of an Indian tribe, and "Indian tribe" as 'means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians." 25 U.S.C.A. § 1903.

An 'Individual Indian' is generally a person who is an enrolled member of a tribe, a descendant of a person who was physically residing on a federally

recognized reservation in 1934, or any person possessing one-half or more degree Indian blood of a tribe. 25 C.F.R. § 151.2. The Respondent does not meet any definition of 'Indian' as the group he belongs to is not federally recognized and they do not seem to receive benefits as a tribe. Therefore, for the purposes of jurisdiction, the Respondent is a non-Indian on state land and is subject to state jurisdiction.

The court did not err when it 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. Even the two tribes that avoid the mandated Public Law 280 jurisdiction have to enforce the state statutes. Because Oregon has jurisdiction over state land, and the Respondent lacks relation to a federally recognized Indian Tribe and therefore not an Indian, the Court should uphold the lower court in deciding that Oregon has criminal jurisdiction over Kelley State Park.

CONCLUSION

An individual in a criminal defense case asked a state court, on behalf of a group of Indians not recognized by the federal or Oregon government, to allow aboriginal title of land for that group, as a way of claiming that the state had no criminal jurisdiction over state land where he had committed a crime. This claim was made even though the group of Indians never once in 160 years has filed the

appropriate claim through federal courts, as mandated by Congress. Then, an Oregon trial court, without congressionally authorized jurisdiction, granted that aboriginal title. Even so, the state court did have jurisdiction to convict that individual of state crimes. That was not what Congress had intended as a way of resolving questions about Indian title in the State of Oregon, but now this Court has been asked to reconsider the decisions of state courts that have upheld that aboriginal title and but not given criminal jurisdiction to that tribe. Again, this is not what Congress had intended. Instead, Congress extinguished any possibility of a claim of aboriginal title of the Cush-Hooks. The doctrines of laches and estoppel prevent the Cush-Hooks from making a claim. In fact, the Cush-Hooks are not even a party to this action. Even adverse possession would quiet the title question, as Oregon has controlled the land since 1880.

The state of Oregon has criminal jurisdiction over the matter despite the lower court ruling that the land has aboriginal title because Oregon is a mandatory Public Law 280 state that has jurisdiction over all lands within state borders tribally-owned or not absent express Congressional intent otherwise or if Oregon retroceded jurisdiction. The individual is a possible member of the non-federally recognized tribe and should be therefore treated like a non-Indian for purposes of jurisdiction. Even if the individual was a member of a federally recognized tribe and if the land was deemed to have aboriginal title, the state of Oregon would still have jurisdiction as a Public Law 280 state absent retrocession.

This Court, therefore, must find that the Cush-Hooks do not have aboriginal title or criminal jurisdiction on the land in question, and therefore dismiss the claim to aboriginal title and uphold criminal jurisdiction of the State of Oregon over the Respondent.

Respectfully Submitted,

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Attorneys for the Plaintiff-Appellant