Docket No. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES

January 14, 2012

STATE OF OREGON

*Petitioner*,

v.

THOMAS CAPTAIN,

*Respondent.*

ON WRIT OF CERTIORARI FROM THE OREGON COURT OF APPEALS

# BRIEF FOR THE PETITIONER

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Attorneys for Petitioner

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## STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument. Resolution of the issues depends on a proper understanding of Petitioner's claims and the relevant case law. Oral argument will aid the Court in evaluating this case.

## QUESTIONS PRESENTED

1. Whether the district court properly found the Cush-Hook to have aboriginal title after leaving the land in question, and the title being passed to the State?

2. Whether the district court properly found the State of Oregon to have criminal jurisdiction to prohibit removal, defacing, or destruction of archaeological, cultural, and historical objects in Kelley Point Park, notwithstanding the purported ownership of the Park by the non-recognized Cush-Hook Nation?

## STATEMENT OF THE FACTS

The Cush-Hook Indians lived in the Portland area before the establishment of the United States. R. at 1. At no point after the formation of the United States did the federal government formally recognize the Cush Hook Indians. *Id.* The Cush-Hooks were first brought to the attention of the United States by the Lewis and Clark expedition in 1806, when the Cush-Hooks accepted a medal commonly given to tribal chiefs as a sign of willingness to engage in future relations with the United States. *Id.*

The Cush-Hooks continued to live in their village on this land until 1850, when they engaged in relations with the United States through Anson Dart, Superintendent of Indian Affairs for the Oregon Territory. *Id.* The Cush-Hooks signed an agreement with Dart to move 60 miles westward to a specific location in the foothills of the Oregon coast range of mountains. *Id.* Congress never ratified this agreement. R. at 2. The entire Cush-Hook Nation moved to this area, and some remain in this portion of the State. *Id.* The United States has never officially recognized the Cush-Hook Nation as a tribe of sovereign Indians. R. at 1.

After the Cush-Hooks relocated, Congress passed the Oregon Donation Land Act of 1850. R. at 2. The Act required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500. *Id.* The United States granted fee title to the 640 acres of land that today comprises Kelley Point Park to Joe and Elsie Meek. *Id.* Their descendants sold the land to Oregon in 1880 in order for the State to create Kelley Point Park. *Id.*

In 2011, Thomas Captain, who identifies as a Cush-Hook Indian, moved from the tribal area in the coast range of mountains to Kelley Point Park. *Id.* He occupied the Park to reassert

the Cush-Hooks' claim to ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over three hundred years. *Id.* The Cush-Hook carved religious symbols into the trees for generations; today, the carved images are at a height of 25-30 feet from the ground. *Id.* Sadly, some vandals have recently begun climbing the trees to deface the images or to cut them off the trees to sell. *Id.* So far, unfortunately, no perpetrators have been apprehended. *Id.* Thomas Captain occupied the Park to reclaim and preserve these crucial tribal objects; he cut down the historical tree, and removed the section of the tree that contained the image. *Id.* He was returning to the coastal mountain range with the historical object when state troopers arrested him and seized the image. *Id.*

## STATEMENT OF PROCEEDINGS

The State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under OR. REV. STAT. §358.905-358.961 (2011) (Archaeological sites) and OR. REV. STAT. §390.235-390.240 (2011) (Historical materials). Captain consented to a bench trial. *Id.*

At trial, the Oregon Circuit Court for the County of Multnomah ruled that the Cush-Hook Nation had aboriginal title to the lands in Kelley Point Park, and that the granting of the land to the Meeks was void. R. at 4. Further, the State had the authority to bring criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object. *Id.* The court further convicted him of those crimes, and fined him $250. *Id.* Yet, it was determined that he did not trespass or wrongfully cut down the timber because the trial court ruled that the Cush-Hooks still own the land. *Id.*

## SUMMARY OF ARGUMENT

Respondents must prove that the Thomas Captain had the right to cut down the tree in Kelley Point Park. Aboriginal Title can be claimed by Tribes or Individuals once they identify themselves as rightful parties. Whether the Tribe ever had Aboriginal Title is a question of fact. Aboriginal Title can only be extinguished by the Federal Government. This title, if proved to have even existed, has since been extinguished by the Federal Government.

Despite any purported ownership by the Cush-Hooks, Kelley Point Park is not a reservation. It is a plot of real property in Portland, Oregon, over which the State of Oregon has complete jurisdiction. In order to undermine the State's jurisdiction, Respondents must convince the Court to constructively recognize the Cush-Hooks as a tribe with sovereign jurisdiction. Even if the Court were willing to do so, the State still has criminal authority to prohibit removal, defacing, or destruction of archaeological, cultural, and historical objects in Kelley Point Park. Moreover, even if that authority were to be construed as regulatory rather than criminal, the State should still have regulatory authority under the exceptional circumstance of a constructively recognized tribe's newfound regulatory jurisdiction, when the Cush-Hook Nation has shown neither the regulatory framework nor the enforcement mechanisms necessary to effectively manage the jurisdiction.

## ARGUMENT

### I. THE CUSH-HOOK NEVER HAD ABORIGINAL TITLE, AND EVEN IF THEY DID IT HAS SINCE BEEN EXTINGUISHED

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. The Cush-Hook Nation must factually establish that the lands in question were, or were included in, the ancestral home in the sense that they constituted definable territory occupied *exclusively*. *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941) (emphasis added). The Cush-Hooks lived in the questioned area before the formation of the United States. R. at 1. This is undisputed. Yet, the Cush-Hooks fail to demonstrate that they can claim aboriginal title despite having occupied the land in the 1800's, let alone that the title still exists today.

#### A. The Cush-Hooks Have Not Proven that They Ever Possessed Aboriginal Title

In order for an Indian Tribe to prove aboriginal title, "[t]here must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." *Alabama-Coushatta Tribe of Texas v. United States*, 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000). Therefore the Cush-Hooks must establish that their land rights were (1) exclusive, (2) continuous and (3) since time immemorial. *Id.* The Cush-Hook Nation cannot show that it meets any, let alone all, of the requirements necessary to establish aboriginal title at this time.

Even if the Cush-Hooks once had aboriginal title to the land, it has since been extinguished. This process of extinguishment is "the exclusive right of the United States. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."

*Santa Fe Pac. R. Co.*, 314 U.S. at 347. If aboriginal title existed, it was extinguished by the deal made with Dart, acting as an agent of the Federal Government, and/or by the Donation Land Claim Act of 1850, regardless of whether the Meeks were properly granted the title to the land.

1. **The Cush-Hook Indians Do Not Have The Right To Establish Aboriginal Title Because They Are Not A Federally Recognized Tribe**

The acknowledgment of tribal existence by the Department of the Interior is a prerequisite to the protection, services, and benefits from the federal government that are available to Indian tribes. 25 C.F.R. § 83.2; *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1029 (E.D. Cal. 2012). Further, courts have found recognition vital to the right to sue for aboriginal title. *United States v. 43.47 Acres of Land More or Less, Situated in County of Litchfield, Town of Kent*, 855 F. Supp. 549, 551 (D. Conn. 1994). The Cush-Hooks must show why they should be viewed as a recognized tribe, when Congress has had ample opportunity to recognize the Cush-Hook Nation and has chosen not to do so. Tribes are entities that (1) were tribes at the time the land was alienated and (2) remain tribes at the time of suit. *Mashpee Tribe v. Sec'y of Interior*, 820 F.2d 480, 482 (1st Cir. 1987). The Cush-Hook Indians have never been formally recognized as a tribe, therefore requiring them to demonstrate that they are a tribe despite not having ever been approved for tribal status. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994).

2. **The Cush Hook Indians have not actually and continuously occupied the Kelly Point Park**

In order to claim aboriginal title, a tribe must continuously and exclusively use the land since time immemorial. This means that the land must not be shared with other Indian groups, and must be constantly occupied by the tribe who held the aboriginal title. This use and occupancy requirement is measured “in accordance with the way of life, habits, customs, and usages of the Indians who are its users and occupiers." *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012). A tribe must prove aboriginal title by a preponderance of the evidence. *Id.*

The Government can extinguish aboriginal title in various ways. First, the Cush-Hook Nation must prove that it once held aboriginal title. *Id.* In particular, the Cush-Hooks must demonstrate actual and continuous possession up until the date of the alleged taking. *Id.* First, the Cush-Hook Nation has not occupied the land since 1850. R. at 1. Therefore, at the time that Thomas Captain is bringing a claim of title, there has not been constant use of the land. *Id*. The sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title. *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 787 (Fed. Cl. 1993). Further, it is unsettled if simply by leaving the land the Cush-Hooks forfeited their rights to it:

> [W]hen an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and

> ownership to such land; and the United States cannot be required to pay therefore on the same basis as if it were a recognized treaty reservation.
>
> *Quapaw Tribe of Indians v. U. S.*, 120 F. Supp. 283, 286 (Ct. Cl. 1954).

The 2nd Circuit did not follow this decision, but the decision is still given great weight by the dissent. *Oneida Indian Nation of New York v. City of Sherrill, New York*, 337 F.3d 139, 172 (2d Cir. 2003). Yet, this was later taken up by this Court, who, without needing to completely settle the issue, remanded the case for the reasoning that the state continuously governed the lands in question for two centuries after tribe's predecessor nation sold reservation land in question, tribe did not seek to revive sovereign control over the parcels through equitable relief against state until recent years, and reestablishment of Indian sovereign control over the parcels would have disruptive practical consequences. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

Though the Cush-Hooks may have once occupied the land, they have not continued occupying the land; therefore, the Cush-Hooks cannot claim aboriginal title today. The Cush-Hooks willingly left the land, and for over a century did not continue to occupy the land. Therefore, in attempt to claim the aboriginal title, there is no way to show that they have, up until the taking, they actually had continuous occupation.

Even if the Court were to rely on *Oneida II*, this is not a case seeking monetary damages. *Oneida III*, 544 U.S. at 197. As this Court stated in *Oneida III*, the asking of monetary damages compared to the actual control of the land are very different issues. *Id.* The Court ruled that the equitable remedies could not occur so late after the original taking.

3. **The Cush-Hook Indians have did not have exclusive use of the land due to the presence of other Tribes on the land**

Implicit in the concept of ownership of property is the right to exclude others. Generally, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by aboriginal title, they must show that they used and occupied the land to the exclusion of other Indian groups. The establishment of exclusive ownership is a question of fact, with the burden of proof on the tribe. *Alabama-Coushatta*, 2000 WL 1013532 at 3-83.

The Cush-Hook Nation did not occupy the land exclusively. In order for an Indian tribe to establish ownership of land by aboriginal title, it must show that it used and occupied the land to the exclusion of other Indian groups. *Santa Fe*, 314 U.S. 339, 345 (1941). True and exclusive ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled, or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such 'exclusive' use and occupancy as is necessary to establish ownership by Indian title. *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1394 (Ct. Cl. 1975). The only documentation of the tribal lands before 1850 clearly states that another tribe occupied the same area. R. at 2. The Multnomah Indians occupied the territory near the Cush-Hook Nation village. *Id.* It was clear they were not functioning as a single tribe, given the fact that a peace symbol had to be flashed before approaching the Chief of the Cush-Hooks. *Id.* This demonstrates that the Cush-Hooks did not exclusively own those lands, as they were shared with the Multnomah. Therefore, aboriginal title should not be granted.

This exact issue was recently visited in *Native Village of Eyak v. Blank* by the Ninth Circuit. *Native Vill. of Eyak*, 688 F.3d at 622 The Court determined that the Eyak did not have exclusive right to the land because other tribes had used the same areas. *Id.* Even if those other Tribes occupied portions, rather than the whole area, the partial occupancy was enough to demonstrate that there was not exclusivity. *Id.* at 624.

Further, the Cush-Hooks should not be viewed as meeting any of the exceptions listed in *Alabama-Coushatta*. *Alabama-Coushatta* 2000 WL 1013532 at 12. This general rule of exclusive use and occupancy is subject to three exceptions: (1) the joint and amicable use exception; (2) the dominated use exception; and (3) the permissive use exception. *Id*. First, the Multnomah and Cush-Hooks did not view the land as communally owned by the two tribes, as evidenced by the fact that one group would not approach the other's village without first making a sign of peace. R. at 2. Therefore there should not be a joint and amicable use exception which exists when the two tribes are "close and intimate alliance, politically and socially" *Alabama-Coushatta* at 12. If that were the case, a peace sign would not have to be given to approach the chief. Secondly, there is no signal in the facts of the case that point to the Cush-Hook dominating the Multnomah, and therefore this would not satisfy the second exception of domination between the two tribes. *Id.* Lastly, the Cush-Hooks do not satisfy the permissive use exception because this exception requires "specific evidence" of more than just shared hunting grounds. *Id.* There is no specific evidence provided to demonstrate that the Multnomah were just briefly sharing the land with permission of the Cush-Hook. Therefore, the Cush-Hook Nation and the Multnomah were separate tribes, and the Cush-Hooks did not have exclusive use of the land.

### B. Even If The Cush-Hook Indians Had Aboriginal Title at One Time, It Has Since Been Extinguished

If the Cush-Hook Indians once had an aboriginal title, it would have been extinguished in 1850. The manner, method, and time of such extinguishment raise political, not justiciable, issues. *Santa Fe Pac. R. Co.*, 314 U.S. at 347. "Further, the exclusive right of the United States to extinguish" Indian title has never been doubted." *Johnson v. McIntosh*, 21 U.S. 543, 585, 5 L. Ed. 681 (1823). "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." *Santa Fe Pac. R. Co.*, 314 U.S. at 347.

#### 1. Anson Dart, Acting on Behalf of the Federal Government, Extinguished Their Title With The Treaty Signed In 1850

The deal made with Dart was not an agreement with a third party because he was acting explicitly on the direction of the sovereign. Further, there was no legally enforceable reason why the treaty had to be ratified because no compensation was ever needed. The deal was not based upon any action of the U.S. after the Cush-Hooks relocated.

Aboriginal title is lost when land patents are validly issued to predecessors in title. *Robinson* 838 F. Supp. 2d at1019. Dart was allowed to negotiate with the tribe for a treaty because he was a federal agent. *Oneida I,* 414 U.S. at 668. Therefore, the deal made with Dart counted as a contract with the Federal Government. R. at 1. Further, whether or not the Cush-Hook were paid for the treaty does not matter. In *Delaware Nation vs. Pennsylvania,* it was made clear that aboriginal title can be extinguished whether payment was made or not. *Delaware Nation,* 446 F.3d at 416. The only thing that matters was that the treaty was made with a representative of the sovereign. *Id.*

Dart was clearly acting on behalf of the Federal Government. Congress created the position of the Superintendent of Indian Affairs. R. at 1. The position was created by Congress and was the function of the Bureau of Indian Affairs. Oregon Encyclopedia, http://www.oregonencyclopedia.org/entry/view/anson_dart/, (last checked at January 14th at 11pm CST). This made the position created by Congress and functioning as an arm of the Executive branch. This makes it so that his specific duty was to negotiate treaties for the federal government. Therefore, even though not ratified to pay the Cush-Hooks, the title was extinguished with the removal of the Indians from those lands.

### 2. Even If The Treaty Did Not Extinguish The Title, The Explicit Act of Congress To Pass The Oregon Land Donation Claim Act Extinguished Any Aboriginal Title That May Have Remained

If aboriginal title survived to 1850, it would have been extinguished when the United States Congress enacted the Oregon Land Donation Claim Act. This act was a clear decision that the lands of the area were to extinguish any title the Cush-Hook Indians may still have had. This was a purposeful act by Congress transferring lands to others. This act contains no mention of reserving Native Lands, but does acknowledge that there are Natives by allowing half-Indians to be eligible for the land grant. Given that there is an inexhaustible amount of ways for the Federal Government to extinguish title, the act of Congress to allow these lands to be settled by others is a straightforward determination of extinguishment. The Supreme Court in *Tee-Hit-Ton Indians v. U.S.* stated

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

*Tee-Hit-Ton Indians*, 348 U.S. at 279

### 3. Even If The Aboriginal Title Survived After 1850, The Cush-Hook Forfeited Their Rights To the Land Due To the Time Elapsed Before Thomas Captain Occupied Kelly Point Park

The validity of the titles given by [the federal government] has never been questioned in our Courts. *Johnson*, 21 U.S. at 587-88, 5 L. Ed. 681 (1823). For example, the Court stated that when the individuals' land claims derived from the Mexican government, were "confirmed and received federal patents to their lands, they were entitled to believe that adverse claims to their lands had been eliminated." *Robinson*, 838 F. Supp. 2d 1019. The Oregon Donation Land Claim Act ended in 1855. The Cush-Hooks have shown no evidence in attempting to quiet the title until this time. Therefore, based on any statute of limitation, it is too late for the Cush-Hooks to have claimed aboriginal title to land that they have not occupied in over a hundred years. This should not be based at all upon whether or not the Meeks title was rightfully given. The title was granted by the federal government, and was then passed on through the years.

Further, the Meeks' title should be even less of a question given the decision of *Delaware Nation* in which it states that even fraud does not complicate the extinguishment of aboriginal rights. *Id.* The federal government extinguishes the title of the Indians. Therefore, it is meaningless to the issue that the Meeks' title should be left unquestioned.

This is all the more evident when looked at through the law of adverse possession as it stands in Oregon. §105.620 lays out that to obtain land through adverse possession, the land must be (1) continuous possessed for 10 years in an (2) actual, open, notorious, exclusive, hostile, and continuous possession of the property (3) for a period of 10 years and (4) the person must have had the honest belief that they were the actual owner of that property. The State can satisfy all of

these requirements easily: it received what it found to be good title, it has held it openly as a park, and it has been more than ten years, and it was held in honest belief.[1] Therefore, the state owns the land through adverse possession, regardless of whether the Meeks' original title was good.

### C. Regardless of whether the Cush-Hooks have aboriginal title, Thomas Captain does not.

An Indian cannot today gain a right of occupancy simply by occupying public land. *United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir. 1989). The decision of *Cramer* stated that no third party could interfere with the individual aboriginal title so long as the Indians remained on the land. *United States v. Cramer,* No. 398 (N.D.Cal.1920); *Dann*, 873 F.2d at 1197. In *Cramer*, three Indians were granted aboriginal title, independent of whether the Tribe had aboriginal title. *Id*. This case is distinguishable from that of *Cramer*. This case echoes what was recently determined in *Robinson v. Salazar*, that the reason the Indians were granted the title in Cramer was that they *actually* occupied the land after the 1851 act. *Id.* Further, the Court in *Cramer* found the 1851 Act inapplicable because the possession by the individual Indians occurred well after the Act. *Robinson* 838 F. Supp. 2d at 1021. Here, there is no actual occupancy after 1850. R. at 1. There was no occupancy between 1850 and 2011, when Captain climbed into a tree. *Id.*

The Ninth Circuit further echoed this in U.S. v. Lowry. In *Lowry,* it was a criminal defendant, much like Thomas Captain, who was attempting to claim individual aboriginal title.

[1] Shown by the fact that the state paid for the land.

*Lowry* stated that to establish individual aboriginal title for a criminal defendant the burden falls upon the defendant. The defendant must prove that:

> She or her lineal ancestors continuously occupied a parcel of land, as individuals, and that the period of continuous occupancy commenced before the land in question was withdrawn from entry for purposes of settlement.
>
> *United States v. Lowry*, 512 F.3d 1194, 1199 (9th Cir. 2008).

Further, in *Dann*, the Court adds that [t]o establish such an individual right of occupancy, the [claimant] must show actual possession by occupancy, enclosure, or other actions establishing a right to the lands to the exclusion of adverse claimants."*Lowry*, 512 F.3d 1201.

Therefore, Thomas Captain must show that not only did his lineal ancestors at some point live on the land he occupied, but that they continuously did up until the moment he planted himself in the park. This cannot be proven true; therefore, he cannot have individual aboriginal title to the land. Even if there were a way he could satisfy the first requirement, it would be difficult to show that he ever had actual possession and the ability to exclude while living in the park.

He only established "temporary" housing and therefore did not reestablish an actual occupancy, which would allow individual aboriginal title to be established. Further, the time in which *Cramer* was decided was intended to encourage the settling of land that was not yet settled. *Dann*, 873 F.2d at 1198. It is evident from *U.S. v. Dann* and *Robinson* that the goal of Federal settling-policy has greatly changed since *Cramer*. *Id.* This is no longer the policy goal of the nation, let alone in a State Park. Therefore, this court should look to the decision in *Dann* where the policy goals of settlement are given a heavy weight by the Ninth Circuit. *Id*. This

shows that actions such as that undertaken by Captain are the exact kind of trespass that the courts have repeatedly disallowed as a basis to establish occupancy.

## II. THE STATE OF OREGON HAS CRIMINAL JURISDICTION TO PROHIBIT REMOVAL, DEFACING, OR DESTRUCTION OF THE ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION.

The Cush-Hook Tribe is not a recognized tribe, and the land at Kelley Point Park is not a reservation, but a plot of real property in Portland. The land in question and objects affixed to it are completely under the jurisdiction of the State of Oregon.

Oregon might share jurisdiction if the Cush-Hook Nation were recognized either by the federal government or by the State of Oregon, but the Cush-Hook Nation is unrecognized. R. at 1. Given that the United States does not recognize the sovereignty of the Cush-Hooks, and that the plot of land the Tribe ostensibly owns is not a reservation, the State of Oregon has complete jurisdiction over the land at Kelley Point Park.

Even if the Court were willing to constructively recognize the Cush-Hook Nation as a tribe, the statutes in question fall within the criminal authority granted to the State of Oregon by Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588; 18 U.S.C. § 1162 (1982). In addition, even if the Court construed the statutes as regulatory after constructively recognizing the Cush-Hook Tribe, the State should still maintain this authority under the "exceptional circumstances" exception set forth in *Cabazon*. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987).

### A. The Cush-Hook Nation lacks sovereign jurisdiction.

The United States does not recognize the sovereignty of the Cush-Hook Nation as a tribe. R. at 1. Absent federal recognition, tribes cannot participate as "third sovereigns" in the United States. 25 C.F.R. § 83.2 (1989). Even if the Court constructively recognized the Cush-Hooks as a sovereign political body, the Cush-Hooks would still lack territory in which to exercise that sovereignty. The Cush-Hooks' ostensible ownership of the land under aboriginal title, if true, would still not make the land in question a reservation.

#### 1. The United States does not recognize the ostensible sovereignty of the Cush-Hook Nation.

Tribes retain sovereign status as "domestic dependent" nations, as a result of the United States recognizing the sovereignty of the tribes. *Cherokee Nation*, 21 U.S. at 543. Tribes must be recognized by the federal government in order for the Tribes' to retain sovereign status. 25 C.F.R. § 83.2 (1989). Since the Cush-Hook Nation is completely unrecognized by the federal government and/or the State of Oregon, the United States recognizes no authority for the Cush-Hooks to govern the land in question, even if it is determined that the Cush-Hook Nation owns the land. R. at 1.

The Cush-Hook Nation can surely assert that it maintains the sovereign jurisdiction it never gave away. *United States v. Winans*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted."). However, tribes not existing as a recognized entity at the time of suit are generally ineligible for federal protection from a state's potential infringement upon the tribe's perceived sovereignty. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, cert. denied, 444 U.S. 866 (1979). The

Cush-Hook Nation is unrecognized, and it follows that the Cush-Hooks have no recognized sovereignty upon which the State of Oregon could theoretically infringe.

**2. The State maintains full authority over this land.**

The land is an unoccupied plot of real property in the city of Portland, purportedly owned by a non-recognized Tribe. R. at 2. Tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 556 (1975) (citing *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)). However, the United States is only bound to recognize sovereign territory where the United States has recognized that sovereignty. *Cherokee Nation*, 30 U.S. at 16 ("The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts."). The Cush-Hook Nation is not recognized, and subsequently, any property owned by the Cush-Hooks is not recognized as sovereign territory. The land was neither reserved by treaty nor continuously occupied by tribal members. The land in question is not a reservation, and it is governed by the State of Oregon. R at 2.

States can retrocede jurisdiction to a tribe, but only (1) when the state elects to do so, and (2) when the tribe has been recognized. 25 U.S.C. § 1323 (1982). Oregon has not elected to retrocede any jurisdiction, neither with the Cush-Hooks nor with any recognized or non-recognized tribe located within the State.

The power of even recognized tribes to regulate off-reservation behavior is incredibly small, and subject to concurrent or cooperative authority with the states. See, e.g., *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (recognizing off-reservation rights of the Klamath Tribe of Oregon, but couching the Tribe's exercise and regulation of those rights within boundaries of the State's regulatory authority). The regulatory authority of the Cush-Hooks - if there even were

any - would be limited to governing tribal members, under regulations that were in conformity with the legitimate interests of the State, like any other off-reservation right. See, e.g., *Kimball*, 590 F.2d 768; *Lac Courte Oreilles v. State of Wisconsin*, 653 F. Supp 1420 (W.D. Wis. 1987). Absent a conflict of territorial jurisdiction, this land remains a plot within the city limits of Portland, Oregon, wholly subject to the laws and regulations of the State of Oregon.

**3. The Court should not grant any jurisdiction to the Cush-Hooks unless it is comfortable usurping primary jurisdiction and "constructively recognizing" Indian Tribes.**

Tribes seeking recognition can follow established governmental paths to seeking recognition. Non-recognized tribes can petition the BIA, documenting evidence of fulfilling requisite criteria, subject to review and analysis. Rachael Paschal, *The Imprimatur Of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 215-217 (1991). Tribes completing this process can be formally recognized, or have recognition restored. See, e.g., 25 U.S.C. § 556e, P.L. 99-398, Aug. 27, 1986, 100 Stat. 850 (restoring federal recognition to the Klamath Indian Tribe of Oregon). Courts wisely defer to the primary jurisdiction of the BIA, because "the BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether [a tribe] meets the criteria for tribal status." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F. 3d 51, 60 (2d. Ct. 1994).

To date, the Cush-Hook Nation has not provided any evidence of attempting to seek recognition through the established channels. The Cush-Hook Nation is essentially asking the Court to usurp the power of tribal recognition from the BIA, bestowing a constructive

recognition of sovereign jurisdiction, and a constructive bestowing of sovereign reservation territory.

Courts have occasionally recognized tribes for limited, specific purposes. E.g., *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005), where the Eastern District of New York concluded that the Shinnecock Indian Nation was an Indian Tribe for the purposes of opening a casino, since it had been formally recognized as one by the State of New York for over 200 years. *Id.* However, this constructive recognition is limited to specific instances, easily distinguished from the case at hand, where a tribe with no formal recognition seeks recognition of full sovereign regulatory jurisdiction. In the past, this Court has wisely refrained from extending full sovereign regulatory jurisdiction, saying:

> Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of [the State's] counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the [tribal members] have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by [the State] and its counties and towns, and the [Tribe's] long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The [Tribe] long ago relinquished the reins of government and cannot regain them."
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> *City of Sherrill v. Oneida Indian Nation of NY*, 544 US 197, 202-203 (2005).

Constructively recognizing the sovereign status of the Cush-Hook Nation, and constructively reserving the land at Kelley Point Park as Cush-Hook sovereign territory, would be as problematic as doing so for the Oneida Nation, creating an awkward patchwork of jurisdiction that burdens the State, the county, and the city of Portland, and landowners adjoining the land in question. Worse, it would be even more problematic than in *Sherrill*, because the Court would be bestowing broad constructive recognition upon a tribe that has never been

recognized by either the federal or state government, and giving regulatory authority to a body that has not shown it has either the lawmaking or law-enforcing framework necessary to properly exercise that jurisdiction.

**B. Even if the Court constructively recognizes the Cush-Hook Nation as a tribe, and constructively recognizes Kelley Point Park as a reservation, the State retains some jurisdiction, and laws in question are a legitimate use of the State's authority.**

Even if the Cush-Hooks were to have some concurrent jurisdiction, statutes prohibiting damage to an archaeological site and/or to cultural and historical artifacts are a legitimate use of the State's authority. Public Law 280 grants the State criminal and civil jurisdiction over Indian tribes. Pub. L. No. 83-280. Since the statutes in question generally prohibit behavior rather than regulate it, the laws are criminal, and within the State's legitimate authority. *Cabazon*, 480 U.S. at 209 (distinguishing between criminal and regulatory jurisdiction in Public Law 280 states).

Even if the Court were to construe the statutes as non-criminal, the State should still be authorized to exercise this authority under these exceptional circumstances. Since the Cush-Hook Nation has not shown it has the rules or infrastructure necessary to regulate the land, the State should be authorized to regulate it at least until such a time that the Cush-Hooks could show the prerequisites to exercise and enforce sovereign regulatory jurisdiction.

**1. The statutes are prohibitive, and within the scope of authority granted to the State by Public Law 280.**

Under Public Law 280, the State "has jurisdiction over all crimes committed within reservation borders other than those federal crimes that are exclusive of state jurisdiction." Pub. L. No. 83-280. The State would have jurisdiction here even if the unoccupied land in Kelley Point Park were to be considered a reservation.

Multiple tribes have had federal recognition enacted or restored. The State of Oregon has maintained civil and criminal jurisdiction over all of these tribes. 25 U.S.C. § 715d, P.L. 101-42, June 28, 1989, 103 Stat. 91 (Coquille Tribe); 25 U.S.C. § 556e, P.L. 99-398, Aug. 27, 1986, 100 Stat. 850 (Klamath Indian Tribe); 25 U.S.C. § 714e, P.L. 98-481, Oct. 17, 1984, 98 Stat. 2250 (Confederated Tribes of the Coos, Lower Umpqua, & Siuslaw Indians); 25 U.S. 713f (c)(6), P. L. 98-165, Nov. 22, 1983, 97 Stat. 1064 (Confederated Tribes of the Grand Ronde Community). Even if the Court were willing to constructively recognize the Cush-Hooks, the State would still have criminal and civil jurisdiction over the Cush-Hooks.

The statutes in question are criminal. While the line between criminal and regulatory is not always clear, the Court has set forth a test:

> "[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy."
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> *Cabazon*, 480 U.S. at 209.

The statutes prohibit conduct, rather than regulate it. The prohibited acts in question violate the State's public policy. This falls within the State's criminal authority. It is the policy of the State of Oregon that "[a]rchaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon" and that the State "shall preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance." OR. REV. STAT. §358.910 (2011).

The primary point of the *Cabazon* test was not solely whether the conduct at issue is against the state's public policy, but "whether the prohibited activity is a small subset or facet of a larger, permitted activity ... or whether all but a small subset of a basic activity is prohibited." *Confederated Tribes v. Washington*, 938 F.2d 146, 148-49 (9th Cir. 1991).The State prohibits anyone to "excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon." OR. REV. STAT. §358.920 (2011). Since the law specifically prohibits behavior that violates the State's stated public policy, the law falls within the authority granted by Public Law 280. *Cabazon*, 480 U.S. at 209.

Additionally, this prohibition is codified under the title "Prohibited Conduct." *State v. McCormack*, 793 P.2d 682 (Idaho 1990) (holding that a statute was criminal, in part because it was codified under "Crimes and Punishments.") While OR. REV. STAT. 390.235 (2011) allows for the circumstances in which archaeological sites or objects can be excavated or removed, this is the exception to the general prohibition, not the other way around.

Moreover, violation of either statute is a Class B Misdemeanor, punishable by six months in prison and/or a $2500 fine. OR. REV. STAT. §161.615; §161.635 (2011). In the vast majority

of cases turning on a criminal/regulatory distinction, the fact that a statute is enforced by criminal penalties supports the reading of the statute as criminal.[2]

Additionally, the purpose of the statute is not to generate license revenue. See *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977) (distinguishing fireworks statutes from hunting and fishing regulations because the latter are designed to generate revenue to regulate conduct, rather than to prohibit conduct). License revenue could go toward paying for the cost of regulation, and lend itself toward a reading of the statutes as regulatory; this is not the case here.

**2. Even if the authority were to be considered non-criminal, the State should still be able to exercise it under the exceptional circumstances of an unrecognized tribe reclaiming land suddenly, without any evidence of having the existing rules or infrastructure necessary to regulate the land.**

States can assume regulatory authority beyond that granted by Public Law 280 in "exceptional circumstances." *Cabazon*, 480 U.S. at 215. If the Court were willing to constructively recognize the regulatory sovereignty of an unrecognized tribe over a plot of land never considered a reservation, it would be the first ruling of its kind in United States legal history. Moreover, the Court would be recognizing regulatory authority of a Tribe that has not shown any evidence of having the existing rules or infrastructure necessary or exercise that regulatory authority. This would certainly be an exceptional circumstance.

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[2]While courts often cite *Cabazon* 's quote, "[T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280," whether a statute is enforced by a criminal penalty or a civil penalty is strongly correlated to whether a court finds a statute to be criminal or regulatory. As of 1999, "[i]ncluding *Cabazon*, only three out of the thirty-two cases that applied the distinction set forth in *Cabazon* have denied state jurisdiction when there is a criminal penalty involved." Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1348-1349 (1999)

Courts are frequently willing to recognize a state's authority over a tribe in a situation where the tribe has no regulations or infrastructure to address the issue. Compare *Confederated Tribes*, 938 F.2d 146 (holding that the State had no jurisdiction where the Tribe had regulations and the ability to enforce them) with *Bray v. Commissioner of Public Safety*, 555 N.W.2d 757, 760-761 (Minn. Ct. App. 1996) (where the court held the State's authority, in part because there was "no forum" in which the Tribe could address the issue).

This is not a reservation. This is a plot of real property in Portland, over which the State retains unquestioned criminal and civil authority. In a situation of shared jurisdiction, it is reasonable to require the Tribe to show an organized tribal government reasonably competent to promulgate and apply regulations, and personnel trained for and competent to provide effective enforcement of those regulations. *United States v. State of Washington*, 384 F. Supp. 312, 341 - (WD Wash. 1974) (requiring similar standards before officially recognizing tribal regulatory hunting jurisdiction).

Additionally, States have been entitled to enforce against natives on the reservation those state laws that are reasonable and necessary for conservation of a shared resource. *Puyallup Tribe, Inc. v. Washington Game Dep't*. 433 U.S. 165, 176-77 (1977). The preservation and protection of the cultural heritage of the State of Oregon is a duty correctly falling to the State, and the objects of archaeological, cultural, and historical importance are shared resources. Oregon statute sets forth a process by which that shared resource can be restored fully to a tribe, saying:

> Any native Indian sacred object, object of cultural patrimony or native Indian funerary object shall be reported to the appropriate Indian tribe and the Commission on Indian Services. The appropriate Indian tribe, with the assistance of the State Historic

> Preservation Officer, shall arrange for the return of any objects to the appropriate Indian tribe.
>
> OR. REV. STAT. §358.940 (2011).

Until that process has been completed, the carvings in question remain the shared resource of all the citizens of the State of Oregon, Native and non-Native. Given the exceptional circumstances of this instance, and given the shared nature of the objects being protected, the State has the authority to regulate the taking, defacing, or removal of these objects.

The State should maintain this authority, at bare minimum, until such a time that the Cush-Hook Nation can show it is prepared to assume either sole or concurrent jurisdiction. Even at that time, the State should maintain concurrent jurisdiction. Dual enforcement mechanisms of congruent regulations increases the probability of those regulations serving their policy goals, and decreases lawlessness, which is the underlying policy of Pub. L. 280. *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1503 (D.S.D. 1989).

## CONCLUSION

WHEREFORE, for the aforementioned reasons, the State respectfully requests that this Court reverse part, and affirm part of the decision of the Oregon Circuit Court for the County of Multnomah.

Respectfully Submitted,

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