No. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,
Petitioner,

v.

THOMAS CAPTAIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR RESPONDENT

TEAM 61

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QUESTIONS PRESENTED

1. Does the Cush-Hook Nation own aboriginal title to the land in Kelley Point Park?

2. 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?

STATEMENT OF THE CASE

Statement of the Proceedings

In 2011, the State of Oregon brought a criminal action against Thomas Captain ("Captain"), a citizen of the federally unrecognized Cush-Hook Nation, for trespass on state lands, cutting timber in Kelley Point Park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358-961 and 390.235-390.240 ("Oregon statutes"). Captain consented to a bench trial. The Oregon Circuit Court for the County of Multnomah held and concluded that the Cush-Hook Nation still owned the lands within Kelley Point Park, and therefore Captain was not guilty of trespass or cutting timber without a permit. However, the Court found Captain guilty of violating the Oregon statutes, and fined him $250. Captain and the State of Oregon appealed the decision. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. The State filed a petition and cross-petition for certiorari and Captain filed a cross-petition for certiorari to the United States Supreme Court. The Court granted certiorari to resolve whether the Cush-Hook nation owns aboriginal title to the land in Kelley Point Park, and whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe.

Statement of the Facts

The aboriginal territory of the Cush-Hook Nation, a non-federally recognized tribe, is located at and around confluence of the Columbia and Willamette Rivers, within the boundaries of the state of Oregon. The Nation lived in this area since time immemorial. Historical records, including the journals of Lewis and Clark, describe the ancestral territory

and way of life of the Cush-Hook Nation. William Clark visited the Cush-Hook village at the confluence of the two rivers, and met with the leaders of the Nation. He recorded information about the culture, governance, religion, burial traditions, housing, agriculture, and food-gathering practices of the Nation. As a symbol of the meeting, Clark gave the leader of the Nation a Jeffersonian Peace Medal, also known as a "sovereignty token." Lewis and Clark believed that the sovereignty tokens represented the desire of tribal leaders to engage in political and commercial relations with the United States government. The tokens are considered to have political and diplomatic significance.

The Cush-Hook lived in their village until 1850, when the Superintendent for Indian Affairs in the Oregon Territory, Anson Dart, attempted to arrange a treaty with the Nation. Under the terms of the attempted agreement, the Cush-Hook would have agreed to relocate to a new location. They moved to the coastal region of Oregon in anticipation of the signing under pressure from encroaching American settlers. However, the United States Senate refused to ratify the treaty and the federal government did not compensate the Cush-Hook for their lands. The tribe also did not receive recognized ownership for the new lands they moved to.

After the Nation moved from its aboriginal territory, two white settlers, Joe and Elsie Meeks, moved into the area where the ancestral Cush-Hook village was located. The Oregon Donation Land Act of 1850 granted a fee simple title to "every white settler" who had "resided upon and cultivated the [land] for four consecutive years." The Meeks did not cultivate or live on the land for four years but their descendants sold the land to the State of Oregon in 1880. Oregon created Kelley Point Park in the location of the former Cush-Hook village.

When the Cush-Hook lived in the ancestral village, tribal religious leaders carved sacred symbols into living trees. The living trees are still growing. However, in the now-state-run Kelley Park, vandals defaced these culturally significant images. In some cases, the images were cut off the trees. The state did nothing to stop the vandalism.

In 2012, Thomas Captain moved into his tribe's ancestral village area for the purpose of protecting and preserving the tree carvings made by his ancestors, and removed a defaced section of the tree that contained a vandalized sacred image. Captain was transporting the image back to the Nation's modern location in order to restore and protect it. State troopers arrested Captain and seized the image. As outlined above, the state brought criminal actions against Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site.

SUMMARY OF ARGUMENT

The Cush-Hook Nation owns aboriginal title to the land in question under federal law. Congress never extinguished the Cush-Hook Nation's aboriginal title by treaty, nor was it extinguished by the Oregon Donation Land Act. Furthermore, the Cush-Hook people's movement to a new settlement in the 1850s did not extinguish the tribe's aboriginal title.

Even if Congress *had* intended to include the Cush-Hook Nation's territory in the Oregon Donation Land Act, the extinguishment of aboriginal title would only have occurred if title to it had been claimed pursuant to the statutory requirements of the Act. Joe and Elsie Meek, the original settlers who sought to take title to the land in question, did not meet the statutory requirements necessary to acquire such title from the United States. Their descendants thus did not possess legal title to the land in question when they made the sale to the state of Oregon. Therefore, the state of Oregon does not hold legal title to the ancestral homelands, according to the chain of events that resulted in its possession of the land.

Oregon does not have jurisdiction to prosecute Thomas Captain under Or. Rev. Stat. § 358.905-358.961 or Or. Rev. Stat. § 390.235-390.240 (hereinafter Oregon statutes). Federal law prohibits state encumbrance of Indian-held property subject to federal restraints on alienation. Because the Oregon statutes are encumbrances on Cush-Hook property, they are invalid under federal law. Additionally, federal law preempts these statutes.

When it enacted Public Law 280 (PL 280) the federal government granted Oregon criminal jurisdiction over all areas of Indian Country in the state[1], including the aboriginal territory of the Cush-Hook Nation currently at issue. However, this jurisdictional power does not extend so far as to grant states sovereign power over Indian-held property interests. In

[1] Except the Warm Springs reservation

fact, PL 280 explicitly prohibits state encumbrance of property held by tribes that is subject to federal restraints on alienation. 18 U.S.C.A. § 1162 (2012).

The Native American Graves Repatriation Act (NAGPRA) places a federal restraint on alienation of objects of cultural patrimony. 25 U.S.C.A § 3001 (2012). The carved tree cut by Captain falls within this category of objects. In addition, the federal government has placed restraints on the alienation of land to which tribes possess aboriginal title. *Tee-Hit-Ton,* 348 U.S. at 281; 25 U.S.C.A. § 177 (2012). The Oregon statutes place restraints on the alienation of the carved trees, and establish a permit requirement that impacts the use and enjoyment of portions of the land to which Cush-Hook Nation holds aboriginal title. Or. Rev. Stat. § 358.905-358.961 (2012); Or. Rev. Stat. § 390.235-390.240 (2012).

Since the trees and the land are subject to federal restraints on alienation, the state-enacted restraints and regulation constitute exactly the kind of encumbrances on tribal property that PL 280 prohibits. 18 U.S.C.A. § 1162 (2012). Further, the Oregon statutes conflict with explicit federal statutory language, and impinge upon Indian-held property interests subject to federal restraints on alienation, a field of law fully dominated by the federal government.

For these reasons, federal law preempts the state statutes. Therefore, these portions of state law are invalid as they have been applied in the current litigation, and the state cannot prosecute Captain for violating them.

ARGUMENT

The Supreme Court has established that "[i]t [is] accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial," subject to the doctrine of discovery. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). This recognition of aboriginal title was codified in the Indian Trade and Intercourse Act of 1790. The Non-Intercourse Act, as set forth in § 4 of the Indian Trade and Intercourse Act, created a trust relationship between the federal government and American Indian tribes by preventing any sale or other conveyance of Indian land not authorized by the federal government. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994).

A tribe may prove aboriginal title *prima facie* by showing that 1) it is an Indian tribe, 2) the land is tribal land, 3) the United States never consented to its alienation, and 4) the trust relationship between the tribe and the United States has not been terminated or abandoned. *Weicker* at 56. The facts of the case combined with the body of law governing aboriginal title claims show that the Cush-Hook Nation meets all four prongs of the Second Circuit test.

The facts show that the Cush-Hook Nation "is a tribe of Indians" and the record indicates no challenge to this assertion. *Fact Pattern* at 1. The record also shows that the land in question is the ancestral tribal homeland of the Cush-Hook Nation. The "[o]ccupancy necessary to establish aboriginal [title] is a question of fact." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941). The facts of this case indicate that the Cush-Hook Nation "occupied the [land in question] since time immemorial and . . . [the Cush-Hook Nation's] permanent village was located in the area that is now enclosed by Kelley Point Park's boundaries." *Fact Pattern* at 1. The Cush-Hook Nation's exclusive settlement

of the area was also documented by William Clark, of the Lewis and Clark expedition, in the early nineteenth century. *Id.* Furthermore, the Oregon Circuit Court's concluded that "[e]xpert witnesses in history, sociology, and anthropology establish that the Cush- Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans." *Id.* at 3.

Further, the trust relationship between the United States and the Cush-Hook Nation was not terminated or abandoned simply because the United States has declined to officially recognize the tribe. The Non-Intercourse Act, which created a trust relationship between Indian tribes and the United States government, has been interpreted to include unrecognized tribes. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) (holding that the federally unrecognized Passamaquoddy Tribe was nevertheless encompassed within the language of the Act because there is no requirement in the Act that a tribe must be recognized by the federal government and the policy underlying the Act was to "protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty.") Therefore, the fact that the Cush-Hook Nation is not federally recognized does not mean that the tribe's ancestral homelands were automatically taken out of the trust created in the Nonintercourse Act.

The facts and arguments thus far show that the Cush-Hook Nation are an Indian tribe who possessed aboriginal title to tribal land prior to the arrival of European and American explorers. Furthermore, the Nonintercourse Act established a trust relationship between the Cush-Hook Nation and the United States government and that relationship was not terminated by the federal government's decision not to officially recognize the tribe. Thus,

the relevant issue at bar is whether the United States subsequently extinguished the Cush-Hook Nation's aboriginal title.

I. The Cush-Hook Nation's Aboriginal Title Was Never Extinguished by the United States

The Cush-Hook Nation's aboriginal title to their homelands in what is now designated as Kelley Point Park in Oregon was never extinguished by the United States. Under established federal law, the aboriginal title of Indian tribes cannot be extinguished by any party but the United States government. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). Extinguishment cannot be lightly implied. *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941). Ambiguities as to federal intent are to be resolved in favor of Indians when dealing with the issue of extinguishment of aboriginal title. *Id.*

While it is true that the Cush-Hook Nation relocated to a new area pursuant to an agreement signed with the superintendent of Indian Affairs for the Oregon Territory, the treaty was never ratified by the United States Senate. Further, the Cush-Hook's voluntary relocation did not serve to legally extinguish aboriginal title because the federal government is the only entity under federal law with the authority to effect such a cession.

A. No Federal Treaty or Other Action Extinguished the Cush-Hook Nation's Aboriginal Title

The United States government never extinguished the Cush-Hook Nation's aboriginal title, either by treaty or other action. Congress has the power to extinguish Indian title by treaty, purchase, or other actions which indicate an intent to extinguish. *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 347 (1941). Aboriginal title is not

extinguished where a federal agency effectuates the removal of an Indian tribe and Congress does not express an intent to extinguish such title. *Id.* at 352-56.

In *Santa Fe Pacific Railroad*, the Court considered the question of whether the aboriginal title of the Hualapai Tribe to their ancestral homelands had been extinguished by a series of different actions by both the United States government and the Hualapai Tribe. One issue the Court addressed was whether the creation of the Colorado River reservation by Congress in extinguished the Hualapai Tribe's aboriginal title to their homelands. *Id.* at 351. The reservation bill was passed in response to a proposal by a former Indian Agent, who had called a meeting of various tribes and proposed that they leave their homelands for a reservation in exchange for an irrigating canal with which to support agricultural activities. *Id.* at 352. In addition, Congress "made various appropriations to defray the costs of [moving] the [Hualapai Tribe and other] Arizona Indians" to the Colorado River reservation. *Id.* at 355. The Hualapai Tribe never agreed to move but were later forcefully relocated to the reservation by the Indian Department. *Id.* at 354. The tribe was eventually allowed to return to their homelands, however, and no further attempt was made at forcible removal. *Id.* at 355. The Court held that the mere creation of the Colorado River reservation did not extinguish the Tribe's aboriginal title. It also held that the removal of the Hualapai by the Indian Department did not extinguish the tribe's aboriginal title either. Writing for the Court, Justice Douglas reasoned that the creation of the Colorado River reservation was merely an "offer which Congress had tendered," and that the forcible removal of the tribe by the Indian Department was "a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited." *Id.* at 354-55.

The Court in *Santa Fe Pacific Railroad* also held, however, that a subsequent removal agreement served to extinguish the Hualapai Tribe's aboriginal title to their original homelands. *Id.* at 358. Several years after returning from the Colorado River reservation, the Hualapai became disenchanted with the presence of encroaching American settlers and requested that the United States create a new reservation for them to settle on. *Id.* at 356-57. The United States military thus created a reservation for the Hualapai and President Arthur signed an Executive Order creating the Hualapai Indian Reservation in 1883. *Id.* at 357. The Court thus concluded that the tribe's active involvement in securing the reservation, coupled with the Executive Order creating it pursuant to the proposal, served to extinguish the tribe's aboriginal title to its homelands.

The case at bar presents a similar historical chain of events with some significant differences. The Cush-Hook Nation accepted a proposal by the superintendent of Indian Affairs for the Oregon Territory to remove from its ancestral homelands in exchange for various forms of compensation. *Fact Pattern* at 1-2. However, it was Congress who rejected the agreement by refusing to ratify the proposed treaty in 1853. In doing so, it clearly rejected the idea of using its power to extinguish the tribe's aboriginal title under the terms of the treaty. Furthermore, Congress did not enter into any subsequent treaty with the Cush-Hooks or pass legislation which expressed an intent to extinguish the tribe's aboriginal title.

Unlike in *Santa Fe Pacific Railroad*, here we do not have an Executive Order signed by the President affirming the proposal between the superintendent of Indian Affairs and the Cush-Hook Nation. Instead, Congress explicitly rejected the terms of the Cush-Hook treaty proposal and thus declined to extinguish the tribe's aboriginal title. The Cush-Hook Nation also did not voluntarily cede their aboriginal title by moving to the coastal region of Oregon.

Under federal law, it is solely within the purview of Congress to extinguish aboriginal title. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). Therefore, the Cush-Hook Nation's abandonment of the area was not legally sufficient to transfer title to any entity or individual because the tribe does not have the power to extinguish or otherwise convey aboriginal title, Congress does.

B. The Oregon Donation Land Act Did Not Extinguish the Cush-Hook Nation's Aboriginal Title to the Land in Question

A. The Oregon Donation Land Act only Included Land Set Aside Under the Oregon Territorial Act

The land made available for settlement under the Oregon Donation Land Act of 1850 ("Donation Act") included all public lands within the Territory of Oregon. Oregon Donation Land Act, § 4. However, the Oregon Territorial Land Act of 1848 ("Territorial Act") specifically excluded from the Oregon Territory's public lands any land held by Indian tribes to which aboriginal title had not been extinguished by treaty. Oregon Territorial Land Act of 1848. The Territorial Act states that "nothing in [the] act contained shall be construed to impair the rights of person or property now pertaining to the Indians in [Oregon] Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." *Id.*

Here, no treaty between the United States and the Cush-Hook Nation was ever ratified by the United States Senate. *Fact Pattern* at 1. While it is true that the Cush-Hook Nation signed an agreement with the Oregon Territory superintendent of Indian Affairs, the United States Senate refused to ratify the agreement and thus it's opposition to the treaty terms. The facts also do not show that any binding treaty was subsequently entered into

between the United States and the Cush-Hook Nation. *Fact Pattern* at 2. The foregoing analysis thus shows that the land in question was never legally opened to settlement under the Donation Act because it was not considered public land under the Territorial Act.

3. The Meeks' Descendants' Conveyance of the Land to the State of Oregon was Invalid Because the Meeks did not Acquire Valid Title Prior to the Sale

A. Joe and Elsie Meeks Never Acquired Title to the Land in Question Because They did not Meet the Statutory Requirements of the Oregon Donation Land Act

Title to land granted under the Land Act vests only to qualified settlers or occupants who have 1) resided upon and 2) cultivated the land in question for four consecutive years. Donation Act, § 4; *Hall v. Russell*, 101 U.S. 503, 504-05 (1879). The Court stated in *Hall* that, under the Donation Act, "until [a settler] was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees." *Id.* at 510. The facts of this case state that Joe and Elsie Meeks "never cultivated or lived upon the land for the required four years." *Fact Pattern* at 2. Therefore, under the language of the Donation Act, as interpreted and affirmed by this Court in *Hall*, Joe and Elsie Meek never acquired title to land in question.

B. The Sale of the Land to Oregon was Void Because the Meeks' Descendants did not Possess Legal Title to the Land

Further, the Donation Act states that "[a]ll future contracts by any person entitled to the benefit of this act, for the sale of the land to which he may be entitled under this act before he or they have received a patent therefor [sic], shall be void." Donation Act at § 4.

In *Hall*, the heirs of a settler who died prior to meeting the four-year residency and cultivation requirement of the Donation Act. The Court noted that the language of the Act "indicates clearly that there was to be no grant except to persons who, by complying with the provisions of the act, had qualified themselves to take." *Id.* at 512.

The appellants argued that § 8 of the Donation Act provides for the acquisition of title where a settler dies before the expiration of the four year requirement of continuous residence and cultivation can be met. *Id.* at 512-14. However, the Court interpreted § 8 to provide only for the transfer of the rights that the original settler possessed at the time of death. The Court held that where a settler died prior to meeting the four year residence and cultivation requirement, the only right that would transfer to his heirs was the right to possess. *Id.* The Court thus held that the heirs never lawfully held title to the land because title had never lawfully vested in the original settler prior to his death. *Id.* at 514.

As in *Hall*, title to the land in question never lawfully vested to any party prior to the sale because Joe and Elsie Meeks did not meet the statutory requirements under the Donation Act. The factual record states that "[T]he Meeks did not live on this land for more than two years and they never cultivated the land." Therefore, neither the Meeks' nor their descendants ever acquired valid title to the land under the terms of the Donation Act. Thus, Oregon Circuit Court was correct in concluding that the descendants' sale of the land to the State of Oregon was void.

III. The Land in Question is Indian Country

The land in question is properly considered Indian Country because the Cush-Hook Nation's ancestral homelands are a "reservation" under 18 U.S.C. § 1151(a). This is true even though the United States never formally declared the land to be a reservation.

18 U.S.C. § 1151(a) provides that the term "Indian Country" shall include "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." 18 U.S.C. § 1151(a). The issue of whether land qualifies as Indian Country is a question of federal law. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 353 (1962). The Supreme Court has recognized that "Congress has defined Indian country broadly to include formal and informal reservations [under 18 U.S.C. § 1151]." *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). The Tenth Circuit has stated that "a formal designation [by Congress] of Indian lands as a 'reservation' is not required for them to have Indian country status." *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987). Furthermore, the Court noted in *United States v. Chavez* that Congress intended the term "Indian Country" to include "any unceded lands owned or occupied by an Indian nation or tribe of Indians." *United States v. Chavez*, 290 U.S. 357, 364 (1933).

The facts show that the Cush-Hook Nation "occupied the [land in question] since time immemorial and . . . [the Cush-Hook Nation's] permanent village was located in the area that is now enclosed by Kelley Point Park's boundaries." *Fact Pattern* at 1. The Cush-Hook Nation's exclusive settlement of the area was also documented by William Clark, of the Lewis and Clark expedition, in the early nineteenth century. *Id.* Furthermore, the Oregon Circuit Court's concluded that "[e]xpert witnesses in history, sociology, and anthropology establish that the Cush- Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans." *Id.* at 3.

As discussed in Parts I and II, *supra*, the aboriginal title to the Cush-Hook Nation's ancestral homelands was never extinguished by the United States nor ceded by the Cush-Hook Nation. Thus, the land in question is still held in trust for the Cush-Hook Nation by the United States because the trust relationship created by the Non-Intercourse Act has not been terminated. Therefore, the land in question can be considered an informal reservation under 18 U.S.C. § 1151(a) because aboriginal title has never been extinguished, and is plainly considered Indian Country under the *Chavez* standard that Indian Country includes "any unceded lands owned or occupied by an Indian nation or tribe of Indians." *Chavez* at 364.

IV. Oregon Lacks Jurisdiction to Prosecute Thomas Captain for Trespass or Cutting Timber Without a State Permit

The Oregon Court correctly decided that Oregon could not prosecute Captain for trespass or cutting timber without a state permit. Because the Cush-Hook Nation owns the aboriginal title to the land at issue, and Captain is a citizen of the Nation, he shares the right of occupancy with the tribe. *See Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir. 1979) (holding that individual Indian members of a tribe enjoy the rights of user in tribal property derived from the property right of which he is a member). The federal government holds fee simple title to the land in question. Further "occupancy [can] only be interfered with… by the United States." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955). The "the right of [federal] sovereignty over discovered lands was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land." *Sac and Fox Tribe of Indians of Oklahoma* v. U.S., 383 F.2d 991, 997 (1967). The only sovereign with property rights to Cush-Hook aboriginal territory, besides the Nation itself, is the federal

government. For this reason, the state does not have a cause of action against Thomas for either trespass or cutting timber without a state permit.

II. Federal Law Preempts Oregon Statutes and Prohibits Oregon from Exercising Jurisdiction Over Captain for Damaging Archaeological Objects

A. Public Law 280 Prohibits State Encumbrance of Indian Property

Although PL 280 grants mandatory criminal jurisdiction over areas of Indian Country to Oregon, it expressly prohibits the state from encumbering tribal property impacted by federal restraints on alienation. As previously established, the area of land in question is Indian Country for purposes of 18 U.S.C. §1151. In 1953, PL 280 granted mandatory criminal jurisdiction over all areas of Indian Country within Oregon to the state[2]. 18 U.S.C.A. § 1162 (2012). Since the area of land in question was Indian Country prior to the passing of the 1953 statute, Oregon has criminal jurisdiction under PL 280.

Congress' principle consideration in enacting PL 280 was curbing perceived "lawlessness" in Indian Country. Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 541 (1975). While PL 280 constitutes a broad grant of criminal jurisdiction powers over Indian Country, the federal government did not grant states power over Indian-held property interests. Not only would such a grant have been beyond the intended scope of the legislation; it would have contradicted years of federal policy and Supreme Court opinions that affirmed the federal government as the only sovereign capable of impacting Indian-held property rights impacted by federal restraints on alienation. As stated in *Cramer v. United States,* and recognized by a long series of opinions, "Unquestionably it has been the policy of the federal government

[2] Except for the Warm Springs Reservation

from the beginning to respect the Indian rights of occupancy, which can only be interfered with or determined by the United States." *Cramer v. United States*, 261 U.S. 219, 227, (1923). Further, "with the adoption of the Constitution, Indian relations became the exclusive province of federal law…. 'the possessory right claimed [by Indian tribes] is a *federal* right to the lands at issue [in cases involving aboriginal title]." *Oneida County,* 470 U.S. at 234. See also *Johnson v. M'Intosh* 21 U.S. 543, 586 (1823)**;** *Santa Fe Pac.* 314 U.S. at 347; *Tee-Hit-Ton* 348 U.S. at 279. Congress affirmed federal sovereign supremacy in relation to Indian property interests in the Nonintercourse Act (NIA), which states in part that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." 25 U.S.C.A. § 177 (2012).

Both the Supreme Court and Congress have clearly indicated that the power to interfere with Indian property interests lies only with the federal government. PL 280 expressly reaffirms this general principle. The law prohibits State encumbrance of tribal property subject to federal restraints on alienation, stating "nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property… belonging to any Indian or any Indian Tribe, Band, or Community that is held in trust by the United States, or is subject to a restriction against alienation imposed by the United States." 18 U.S.C.A. § 1162 (2012).

B. Tree Carvings are subject to a federal restraint on alienation, and the Cush-Hook Nation is a "Native American group" for Purposes of NAGPRA

The tree carving removed by Thomas, as well as the carvings located on the land in question, are "Objects of Cultural Patrimony" for purposes of NAGPRA, because of their sacred importance to the tribe. NAGPRA is a 1990 federal statute enacted by Congress. The legislation protects ownership rights of tribes to burial sites, human remains, and important cultural and religious objects, like the Cush-Hook tree carvings, and orders repatriation of such items back to tribes. Jack F. Trope and Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 59 (1992). Congress sees protection of these cultural resources as an essential part of its trust responsibility to tribes, as is indicated by the Act in § 3010, which states that the statute "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations." 25 U.S.C.A. § 3010 (2012). As a reflection of this trust relationship, Congress reaffirms the property interests of tribes in important cultural and sacred objects by placing such objects under a federal restraint on alienation.

NAGPRA defines "Objects of Cultural Patrimony" and establishes the restraint on alienation in § 3001, stating:

> "Cultural patrimony"… shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American

group at the time the object was separated from such group. 25 U.S.C.A § 3001 (2012)

Since the tree carvings are sacred markings carved by important Cush-Hook religious leaders hundreds of years ago, they clearly are important to the history, religion, and culture of the Cush-Hook nation. As such, they are relevant to the entire Nation, and are not property owned by any individual. Therefore, the tree carvings fall within the definition of "objects of cultural patrimony," and are subject to a federal restraint on alienation.

The Cush-Hook Nation fits NAGPRA's definition of a Native American group or culture. The statute defines "Native American" as "of or relating to a tribe, people, or culture that is indigenous to the United States." Importantly, this definition relies on indigeneity, not federal recognition, as the standard for defining "Native American" status. As further evidence that Congress intended NAGPRA to protect non-federally recognized indigenous groups, the statute expressly includes Native Hawaiians. 25 U.S.C.A. § 3002 (2012). Native Hawaiians are not federally recognized by the United States.

The section of the Code of Federal Regulations that establishes which Indian groups can be categorized as tribes defines "Indian group" as "any Indian or Alaska Native aggregation within the continental United States that the secretary of the Interior does not acknowledge to be an Indian tribe." In the same section, "Indigenous" is defined as "native to the continental United states in that at least part of the [nation's] territory at the time of sustained contact extended into what is now the continental United States." 25 C.F.R. 83.1 (2011). See also *Abenaki Nation of Mississquoi v. Hughes,* 805 F.Supp 234, 251 (D. Vt. 1992), aff'd 990 F.2d. 729 (2d Cir. 1993). (Holding that the non-federally recognized Abenaki Nation of Mississquoi fell within the class of Indians protected by NAGPRA, using the definitions set out in the Code of Federal Regulations). The Cush-Hook Nation, a non-

federally recognized group of Indians, is native to the continental United States, and has lived in Oregon since time immemorial. For these reasons, the Cush-Hook are a Native American group protected by NAGPRA, and as previously stated, the tree carvings are objects of cultural patrimony subject to a federal restraint on alienation.

C. The Aboriginal Territory of the Cush-Hook is Subject to a Federal Restriction on Alienation under the Non-Intercourse Act and the Cush-Hook Nation is a Tribe for Purposes of the Act

The Nonintercourse Act (NIA) places a restraint on the alienation of aboriginal title land to which the federal government owns the fee-simple title. The NIA codifies the federal common law doctrine of discovery, which holds that the fee-simple title of aboriginal lands belongs to the colonizing government as a right of conquest, and with it, all rights to alienation and conveyance. *See Johnson v. M'Intosh*, 21 U.S. at 586. The Act states, in part, "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by [federal] treaty or convention entered into pursuant to the constitution." 25 U.S.C.A. § 177 (2012). *See also Oneida County*, 470 U.S. at 240, (acknowledging that Nonintercourse act codified federal common law restraint on alienation of Aboriginal Title land.) Both federal common law and the NIA indicate that no sovereign but the federal government can alienate or convey aboriginal title land. This is a federal restraint on alienation.

The Cush-Hook nation qualifies as a tribe for purposes of the NIA. In *Montoya v. United States,* the Supreme Court defined the term "tribe" for a statute similar to the NIA, which also did not provide a definition of the word. In this case, the court defined "tribe" as

"a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States,* 180 U.S. 261, 266 (1901); *See also Robinson v. Salazar* 838 F.Supp. 2d 1006, 1028, (D. Cal 2012.) This definition requires a "tribe" to be a group of people with shared ancestral roots, defined political structure, and a specific territorial locus.

The Cush-Hook Nation meets all three of these requirements. It has been documented and described as a cohesive group since the time of contact. The journals of Lewis and Clark reference the explorers' meeting with the Nation's leadership, and further historical record shows that the Nation operated as a political body, attempting to engage in treaty relations with the United States. These facts reveal that the Nation operated as a political community, with a clear government structure. Additionally, the Lewis and Clark journals and attempted but invalid agreements with the United States describe and clearly locate the aboriginal territory of the Nation. Finally, as the evidence shows that the Cush Hook people have lived together since before the time of contact and continue to live together, and the Lewis and Clark journals record shared cultural and religious practices, it is clear that the Cush-Hook people share common ancestral roots. Federal common law makes it clear that federally unrecognized tribes retain aboriginal title to land. See *Tee-Hit-Ton*, 348 U.S. at 278 (recognizing that federally unrecognized tribe held aboriginal title to ancestral territories). Therefore, the word "tribe" as it is used in the NIA, which codifies this common law, does not turn on federal recognition, but rather on the characteristics of the Indian group in question. For these reasons, the Cush-Hook Nation is a tribe for purposes of the NIA. Because the Cush-Hook Nation holds the aboriginal title of the area of land in question in

this case, the land is subject to a restraint on alienation under both federal common law, and the NIA.

D. The Oregon Statutes Unlawfully Encumber the Property of the Cush-Hook Nation, and Are Preempted by Federal Law

The Oregon statutes restrict alienation and conveyance of the Cush-Hook Indian community's property, which is subject to a federal restraint on alienation. Oregon also asserts that Thomas Captain needed a state-issued permit to remove objects for the Cush-Hook nation's property. These restrictions and the permit requirement are encumbrances because they impair the power of the Nation to alienate its property, and are burdens on the title. As previously outlined, PL 280 expressly prohibits encumbrance of such Indian-held property, stating "nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property… belonging to any Indian or any Indian Tribe, Band, or Community… subject to a restriction against alienation imposed by the United States." 18 U.S.C.A. § 1162 (2012). The Oregon statutes unlawfully encumber the carved trees and the area of land at question in this case, and are therefore invalid under Public Law 280. Additionally, federal law preempts the Oregon statutes. Oregon's ability to prosecute Captain is derived from illegitimate sections of law, and the lower Court erred in upholding his convictions under the Oregon statutes.

The carved trees, and the aboriginal title to the area of land in question are types of property. In the classical sense, as James Madison explained, property "embraces every thing to which a man may attach a value and have a right." James Madison, The Writings of James Madison 101 (Gaillard Hunt ed., 1906.) See also Cheryl I. Harris, Whiteness as Property 106 Harvard L. Rev. 1707, 1726 (1993). Today, types of property include

everything from contracts, to government aid, to earning potential, to occupational licenses. Charles A. Reich, The New Property, 73 Yale L.J. 733, 733 (1964). Real property constitutes land, and personal property is movable property, also known as chattels. A. James Casner et al., Cases and Texts on Property 23, 655 (5th ed. 2004). The Cush-Hook Nation holds the right of occupancy to the area of land in question. Since the land has value, the Nation holds a possessory interest and special rights to it, and the Nation is an "Indian tribe or community,"[3] the area of land is "real property" for the purposes of 18 U.S.C.A. §1162.

The Nation attaches value to the carved trees as important religious and cultural objects. The trees are "objects of cultural patrimony" for purposes of NAGPRA, and under this statute, "the ownership and control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be… in the case of… objects of cultural patrimony—in the Indian tribe… on whose tribal land such objects… were discovered." 25 U.S.C.A. § 3002 (2012). Since the trees are located on the land to which the Cush-Hook has aboriginal title, and the Cush-Hook own and control the objects, they are "personal property" of the Cush-Hook Nation, an "Indian Community,[4]" for the purposes of 18 U.S.C.A. § 1162.

Or. Rev. Stat. 358.905-358.961 places restraints on the alienation of "archeological objects"[5] and "archaeological sites."[6] It says that "[a] person may not … injure, destroy, or

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[3] As previously outlined, the Cush-Hook nation qualifies as an Indian "tribe" for purposes of the NIA, and a "Native American group" for the purposes of NAGPRA. For he same reasons applied to establish that the Nation fit these definitions, it should be considered an Indian "tribe" or "community" for the purposes of PL 280, which does not provide a definition for either of these terms.

[5] "an object [at] least 75 years old [that] is part of the physical record of an indigenous or other culture found in the state or waters of the state; and is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments [and] symbols" 358.905 (1)(a)A-C.

[6] "a geographic locality in Oregon… that contains archaeological objects and the contextual associations of the archaeological objects with each other; or biotic or geological remains or deposits." Or. Rev. Stat. § 358.961 (2012)

alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235" and "[a] person may not sell, purchase, trade, barter or exchange or offer to sell, purchase, trade, barter or exchange any archaeological object that has been removed from an archaeological site on public land or obtained from private land within the State of Oregon without written permission of the landowner." Further, "[a] person may not sell, trade, barter or exchange… any archaeological object unless the person furnishes the purchaser a certificate of origin . . . ." Or. Rev. Stat. § 358.920 (2012). Finally, it defines "objects of cultural patrimony" in practically the same way that they are defined by NAGPRA, and similarly prohibits such objects from being "alienated, appropriated or conveyed by an individual, regardless of whether or not the individual is a member of the Indian tribe [in question]."[7] Or. Rev. Stat. § 358.968 (2012).

Or. Rev. Stat. § 390.235-390.240 states that "[a] person may not … remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department." Or. Rev. Stat. § 390.235 (2012). Additionally, "[e]xcept for sites containing…objects of cultural patrimony as defined in ORS 358.905, or objects associated with a prehistoric Indian TRIBAL culture, the permit required by subsection (1) of this section shall not be required for forestry operations on private lands." Or. Rev. Stat. § 390.235 (2012)

The prohibition on alteration of archaeological sites, and the bar on sale or removal of archeological objects or objects of cultural patrimony encumber the Cush-Hook Nation's

[7] In full, the definition states "an object having an ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object shall have been considered inalienable by the native Indian group at the time the object was separated from such group." Or. Rev. Stat. § 358.968 (2012)

aboriginal territory and the carved trees, as does the requirement that state permits be obtained to remove objects from public and private lands. Narrowly construed, the term "encumbrance" means "a burden on the land and affecting the title therto [sic] or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership." *People v. Rhoades,* 12 Cal. App. 3d 720, 724 (App. 1970); *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668 (Wash. 1967) *(Hale, J., dissenting)*. See also *Rincon Band of Mission Indians v. San Diego County,* 324 F. Supp. 371 at 376, (S.D. Cal. 1971) (defining "encumbrance" as a burden on land imposed by third persons which may impair alienability of fee, such as mortgage, lien, or easement).

In the case of statutory interpretation, one should "[start] with the premise that this law like all federal Indian laws must be construed in a manner most favorable to Indians." *Rhoades,* 12 Cal. App. 3d at 723. However, even when the word "encumbrance" is construed in its most narrow sense, the Oregon statutes are clearly "encumbrances" on the property of an Indian community. Oregon impairs the power of the Cush-Hook Nation to alienate its property, since it forbids both the sale of "archeological objects" without signature and certificate, as well as the alienation, appropriation and conveyance of "objects of cultural patrimony." These prohibitions burden the Nation's possessory rights to the carved trees, and affect their title. The Oregon statutes also require that persons must obtain a permit to "injure, destroy or alter an archaeological site, or remove objects from it." Or. Rev. Stat. § 358.920 (2012) Since the area where the carved trees are located fits the definition of an "archaeological site," Oregon requires the tribe get state permission before making any alterations to its own property. For example, if religious leaders from the tribe decided to continue the ancient practice of carving sacred symbols on trees in the same area,

they would have to first obtain permits from the state. This requirement clearly burdens the nation's right of occupancy, which includes the rights to use and enjoyment of the land. It also violates the long-held principle, expressed in both federal common law and statutes like the NIA that the federal government is the only sovereign that can impact tribal property interests.

Essentially, under the guise of protecting the tribe's interests, the state is asserting control over one of the Cush-Hook Nation's most important cultural sites to which the federal government holds fee-title, as well as to the Nation's sacred objects. The federal government has placed restraints on alienation on both the land and the carved trees (under NAGPRA and the NIA,) and PL 280 explicitly forbids the state from encumbering tribal property subject to such a federal restraint. 18 U.S.C.A. § 1162 (2012). Therefore, Oregon is unlawfully encumbering the Nation's property, and cannot prosecute Thomas Captain under its state statutes.

Moreover, federal law preempts the Oregon statutes. Under the Supremacy clause, Congress has the power to preempt state legislation if it clearly intends to do so. The intent of congress is "the ultimate touchstone in every preemption case." "Express preemption" occurs when Congress uses explicit statutory language to preempt conflicting state law. "Field preemption" occurs when a state law bears upon a field reserved for federal regulation, "either where the nature of the regulated subject matter permits no other conclusion, or where the Congress has unmistakenly so ordained." *Deweese v. National R.R. Passenger Corp. (Amtrak),* 590 F.3d 239, 245 (3d Cir. 2009).

In this case, both express preemption and field preemption have occurred. First, congress explicitly states in PL 280 that states may not encumber Indian property subject to

federal restraints on alienation. Since Oregon's law directly conflicts with this language, it is expressly preempted. Additionally, the federal government occupies the field of regulating Indian property rights subject to federal regulation. As already discussed, the broad intent of Congress in enacting PL 280 was to extend criminal jurisdiction over Indian Country to the states, and the intent in including the particular provision prohibiting state encumbrance of Indian-held property was to uphold the long-established principle that the federal government is the only sovereign with the ability to impact and control Indian property rights. This is "unmistakenly ordained" by the Nonintercourse Act and the federal common law doctrine of discovery. 25 U.S.C.A. § 177 (2012); *Johnson v. M'Intosh*, 21 U.S. at 586. As has already been established earlier in this brief, through statute and common law, the federal government has indicated that Indian property subject to federal restraints on alienation is a field it reserves for itself.[8]

In conclusion, the Oregon statutes are not only invalid with regards to current litigation, they are also preempted by federal law. In addition to being void and unenforceable, the statutes are unnecessary and ineffective as they pertain to the facts of this case. While Oregon's purpose in enacting the legislation is to protect important cultural property, the state of Oregon failed to protect one of the Cush-Hook Nations most sacred sites from vandalism. When a member of the Cush-Hook Nation sought to protect these resources after observing that some of them had been irreplaceably destroyed, the state attempted to prosecute him. Rather than accomplishing its purpose, the Oregon legislation as it is applied in this case only interferes with federal-tribal relations and tribal property rights.

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[8] To refer back to earlier quoted authority, "with the adoption of the Constitution, Indian relations became the exclusive province of federal law…. 'the possessory right claimed [by Indian tribes] is a *federal* right to the lands at issue [in cases involving aboriginal title]." *Oneida County,* 470 U.S. at 234. See also *Johnson v. M'Intosh* 21 U.S. 543, 586 (1823)**;** *Santa Fe Pac.* 314 U.S. at 347; *Tee-Hit-Ton* 348 U.S. at 279

For these reasons, the lower Court's holding that Captain was guilty of damaging an archaeological site, and a cultural and historical artifact should be reversed. The statutes that Oregon is attempting to prosecute Captain under unlawfully place a restraint on the alienation of both the carved trees, and parts of the area of land in question, and are therefore invalid.

III. If the Court Determines the Land Is Not Indian Country, The Code of Federal Regulations Preempts Oregon Law and Prohibits Oregon from Prosecuting Thomas Captain for Damaging Archeological, Cultural, and Historical Objects

If the court decides that the land in question is not Indian country, the code of federal regulations still prohibits the encumbrance of tribal land subject to federal restraints on alienation outside of the context of PL 280. This federal regulation also preempts the Oregon statutes. The Code of Federal Regulations states that "none of the laws, ordinances, codes, resolutions, rules, or other regulations of any state or political subdivision thereof, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 25 C.F.R § 1.4[9] (2012)

As was established earlier in this brief, the Cush-Hook Nation is a "tribe" for the purposes of the NIA, and a "Native American group" for the purposes of NAGPRA.[10] The Nation holds aboriginal title to the land in question in this case. The land and the carved trees are property subject to federal restraints on alienation. Because the Oregon statutes are state

[9] Sources of statutory authorization are 5 U.S.C.A. § 301 (2012) and 25 U.S.C.A. § 2 (2012).

laws that encumber the property of the Cush-Hook Nation, they limit, govern, and control the use and development of the Nation's property, and as a result, are invalidated by §1.4. Finally, the Oregon statutes explicitly conflict with § 1.4, and are therefore expressly preempted by it. Similarly to PL 280, the intent of this statute is to uphold federal sovereign supremacy in relation to Indian property rights subject to federal restraints on alienation. The Oregon statutes are impinging upon this federal field of law.[11] Even if the court holds that the land in question is not Indian Country, Oregon cannot prosecute Thomas Captain because the Oregon statutes are invalid and preempted by federal law.

CONCLUSION

For the foregoing reasons, the Oregon Court of Appeals affirmation of the Oregon Circuit Court's conclusion that the Cush-Hook Nation owns the land in question under aboriginal title should be affirmed. The Oregon Court of Appeals affirmation of the Oregon Circuit Court's conclusion that the State of Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question should be reversed.

[11] Again, to refer back to earlier quoted authority, "with the adoption of the Constitution, Indian relations became the exclusive province of federal law…. 'the possessory right claimed [by Indian tribes] is a *federal* right to the lands at issue [in cases involving aboriginal title]." *Oneida County,* 470 U.S. at 234. See also *Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823)**;** *Santa Fe Pac.*, 314 U.S. at 347; *Tee-Hit-Ton*, 348 U.S. at 279; 25 U.S.C.A. § 177 (2012)