Case No.: 11-0274

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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State of Oregon,

Appellant,

v.

Thomas Captain,

Appellee.

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On Appeal

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# BRIEF OF APPELLEE

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January 14, 2013

Oral Argument Requested

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## Questions Presented

I. Is the Cush-Hook tribe a recognized tribe for the purpose of asserting a claim of aboriginal title, and if so can the Cush-Hook tribe assert such a claim to the Kelly Point Park?

II. Does the Oregon criminal statue control the use and protection of archeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe, and if so does federal action speak to this issue thereby preempting the state?

## Statement of the Case

I. Statement of the 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. 358.905-358.9612 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). Captain consented to a bench trial.

The court held that the Cush-Hook Nation still owned the land within the Park and found Thomas Captain not guilty for trespass or for cutting timber without a state permit. However, the court found him guilty for violating Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. for damaging an archaeological site and a cultural and historical artifact and fined him $250.

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

II. Statement of the Facts

The Cush-Hook Nation of Indians occupied their permanent village, now encompassed by Kelly Point Park, since time immemorial. The Nation derived sustenance through farming, harvesting wild plants such as wapato, fishing, and hunting in this area.

William Clark of the Lewis & Clark expedition once encountered the Cush-Hooks and visited their village. In addition, he obtained information about them from Multnomah Indians of whom pointed out the Cush-Hook Nation village and longhouses. The Multnomah took Clark to meet the chief of the Cush-Hook Nation. Clark gave the chief a President Thomas Jefferson peace medal. Clark and Meriwether Lewis handed out these medals to chiefs during their expedition and believed that tribal leaders accepting the medals desired political and commercial relations with the United States. They further believed acceptance of the objects demonstrated which tribal leaders and governments would be recognized. These items had such significance they were later termed "sovereignty tokens" by historians.

Clark recorded his interactions with Cush-Hooks and surrounding tribal communities in the Lewis &Clark Journals in April of 1806. Clark took note of their housing, agriculture, burial traditions, religion, governance, hunting and fishing practices, and other aspects of their culture. He drew a sketch of the village and longhouses in which they lived. Clark also documented in his journals the practice in which shamans or medicine men carved religious and sacred totem symbols into living trees hundreds of years ago. The carved images now stand at a height of 25-30 feet off the ground. The totems remain religiously and culturally significant to the modern day Cush-Hook Nation.

The Cush-Hooks continued to live in the area of their village, occupy the land, and engage in their traditional way of life. In 1850, Anson Dart negotiated a treaty with Anson Dart in which the tribe agreed to relocate 60 miles westward to a specific location in the foothills so

that Dart could free the valuable farming lands on the river for American settlers. The Nation signed the treaty and relocated in order to avoid encroaching Americans. Without their traditional property, the Nation has remained impoverished at this location until the present time. The Nation did not receive benefits from the treaty nor did they receive any compensation for their relocation or for the seizure of their occupied lands. The treaty was not recognized by Congress. The Cush-Hooks have yet to attain Federal recognition.

Pursuant to the Oregon Donation Land Act of 1850 requiring "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted fee title from the United States, Joe and Elsie Meek claimed 640 acres of the land and received fee title. The Meeks did not live on the land for the required four years and did not cultivate it. Descendants sold the land to Oregon in 1880 and Oregon subsequently created Kelly Point Park.

Today, the totem images in which ancestral Cush-Hooks carved images into trees still exist but vandals have recently begun to climb the trees in and deface the images. In some cases these vandals have marketed these images. The state has done nothing to stop these vandals.

In 2011, Thomas Captain, a Cush-Hook citizen, occupied Cush-Hook ancestral territory in Kelly Point Park in order to reinsert his Nation's ownership of the land and to protect the etched trees in which the Cush-Hooks hold to be of great cultural and religious significance. In order to protect one of the images, Captain cut a tree down and removed a section that contained a sacred image. As he was returning to his Nation's location in the coastal mountain range, the image was seized and the State troopers arrested Captain.

## Summary of the Argument

There are multiple definitions that exist for a tribe by federal, state, and local governments. These definitions are laid out through framework established by the courts,

congress, and the executive. These definitions are usually followed up by a secondary inquiry, which asks, "is this group a tribe for the purposes of – ?" The Cush-Hook tribe meets these definitions of a tribe, and specifically for the purpose of asserting a claim of aboriginal title to the Kelly Point Land. In order for aboriginal title to be extinguished there must be demonstrated clear, unequivocal, and unambiguous federal action. The *Oregon Land Donation Act* fails to meet this test, and extinguish Cush-Hook aboriginal title to the Kelly Point Land. Therefore, this court should uphold the ruling of the lower court that the Cush-Hook tribe still holds title to the Kelly Point Land.

Congress has the authority by way of the Indian Commerce Clause to confer State jurisdiction over tribal matters. Congress has not given its consent for Oregon to have jurisdiction under Public Law 280 because the law in which the State attempts to assume jurisdiction is civil regulatory in nature and not criminal prohibitory. Therefore, the State cannot assume jurisdiction under Public Law 280.

## Argument

### I. The Cush-Hook tribe is a tribe as defined by statute, common law, and executive finding. As such, the Cush-Hook tribe maintains a claim of aboriginal title to the Kelly Point Land because of the absence of a clear and unambiguous federal action extinguishing Cush-Hook aboriginal title.

A. The Cush-Hook tribe is a tribe as shown through statutory, common law, and executive framework;

i. Definition of an Indian Tribe

What constitutes an Indian tribe for purposes of federal law varies according to the legal context and which federal body is defining the tribe. There is no universally applicable

definition.[1] Consequently, federal courts historically played a significant role in determining federally recognized tribal existence, relying heavily on the history of dealings by the political branches through treaties, statutes, executive orders, or agreements recognizing the tribe in question. [2]

Additionally, there is no single statute that defines "Indian" for all federal purposes. [3] For legal purposes, a person may be classified as an Indian if (a) some of the individual's ancestors lived on lands that are currently the United States prior to its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual's tribe or community. United States v. A.W.L., 117 F.3d 1423 (8th Cir. 1997); Ex parte Pero, 99 F.2d 28 (7th Cir. 1938); United States v. Rogers, 45 U.S. 567, 572-573 (1846). Furthermore, a member of a terminated tribe will be considered an Indian for the purposes of federal programs that are available to all Indians.[4]

Because there are so many ways to define a tribe, for the purposes of this inquiry a narrow interpretation from both a judiciary as well as a regulatory framework will be used to show the Cush-Hook people are a "federal tribe" eligible to assert a claim of aboriginal title.

ii. Legislative

Congress has conferred recognized tribal status to a number of tribes.[5] The Indian Commerce Clause of the United States Constitution gives congress plenary power over Indian affairs. In a foundational case for Indian law, Worcester v. Georgia, the U.S. Supreme Court states "our existing constitution...confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with

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[1] Cohen's Handbook of Federal Indian Law §3.03[1], 171 (lexis 2005).
[2] Id. at §3.02[2], 136
[3] Id. at §3.03[4], 177
[4] Id. at §3.03[2], 173. Tribes legally terminated from federal supervision continue to be Indian tribes and can operate as tribal entities for many different purposes. *See* 25 U.S.C. §1603
[5] Id. at §3.02[6][a], 144

the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with Indians." Worcester v. Georgia, 31 U.S. 515, 559 (1832). Congress historically recognized tribes treaties through legislation. Only Congress has the power to terminate the government-to-government relationship with a tribe. The last tribe to be recognized through congressional legislation was the Shawnee Tribe of Oklahoma in 2000 (Loyal Shawnee).[6]

iii. Executive

The Federally Recognized Indian Tribe List Act of 1994 (known as the 1994 list act) outlines its purpose in §104(a) Publication of the List. §104(a) reads, "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians. §104 of the List act also reads that, "The term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." When compared to other federal statues this definition varies greatly.[7] Additionally, §103(3)-(5) of the act speaks specifically to the various tools that can be used to recognize tribes.[8] One of the tools which the Executive uses to define a tribe for the purpose of placing them on this list is 25 CRF Part 83 Procedures for Establishing that an American Indian Groups Exists as an Indian Tribe. (Also known as the Part

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[6]Testimony of Michael J. Anderson to the United States Senate Committee on Indian Affairs – Oversight Hearing on Federal Recognition: Political and Legal Relationship between Governments July 12, 2012

[7] *See* Cohen's Handbook of Federal Indian Law §3.03[4] "[f]ederal statutory definitions of who is an Indian vary considerably from statute to statute. Some emphasize membership or eligibility for membership in a federally recognized Indian nation…the Indian Self Determination and Education Assistance Act of 1975 defines *Indian* as 'a person who is a member of an Indian tribe.' *United States v. Broncheau*, 597 F.2d 1260 (9th Cir. 1979)...Under the Indian Child Welfare Act…an Indian child is defined as, 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' 25 U.S.C. § 1903(4)"

[8] Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792) §103(3)-(5), Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court; a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress; Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated.

83 Process). There are seven mandatory criteria a group must satisfy in order to be defined as a tribe under the Part 83 process.[9]

The Part 83 process is not exhaustive when speaking to the Secretary's authority to recognize tribes. Prior to the creation of the Part 83 Process the Secretary used his authority to acknowledge tribes, and has continued to do so in addition to, or separate from the Part 83 process. For example a limited number of tribes that were recognized and mistakenly omitted from the list of federally recognized tribes also have been reaffirmed through administrative error correction. This occurs when tribes whose government-to-government relationship was never severed, lapsed, or administratively terminated and are administratively reaffirmed and placed on the list of recognized tribes…Rather than a new recognition, this is a reaffirmation of the government-to-government relationship. Thus, a process similar to that under 25 C.F.R. Part 83 is not required. The status of the Lower Lake Rancheria Koi Nation, the Ione Band of Miwok Indians, the King Salmon Tribe, the Shoonaq' Tribe of Kodiak, and most recently the Tejon Indian Tribe[10] were appropriately corrected this way.

In a unique situation involving Alaska Native Tribes, on October 21, 1993, the Department issued its list of tribes in the United States eligible for services from the Department. The list named the Alaska villages recognized under the Alaska Native Claims Settlement Act as

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[9] *See generally* 25 CFR Part 83 criteria for federal acknowledgment (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present (d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historian Indian tribes which combined and functioned as a single autonomous political entity (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

[10] Under limited circumstances, Indian tribes omitted from a list of Indian Entities because of an administrative error can be placed on the current list without going through the Federal Acknowledgment Process…[A]s a threshold matter I find that an Assistant Secretary's authority to make this determination is not limited by the regulations at 25 CFR Part 83. January 6th, 2012 letter from Assistant Secretary Echohawk to Tejon Tribe (2012 Tejon Letter)

tribes, and specifically stated that they have "all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." The over 220 tribes acknowledged in that notice did not achieve recognition through the Office of Federal Acknowledgment […] but rather through the Department's interpretation of congressional statutes, policies, and directives, which collectively affirm Alaska Native government sovereignty. [11]

iv. Common Law

In Montoya v. United States, the Supreme Court adopted a common-law[12] test to determine whether a group constituted a tribe for purposes of applying a federal act.[13] A *tribe* is defined 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, 265, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1901)(italicized added for emphasis). A court may deem a group a tribe for the purpose of inclusion under the protections of the non-intercourse act. Joint Tribal Passamaquoddy v. Morton, 528 F.2d 370, 376 (1st Cir. 1975). The court in Passamaquoddy also rejected the idea, prevalent in the 1960's and 1970's, that tribes that had not been the subject of some specific act of recognition, such as federal treaty or a statute naming the tribe, were therefore unrecognized as tribes for the purpose of all federal statues and programs.[14]

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[11]Testimony of Michael J. Anderson to the United States Senate Committee on Indian Affairs – Oversight Hearing on Federal Recognition: Political and Legal Relationship between Governments July 12, 2012

[12] The body of decisional law derived from federal courts when adjudicating federal questions and other matter of federal concern, such as disputes between the states, and foreign relations, but excluding all cases governed by the state. Black's Law Dictionary 132 (9th ed. 2009)

[13]Cohen's Handbook of Federal Indian Law §3.02[6][b] 146

[14] Id. at §3.02[6][b], 147

Non-federally recognized tribes may be classified as a "federal tribe" by asserting that they are immune from suit by virtue of their sovereign status as Indian tribes or entities thereof. Gristede's Foods, Inc. v. Unkechaug Nation, 660 F. Supp. 2d 442, 446 (E.D.N.Y. 2009). In order to determine whether sovereign immunity applies, the tribe must be a tribe recognized by Congress or the Bureau of Indian Affairs (BIA), United States v. Sandoval, 231 U.S. 28, 46-47, 34 S. Ct. 1, 58 L. Ed. 107 (1913), or meet the federal common law definition. See Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 45 L. Ed. 521 (1901).

Precisely on point to this Montoya definition is Gristede's Foods, Inc. v. Unkechaug Nation, 660 F. Supp. 2d 442 (E.D.N.Y. 2009) (finding court lacked subject matter jurisdiction because Unkechaug Nation has tribal sovereign immunity as to civil suits). In Gristede's Foods, the court addressed whether the Unkechaug Nation enjoys tribal sovereign immunity by virtue of it being recognized as an Indian tribe under federal law, even though the Unkechaug Nation had not been federally recognized by Congress or the BIA. Id. at 465. To determine an answer to this question the court proceeded to analyze whether the Unkechaug met the federal common law definition set forth in Montoya v. United States. After an extensive and extremely thorough analysis of whether the Unkechaug met the federal common law definition, following an evidentiary hearing, the court's answer was in the affirmative. Indeed, other courts to consider the issue have consistently held that the Unkechaug Nation is a sovereign nation and thus had sovereign immunity from personal injury suit. Maynes v. Unkechaug Tribal Council, 2011 U.S. Dist. LEXIS 1481("[T]he Unkechaug is, and has been, recognized as an Indian tribe by the State of New York for more than 200 years . . . and 'fall[s] squarely within the umbrella of the Montoya . . . line of cases.'"). Therefore, given that the Unkechaug Nation is an Indian Nation under federal common law, it enjoys sovereign immunity. Maynes v. Unkechaug Tribal Council.

Passamaquoddy which precedes Gristede's speaks specifically to a non-federally recognized tribe bringing suit for a violation of the 1790 Non-Intercourse Act. The court in Passamaquoddy applies the statutory interpretation doctrine of plain meaning to the definition of Indian tribe as it is used with the 1790 Act, to find that Indian tribe should be read to be inclusive of non-federally recognized tribes rather than exclusive of them.

v. Analysis

The Congress through legislation has recognized or reaffirmed tribes. Congress through the doctrine of plenary power has the authority to act and make laws affecting tribes. The Cush-Hook tribe has not had any congressional action taken upon them in regard to their status as an Indian tribe. As a result we can say Congress has remained silent as to the status of the Cush-Hook because there is no legislation terminating them as a Indian tribe, or affirming their status.

The Executive has multiple tools with which to recognize, reaffirm, or acknowledge the existence of a tribal – federal relationship. The Part 83 Process is only one of the more recent tools that have been used to do this. In addition to and outside of the Part 83 Process, the Secretary has demonstrated the same authority to recognize and reaffirm tribes. Prior to the Part 83 Process the Secretary recognized tribes for the purposes of defining a federal tribal relationship. This was exemplified through treaty interpretation, legislative, and regulatory implementation. Throughout the history of tribal – federal relations the President negotiated and Congress ratified Indian treaties Under the Treaty Clause of the Constitution.[15] Even examples of unratified treaties are evidence enough to show a minimal federal relationship or that the government had some responsibility for the treating parties. There is very demonstrated with the Cush-Hook and their unratified Dart treaty. When their land was seen to be of value the

[15] United States Department of Interior, Record of Decision Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (Dec. 2010) ("Cowlitz ROD").

government took action to try and displace them from it, even going so far as to negotiate their removal.

In 1993 Assistant Secretary of Indian Affairs Ada Deer, in a opinion affirmed the sovereign status of the over 200 Alaska native governments. In fact to date of the over 500 "recognized tribes" in the United States over half of them have had their status affirmed or acknowledged by the Executive outside of the Part 83 Process. The 1994 List Act creates a very narrowly defined universe of tribes that are acknowledged by the federal government. This list is not exhaustive and is only a list of tribes for the purpose of receiving benefits because of their status as Indians. The Cush-Hook tribe has not gone through the Part 83 Process, in fact few tribes have. Less than 20 tribes have been acknowledged through this process. The Cush-Hook fall with in the universe of tribes who have a historical relationship with the federal government, but have been left off a list. The Cush-Hook are more like the Lower Lake Rancheria Koi Nation, the Ione Band of Miwok Indians, the King Salmon Tribe, the Shoonaq' Tribe of Kodiak, the Tejon Indian Tribe, and the over 200 recognized Alaskan Native governments.

The judicial framework outlined in Passamaquoddy and Gristede's give clear evidence that courts are required to acknowledge a tribe if the executive and Congress have remained silent on a tribe's status. In both of these cases inherent tribal rights such as aboriginal title and tribal sovereignty were at risk of being extinguished. The courts have a clearly defined framework with which they can determine if a group is a tribe, and this is shown by using the Montoya criteria. While Passamaquoddy stands for the principal that a non-federally recognized tribe is read to be included within the protections of the 1790 Non-intercourse Act, Gristede's gives further strength to that claim by giving a successful demonstration of the analysis a court will look to when applying Montoya. Taken together these two judicial definitions the Cush-

Hook's history of federal relations to demonstrate their status as a tribe. Like in Passamaquoddy and Gristede's the Cush-Hooks have always existed as a tribe from time immemorial. The lower court found through expert witnesses in history, sociology, and anthropology that the Cush-Hook Nation occupied, used and owned the lands in question before the arrival of European-Americans.

This is similar to the evidence presented by the Unkechaug tribe, in which expert ethno-historians established that the Unkechaug existed from pre-colonial times to present. The Cush-Hook presence on the Kelly Point Land from pre-European contact to present is shown by the sacred religious symbols permanently affixed within the Kelly Point Land. The presence of Cush-Hook traditional archaeological, culturally, and historically significant religious symbols demonstrate a continued religious use of this land by the Cush-Hook.

Additionally, Thomas' housing in Kelly Point Land is evidence that the Cush-Hook people still consider this land to be significant to them, and part of the area that they inhabit. The fact that the Kelly Point Land had such strong historical cataloging of Cush-Hook presence helped supplement Thomas' already retained knowledge of knowing exactly where traditional Cush-Hook land was located, and as a result where exactly he was going to place his home.

Finally the language of the 1994 List Act allows for the Executive, Congress, or the Courts to recognize a tribe. The application of the Part 83 Process only clearly defines the narrow slice of tribes eligible to receive services because of their status as tribe. This is not applicable to the Cush-Hook tribe because they have not petitioned to go through the Part 83 process. In fact the Cush-Hook fall in the greater universe of tribes who have been acknowledged by the secretary as a result of their historical federal relationship with the executive. This is more important to Cush-Hook because they are attempting to define their status as a tribe for the

purpose of asserting a claim of aboriginal title. Using this "executive" framework of historical acknowledgement the Cush-Hook tribe may couple this status with the Plain Meaning application to Passamaquoddy to assert a claim of aboriginal title to the Kelly Point Land.

B. The Cush-Hook tribe never relinquished their claim of aboriginal title to the Kelly Point Land as clearly outlined through judicial and regulatory framework. The *Oregon Donation Land Act* does not contain clear and explicit federal language extinguishing the Cush-Hook claim to aboriginal title.

Land, forms the basis for social, cultural, religious, political, and economic life for American Indian nations. [16] If a tribe has this significant piece of their identity taken from them, they may cease to continue on as a tribal community. The Cush-Hook tribe has demonstrated their continued existence as a tribal community through their physical religious presence on the Kelly Point Land. If the Cush-Hook tribe's claim to this land is extinguished than the tribe should cease to be; their continued existence defies the notion that they are separated from their land and as such cease to be a tribal community.

Indian tribes are *domestic dependent nations* that exercise inherent sovereign authority over their members and territories. Oklahoma Tax Commissioner v. Citizen Band of Pottawatomie Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (citing Cherokee Nation v. Georgia, 30 U.S. 1, 17, 5 Pet. 1, 8 L. Ed. 25 (1831)). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. Oklahoma Tax, 498 U.S. at 509 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 48, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). Non-federally recognized

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[16] *Cohen's Handbook of Federal Indian Law §15.02, 965 (lexis 2005)* (quoting John P. Lavelle, *Rescuing* Paha Sapa: *Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation,* 5 Great Plains Nat. Resources J. 40 (2001) (recounting historical and continuing spiritual significance of Black Hills for Lakota, Dakota, and Nakota people); Frank Pommershiem, *The Reservation as Place: A South Dakota Essay,* 34 S.D. L. Rev. 246 (1989); Rebecca Tsosie, *Sacred Obligations: Intellectual Justice and the Discourse of Treaty Rights,* 47 UCLA L. Rev. 1615, 1640 (2000)).

tribes may be classified as a "federal tribe" by asserting that they are immune from suit by virtue of their sovereign status as Indian tribes or entities thereof. Gristede's Foods, Inc. v. Unkechaug Nation, 660 F. Supp. 2d 442, 446 (E.D.N.Y. 2009). In order to determine whether sovereign immunity applies, the tribe must be a tribe recognized by Congress or the Bureau of Indian Affairs (BIA), see United States v. Sandoval, 231 U.S. 28, 46-47, 34 S. Ct. 1, 58 L. Ed. 107 (1913), or meet the federal common law definition. See Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 45 L. Ed. 521 (1901). We reject the government's argument that aboriginal title can never be asserted against the government. Aboriginal title can be extinguished only by Congress or with the authorization of Congress. U.S. v. Dann, 706 F.2d 919 (9th Cir. 1983). Federal recognition is not required for Indian group to establish treaty rights. U.S. v. State of Wash., 641 F.2d 1368 (9th Cir. 1981)

i. Extinguishment

Only the United States can extinguish original Indian title. 25 U.S.C. §177; see also 25 C.F.R. §152.22(b); United States ex rel. Hualpai Indians v Santa Fe Pac. R.R., 314 U.S. 339 (1941). The case of Johnson v. McIntosh clearly lays out a judicial standard that defines which governmental body, and through what process aboriginal title may be extinguish. This framework is rooted in the holding of Johnson v. McIntosh through the doctrine of discovery. Under the doctrine of discovery, European nations claimed the right to acquire ownership of land from native Americans, exclusive both of other European nations and their own subjects.[17] "[d]iscovery gave title to the government by whose subjects, or by whose authority, it made, against all other European governments, which title might be consumed by possession. Johnson v. McIntosh, 21 U.S. 543, 573 (1823). The court in *Johnson* further goes on to define the limits

[17] Cohen's Handbook of Federal Indian Law §15.04[2], 970.

by which tribes claim to title over the land goes, "They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whosoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." Id. 574. As the "discovering" nation Great Britain held exclusive right to convey title of aboriginal land. The United States as the successor sovereign inherited that right from the British. The United States is now the only sovereign with the right to freely grant title to Indian land, and as illustrated in Johnson v. McIntosh that right to convey or extinguish is held exclusively by the United States[18] through, "purchase or conquest." Id. 587. This judicial concept is given further definition in the subsequent cases of Cherokee Nation v. Georgia and Worcester v. Georgia. In Cherokee the court clarified the meaning of acquire by noting that "Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[19] Worcester v. Georgia outlines that when choosing between conquest and purchase, the practice of purchase is preferred, but conquest is acceptable in instances where wars were instigated by a tribe's aggression. Worcester v. Georgia, 31 U.S. 515, 546 (1831)("[t]he power of war is given only for deference, not conquest."); *id* 580 ("[T]he soil, thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians.") Also outlined by the courts is the power of congress to abrogate provisions of an Indian treaty. This power though presumably will be exercised only

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[18] "[t]he exclusive right of the United States to extinguish Indian title has never been doubted. And whether it is done by treaty, by 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." Johnson v. McIntosh, 21 U.S. 543, 586 (1823).
[19] Cohen's Handbook of Federal Indian Law §15.09[1][a] (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831)).

when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in congress, and that in a contingency such power might be availed of from considerations of governmental policy. Lonewolf v. Hitchcock, 187 U.S. 553, 556 (1903).

In addition to this judicial framework congress enacted legislation to address the issue of extinguishment of aboriginal title. This was done through a series of Trade and Intercourse Acts that began in 1790. The original language of this act provided that non-Indians could not acquire lands from Indians except by treaty entered into pursuant to the Constitution. [N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138. This language was further defined through subsequent versions of this act and finally set as, [N]o purchase, grant, lease, or other conveyance of land, 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 the constitution. Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)). This legislative language set the tone that aboriginal title could not be compromised by anyone except the federal government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661,667 (1974). One of the earliest instances of the United States asserting their right to convey or extinguish aboriginal title, is seen in a speech by George Washington to the Seneca Nation of New York,

> I am not uninformed that the six Nations have been led into some difficulties with respect to the sale of their lands since the peace. But I must inform you that these evils arose before the present government of the United States was established, when the separate States and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered. The general Government only has the power, to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding. Here then is the security for the remainder of your lands. *No State nor person can purchase your lands, unless at some public treaty held under the authority of the United States.* The general government will never consent to your being defrauded. But it will protect you in all your just rights.

George Washington Address to Seneca Indians, December 29, 1790. (Italicized for emphasis)

Congress was able to take this action because of the power vested in them by the constitution to regulate the affairs of the various tribal nations. Article I, Section 8, Clause 3 of the constitution states that congresses has enumerated powers, one of them being the power to regulate commerce with foreign Nations, and among the several States, *and with the Indian Tribes.* Article I, Section 8, Clause 3 (italics added for emphasis). Congress empowered through the constitution created the Non-Intercourse Act, and set the statutory framework by which aboriginal title may be extinguished. This rule became further defined to prevent frivolous extinguishment of aboriginal title by the federal government. The federal government can extinguish aboriginal title by purchase, which is the usual method, or simply by taking it. Such a taking will not be lightly implied. United State sex rel. Hualpai Indians v. Santa Fe Pacific R. Co.., 314 U.S. 339, 346, 354 (1941); see also County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985). The extinguishment by the sovereign though must be clear in explicit. Where extinguishment has not been clear and lead to ambiguity the courts have applied the Indian canon of construction that tribal property rights are preserved. Congressional intent to

extinguish Indian title must be plain and unambiguous and will not be lightly implied. United States ex rel. Hualpai Indians v Santa Fe Pac. R.R., 314 U.S. 339 (1941)

Additionally the judiciary has acknowledged an exception to the rule that federal statutes of generally applicability are presumed to apply to Indian tribes, so that if the statute would abrogate a treaty, it will not apply unless congress expressly made the statute applicable to Indian tribes. United States v. Smisksin, 487 F.3d 1260, 1264 (9th Cir. 2007).

ii. analysis

The *Oregon Land Donation Act* when read in its entirety makes no mention of tribes, or Indian lands. The only mention of Indians in the act speaks to the eligibility of half blood Indians to participate in the act. This is not in line with the judicial and regulatory principle of clear and unambiguous federal langue or action extinguishing aboriginal title. In fact when compared to other federal action at the time which was explicitly taken to extinguishing aboriginal title, such as the *General Allotment Act*, the *Oregon Land Donation Act* appears to be have absolutely no weight in determining if it applies to Indian lands. Looking to the language of United States v. Smisksin a federal act of general applicability when dealing with abrogating or extinguishing a right such as aboriginal title must be explicitly expressed. Once again because the *Oregon Land Donation Act* is silent as to the Indian lands we must apply the Indian cannons of construction to interpret this ambiguity in favor of the tribes, and here that would stand for the principle that no federal action has been clearly and unambiguously expressed to extinguish the Cush-Hook aboriginal title to the Kelly Point Land.

Aboriginal title is an inherent tribal right, much like sovereignty immunity. The courts have held that when a tribe waives sovereign immunity this must be explicit and not implied.

Similarly, aboriginal title can only be extinguished through explicit action and not implied. The Cush-Hook's can be defined as a tribe according to the same Montoya criteria

Analogous to the extinguishment of aboriginal title is action taken by the congress to abrogate Indian treaties. Treaties are a federal action or agreement that only congress may enter into with another sovereign, in this instance a tribe. Treaty making like aboriginal title are recognized as inherent sovereign exercises of tribal governments. The power of Congress to do so is vested in the constitution. In order for a treaty to be abrogated congress must be clear, explicit, and unambiguous in their intent to do so. And if a statute is to take action analogous to treaty abrogation i.e extinguishing Indian title than congress must expressly mandate that the statute is applicable to tribe. Here again the Cush-Hook tribe like the tribes in U.S. v Washington are having their inherent rights terminated by implication rather than the necessary explicit action. As such the Cush-Hook like the tribes in U.S. v Washington should be seen as having their inherent right to aboriginal title illegally terminated.

**II. The lower court has erred in assuming Public Law 280 confers criminal jurisdiction over Cush Hook lands because federal law preempts state law in regards to real and personal property, and because the statute the State uses is regulatory in nature rather than criminal prohibitory.**

A. Federal Pre-emption and Public Law 280

It is a well established principle that Indian Commerce Clause of the United States Constitution gives congress plenary power over Indian affairs. It states that Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[20] Fundamental to Indian Law, the Supreme Court held that State laws have no force in Indian country unless given the express consent by Congress. Worcester, 31 U.S. at 520.

[20] See Cohen's Handbook of Federal Indian Law § 6.05 "Because of federal supremacy over Indian affairs, tribes and states may not make agreements altering the scope of their jurisdiction in Indian Country absent congressional consent."

The court has "long ago departed from the conceptual clarity of Mr. Chief Justice Marshall's view in Worcester, and have acknowledged certain limitations on tribal sovereignty." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983). To that extent, "Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status, that under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." Id. at 331-32. Congress has given this consent explicitly in various ways, as they have done so in regards to conferring State's criminal jurisdiction through Public Law 280. The lower court has erred in assuming this jurisdiction is automatic because it prohibits the conduct in question.

PL 280 confers that that six states, including Oregon "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."[21] In this light the language, the statute provides that "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property" or "authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 18 U.S.C.A. § 1162 (West 2010).

In this instance, Captain claims the image carved by his ancestors as his rightful personal property. His claim falls under this exception under Public Law 280's own terms that dictate that federal law preempts State law in dealing with matters of personal property on lands in which the tribe holds aboriginal title. Regardless of whether the totem constitutes personal

[21] See Cohen's Handbook of Federal Indian Law § 6.04[3][e] "Because Public Law 280 does not differentiate between member and nomember Indians for purposes of conferring state jurisdiction, its preemptive effect should arguably extend to Indians in both categories."

property, Public Law 280 does not confer automatic jurisdiction as it is limited by its own statutory language and intent. Id.

The history of the legislation demonstrates that "[t]he primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." Bryan v. Itasca County, 426 U.S. 373, 379 (1976). The Supreme court looked to Congressional intent of Public Law 280 and concluded that its motive were not to "effect total assimilation" since "[t]he same Congress that enacted Public Law 280 also enacted several termination Acts legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation." Id. at 389.

As the central focus of PL 280 in its conception was to combat lawlessness, that focus has little to do with the issue today. The irony is that the issue here stems from a Cush-Hook citizen's attempt to prevent lawlessness and damages to a significant cultural, religious, and archeological object.[22] Captain was attempting to prevent destructive forces and preserve the sacred totem etchings from further desecration by vandals. Thomas Captain had a significant interest in keeping the images his ancestors carved into the tree intact. He felt he had to take this action because the State was failing to act pursuant to its own provisions of its policy defined in the statute to "preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance." Or. Rev. Stat. Ann. § 358.910 (West 2012). Captain acted because the state refused to protect archeological sites and the cultural heritage of the Cush-Hook Nation, of whom had occupied the land since time immemorial.

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[22] Article 12, section I of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that indigenous people have "the right to maintain, protect, and have access in privacy to their religious and cultural sites."

B. The State statute in which it bases its jurisdiction under Public Law 280 is civil regulatory in nature and not criminal prohibitory, therefore the State is not permitted to exercise jurisdiction under Public Law 280.

As the Supreme Court weighed in on a bingo statute that prohibited certain kinds of gambling, it recognized that a Public Law 280 "grant to to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987). Because of this unintended destructive consequence, "when a State seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." Id. The Court weighed the competing interests of the civil and criminal portions of California's law in which it asserted criminal jurisdiction under Public Law 280. Id. The court reasoned that since California permits numerous gambling activities and even goes as far as to promote gambling through the state lottery, the State did not prohibit gambling but instead was regulating it in general, particularly speaking to the regulation of bingo. Id. at 211.

Adhering to this precedent, a dog control ordinance was held to be a local regulatory measure as opposed to a criminal prohibitory measure, thus a member of a tribe on a reservation was not subject to the regulation under PL 280. People v. Lowry, 29 Cal. App. 4th Supp. 6, 11 (Cal. App. Dep't Super. Ct. 1994). In determining whether the law was applicable to residents on a reservation constituting Indian Country, "it is necessary to determine whether the law is 'civil/regulatory' or 'criminal/prohibitory' as those terms were used by the United States Supreme Court in the Cabazon case." Id. at 10. "[A]n 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." Cabazon, 480 U.S. 202, 211 (1987).

Here, the lower errs in its assumption that the statute is criminal prohibitory in nature. In the context of the statutes in which the State of Oregon brought a criminal action against Thomas Captain, Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical material), the provisions in its entirely demonstrate a civil regulatory purpose and nature rather than a criminal prohibitory purpose in nature. The provisions regulate archeological sites and historical material and are not primarily intended to impose criminal sanctions but instead intend to regulate activities in regards to objects or property of particular significance.

The statutes in which the State confers jurisdiction are civil regulatory in nature by the wording in its provisions and in its stated intent. The statute's stated policy is to "preserve and protect the cultural heritage" of its state and further permits the conduct undertaken by Captain if a permit is obtained. Or. Rev. Stat. Ann. § 358.910 (West 2012). Under § 390.235, describing prohibited conduct, "[a] person may not excavate, injure, destroy or 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*."

Throughout the provisions of 358.905-358.961 there are various examples of the civil regulatory nature of the statute. This can be deciphered through the plain language of the statute. There are several provisions that speak to the deference of tribal consultation in respect to objects of sacred and religious significance. "Any native sacred object, object of cultural patrimony . . . shall be reported to the appropriate Indian tribe and the Commission on Indian Service. 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. Ann. § 358.905 (West 2012). In speaking of "object of cultural patrimony" § 358.905(1)(h)(A) defines such object to be

> [m]eans an object having 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.

Further, these provisions specify a requirement that notification to tribes are required if any person is conducting an excavation "associated with a prehistoric or historic American Indian tribe." Or. Rev. Stat. Ann. § 358.950 (West 2002). Written is notice to "[t]he appropriate ethnic group, religious group or Indian tribe with which the object is associated" and "[i]f a sacred object or object of cultural patrimony is recovered on any land, the State Historic Preservation Officer shall assist the appropriate group to repossess the object."

Additional statutory language demonstrates that the conduct in which Captain was prohibited is in fact permitted by the statute as described. The statute provides that one "may not excavate or alter an archaeological site on public lands . . . or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit." Or. Rev. Stat. Ann. § 390.235. The provision further states that the State Parks and Recreation Director is to consult "[i]f the archaeological site is associated with a prehistoric or historic native Indian culture: (i) The Commission on Indian Services; and (ii) The most appropriate Indian tribe." All of these provisions indicate the overall civil regulatory scheme in addition to recognition that the purpose of the statute is to preserve and protect items of cultural and religious significance and to defer handling and ownership of sacred objects to

the appropriate tribe.

## CONCLUSION

For the foregoing reasons, Defendant asks this Honorable Court to affirm the lower court's opinion that the Cush-Hook Nations owns the land in question under aboriginal title. Secondly, Defendant ask to reverse the lower court's decision as Oregon's state law is preempted by federal law and the State's action is improper.