No. 11-0274

IN THE
SUPREME COURT FOR THE UNITED STATES

STATE OF OREGON,

PLAINTIFF-APPELLANT,

V.

THOMAS CAPTAIN,

RESPONDENT-APPELLEE.

ON PETITION FOR CERTIORARI
FOR THE OREGON COURT OF APPEALS

BRIEF FOR THE RESPONDENT-APPELLEE

TEAM 1

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QUESTIONS PRESENTED

1. Does the Cush-Hook Nation continue to maintain aboriginal title to the lands within Kelley Point Park?
2. Are O.R.S. § 358.905-358.961 *et seq.* and O.R.S. § 390.235-390.240 *et seq.* unconstitutional on grounds of racial discrimination under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution?
3. Are O.R.S. § 358.905-358.961 *et seq.* and O.R.S. § 390.235-390.240 *et seq.* unconstitutional on grounds of inhibiting the Free Exercise clause of the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDING

The State of Oregon (State) brought a criminal action against Thomas Captain (Respondent) for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under O.R.S. § 358.905-358.961 and O.R.S. § 390.235-390.240 in the Circuit Court for Multnomah County. (R. at 2-3). The court held that the Cush-Hook Nation (Nation) owned the land in the state park and that Respondent was not guilty of trespass or of wrongly cutting timber. (R. at 4). The court fined Respondent for violation of O.R.S. § 358.905-358.961 and O.R.S. § 390.235-390.240 for damaging an archaeological site and a cultural and historical artifact. Respondent appealed. (R. at 4). The Oregon Court of Appeals affirmed without a written opinion (R. at 4). The

Oregon Supreme Court denied review. (R. at 4). The State and Respondent filed petitions for certiorari to the United States Supreme Court, which was granted. (R. at 4).

STATEMENT OF THE FACTS

Evidence of the traditional lands and customs of the Nation were recorded by William Clark (Clark) of the Lewis & Clark Expedition in April, 1806. (R. at 1). The Nation was identified to Clark by a neighboring tribe of Multnomah Indians, whom Clark had encountered earlier. (R. at 1). The Multnomah Indians directed Clark to the village of the Cush-Hook Indians. (R. at 1). While visiting the Nation, Clark recorded observations about the Nation in a journal. (R. at 1). The observations included a sketch of the village and descriptive annotations of the Tribe's governance, culture, religion and traditions. (R. at 1). Within the observations was a description of sacred totems and religious symbols the Cush-Hook religious leaders carved into living trees in the village. (R. at 2). The trees held great significance for the tribe. (R. at 2). The Nation occupied, used and owned lands that make up modern day Kelley Point Park since before the arrival of white settlers. (R. at 3).

In 1850, nearly 50 years after Clark documented the location and ethnographic data of the Nation, the Nation negotiated and signed a treaty with Anson Dart (Dart), superintendent of Indian Affairs for the Oregon Territory, on behalf of the United States (U.S.). (R. at 1). Dart, in recognition of the value of the Nation's farm land, negotiated with the tribe to sell its traditional homelands and relocate west to avoid further encroachment by white settlers. (R. at 3). In compliance with the negotiated terms of the treaty, the Nation relocated from its ancestral homeland to the agreed upon location in the foothills of the coastal mountains. (R. at 1-2). That same year, Congress passed the Oregon Donation Land Act. (R. at 3). The Act defined all lands within Oregon territory as public lands and required fee simple title be

provided to any white settler who lived on the land for a period of four years and cultivated the land. (R. at 2). After the Nation relocated, Joe and Elsie Meek (Meeks) applied for and received title to the 640 acres of land where the traditional village of the Nation was located. (R. at 3). The Meeks only lived on the land for a period of two years and did not cultivate the land, failing to meet the requirements for a grant of fee simple title under the Oregon Donation Land Act. (R. at 3).

In 1853, Congress failed to ratify the treaty with the Nation. (R. at 2) The Nation never received compensation for its land, never received recognized ownership of their new lands, and never received any of the promised benefits negotiated during the signing of the treaty. (R. at 2, 3). The U.S. took no action to recognize the Nation. (R. at 2). The Cush-Hook Nation is not currently a federally recognized Indian tribe. (R. at 3).

Descendants of the Meeks sold the lands to the State in 1880. (R. at 2). The land became what is presently known as Kelley Point Park. (R. at 2).

Recently, vandals began defacing the sacred totems and religious carvings on the trees in the park. (R. at 2). The State did not take any action to protect the carvings from damage and theft. (R. at 2). Respondent, a tribal member of the Nation, occupied Kelley Point Park to reassert tribal ownership of the land and to protect the sacred religious icons of the Nation. (R. at 3). Respondent cut down one damaged icon, carved by an ancestor of the Respondent, in order to restore and preserve it. (R. at 3). Respondent was en route with the icon to the Nation's current location in the foothills of the coastal mountains when apprehended by police. (R. at 3).

SUMMARY OF THE ARGUMENT

The Doctrine of Discovery established that the Indians, as original inhabitants of the United States, maintained their right to the use and occupancy of their lands. Indian title is not granted by the discovering sovereign, but stems from a tribe's original claim to the land through possession. Aboriginal Indian title is sacred and may only be extinguished under a clear and unambiguous congressional action. It is not reliant on federal recognition. It is established through a tribe or nation's actual, exclusive and continual use and occupancy for a long time prior to the loss of the property, or can be shown through implicit or explicit acknowledgment by the federal government.

The Nation has proven aboriginal Indian title to the lands within Kelley Point Park. Proof of aboriginal title is established through Clark's historical recordings of 1806. Clark's historic journals sketched a replica of the Nation's domestic area and described its culture, government, traditions and practices. Kelley Point Park currently covers the area of land that originally made up the village of the Nation. The recordings also referenced acknowledgment from surrounding tribes of the Nation's occupancy and possession in the land. Additionally, the federal representative, Dart, acknowledged the Nation's aboriginal title when he negotiated the treaty to remove the Nation in 1850. Through proof and acknowledgment by the U.S., the Nation has proven aboriginal title to the lands within Kelley Point Park.

The U.S. has sole jurisdiction over Indian affairs. Aboriginal title to Indian lands may be extinguished by the U.S. through treaty, purchase, force or complete adverse dominion. Extinguishment may only be attained through clear congressional authority. Congress did not show its intent to extinguish aboriginal title to the Nation when it refused to

ratify its treaty in 1853. Absent the congressional authority, the Nation's original Indian title has not been extinguished and remains intact.

The U.S. holds a duty to protect aboriginal title against infringement from trespassers and extinguishment by the state. Federal legislature, beginning with the Indian Commerce Clause in the U.S. Constitution, prescribes a policy of protection over tribes. Tribes rely on the federal government as domestic dependent nations. Title provided to the settlers was unlawfully granted for three reasons: First, the Oregon Donation Land Act was enacted and authorized three years before Congress denied ratification of the Nation's treaty. By providing title to settlers for the Nation's land without extinguishing aboriginal title, the federal government violated its duty to the Nation. Second, the Act was enacted erroneously, as it contained language listing all of Oregon Territory as public lands. Indian title to lands, through aboriginal right, is not public lands until extinguished through a clear congressional act specifying the aboriginal title is to be extinguished. Third, the title granted to the settlers was in violation of the Act as the settlers did not meet the requirements of the Act by living on the land no more than two years and not cultivating the land. As the title was unlawfully granted to the Meeks, it is void *ab initio*. Subsequent transfer of title to the State of Oregon is also void *ab initio.*

Through unlawful federal actions, the Nation's ancestral homelands were taken, subject to § 2 of the Indian Claims Commission Act for dishonorable and unfair dealings. Directly after the Nation signed the treaty with Dart, the U.S. representative and was relocated off of its ancestral lands, the United States passed the Oregon Donation Land Act. The Act specified all of Oregon Territory as public lands without regard to aboriginal Indian title lands. Title to the area now known as Kelley Point Park was provided under the Act to

two settlers. The settlers did not qualify for title, as required by the Act. Congress refused ratification of the treaty three years later. By this time, the Nation had relocated and title to their native village was granted to the Meeks. These dealings were dishonorable and unfair to the Nation, in violation of the United States' duty to protect Indian tribes.

The State, in its efforts to preserve cultural heritage, has created a statutory scheme to protect objects of archaeological, historical, and cultural importance from theft and desecration. In acknowledgment of the significance of the indigenous contribution to objects found in historical archaeological sites, the statutes provide for participation by modern descendants of historical indigenous peoples by including the "appropriate Indian tribe."[1] Historical indigenous peoples are an ethnic group. Federal tribal recognition is a political distinction signifying a government-to-government relationship between a tribe and the U.S. government. The Nation is ethnically connected to historical indigenous peoples, but does not have a government-to-government relationship with the United States.

The State has chosen to only acknowledge tribes that are federally recognized. By limiting the definition of 'Indian tribe' to those federally recognized by the Secretary of the Interior, unrecognized tribes such as the Nation, face a series of statutes that manage and control objects significant to their cultural and religious practice based on their link to an ethnic group, historical indigenous peoples, which is unconstitutional racial discrimination. The State made considerable effort to include participation by federally recognized tribes that have an interest in cultural objects subject to the statutes, but Respondent and the Nation are excluded from those provisions.

An additional issue created by not including unrecognized tribes in the statutory scheme created to control significant cultural objects is infringement on the free exercise of

[1] *See* O.R.S. §§ 358.920, 358.925, 358.928, 358.940, 358.945, 358.950, 390.235, 390.237.

religion. Many of the objects affected by the protective statutory scheme hold religious significance. Excluding unrecognized tribes results in restriction of access to, and in this case confiscation of, objects important to the free exercise of religion, which is unconstitutional. The Nation is being denied access to objects of religious significance based on their lack of federal recognition, which is a political designation.

While it may be appropriate for federal recognition to be a deciding factor in hiring preference or access to aid programs as a part of the political government-to-government relationship between tribes and the U.S. government, free exercise of religion and freedom from racial discrimination are rights afforded to every U.S. citizen, regardless of their political affiliation.

ARGUMENT

I. The Nation holds aboriginal title to its homeland that was not extinguished through purchase or force by the U.S. and is subject to protection against infringement from trespassers and extinguishment by the State.

That State wrongfully brought criminal action against Respondent, a citizen of the Nation, alleging Respondent trespassed on state lands, Kelley Point Park, cut timber in the park without a permit and desecrated an archeological and historical site. This Court has jurisdiction under 28 U.S. C. §1257 (2006). The appropriate standard of review for determining aboriginal title is rational basis of judicial scrutiny as extinguishment of aboriginal title is a federal question. The Nation holds aboriginal rights to the original homelands, which include Kelley Point Park. Federal law and policy recognizes the Nation has a sacred right to the occupancy and exclusive enjoyment of its homeland based its aboriginal possession. The Nation's aboriginal title is a right to the use and occupancy of its homelands, subject only to extinguishment by the federal government with clear intent. The

Nation's aboriginal title was not extinguished. The federal government has a duty to protect the Nation's aboriginal title against infringement from trespassers and extinguishment by the state of Oregon. Granting fee simple title to the Meeks is void *ab initio*, as it violates the duty of the United States to Indian lands, was granted by an invalid statute and was not consistent with the requirements of the statute. Any defense of laches or quiet title action to the Indian lands within Kelley Point Park is in applicable and barred. Alternatively, any federal action found to extinguish aboriginal title was done by dishonorable and unfair dealings by the United States.

A. Federal law and policy recognizes the Cush-Hook Nation has a sacred right to the occupancy and exclusive enjoyment of its homeland based on aboriginal possession.

The United States Constitution provided exclusive authority over Indian Affairs when it was enacted the Indian Commerce Clause. U.S. Const. Art I, §8, cl. 3 (1789). From the constitution, Congress further passed the Nonintercourse Act. Indian Nonintercourse Act, (currently codified at 25 U.S.C. §177)[2]. The Act did not create rights of occupancy that did not already exist. Instead it recognized Indian Nations as independent political community within specific boundaries who hold exclusive authority for all lands within those boundaries. *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Under the Nonintercourse Act, no sale or transfer of Indian land is valid absent the express authority of the United States. The intent of Congress when it enacted the Act was to provide a measure of protection over Indian lands from encroachment and unfair dealings. *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621-22 (1980).

[2] Originally enacted at Ch. 33, 1 Stat. 137 (1793), also known, through subsequent amendments as the Trade and Intercourse Act. For purposes of this paper, the Act will be referred to as the Nonintercourse Act.

By the Acts text, it gave sole, exclusive jurisdiction of Indian property rights to the federal government. The section applying to Indian title specifies "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution...." U.S. Const. Art I, §8, cl. 3 (1789). The Nonintercourse Act "put into statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States"[3] and that any conveyance absent extinguishment was void *ab initio*. *Oneida County of New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 245 (1985).

This court in *Johnson v. McIntosh* established under the Doctrine of Discovery that the federal government holds supreme title to lands, subject to the possession of its original inhabitants, the Indian Tribes. 21 U.S. 543, 562 (1823). In his opinion, Chief Justice Marshall specified that the United States held an exclusive right to title and authority to appropriate lands as discoverer, while Indian tribes held a right to occupy the land but no the authority to transfer title. "Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession and the exclusive power of acquiring that right." *Id*. 21 U.S. at 603. Chief Justice Marshall further acknowledged Indian rights in *Cherokee Nation v. Georgia*, when he stated they have an "unquestionable . . . . right to the lands they occupy until that right shall be extinguished." 30 U.S. 1, 32 (1831). *Johnson v. McIntosh* was the first court to describe the federal relationship with Indian tribes. Aboriginal title provides Indian tribes and nations as "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."

[3] *Oneida Indian Nation of N.Y. State v. Oneida County, N.Y.*, 414 U.S. 661, 678, 94 S. Ct. 772, 783 (1974).

Johnson, 21 U.S. at 574. Since Justice Marshall's opinion in the *Johnson* case, federal Indian law has continued to develop principles around aboriginal rights. Through these principles, standards have been established for proving aboriginal title[4], describing exclusive methods to extinguish those rights[5] and the consequences of their extinguishment.

Aboriginal rights are not granted by the sovereign nation to the Indian Tribe for use and occupancy, but instead originate by the Tribe's claim of the land through possession. *Holden v. Joy*, 84 U.S. 211, 244 (1872); *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Cramer v. U.S.*, 261 U.S. 219 (1923); *Lipan Apache Tribe v. U.S., 180 Ct. Cl. 487, 492 (1967)*. Indian Tribes have always retained their original, natural right of undisputed possession of soil from time immemorial. *U.S. v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (138). Indian title is as sacred as fee title. *Id.,* 304 U.S. at 115. Authority to extinguish title is the sole ability of the federal government. *Oneida Nation of N.Y. v. N.Y.*, 194 F.Supp.2d 104, 146-147 (2002). Proof of aboriginal title is made by actual, exclusive and continual use and occupancy for a long time prior to loss of the property. *Confederated Tribes of the Warms Springs Reservation of Oregon v. U.S.*, 177 Ct. Cl. 184, 194 (1966); *Sac & Fox Tribe of Indians of Okla. V. U.S.*, 383 F.2d 991 (1967). Aboriginal title may be proven through reference to activities of the Tribe or Nation's ancestors upon the lands, or through reference to lifestyle, habits, customs and usage of the Tribe or Nation that reflects its use and occupancy of the lands. *Sac & Fox*, 383 F.2d 991. Continual use does not necessarily apply only to the tribe's village, but also applies to surrounding hunting areas,

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[4] *U.S. v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941) (stating occupancy is a question of fact); *Sac & Fox Tribe of Indians of Oklahoma v. United States*, 315 F.2d 896, 903 (1963).

[5] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, (1985) (requiring a plain and unambiguous congressional intent); *Oneida Indian Nation,* 414 U.S. at 667 (requiring a sovereign act); U.S. v. Santa Fe P.R. Co., 314 U.S. 339, 347 (1941) (Indian title may be extinguished by treaty, sword, purchase or exercise of complete dominion through adverse possession.)

that may have been used intermittently. *Spokane Tribe v. U.S.*, 163 Ct. Cl. 58, 66 (1963); *Delaware Tribe of Indians v. U.S.*, 130 Ct. Cl. 782 (1955). The amount of time necessary to prove Indian Title is not a specific period of years, but a period long enough to show the Indians were settled in and modified the land into a domesticated area. *Sac & Fox Tribe*, 315 F.2d at 905.

The Nation possessed its original homeland from time immemorial. (R. at 1). Its original homelands were recognized and documented by Euro-Americans as early as Lewis and Clark's historic expedition in 1806. (R. at 1). During the expedition William Clark sketched a replica of the Nation's village and longhouses in journals and wrote descriptive accounts of the Nation's governance, culture, traditions and practices. (R. at 1). Mr. Clark's journals also referenced acknowledgment by other local Indians from the Multnomah Tribe of the Nation's occupancy in the area. (R. at 1).

The Court in *Confederated Tribes of Warm Springs Reservation of Oregon v. U.S.*, 177 Ct.Cl. 184 (1966), held that contemporary accounts in the form of records and journals at to be given some weight in determining Indian title as they help in locating tribal lands and understanding other necessary evidence. *Id.*, 177 Ct.Cl. at 202. The Nation's aboriginal title is proven through the historical accounts of William Clark during his expedition of 1806.

Proof is not required where the government has implicitly or explicitly acknowledged the Indian title in some appropriate fashion. *Miami Tribe of Oklahoma v. U.S.*, 175 F. Supp. 926, 940 (1959). The government, through its representative Anson Dart, superintendent of Indian Affairs for the Oregon Territory, acknowledged the Nation's aboriginal title when he signed a treaty with the Nation to cede those lands. Superintendent Dart recognized the value in the Nation's homelands and attempted to compromise with the Nation to relocate off of

their original homelands in order to open the valuable territory to American settlers. The signed treaty can be shown to reflect the government's implicit acknowledgement of the Nation's aboriginal title to its homelands. The Nation's rights have not been extinguished and are intact.

B. Federal case law provides the aboriginal title of the Nation is an exclusive right to the use and occupancy of its homelands, not severable except under explicit extinguishment by the federal government through purchase or force.

Aboriginal rights are accorded full protection, except by the federal government, which may extinguish title through treaty, purchase, force or complete dominion adverse to the right of occupancy. *U.S. v. Newmont U.S.A., Ltd.,* 504 F.Supp.2d 1050 (2007); *U.S. v. Bouchard,* 464 F.Supp. 1316 (1978). The justness of extinguishment is not a matter for courts to decide, as it is a political question. *Beecher v. Wetherby*, 95 U.S. 517 (1877). Congressional authority to extinguish aboriginal Indian title is exclusive and its intent must be clearly and unambiguously shown in a federal action to extinguish title. *U.S. v. Ft. Sill Apache Tribe*, 480 F.2d 819, 923 (1973). However, courts are free to decide if aboriginal title has been extinguished through a plain congressional act. Indian title is not extinguished by the federal government's refusal to ratify the treaty, which otherwise would have recognized rights of the tribe. *Lipan Apache Tribe v. U.S*, 180 Ct. Cl. 487, 494 (1967). Federal acts preparing for white settlement or entry also do not constitute extinguishment of aboriginal rights. *Gila River Pima-Maricopa Indian Community v. U.S.*, 494 F.2d 1386, 1391 (1974).

Directly on point and consistent with this case, the court in *Plamondon ex rel. Cowlitz Tribe of Indians v. U.S.*, affirmed a decision of the Indian Claims Commission that held the United states deprived the Cowlitz Tribe of its aboriginal right without payment or

consideration when treaty negotiations were unsuccessful and the government treated the lands as public domain by surveying and permitting titles to be patented. 467 F.2d 935 (1972). The Court of Claims determined that preparation for white settlers alone was not sufficient to show congressional intent to extinguish the title of the Indians. *Id*. 467 F. 2d at 937.

However, where settlement or entry upon lands is authorized by Congress, aboriginal title is held to be extinguished. Very similar to the matter at hand, the court in *U.S. v. Ashton* involved Indian land provided to white settlers through the Oregon Donation Land Act. 170 F. 509 (1909). The key difference in *U.S. v. Ashton* is that the Pullalup Indians had a treaty with the U.S. that was ratified in 1854, four years after the Oregon Donation Land Act was enacted. In addition to the Oregon Donation Land Act, the treaty demonstrated to the court that congressional intent to extinguish the Tribe's aboriginal title was present. *Id.* 170 F. at 517. Extinguishment, with congressional authority, can be determined in instances where there is federal designation of the lands for other public uses,[6] where there has been payment of compensation for the lands,[7] the Indians have voluntarily ceased actual, exclusive possession and use of the lands,[8] there has been a public sale of lands or the U.S. has exercised complete dominion of the lands that is adverse to the Tribe or Nation's use and occupancy.[9]

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[6] *Tlingit & Haida* Indians v. U.S., 177 F. Supp. 452 (1959) (where the court determined that federal establishment of a reserve constituted extinguishment of aboriginal title).
[7] *U.S. v. Gemmill*, 535 F.2d 1145 (1976) (the court determined that any ambiguity was resolved when the tribe was provided with compensation for the lands).
[8] *Cayuga Indian Nation of N.Y. v. Cuomo*, 758 F.Supp. 107, 110 (1991) (proof of voluntary abandonment of property by the Tribe is a defense to subsequent claims to the land); Quapaw *Tribe of Indians v. U.S.*, 120 F. Supp. 283 (1954) (clear and adequate proof that a tribe ceased to actually and exclusively use and occupy lands is sufficient to extinguish aboriginal title).
[9] *U.S. v. Santa Fe P.R. Co.*, 314 U.S. 339 (1941) (showing that exercise of adverse domain that was adverse to the tribe's occupancy effectively extinguished aboriginal title).

If fee title to Indian lands is provided to a non-tribal member, the holder of fee title remains subject to the aboriginal title until extinguished. *Oneida Indian Nation of N.Y. v. State of N.Y.*, 691 F.2d 1070, 1075 (1982). While the aboriginal title remains intact, the holder of the fee title does not hold any right to possession of the property. *James v. Watt*, 716 F.2d 71, 74 (1983).

In 1850, the Nation signed a treaty with Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. at 1). The treaty provided that the Nation would relocate from their original homeland to a tract of land 60 miles west in order to provide valuable farm lands to incoming white settlers. (R. at 1). Upon signing the treaty, the Nation upheld its negotiated obligation and relocated to the designated area. (R. at 2). However, the U.S. Senate failed to ratify the treaty in 1853. Without congressional ratification of the treaty there is no extinguishment of the Nation's aboriginal rights to the land. Further, the U.S. never provided any compensation to the Nation for the land it was relocated from, or any other benefit negotiated at the time of the treaty signing. (R. at 2).

Acts in preparation of white settlement, or availing lands to white settlers may only extinguish aboriginal title if those acts are authorized by Congress and show a specific intent to extinguish the tribe or nation aboriginal rights. *Plamondon v. U.S.*, 467 F.2d 935, 937-38 (1972); *Gila River,* 494 F.2d at 1391; *Lipan Apache Tribe v. U.S.*, 180 Ct. Cl. at 494 (1967). Congressional authority granting title to white settlers in Oregon through the Oregon Donation Land Act of 1850 does not show a specific intent to extinguish the Nation's aboriginal rights. The Act erroneously described all lands in Oregon Territory as public lands without regard to Indian title.

Consistent with the canons of construction, silence in the statute should be construed in the manner most favorable to the Nation. In interpreting Indian treaties, generally, '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' *McClanahan v. State Tax Commission*, 411 U.S. 164, 174-75 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Consequently, the Nation's aboriginal title was not extinguished and is subject to federal protection. Any fee title provided to the Indian lands is subject to the aboriginal title held by the Nation.

C. The federal government has a duty to protect the aboriginal title of the Nation against infringement from trespassers and extinguishment by the State.

The federal government has a fiduciary obligation to protect the interests of tribes. *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). Through legislative acts including the Nonintercourse Act and the Northwest Ordinance of 1787,[10] the duty of the federal government to protect tribes as separate, but dependent sovereigns emerged. The Nonintercourse Act limited tribal property transactions exclusively to the federal government. 25 U.S.C.S. 177. The Northwest Ordinance clarified the federal government's policy of protection over the tribes:

> "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in the property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and preserving peace and friendship with them." Art. III, 1 Stat. 50 (1787).

The relationship of the federal government to tribes is similar to that of a wardship where tribes are domestic dependent nations who look to the federal government for

[10] Art. III, 1 Stat. 50 (1787).

protection. *Cherokee Nation v. Georgia*, 30 U.S. at 14 (1831). In the case of *Worcester v. Georgia,* Justice Marshall defined the trust relationship between the federal government and tribes as "a nation claiming and receiving protection of one more powerful." 31 U.S. at 555-56.

In accordance with this trust relationship, the federal government is obligated to protect aboriginal lands against intrusion. *Tee-Hit-Ton v. U.S.*, 348 U.S. 272, 279 (1955). Providing title to white settlers under the Oregon Donation Land Act is inconsistent with its federal duty while aboriginal title remains intact. The Oregon Donation Land Act of 1850 provided fee simple title of public lands to every white settler that resided and cultivated land for a consecutive four year period. 9 Stat. 496-500. Directly after the treaty was signed between the Nation and Dart, on behalf of the U.S., the Nation relocated, and two settlers, the Meeks, moved onto the Nation's aboriginal lands and claimed 640 acres. Granting of title to the Meeks was unlawful for three reasons. First, the Nation's aboriginal right to their homeland was never extinguished by Congress. Aboriginal title is as sacred as fee simple title. *Mitchell v. U.S.*, 34 U.S. 711, *Cramer v. U.S.* 261 U.S. 219 (1923); *U.S. v. Santa Fe P.R. Co.*, 314 U.S. 339 (1941). Congress holds a duty to protect the Nation's aboriginal right to their original homeland. This Court has specified that supreme title to lands occupied by Indians is vested in the U.S. through the Doctrine of Discovery. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Witchita & Affiliated Bands of Indians v. U.S.*, 89 Ct. Cl. 378 (1939). Fee title vested in the United States remains subject to the right of occupancy of Indian Tribes, which right is continued and protected against all but the sovereign. *U.S. v. Alcea Bank of Tillamooks*, 329 U.S. 40 (1946). The Nation's right remains intact until extinguished and the Nation no longer actually and exclusively occupies

and uses the area. *Quapaw Tribe of Indians v. U.S.*, 120 F.Supp. 283 (1954). Until extinguishment, the federal government holds a duty to protect the Nation's aboriginal title from trespass. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955). The U.S. is liable to the Nation under § 2 of the Indian Claims Commission where it fails to uphold its protective duty over Indian title. *Lipan Apache Tribe v. U.S.*, 180 Ct.Cl. at 502 (1967). The Nation's aboriginal title was not extinguished to its original homelands. Awarding fee simple title to the Meeks for lands within the Nation's original homelands violated the policy of protection afforded Tribes and Nations by the federal government, under the Nonintercourse Act.

Second, the Oregon Donation Land Act erroneously stated that all lands within the Oregon Territory were public lands. Public lands do not include land where aboriginal title is held by Tribes and Nations. Tribal aboriginal title precludes Tribal lands from public use, unless Congress specifically and intentionally extinguishes the Indian title. *Tlingit v. Haida Indians v. United States*, 177 F.Supp 452 (1959). Any federal act to deem Indian lands as public must be shown by a clear congressional intent extinguishing aboriginal title. *U.S. v. Ft. Sill Apache Tribe*, 480 F.2d 819 (1973). Extinguishment of aboriginal title is not to be treated lightly, as the federal government has a duty to protection of the aboriginal title. *U.S. v. Santa Fe P.R. Co.*, 314 U.S. 339 (1941). Aboriginal title to the Nation's homeland is supreme to any fee title lands awarded to the Meeks. As a result, congressional intent to extinguish aboriginal title for purposes of granting tribal lands to white settlers under the Oregon Donation Land Act is not present.

Finally, even if this Court finds that the Oregon Donation Land Act was not erroneously written and void, the title issued to the Meeks was not in compliance with the Oregon Donation Land Act. Requirements of the Oregon Donation Land Act specify that fee

simple title be provided to white settlers who have lived on public lands for a period of four consecutive years and have cultivated the land. (R. at 2). The Meeks did not meet the requirements of the Act as they only lived on the land for two years and did not cultivate it. (R. at 2). The circuit court correctly held that granting of fee simple title to the Meeks under the Oregon Donation Land Act was void *ab initio*.[11] As the fee simple title granted to the Meeks was void *ab initio*, the subsequent transfer of title to their heirs, and future sale by the heirs to the State is also void *ab initio*.

Any defense raised through laches or quiet title action is not applicable to the case at hand. The doctrine of Laches has been shown to bar Indian land claims by a Tribe where the Tribe ceded its lands and did not timely file claims for recovery or compensation. *City of Sherrill N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). The case at hand can be differentiated from *Sherrill* because the Nation did not voluntarily cede its lands. The Nation agreed to relocate based on a negotiated treaty, which Congress refused to ratify at a later time. As the Nation did not cede its land, a defense of laches does not apply.

A suit for quiet title action is also ineffective in the present case. Where fee title provided to the Meeks is found to be void *ab initio*, the U.S. retains supreme title to the lands, subject to the Tribe's aboriginal rights. The State is barred from filing a quiet title action against the United States under the Quiet Title Act. 28 U.S.C.A. § 2409(a). As codified, the Act provides a limited waiver of sovereign immunity in claims of quiet title against the U.S., except in cases where the disputed property is held in trust or is restricted Indian lands. Aboriginal title to the lands comprising Kelley Point Park is restricted Indian

[11] *Oneida Nation*, 470 U.S. at 245 (holding that any conveyance by an Indian tribe not made pursuant to a treaty or convention under the federal constitution is void *ab initio*.)

land and therefore does not qualify for judicial review under the Quiet Title Act. 28 U.S.C.A. § 2409(a).

Even if this Court does find merit in a defense of laches or quiet title action, the U.S. would be liable to the Nation for unfair and dishonorable dealings.

D. The Nation's ancestral homelands were taken through dishonorable and unfair dealings by the federal government.

As iterated in *Johnson v. McIntosh*, aboriginal title is a permissive right to the use and occupancy of original homelands, not a property right in the land. 21 U.S. 543 (1823). Extinguishment of aboriginal title is a political matter under the exclusive jurisdiction of Congress. The federal government does not have a legal obligation or responsibility to compensate Tribes for extinguishment of aboriginal title, unless specified by statute. *Tee-Hit-Ton Indians v. U.S.*, 348 US 272 (1955). Congress created a statute to specifically address claims for taking of Indian title when it enacted the Indian Claims Commission Act. 25 U.S.C.A. §70. The Act provides a course of action for Tribes and Nations to file claims against the U.S. and hold it liable to protection of Indian title. *Lipan Apache Tribe v. U.S.*, 180 Ct. Cl. at 500 (1967).

Where the United States took timber from Alaskan lands, the court in *Tee-Hit-Ton Indians v. United States* held that Congress authorized the taking through a specific Act and no compensation was due to the tribe without an equally specific statute directing and authorizing payment. 348 U.S. at 290 (1955). Further, the Court held that a taking by the U.S. of unrecognized Indian title is not subject to compensation under Article V of the U.S. Constitution due to the limited Indian possessory rights and lack of protection from the U.S. for takings. *Id*.

However, the court of claims in *Otoe and Missouri* distinguished that the holding in *Tee-Hit-Ton* was a claim under the Indian Tucker Act[12] and is not a bar to claims filed under the Indian Claim Commissions Act.[13] 1311 F.Supp. 265 (1955). When the federal government takes Indian lands through unfair and dishonorable dealings, the tribe is entitled to statutorily imposed compensation under §2 of the Indian Claims Commission. *Id*. This statutory provision was enacted by Congress to provide compensation for claims stemming from a taking by the U.S. of Indian title. *Lipan Apache Tribe v. U.S.*, 180 Ct. Cl. 487, 501 (1967). Claims under the Claims Commission Act were limited to actions brought prior to 1946. The Indian Claims Commission Act was terminated in 1978. Claims arising against the U.S. after 1946 fall under the jurisdiction of the Court of Claims. Indian Tucker Act, 28 U.S.C.A. §1505. Where the federal government action began before 1946 and continued, the Indian Claims Commission is authorized to take action and award relief for compensation of damages as a result of that action. *Navajo Tribe v. U.S.*, 586 F.2d 192 (1978). In *Miller v. United States*, the court concluded that it would be "indulgence in pious and high-sounding but empty generalizations to recognize the Indian right of occupancy as sacred, but at the same time to refuse compensation to Indian possessors when their land is taken away from them." 159 F.2d 997 (1947) (relying on *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40 (1946)).

In the present case, the Nation acted in good faith and entered a treaty with a representative of the United States. Directly after signing of the treaty in 1850, the Nation relocated 60 miles west of its original homeland. (R. at 2). The Oregon Donation Land Act was enacted by Congress that same year and provided title to two white settlers for a portion

[12] 28 U.S.C.A. §1505.
[13] 25 U.S.C.A. §70.

of the Nation's homeland. Three years later, in 1953, when Congress failed to ratify the treaty signed with the Nation, the damage had been done. The Tribe was relocated off of its land, white settlers had moved onto and received fee simple title to the lands. The Tribe did not receive any compensation for concessions made in good faith upon signing the treaty and relocating, or any other promised benefit. The facts of this case illustrate that the U.S. did not deal fairly and or honorably with the Nation. Had the Nation brought claim before 1946 with the Indian Claims Commission, it would have been eligible for compensation for the backhanded taking by the U.S. of its ancestral homeland.

With aboriginal title intact and not extinguished, the Nation remains the lawful owner of artifacts on their ancestral lands.

II. The State of Oregon does not have criminal jurisdiction to protect or control the uses of the cultural icon in question because the statutory scheme is racially discriminatory and as such unconstitutional under the Equal Protection clause of the Fourteenth Amendment.

In its effort to protect the cultural heritage of the State, Oregon passed a series of archaeological and cultural preservation statutes. The broad definitions of material protected by the statutes include any object "demonstrably revered by any ethnic group," which include the religious icons of the Nation. O.R.S. § 358.905. In acknowledgment of the significance of the indigenous contribution to objects found in archaeological sites, the statutes provide for participation of modern descendants of historical indigenous peoples by frequently calling for interaction with "the appropriate Indian tribe."[14] The statutes accord respect for the continuing cultural importance of objects to modern descendants of historical indigenous peoples. However, limiting the definition of 'Indian tribe' throughout the cultural protection statutory scheme to those tribes recognized by the federal government means that for the

[14] *See* O.R.S. §§ 358.920, 358.925, 358.928, 358.940, 358.945, 358.950, 390.235, 390.237.

Respondent and other members of unrecognized tribes, the State has created a system of control and management over important cultural objects based on their connection to an ethnic group, which is racially discriminatory.

A. The lack of federal recognition of the Nation means that singling out their objects of cultural patrimony for cultural protection is based on race and is unconstitutional under the Equal Protection clause of the Fourteenth Amendment.

The central purpose of the equal protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Racial and ethnic distinctions of any sort are inherently suspect, subject to strict scrutiny and can only be justified if they further a compelling government purpose and if no less restrictive alternative is available. *Regents of University of California v. Bakke*, 438 U.S. 265, 290 (1978). Ethnic preference must be rationally tied to Congress's obligation to Indians. *Morton v. Mancari*, 417 U.S. 535, 536 (1974) (hiring preference to Indians not considered racial discrimination, rather an extension of the unique obligation of the U.S. government to Indians). In that instance, the Bureau of Indian Affairs was challenged for its policy of employment preference for qualified members of federally recognized tribes. The policy was upheld on the grounds that membership in a federally recognized tribe is a political, not racial distinction.[15]

The Nation does not have a government-to-government relationship with the U.S. and is thus excluded from the 'unique obligation' discussed in *Mancari*. The statutes specify that objects "part of the physical record of an indigenous or other culture" are included as protected items. O.R.S. § 358.905(1)(a)(B). Therefore, cultural objects important to the

[15] *Morton v. Mancari*, 417 U.S. 535, fn. 24 (1974)("[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature").

Nation are subject to State control based on their affiliation with an ethnic group, which is unconstitutional.

The State expressed a compelling government interest in preserving cultural heritage. O.R.S. § 358.910. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied. *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (upholding an admission policy at a law school designed to increase diversity on campus). The purpose of the narrow tailoring requirement, when determining whether racial distinctions are permissible under the equal protection clause to further a compelling state interest, is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Grutter*, 539 U.S. at 333.

In the instant case, the State made significant effort to accommodate federally recognized tribes in the cultural protection statutes. Limited statutory means exist for the Nation to participate in the State process as an unrecognized tribe. Omission of unrecognized tribes fails the 'narrow tailoring' requirement necessary to satisfy a compelling governmental interest manifested through racially biased laws because it is based on the stereotypical assumption that only recognized tribes have a legitimate cultural claim to artifacts and icons of indigenous peoples. Further, little is gained by the State in restricting access of protected items from the Nation, as § 358.925 states "[i]f there is no appropriate Indian tribe [to return forfeited property to], the commission shall use the property and proceeds for Indian historic preservation." O.R.S. § 358.925.

B. The unrecognized status of the Nation creates statutory inconsistencies in O.R.S. § 358.905-358.961 *et seq.* and O.R.S. § 390.235-390.240 *et seq.*, which make it impossible for the statutes to be enforced.

The relevant Oregon statutes define 'Indian tribe' as "any tribe of Indians recognized by the Secretary of the Interior." O.R.S. § 358.905, O.R.S. § 97.740. The Nation is not recognized by the federal government, and thus not by the State. In many instances, statutes reference consultation with, or permission granted by "the appropriate Indian tribe."[16] In the instant case, 'the appropriate Indian tribe' is ineligible to be consulted because the State has chosen not to recognize it. Fourteen states have chosen to recognize Indian tribes not otherwise recognized by the federal government. *Nat'l Conf. of State Legis.*, http://www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized-tribes.aspx (last accessed Jan. 10, 2013).

The Columbia Plateau Indians in *Bonnichsen v. U.S.* were unable to establish a sufficient "cognizable link" between the modern tribe and the 9,000-year-old remains of Kennewick Man to support the determination of the Secretary of the Interior that the Native American Graves Protection and Repatriation Act (NAGPRA) should apply. 367 F.3d 864, 880 (2004) (holding that human remains must be related to a presently existing tribe, people, or culture to be considered "Native American" within the meaning of NAGPRA). In contrast, the direct cultural connection of the removed image to the original homeland of the Nation is expressly documented in the historical journal of Clark. (R. at 2).

Sacred cultural objects removed without a permit shall go directly to the appropriate Indian tribe. O.R.S. § 390.237. In this case, the removed sacred cultural object was already in the custody of a member of the tribe and in the act of being transported to the location of the Nation when confiscated by police.

[16] *Supra*, n. 14.

O.R.S. § 358.905(1)(h)(A) states "[t]he object shall have been considered inalienable by the native Indian group at the time the object was separated from such group." In this case, there was no time when the object was separated from the appropriate 'native Indian group' until the police removed it from the custody of Respondent at the time of his arrest. O.R.S. § 358.905(1)(h)(A).

Once confiscated, the State statutes offer no direct mechanism for returning archaeological objects to an unrecognized tribe. Upon confiscation by police, the Commission on Indian Services is to designate the appropriate tribe for notification. O.R.S. § 358.928(3). In this case, the Nation would not be considered an Indian tribe. A penalty exists for failure to notify a recognized tribe. O.R.S. § 358.945, O.R.S. § 358.950.

Provided the Nation obtained notice of a seizure, its remedies are limited. Any person may claim a seized item, causing the district attorney to petition the county circuit court for a determination of whether the items requested are archaeological objects, funerary objects, human remains, sacred objects or objects of cultural patrimony and whether the claimant may lawfully possess the item. O.R.S. § 358.924. Property seized by police is not subject to replevin pending action taken under the statute. O.R.S. § 358.928(4). The Nation is at the mercy of neighboring tribes that are recognized for notification and representation in resulting proceedings. Although any person may institute a civil proceeding against a violator under § 358.955, the Nation would not be eligible to demand a trial for the return of confiscated items, as would a recognized tribe. O.R.S. § 358.955, O.R.S. § 358.928(6).

Further, § 358.940 specifies that in the case of sacred objects and objects of cultural patrimony, protocol requires immediate notification and return of native Indian sacred objects and objects of cultural patrimony to the appropriate Indian tribe. In this case, that

would have entailed contacting the Nation, which do not exist as a tribe to the State. There is only one instance of language in the statutes acknowledging that modern indigenous groups exist other than recognized Indian tribes: § 358.945 demands the leader of an archaeological investigation on public lands, or on private land conducted with written permission, upon finding a sacred object or object of cultural patrimony must contact the State Historic Preservation Officer (SHPO) as well as the "appropriate ethnic group." O.R.S. § 358.945(1)(a-b). The SHPO is to assist "the appropriate group" to acquire the object. O.R.S. § 358.945(2).

The Nation is in a statutory no-mans-land whereby objects significant to cultural and religious practice are controlled by laws of the State due to their indigenous and historical significance, but the concerns of present day practitioners of the same culture, do not exist in the eyes of the law and are afforded limited consideration in the statutory scheme of protection for those objects. The State is 'protecting' the cultural objects away from the people to which they belong.

C. The State of Oregon failed to fulfill its statutory obligation to protect the cultural objects.

The State shall preserve and protect the cultural heritage of the state embodied in objects and sites that are of archaeological significance. O.R.S. § 358.910. The State neglected its obligation to preserve or protect the culturally significant icons carved in the trees at Kelley Point Park from damage and removal by vandals. (R. at 2). When Respondent stepped in to protect the cultural and religious carvings in lieu of the State, he was penalized under the same statutory section that called for the State to act.

D. Respondent, as a descendant of the creator of the icon, had the right to act as its custodian.

An 'object of cultural patrimony,' such as the sacred cultural icon removed from the tree in the instant case, has cultural importance to the whole tribe and as such cannot be "alienated, appropriated or conveyed by an individual." O.R.S. § 358.905(1)(h)(A). However, in this case, Respondent, as a descendant of the creator of the object, was in the act of fulfilling a custodial role of protecting the image from further damage, by removing it. Respondent was not conveying the object away from the Nation. He was in the act of bringing the object to the location of the Nation for preservation and repair.

III. The State of Oregon does not have criminal jurisdiction to protect or control the uses of the cultural icon in question because the statute interferes with the constitutional Free Exercise right to religious practice of Respondent.

A state regulation, neutral on its face may, in its application, be unconstitutional if it unduly burdens the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Even though religiously grounded actions are often subject to the broad police power of the state, there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. *Yoder*, 406 U.S. at 220; *see also Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963) (disqualification of unemployment compensation claimant from benefits because of refusal, based on religious beliefs, to accept employment which would require work on Saturday, imposed a burden on the free exercise of religion). When the Court is presented with state law granting denominational preference it must treat the law as suspect, and apply strict scrutiny in adjudging its constitutionality. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

In the instant case, the State statutes designed to preserve cultural heritage for the people of Oregon interfered with the religious practice of the Respondent. The State failed to protect or preserve religious symbols carved into the trees in Kelley Point Park, as was policy stated in O.R.S. § 358.910(2), forcing Respondent to take action to protect them and his ability to practice his religion. While in the act of transporting the damaged religious icon back to the Nation location for repair, Respondent was arrested and the icon confiscated by police. (R. at 2). The statutory scheme offers limited means by which Respondent or the Nation, as an unrecognized tribe, can gain access to the confiscated religious icon. Though clearly not intended to interfere with the religious practices of the Nation, the Oregon statutes, which manage and control cultural, historical, and archaeological objects, are similar to the laws of general applicability found to unconstitutionally interfere with the free exercise of religion in *Sherbert* and *Yoder*.

In *Employment Division v. Smith*, the Court narrowed the criteria for laws that burden religious practice in instances of broad criminal prohibition on a particular form of conduct. *Employment Division v. Smith*, 494 U.S. 872, 873 (1990). However, the law in question in *Smith* was not "specifically directed at their religious practice." *Id.,* 494 U.S. at 878. In contrast, the Oregon statutes focus on management and control of cultural objects important to indigenous people, which can be specifically related to their religious practice. Particularly in the case of the Nation, which is not recognized by the State, the statutes interfere with objects important to religious practice without providing a mechanism for their direct return, resulting in confiscation of religious icons by the State.

The holding in *City of Boerne v. Flores* stated that the Religious Freedom Restoration Act (RFRA) exceeded the federal enforcement power under § 5 of the Fourteenth

Amendment with regard to state laws. 521 U.S. 507, 507 (1997) (local zoning laws could be upheld even though they restricted the building expansion of a church). In *City of Boerne,* enforcing the laws in question did not result in religious discrimination because the laws did not single out a particular group nor were they unevenly enforced. *Id.*, 521 U.S. at 534-5.

However, in the instant case, the Oregon statutes at issue have a discriminatory result that can be clearly distinguished from the facts of that case. In proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. *Washington v. Davis*, 426 U.S. 229, 240 (citing *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972)([i]n determining whether realignment of school districts by officials comports with the requirements of the Fourteenth Amendment, courts will be guided, not by the motivation of the officials, but by the effect of their action).

Law which is not neutral and of general applicability must be justified by compelling governmental interest and must be narrowly tailored to advance that interest if it burdens religious practice. *Church of the Lukumi v. City of Hialeah*, 508 U.S. 520, 531 (1993). All laws are selective to some extent, but categories of selection are of paramount concern when law has incidental effect of burdening religious practices, and inequality results when legislature decides that government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. *Church of the Lukumi*, 508 U.S. at 542.

The Oregon statues at issue single out "archaeological sites and their contents," including religious items, of indigenous peoples and determine them to be "an intrinsic part of the cultural heritage of the people of Oregon." O.R.S. § 358.910(1). However, the outcome of the determination in this instance is to create a scheme of laws that separate religious items from practitioners of that religion. The burden on religious practice is borne

most heavily by members of unrecognized tribes, who are penalized for not holding the correct political affiliation of being members of recognized tribes.

The statutes specify that 'Indian tribe' refers to federally recognized tribes. O.R.S. § 358.905, O.R.S. § 97.740. This maintains the political designation of tribal membership and could be considered to alleviate the classification from being considered 'race-based.' *Mancari,* 417 U.S. at 536. However, the criteria for subjecting cultural objects to state control is not limited to affiliation with a federally recognized tribe, it broadly includes objects revered "by any ethnic group." O.R.S. § 358.905(1)(k)(A). The impact on Respondent is that items important to him because of his ethnic background have been specifically designated under the statutes as "part of the physical record of indigenous or other culture," which means the State is regulating his access to religious practice, yet all the protections built into the statutory scheme that protect 'Indian tribes' are not available to him as the member of an unrecognized tribe. O.R.S. § 358.905(1)(a)(B).

CONCLUSION

Respondent requests that the Court uphold the decision of the lower court to recognize the aboriginal title of the Nation in its ancestral lands and affirm the dismissal of the criminal charge of trespass. Further, Respondent requests the Court reverse the conviction under O.R.S. § 358.905-358.961 *et seq.* and O.R.S. § 390.235-390.240 *et seq.* on the grounds that the statutory scheme is racially discriminatory and interferes with his first amendment right to the free exercise of religion.

APPENDIX A

The Donation Land Claim Act, 1850

An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a surveyor-general shall be appointed for the Territory of Oregon, who shall have the same authority, perform the same duties respecting the public lands and private land claims in the Territory of Oregon, as are vested in and required of the surveyor of lands in the United States northwest of the Ohio, except as hereinafter provided.
Sec. 2 And be it further enacted, That the said surveyor-general shall establish his office at such place within the said Territory as the President of the United States may from time to time direct; he shall be allowed an annual salary of two thousand five hundred dollars, to be paid quarter-yearly, and to commence at such time as he shall enter into bond, with competent security, for the faithful discharge of the duties of his office. There shall be, and hereby is, appropriated the sum of four thousand dollars, or as much thereof as is necessary for clerk hire in his office; and the further sum of one thousand dollars per annum for office rent, fuel, books, stationary, and other incidental expenses of his office, to be paid out of the appropriation for surveying the public lands.
Sec.3. And be it further enacted, That if, in the opinion of the Secretary of the Interior, it be preferable, the surveys in the said Territory shall be made after what is known as the geodetic method, under such regulations, and upon such terms, as may be provided by the Secretary of the Interior of other Department having charge of the surveys of the public lands, and that said geodetic surveys shall be followed by topographical surveys, as Congress may from time to time authorize and direct; but if the present mode of survey be adhered to, then it shall be the duty of said surveyor to cause a base line, and meridian to be surveyed, marked, and established, in the usual manner, at or near the mouth of the Willamette River; and he shall also cause to be surveyed, in townships and sections, in the usual manner, and in accordance with the laws of the United States, which may be in force, the district of country lying between the summit of the Cascade Mountains and the Pacific Ocean, and south and north of the Columbia River: Provided, however, That none other than township lines shall be run where the land is deemed unfit for cultivation. That no deputy surveyor shall charge for any line except such as may be actually run and marked, nor for any line not necessary to be run; and that the whole cost of surveying shall not exceed the rate of eight dollars per mile, for every mile and part of mile actually surveyed and marked.
Sec.4. And be it further enacted, That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year

from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, and enter the same on the records of his office; and in all cases where such married persons have compiled with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the decreased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon: Provided, That no alien shall be entitled to a patent to land, granted by this act, until he shall produce to the surveyor-general of Oregon, record evidence of his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue: Provided, further, That in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon: Provided, further, That all future contracts by any person or persons entitled to the benefits of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void: Provided, further, however, That this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land.

Sec.5. And be it further enacted, That to all white male citizens of the United States or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said Territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three; and to all white male citizens, not hereinbefore provided for, becoming one and twenty years of age, in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is, granted the quantity of one quarter section, or one hundred and sixty acres of land, if a single man; or if married, or if he shall become married within one year after becoming twenty-one years of age as aforesaid, the quantity of one half section, or three hundred and twenty acres, one half to the husband and the other half to the wife in her own right, to be designated by the surveyor-general as aforesaid: Provided always, That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right: Provided, That no mineral lands shall be located or granted under the provisions of this act.

Sec.6. And be it further enacted, That within three months after the survey has been made, or where the survey has been made before the settlement commenced, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor-general, to be appointed under this act, of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form; and where it is practicable by legal subdivisions; but where that cannot be done, it shall be the duty of the said surveyor-general to survey and mark each claim with the boundaries as claimed, at the request and expense of the claimant; the charge for the same in each case not to exceed the

price paid for surveying the public lands. The surveyor-general shall enter a description of such claims in a book to be kept by him for that purpose, and note, temporarily, on the township plats, the tract or tracts so designated, with the boundaries; and whenever a conflict of boundaries shall arise prior to issuing the patent, the same shall be determined by the surveyor-general: Provided, That after the first December next, all claims shall be bounded by lines running east and west, and north and south: And provided, further, That after the survey is made, all claims shall be made in conformity to the same, and in compact form.

Sec. 7. And be it further enacted, That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act has been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor-general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts of the case, and specifying the land to which the parties are entitled. And the said surveyor-general shall return the proof so taken to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objections thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof.

Sec. 8. And be it further enacted, That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

Sec.9. And be it further enacted, That no claim to a donation right under the provisions of this act, upon sections sixteen or thirty-six, shall be valid or allowed, if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same; nor shall such claim attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have commenced pervious to the selection or reservation of the same for such purposes.

Sec.10. And be it further enacted, That there be, and hereby is, granted to the Territory of Oregon the quantity of two townships of land in the said Territory, west of the Cascade Mountains, and to be selected in legal subdivisions after the same has been surveyed, by the legislative assembly of said Territory, in such a manner as it may deem proper, one to be located north, and the other south, of the Columbia River, to aid in the establishment of the university in the Territory of Oregon, in such manner as the said legislative assembly may direct, the selection to be approved by the surveyor-general.

Sec.11. And be it further enacted, That what is known as the "Oregon city claim," excepting the Abernathy Island, which is hereby confirmed to the legal assigns of the Willamette Milling and Trading Companies, shall be set apart and be at the disposal of the legislative

assembly, the proceeds thereof to be applied by said legislative assembly to the establishment and endowment of a university, to be located at such place in the Territory as the legislative assembly may designate: Provided, however, That all lots and parts of lots in said claim, sold or granted by Doctor John McLaughlin, previous to the fourth of March, eighteen hundred and forty-nine, shall be confirmed to the purchaser or donee, or their assigns, to be certified to the commissioner of the general land office, by the surveyor-general, and patents to issue on said certificates, as in other cases: Provided, further, That nothing in this act contained shall be so construed or executed, as in any way to destroy or affect any rights to land in said Territory, holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain.

Sec.12. And be it further enacted, That all persons claiming land under any of the provisions of this act, by virtue of settlement and cultivation commenced subsequent to the first of December, in the year eighteen hundred and fifty, shall first make affidavit before the surveyor-general, who is hereby authorized to administer all such oaths or affirmations, or before some other competent officer, that the land claimed by them is for their own use and cultivation; that they are not acting directly or indirectly as agent for, or in the employment of others, in making such claims; and that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation oft he same, or by which the said land shall ensure to the benefits of any other person. And all affidavits required by this act shall be entered of record, by the surveyor-general, in a book to be kept by him for that purpose; and on proof, before a court of competent jurisdiction, that any such oaths or affirmations are false or fraudulent, the persons making such false or fraudulent oaths or affirmations are false or fraudulent, the subject to all the pains and penalties of perjury.

Sec.13. And be it further enacted, That all questions arising under this act shall be ajudged by the surveyor-general as preliminary to a final decision accord to law; and it shall be the duty of the surveyor-general, under the direction of the commissioner of the general land office, to cause proper tract books to be opened for the lands in Oregon, and to do and perform all other acts and things necessary and proper to carry out the provisions of this act.

Sec.14. And be it further enacted, That no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act; and that such portions of the public lands as may be designated under the authority of the President of the United States, for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act; Provided, That if it shall be deemed necessary, in the judgement of the President, to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the Secretary of War to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled hereto, out of any money not otherwise appropriated.

Approved, September 27, 1850.

E

APPENDIX B

25 U.S.C. § 9
§ 9. Regulations by President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

APPENDIX C

25 U.S.C. § 177
§ 177. Purchases or grants of lands from Indians

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. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

APPENDIX D

25 U.S.C. § 465

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX E

U.S. Const. Art. I § 8, cl. 3
Section 8, Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

APPENDIX F

U.S. Const. Art. I § 1
Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

APPENDIX G

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX H

U.S.C. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX I

28 U.S.C. § 2409a

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).
(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal there from, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.
(c) No preliminary injunction shall issue in any action brought under this section.
(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.
(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.
(f) A civil action against the United States under this section shall be tried by the court without a jury.
(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.
(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.
(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the

United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.
(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.
(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--
(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.
(l) For purposes of this section, the term “tide or submerged lands” means “lands beneath navigable waters” as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).
(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefore, and a description of the lands included in the suit.
(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

APPENDIX J

28 U.S.C. § 1257
§ 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX K

28 U.S.C.A. § 1505
§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

APPENDIX L

Northwest Ordinance; July 13, 1787

An Ordinance for the government of the Territory of the United States northwest of the River Ohio.

Section 1. *Be it ordained by the United States in Congress assembled*, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec 2. *Be it ordained by the authority aforesaid*, That the estates, both of resident and nonresident proprietors in the said territory, dying intestate, shall descent to, and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; and there shall in no case be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance, of property.

Sec. 3. *Be it ordained by the authority aforesaid*, That there shall be appointed from time to time by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1,000 acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive

department, and transmit authentic copies of such acts and proceedings, every six months, to the Secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in 500 acres of land while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but afterwards the Legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or townships to represent them in the general assembly: Provided, That, for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty five; after which, the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; Provided, also, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The Legislative Council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the Council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the Governor shall appoint a time and place for them to meet together; and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the president of congress, and all other officers before the Governor. As soon as a legislature shall be formed in the district, the council and house assembled in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not voting during this temporary government.

Sec. 13. And, for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

Art. 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All

persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.

Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Art. 4. The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and, in no case, shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Art. 5. There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due North, to the territorial line between the United States and Canada; and, by the said territorial line, to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line, drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and

the said territorial line: *Provided, however*, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: *Provided*, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

Art. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: *Provided, always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23rd of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their soveriegnty and independence the twelfth.

APPENDIX M

U.S. Const. amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX N

U.S. Const. amend. I

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX O

O.R.S. § 97.740
97.740. Definitions

For the purposes of ORS 97.740 to 97.760:
(1) “Burial” has the meaning given that term in ORS 358.905.
(2) “Funerary object” has the meaning given that term in ORS 358.905.
(3) “Human remains” has the meaning given that term in ORS 358.905.
(4) “Indian tribe” means any tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act, 25 U.S.C. 3564 et seq., or listed in the Western Oregon Indian Termination Act, 25 U.S.C. 3691 et seq., if the traditional cultural area of the tribe includes Oregon lands.
(5) “Object of cultural patrimony” has the meaning given that term in ORS 358.905.
(6) “Professional archaeologist” means a person who has extensive formal training and experience in systematic, scientific archaeology.
(7) “Sacred object” has the meaning given that term in ORS 358.905.

APPENDIX P

O.R.S. § 358.905
358.905. Definitions; interpretation

(1) As used in ORS 192.005, 192.501 to 192.505, 358.905 to 358.961 and 390.235:
(a) “Archaeological object” means an object that:
(A) Is at least 75 years old;
(B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and
(C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.
(b) “Site of archaeological significance” means:
(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or
(B) Any archaeological site that has been determined significant in writing by an Indian tribe.
(c)(A) “Archaeological site” means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with:
(i) Each other; or
(ii) Biotic or geological remains or deposits.
(B) Examples of archaeological sites described in subparagraph (A) of this paragraph include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.
(d) “Indian tribe” has the meaning given that term in ORS 97.740.
(e) “Burial” means any natural or prepared physical location whether originally below, on or above the surface of the earth, into which, as a part of a death rite or death ceremony of a culture, human remains were deposited.
(f) “Funerary objects” means any artifacts or objects that, as part of a death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.

APPENDIX Q

O.R.S. § 358.910
358.910. Policy

The Legislative Assembly hereby declares that:
(1) Archaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon. As such, archaeological sites and their contents located on public land are under the stewardship of the people of Oregon to be protected and managed in perpetuity by the state as a public trust.
(2) The State of Oregon shall preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance.

APPENDIX R

O.R.S. § 358.920
358.920. Conduct prohibited

(1)(a) 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.
(b) Collection of an arrowhead from the surface of public or private land is permitted if collection can be accomplished without the use of any tool.
(c) It is prima facie evidence of a violation of this section if:
(A) A person possesses the objects described in paragraph (a) of this subsection;
(B) A person possesses any tool that could be used to remove such objects from the ground; and
(C) A person does not possess a permit required under ORS 390.235.
(2) 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 the written permission of the landowner.
(3)(a) A person may not sell, trade, barter or exchange or offer to sell, trade, barter or exchange any archaeological object unless the person furnishes the purchaser a certificate of origin to accompany the object that is being sold or offered. The certificate shall include:
(A) For objects obtained from public land:
(i) A statement that the object was originally acquired before October 15, 1983.
(ii) The location from which the object was obtained and a brief cumulative description of how the object had come into the possession of the current owner in accordance with the provisions of ORS 358.905 to 358.961 and 390.235.
(iii) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.
(B) For objects obtained from private land:

(i) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.
(ii) A copy of the written permission of the landowner to acquire the object.
(b) As used in this subsection, “certificate of origin” means a signed and notarized statement that meets the requirements of paragraph (a) of this subsection.
(4)(a) If the archaeological object was acquired after October 15, 1983, from public lands, any object not described in paragraph (b) of this subsection is under the stewardship of the state and shall be delivered to the Oregon State Museum of Anthropology. The museum shall work with the appropriate Indian tribe and other interested parties to develop appropriate curatorial facilities for artifacts and other material records, photographs and documents relating to the cultural or historic properties in this state. Generally, artifacts shall be curated as close to the community of their origin as their proper care allows. If it is not feasible to curate artifacts within this state, the museum may after consultation with the appropriate Indian tribe or tribes enter into agreements with organizations outside this state to provide curatorial services; and
(b) If the object is human remains, a funerary object, a sacred object or an object of cultural patrimony, it shall be dealt with according to ORS 97.740, 97.745 and 97.750.
(5) A person may not excavate an archaeological site on privately owned property unless that person has the property owner's written permission.
(6) If human remains are encountered during excavations of an archaeological site on privately owned property, the person shall stop all excavations and report the find to the landowner, the state police, the State Historic Preservation Officer and the Commission on Indian Services. All funerary objects relating to the burial shall be delivered as required by ORS 358.940.
(7) This section does not apply to a person who disturbs an Indian cairn or burial. Any person who disturbs an Indian cairn or burial for any reason shall comply with the provisions of ORS 97.740 to 97.760.
(8) Violation of the provisions of this section is a Class B misdemeanor.

APPENDIX S

O.R.S. § 358.924
358.924. Unlawfully held objects considered contraband; seizure; procedure; disposition

(1) Archaeological objects, funerary objects, human remains, sacred objects and objects of cultural patrimony that are held in violation of the provisions of ORS 358.920 or 390.235 are contraband. A police officer shall seize all items declared to be contraband under the provisions of this section if the police officer has reasonable cause to believe the items are held in violation of the provisions of ORS 358.920 or 390.235.
(2) A law enforcement agency employing a police officer who seizes contraband items under this section shall give notice of the seizure to the district attorney for the county in which the items are seized. The district attorney shall promptly investigate to determine whether any person claims the items seized.
(3) If any person claims items seized under this section, the district attorney shall file a petition with the circuit court for the county for an expedited hearing on the claim. The court shall conduct a hearing for the sole purposes of determining:
(a) Whether the items are archaeological objects, funerary objects, human remains, sacred objects or objects of cultural patrimony;
(b) Whether any arrowheads seized under this section were collected in compliance with ORS 358.920 (1)(b); and
(c) Whether a person claiming an item other than an arrowhead can lawfully possess the item under ORS 358.905 to 358.961.
(4) If items seized under this section are not claimed by any person, or the circuit court determines that the items may not be returned to the claimant under the provisions of subsection (3) of this section:
(a) Archaeological objects shall be delivered to the Oregon State Museum of Anthropology and curated as described in ORS 358.920 (4)(a).

(b) Funerary objects, human remains, sacred objects and objects of cultural patrimony shall be returned to the appropriate tribe for reinterment or other disposition as provided in ORS 358.940.

APPENDIX T

O.R.S. § 358.925
358.925. Seizure of instrumentalities; proceeds of certain violations; forfeiture; procedure

(1) Violation of ORS 358.920 or 390.235 is prohibited conduct for the purposes of ORS chapter 131A. Proceeds and instrumentalities of a violation of ORS 358.920 or 390.235 may be seized and forfeited in the manner provided by ORS chapter 131A. An action for civil forfeiture under this section may be commenced by the Attorney General or by the district attorney for the county in which any of the property is seized.
(2) Property subject to forfeiture under this section may be seized by a police officer upon court process. Seizure without process may be made if:
(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant; or
(b) The property subject to seizure has been the subject of a prior judgment in favor of the state.
(3) In the event of a seizure under subsection (1) of this section, a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the police officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the police officer may:
(a) Place the property under seal;
(b) Remove the property to a place designated by the court; or
(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(4) In any action brought under this section, the circuit court shall give priority to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions or restraining orders, or take such actions as the court may deem proper.
(5) A judgment rendered in favor of the state in any criminal proceeding for a violation of ORS 358.920 or 390.235 shall estop the defendant in any subsequent civil action or proceeding brought by the state or any other person as to all matters as to which such judgment would be an estoppel as between the state and the defendant.
(6) Notwithstanding any provision of ORS chapter 131A, after entry of a judgment of forfeiture in an action under this section, a forfeiting agency shall deliver the forfeited property and proceeds of the forfeited property to the Commission on Indian Services after making any deductions allowed for costs incurred by the forfeiting agency. The commission shall deliver the property and proceeds to the appropriate Indian tribe, as designated by the commission. If there is no appropriate Indian tribe, the commission shall use the property and proceeds for Indian historic preservation.

APPENDIX U

O.R.S. § 358.928
358.928. Seizure and forfeiture of instrumentalities; alternative methods; proceeds of certain violations; procedure

(1) All instrumentalities or proceeds from the violation of the provisions of ORS 358.920 to 358.955 or 390.235 are subject to civil forfeiture to the appropriate Indian tribe, as designated by the Commission on Indian Services. All forfeitures under this section shall be made with due provision for the rights of innocent persons.
(2) Property subject to forfeiture under this section may be seized by a police officer upon court process. Seizure without process may be made if:
(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant; or
(b) The property subject to seizure has been the subject of a prior judgment in favor of the state.
(3) Any police officer seizing property under this section shall promptly contact the Commission on Indian Services. The commission shall designate the appropriate tribe, and give notice to the tribe of the seizure. A civil forfeiture proceeding under ORS 358.925 may not be commenced if the tribe gives written notice that the tribe intends to seek forfeiture under this section. Notice by the tribe must be given within 30 days after the commission gives notice to the tribe of the seizure.

(4) Property seized under this section shall be held by the police agency that employs the police officer pending judgment in an action under this section. The property shall not be subject to replevin. Pending judgment in the action, the police agency may:
(a) Place the property under seal;
(b) Remove the property to a place designated by the court; or
(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.
(5) In any action brought under this section, the circuit court shall give priority to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.
(6) The defendant or the tribe may demand a trial by jury in any civil action brought under this section.
(7) A judgment rendered in favor of the state in any criminal proceeding for a violation of ORS 358.920 to 358.955 or 390.235 shall estop the defendant in any action under this section as to all matters as to which such judgment would be an estoppel as between the state and the defendant.

APPENDIX V

O.R.S. § 358.940
358.940. Reinterment required under tribe supervision; notice to appropriate Indian tribe or Commission on Indian Services

(1) A person who disturbs native Indian remains or a funerary object at or associated with an archaeological site shall reinter at the person's expense those remains or funerary objects under the supervision of an Indian tribe as provided in ORS 97.750.
(2) Any native Indian sacred object, object of cultural patrimony or native Indian funerary object shall be reported to the appropriate Indian tribe and the Commission on Indian Services. The appropriate Indian tribe, with the assistance of the State Historic Preservation Officer, shall arrange for the return of any objects to the appropriate Indian tribe.

APPENDIX W

O.R.S. § 358.945
358.945. Written notice required upon finding of object; exception

(1) If a person who is conducting an archaeological investigation on public lands according to the provisions of ORS 390.235 or on private land with the owner's written permission finds a sacred object or object of cultural patrimony, the person conducting the archaeological investigation shall notify in writing:
(a) The State Historic Preservation Officer; and
(b) The appropriate ethnic group, religious group or Indian tribe with which the object is associated.
(2) If 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.
(3) This section does not apply to the contents of an Indian cairn or burial regulated under ORS 97.740 to 97.760.
(4) Failure to notify the appropriate Indian tribe as required by subsection (1)(b) of this section is a Class B misdemeanor.

APPENDIX X

O.R.S. § 358.950
358.950. Notification to Indian tribe required; report

(1) Any person who conducts an archaeological excavation associated with a prehistoric or historic American Indian archaeological site shall notify the most appropriate Indian tribe. The notification shall include, but not be limited to:
(a) The location and schedule of the forthcoming excavation;
(b) A description of the nature of the investigation; and
(c) The expected results of the investigation.
(2) After notifying the appropriate Indian tribe under subsection (1) of this section, the person conducting the archaeological excavation shall consult a representative of the tribe to establish a procedure for handling sacred objects recovered during the archaeological excavation.
(3) A delegate from the appropriate Indian tribe may be present during the excavation.
(4) If requested, the Commission on Indian Services shall assist a person in locating the appropriate Indian tribe.

(5) At the conclusion of the investigation, the person conducting the excavation shall prepare and forward a copy of a report on excavation findings to the Commission on Indian Services and to the appropriate Indian tribe.
(6) Failure to notify the appropriate Indian tribe as required by subsection (1) of this section is a Class B misdemeanor.

APPENDIX Y

O.R.S. § 358.955
358.955. Civil proceeding and enforcement

(1) Any person or the Attorney General, on behalf of the state, may institute a civil proceeding against a person who violates the provisions of ORS 358.920, 358.945, 358.950 or 390.235. In the proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief in other civil cases, except that a showing of special or irreparable damage to the person is not required. Upon the execution of the proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order or a preliminary injunction may be issued in any such action before a final determination on the merits.
(2) In any proceeding brought under this section, the court may allow the prevailing party to recover costs, expert witness fees, and reasonable attorney fees at trial and upon appeal. Any

moneys recovered by the Attorney General under this subsection shall be deposited in the fund established in ORS 358.664.
(3) The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under subsection (1) of this section if the Attorney General certifies that in the opinion of the Attorney General, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Attorney General instituted the action or proceeding.

APPENDIX Z

O.R.S. § 390.235
Formerly cited as OR ST § 273.705
390.235. Excavation or removal of archaeological or historical material; permits; penalties

(1)(a) A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or 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.
(b) If a person who obtains a permit under this section intends to curate or arrange for alternate curation of an archaeological object that is uncovered during an archaeological investigation, the person must submit evidence to the State Historic Preservation Officer that

the Oregon State Museum of Anthropology and the appropriate Indian tribe have approved the applicant's curatorial facilities.
(c) No permit shall be effective without the approval of the state agency or local governing body charged with management of the public land on which the excavation is to be made, and without the approval of the appropriate Indian tribe.
(d) The State Parks and Recreation Director, with the advice of the Oregon Indian tribes and Executive Officer of the Commission on Indian Services, shall adopt rules governing the issuance of permits.
(e) Disputes under paragraphs (b) and (c) of this subsection shall be resolved in accordance with ORS 390.240.
(f) Before issuing a permit, the State Parks and Recreation Director shall consult with:
(A) The landowning or land managing agency; and
(B) If the archaeological site in question is associated with a prehistoric or historic native Indian culture:
(i) The Commission on Indian Services; and
(ii) The most appropriate Indian tribe.
(2) The State Parks and Recreation Department may issue a permit under subsection (1) of this section under the following circumstances:
(a) To a person conducting an excavation, examination or gathering of such material for the benefit of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology;
(b) To a qualified archaeologist to salvage such material from unavoidable destruction; or
(c) To a qualified archaeologist sponsored by a recognized institution of higher learning, private firm or an Indian tribe as defined in ORS 97.740.
(3) Any archaeological materials, with the exception of Indian human remains, funerary objects, sacred objects and objects of cultural patrimony, recovered by a person granted a permit under subsection (2) of this section shall be under the stewardship of the State of Oregon to be curated by the Oregon State Museum of Anthropology unless:
(a) The Oregon State Museum of Anthropology with the approval from the appropriate Indian tribe approves the alternate curatorial facilities selected by the permittee;
(b) The materials are made available for nondestructive research by scholars; and
(c)(A) The material is retained by a recognized scientific, educational or Indian tribal institution for whose benefit a permit was issued under subsection (2)(a) of this section;
(B) The State Board of Higher Education with the concurrence of the appropriate Indian tribe grants approval for material to be curated by an educational facility other than the institution that collected the material pursuant to a permit issued under subsection (2)(a) of this section; or
(C) The sponsoring institution or firm under subsection (2)(c) of this section furnishes the Oregon State Museum of Anthropology with a complete catalog of the material within six months after the material is collected.
(4) The Oregon State Museum of Anthropology shall have the authority to transfer permanent possessory rights in subject material to an appropriate Indian tribe.
(5) Except for sites containing human remains, funerary objects and 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 or by ORS 358.920 shall not be

required for forestry operations on private lands for which notice has been filed with the State Forester under ORS 527.670.
(6) As used in this section:
(a) “Private firm” means any legal entity that:
(A) Has as a member of its staff a qualified archaeologist; or
(B) Contracts with a qualified archaeologist who acts as a consultant to the entity and provides the entity with archaeological expertise.
(b) “Qualified archaeologist” means a person who has the following qualifications:
(A) A post-graduate degree in archaeology, anthropology, history, classics or other germane discipline with a specialization in archaeology, or a documented equivalency of such a degree;
(B) Twelve weeks of supervised experience in basic archaeological field research, including both survey and excavation and four weeks of laboratory analysis or curating; and
(C) Has designed and executed an archaeological study, as evidenced by a Master of Arts or Master of Science thesis, or report equivalent in scope and quality, dealing with archaeological field research.
(7) Violation of the provisions of subsection (1)(a) of this section is a Class B misdemeanor.

APPENDIX AA

O.R.S. § 390.237
Formerly cited as OR ST § 273.711
390.237. Removal of materials without permit; exceptions

In addition to the provisions of ORS 273.241, if any individual or institution excavates or removes from the land designated in ORS 390.235 any materials of archaeological, historical, prehistorical or anthropological nature without obtaining the permit required in ORS 390.235, all materials and collections removed from such lands, with the exception of native Indian human remains, funerary goods, sacred objects and objects of cultural patrimony, which shall go directly to the appropriate Indian tribe, are under the stewardship

of the State of Oregon and shall be assigned to the Oregon State Museum of Anthropology with the expressed approval of the appropriate Indian tribe.