NO. 11-0274

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OREGON,

Petitioner,

V.

THOMAS CAPTAIN,

Respondent.

On Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR RESPONDENT

TEAM 05
RESPONDENT

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QUESTIONS PRESENTED

I. Whether a Native American tribe who leaves their ancestral homeland in reliance on a voidable treaty still has aboriginal title when their possession was acknowledged by Lewis and Clark and never extinguished by the United States?

II. Whether Oregon has jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects that are found on tribal land, and that are sacred to an existing Native American tribe?

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDING

This acceptance of certiorari follows the Oregon Supreme Court's refusal to review the Oregon Court of Appeals' affirmance of the Oregon Circuit Court of Multnomah County's judgment that the Cush-Hook Nation has aboriginal title to their homeland, and that the Respondent, Thomas Captain, is innocent of trespassing or cutting timber without a permit but guilty of damaging an archaeological site and historical artifact under Oregon law. Thomas Captain appealed the Oregon Circuit Court's judgment finding him guilty of damaging an archaeological site and artifact. The Petitioner appealed the Oregon Circuit Court's judgment finding that the Cush-Hook Nation has aboriginal title to their ancestral homeland and that Thomas Captain is innocent of cutting timber without a permit. After the Petitioner filed a petition and cross petition, and Thomas Captain filed a petition for certiorari to the United States Supreme Court, this Court granted certiorari on two issues.

STATEMENT OF THE FACTS

This Court is being asked to affirm a judgment of the Oregon Circuit Court for the County of Multnomah that the Cush-Hook Nation owns aboriginal title to their original homeland, and that the land still qualifies as "Indian country." The Court should, however, find that the Oregon Circuit Court erred when it determined that Oregon properly brought a criminal action against a citizen of the Cush-Hook Nation for damaging an archaeological, cultural, and historical object. The issues at hand are whether the Cush-Hook Nation owns aboriginal title to their original homeland, and whether Oregon has jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question.

In 2011, a citizen of the Cush-Hook Nation, Thomas Captain, occupied the homeland of his tribe to protect culturally and religiously significant trees that were over three hundred years old.[1] The trees are very important to the Cush-Hook Nation's religion and culture because tribal medicine men carved sacred totem and religious symbols into the tree.[2] Now, the carved images are at a height of 25-30 feet from the ground.[3] Incredibly, vandals have recently begun climbing the trees to deface the images and in some cases to cut them off the trees to sell, and nothing has been done to stop these acts.[4] In order to protect and preserve these invaluable cultural objects, Thomas Captain cut a tree down and removed the section of the tree that contained the carving and attempted to return the cultural object back to his Nation.[5] However, state troopers arrested Thomas Captain and seized the image.[6]

The original homeland of the Cush-Hook Nation is located in present day Kelley Point Park in Portland, Oregon.[7] The Cush-Hook Nation occupied this area since time immemorial, and they lived by growing crops, harvesting wild plants, and by hunting and fishing.[8] They also established a permanent village within the boundaries of their territory.[9]

In 1806, William Clark, of the Lewis & Clark expedition, encountered some Multnomah Indians on the bank of the Multnomah (Willamette) River.[10] The Multnomah Indians took Clark to the Cush-Hook village and introduced him to the chief of the Cush-Hook Nation.[11] He recorded these interactions in the Lewis & Clark Journals.[12] Clark drew a

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[1] R. at 2.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 1.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

sketch of the Cush-Hook village and their permanent longhouses in the journals, and recorded ethnographic materials about Cush-Hook governance, religion, culture, burial traditions, agriculture, and hunting and fishing practices.[13] Specifically, Clark also noted the Cush-Hook Nation's practice of carving sacred totems and symbols into living trees.[14]

In an act described by historians as an expression of political and diplomatic significance, Clark gave the chief of the Cush-Hook Nation a President Thomas Jefferson peace medal.[15] Clark and Meriwether Lewis handed out these medals to chiefs during their expedition, and they believed that tribal leaders who accepted these medals showed they desired to engage in political and commercial relations with the United States.[16] In essence, the distribution of these medals demonstrated which tribal governments would be recognized by the United States.[17] In fact, historians call these medals "sovereignty tokens" because of their political implications.[18]

Thereafter, the Cush-Hook Nation continued to live in their village within their original homeland, and they engaged in their traditional ways of life throughout the territory.[19] Recognizing that the territory of the Cush-Hook Nation was located on valuable farming lands, the superintendent of Indian Affairs for the Oregon Territory attempted to relocate the tribe in 1850.[20] The Cush-Hook Nation signed a treaty with the Oregon Territory in which they agreed to relocate to a specific location in the foothills of the Oregon coast

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

range of mountains for a promised amount of compensation.[21] The tribe moved to the coast range in compliance with their agreement, and to avoid the encroaching Americans.[22] However, this treaty was never ratified by Congress and the Cush-Hook Nation never received any of the promised compensation.[23] The Cush-Hook Nation has continued to live a bare existence in the Oregon coast range, and they have remained a non-federally recognized tribe of Indians.[24]

After the Cush-Hook Nation relocated, two American settlors moved into what is now Kelley Point Park.[25] They received possession of the land from the United States under the Oregon Donation Land Act of 1850, which required "every white settlor" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title.[26] But, the two settlors never cultivated or lived upon the land for the required four years.[27]

[21] *Id*. at 1-2.
[22] *Id*. at 2.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] 9 Stat. 496-500 (1850).
[27] R. at 2.

SUMMARY OF ARGUMENT

First, the Oregon Circuit Court correctly determined that the Cush-Nook Nations has aboriginal title to their homeland. The Cush-Hook Nation lived in an established community to the exclusion of other tribes from time immemorial to 1850 and treated this land like any rightful owner treats their home; they built permanent housing for their families, hunted on the land and fished from the river, grew crops, practiced religion, and physically marked their land with religious and cultural symbols. The Cush Hook Nation's actual use and possession of the land since time immemorial gave them aboriginal title, and Lewis and Clark's gift of the sovereignty token intended to show the Cush-Hook Nation that the federal government acknowledged and respected their possession.

The Cush-Hook Nation still has aboriginal title to their homeland because, as the Oregon Circuit Court correctly found, Congress' refusal to ratify the 1850 treaty does not affect their un-extinguished right to possession under *Johnson v. M'Intosh*.[28] Only unambiguous federal intent to extinguish a tribes' aboriginal title will be respected, whether it is by a single or several actions.[29] The Oregon Donation Land Act's (Land Act) opening of land for American settlement and Congress' description of all the land in the Oregon Territory as public land of the United States is ambiguous because it is silent on tribal rights and does not provide special procedures for claim extinguishment. The two settlers also failed to comply with the Land Act by failing to live the required four years or cultivating the land, so both the grant to the settlers' descendants and Oregon were void.

[28] 21 U.S. 543 (1823).
[29] United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) (*Santa Fe*).

Beyond a federal extinguishment, an intentional relinquishment of possession can extinguish tribal aboriginal title,[30] but the Cush-Hook Nation did not intend to abandon all possessory rights when they were induced to the coast by the Oregon Territory's voidable agreement. The Cush-Hook Nation never received the compensation or reservation their relinquishment of rights was conditioned on. None of these events, alone or viewed together, clearly and unambiguously prove Congress intended to extinguish, or the Cush-Hook Nation intended to relinquish, aboriginal title to their homeland. Thus, this Court should affirm the Oregon Circuit Court's finding that the Cush-Hook Nation still has aboriginal title to their homeland.

Secondly, the Oregon Circuit Court correctly found that the land is "Indian country," which triggers the application of Public Law 280. "Indian country" includes "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State."[31] The Cush-Hook Nation is a dependent Indian community because tribes as "wards of the nation" were given that status when they were first recognized by the United States. The United States recognized the Cush-Hook Nation when sovereignty tokens were given to the chief of the tribe. There have been no subsequent acts which revoked the dependency status of the Cush-Hook Nation, and thus they remain a dependent Indian community today. This Court should affirm the Oregon Circuit Court's judgment finding that Public Law 280 applies to this case because the Cush-Hook Nation's homeland is still "Indian country."

The Oregon Circuit Court erred when it determined that, under Public Law 280, Oregon properly brought a criminal action against Thomas Captain for damaging an

[30] Williams v. City of Chicago, 242 U.S. 434, 437-38 (1917).
[31] 18 U.S.C. § 1151(b) (1976).

archaeological, cultural, and historical object. Public Law 280 transferred federal jurisdiction in "Indian country" to several states, including Oregon. The law gave the state jurisdiction over criminal/prohibitory laws, but not civil/regulatory laws.

Oregon does not have jurisdiction to bring this action against Thomas Captain because the law in question is civil/regulatory in nature. Even though the state law concerning archaeological, cultural, and historical objects has a criminal penalty, it does not prohibit damage to these sites, but rather sets up a permitting system administered by the state. Accordingly, the law has a civil/regulatory purpose and the state cannot enforce it in "Indian country."

Further, giving the state jurisdiction over the uses and protection of archaeological and historical sites and artifacts would interfere with the Cush-Hook Nation's internal relations and ability to be governed by its own laws because it has to do with their items of cultural importance. It should be within the jurisdiction of the Cush-Hook Nation to determine the best way to protect and control the uses of archaeological and historical sites on their ancestral homeland. Thus, this Court should reverse the Oregon Circuit Court's judgment because , under Public Law 280, Oregon improperly brought a criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

ARGUMENT

I. The Oregon Circuit Court correctly found that the Cush-Hook Nation has aboriginal title to their ancestral homeland because their possession was acknowledged by Lewis and Clark's gift of the sovereignty token in 1806, they lived on the land since time immemorial treating it as home, and their right to possession was never extinguished by the United States or intentionally relinquished.

This Court should affirm the Oregon Circuit Court's judgment finding that the Cush-Hook Nation holds aboriginal title to their homeland. Aboriginal title—tribal right to occupancy—is obtained by actually and continually treating land as home for a long time or by the United States' acknowledgment that it intends to recognize the tribe's right to occupy the land.[32] The federal government alone has the power of extinguishment.[33] While extinguishment can arise by treaty, by taking with or without payment, by a tribe's acceptance of a reservation and intentional abandonment of land, or several events together,[34] an extinguishment will not be lightly implied.[35] The United States' intent to extinguish title must be clear,[36] and tribes get the benefit of doubt.[37]

Lewis and Clark's gift of the sovereignty token represents federal acknowledgement that the Cush-Hook Nation held aboriginal title to the land in Kelley Point Park because they lived there since time immemorial and made it their home by building a permanent village, growing crops, hunting and fishing, and marking their homeland with sacred totem. Whether or not their right to possession is determined to be acknowledged by the United States, the Cush-Hook Nation's right to occupancy could not be extinguished absent unambiguous

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[32] United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) (*Santa Fe*).
[33] *Id.* at 346.
[34] *Id.* at 347 (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)).
[35] Oneida Indian Nation of New York State v. Oneida Country of New York, 414 U.S. 661, 670-71 (1974) (*Oneida*) (citing Worcester v. Georgia, 6 Pet. 515, 560 (1832)).
[36] *Santa Fe*, 314 U.S. at 347.
[37] *Id*. at 354 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)).

federal intent or intentional abandonment. Neither individually nor in their totality, the Land Act calling all the land in the Oregon Territory public land of the United States, the two settlers' void taking under the Land Act, Congress' refusal to ratify the 1850 treaty, or the Cush-Hook Nation's conditional movement to the Oregon coast amounts to an unambiguous federal intention to extinguish their right to possession, or an intentional abandonment by the Cush-Hook Nation. These ambiguous actions have the same legal affect as an unlawful removal of the Cush-Hook Nation by the Oregon Territory—none. Thus, the Oregon Circuit Court should be affirmed in correctly concluding the Cush-Hook Nation has aboriginal title to their homeland.

The Cush-Hook Nation's original ownership of their homeland is a finding of fact reviewed under the clearly erroneous standard.[38] Whether the federal government intended to extinguish or the Cush-Hook Nation intended to relinquish that ownership is a question of law determined de novo.[39]

A. The Cush Hook Nation occupied their homeland to the exclusion of others since time immemorial by constructing a permanent village, growing crops, fishing, and hunting, and their possession was acknowledged by Lewis and Clark's gift of the sovereignty token in 1806.

The Oregon Circuit Court correctly found that the Cush-Hook Nation permanently lived on the land in Kelley Point Park prior to the arrival of Americans, and this was recognized by Lewis and Clark's sovereignty token gift. Aboriginal title is established by showing a tribe actually occupied land to the exclusion of others for a long time.[40] The use of the land is viewed in reference to the tribes' ways of life: their customs, usages, and habits.[41]

[38] Pierce v. Underwood, 487 U.S. 552, 558 (1988).
[39] *Id.*
[40] *Santa Fe*, 314 U.S. at 345.
[41] Mitchel v. United States, 34 U.S. 711, 713 (1835)

No precise number of years is required, but enough time has to pass for the tribe to turn contested land into a domestic territory.[42] When a tribe shows Congress acknowledged the tribes' possession of land "by treaty or otherwise," the tribe does not have to show exclusive and continuous use and occupation for a long time in a proceeding, but Congress must have intended to give the tribe the right of permanent over permissive occupation.[43]

In *Tee-Hit-Ton Indians v. United States*[44] the Supreme Court determined Congress intended to post-pone ultimately determining a tribe's ownership of land because a statute guaranteeing the tribe permissive occupation explicitly said it left the ultimate decision of the tribes' possessory rights for future congressional decision.[45] In contrast, in *Sioux Tribe v. United States*[46] the Court of Claims excused the tribe from showing exclusive use when it found a treaty intended to acknowledge the tribe's actual possession of the land, regardless of any aboriginal title the tribe may have independently established.[47] The Court of Claims reasoned that the circumstances indicated Congress desired to negotiate with tribes Congress perceived as large enough to disturb travelers and disturb peace between tribes, and Congress wanted to officially recognize this tribe's ownership once and for all.[48]

The land in Kelley Point Park is the Cush-Hooks Nation's homeland. They built a village with longhouses to live in, provided food for themselves and their families by hunting and fishing, established burial procedures, marked their home with sacred totem, and practiced religion. The Cush-Hook Nation occupied this land in the same manner as

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[42] *Santa Fe*, 314 U.S. at 345. *See also* United States v. Seminole Indians of State of Florida, 180 Ct. Cl. 375, 387 (1967) (finding fifty years sufficient as a matter of law).
[43] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-79 (1955) (*Tee-Hit-Ton*) (citing Hynes v. Grimes Packing Co., 337 U.S. 86, 101 (1949)); Sioux Tribe v. United States, 205 Ct. Cl. 148, 166 (1974).
[44] 348 U.S. 272 (1955).
[45] *Id.* at 278.
[46] 205 Ct. Cl. 148 (1974).
[47] *Id.* at 166.
[48] *Id.*

American settlers occupied established American towns: by establishing a self-sufficient life, raising families, and enjoying their culture. The Cush-Hook Nation also occupied this land to the exclusion of other tribes. The neighboring tribe pointing out the Cush-Hook Nation's village to Lewis and Clark evidences other tribes acknowledged the Cush-Hook Nation's possession. The Cush-Hook Nation's exclusive occupation was also for a long time. Lewis and Clark encountered them in 1806 and the Cush-Hook Nation continued to live on the land until 1850 when they were induced to the coast. However, the Cush-Hook Nation likely called this land home long before Lewis and Clark observed their established life in 1806.

Lewis and Clark noted the Cush-Hook Nation's possession by recording observations in their journals, and their gift of the sovereignty token demonstrates that the United States intended to respect the Cush-Hook Nation's possession.[49] The gifting of a token is not as momentous as the agreement of a treaty or passing of a statute, but the intent behind the gesture is the same. Historians' references to the medal as a sovereignty token demonstrates the significance of the gift—the tokens would not have taken this name if tribes receiving them did not receive an utmost level of possession. Rather than intending to postpone fully determining tribal possessory rights like the congressional language in the *Tee-Hit-Ton* treaty, this gift indicates intent to currently recognize the Cush-Hook Nation's actual possession of the land. Perhaps a token shows the government's intent to act in good faith toward a tribe, and ultimately determine that tribes' possessory rights later, but withholding a sovereignty token from the Cush-Hook Nation would better indicate intent to wait to

[49] Thomas Jefferson understood the Doctrine of Discovery and planned the Lewis and Clark expedition with an eye toward its application. Robert Miller, *The Doctrine of Discovery in American Indian Law*, IDAHO L. REV. 1, 86-87 (2005). Jefferson predicted the Supreme Court's interpretation of the Doctrine years ahead of its formal adoption, *id.* at 82, and likely gifted the sovereignty tokens intending that they would acknowledge tribal possessory rights, as historians observed ultimately happened.

formally acknowledge their possession. The word "sovereignty" indicates the highest level of possession,[50] and for tribes, the highest level of possession is recognized aboriginal title.

A finding that the sovereignty token formally acknowledged the Cush-Hook Nation's right to possession excuses them from proving exclusive occupation of the land for a long time. But even absent this finding, they do not have a problem establishing the necessary possession. The Oregon Circuit Court's finding that they occupied, used, and owned the land before American settlers arrived is not clearly erroneous. Therefore, this Court should affirm the Oregon Circuit Court's conclusion that the Cush-Hook Nation has aboriginal title to their homeland from actually, continually, and exclusively calling the land home since time immemorial as recognized by Lewis and Clark.

B. The 1850 treaty between the Oregon Territory and the Cush-Hook Nation did not extinguish the Cush-Hook Nation's aboriginal title because the United States refused to ratify the treaty.

This Court should affirm the Oregon Circuit Court's correct finding that the United States' refusal to ratify the Oregon Territory's voidable treaty did not affect the Cush-Hook Nation's aboriginal title. Only the United States can extinguish aboriginal title,[51] and a treaty between the United States and a tribe where the tribe gives up their claim to possession and abandons land constitutes an extinguishment.[52] The treaty can be a voluntary cession, or conditioned on creating a reservation, but even if a reservation is created, aboriginal title is still not be extinguished unless the United States intends.[53]

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[50] The Merriam-Webster dictionary defines "sovereignty" as "freedom from external control." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/sovereignty (last visited Jan. 10, 2013).
[51] Johnson v. M'Intosh, 21 U.S. 543, 568 (1823); 25 U.S.C. § 177 (2006) ("No purchase . . . or other conveyance of land, or of any title or claim thereto, from an Indian nation . . . [is valid] unless the same be made by treaty or convention entered into pursuant to the Constitution."). This rule has been in force since 1790.
[52] Buttz v. Northern Pac. R.R., 119 U.S. 55, 68-70 (1886).
[53] *Santa Fe*, 314 U.S. 351-56.

This policy, that only the federal government can affect Indian title was taken from the English Crown,[54] and affirmed in *M'Intosh*, where land sales between a tribe and citizens were ruled void.[55] In *Mitchel v. United States*,[56] the Supreme Court said, "permission or license from the Crown" could validate an otherwise void private land grant,[57] and in *Oneida*, a tribe's grant of land to New York was held void for lack of federal consent.[58] Regarding treaties, in *Santa Fe*, the Supreme Court held that the United States' creation of a reservation at a tribe's request indicated federal intent to extinguish aboriginal title outside the reservation when history showed the tribe acquiesced to that result.[59]

The only way the Oregon Territory's voidable treaty with the Cush-Hook Nation could have force under *M'Intosh* and *Santa Fe* is if it was ratified, and Congress refused to ratify it. This refusal nullified any agreement. Like the land grant in *Oneida*, this treaty has no effect on the Cush-Hook Nation's title to the land—just as New York could not unilaterally determine tribal rights, neither can Oregon. Congress's' 1853 refusal to ratify the treaty shows federal intent to respect the Cush-Hook Nation's title to their homeland: Congress had the option to give effect to the agreement between the Oregon Territory and the Cush-Hook Nation and refused. As explained by the Supreme Court in *Mitchel*, while the sovereign can ratify what would otherwise be invalid under *M'Intosh*, acts not ratified are void.

In *Santa Fe*, the Supreme Court commanded that Congress' intent to extinguish aboriginal title not be "lightly implied." The word "implied" could be interpreted to mean

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[54] See Robert Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 97 (2005) (describing how the Crown used the Doctrine of Discovery to get Indian land and colonize America).
[55] *M'Intosh* , 21 U.S. at 568.
[56] 34 U.S. 711 (1835).
[57] *Id.* at 746.
[58] *Oneida*, 414 U.S. 661, 670 (1974).
[59] *Santa Fe*, 314 U.S. at 356-58.

Congress can impliedly ratify a treaty. Under this interpretation, the United States intentionally called all the land in the Oregon Territory public land of the United States in the 1850 Land Act, and accordingly, refused to ratify this treaty in 1853 because the federal government believed it had already extinguished the Cush-Hook Nation's aboriginal title three years before in the Land Act. The Oregon Circuit Court has the better interpretation. *Santa Fe,* also commands that a taking only follow "plain and unambiguous action," and an implied action is inconsistent with this requirement. If the federal government intended to extinguish the Cush-Hook Nation's aboriginal title, it would have done so expressly. Thus, this Court should affirm the Oregon Circuit Court's correct finding that Congress' refusal to ratify the treaty does not affect the Cush-Hook Nation's aboriginal title.

C. The Oregon Donation Land Act's description of all the land in the Oregon Territory as public land of the United States was error, and neither that description, nor the grant to the two settlers demonstrates federal intent to extinguish, or actually extinguished the Cush-Hook Nation's aboriginal title.

The Oregon Circuit Court correctly found that Congress erred in describing all the lands in the Oregon Territory as public lands of the United States and that the settlers' grant was void: there is no indication in the Land Act, or other congressional action, that Congress intended that description to extinguish the Cush-Hook Nation's aboriginal title. Tribal aboriginal title can survive land surveys under public land laws and other preparation for American settlement, and actual American settlement.[60] Only when Congress intends to extinguish aboriginal title will that effect be given,[61] and doubts are construed in favor of the tribe.[62]

[60] *Santa Fe*, 314 U.S. 339, 348-49 (1941); Gila River Pima-Maricopa Indian Community v. United States, 204 Ct. Cl. 137, 145 (1974) (citing Plamondon v. United States, 199 Ct. Cl. 523, 529 (1972)).
[61] *Santa Fe*, 314 U.S. at 347.
[62] *Id*. at 354 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)).

In rejecting the argument that land surveys under public land acts in preparation for American settlement affect aboriginal title, the Supreme Court in *Santa Fe* distinguished the case where a survey requires land claims to be presented by a specific time or forfeited.[63] In *United States v. Pueblo of San Ildefonso*,[64] the Court of Claims found the government's broad opening of lands recently ceded by Mexico for settlement was insufficient to prove federal intent to extinguish aboriginal title, reasoning that inevitably, American settlers would occupy much of the land, and that the general grant for this purpose was only an acknowledgement of that fact—not an extinguishment itself.[65] The Court of Claims emphasized that American settlement is just one factor in determining extinguishment, and went on to find that aboriginal title was extinguished by a combination of "fairly numerous intrusions" by American settlers under public land laws, the inclusion of part of the land in a national forest reserve, and the placement of the land in a grazing district.[66] The Ninth Circuit used similar reasoning in *United States v. Gemmill*[67] to find a requirement that claims be presented to a commission under the California Land Claims Act, along with other non-dispositive factors—inclusion of the land in a national park, inclusion of a portion of the land in a grazing district, military action forcing out the tribe, and payment for lands under the Claims Commission—indicated a "course of conduct" culminating in the extinguishment of the tribe's aboriginal title.[68]

Regarding actual American settlement, in *Marsh v. Brooks*[69] the Supreme Court said that a settler could take good title to lands with un-extinguished aboriginal title even though

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[63] *Id.* at 349-51.
[64] 206 Ct. Cl. 649 (1975).
[65] *Id.* at 660-61.
[66] *Id.* at 661-63.
[67] 535 F.2d 1145 (9th Cir. 1976).
[68] *Id.* at 1148-49.
[69] 55 U.S. 513 (1852).

the settler's deed said, "if Indian right extinguished."[70] Dispensing with the conditional deed clause as surplusage, the Supreme Court reasoned that the settler—who had been charged with setting up a trading post at the time—had added substantial and valuable improvements to the land in question, and the tribes consented to his possession because they lived in the same area and were deemed to have knowledge of the settler's notorious and adverse possession.[71]

Congress' Land Act description is more like the ambiguous federal land surveys created in preparation for settlement in *Santa Fe*, *Gemmill,* and *Pueblo of San Ildefonso* than a clear indication of intent to extinguish the Cush-Hook Nation's title. There was nothing explicit about tribal possession in the Land Act; it is not even mentioned. Rather than inferring that Congress intended to extinguish all tribal rights to possession in the Oregon Territory by ambiguously interpreting a statutory omission, a more reasonable inference is that Congress was not thinking about tribes' rights to lands when it wrote the legislation, but rather, was focused on creating a procedure allowing setters to make new homes. It likely went without saying that Congress continued to respect the rights of tribes to possess their homelands in the Oregon Territory. Congress' description should be interpreted as acknowledging that eventually there would be many American settlers in the Oregon Territory, and not itself an extinguishment of the Cush-Hook Nation's aboriginal title. The absence of other factors that the Supreme Court, the Ninth Circuit Court of Appeals, and the Court of Claims look to in combination with ambiguous public land acts, like compensation for land taken, federal creation and tribal acceptance of a reservation, inclusion of disputed land in a national forest or federal grazing district, and military removal of the tribe from the

[70] *Id.* at 525.
[71] *Id.* at 523-24.

area weighs towards finding congressional intent to respect the Cush-Hook Nation's possession. The Land Act description is ambiguous on federal treatment of Indian title, and *Santa Fe* requires doubts to be resolved in favor of the Cush-Hook Nation.

The two settlers' receipt of the land does not change this result. It is possible that the two settlers could have taken good title to the land under *Marsh*, but their failure to comply with the Land Act stopped them, and their failure to actually, continually, and exclusively occupy the land forecloses this finding. The two settlers acted differently than the settler in *Marsh*. The two settlers did not, as required, actually cultivate the land or stay four years. The *Marsh* settler lived on the land and treated it as home by adding valuable improvements. Likewise, the Cush-Hook Nation cannot be deemed to have knowledge of the two settlers' possession because the Cush-Hook Nation was not there at the same time as the settlers like the tribe in *Marsh* who was on notice. Even if the Cush-Hooks had been present, the two settlers' failure to cultivate the land or live on it longer than two years is not a notorious and continuous use of the land. Because the two settlers never got good title to the land, neither did their predecessors, and neither did Oregon when it purportedly purchased the land back, as correctly found by the Oregon Circuit Court. Thus, this Court should affirm the Oregon Circuit Court's findings that the United States erred in describing all of the Oregon Territory in the Land Act as public land of the United States, that all the subsequent land grants were void, and therefore, that the Cush-Hook Nation still has aboriginal title.

D. <u>The Cush-Hook Nation was unlawfully forced from their homeland and did not intentionally relinquish possession when they left for the coast in reliance and condition on their receipt of compensation and a reservation they never received</u>.

The Oregon Circuit Court Correctly found the Oregon Territory failed to wrest possession of the Cush-Hook Nation's homeland. Aboriginal title can be lost by

abandonment, but the tribe must intend to relinquish possession.[72] In *Williams v. City of Chicago*,[73] a tribe argued that a nineteenth century treaty protecting their use and quiet enjoyment of certain land gave them fee simple title despite establishing a home elsewhere.[74] The Supreme Court rejected their argument, reiterating that under *M'Intosh*, the only right tribes can possess is a right of occupancy, not fee simple, and that the tribe abandoned this right by failing to occupy the land for fifty years and moving to a new home pursuant to a treaty with the United States.[75] Likewise, in *Buttz v Northern Pac. R.R.*,[76] the Supreme Court determined aboriginal title was extinguished after a treaty ceded tribal lands to the United States and the tribe actually abandoned the area.[77]

The Cush-Hook Nation was forced off of their land and did not intend to relinquish possession. This situation is distinguishable from *Williams* and *Buttz* because the tribes in *Williams* and *Buttz* actually received possession of a federally recognized reservation. Here, the Cush-Hook Nation has no treaty with the federal government and no home that they legally claim possession to. It is easier to find that the tribes in *Williams* and *Buttz* intended to relinquish their possession of the disputed lands when that relinquishment was conditioned on receiving legal possession of a reservation. The tribes in *Williams* and *Buttz* received ownership interests as agreed but the Cush-Hook Nation did not.

The Oregon Territory wanted land for its growing population; the Cush-Hook Nation's home was valuable farmland near a river. Rather than forcibly remove the Cush-

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[72] Williams v. City of Chicago, 242 U.S. 434, 437-38 (1917); Fort Berthold Indian Reservation v. United States, 71 Ct. Cl. 308, 334 (1930) (noting forced ejectment, nonuse of the land in some instances, and the passage of time would not necessarily indicate abandonment under *Williams*).
[73] 242 U.S. 434 (1917).
[74] *Id.* at 435-37.
[75] *Id.* at 437-38.
[76] 119 U.S. 55 (1886).
[77] *Id.* at 68-70.

Hook Nation from their home, the superintendent of Indian Affairs achieved the same result through a subtler method: he induced them from their land with promises in a voidable agreement. The Oregon Territory got what it wanted, the valuable farmland and the Cush-Hook Nation was left without recognized land ownership just as if they were forcibly removed. Perhaps the superintendent of Indian Affairs was not motivated by deceptive intentions and believed the treaty would be ratified, but the result was the same.

Neither has the mere passage of time divested the Cush-Hook Nation of aboriginal title. While over one hundred years has passed between the Cush-Hook Nation's inducement from their land and Thomas Captain's reassertion of ownership, nothing in the Land Act provided for extinguishment of claims not asserted past a specific date or necessarily put the Cush-Hook Nation on notice that they should present an ownership claim. Moreover, any title to the land the two settlers could take had the entire grant not been void would still be subject to the Cush-Hook Nation's right of occupancy under *M'Intosh* because it was never federally extinguished. The settlers would own a fee simple in reversion with the Cush-Hook Nation possessing the present right of occupancy.

Finally, despite the length of time since the Cush-Hook Nation left, even if they had returned to check on their homeland, they may not have realized anyone else claimed ownership to it, and the passage of time and nonuse of land are not dispositive. The two settlers failed to cultivate any of the land as required by the Land Act, they were gone within two years and there were only two of them purportedly possessing the 640 acres. This is not an adverse and hostile use that would put a visiting Cush-Hook Nation member on notice that American settlers claimed the land. This remains true when the land was converted into Kelly Point Park. Even in 2011 the Cush-Hook Nation's ownership is visible—the trees with

sacred totem are signs to those who enter that the land is the homeland of the Cush-Hook Nation. As a matter of policy, this Court should refuse to retroactively validate a state's past unlawful taking of a tribes' acknowledged homeland despite the passage of time. The Cush-Hook Nation never intended to relinquish ownership, and their right to possession was never extinguished. Therefore, this court should affirm the Oregon Circuit Court's conclusion that they still hold aboriginal title to their homeland.

II. Oregon does not have jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question because the land is still "Indian country" and although Public Law 280 applies, the applicable law is civil/regulatory in nature and Public Law 280 gave states only law enforcement and civil judicial authority - not regulatory power.

This Court should affirm the Oregon Circuit Court's finding that the Cush-Hook Nation owns the land in question under aboriginal title and that Public Law 280 applies to this case because the land is "Indian country." All dependent Indian communities are included in the definition of "Indian country." The Cush-Hook Nation is a dependent Indian community because they were given that status when sovereignty tokens were gifted to the chief of the tribe. There have been no subsequent acts which revoked the dependency status of the Cush-Hook Nation, and thus they remain a dependent Indian community today.

This Court should reverse the Oregon Circuit Court's finding that, under Public Law 280, Oregon properly brought a criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object. Public Law 280 transferred federal jurisdiction in "Indian country" to several states, including Oregon. The law gave the state jurisdiction over criminal/prohibitory laws, but not civil/regulatory laws. The law in question is civil/regulatory in nature and the state cannot enforce it in "Indian country."

Additionally, giving the state jurisdiction over the uses and protection of archaeological and historical sites would interfere with the Cush-Hook Nation's internal relations because the artifacts are part of their own history. It should be within the jurisdiction of the Cush-Hook Nation to determine the best way to protect and control the uses of archaeological and historical sites on their ancestral homeland. Thus, this Court should reverse the Oregon Circuit Court's judgment because, under Public Law 280, Oregon improperly brought a criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

Oregon does not have jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question because the land is still "Indian country" and accordingly, under Public Law 280, the state does not have civil/regulatory authority over tribal members in "Indian country." Further, giving the state this authority would jeopardize internal relations of the tribe because it has to do with items of cultural importance belonging to the Cush-Hook Nation. For questions involving issues of law, this Court reviews the lower court's decisions de novo.[78]

A. Kelley Point Park is "Indian country" because the Cush-Hook Nation holds aboriginal title in the land that was never extinguished and is a "dependent Indian community"

The Oregon Circuit Court correctly found that the Cush-Hook Nation owns the land in question under aboriginal title and that the land is "Indian country," which triggers the application of Public Law 280. The full definition of "Indian country" in 18 U.S.C. § 1151 (1949) is as follows:

[78] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[79]

Because the Cush-Hook territory is not a reservation, and because no Indian allotments are at issue, whether the tribe's land is "Indian country" depends on whether it falls within the "dependent Indian communities" prong of the statute, § 1151(b).

In *United States v. Sandoval,* [80] the Supreme Court reviewed a successful demurrer to a federal indictment of a non-Indian defendant who had brought liquor into the Pueblo lands of New Mexico. The indictment was based upon a section of the New Mexico enabling act which had expressly extended the term "Indian country" to the Pueblo people and lands of New Mexico.[81] The defendant asserted that the attempt by Congress to subject the Pueblos to all federal laws applicable in "Indian country" was unconstitutional, and the enabling legislation was an arbitrary usurpation of a sovereign state's police powers.[82] Further, the defendant argued that since Pueblo lands were not held in trust by the federal government, but instead held by the Indians in fee simple absolute, they were not subject to federal supervision and jurisdiction over the Pueblos belonged with the state.

Regardless of the Pueblo people's fee title, the United States Supreme Court denied the defendant's constitutional challenge, pointing both to characteristics of the Pueblos which presently justified Congress' exercise of federal guardianship, and to examples of Congress'

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[79] 18 U.S.C. § 1151 (1949).
[80] 231 U.S. 28 (1913).
[81] *Id*. at 36-37.
[82] *Id*. at 36.

past use of such guardianship. In language since adopted as a governing definition of "Indian country" the Court stated:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but ... the United States as a superior and civilized nation [has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.[83]

Sandoval showed that acts of specific recognition are not the only sufficient indicia of an Indian community's "dependency" on the federal government, and that other forms of tribal land ownership could constitute "Indian country."

US v. Kagama[84] held that the Constitution was not violated when, through the original Major Crimes Act, Congress had excluded a state's jurisdiction over the crime of murder committed by one Indian against another Indian on a reservation located within that state's boundaries. The Supreme Court in *Kagama* had been asked to validate the Major Crimes Act as a regulation of commerce with the Indian tribes, but the Court refused to adopt such a "strained construction" of the Commerce Clause.[85] Instead, the Court found a "suggestion" in the Constitution "in the manner in which the Indian tribes are introduced into… [The Commerce] clause."[86] The Commerce Clause empowers Congress to "regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."[87] Through analysis of the clause's specific wording, the Court concluded that the Constitution impliedly

[83] *Id*. at 45-46.
[84] 118 U.S. 375 (1886).
[85] *Id*. at 378-79.
[86] *Id*. at 379.
[87] U.S. CONST. art. I, § 8.

distinguishes Indian tribes from "foreign nations," and characterized their relationship to the United States as "anomalous . . . and of complex character."[88]

Kagama noted that this unique relationship came in part from the nature of tribal land ownership under the federal government. Following the policy of the European governments in the discovery of America, the United States has recognized in the Indians a possessory right to their lands. But the colonies "asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority."[89]

Kagama referred to this mere right of occupancy known as "Indian title" as a key basis for the Supreme Court's assertion in *Cherokee Nation v. Georgia*[90] and *Worcester v. Georgia*[91] that the Indian tribes were "wards of the nation" and "dependent communities." Reaffirming the "dependent community" status for Indian tribes, the *Kagama* Court held that the general federal duty of protection from this status was a source of constitutional power. Accordingly, the Court validated the Major Crimes Act. *Kagama* concluded that,

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[92]

The "dependent community" language used by *Kagama* to uphold the Major Crimes Act is closely related to the terminology used by *Sandoval* to justify an

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[88] Kagama, 118 U.S. at 381.
[89] *Id*.
[90] 30 U.S. 1 (1831).
[91] 31 U.S. 515 (1832).
[92] Kagama, 118 U.S. at 384-85.

extension of Indian protective federal laws to the fee simple lands of the Pueblos. Aboriginal territory can constitute "Indian country" absent formal federal creation of a reservation and continuous federal supervision of its affairs. *Kagama* and *Sandoval* indicate that when an Indian tribal community has "Indian title," a right to occupy lands, the dependency status of the Indian community acknowledged and protected by the federal government would be sufficient to establish "dependency" within the meaning of Section 1151(b).

The Supreme Court further interpreted "dependent Indian communities" in *Alaska v. Native Village of Venetie*.[93] The Court held that the term refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements. First, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.[94] The Court found that land transferred to private corporations consisting of Indian shareholders, in fee simple without restrictions, and subsequently re-conveyed to tribe was not "Indian country," because the tribe did not meet the requirements of a "dependent Indian community."[95] The Supreme Court came to this conclusion by noting that the tribe's reservation and benefits from the United States were specifically revoked by statute.[96] In fact, settlement provisions associated with the revocation of federal superintendence Congress stated explicitly that they were intended to avoid a "lengthy wardship or trusteeship."[97]

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[93] 522 U.S. 520 (1998).
[94] *Id*. at 527.
[95] *Id*. at 532.
[96] *Id*. at 532-33.
[97] *Id*. at 533, citing 43 U.S.C. § 1601(b).

The Cush-Hook Nation holds aboriginal title to their territory, which was recognized by the United States through the distribution of sovereignty tokens in 1806. This "Indian title" has never been extinguished and thus the title to the Cush-Hook aboriginal nation remains with the tribe today. Because the Cush-Hook Nation holds aboriginal title to their territory that was never extinguished, the land is still "Indian country" under 18 U.S.C. § 1151. This definition was meant to clarify and expand the existing definitions of "Indian country."

The term "Indian country" was adapted from the Supreme Court's decision in *Sandoval*, which recognized that Pueblo land owned in fee simple by tribal members was still a dependent Indian community that qualified as "Indian country." Like the Pueblo people in *Sandoval*, the Cush-Hook Nation's territory is not a reservation or trust lands, but the community does have an occupancy right to the land. The tribe has never been devoid of its original territory, and as such, the United States has a continued duty of exercising care over this Indian nation.

Kagama clarified that this dependency status comes from ideas of tribal land ownership introduced in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. These cases established that tribes are "wards of the nation," a term which still applies to the Cush-Hook Nation due to their continued ownership of their aboriginal territory. Even though the United States has not taken any steps to "recognize" the Cush-Hook Nation since they were first discovered by Lewis and Clark, the tribe's dependent status was established when the sovereignty token was given to the tribe, and the land was thereafter considered to be Cush-Hook Nation territory by Oregon. This is evidenced by the superintendent of Indian Affair's unsuccessful attempt to

relocate this territory. The Cush-Hook Nation's dependency status was never taken away so they are still under the supervision of the United States.

Alaska explained that "dependent Indian community" requires a set aside by the federal government for the use of the Indians as Indian land and second, they must be under federal superintendence. The *Alaska* court held that the land in question was not "Indian country" because the tribe failed to meet the qualifications of a "dependent Indian community." However, the Cush-Hook Nation can be distinguished from the tribe in *Alaska* because the United States never revoked the Cush-Hook's aboriginal title or their federal supervision. Therefore, the Cush-Hook Nation still holds their territory that has been set-aside for them, and the Nation is under federal superintendence that has never been withdrawn.

The Cush-Hook Nation holds aboriginal title to their territory and they continue to be a "dependent Indian community," and as such the land is still "Indian country" under 18 U.S.C. § 1151. Because this case involves a tribal member whose actions occurred in "Indian country," Public Law 280 is triggered.

B. Although Public Law 280 applies, the applicable law is civil/regulatory in nature and Public Law 280 gave states only law enforcement and civil judicial authority - not regulatory power.

The Oregon Circuit Court erred in determining that, under Public Law 280 (PL 280), Oregon properly brought a criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object. PL 280[98] was enacted by Congress in 1953 as a measure to curb perceived lawlessness on the Indian reservations of six states: Alaska,

[98] 18 U.S.C. § 1162; 28 U.S.C.§ 1360.

California, Minnesota, Nebraska, Oregon, and Wisconsin.[99] It applies in the current case because it occurred in Oregon. PL 280 was a transfer of jurisdiction from the federal government to state governments, and it fundamentally changed the jurisdictional arrangements in "Indian country."[100] The main legal impact of PL 280 concerning criminal jurisdiction is that it extended state criminal jurisdiction and the application of state criminal laws onto Indian lands within the affected states. The civil jurisdiction impact of PL 280 is more complicated than the criminal jurisdiction impact. In general, it authorized the application of general state adjudicatory jurisdiction into "Indian country" in the affected states, but it did not authorize state civil regulatory jurisdiction. The legislative history's emphasis on criminal jurisdiction, and the congressional desire to improve law enforcement, supports the view that the statute's extension of civil jurisdiction to the states was not a priority, but more of a late addition.[101]

In *Bryan v. Itasca County*,[102] the United States Supreme Court made it clear that any exercise of state control or jurisdiction over tribal members on their reservations required an explicit grant of congressional approval. The Supreme Court ruled that under PL 280 Minnesota lacked the authority to impose a personal property tax on a mobile home located on tribal trust land and owned by an enrolled member of the Minnesota Chippewa Tribe.[103] Upon review of 28 U.S.C. § 1360(a), the Court held that under PL 280, states did not possess general civil regulatory power over the tribe, but only adjudicatory power over private civil

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[99] Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535,541-42 (1975).
[100] 18 U.S.C. § 1162 (2010); 28 U.S.C. § 1360 (1984).
[101] Santa Rosa Band of Mission Indians v. Kings County, 532 F.2d 655, 661 (9th Cir. 1975) (Noting that there is little in the legislative history of the Act that indicates a "congressional rationale" for extending state civil jurisdiction over the tribes); see also Bryan v. Itasca County, 426 U.S. 373, 380-81 (1976) (acknowledging that section 1162 "was the central focus of Pub. L. 280" and the total absence of legislative history regarding Public Law 280's civil provision).
[102] 426 U.S. 373 (1976).
[103] *Id*. at 375.

litigation.[104] The Court stated, "[N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than private, voluntary organizations."[105]

In addition, the Court found that any ambiguity found in determining the scope and extent of state jurisdiction should be resolved in the manner most favorable to the tribes.[106] Congress knows how to express its intent to subject Indians to the full sweep of state law, but it did not do so here.[107]

The Supreme Court in *California v. Cabazon Band of Mission Indians*[108] reaffirmed the distinction between criminal and civil regulatory power recognized in *Bryan* and set out a basis for determining whether a given offense is covered under PL 280's grant of limited jurisdiction from the federal government to certain states. The Court ruled a penal code section that would regulate bingo and prohibit the playing of poker inside reservation boundaries was an unlawful exercise of state civil regulatory power not granted under PL 280.[109] The Court reaffirmed *Bryan*'s position that "total assimilation of Indian tribes into mainstream American society"[110] was not PL 280's purpose, and stressed tribal self-governance and the protection of tribal interests, such as encouraging tribal "self-sufficiency and economic development."[111] The Court found that when a state tries to enforce one of its laws in Indian country, it must first determine if the law is civil/regulatory or

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[104] *Id*. at 384, 388-89.
[105] *Id*. at 388.
[106] *Id*. at 392.
[107] *Id*. at 393.
[108] 480 U.S. 202 (1987).
[109] *Id*.
[110] *Id*. at 208.
[111] *Id*. at 216.

criminal/prohibitory in nature.[112] If the law is criminal/prohibitory, it is enforceable under PL 280. If it is civil/regulatory, as in the *Cabazon* case, the state law is unenforceable.

Or. Rev. Stat 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. are civil/regulatory in nature and, as established in *Bryan*, the state does not have jurisdiction to enforce the laws in "Indian country." These laws control the uses of, and protect, archaeological, cultural, and historical objects. The laws make it a criminal offense to damage any archaeological, cultural, or historical artifact without the issuance of a permit from the State Parks and Recreation Department.[113] Even though these laws have a criminal penalty, they are regulatory in nature. The laws seek to regulate any damage to archaeological sites, but the activity is not prohibited because the state issues permits to allow some damage to occur. Minimal damage to archaeological and historical sites, which are located all over original aboriginal territories, is unavoidable with necessary undertakings such as construction and road building, and can even occur as part of mitigation to ultimately protect artifacts.

Like *Cabazon*, enforcing this regulatory law in "Indian country" would be an unlawful exercise of state civil regulatory power not granted under PL 280. The law regulating bingo in *Cabazon* is similar to this law regulating the uses and protection of archaeological sites because the activity was not actually prohibited, and it is related to elements of tribal sovereignty. Gambling was important to the tribe in *Cabazon* because it was a vital to the tribe's self-sufficiency and economic development. The protection of

[112] *Id*. at 209.
[113] Or. Rev. Stat. Ann. § 390.235(1)(a).

cultural resources and archaeological sites is important to the Cush-Hook Nation because it involves their own cultural history and these sites belonged to their own ancestors.

The laws that the State of Oregon seek to enforce on a tribal member for an activity that occurred in "Indian country" are civil/regulatory in nature because they do not prohibit damage to cultural sites, but rather create a permitting program administered by the state. Because these laws are civil/regulatory, the State of Oregon does not have jurisdiction to enforce them in "Indian country."

C. Giving Oregon jurisdiction over the uses and protection of archaeological and historical sites and artifacts would interfere with the Cush-Hook Nation's internal relations and ability to be governed by its own laws because it has to do with their items of cultural importance.

In interpreting PL 280, the Courts have stressed that the purpose of the law was to combat lawlessness, but not to completely take jurisdiction away from tribes in "Indian country." The United States has a continued obligation to protect Indian nations and their inherent sovereignty over their own territory. The Supreme Court has interpreted relevant treaties and statutes against this "backdrop" of Indian sovereignty.[114] The Court has found that inherent tribal sovereignty includes the power to "regulat[e] their internal and social relations,"[115] and the power to prescribe laws for their community and enforce these laws against their members.[116] The Court has also held that these inherent powers of self-government remain unless expressly limited or extinguished by Congress through treaty or

[114] McClanahan v. Arizona State Tax Commission, 411 U.S. 164 , 172 (1973) ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.")
[115] Kagama, 118 U.S at 381-82.
[116] *See e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978) (stating that membership rules are "no more or less than a mechanism of social ... self-definition," and as such are basic to the tribe's survival as a cultural and economic entity").

statute. For example, in *Bryan* the Court ruled that PL 280 did not remove tribal immunities from state taxation because any congressional mention of "such a sweeping change in the status of tribal government and reservation Indians" was absent in the legislative history.[117]

The Cush-Hook Nation owns aboriginal title to their native territory, and they hold inherent powers of sovereignty over this territory. The Cush-Hook Nation has retained their powers of self-government because they have never been expressly limited by Congress. State control of the uses and protection of cultural items within the Cush-Hook Nation's "Indian country" would take away the tribe's ability to control its internal and social relations. The state has no right to interfere with the Cush-Hooks Nation's protection of artifacts. This important cultural site belongs to the Cush-Hook Nation and only they should decide how it should be used and protected. Thomas Captain is a member of the Cush-Hook Nation and he decided to remove the carvings from the original site in order to mitigate any future harm to the carvings. It should be within the jurisdiction of the Cush-Hook Nation, and only the Cush-Hook Nation, to decide whether Thomas Captain's actions were necessary, or whether he should be prosecuted as the tribe sees fit. Giving the state jurisdiction over the uses and protection of archaeological and historical sites and artifacts would interfere with the Cush-Hook Nation's internal relations and ability to be governed by its own laws because it has to do with their items of cultural importance.

CONCLUSION

The Oregon Circuit Court for the County of Multnomah's judgment that the Cush-Hook Nation has aboriginal title to their homeland, and that Public Law 280 applies to this

[117] Bryan, 426 U.S. at 381.

case because the land is "Indian country" should be affirmed. The Oregon Circuit Court for the County of Multnomah's judgment that Oregon properly brought a criminal action against Thomas Captain should be reversed.

DATED this 14th day of January 2013.

Respectfully submitted,

TEAM 05