

No. 11-0274

**IN THE SUPREME COURT
OF THE UNITED STATES**

STATE OF OREGON,

PETITIONER,

v.

THOMAS CAPTAIN,

RESPONDENT AND CROSS-PETITIONER.

ON WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

BRIEF FOR THE RESPONDENT AND CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether the Cush-Hook Nation retains aboriginal title to the land in Kelley Point Park, which they inhabited from time immemorial, but were subsequently removed from and not compensated for under a treaty that Congress refused to ratify.

2. Whether Oregon improperly asserted criminal jurisdiction over Thomas Captain, finding him guilty of violating Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. for taking a carved image which has been traced back to Captain's own ancestors, in order to protect it from further vandalism which the state has failed to protect against.

STATEMENT OF THE CASE

In 2011, Thomas Captain a member of the Cush-Hook tribe that resided in what is now Kelley Point Park, in Portland, Oregon, entered the land which was once the cultural center of his tribe and subsequently occupied it to protect culturally significant trees and sacred religious symbols and to reassert his nations rights to the land. Due to the recent vandalism that had defaced a totem pole traced back through his lineage, Captain removed the section of the tree which contained the image carved by one of his ancestors in order to protect it from further harm that the state was doing nothing to prevent.

The Cush-Hook nation occupied a thriving village in what is now Kelley Point Park, since time immemorial. Although not presently politically recognized by the federal government or the state of Oregon, the flourishing and extensive history of the tribe in this area is well documented in the journal of William Clark of the Lewis & Clark expedition

through sketches and ethnographic materials regarding governance, religion, culture, burial traditions, housing, agriculture and hunting and fishing practices. In recognition of the tribe's establishment on the land, Clark presented the headman/chief a medal on behalf of President Thomas Jefferson, acceptance of which was regarded as an indication of willingness toward a political relationship with the federal government and an indication of later formal recognition by the federal government. The Cush-Hooks continued to live on the land in the same manner, engaged in their traditional practices.

The tribe was later relocated when in 1850 Anson Dart, the superintendent of the Indian Affairs for the Oregon Territory entered into a treaty with the tribe which Congress refused to ratify. This meant the tribe never received the promised compensation for their land or title to the land they subsequently relocated to and currently inhabit near the Oregon coastal range. The land originally inhabited by the Cush-Hook tribe was later redistributed under the Oregon Donation Land Act of 1850 where the land was categorized as federal public land. Joe and Elsie Meek resided on the land and passed it down to their descendants who later sold it to the State of Oregon, which was then turned into Kelley Point Park. The Meeks, however, never cultivated or lived on the land for four years, as was required by the Land Act.

A criminal action was brought against Captain by the State of Oregon for trespass on the land in question which the state considered, state land for cutting timber thereon without a permit, and desecrating an archeological and historical cite under Oregon Revised Statutes 358.905-358.961 and 390.235-390.240. A bench trial was held in the Oregon Circuit Court for the County of Multnomah where the court held that the Cush-Hook Nation owns the land

in question under aboriginal title because the title has never been extinguished by the United States government under *Johnson v. McIntosh* because of the refusal of the US Senate to ratify and compensate the tribe for their land. The court also found the lands at issue were erroneously labeled public lands for purposes of the Oregon Donation Land Act.

Subsequently the Circuit Court held the grant of land to the Meeks under the Act was void as was the later sale by their descendants to the State of Oregon. Therefore, because the tribe retained aboriginal title, the lower court found Captain not guilty of trespass and cutting timber without a permit. His criminal conviction under Oregon Revised Statutes 358.905-358.961 and 390.235-390.240, however for damaging an archeological and cultural and historical artifact were upheld under Public Law 280, and he was fined \$250.

The State and Captain both appealed to the Oregon Court of Appeals, which affirmed the lower court without issuing an opinion. Thereafter the Oregon Supreme Court denied review. The State then filed a petition and cross-petition for certiorari and Captain filed a cross petition to this Court.

SUMMARY OF ARGUMENT

The inherent land rights of the native peoples of the United States is aboriginal title. This interest in land need not be established by statute, treaty, or other documentation but is rather established through centuries old occupation of Indians on land that they lived, developed, and established cultural centers on. The longstanding understanding in the United States of the Discovery Doctrine and its recognition in early caselaw established that while a discovering sovereign obtained certain claims to land, this by no means divested Indians of claims to their indigenous lands which were inhabited long before the sovereign staked its

claim. In fact, in *Mitchel v. United States*, the court described this interest in the land as being “as sacred as the fee simple.”

In order to demonstrate that a tribe retains aboriginal title to its historical land, the tribe must have occupied the land to the exclusion of other tribes for time immemorial. To demonstrate this occupation, a tribe must have developed the land into a domestic territory. The ability to take aboriginal title from a tribe is exclusively held by the United States, and this taking of the title may only be executed through an explicit act of Congress, which will not be lightly implied. While compensation for a taking of aboriginal title may not be required, the courts have looked down upon failure to compensate tribes in other situations and view it as an abuse of the government’s role in its relationship with the tribes.

This court should affirm the lower court’s correct ruling that the Cush-Hooks retain aboriginal title to their land in Kelley Point park due to the longstanding ties of the tribe to the land to the exclusion of others as witnessed by the Lewis & Clark expedition. Furthermore, the title was never extinguished by an explicit act of Congress because the treaty between the Cush-Hooks and the superintendent of the Indian Affairs for the Oregon Territory was never ratified nor carried out in full and is thus not law. The tribe was never compensated under the treaty nor given title to the land they were relocated to and currently reside on. When the land was later awarded to settlers in the Oregon Donation Land Act of 1850, this transaction was improper because the title was not extinguished prior to the act and the act itself did not sufficiently constitute a direct intent to extinguish title.

Furthermore, this Court should give weight to the international law set out in the United Nations Declaration of the Rights of Indigenous People, which sets forth the

international recognition of indigenous land and property rights. This declaration has been adopted by the United States, and therefore the policy should be considered in this case. This in addition to the United States' policy changes toward the Indians that were established in the "Self-Determination" movement indicate the importance of these ideals.

In recognition of the strength of the property interest under aboriginal title, a tribe and its members have the power to occupy and use the land and its resources. Additionally, they have the right to claim, protect, and possess objects of cultural significance. The interest of tribes in these cultural items is clearly considered in state, federal, and international law. The Or. Rev. Stat. 358.905-358.961 et seq and the Or. Rev. Stat. 390.235-390.240 et seq which regulates archeological and historical items clearly indicates that the ultimate claim on any Indian artifact at issue under the statute belongs to the tribe to which it originates. The Native American Graves Protection and Repatriation Act (NAGPRA), also recognizes the importance of returning cultural items to the tribes. Furthermore the United Nations Declaration of the Rights of Indigenous Peoples explicitly mandates the recognition of these rights. The Court should determine that criminal jurisdiction under these statutes is improper because of the clear indications in law of the intent to protect Indian claims as to what is rightfully theirs.

Even if the Court finds that the Oregon Statutes do apply in regard to the cultural items, then Public Law 280 should apply. This law is a grant of criminal and civil jurisdiction from the Federal government to the states, on Indian land. The Court has held that this law should be narrowly applied, and in determining criminal jurisdiction, distinguishes between laws that generally prohibit action and those that simply regulate it. A

criminal penalty to a regulatory law is not sufficient to grant criminal jurisdiction, and will be viewed by the court as civil/regulatory, and therefore the state will be without jurisdiction.

The Cush-Hooks retain aboriginal title to the land, and thus it should be considered Indian land for the purposes of Public Law 280. While the tribe is not Federally recognized, they none the less retain rights because of their cultural history and distinct tribal identity, and therefore retain a certain amount of sovereignty over their affairs. While Public Law 280 is an infringement on sovereignty its narrow interpretation allows for some self-governance. Here the state should not be allowed to exercise criminal jurisdiction over Captain, because the statutes are regulatory in nature because they do not generally prohibit the acquisition of archeological and historical items, and therefore the state may not enforce them against Captain in this case.

ARGUMENT

I. The Court should affirm the holding of the Circuit Court of Multnomah County that the Cush-Hook Nation has aboriginal title to the land in Kelley Point Park under caselaw and international policy.

The lower court correctly found that the Cush-Hooks retained aboriginal title to the land at issue because a tribe may have an inherent right to occupy land, regardless of “treaty, statute, or other formal government action,” *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941), reh’g denied, 314 U.S. 716 (1942), establishing an interest in the land. Aboriginal title was first recognized by the Supreme Court in *Johnson v. McIntosh*, holding that tribes have the right to occupy the land of their ancestors. See 21 US 543 (1823). This right is considered “as sacred as the fee simple.” *Mitchel v. United States*. 34 U.S. 711, 746 (1835). Aboriginal title was established through the Discovery Doctrine, discussed in detail

in *McIntosh*. “Discovery” of the land created a property interest in the Sovereign, in this case the United States, to the land. However, under the Discovery Doctrine, the indigenous peoples retain an important interest in the land and only the discoverer can acquire title at some future date. Under caselaw, in order to establish aboriginal title, the tribe must have occupied the land at issue for time immemorial to the exclusion of other groups. *Santa Fe*, 314 US at 346. Furthermore, the tribe must demonstrate the title was not extinguished by an action clearly showing intent of Congress, who has the sole power to extinguish title to the land as an act of the Sovereign. *Id.* at 354.

A. The Cush-Hook Nation occupied the land at issue since time immemorial and as a cultural center to the exclusion of other groups.

The land at issue was occupied by the Cush-Hook tribe and their sole occupancy is clearly established by detailed historical material. In order to establish occupancy of land to the exclusion of other groups for a sufficient length of time, there must be a defined territory that was exclusively occupied by the tribe, *Santa Fe* 314 at 345, and for a long enough period that the area was fully developed as a “domestic territory,” *Uintah Ute Indians of Utah v. US*, 28 Fed. Cl. 768, 785 (1993) citing *Confederated Tribes*, 177 Ct. Cl. at 194. Here, the Cush-Hooks occupied and used the land for cultural and political purposes as is well documented by William Clark of the Lewis & Clark expedition. Clark’s recorded interactions with the Cush-Hook tribe show their well-established cultural practices, and longstanding established community. Specifically, Clark drew sketches of the fully functioning villages and the longhouses, and his ethnographic materials documented a fully functioning governmental structure, religious ceremonies, and further practices displaying their ties to the land and use of the resources. The Multnomah Indians who resided nearby introduced Clark to the chief

by displaying peace signs, evidencing that the tribes were separate entities with separate territories, and that formalities were required for entrance to enter the Cush-hook's village. These recordings date back to 1806, and the establishment of the village and the tribal practices precede Clark's introduction to the area, demonstrating the deep seeded historical roots of the Cush-Hook dominion over the land in question. The ties and dominion of the Cush-Hooks to the land at issue clearly indicating their aboriginal title.

B. The aboriginal title to the land at issue was never extinguished by an action reflecting the clear intent of congress.

Congress refused to ratify the treaty between the Cush-Hook tribe and Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, and thus there was no clear intent to extinguish the aboriginal title of the tribe. While the ability of Congress to extinguish aboriginal title is established, "...an extinguishment cannot be lightly implied in view of the avowed solicitude of the federal government for the welfare of its Indian wards." *Santa Fe*, 314 US at 354. The treaty would have resulted in a sale of the land at issue for rights to another piece of land, but because the treaty was not ratified, as established by the lower court, the transaction did not result in an extinguishment under *Johnson v. McIntosh*.

Additionally, the Cush-Hook nation was never compensated for their land or given title to the area to which they were removed and currently occupy. While it is likely that ratification of the treaty would have resulted in extinguishment of the aboriginal title, Congress' refusal to approve the transaction makes the transfer void. Furthermore, any ambiguity as to extinguishment will be interpreted in a light more favorable to the Indians. *Santa Fe*, 314 US at 354.

Furthering the illegitimacy of the transfer of land and extinguishment of title was the

fact that the tribe was not compensated as promised. While payment for a taking under the 5th Amendment of the Constitution of the United States is not required due to the nature of the property interest in aboriginal title, See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), here a taking is not at issue but rather a treaty that Congress refused to ratify.

Furthermore, subsequent cases have put into question the soundness of the reasoning of the *Tee-Hit-Ton Court*. See Felix S. Cohen, Handbook on Federal Indian Law, 15.09(1)(d) (2012).¹ Additionally, caselaw supports compensation for Indian land acquired by the federal government. See *United States v. Creek Nation*, 295 U.S. 103, (1935), finding that the government's appropriation of land for its own purposes would be an abuse of its responsibility as a guardian to the tribe. See also, *United States v. Sioux*, 448 US 371 (1980), holding that Congress should make a good faith effort to compensate for the value of the land in the abrogation of a treaty. Non-payment for the land at issue reaffirms the nullity of the treaty between the Cush-Hooks and Anson Dart.

The State may argue that if the treaty was not an extinguishment, the Oregon Donation Land Act of 1850 served to extinguish title. The Donation Land Act allowed settlers to obtain fee simple title to Oregon territory land, provided that they lived on and cultivated the land for four years. The language of the act does not demonstrate the clear Congressional intent required to extinguish title as there is absolutely no mention in the Act of Indian lands or the appropriation thereof. Additionally, the enactment of the act does not establish the clear intent of Congress to extinguish title, as preparation for white settlement has been found to be an insufficient means of extinguishment. See *Santa Fe*, 314 U.S. 339.

¹ See also Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga.L. Rev. 481 (1994), noting that the reasoning in *Tee-Hit-Ton* is comparable to that of *Dred Scott*.

Furthermore, The Organic Act of 1848, Section 1, preceding the Oregon Donation Land Act of 1850, stated that the rights to the property interests of Indians were not precluded “so long as such rights shall remain un-extinguished by *treaty* between the United States and such Indians.” Robert J. Miller, *Native America, Discovered and Conquered*, 158 (Praeger Publishers 2006), *emphasis added*.² Therefore the Organic Act proves there could be no extinguishment of aboriginal title except by treaty. The Organic Act explicitly recognized the tribal rights to the land. The fact that Indian land in the Oregon Territory was explicitly accounted for and addressed in the Organic Act and that extinguishment thereof must be accomplished through treaty, strongly suggests that the Oregon Donation Land Act could not have been intended as an extinguishment in itself. Here, the lower court found that the title to the land at issue, granted to Joe and Elsie Meek under the Act was void ab initio.

Additionally, the court found that Congress improperly described all the land in the Oregon territory as public lands of the United States. This Court should uphold these findings of the lower court because it is clear the land at issue was not public and therefore could not have been granted to the Meeks, as there was no extinguishment under the Donation Land Act.

Because the aboriginal title was not extinguished, it was improper to categorize the lands as public. As the Organic Act shows, the only method of extinguishment would have been by treaty as stated in the language of the Act itself. Subsequent sale of the land by the Meek’s descendants to the state of Oregon was therefore also void, as was determined by the lower court. It follows that because the title was not extinguished by any of the actions addressed above, the Cush-Hooks retain aboriginal title to the land at issue, as was

² Robert Miller, the author of *Native America, Discovered and Conquered*, suggests that the government would have had to purchase the title to the land to extinguish title. Miller, *Supra* at 158.

appropriately determined by the lower court and affirmed by the Oregon Court of Appeals. Furthermore, the Meeks did not live on the land for more than two years and did not cultivate the land, thus falling short of the requirements of the Act.

C. This Court should give weight to international law regarding the rights of indigenous peoples under the United Nations Declaration of the Rights of Indigenous peoples, and uphold the lower court’s ruling that the Cush-Hooks retain aboriginal title to the land at issue.

The United Nations Declaration on the Rights of Indigenous Peoples should be adhered to by this Court because of its assertion of internationally recognized rights of indigenous peoples to their land, in upholding the lower court’s finding of aboriginal title. The United Nations Declaration of the Rights of Indigenous Peoples is an international instrument and thus not binding. The Declaration, however should arguably be binding as international customary law because the principles set forth are internationally recognized rights including property rights and increasing recognition of the importance of the sovereignty of indigenous peoples. Robert T. Anderson et al, *American Indian Law Cases and Commentary*, 903 (2010). This is especially relevant in the context of the “Self-Determination” era, the current policy of the United States government towards Indians, which extends more meaningful rights to tribes and the power of self-governance and control over their land. Beginning in the 1960’s and through the present, the “Self-Determination” policy of the Federal Government promotes establishing greater tribal control over their people and affairs. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 *UCLA L. Rev.* 535 (1975).

Even if the United Nations Declaration on the Rights of Indigenous Peoples is not binding international law, but rather an international instrument, the adoption of this

document by the United States arguably signifies intent to abide by the principles set forth. Additionally, these types of international documents may have moral, if not binding implications. Anderson, *Supra* at 902.

The United Nations Declaration on the Rights of Indigenous Peoples sets forth agreed upon rights of indigenous peoples to their land, relevant to upholding the lower court's ruling on the Cush-Hooks title. Specifically, The United Nations Declaration on the Rights of Indigenous Peoples, Article 10 recognizes the right to fair compensation of land, and with the option to return to ancestral land, stating, "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and where possible, with the option of return." The Cush-Hooks were never compensated for their land or given title to the mountainous area where they currently reside, in violation of this declaration. Thus, this Court should uphold the lower court's finding of the Cush-Hooks aboriginal title to the land at issue in recognition of this international declaration and the United States' affirmed support of its contents.

Additionally, the United Nations Declaration on the Rights of Indigenous Peoples, Article 26, Sections 1-3, recognize the right to lands traditionally owned or occupied, and the right to use and develop the land. Section 1 specifically states, "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." The Cush-Hooks have rights to the land at issue because of their traditional occupancy and use of the land, and their right to the land should be upheld under domestic and international law.

II. This Court should find that Oregon has no criminal jurisdiction to control the sacred carving tied to Captain's ancestors because it is contrary to property law and to domestic and international policy.

This court should overrule the finding of the lower court of criminal jurisdiction over Captain for his action to protect a culturally significant item because the carving was located on land for which the Cush-Hooks have aboriginal title. Aboriginal title is a strong property interest, and tribes should be able to control cultural items on their land under the common law of property and the value of these items recognized in the United Nations Declaration on the Rights of Indigenous Peoples.

A. The state of Oregon improperly exercised criminal jurisdiction over Captain when he sought to protect a cultural artifact traced back to his ancestors on land to which the Cush-Hooks retain aboriginal title.

State criminal jurisdiction is improper in this situation because of the nature of the object at issue, and the land on which it is located. As discussed above, aboriginal title is as “sacred as fee simple” under *Mitchel v. United States*. 34 U.S. 711, 746 (1835).³ The lower court correctly recognized the nature of the property interest finding that Captain has a right to occupy and use the resources on the land without regulation. It follows that items on the land are also a property interest of the tribe and may also be considered personal property of Captain.⁴ Captain obtained the carving in order to protect it in the interest of himself and his

³ In his article, “*The Doctrine of Discovery and the Elusive Definition of Indian Title*,” Blake Watson discusses the view of some scholars at the Lewis & Clark Law Review Spring Symposium on April 15, 2011, including those of Michael Blumm and Tim Coulter that aboriginal title includes all ownership rights, with the limitation that the land may only be transferred to the discovering government, identified as the “limited owner” concept of aboriginal title. 15 Lewis & Clark L. Rev. 995, 1009 (2011).

⁴ Robert Miller, in his article *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, points out the common misunderstanding that while most tribal land was held communally, there was some private property recognized by all tribes. 80 Or. L. Rev. 757, 768 (2001). Miller states that, “All Indian tribes also recognized various forms of private property other than land. In an early form of what is today called intellectual property, copyright and trademark law, the Makah and other tribal families owned the sole rights to use the carvings on their houses, dances, marriage ceremonies, names, songs, medicines, masks and rituals. Similarly, individuals in the Tlingit Tribe privately owned their totem pole symbols.” *Id.* at 773.

tribe. The state had failed to protect these sacred objects and vandals had defaced many images without penalty. Captain sought only to preserve pieces of his tribes property. It should be noted by the Court, that the implications of Captain's prosecution for protecting his tribe's property, largely goes against the intent of the Oregon statutes, where artifacts referenced in the statute are forfeited to the tribe that they are associated with. Or. Rev. Stat. § 358.924.

Congress has expressed concern for the treatment of Indian cultural items in the Native American Graves Protection and Repatriation Act (NAGPRA), which requires certain institutions and federal agencies to repatriate cultural items to the lineal descendants of the items or alternatively the tribes to which they are associated. 25 U.S.C. 3001 et seq. While the application of this law is limited to federally funded land, it demonstrates Congress' intent that cultural items should be deemed as property of the tribes and properly restored to their owners. Therefore, this Court should recognize this important policy consideration when assessing the appropriateness of the criminal jurisdiction and the enforcement against Captain in this case.

B. This Court should find that the exercise of state criminal jurisdiction over Captain for protection of an important cultural and historical item is improper under international law.

Two sections of the United Nations Declaration on the Rights of Indigenous Peoples strongly indicated that Captain should have the right to maintain and protect the important object at issue here. The declaration clearly identifies the importance of these rights and mandates the adherence to these principles. The United Nations Declaration on the Rights of Indigenous Peoples, Article 11, Section 1 states:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect, and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artifacts, designs, ceremonies, technologies, and visual and performing arts and literature.

Here, Captain sought to protect an important cultural object, subject to present and future vandalism, and intended to return the item to the Cush-Hooks in order for it to be properly cared for by the his tribe, to which it belongs. His action to protect this property should be honored by this international declaration, and state criminal prosecution is inappropriate. Additionally, The Declaration in Article 12, Section 1, further states,

Indigenous peoples have the right to manifest, practice, and develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

This Article of the declaration indicates the importance of preserving and maintaining the integrity of cultural sights and objects, and indicates the ability of indigenous peoples to further this objective in order to pass along their practices to future generations. Again, the state criminal prosecution of Captain was improper under international law, which clearly indicates the rights Captain exercised here.

III. The state of Oregon has no criminal jurisdiction under statute to control the uses of and protect archaeological, historical, and cultural objects on the land in question because Public Law 280 applies.

If this Court does not recognize a property interest of Captain in the items or land, or the application of the United Nations Declaration of the Rights of Indigenous Peoples, and in the alternative find that the Oregon Statutes apply, Public Law 280 controls in Oregon, and the state criminal jurisdiction should be interpreted narrowly in accordance with caselaw and policy considerations.

In 1953, Congress passed Public Law 280 which withdrew federal criminal jurisdiction on reservations in certain states, including Oregon and granted state's criminal and civil jurisdiction in certain circumstances. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in Indian Country*, 44 UCLA L. Rev. 1405, 1406 (1997). This law did not require or consider approval of the tribes. *Id.* Congress later amended the law to require consent for states where Public Law 280 is not mandatory in order to assume jurisdiction, but this did not affect Oregon where jurisdiction is required. *Id.* at 1407.

Because the Cush-Hooks retain aboriginal title to the land in Kelley Point Park, it should be considered Indian country and thus Public Law 280 applies. Although the Cush-Hooks are not recognized by the Federal government or the state, this is not determinative of their rights and power as a tribe. The Court has recognized certain rights of unrecognized tribes, taking into account factors such as the maintenance of a distinct community, unique ethnicity, territorial boundaries, and leadership. *See United States v. Washington*, 641 F.2d 1368 (9th Cir.1981), holding that federal recognition was not required in order to exercise vested treaty rights; *see also Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*,

315 Mont. 510, 68 P.3d 814 (2003), finding that an unrecognized tribe had immunity from state tort suits, as are federally recognized tribes. The Cush-Hooks clearly demonstrate historic cohesiveness and autonomy dating back centuries, as noted by Clark's documentation and presentation of President Thomas Jefferson's peace medal. The Cush-Hooks currently still reside as an entity in Oregon as the lower court recognized, despite no formal recognition by the federal government or the state of Oregon.

Because the Cush-Hooks retain a tribal identity and aboriginal title to the land at issue, Public Law 280 should apply. While 280 grants criminal jurisdiction to the state of Oregon in Indian Country, caselaw mandates limits on state jurisdiction with an eye toward recognizing tribal sovereignty.

A. The state of Oregon does not have criminal jurisdiction in this case under Public Law 280 because the Oregon statutes are regulatory and therefore not truly criminal as required under caselaw.

The Oregon Revised Statutes that Captain is being charged under for damaging an archeological, cultural, and historical object are regulatory in nature and thus do not allow for state criminal jurisdiction. *California v. Cabazon Band of Mission Indians* holds, "...if the intent of a state law is generally to prohibit certain conduct it falls within Public Law 280's grant of jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation." 480 U.S. 202, 208 (1987). This case expanded on *Bryan v. Itasca County*, which differentiated between and adjudicatory and regulatory civil jurisdiction, holding that Congress' grant of civil jurisdiction over the tribes was limited. *See Bryan*, 426 U.S. 373 (1976). The court also explicitly stated that the state civil jurisdiction

should not result in the destruction of tribal governments. *Id.* at 388. In *Cabazon's* extension of *Bryan*, the court applied this important principle and made clear that a state may not impose a criminal penalty to a civil law in order to assert criminal jurisdiction over a tribe under Public Law 280. *Cabazon*, 480 U.S. at 208.

Applying the *Cabazon* test to this case, the Oregon statute is regulatory rather than criminal in nature because the conduct at issue is not generally prohibited but rather regulated by the state through procedure and the issuances of permits. Or. Rev. Stat. 358.920. Just like in *Cabazon* where the state law at issue was only intended to *regulate* gambling in California and not to prohibit it altogether, here the Oregon laws simply regulates the means of obtaining archeologically and historically important items and does not prohibit the practice altogether. For example, the Oregon statute regulating archeological items and sites indicates that an item may be obtained legally through a series of steps laid out in statute and in consideration of academic interests and availability to the public, often requiring approval from the appropriate Indian tribe. ORS 390.235. Thus, the obtainment of historical and archeological items is not prohibited altogether as required by caselaw, but rather regulatory with a criminal penalty for non-compliance.

B. The Court should find state criminal jurisdiction against Captain improper because it is against public policy to severely undercut tribal self-governance on tribal land regarding tribal property.

In the landmark Supreme Court case *Worcester v. Georgia*, the Court recognized the sovereign status of tribes, affirming their political independence from states. *See* 31 U.S. 515 (1832). States therefore could not regulate on Indian lands. *Id.* Although tribal sovereignty has changed throughout time based on the United States' policies towards the Indian tribes,

the more recent international and domestic laws promote the rights of tribal self-governance. As addressed above, the “Self-Determination” policy of the Federal Government promotes establishing greater tribal control over their people and affairs. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975). The “Self-Determination” era is in conflict with Public Law 280 and the goals of the United States government to strengthen the rights of the tribes. The foremost authority on the law has addressed this conundrum in her work stating, “The mere fact that Congress did not declare Public Law 280 an obstacle or seek to repeal it, supports an argument that Congress itself did not interpret Public Law 280 to divest tribes of their criminal and civil jurisdiction.” *Id.* at 1688. Taking into account the strong historical recognition of tribal sovereignty and the current policy of the United States government towards Indian tribes promoting tribal autonomy, the court should find that Oregon improperly exercised criminal jurisdiction over Captain.

The Court has limited the breadth of Public Law 280 in order to preclude state infringement on tribal sovereignty, recognizing the potential for state abuse. *See Cabazon*, 480 U.S. 202; *see also Bryan*, 426 U.S. 373. Additionally, when the law was passed, it prompted outrage amongst the tribes in the states where it was mandatory, since it severely undercut their ability to regulate their own affairs and state jurisdiction was allowed without tribal consent. Goldberg-Ambrose, 44 UCLA L. Rev. at 1407. This outrage prompted the later amendment requiring the consent of the tribes in states where criminal jurisdiction was not mandatorily assumed by the states. *Id.* This Court should follow the intent of Congress and apply a narrow interpretation as the court precedent demonstrates.

C. International Law supports the importance of indigenous sovereignty and this Court should give weight to this strongly endorsed policy when considering state jurisdiction in this case.

This Court should consider international law when considering the propriety of state jurisdiction over Captain for protecting a cultural item connected to his tribal ancestry.

International law clearly recognizes the importance of tribal sovereignty, as articulated in The United Nations Declaration on the Rights of Indigenous People, Article 5, which states, “Indigenous peoples have the rights to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state.” The importance of Sovereignty of indigenous peoples in international law should be fully considered by the Court as it applies to the Cush-Hooks and find state jurisdiction over Captain regarding a Cush-Hook artifact on tribal land improper.

CONCLUSION

Kelley Point Park is the site of what once was the cultural and political center of the Cush-Hook Nation. The lower court correctly held that the tribe’s right to this land should be honored and was not extinguished by a clear act of Congress. The court should uphold the Cush-Hook’s aboriginal title to this land under the overwhelming precedent of case law and international recognition of indigenous land rights. This Court however, should overturn the erroneous ruling that stripped Captain and the tribe of their rights to a culturally important artifact, and should find that the state of Oregon mistakenly asserted criminal jurisdiction over Captain.