No. 11-0274

United States Supreme Court

State of Oregon

Appellant/Petitioner,

v.

Thomas Captain

Appellee/Respondent

and Cross-Petitioner.

On Appeal From the Oregon Supreme Court

Brief for Respondent and Cross-Petitioner

Team No. 9

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QUESTIONS PRESENTED

I. WHETHER THE CUSH-HOOK NATION OWNS THE ABORGININAL TITLE TO THE LAND IN KELLEY POINT PARK?

II. WHETHER OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION NOTWITHSTANDING ITS PURPORTED OWNERSHIP BY A NON-FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE?

STATEMENT OF THE CASE

A. Statement of Proceedings

This appeal stems from a dispute regarding the legality of a Cush-Hook citizen, Thomas Captain's right to cut down an archaeologically, culturally, and historically significant tree in order to restore and protect a tribal, cultural, and religious symbol on Cush-Hook aboriginal land. While traveling to return the image to the Nation, state troopers seized the image and the State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. § 358.905-358.961(archaeological sites) and Or. Rev. Stat. § 390.235-390.240 (historical materials).

After receiving the charges, Captain consented to a bench trial, held by the Oregon Circuit Court for the County of Multnomah. The court found the Cush-Hook Nation held aboriginal title to the land within the Park and, therefore, Thomas Captain was not guilty for

trespassing or for cutting timber without a state permit. Acknowledging that Public Law 280 abrogates federal criminal jurisdiction over Indian lands to the state, the court determined that the archaeological site and historical material laws “apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not.” R 4. Therefore, Captain was held guilty for violating Or. Rev. Stat. § 358-905-358.961 *et seq*. and § Or. Rev. Stat. 390.235-390.240 *et seq*. for damaging an archaeological site and a cultural and historical artifact, fining him $250.

In response to the rulings, both the State and Thomas Captain appealed the decision and the Oregon Court of Appeals affirmed without writing an opinion. After the Oregon Supreme Court subsequently denied review, the State filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court.

B. Statement of Facts

Although the Cush-Hook people are currently located in the coastal mountain range of Oregon, the tree was housed in Kelley Point Park, an Oregon state park located on the Tribe’s aboriginal land. Cush-Hook Indians occupied the tribal area, including the park, since time immemorial. William Clark in the Lewis & Clark Journals dating back to 1806, recorded his interactions with the Cush-Hook headman, as well as the Nation’s governance, religion, cultural, burial traditions, housing, harvesting, fishing, and hunting practices on the land. In recognition of the Cush-Hook Nation’s desire to engage in political and commercial relations with the United States, Clark awarded the headman a peace medal from President Thomas Jefferson. R 1.

The tribe relocated 60 miles westward to a specific location in the foothills of the Oregon coast range of mountains, in exchange for compensation and non-monetary benefits including recognized ownership of the lands they moved to and tribal federal recognition. In 1853, after the tribe relocated, the U.S. Senate refused to ratify the Cush-Hook treaty, dismissing the promised compensation or benefits. Instead, the United States granted two settlers, Joe and Elsie Meek, fee simple title over Kelley Point Park under the Oregon Donation Land Act of 1850. Even though the Meek's had not met the statute's requirement to cultivate the land for four years, Oregon purchased the land in 1880 and created the current park. R 1-2.

Several of the trees in this park bear carved totem and religious symbols which remain of critical importance to the Cush-Hooks continuous practice of religion and culture. In 2011, Captain moved to the Park in order "to reassert his Nation's ownership of the land," and to protect the trees from vandals who have recently climbed the trees, to deface the images and in some cases, cut them off the tree to sell, without state prosecution.

STANDARD OF REVIEW

The United States Supreme Court has jurisdiction to review state Supreme Court decisions when a federal question arises. These actions challenge the validity of state interpretation of federal law as applied on Indian land. The "Supreme Court by writ of certiorari" may review decision of the highest court of any state, "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to…laws of the United States." 28 U.S.C.A. § 1257(a) (1988).

As this case presents a federal question related to interpretation of federal law as applied to Indian land, it should be reviewed *de novo*. *National Farmers Union Ins. Companies v. Crow Tribe of Indians,* 471 U.S. 845, 852-853 (1985). Finally, while the questions of law shall be reviewed *de novo*, this Court must apply a clearly erroneous standard of review to the lower court's factual determinations.

SUMMARY OF ARGUMENT

The Cush-Hook Nation clearly holds aboriginal title to the lands at Kelley Point Park. The Tribe meets all of the requirements to establish a right to aboriginal title over the lands, including continuous and exclusive use and occupancy of the land. Further, no proper action has taken place that would work to extinguish the Cush-Hook's aboriginal title to the lands.

Longstanding Supreme Court precedent dictates that only the federal government, not the state or any individuals, may enter into treaties with Native American tribes. Furthermore, even when the federal government enters into such a treaty, the Senate must ratify it. The Senate never ratified the Anson Dart Treaty of 1850, in which the Cush-Hook agreed to move away from the lands at Kelley Point Park, and therefore, it was invalid and could not have extinguished the Tribe's aboriginal title to the lands. Additionally, the Court dictated rules of construction for treatises with Native American tribes. Any ambiguity in a treaty must be interpreted in favor of the Native American tribe. Therefore, even if the treaty were valid, the rules of interpretation counsel against finding extinguishment of the Cush-Hook's aboriginal title to the lands at Kelley Point Park.

The Oregon Donation Land Act of 1850 also did not extinguish the Cush-Hook aboriginal title to the lands at Kelley Point Park. Although passed by Congress, Supreme

Court precedent holds that any act of Congress intended to extinguish a tribe's aboriginal title must be clear and exact in its intention. Therefore, the broad language of the Act, which does not mention the Cush-Hook or their lands, could not have extinguished this title. Furthermore, the Oregon Donation Land Act improperly ceded the lands at Kelley Point Park to Joe and Elise Meek while the Cush-Hook still held aboriginal title to the lands, the grant was void *ab initio* and no title was ever transferred to the Meeks and therefore to the State of Oregon.

Ignoring its recognition of the Cush-Hook Nation, the United States negotiated in bad faith, pursuing control over the valuable Cush-Hook Nation farming lands through a broken treaty and subsequent false promises.

The United States and Cush-Hook Nation have concurrent jurisdiction over archaeological, cultural, and historical objects on the land in question. When Congress enacted Public Law 280, the federal government did not transfer criminal jurisdiction over the use and protection of archaeological, cultural, and historical objects. Extending the scope of Public Law 280 to cover how an Indian tribe chooses to use and protect archaeological, cultural, and historical objects is a matter of first impression and would set a detrimental precedent with the effect of weakening the sovereignty of tribes across Indian Country. Even if this Court extends the scope of Public Law 280 to include the subject matter at issue, Oregon still does not possess criminal jurisdiction to control and protect such objects on the land in question. Or. Rev. Stat. § 358.905-358.961 *et seq*. and Or. Rev. Stat. § 390.235-390.240 *et seq*. violate the Native American Graves Protection and Repatriation Act by criminalizing the appellant and the Cush-Hook Nation's rights to use objects on the land.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN ITS CONCLUSION THAT THE CUSH-HOOK NATION HOLDS ABORIGINAL TITLE TO THE LANDS AT KELLEY POINT PARK.

This case concerns the ability of a tribe to maintain a connection with both its historic and religious roots through its ancestral homelands. This case has implications for not only the Cush-Hook Nation, but also potentially for the many other tribes of the Pacific Northwest who may falsely believe that they have lost rights to their ancestral homelands when many tribes were forced to relocate over a century ago. The facts of this case make clear, and the Oregon Supreme Court was correct in holding that the Cush-Hook Nation has aboriginal title to the lands at Kelley Point Park. Since the United States Supreme Court's ruling in *Johnson v. McIntosh* in 1823, the Court has time and time again underscored the importance of the "right of occupancy" or aboriginal title of Native American tribes to their ancestral homelands. 21 U.S. (8 Wheat.) 543 (1823); *Worchester v. Georgia*, 6 Pet. (31 U.S.) 515 at 559 (1832), ("the Indian Nation has always been considered…as the undisputed possessors of the soil from time immemorial.") Declaring that the Native American tribes "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," the Supreme Court in *Johnson v. McIntosh* demonstrated the long held understanding that, even while the federal government attempted to relocate thousands of tribes, respect still must be accorded to the connection between these tribes and the need to access to their ancestral homelands. *Id.*

In addition to highlighting the importance of the federal government's protection and respect for aboriginal titles and rights of occupancy, the Court in *Johnson v. McIntosh* also underscored the fact, and the law from the Trade and Intercourse Agreement of 1790, that it

is only the Federal Government, and not states or individuals that are allowed to enter into treaties with Native American tribes over land, or to extinguish aboriginal title either by "purchase or by conquest." *McIntosh,* 21 U.S at 587; *See Also United States v. Sante Fe Pacific Railroad* Co. 314 U.S. 339 at 345 (1941). The lower court in the case of Thomas Captain, therefore, correctly held that the Cush-Hook Nation held aboriginal title to the lands at Kelley Point Park, because the Federal Government never extinguished that title through either purchase or conquest. The Cush-Hook Nation satisfies all of the qualifications to hold aboriginal title over the Lands at Kelley Point Park, and the various historical events of the Anson Dart Treaty, the Oregon Donation Land Act, and the fee simple title of the Meeks never worked to properly extinguish the Cush Hook's title to the land at Kelley Point Park.

A. The Cush-Hook Tribe Meets All of the Requirements Needed to Establish Right to Aboriginal Title of the Lands at Kelley Point Park.

As a preliminary matter in assessing if the Cush-Hook hold aboriginal title to the lands at Kelley Point Park, it is important to note that the Cush-Hook fulfill all of the eligibility requirements to hold aboriginal title over these lands. Historically, in order to establish a right to aboriginal title over lands, a tribe must demonstrate that its ancestors had continuous and exclusive use and occupancy of the land in question. *Confederated Tribes of Warm Springs Reservation of Oregon v. United States,* 177 Ct. Cl. 184, 194 (1966). In order to establish that a tribe had exclusive use and occupancy of land, courts have traditionally looked toward the manner in which the tribe used and occupied the land. *U.S. v. Sante Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). The courts have found various activities sufficient to establish "use" and "occupation" of the land as long as that use was exclusive. *Mitchel v.*

United States, 9 Pet. (34 U.S.) 711 at 746 (1835). Such uses have included hunting and fishing, and the courts have even found nomadic tribes to have aboriginal title over lands used regularly as a part of the tribe's way of life. *Holden v. Joy,* 17 Wall. (84 U.S.) 211 at 243 (1872); *United States v. Seminole Indians*, 180 Ct. Cl. 375 at 383-87 (1967); *United States v. Kagama*, 118 U.S. 375 at 381 (1886); *See Also Confederated Tribes of Warm Springs Reservation of Oregon v. United States*, 130 Ct. Cl. 782 at 789 (1966).

Based upon the facts of this case, the Cush-Hook Nation clearly fulfills the requirements needed to establish a right to aboriginal title over the land at Kelley Point Park, as the record is replete with evidence of the Tribe's ancestors' continuous and exclusive use of the land in question. The record indicates that from "time immemorial," the Cush-Hook occupied the land in question, and also used the land to grow and harvest crops. R 1. Additionally, they used the land for resources exclusive to it, such as harvesting wild plants like Wapato and hunting and fishing. R 1. These types of activities easily fulfill the Supreme Court's requirements for both occupation and use of the land.

Furthermore, the Cush-Hook can also prove "continuous" occupancy of the land. The historical records of William Clark of the Lewis & Clark expedition contain written evidence that on April 5, 1806, William Clark met with the Cush-Hook people on the lands at Kelley Point Park (as indicated in his records by the Tribe's location in 1806 on land at the confluence of the Columbia and Willamette (then Multnomah) Rivers). R 1. Clark's records are thorough and include sketches of the longhouses, and observations of the religious, cultural, and burial traditions, as well as the Tribe's hunting and fishing practices. R 1. While Clark recorded these observations in 1806, the advanced tribal development of burial, housing, and hunting practices, indicate that the Tribe's way of life was integrated with the

land at Kelley Pointe Park, and therefore, the Cush-Hook had likely occupied the land for many decades if not centuries before Clark encountered them in 1806. Indeed, when Anson Dart met the Cush-Hook forty-four years later in 1850, they were still living on the land in Kelley Point Park. The Cush-Hook therefore clearly also fulfill the requirement of "continuous" occupation of the lands in question, as forty-four years of their occupancy is recorded in the historical records of William Clark and Anson Dart, and the Oregon Circuit Court for the County of Multnomah found as fact based upon expert witnesses in history, sociology, and anthropology that the Cush-Hook Nation occupied and used the land before the arrival of Euro-Americans. Finally, the Cush-Hook possession of a President Thomas Jefferson peace medal given to them by William Clark on his 1806 visit, further demonstrates that it was indeed the Cush-Hook that Clark recorded in his travel diaries, and that they were the Tribe he met on the Kelley Point Park land in 1806. R 1.

In addition to the Tribe's ability to prove continuous occupancy and use of the land at Kelley Point Park, the Cush-Hook can also prove that their use of the land was exclusive. In his 1806 journal, William Clark also recorded that a separate tribe, the Multnomah Indians had directed him to him the long houses and location of the Cush-Hook Tribe along the confluence of the Columbia and Willamette Rivers. It was indeed the Multnomah who escorted Clark to meet the Cush-Hook, and before venturing onto the Cush-Hook land, Clark recorded that the Multnomah made peace signs. R 1. The fact that the Multnomah made peace signs before entering the Kelley Point Park lands is strong evidence that the Cush-Hook had exclusive use over these lands, and that other tribes understood that they could enter these lands only upon permission. Thus, based upon the facts from the record, the Cush-Hook easily fulfill the requirements of continuous and exclusive use and occupancy of

the lands at Kelley Point Park and are therefore eligible to hold aboriginal title to those lands. *Id.*

B. The Cush-Hook Nation's Aboriginal Title to the Lands at Kelley Point Park was Never Extinguished.

The Cush-Hook Nation is clearly eligible to hold aboriginal title to the lands at Kelley Point Park, and the Tribe still holds this title because it was never extinguished. In *Johnson v. McIntosh*, the Supreme Court makes clear that only the Federal Government, and not the states, or individuals, which may extinguish aboriginal title to lands, and this may only be done by purchase or by conquest. 21 U.S. (8 Wheat.) 543, 587 (1823); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). The history and case law underscore the fact that it is only the Federal Government that can enter into agreements with Native American tribes over land or otherwise (for example in *Oneida Indian Nation v. Oneida County*, the Supreme Court in 1974 declared "…that federal law, treatises, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law"), and further, within the federal government, it is only the Senate which has final authority to approve such agreements. 414 U.S. 661, 667 (1974)). While under the First Trade and Intercourse Act of 1790 and in subsequent acts, it was clearly dictated that Indian lands could only be transferred "under the authority of the United States," any treaty must be ratified by two-thirds of the Senate. Thus, while the executive branch has the power to initiate a treaty with Native American tribes, any treaties un-ratified by the senate are invalid. 1 Stat. 137 (1790); *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed. Cir. 2000). Finally, while Congress can extinguish aboriginal title to certain lands by passing acts, historically, such extinguishment of title will not be presumed lightly and must be clearly stated in the act. Therefore, while

both the Anson Dart Treaty of 1850 and the Oregon Donation Land Act of 1850 may appear to have stripped the Cush-Hook of aboriginal title to the lands at Kelley Point Park, neither effectively did so. The lack of senatorial ratification rendered the Anson Dart Treaty invalid, and the Oregon Donation Land Act was not passed in order to strip the Cush-Hook of Aboriginal Title to the lands at Kelley Point Park.

i. The Anson Dart Treaty did not Extinguish Cush-Hook ownership because it was never ratified by the Senate and was therefore forbidden under the First Trade and Intercourse Act of 1790.

The record indicates that in 1850, the Cush-Hook Nation signed a treaty with Anson Dart, the superintendant of Indian Affairs for the Oregon Territory, a federal official. R 1. Based upon the treaty, the Tribe agreed to relocate sixty miles westward to the foothills of the Oregon coast in order to make the lands at Kelley Point Park available for American settlers. R 1-2. The Cush-Hook agreed to relocate to a specific location in the foothills in return for promised compensation for their lands, as well as other benefits, including recognized ownership of the lands to which they had moved. However, in 1853, the U.S. Senate refused to ratify the treaty. R 2. Although the Cush-Hook remained on the coastal lands, likely due to the difficulty of relocating after having lived in on the land for three years during the 1850s, and complications of communication, the failure of the Senate to ratify the Anson Dart treaty rendered the treaty a nullity and, therefore, the Anson Dart Treaty never worked to extinguish the Cush-Hook's aboriginal title to the lands at Kelley Point Park.

While there are Supreme Court rulings that support the idea that acceptance of reservation lands by a tribe act to extinguish that tribe's aboriginal title to their ancestral lands, such holdings do not apply to the Cush-Hook Nation, as it is unclear that the coastal

lands were intended to be a permanent reservation, and most importantly, the senate did not ratify the treaty. *Menominee Indian Tribes v. Thompson*, 161 F. 3d 449, 462 (7th Cir. 1998). Without Senate ratification, the Treaty was rendered a nullity, and the Kelley Point Park lands were, therefore, never transferred from the Cush-Hook to the United States. Similar to the land in Oregon, there have been a number of cases ruled on in California in which executive officials entered into treatises with Native American tribes, however, a century later they were ruled to be legal nullities because the Senate never affirmed. *Id.* Furthermore, in *Sioux Tribe of Indians v. United States*, the Supreme Court also declared that, without Senate ratification, the President has no authority to convey or take lands from Native American tribes, stating, "The President Has no authority to convey any interest in public lands without a clear and definite delegation in an Act of Congress." 316 U.S. 317, 325 (1942). Thus, without Senate ratification, the Anson Dart Treaty of 1850 with the Cush-Hook Tribe was never valid under the Trade and Intercourse Act of 1790 which forbade individuals (such as Anson Dart who acted without the treaty authority vested in him by the Senate) from entering into agreements with Native American tribes, and, therefore, the Cush-Hook's aboriginal title to the lands at Kelley Point Park was never extinguished based upon this treaty. 1 Stat. 137 (1790).

ii. Even if the Anson Dart Treaty of 1850 was valid, rules of construction for Native American treaties require narrow construction of the treaty.

In addition to the fact the Anson Dart Treaty of 1850 was invalid and, therefore, could not have worked to extinguish the Cush-Hook's aboriginal title to the lands at Kelley Point Park, the laws of construction for Native American treatises also counsel against finding extinguishment of Cush-Hook aboriginal title. The Supreme Court has held that

treatises with Native American tribes are to be construed as they were understood by the representatives who participated in the negotiations at the time the agreement was reached. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)[1]. It is thus the duty of the federal government and the courts "to see that the terms of the treaty are to be carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives and council, and in the sprit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Id.*; *See Also*, *Kagama*, 118 U.S. at 384; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979).

In addition to construing the treatises as the tribal participants would have understood them, the Supreme Court has also declared that any ambiguities in a treaty with a Native American tribe are to be liberally construed and resolved in favor of the tribe, and that one must also look to the context and history surrounding the agreement, including looking "beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Carpenter v. Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930); *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 179 (1999); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

Thus, although the Anson Dart Treaty is not valid due to the lack of Senate ratification, even if aspects of the treaty were found to be valid, the rules of Native American treaty construction strongly counsel against finding the treaty to have extinguished the Cush-Hook Nation's aboriginal title to the lands at Kelley Point Park. For example, if following

[1] Canby, William. *Federal Indian Law in a Nutshell.* 5th ed. St. Paul, Minn: West Group, 2009.

the rule of construction of construing the treaty by the terms as they would have been understood by the tribal representatives of the time, the record suggests that the Cush-Hook understood the Anson Dart Treaty to have meant that the Tribe would receive compensation and title to the new coastal land in exchange for moving off of the Kelley Point Park land. Thus, if the treaty was agreed to based upon this understanding by the Cush-Hook, if this aspect of the treaty was not fulfilled because the Tribe never received compensation, then the entire treaty would become invalid as Anson Dart failed to fulfill the agreement. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Further, the treaty may have been ambiguous as to if it were meant to be a permanent relocation for the Cush-Hook tribe, and construing the ambiguity liberally and looking to the historical contexts of the negotiation, suggest that it was not intended to extinguish all Cush-Hook title to the lands at Kelley Point Park. For example, the record indicates that the Cush-Hook have been unable to thrive in the coastal location and were only able to "eke out a bare existence," suggesting that their move away from the river banks and lands where they were expert in gathering and hunting food was only intended to be a temporary move while the American settlers adapted to life in Oregon. R 2. Additionally, the record indicates that beyond relying on the local fish and game near Kelley Point Park, the land has also held religious significances for the Cush-Hook for many generations (as also indicated by the carvings into trees on the land which Thomas Captain tried to preserve). R 2. The Tribe's religious attachment to the land is also an important historical and contextual fact to consider when interpreting the Anson Dart Treaty, and, construed in favor of the Cush-Hook, it suggests that, while they may have intended to agree to live elsewhere, they likely did not agree to relinquish all rights to visit and worship upon the lands at Kelley Point Park.

Therefore, based upon the Supreme Court dictated rules of construction for Native American Treatises, even if the Anson Dart Treaty is valid, the rules of construction counsel toward construing the Treaty as not having extinguished the Cush-Hook's aboriginal title to the lands at Kelley Point Park.

iii. The Oregon Donation Land Act did not extinguish Cush-Hook aboriginal title to the lands at Kelley Point Park.

Just as the Anson Dart Treaty of 1850 did not extinguish the Cush-Hook Nation's aboriginal title to the lands at Kelley Point Park, the passage of the Oregon Donation Land Act in 1850 also did not work to extinguish the Tribe's title. While it was passed by Congress, the Oregon Donation Land Act did not clearly extinguish the Cush-Hook's aboriginal title and, therefore, based upon Supreme Court precedent, it cannot be interpreted to have done so. It is clear that the Federal Government can extinguish aboriginal title should it decide to do so by purchase or by a taking, however, such a taking "will not be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian Wards." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *United States v. Sante Fe Pacific R. Co*., 314 U.S. 339, 354, (1941). In *United States v. Sante Fe Pacific Railway Company*, the Supreme Court clarified the importance of a clear intention and statement by Congress in order to extinguish a tribe's title to land, explaining in that particular case:

> "We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais…we find no indication that Congress by creating the reservation intended to extinguish all of the rights which the Walapais had in their ancestral home." *Id.*

Further, in *Rhode Island v. Greene,* the First Circuit clarified that any attempt by the Federal Government to extinguish aboriginal title must be clearly stated; "It is well established that courts will not infer congressional intent to extinguish Indian claims to aboriginal rights to land absent plain and unambiguous statutory language making such an extinguishment." 398 F.3d 45, 47 (1st Cir. 2005). Thus, similar to the rules of construction of Native American treatises discussed supra, Congressional Acts regarding Native Americans must also be construed liberally, and in the favor of the Native American tribes. *Choate v. Trapp*, 224 U.S. 665 (1912), ("doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation and dependent wholly upon its protection and good faith.").

Therefore, the sweeping language of the Oregon Donation Land Act that all of the lands of Oregon in 1850 were public lands free to be given to American settlers, was not specific or clear enough to properly extinguish Cush-Hook title to the lands at Kelley Point Park. Neither the Tribe nor the lands in question were explicitly referred to in the Oregon Donation Land Act, and, as the Court has noted, "Congressional silence does not delegate the right to create, or acquiesce in the creation of permanent rights." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947). Therefore, because of the lack of a clear statement regarding any specific intent to extinguish the Cush-Hook's aboriginal title to the lands at Kelley Point Park, which they still clearly owned as of 1850, the Oregon Donation Land Act cannot be interpreted to have extinguished aboriginal title to the lands at Kelley Point Park. Additionally, the rules of statutory construction for congressional acts regarding Native American tribes dictate that the failure of the Oregon Donation Land Act to

specifically mention the Cush-Hook or their lands, cannot be interpreted to be a blanket statement simply extinguish all Native American titles in Oregon in 1850.

iv. The Meeks did not own proper title to the land at Kelley Point Park; therefore the sale to the state of Oregon was void ab initio.

Finally, because the Oregon Donation Land Act did not work to extinguish the Cush-Hook's aboriginal title over the lands at Kelley Point Park, the granting of the lands to the Meeks in 1850, and the Meeks's subsequent sale of the land to the State of Oregon in 1880 was not valid, did not sever the Cush-Hook's title. As clarified supra, because of the broad language of the Oregon Donation Land Act, it did not extinguish the Cush-Hook title to the lands at Kelley Point Park, and, as found as a conclusion of law by the Oregon Circuit Court of Multnomah, Congress erred in the Act when it described all the lands in the Oregon territory as public lands of the United States. As the Cush-Hook still held aboriginal title to the lands at Kelley Point Park when they were granted to Joe and Elise Meek in 1850, the Meeks could not have held fee title to the land. The courts have held that if aboriginal title to a piece of land is not extinguished, any conveyance of fee to that land to a purchaser (or donee in the case of the Meeks), transfers only a reversion to the land that matures when aboriginal title to the land ends. *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989). Thus, because the Cush-Hook still held aboriginal title to the lands at Kelley Point Park in 1850, the greatest possible right that the Meeks could have owned, and therefore could have sold to the State of Oregon, was a reversionary title to the lands once the Cush-Hook's aboriginal title is extinguished.

Even this right to a reversionary title is doubtful, however, as the record indicates and the court found as fact, that by 1850 the Meeks had not met the requirements to be granted

fee simple title under the Oregon Donation Land Act of having "resided upon and cultivated the [land] for four consecutive years," as the Meeks never cultivated the land, nor lived upon it for the required four years. R 2; 9 Stat. 496-500 (1850). Therefore, because they did not fulfill the requirements of eligibility for the Oregon Land Donation Act of 1850, the fee simple title was improperly transferred to them and was therefore not void *ab initio*. Thus, because the transfer of fee under the Act was invalid, the Meeks and therefore the State of Oregon do not own a right of reversion in the lands at Kelley Point Park either, as no valid transfer of title was ever granted. Therefore, the Cush-Hook still hold aboriginal title to the lands at Kelley Point Park, not subsequent to any right of reversion.

II. OREGON LACKS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION NOTWITHSTANDING ITS PURPORTED OWNERSHIP BY A NON-FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE.

Oregon lacks criminal jurisdiction to control the uses of, and to protect archaeological, cultural, and historical objects on the land in question for two reasons. First, Public Law 83-280 (P.L. 280), the federal statute, which grants Oregon criminal jurisdiction over Indians on Indian land within the state, does not extend to the subject matter at issue. Second, even if P.L. 280 does include such objects, the land in question is within Cush-Hook aboriginal lands and the federal Native American Graves Protection and Repatriation Act (NAGPRA) limits the state's ability to regulate sacred objects and objects of cultural patrimony. Oregon's archaeological, cultural, and historical laws impermissibly infringe on the Cush-Hook's ability to access and use sacred objects under tribal and federal law. In order to prevent further state infringement on the federal government's trust responsibility to

tribes and their sovereignty, P.L. 280 must be narrowly interpreted. This court should reverse the lower court's holding that respondent was in violation of Or. Rev. Stat. § 905-358.961 *et seq*. and Or. Rev. Stat. § 390.235-390.240 *et seq*. for damaging an archaeological site and a cultural and historical artifact because his actions were permissible under Cush-Hook tribal law and custom.

A. P.L. 280, Does Not Authorize Enforcement of Statutes Controlling the Use and Protection of Archaeological, Historical, and Cultural Objects, Because Such Regulations are a Matter of Intratribal Affairs.

States have never possessed complete criminal jurisdiction over sovereign tribal functions and the scope of P.L. 280 should be narrowly interpreted in line with Congress' intent to uphold the federal government's relationship with tribes as quasi-sovereign nations. Absent explicit delegation from Congress, states lack criminal jurisdiction over Indian land because Indian tribes "hold and occupy [reservations] with the assent of the United States, and under their authority." *Oliphant v. Suquamish Indian Trib*e, 435 U.S. 191, 208-209 (1978); *United States v. Rogers*, 45 U.S. 567, 572 (1846). Indian tribes "retain elements of 'quasi-sovereign' authority," which precludes them from total jurisdiction by the states in which they reside. *Cherokee Nation v. Georgia,* 5 U.S. 1, 15 (1831); *Oliphant*, 435 U.S. at 208. Despite ceding their lands to the United States, the federal government recognized Indian tribes as holding a unique status and respected their ability to exercise tribal governance over internal affairs between tribal members. In light of the legislative history, this court previously held that rather than prescribing an expansive reading of the statute, the scope should be narrowly construed. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 385-86 (1976).

i. P.L. 280 limits Oregon criminal jurisdiction over "matters of lawlessness."

P.L. 280 expressly abrogated federal criminal jurisdiction to six states. Congress granted Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin jurisdiction over Indians on Indian lands without the consent of the Tribes within each state. 18 U.S.C.A. § 1162(a) (2010). The specific wording of the statute grants states "jurisdiction over offenses committed by or against Indians," and provides "the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." *Id.* Unlike the "mandatory states" listed in the original provisions, the 1968 amendments empowered additional states with the option to exercise civil and criminal jurisdiction with the consent of tribes.[2]

The Indian Commerce Clause vests exclusive authority over Indian affairs in the federal government. U.S. Const. art. I, § 8, cl. 3. The United States' policy to protect tribal territory and the tribes' authority to govern within it is reflected in legislation and numerous treaties and agreements. In *Williams v. Lee*, this Court considered whether state action superseded the affairs of reservation Indians and reasoned that, "essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.*, 400 U.S. 423, 426-27 (1971); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (*citing Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885)). Time and time again, federal statutes have been enacted to preserve and protect Indian tribal property." *Chilkat Indian Village v. Johnson,* 870 F.2d 1469, 1478 (1989); *See*, e*.g.,* 18 U.S.C.A. §1163 (1996) (criminal sanctions for the theft or embezzlement of Indian tribal property); 16

[2] Carole Goldberg and Duane Champagne*, Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, vi, November 1, 2007.

U.S.C.A. § 470aa (1979) (protection of archaeological resources removed from tribal lands). Rather than embracing a broad P.L. 280 scope, this court should limit state encroachment on the Cush-Hook Nation's ability to define their own, "government structure, culture, and source of sovereignty" with respect to objects of cultural and religious importance. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

Congress' primary purpose in extending jurisdiction of states to Indian reservations was to address the "problem of lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement." *Bryan*, 426 U.S. 373. When issues of tribal and state justification conflict, Congress has weighed in favor of tribal self-government and tribal court processes to address community safety issues in Indian country, rather than imposing state mechanisms. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 Regent U. L. Rev. 139, 170-175 (2010).

A review of the P.L. 280 legislative history is filled with members of Congress advocating the enactment of the law with major crime goals in mind. Language like, "cases of offenses committed by Indians against Indians," was intended to be limited "to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny." *Bryan*, 426 U.S. at 379-80 (1976) (*citing* H.R.Rep.No.848, 83d Cong., 1st Sess., 5-6 (1953), U.S.Code Cong. & Admin.News 1953, 2409, 2411-2412.5). When P.L. 280 was debated, many tribes were not equipped to carry out effective law-enforcement and Congress sought help from the states by conferring criminal jurisdiction on those "with an ability and willingness to accept such responsibility." *Bryan*, 426 U.S. at 373. Congress even exempted tribes that possessed a

"tribal law-and-order organization that functions in a reasonably satisfactory manner." *Id.* at 380.

The statute was given life during an assimilation era in which Congress overlooked functioning or potentially effective criminal jurisdiction and delegated law enforcement to states in the name of cutting federal costs. The Cush-Hook Nation, as a non-federally recognized tribe is without a functioning law enforcement system and was one of the tribes Congress had in mind with regards to preserving community safety. Under P.L. 280, the tribe remains subject to Oregon criminal jurisdiction when it comes to such issues of lawlessness and major crimes. However, conduct like robbery and murder is distinguishable from acts due to cultural and religious practices. Criminal jurisdiction over a tribal member's ability to access a sacred object and transport it to the Nation's location, lies outside of Congress' concerns as identified throughout the legislative history. Regulating the use and protection of archaeological, historical, and cultural objects on the aboriginal land at issue continues to be governed by Cush-Hook tribal common law, customs, and values.

ii. P.L. 280's exclusions extend to jurisdiction over control and protection of archaeological, cultural, and historical objects.

Although P.L. 280 outlines several subject areas in which states lack criminal jurisdiction, these areas are not exclusive. Section (b) limits the scope of Public Law 280 in three ways. First, it excluded the authorization of any "alienation, encumbrance, or taxation of any real or personal property," held by any "Indian or any Indian tribe, band, or community" that is in trust by the United States or subject to restrictions against alienation imposed by the United States. 28 U.S.C.A. § 1360(b) (1984). Second, the statute restricted States from regulating "the use of such property in a manner inconsistent with any Federal

treaty, agreement, or statute or with any regulation made pursuant thereto." Last, Congress excluded the control, licensing, or regulation of hunting, trapping, or fishing rights afforded to Indians under any Federal treaty, agreement, or statute. 18 U.S.C.A. § 1162(b) (2010).

This court has declined an opportunity to provide a definitive interpretation of the rights protected by "treaty, agreement, or statute," but the Court's concern over the regulatory nature of such rights arises in the present case with respect to defining use and protection of Cush-Hook objects on the Nation's aboriginal lands. *See Mattz v. Arnett*, 412 U.S. 481, 483 (1973). In *California v. Cabazon Band of Mission Indians*, this Court identified a test for determining whether state laws are criminal within the bounds of state jurisdiction. 480 U.S. 202, 208 (1987). When states seek to enforce laws in Indian country, the test compels the court to determine "whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Id.* The Court formulated the test in recognition of Indian tribes ability to retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie,* 419 U.S. 544, 557 (1975), and that such "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Cabazon*, 480 U.S. at 207; *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 154 (1980).

Distinguishing between prohibitory and regulatory laws required a consideration of whether a statute seeks to prohibit a particular conduct or seeks to impose regulations or stipulations on how the conduct may be completed. *Cabazon*, 480 U.S. at 209. For example, if state laws have the effect of destructing the purpose of tribal institutions and values, the act would be regulatory. *Id.* at 208. The ninth circuit in *Cabazon* deemed purported criminal

California bingo laws to be regulatory in nature and having the effect of infringing on the tribal government's ability to regulate its economic development. *Id*. at 221-222.

Under the same regulatory and prohibitory test, courts have also limited the application of several state hunting and fishing laws for being regulatory rather than prohibitive. In *Quechan Indian Tribe v. McMullen*, the ninth circuit characterized hunting and fishing as a "regulatory scheme" because "a person who wants to hunt or fish…has to pay a fee and obtain a license." 984 F.2d 304, 307 (9th Cir. 1993). Often times, hunting and fishing laws entail permit systems and procedures for subsequent oversight. In very unique circumstances, states have been permitted to enforce laws for the limited purpose of conservation, regardless of treaty or other guarantees made to the tribes. *See Puyallup Tribe v. Dep't of Game*, 433 U.S. 165 (1977) (indicating that in some circumstances states may regulate reservation fishing deemed necessary for conservation of species); *see also Jones v. State*, 936 P.2d 1263 (Alaska Ct. App. 1997) (Indian convicted for hunting deer out of season). Admittedly, much confusion has arisen in the analyses of "traffic offenses, fireworks, and illegal dumping,"[3] as well as zoning cases, see *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 532 (9th Cir. 1987), *aff'd in part & rev'd in part sub nom*; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (tribe had the authority to zone property); *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975) (county was without jurisdiction to enforce zoning ordinance).

Unlike the contentious topics, criminal jurisdiction over the use and protection of objects on Cush-Hook tribal land mirrors the Court's concerns with fishing and hunting

[3] Goldberg*, Final Report: Law Enforcement and Criminal Justice Under Public Law 280,* 12.

rights. As such, the Court should exclude archaeological, cultural, and historical objects based on the subject matter's regulatory nature. Under the *Cabazon* test, Oregon's current laws to control the use and protection of, archaeological, cultural, and historical objects on the Cush-Hook aboriginal lands impose heavy restrictions and procedural barriers on Indians. The laws are not criminal in the traditional sense; they do not explicitly prohibit access and use of objects.

The restrictions to access the objects require a permitting process, much like the hunting and fishing cases in which courts precluded application on tribal lands. Permit provisions state that a person, "may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands," "or remove from pubic lands any material of an archaeological, historical, prehistorical or anthropological nature," without obtaining a permit from the State Parks and Recreation Department. Or. Rev. Stat. § 390.235(1)(a) (2012). These regulations are detrimental to the Cush-Hook Nation's ability to continue its cultural and religious practices in three ways.

First, while Oregon treats the Cush-Hook land in question as a public land, it does not delegate or defer to the tribal values when approving excavations on their aboriginal land. In section (1)(d), the statute empowers only the State Parks and Recreation Director to adopt the rules governing the issuance of permits, with mere "advice of the Oregon Indian tribes." Or. Rev. Stat. § 390.235(1)(d) (2012). The breadth of this term does not mandate that the Cush-Hook values be incorporated into the definitions of archeological significance and the State instead, imposes its own values of what it thinks "archaeological significance" should mean on Cush-Hook aboriginal land.

Second, the issuance of a permit under section 2 is limited to three circumstances, none of which cover use by tribes or tribal members for cultural customs. The state assumes the only reason one may want to access objects is to excavate, examine, or gather material to promote "the knowledge of archaeology or anthropology." Or. Rev. Stat. § 390.235(2)(a) (2012). For example, such limitations ignore the unique history of the Cush-Hook people and the Nation's relocation from its aboriginal land. Due to geographic constraints, the Cush-Hook need to excavate objects to practice their religion.

Last, tribal members must qualify as a "qualified archaeologist," a definition that has a discriminatory impact on tribes without members who possess post-graduate degrees in one of the specified areas, have undergone twelve weeks of supervised experience in basic archaeological field research, nor designed and executed an archaeological study. Or. Rev. Stat. § 390.235(6)(b)(A)-(C) (2012). Such qualifications may be irrelevant for the type of person that can protect and preserve Cush-Hook "archaeological sites" or "historical and cultural objects."

For the aforementioned reasons, the relevant Oregon law is regulatory and should be excluded from the scope of P.L. 280

B. Even if Within the Scope of P.L. 280, Application of Oregon Law to Archaeological, Historical, and Cultural Objects on Land in Question Violates the Native American Graves Protection and Repatriation Act (NAGPRA).

Even if Oregon's criminal jurisdiction to regulate the use and protection of archaeological, cultural, and historical objects on the land in question is covered within the scope of P.L. 280, the Oregon statutes violate federal law under NAGPRA. This court has subject matter jurisdiction pursuant to NAGPRA's jurisdictional and repatriation provisions,

25 U.S.C.A. § 3013 (1990) and 25 U.S.C.A. § 3005(a) (1990) respectively. Section 3013 vests federal courts with jurisdiction over "any action brought by any person alleging a violation of this chapter." 25 U.S.C.A. §3013 (1990). Oregon violated NAGPRA's repatriation provision, 25 U.S.C.A. § 3005(a) (1990), which applies to "Native American human remains and objects possessed or controlled by Federal agencies and museums." The definition of museum is broadly defined to include, "any institution or State or local government agency (including any institution of higher learning) that receives federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C.A § 3001(8) (1990). Since Oregon state troopers seized the images, under Or. Rev. Stat. § 390.237 (2012), the State will possess the object until a determination is made to transfer the object directly to the appropriate Indian tribe, or shall be assigned to the Oregon State Museum of Anthropology, therefore meeting the NAGPRA museum definition.

i. The Cush-Hook images are Native American and have an ongoing connection to a present day tribe, warranting NAGPRA protection.

Tribal shamans and medicine men carved the Kelley Point Park trees with sacred totem and religious symbols, making the trees incredibly important to the Cush-Hook religion and culture. These images qualify as sacred objects and objects of cultural patrimony within the definition of both Oregon and federal law.

Enacted in 1990, NAGPRA gives tribes the power to reclaim objects central to their heritage. Important cultural items are divided into four main categories: human remains, funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their

present day adherents." 25 U.S.C.A. § 3001(3)(C) (1990). Objects of cultural patrimony are defined as objects "having ongoing historical, traditional, or cultural importance..., rather than property owned by an individual Native American, and which, therefore, cannot be alienated ... by any individual...." *United States v. Corrow*, 941 F. Supp. 1553, 1560 (D.N.M. 1996) *aff'd*, 119 F.3d 796 (10th Cir. 1997); 25 U.S.C.A. § 3001(3)(D) (1990). Such objects are so central to the culture of the tribe that they cannot be alienated or ownership cannot be passed on to any individual.

NAGPRA respects the fact that present day tribes may have affiliation to past objects. NAGPRA vests "ownership or control" of Native American human remains and objects in the decedent's lineal descendants or, if lineal descendants cannot be ascertained, gives ownership to the tribe most "affiliated" with the remains. 25 U.S.C.A. § 3002(a) (1990). In order for this ownership to be vested, NAGPRA mandates a two-part analysis. First, the human remains or objects must be determined to be Native American within the statute's meaning. If the remains or objects are not Native American, then NAGPRA does not apply. However, if the remains or objects are Native American, then NAGPRA applies and triggers "the second inquiry of determining which persons or tribes are most closely affiliated with the remains." *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004).

In *Bonnichsen*, the Court assessed the first prong and interpreted the term Native American to be defined as being "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 367 F.3d at 875 (*citing* 25 U.S.C.A. § 3001(9)). The Court felt the present tense of the statute required these people to be of a presently existing tribe, people, or culture and presumed that, "Congress gave the phrase 'is indigenous' its ordinary or natural meaning." *Id*. Generally, any finding of a "significant relationship" must relate to

a present "tribe, people, or culture," a relationship that extends "beyond features common to all humanity." *Id*. at 877 . A literal reading of this definition reveals that any artifact to be deemed a "sacred object" must be connected to the practice of an American Indian religion by present-day peoples. *Id*. at 879 .

The second inquiry is more specific. The object must be "most closely affiliated to specific lineal descendants or to a specific Indian tribe." *Id*. at 877. Section 3001(2) defines "cultural affiliation" as a "relationship of shared group identity, which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C.A. § 3001(2) (1990). In *Bonnichsen*, the District Court of Oregon found no "cultural affiliation" between the remains of the Kennewick Man found on federal property and tribal claimants under Native American Graves Protection and Repatriation Act (NAGPRA). The district court held that the Secretary of the Interior did not adequately determine "an identifiable earlier group" to which the Kennewick Man allegedly belonged, or even "establish that he belonged to a particular group." *Bonnichsen v. U.S.*, 217 F.Supp.2d 1116 (2002) *aff'd and remand*ed 357 F.3d 962, *amended and superseded on denial of rehearing* 367 F.3d 864. The court disagreed with the Secretary of the Interior and believed that the agency "reached a conclusion that was not supported by the reasonable conclusions of the Secretary's experts or the record as a whole." *Id*.)

The images possessed by Captain meet the NAGPRA standard for protection because the lower court found the object to be Cush-Hook and constructively treated the Cush-Hook as a present day group of Indians. Unlike the Kennewick man, the Oregon Circuit Court for the County of Multnomah made a finding of fact that based on expert witnesses, the Cush-

Hook Nation occupied, used, and owned the lands in question, concluding that the tribe currently owns the land in question under aboriginal title. Furthermore, the court found that the tree contained a tribal cultural and religious symbol. Throughout the state's history- beginning with Lewis & Clark, into the Anson Dart treaty, and most recently, the lower court's recognition of Cush-Hook aboriginal title over the land- this Nation is unquestionably a present day people practicing their culture in contemporary society.

ii. Oregon law conflicts with NAGPRA by restricting Cush-Hook use of sacred objects and items of cultural patrimony on the land in question and federal law should be applied.

Oregon's law prevents Cush-Hook tribal members like Captain, from practicing their culture and religion by unfairly regulating the use of culturally important artifacts and criminalizing tribal members acting in accordance with tribal law under the guise of "protection." Rather than permitting overly restrictive state regulatory laws to govern such tribal artifacts, which are central to the continuance of tribal societies, the federal court should apply NAGPRA to the subject matter on the land in question. Federal law accounts for the Cush-Hook tribal values, while Oregon's law does not.

In *Chilkat Indian Village v. Johnson*, an Alaskan village claimed ownership over four carved wooden posts and a wooden partition called a rain screen. The village claimed that the communally-owned property played "a central role in the 'spiritual, cultural and social' practices of the Chilkat tribal members." 870 F.2d 1469, 1479 (1989). The ninth circuit acknowledged that the laws made by the village over the use of the artifacts were a creature of tribal law and tradition, "wholly unconnected with federal law." *Id.* at 1473. The village's law declared that, "Relying on the authority given to it by its federally-approved constitution

and its reserved powers, the Chilkat Tribe has regulated the use and disposition of all tribal artifacts found within its borders." *Id.* Finding the tribal law persuasive, the Court recognized that, "a tribe's enforcement of its ordinances against its members will raise no federal questions at all." *Id.* at 1475; *E.G. Bow v. Fort Belknap Indian Community*, 642 F.2d 276 (9th Cir. 1981).

Like the *Chilkat*, the Cush-Hook Nation invoked tribal law governing culturally important objects, but unlike *Chilkat*, the law was not transformed into written form. However, Captain acted under tribal common law as he took actions to restore and transport the image to the current location of his Nation. Captain legally occupied Kelley Point Park, land that the Cush-Hook Nation legally possessed aboriginal title to. Since the state did nothing to stop the vandals from defacing the culturally significant images, it was critical that Captain take action to protect and preserve the tribal objects. Taking such action meant acting in opposition to the permitting requirements defined by the state, which arguably did not apply to him since he had no goals to excavate with scientific intentions. Respondent cut the tree down and removed only the image, solely to return it to his Nation's current location. Any attempt to restore the image would have required him to travel outside the park, thereby restricting tribal access.

Oregon's laws do not provide exceptions to tribal restoration requirements or considerations for instances where sacred objects reside away from the geographical location of the tribes. Additionally, the current permit process violates rights of tribal members like Captain, who exercise tribal rights to protect and restore objects owned by the Cush-Hook Nation. The provisions at issue mandate individuals to seek permits when excavating

anything on purported public lands, but set the requirements too high, making it impossible for tribal members to comply without being deemed a criminal.

Even if this court finds the subject matter on the land in question to be within the bounds of P.L. 280, respondent respectfully requests the Court declare that under NAGPRA, Congress did not permit Oregon to have criminal jurisdiction over tribal objects in the manner adopted by the state.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the lower court that the Cush-Hook Nation possessed aboriginal title to the land in Kelley Point Park and reverse in the matter of criminal jurisdiction. The Court should instead hold that Oregon did not have criminal jurisdiction to control the uses of, and to protect, archaeological cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe.