No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,

PETITIONER

v.

THOMAS CAPTAIN.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

BRIEF FOR THE PETITIONER

TEAM #10

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QUESTIONS PRESENTED

I. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park.

II. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archeological, 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

I. STATEMENT OF THE PROCEEDINGS

Prior to 1850, the Cush-Hook Nation occupied the land that is currently referred to as Oregon's Kelley Point Park. Record on Appeal (ROA) 1. Recently in 2012, over 160 years following the Cush-Hook Nation's decision to relocate to the coast range, Thomas Captain, a citizen of the Cush-Hook Nation, decided to cut down a tree with his tribe's historical carvings, and remove a section of it from the Park in an attempt to protect a culturally significant artifact. Id. at 2. The State of Oregon brought a criminal action against 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 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. Id. at 2-3. Captain consented to a bench trial, and the Oregon Circuit Court for the County of Multnomah heard the case. Id. Captain asserted that he was exempt from Oregon jurisdiction because the Cush-Hook Nation had aboriginal title to the land at Kelley Point Park, and as a result he was outside the reach of Oregon's criminal jurisdiction. Id. at 4.

The Oregon Circuit Court held that the Cush-Hook Nation still owned the land within the Park, and found Captain not guilty for trespass and for cutting timber without a State

permit. Id. However, the court found him guilty for violating Or. Rev. Stat. 358.905-359.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.*, for damaging an archeological site and a cultural and historical artifact. Id. The State and Captain appealed the decision. Id. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. Id. Thereafter, the State filed a petition and cross petition for certiorari to the United State Supreme Court, and Captain filed a cross petition for certiorari. Id.

II. STATEMENT OF THE FACTS

Kelly Point Park is a state park located in Portland, Oregon. Id. at 1. Oregon has owned the land that currently comprises the Park for over 130 years. Id. at 2. The Park is part of a much larger area that encompasses the original homelands of the Cush-Hook Nation of Indians. Id. at 1. The Cush-Hook Nation is not politically recognized by the United States or the State of Oregon. Id. The Cush-Hook Indians had previously occupied the area since time immemorial, where they fished, hunted, and grew and harvested many wild plants for their subsistence. Id. The Cush-Hook Nation's permanent village was located in the area enclosed by the Park's boundaries. Id.

There were several tribes that lived on the riverbanks in the area around the Park. Id. William Clark, of the Lewis & Clark expedition, encountered the Cush-Hook Indians in April 1806. Id. Clark visited their village, and recorded his interactions with the Cush-Hook Indians in the Lewis & Clark Journals. Id. Following his interactions, on April 5, 1806, Clark went south and encountered Multnomah Indians fishing and gathering wapato on the banks of the river near the Cush-Hook village. Id. The Multnomah Indians pointed out the

Cush-Hook Nation village and longhouses to Clark, took him to the village, and introduced him to the headman/chief of the Cush-Hook Nation. Id.

Clark drew a sketch of the village and the longhouses in the journals, and recorded some ethnographic materials about Cush-Hook governance, religion, cultural, burial traditions, housing, agriculture, and hunting and fishing practices. Id. Clark also gave the headman/chief one of President Thomas Jefferson's peace medals that he and Meriwether Lewis handed out to other chiefs during their expedition. Id. Lewis and Clark believed that tribal leaders who accepted the medals showed a desire to engage in political and commercial relations with the United States, and acceptance of the medals demonstrated which tribal leaders and governments would be recognized by the United States. Id.

In 1850, the Cush-Hook Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. Id. The Cush-Hook Nation agreed to relocate sixty miles westward to the foothills of the Oregon coast range of mountains. Id. at 1-2. The Cush-Hook Nation also relocated to avoid encroaching settlers, and a majority of the Cush-Hook Nation's citizens have continued to live there ever since. Id. at 2. However, in 1853, the United States Senate refused to ratify the treaty, so the Cush-Hook Nation and its citizens never received compensation or any of the other benefits agreed upon in the treaty. Id. The Cush-Hook Nation remains a non-federally recognized tribe. Id.

Following the Cush-Hook Nation's relocation, two American settlers, Joe and Elsie Meek moved onto the land where the Park is currently located and received fee simple titles to 640 acres of land from the United States under the Oregon Donation Land Act of 1850. Id. The Act required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. Id. The Meeks claimed the 640

acres of land, and they received fee title from the United States. Id. The Meeks, however, never cultivated or lived upon the land for the required four years. Id. Their descendants sold the land to Oregon in 1880, and Oregon created the Park. Id.

In 2011, Thomas Captain moved from the Cush-Hook Nation's tribal area in the coast range of the mountains to Kelley Point Park. Id. He occupied the Park to reassert the Cush-Hook Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over 300 years. Id. The trees are important to the Cush-Hook religion and culture because shamans/medicine men carved sacred totem and religious symbols into the trees hundreds of years ago, which Clark noted in his journals. Id. The carved images are at a height of twenty-five to thirty feet from the ground. Id.

Vandals have recently begun climbing the trees to deface the images, and in some cases, to cut them off and sell the trees. Id. The State of Oregon has not stopped these acts. In order to protect the tribal objects, Thomas Captain cut a tree down and removed the section of the tree that contained an image. Id. Thomas Captain was returning to the Cush-Hook Nation's location in the coastal mountain range when state troopers arrested him and seized the image. Id. The State of Oregon brought a criminal action against 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 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*. Id. at 2-3.

SUMMARY OF THE ARGUMENT

The United States Constitution gives Congress broad plenary authority over Indian affairs. Although Congress enacted the Nonintercourse Act[1] as a mechanism to prevent the sale of Indian tribal lands without the federal government's approval, there are no limits to Congress's exclusive and plenary power to extinguish aboriginal title. Congress also has authority to change the division of jurisdiction among the federal, state, and tribal governments and can expressly grant the states jurisdiction over Indian affairs.

This case has two primary issues. First, the Oregon lower court incorrectly concluded that the Cush-Hook Nation owns aboriginal title to the land at Kelley Point Park. Thomas Captain's claim failed to establish that the Cush-Hook Nation owns aboriginal title to the land, and any such claim by the Cush-Hook Nation has been extinguished. Additionally, even if aboriginal title had not been extinguished, any claim is now barred by laches.

Second, Oregon still has criminal jurisdiction to control the use of, and to protect, archaeological, cultural, and historical objects on the land in question, notwithstanding its purported ownership by the non-federally recognized Cush-Hook Nation. The State of Oregon has jurisdiction to enforce its criminal laws, without question, on all lands within its boundaries that do not constitute Indian country. Aboriginal title to the land does not make it Indian country, and the land in question does not constitute Indian country. Even if this Court determined that the land was Indian country, Congress expressly gave Oregon criminal jurisdiction over Indian country when it enacted Public Law 280. Thus, Oregon has criminal jurisdiction over all lands within the State, including Indian country, and only federally recognized tribes can assert an exemption from state jurisdiction.

[1] Act of July 22, 1790, Pub. L. No. 1-33. § 4, 1 Stat. 137, 138 is now codified as amended at 25 U.S.C. § 177 (2006).

ARGUMENT

I. THE CUSH HOOK NATION DOES NOT OWN ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK

Original Indian title, also known as aboriginal Indian title, refers to land claimed by an Indian tribe by virtue of its possession and exercise of sovereignty, and is a right of possession. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). Indian tribes may have a "legal as well as just claim to retain possession" of land that they historically occupied within the United States. Id. Claims for aboriginal title are often based on violation of the Indian Nonintercourse Act, which prohibits purchase of Indian lands without the approval of the federal government. See Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 251 (1985). The Nonintercourse Act, 1 Stat 138, as well as the current form of the law now codified at 25 U.S.C. § 177 (2006), prohibits the sale of land between Native Americans and non-Indians whereby "[n]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Id. This Court has recognized that "§ 4 of the 1790 Act, 1 Stat. 138, merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*." Id.

The Cush-Hook Nation does not have aboriginal title to the land at Kelley Point Park, and the Oregon Court of Appeals court erred when it upheld the decision of the lower Oregon court. See ROA 4. This Court should reverse the Oregon Court of Appeals because: (A) the claim brought by Thomas Captain failed to establish that the Cush-Hook Nation had aboriginal title to the land at Kelley Point Park; (B) any such claim by the Cush-Hook Nation has been extinguished; and (C) even if it had not, the claim is now barred by laches.

A. Thomas Captain's Claim for Aboriginal Title on Behalf of the Cush-Hook Nation Fails.

This claim for aboriginal title brought by Thomas Captain fails to establish title for the Cush-Hook Nation. The court in Oregon erred in its holding that the Cush-Hook Nation owns the land under aboriginal title because: (1) Thomas Captain does not have standing to bring this claim; (2) the State has Eleventh Amendment immunity; and (3) the case did not present prima facie evidence to support the claim to aboriginal title.

1. Thomas Captain does not have standing to bring this claim.

The common view of aboriginal title is that it is held by tribes. Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974). The Trade and Intercourse Acts invalidated transfers of title from tribes without the approval of the United States. Act of July 22, 1790, Pub. L. No. 1-33. § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (2006)). Individual Indians do not have standing to contest a transfer of tribal lands on the ground that the transfer violated that statute. United States v. Dann, 873 F.2d 1189, 1195-96 (9th Cir. 1989). Individual aboriginal rights may exist in certain contexts, and there is no theoretical reason why individuals could not establish aboriginal title in much the same manner that a tribe does. Id. However, in United States v. Dann, the Ninth Circuit held that when it is clear that the petitioner makes no individual claim to the land, but rather requests a declaration that the tribe was the recognized beneficial owner of the land, the court will not consider the claim. Id. In this case, Thomas Captain, an individual, is attempting to assert the rights of the Cush-Hook Nation to aboriginal title, as opposed to his individual right to aboriginal title. ROA 3. However, only the tribe may bring a federal common law action to enforce the tribe's ownership rights. See Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235-36 (1985); Oneida Indian, 414 U.S. at 235 ("a federal common-law action by a tribe

may be brought to vindicate aboriginal rights[.]") (emphasis added). Because the tribe itself must assert a claim for tribal aboriginal title, Thomas Captain as an individual does not have standing to make this claim and this Court should not even consider the merits.

2. The Eleventh Amendment prevents this claim against Oregon.

Thomas Captain's claim for aboriginal title is against the State of Oregon, which has Eleventh Amendment immunity to such a claim. Under the Eleventh Amendment, a state may not be sued without its consent. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268-69 (1997). The text of the Eleventh Amendment requires that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. In Cnty. of Oneida v. Oneida Indian Nation, this Court recognized that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." 470 U.S. at 251. The aboriginal land claim here, just as in the Cnty. of Oneida case, is a claim against the State, where this Court held that "in the absence of the State's consent . . . the suit is barred by the Eleventh Amendment." Id. Whether Thomas Captain is suing as an independent citizen, or if the claim was made by a tribe, it is subject to the Eleventh Amendment. In Blatchford v. Native Vill. of Noatak, this Court reaffirmed that States have sovereign immunity in suits by citizens and further held that Indian tribes should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity. 501 U.S. 775, 779-82 (1991); Idaho at 268-269.

An exception to the general rule of immunity applies when the United States sues on behalf of an Indian tribe or intervenes in a suit. Seneca Nation of Indians v. State, 26 F.

Supp. 2d 555 (W.D.N.Y. 1998). The present case can be distinguished from Seneca Nation of Indians v. State, where the court held that the United States is not barred by the Eleventh Amendment from bringing a suit on behalf of Indian tribe against a state. In that case, the United States intervened in the suit. In contrast, in this case the United States has not intervened, and as a result, Oregon has retained its Eleventh Amendment immunity. As such, this claim brought by Thomas Captain cannot establish any aboriginal title for the Cush-Hook Nation.

3. The record does not include prima facie evidence sufficient to support a finding for aboriginal title.

Thomas Captain's case record does not provide prima facie evidence sufficient to support such a finding for aboriginal title and the Oregon court should be reversed. There are two main issues the Oregon court failed to include in its findings of fact that are necessary to prove aboriginal title. First, if proceeding only on a claim for aboriginal title, the record in Thomas Captain's claim did not include prima facie evidence required to support a claim for aboriginal title because the Cush-Hook Nation never established exclusive aboriginal possession. Second, if proceeding on a claim for aboriginal title based on a violation of the Nonintercourse Act, the record did not reflect that the Cush-Hook Nation was a tribe, sufficient to assert a claim for violation of the Nonintercourse Act.

First, the Oregon court erred in holding that the Cush-Hook Nation had established aboriginal title, because the record is insufficient to establish prima facie evidence sufficient to support this finding. When proceeding on a claim for aboriginal title, a tribe must establish its "actual, exclusive, and continuous use and occupancy for a long time prior to the loss of the property." Sac & Fox Tribe of Okla. v. United States, 383 F.2d. 991, 997-98 (Ct. Cl. 1967) (emphasis added). In United States v. Santa Fe Pac. R. Co., this Court described

aboriginal possession as "definable territory occupied exclusively by the . . . [Indians]." 314 U.S. 339, 345 (1941). The Court held that if it were established as a fact that lands in question were, or were included in, the ancestral home of a tribe in the sense that they constituted definable territory occupied exclusively by the tribe, that would be distinguishable from lands wandered over by many tribes. Id. In the present case, the Oregon lower court's findings of fact contain no evidence that the Cush-Hook Nation ever exclusively used the land in question. ROA 3 ("the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans[.]"). The record is insufficient to support a finding for aboriginal title because evidence of the Cush-Hook Nation's exclusive use of the land were not included in the lower court's findings of facts. Id. Furthermore, the record includes evidence that another tribe used land along the river. Id. ("the Multnomah Indians fished and gathered on the bank of the Willamette river near the Cush-Hook village"). A tribe must prove exclusive possession of a parcel, *i.e.,* "that it used and occupied the land to the exclusion of other Indian groups." Strong v. United States, 518 F.2d 556, 561 (Ct. Cl. 1975) (internal citations omitted). Mixed use of a given parcel "precludes the establishment of any aboriginal title[.]" Id. Because the record shows mixed use, and the lower court findings of fact do not establish exclusive use, this Court should find plain error in the Oregon court's ruling. Thomas Captain's claim does not present a prima facie case for a finding of aboriginal title.

Second, if Thomas Captain is asserting title based on a violation of the Nonintercourse Act, the record does not establish that the Cush-Hook Nation is a tribe within the meaning of the Act. To establish a right to possession of certain land alleged to have been unlawfully held in violation of the Indian Nonintercourse Act, a plaintiff must show that

it is or represents an Indian tribe within the meaning of the Act, that parcels of land at issue are covered by the Act as tribal land, the United States has never consented to alienation of tribal land, and that trust relationship between United States and tribe which is established by coverage of the Act has never been terminated or abandoned. Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp., 418 F. Supp. 798, 798 (R.I. 1976). When asserting a claim for aboriginal title based on violation of the Nonintercourse Act, a plaintiff is required to show that he represented a tribe within the meaning of that Act. Id. The Oregon findings show that the Cush-Hook Nation has not been federally recognized. ROA 3. Because the Cush-Hook Nation has not been recognized, and the court did not establish that it is a tribe within the meaning of the Nonintercourse Act, any claim for aboriginal title based on violation of the Nonintercourse Act fails.

Whether Thomas Captain is simply asserting a claim for aboriginal title, or is proceeding under a theory of aboriginal title based on a violation of the Nonintercourse Act, his case is not sufficient to support such a finding. The lower court erred because the findings of fact do not support the conclusion of law that the Cush-Hook Nation established a prima facie case for aboriginal title. As a result, this court must reverse the Oregon Court of Appeals.

B. The Claim to Aboriginal Title Has Been Extinguished.

The Cush-Hook Nation did not and cannot establish aboriginal title, because it has been extinguished. There are two ways that aboriginal title may be extinguished, either by Congress, or by a tribe abandoning the land. In this case the Cush-Hook Nation's claim to land at Kelley Point Park was extinguished by both. The Oregon court's erred when it determined that congressional error was made by enacting the Oregon Donation Land Claim

Act, and the Court of Appeals should be reversed for affirming the ruling. This Court should reverse because the Oregon Donation Land Claim Act was not a Congressional error, but rather an expression of extinguishment.

1. Congress extinguished the Cush-Hook Nation's aboriginal title.

The power of Congress to extinguish aboriginal title by purchase, conquest, or with a clear statement, is plenary and exclusive. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 339 (1941). Congress enacted the Oregon Donation Land Claim Act in 1850 as an exercise of that power, and it was evidence of Congressional intent to assert complete dominion over the land at Kelley Point Park. See ROA 2. Aboriginal land claim rights can be terminated by express acts of Congress, or may be implied by plain and unambiguous action. Santa Fe Pac. R. Co., 314 U.S. at 339. The Oregon Donation Land Claim Act terminated the Cush-Hook Nation's claim to aboriginal title because it was a plain and unambiguous action by Congress to assert dominion and control over the land. The Government can extinguish aboriginal title in various ways. Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768, 787 (1993). For instance, "the sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title." Id. In this case the intent of Congress to settle the land in question, along with the subsequent sale to various private parties, including the Meeks, demonstrates Congress's intent to exercise dominion and control.

2. The Cush-Hook Nation abandoned the land, which also extinguished the aboriginal title.

Not only did Congress intend to extinguish the land claim of the Cush-Hook Nation, but the Cush-Hook Nation also abandoned the land, extinguishing its rights by voluntarily leaving the land because of the encroaching settlers. Where the Indian departure from the

land occurs, it extinguishes any aboriginal title to the subject land. Uintah Ute Indians of Utah, 28 Fed. Cl. at 787. "When an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land; and the United States cannot be required to pay therefor on the same basis as if it were a recognized treaty reservation." Id. When the encroaching white settlers took dominion over the land, it further cemented the abandonment by the Cush-Hook Nation. The exclusive right of the United States to extinguish Indian title has never been doubted and it may be accomplished by dominion adverse to the right of occupancy, or otherwise. Johnson v. M'Intosh, 21 U.S. 543, 586 (1823). This Court has also recognized that government occupation of the land or occupation by settlers is inconsistent with Indian title. See United States v. Gemmill, 535 F.2d 1145, 1148-49 (9th Cir. 1976) (holding that forced expulsion of Indians followed by Government use of land extinguishes Indian title); Pueblo of San Ildefonso, 206 Ct.Cl. 660, 661 (1975) (holding the impact of white settlement a factor in extinguishment of Indian title).

In United States v. Santa Fe Pac. R. Co., the Supreme Court examined the circumstances surrounding the creation of an alternate area of land for a tribe, and the effect on a claim for aboriginal title. 314 U.S. 339 (1941). The Court found that the tribe's acceptance of an alternate area of land amounted to a relinquishment of any tribal claims to lands that the Indians might have had outside that reservation. Id. In reaching this conclusion, the Court viewed the "historical setting," which disclosed the Indians' acquiescence in the penetration of settlers into the territory on condition that permanent

provision were made for the Indians as well. Id. The Court reasoned that while the forceful removal of the Walapai Tribe of Indians from their land did not extinguish title, the creation of an Indian reservation at the request of and with acceptance by the tribe, amounted to a relinquishment of any tribal claims to lands outside that reservation, and that relinquishment was tantamount to an extinguishment of Indian title by "voluntary cession." Although, unlike the Walapai tribe, the Cush-Hook Nation did not receive title to the a reservation at the base of the foothills where they resettled, they did voluntarily leave the land along the river because of the encroaching settlers. Just as it did in Santa Fe, this Court should find that the voluntary cession of the land in question and the Cush-Hook Nation's acquiescence to the penetration of settlers were sufficient to relinquish a claim for aboriginal title.

C. The Aboriginal Title Claim is Barred by Laches.

Finally, the Oregon Court of Appeals erred in affirming that the Cush-Hook Nation had aboriginal title because any claim by Thomas Captain or the Cush-Hook Nation to the land at Kelley Point Park is barred by laches. The Cush-Hook Nation left the land at Kelley Point Park in 1850, and it has been over 160 years since their departure. ROA 2. During this time, Oregon has become the owner of the land at Kelley Point Park, and continuously exercised jurisdiction over the land. Id. The doctrine of laches prevents such a claim because too much time has passed, and the Cush-Hook Nation can no longer assert this right of possession.

This Court has held that delay in bringing suit to reclaim tribal land may result in loss of rights in the land under the doctrine of laches. City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). In Sherrill, this Court held that Oneida land that had been repurchased by the tribe from non-Indian possessors was subject to state property taxes

because the tribe waited to long to make a claim. Id. Following the Sherrill decision, the Second Circuit has expanded the defense of laches to overturn a damage judgment awarded to the Cayuga Indian Nation against the State of New York for a wrongful taking of land in violation of the Nonintercourse Act. Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005). Following the holding in both Sherrill and Cayuga Indian Nation, this Court should hold that the Cush-Hook Nation's claim to aboriginal title is barred by laches, because the Cush-Hook Nation has waited over 150 years to assert this right.

II. OREGON HAS CRIMINAL JURISDICITON TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLGOICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION

The second question before this Court is 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 the Cush-Hook Nation. As previously asserted, the Cush-Hook Nation does not own aboriginal title to the land in question. However, even if they did, Oregon still has criminal jurisdiction over the land in question because: (A) the land in question does not constitute Indian country; (B) even if this Court determines that it is Indian country, Congress expressly gave Oregon criminal jurisdiction over Indian country when it enacted Public Law 280; and (C) the Cush-Hook Nation has no exemption from state jurisdiction because only federally recognized tribes can assert an exemption.

A. Oregon has Criminal Jurisdiction Over the Land in Question Because the Land does not Constitute Indian Country.

It is well established that outside of Indian country, the states have general criminal jurisdiction within their territorial boundaries over all persons, including Indians. See, e.g., Hagen v. Utah, 510 U.S. 399 (1994). As such, the State of Oregon has jurisdiction to enforce

its criminal laws, without question, on all lands within its boundaries that do not constitute Indian country. In the instant case, regardless of whether the Cush-Hook Nation owns aboriginal title, the disputed land in question does not constitute Indian country. Aboriginal title to land does not make it Indian country. See 18 U.S.C. § 1151 (2006). Indian country is defined as:

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

Id. The land in question does not fall within any of three subsections listed above that would qualify it as Indian country under 18 U.S.C. § 1151 (2006).

First, the land in question does not fall under subsection (a), which includes all territory within an Indian reservation under the jurisdiction of the United States government. Although the United States Supreme Court has interpreted the term "reservation" broadly, it is clear that in order for land to be considered a "reservation" it must encompasses an element of federal protection. See, e.g., Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991) (holding that the for purposes of determining Indian country, the test is whether that area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government"); Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902). In the instant case, the land in question is not a designated reservation or federally protected Indian tribal land. There is nothing in the record that establishes that the land in question is either an Indian reservation, or under federal protection. On the contrary, the record states that the Cush-Hook Nation is non-federally recognized tribe, and that the

federal government refused to ratify a treaty with the Cush-Hook Nation with respect to the lands in question. ROA 1.

Second, the land in question does not fall under subsection (b), which incorporates all "dependent Indian communities" within the borders of the United States. In Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998), the United States Supreme Court laid out the essential characteristics of a "dependent Indian community" in determining whether lands would qualify as Indian country. Id. at 529-30. The Court held that two essential characteristics are necessary to constitute a "dependent Indian community": (1) that the land be set aside for the use of Indians; and (2) that the land, not just the tribe, be under the superintendence of the federal government. Id. In order to satisfy the set-aside requirement, the Court determined that "some explicit action by Congress (or the Executive, acting under delegated authority), must be taken to create or to recognize Indian country." Id. at 531 n.6. The Court also determined that superintendence of the federal government meant that the community must be "sufficiently dependent upon the Federal Government that the Federal Government and the Indian involved, rather than the States, are to exercise primary jurisdiction over the land in question." Id. at 531. The land in question does not fall under subsection (b) as a "dependent Indian community" because the land was not set aside by an explicit act of Congress, and because the Cush-Hook Nation is not sufficiently dependent upon the federal government. Not only is the Cush-Hook Nation is a non-federally recognized tribe, it is not a dependent Indian community. ROA 1-3.

Third, the land in question does not fall under subsection (c), which includes all Indian allotments, the titles to which have not been extinguished. The term "Indian allotment" has a precise meaning and refers to land owned by individual Indians that are

either "held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment)." Yankton Sioux Tribe. v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999); see e.g., United States v. Ramsey, 271 U.S. 467 (1926); United States v. Pelican, 232 U.S. 442 (1914); United States v. Stands, 105 F.3d 1565, 1571-72 (8th Cir. 1997). In the instant case, the land in question is not an Indian allotment. It is not owned by an individual Indian, and is neither held in trust by the federal government for the benefit of an Indian, nor subject to restriction on alienation in favor of the United States.

Because the land in question does not fall within any of the three subsections defining Indian country, Oregon assumes jurisdiction to enforce its criminal laws, including those seeking to protect archaeological, cultural, and historical objects from excavation, removal, and alteration on the land in question. See 18 U.S.C. § 1151 (2006); Or. Rev. Stat. §§ 358.905-358.961 (West 2012); Or. Rev. Stat. §§ 390.235-390.240 (West 2012).

B. Oregon has Criminal Jurisdiction Over the Land in Question even if the Land in Question Constitutes Indian Country Because Public Law 280 Authorizes the Application of Oregon Criminal Laws in Indian Country.

Oregon has criminal jurisdiction over the land in question because it does not constitute Indian country. However, even if this Court determines that the land is Indian country, Oregon still has criminal jurisdiction over the land in question because Congress expressly granted Oregon extensive criminal jurisdiction over Indian country. See Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1162, 1360 (2006)). Although states generally lack criminal jurisdiction over Indians within Indian country, Congress has broad plenary authority over Indian affairs enabling it to change the division of

jurisdiction among the federal, state, and tribal governments. U.S. Const. art. I, § 8, cl. 3; see, e.g., Williams v. Lee, 358 U.S. 217 (1959).

In 1953, Congress enacted Public Law 280, granting five (later six) states extensive criminal jurisdiction over Indian country. See Pub. L. No. 280, 67 Stat. 588 (1953); (codified as amended at 18 U.S.C. §§ 1162, 1360 (2006)). The primary purpose of Public Law 280 was to combat the lawlessness deriving from the absence of adequate tribal institutions for law enforcement. Bryan v. Itasca Cnty. Minnesota, 426 U.S. 373, 379 (1976); see H.R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953). Public Law 280 states in relevant part:

> **(a)** Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory[.]

18 U.S.C. § 1162 (2006) (emphasis added). Congress listed Oregon as one of the six states; explicitly granting the State criminal jurisdiction over all Indian country, except the Warm Spring Reservation. Id. In order to balance tribal interests, the United States Supreme Court in California v. Cabazon Band of Mission Indians, limited the extension of Public Law 280's grant of criminal jurisdiction over Indian country. 480 U.S. 202 (1987). The Court concluded that state laws that are "criminal/prohibitory" in nature are enforceable in Indian country, but state laws that are "civil/regulatory" in nature are not enforceable in Indian country. Id. at 209-11.

1. Public Law 280 authorizes the enforcement of statutes in Indian country that are "criminal/prohibitory" in nature.

Public Law 280 authorizes the enforcement of statutes in Indian country that are "criminal/prohibitory" in nature. In Cabazon Band of Mission Indians, the United States

Supreme Court decided to distinguish the nature of a state law as either "civil/regulatory" or "criminal/prohibitory," in order to decide whether the law would fall within the enforceable purview of Public Law 280. Id. at 209-11. The case involved the operation of high-stake bingo and poker games on tribal reservations, and California sought to enforce its penal law prohibiting bingo games unless they were conducted by charitable organizations and offered prizes not exceeding $250. Id. at 205. California insisted that its penal law was criminal; asserting that a violation of any of its provision constituted a misdemeanor. Id. at 209. California argued that its penal law was enforceable pursuant to Public Law 280's grant of criminal jurisdiction to the State of California. Id. The United States Supreme Court decided to adopt the Court of Appeals' prohibitory/regulatory distinction in determining whether California could enforce its penal law in Indian country. Id. at 210. The Court stated:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209. Accordingly, if a state seeks to enforce its laws in Indian country pursuant to Public Law 280, such laws must be "criminal/prohibitory" in nature, or, using the shorthand test, the conduct at issue must violate the State's public policy.

2. The Oregon statutes seeking to protect archaeological, cultural, and historical objects are "criminal/prohibitory" in nature.

In this case, Oregon's statutes seeking to control the uses of, and to protect, archeological, cultural, and historical objects on the land in question are "criminal/prohibitory" in nature. As a result, the statutes fall within the purview of Public Law 280; thus giving Oregon jurisdiction to enforce them. Section 358.920 of the Oregon

Revised Statutes is specifically entitled "Conduct Prohibited." The statute expressly prohibits conduct: "[a] person may not excavate, injure, destroy, or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issues under ORS 390.235." Or. Rev. Stat. § 385.920 (West 2012).

In Cabazon Band of Mission Indians, the Court held that California's penal law was "civil/regulatory" in nature. 480 U.S. at 210. The Court's reasoning was that California does not prohibit all forms of gambling, operates a lottery, and encourages its citizens to participate in state-run gambling. Id. at 210. This instant case is distinguishable from Cabazon Band of Mission Indians because Oregon's statute clearly prohibits all persons from excavating, injuring, destroying, altering, or removing an archaeological object and/or site. Id. at 210; Or. Rev. Stat. § 358.920. Applying the shorthand test, the conduct at issue (i.e., prohibiting excavation, destruction, alteration, and removal or archaeological objects) violates Oregon's public policy interests in protecting, archeological, cultural, and historical objects on the land in question. Additionally, many cases following the Cabazon Band of Mission Indians decision that address the scope of Public Law 280 have been decided in favor of the State's interest. See, e.g., Quechan Tribe v. McMullen, 984 F.2d 304 (9th Cir. 1993) (holding that a state law regulating classes of fireworks and prohibiting dangerous fireworks except in the hands of licensed and trained person, with violation a misdemeanor, was criminal/prohibitory); State v. Lasley, 705 N.W.2d 481 (Iowa 2005) (holding that a statute prohibiting sale of tobacco to minors was criminal/prohibitory); Jones v. State, 936 P.2d 1263, 1266-67 (Alaska App.1997) (holding that state hunting regulations were criminal prohibitory). In summary, Oregon has criminal jurisdiction over the land in question even if

the land in question constitutes Indian country because Public Law 280 authorizes the application of Oregon's "criminal/prohibitory" laws seeking to control the uses of, and to protect archaeological, cultural, and historical objects on the land in question.

C. The Cush-Hook Nation has no Exemption from State Jurisdiction Because only Federally Recognized Tribes can Assert Exemption from State Jurisdiction.

Actions occurring on the land in question must fall within the purview of either federal, state, or tribal jurisdiction. In the instant case, Oregon must assume primary jurisdiction over the land in question because the Cush-Hook Nation, being non-federally recognized, cannot assert an exemption from state jurisdiction. The Cush-Hook Nation has not formally established a government-to-government relationship with the United States, which could allow it to assert federal or tribal jurisdiction. See, e.g., South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Alaska v. Native Vill. of Venetie, 522 U.S. 520, 527 n.1 (1998). As such, if Oregon does not have criminal jurisdiction, there is no legal remedy when persons, Indian or non-Indian, excavate, injure, destroy, alter, or remove any archaeological objects or sites.

Federal recognition is necessary before a tribe can have any exemption from state jurisdiction. Federal recognition of an Indian tribe's legal status is "a formal political act, it permanently establishes a government-to-government relationship between the United States as a 'domestic dependent nation,' and imposes on the government a fiduciary trust responsibility to the tribe and its members." H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994). Recognition "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary." Id. "It is now a well established principle that for purposes of acknowledgment

and dealings with the federal government, a tribe is a political institution; so racial or ancestral commonality is not enough, without a continuously existing political entity, to constitute a tribe for those purposes." Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, 255 F.3d 342 (7th Cir. 2001) (citing 25 C.F.R. § 83.3(a, c) (2012)); see Morton v. Mancari, 417 U.S. 535, 553 (1974).

Non-federally recognized tribes have no legal relationship with the federal government, and have little, if any, federally sanctioned authority to function legally and politically. Id. As such, non-federally recognized tribes are not protected from state jurisdiction, and do not have access to repatriation rights and other forms of cultural protection under federal law that are only available to federally recognized tribes. See Bonnichsen v. United States, 217 F. Supp.2d 1116 (D. Or. 2002). Additionally, this case would be an improper avenue for the Cush-Hook Nation to take, to assert exemption from state jurisdiction. The executive branch has granted tribes with a means to petition for federal recognition through the Office of Federal Acknowledgement ("OFA") process. See 25 C.F.R § 83 (2012). Following federal recognition, "Congress has provided a mechanism for the acquisition of lands for tribal communities . . ." City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 220 (2005). This mechanism authorizes the Secretary of the Interior, in his or her discretion, to acquire land in trust for Indians that is exempt from State and local taxation. 25 U.S.C. § 465 (2006); see Sherrill, 544 U.S. at 220.

"The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Id. at 220-21. Among other things, the Secretary of the Interior must consider the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State

and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise[,]" before approving an acquisition of land into trust. Id. at 221; 25 CFR § 151.10(f) (2012). Section 465 provides the proper avenue to reestablish sovereign authority. Sherrill, 544 U.S. at 221. However, until further political action is taken by the Cush-Hook Nation, Oregon must assume primary jurisdiction over the land in question because there needs to be a legal venue available for actions against persons who excavate, injure, destroy, alter, or remove archaeological objects or sites on the land in question.

CONCLUSION

For the aforementioned reasons, the state of Oregon respectfully requests that the United States Supreme Court: (1) reverse the decision of the Oregon Court of Appeals holding that the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park; and (2) affirm the decision that the State of Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in Kelley Point Park.