IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 12-345

OCTOBER TERM 2012

THE STATE OF OREGON,
Petitioner,

-against-

THOMAS CAPTAIN,
Respondent.

On Writ of Certiorari from the
Oregon Supreme Court

Brief for the Respondent

Team #13

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Constitution and Statute Provisions

Reports

Secondary Sources

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, 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

STATEMENT OF PROCEEDINGS

This case arises from the final order of the Oregon Circuit Court for the County of Multonmah. The Petitioner, the State of Oregon, and the Respondent, Thomas Captain, appealed the decision to the Oregon Court of Appeals. The Oregon Court of Appeals affirmed the original order of the circuit court, without writing a separate opinion. The Oregon State Supreme Court denied review. Both, the Petitioner and Respondent, filed a petition and cross-petition for certiorari to the United States Supreme Court.

STATEMENT OF FACTS

The Cush-Hook Nation has lived within the modern boundaries of the United States since time immemorial. The original homelands of the Cush-Hook Nation are located within the State of Oregon, which includes the area known as Kelly Point Park. Kelly Point Park is located at the confluence of the Columbia and Willamette River inside the present day limits of Portland, Oregon. The permanent village of the Cush-Hook Nation was located within the area now known as Kelly Point Park. The Cush-Hook Nation thrived in their homeland by hunting, fishing, growing crops and harvesting wild plants.

In 1806, the Cush-Hook Nation encountered William Clark (Clark), who was apart of the Lewis and Clark Expedition. The Multnomah Indians, who were fishing and gathering wild plants near the Willamette River, introduced Clark to the Cush-Hook Nation's chief. Clark then depicted the village and their longhouses in his journals, and chronicled the Cush-Hook's way-of-life, including their governance, religion, cultural, burial traditions, housing, agricultural and hunting and fishing practices. Clark specifically documented the cultural and religious practices of the Cush-Hook religious leaders by recording the religious leaders'

practice of carving totems and their religious symbols into the living trees, in the Kelly Point Park area.

After Clark's interaction with the Cush-Hook people, Clark and Meriwether Lewis (Lewis) presented the Cush-Hook Nation's chief with President Thomas Jefferson's peace medal. It was believed by Lewis and Clark, that when a tribal leader accepted the peace medal, it showed that they had the desire to engage in political and commercial relations with the United States. Furthermore, the acceptance of the peace medal essentially demonstrated that the tribal leaders who accepted the peace medals would be recognized by the United States. Today, historians have renamed the peace medals to sovereignty tokens because of the political and diplomatic significance the medals represented between the various tribal leaders and the United States.

The Cush-Hook Nation continued to live in their territory, traditionally and undisturbed, until 1850. It was in 1850, when Anson Dart, the superintendent of the Indian Affairs for the Oregon Territory, entered into a treaty with the Cush-Hook Nation. Dart wanted to move the Cush-Hook Nation from their territory near the Columbia to a specific location in the foothills of the Oregon coast range of mountains, sixty miles away from westward from their homelands, because their territory contained value farm land on the river. However, subsequent to the treaty was signing, the Cush-Hook Nation unilaterally relocated to the coast range to avoid the encroaching Americans.

In 1853, the United States Senate refused to ratify the treaty with the Cush-Hook Nation. Thus, the Cush-Hook Nation has never received any compensation, monetary or other promised benefits, for their territory in and around the Kelly Point Park area. Furthermore, the United States has never procured the Cush-Hook Nation as federal

recognized Indian tribe. Although, the Cush-Hook Nation continues to reside in the coast range of mountains, with the majority of members scarcely able to survive, they also have never received any recognized ownership of their current lands in the coast range of mountains.

It was soon after the Cush-Hook Nation relocated to the coast range of mountains, two settlers moved into the Cush-Hook territory. The settlers received fee simple title to the land from the United States through the Oregon Donation Land Act of 1850 (Donation Act). To receive the fee simple title, under the Donation Act, the settler must be "white" and must reside and cultivate the land for four consecutive years. However, the settlers that settled the Cush-Hook territory, around Kelly Point Park, did not reside or cultivate the land for four consecutive years, and eventually, their descendants sold the land to Oregon in 1880, and soon after Oregon created Kelly Point Park.

In 2011, the respondent moved into Kelly Point Park to assert the Cush-Hook Nation's ownership of their homelands and to protect and restore the carvings in the living trees. Which hold great significance to their cultural and religious beliefs. Vandals, who would climb the trees to deface the images, were vandalizing the carvings. The respondent eventually cut down a tree that contained an image created by his ancestor to preserve the carving. However, it was during transport of the carving to the Cush-Hook Nation, the respondent was stopped by a state trooper. The state trooper seized the image and he was arrested and convicted of damaging an archaeological site, and a cultural and historical artifact.

It was later determined by the Oregon Circuit Court for the County of Mulnomah, that the Cush-Hook Nation's holds aboriginal title to its homelands and that the title was

never extinguished by the United States. Furthermore, the United States grant to the settler's for the Kelly Point Park area is *void ab initio*, and the subsequent sale of the land to the State of Oregon is also void. Finally, the State of Oregon properly brought charges against the respondent due to Public Law 280 criminal jurisdiction granted to the state by Congress.

Argument

IV. THE APPEALS COURT OF OREGON CORRECTLY UPHELD THE CUSH-HOOK NATION ABORIGINAL TITLE TO KELLY POINT PARK BECAUSE THEIR RIGHT OF OCCUPANCY HAS NEVER BEEN EXTINGUISHED BY CONGRESS.

The Cush-Hook Nation entered into a treaty in 1850 with the United States, which Congress later refused to ratify. At the request of Anson Dart and an attempt to avoid encroaching Americans the Cush-Hook Nation relocated sixty miles from their original inhabitants. To date, the Cush-Hook Nation has never received compensation for the land they were deprived of or any benefits that flowed from the treaty. Furthermore, Congress has never attempted to recognize the Cush-Hook Nation and since their right of occupancy has never been extinguished by purchase or conquest.[1] The Cush-Hook Nation still maintains aboriginal title from time immemorial. The Ninth Circuit correctly held that the Cush-Hook Nation proved they still hold aboriginal title to the area in and around Kelly Point Park. The Supreme Court should also find on the arguments and evidence presented that the Cush-Hook Nation holds aboriginal title over the lands on and around Kelly Point Park.

A. The Cush-Hook Nation has satisfied the two-prong test in order to establish a claim of aboriginal title.

There are many ways a tribe can have a vested property right in the land they occupy. Traditionally, and the most common way Indian tribes held recognized land title is through a

[1] Johnson v. McIntosh, 21 U.S. 543, 587 (1823).

treaty, statute or executive order. However, this was not the only way to show title. The Supreme Court, in United States v. Santa Fe Pac. R. Co., stated that an Indian tribe's claim to land does not have to be vested in a "treaty, statute, or other formal governmental action."[2]

Another way a tribe may have a vested property right is through aboriginal title. This concept was first introduced in Fletcher v. Peck,. Although that case did not involve Indians, but two land spectators, who were in dispute over the same land. John Marshall, who delivered the opinion of the court, essentially spilt the land title in two, giving the surface rights, or more accurately gave the Indians the right to occupy the land, while vesting exclusive title with the United States.[3]

The concept of aboriginal title was defined further in Johnson v. McIntosh,. The Supreme Court determined who held superior title between two land spectators. Title, which had been purchased from Congress, or the same title, which had been conveyed by the Indians.[4] As John Marshall explained, paramount title is given to the discovering Nation, where the Indians have the right to occupy the land, and to the excluded all others, except to the sovereign nation.[5] Since Congress holds exclusive title, it has the power to unilaterally extinguish aboriginal title through purchase or conquest. [6]

If Congress has taken not steps to extinguish aboriginal title, either through purchase or by conquest, the tribe is considered to have maintained aboriginal title. Therefore, the tribe

[2] United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 347 (1941)., Cramer v United States, 261, 229 (1923)., Johnson v. McIntosh, 21 U.S. 543, 543 (1823). (land claim does not have to be formal).
[3] Fletcher v. Peck,10 U.S. 87, 141,143 (1810).
[4] Johnson v. McIntosh, 21 U.S. 543, 543-71 (1823).
[5] Id. at 573.
[6] Id. at 587.

has a vested property right to occupy the land they inhabit. The Supreme Court has held such land title, as "sacred as the fee simple of the whites**."**[7]

Since the time of John Marshall, the federal government has always acknowledged and respected Indian's rights of occupancy, which has been reflected in many U.S. Supreme Court cases.[8]

In United States v. Santa Fe Pac. R. Co., the Supreme Court established a two-part test that tribes are required to satisfy in order to establish an aboriginal title claim.[9] A claimant will first need to show that the tribe maintained "actual, exclusive continuous use" or "occupancy of the land," and they must show that they occupied the land for a long period of time.[10]

I. The Cush-Hook Nation Is Able To Satisfy The First Prong Of The Test: Actual, Exclusive And Continuous Use over Kelly Point Park.

The Cush-Hook Nation has shown actual, exclusive, and continuous use of the land. The evidence provided by the tribe establishes and satisfies the first prong, of actual, as required by the Supreme Court.

According to U.S. v. Santa Fe Pac. R. Co., a demonstration of "occupancy necessary to establish aboriginal possession is a question of fact."[11] One way a tribe can demonstrate their occupancy over the land in question, is through the tribe's way of life, their habits, customs, and usage of the land prior to being dispossessed of it."[12]

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[7] Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831).

[8] Cramer v. United States, 261 U.S. 219, 227 (1923)., Johnson v. McIntosh, 21 U.S. 543, 587 (1823)., Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831).

[9] United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 359 (1942).

[10] Id.

[11] Id.

[12] Sac & Fox Tribe of Indians v. United States, 383 F.2d 991, 998 (1967)., Mitchel v. United States, 34 US 711, 745 (1835).

In Sac and Fox Tribe of Indians of Oklahoma v. United States, the tribe claimed they were entitled to more compensation for land that was ceded to the government. The tribe asserted they held both aboriginal and recognized title. In order to establish the first pong of the two-part test, actual, exclusive and continuous use of the land, the tribe relied on historical villages that were located in that specific area, general statements from prominent American officials at the time in question, and historical data. [13] The Supreme Court found that this was enough to satisfy the first prong.

In this case, the Cush-Hook Nation has also relied on an expert witness in history, sociology and anthropology along with other historical documents that establish occupancy from time immemorial.[14] Actual, exclusive and continuous use of the land can be established by the location of their village, which was physically located within the boundaries of Kelley Point Park.[15] It is within that same area that they grew their crops, harvested wild plants, and engaged in hunting and fishing.[16]

Additional evidence can be found in William Clark's journals, during Lewis and Clark's expedition in 1806.[17] His journals not only record their interactions with the Cush-Hook Indians, but also show detailed drawings of their inhabitant.[18] The journals also recorded Clark's observations of their tribal governance, religion, culture and burial traditions.[19]

The facts do not clearly indicate whether the Cush-Hook Nation were the sole inhabitants in that particular area. The facts merely state that Clark met Multnomah Indians

[13] 315 F.2d 896, 903 (1963). U.S. v. Seminole Indians of State of Fla. 180 Ct. Cl. 375, 384-86 (1967). , Confederated Tribes v. U.S., 177 Ct. Cl. 184, 198-205 (1966).
[14] R. at 3.
[15] R. at 1.
[16] Id.
[17] Id.
[18] Id.
[19] Id.

who were also fishing and gathering plants near the Cush-Hook village.[20] Regardless of whether the Cush-Hook Nation shared the land with other Indians is not dispositive in order to satisfy this element. In United States v. Seminole Indians**,** the court held that a tribe may satisfy the requirement of "use and occupancy" through intermittent contacts to the land in question.[21] Taking into consideration the weight of all the evidence presented, The Cush-Hook Nation is able to establish continuous, actual, and exclusive occupancy of the land. Once this has been established, the tribe needs to demenstrate the use of the land was "for a long time."

II. The Cush Hook-Nation's can demonstrate their occupancy "for a long time" in and around the Kelly Point Park area.

Based on the historical data presented the Cush-Hook Nation can establish that the use of the land was "for a long time." The second part of the test requires a tribe to not only to establish actual, exclusive, and continuous use of the land, but also, that the tribe occupied the land in question "for a long time", prior to the loss of the property.[22]

The length of time requirement was established in the Confederated Tribes of Warm Springs Reservation v. Unites States,. In that case, the tribe was appealing the Indian Claims Commission's decision, on the determination of the tribe's Indian title. The court held in that case, that in general there was no specific amount of years a tribe needed to occupy the land in order to satisfy the time element of the test.[23] The court further added a tribe's occupancy

[20] Id.
[21] United States v. Seminole Indians, 180 Ct. Cl. 375, 385 (1967)., Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 184-88 (1966).
[22] U.S. v. Santa Fe Pac. R. Co., U.S. 314, 339, 359-60 (1941).
[23] Confederated Tribes of Warm Springs Reservation of Oregon v. U.S., 177 Ct. Cl. 184, 194 (1966).

simply "needs to be long enough for a tribe to transform the land into their domestic territory."[24]

The Confederated tribes relied on expert witnesses, interviewed decedents, personal journals from Lewis and Clark expedition, post treaty material, testimony from traders during that time who were in that area, and maps from field commanders who were stationed in the area to establish the requirement of "a long time".[25]

The Cush-Hook Nation at the very minimum occupied the land for forty-four years. This can be shown with Lewis and Clark's first encounter with the Indians in 1806 and up until the time of the signing of their treaty in 1850, at which time they relocated.[26] However, it is probable that they occupied the land for significantly longer based on the establishment of the village, fishing and harvesting areas and land specifically used to grow crops. (R. at 1). It should be noted however, the facts in the case stipulate the Cush-Hook Nation did in fact occupy the area in and around Kelly Point Park since time immemorial. (R. at 1).

In Alabama-Coushatta Tribe of Texas v. U.S., the court determined that a "long time" could be as little as thirty years. [27] Furthermore, in Sac & Fox Tribe of Indians v. United States, the Indian Claims Commission explained when deliberating compensation to a tribe for aboriginal title, the "time" factor requires a period of time allowing for the occupancy to take root. [28]

The Cush-Hook Nation has established that they had continuous, exclusive, and actual use of the land for a long time. The historical documents show that they sowed the

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[24] Id.
[25] Id. at 200-04.
[26] R. at 1.
[27] Alabama-Coushatta Tribe of Texas v. U.S., Cong. Ref. No. 3, 83, *2000 WL 1013532, at *30 (Fed. Cl. June 19, 2000).*
[28] Sac & Fox Tribe of Indians v. United States, *315 F.2d 896, 905 (1963).*

land, built a village and grew crops on the land in Kelly Point Park. There is no specific number of year's requirement that needs to be met "for a long time." The Cush-Hook Nation has shown with evidence that they had used the land for a long period of time through their historical data.

III. Proving "tribal entity" when a tribe is not federally recognized.

Since the Cush-Hook Nation is not a federally recognized tribe, they are still able to show they are in fact a tribal entity. A tribal entity that brings forth a claim of aboriginal title has the burden of showing they constitute a tribe historically through to present, and that they have never voluntarily abandoned their tribal status. [29]

State v. Elliot, demonstrates what is needed to show that the tribal qualifies as a tribal entity. In that case, a non-federally recognized tribe claimed that the state of Vermont's fishing permit did not apply to them, by asserting their aboriginal rights. The Abenaki tribe provided evidence from "expert witnesses on their origins, length of time and quality of Abenaki presence in the Missisquoi area, as well as the nature and continuity of their tribal status". [30]

The Cush-Hook Nation, like the Abenaki Tribe, is currently a non-federally recognized tribe. In order to establish that the Cush-Hook Nation has never abandoned their status as a tribal entity, they can rely on their expert witnesses in history, sociology and anthropology in order to show that they have always held themselves out to be a tribe, since time immemorial.[31] Clark's personal journals also provide an eyewitness account of the

[29] Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 586-87 (1st Cir. 1979).
[30] State v. Elliot, 616 A.2d 210, 214 (1992).
[31] R. at 3.

Cush-Hook Nation's distinct customs, and a glimpse at their culture, religion, and way of life that is specific to that tribe of people.[32]

This court should find the Cush-Hook Nation as a tribal entity. There is more than sufficient evidence to prove the Cush-Hook Nation has a historical tribal identity, which they have never abandoned their identity since time immemorial, and consists of one cultural group in, one distinct area-that located in and around Kelly Point Park.

B. The Cush-Hook Nation's aboriginal title has never been extinguished and therefore is still held by the tribe.

In Johnson v. McIntosh, Chief Justice Marshall defined the scope of aboriginal title, by stating the Indians have the right to occupy the land to the exclusion of everyone, except the sovereign nation.[33] The United States is the sovereign nation and has paramount title. Only the United States may unilaterally extinguish an Indian tribe's right of occupancy at any time, which can be done through purchase or by conquest. [34] The United States approach towards extinguishment of aboriginal title was to engage in negotiation, in exchange for Indian land title, but if negotiations failed, the United States would take the land by force.[35] The Supreme Court stated when deciding if a tribe's aboriginal title has been extinguished, the court will not view the matter lightly, and deference will been given to tribe for any vague or confusing acts conducted on behalf of the government.[36]

I. Determining congressional intent when a treaty is not ratified.

A court will look to congressional intent when a statute is ambiguous or could be interpreted in more than one way. Looking at the intent of Congress rather than the presence

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[32] R. at 1.
[33] Johnson v. McIntosh, 21 U.S. 543, 587-88 (1823).
[34] Id.
[35] U.S. v. Gemmill, 535 F.2d 1145, 1148 (1976), Citing Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 273 (1955).
[36] U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 354 (1942).

of the treaty, one can conclude that the Cush-Hook Nation's aboriginal title had not been extinguished. The Supreme Court has ruled that an act by "Congressional intent needs to be plain and unambiguous". [37]

In Oneida County N.Y. v. Oneida Indian Nation, the state of New York entered into an agreement in 1795 with the Oneida Indians, which was a violation of the Non-intercourse Act. The Non-intercourse Act prohibited anyone other than the United States to enter into treaties with the Indians.[38] In that case, Oneida County violated a federal statute and entered into an agreement with the Oneida Indian Nation. Oneida County argued that their conveyance was together, with two other treaties. The two other treaties mentioned were treaties that were lawfully entered into between the United States and the tribes. The Supreme Court rejected the state's argument, which relied on the idea that Congress's lack of a plain and unambiguous act to extinguish the Indian's title meant they did not intend to ratify the 1795 conveyance between the state and the Indian tribes.[39]

Applying the plain and unambiguous standard to this case, the focus is the "intent" prior to the signing of the treaty and not the act of the treaty that the Cush-Hook Nation signed. Since the United States can extinguish aboriginal title in more than one way, the intent of Congress' actions must be clear.[40] When Congress refused to ratify the Cush-Hook Nation's treaty, it demonstrates clear and unambiguously, that Congress did not intend to extinguish their aboriginal title, therefore no extinguishment occurred.

An counter argument that may be raised is that Congress' intent was clear and unambiguous because the treaty was drafted by the United States, signed by the Cush-Hook

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[37] United States v. Santa Fe Pacific R. Co., 314 U.S., 347 (1941).
[38] Purchases or grants of lands from Indians Ann. § 177 (West 2012).
[39] Oneida County N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 247-8 (1985).
[40] Greene v. Rhode Island, 398 F.3d 45, 54 (2005).

Nation, but was actually never ratifies. However, this is an ineffective argument because it does not matter what Congress' initial actions were, but the end result. In this case, Congress made a conscious decision not to ratify the treaty, thus making the treaty null and void.

In U.S. v. Gemmill, the Ninth Circuit said, extinguishment need not be accomplished by treaty or voluntary cession. The court went further by saying when looking at an action taken by the government one should look at whether that action was intended to be an abrogation of a tribe's right of occupancy, rather than if the manner in which it was abrogated was done by permissible means. [41] Congress' final decision regarding the treaty, is a clear and unambiguous action. Congress rescinded the treaty, thus leaving the Cush-Hook Nation's land title in tact.

3. **Opening land to the public for use does not constitute extinguishment**

Actions taken by land surveyors, in the preparation of new homesteaders, does not constitute extinguishment of aboriginal title.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that a surveyor general shall be appointed for the Territory of Oregon, who shall have the same authority, perform the same duties respecting the public and private land claims in the Territory of Oregon, as are vest in and required of the surveyor of lands in the United States North-West of the Ohio, except as hereinafter provided. [42]

Oregon Land Donation Act of 1850, Pub. L. No. 63, ch.76 vol. IX § 9, Stat. 496 (1850).

Cowlitz Tribe of Indians v United States, held that the United States had commissioned a surveyor-general in the Oregon Territory pursuant to the Oregon Land Donation Act of 1850. The surveyor-general was to survey the land in preparation of new

[41] U.S. v. Gemmill, 535 F.2d 1145, 1148 (1976).
[42] Oregon Land Donation Act of 1850, Pub. L. No. 63, ch.76 vol. IX § 9, Stat. 496 (1850).

settlers, that included land, which was held by the Cowlitz tribe. The Court of Claims ruled this did not amount to an extinguishment of title. Earlier congressional intent specifically stated that Indian land title was to be extinguished by treaty. Since the surveyor- generals were not prohibited from surveying the land before extinguishment occurred. The court concluded that it was not Congress's intent for each parcel of land that was surveyed to be an extinguishment of title.[43]

This was affirmed in Gila River Pima-Maricopa Indian Community v. United States, where the Court of Claims held that the opening up of lands to the public in the anticipation of settlers, including the formation of land districts, and did not constitute extinguishment because the settlers would be obtaining land parcel by parcel.[44]

The Cush-Hook Nation had exclusive use and complete dominion over the area in and around Kelly Point Park. When the land surveyors arrived in the Oregon Territory, they began to the process of surveying the land in preparation of the new settlers. However, as noted in the other cases above, this did not constitute the taking of the Cush-Hook Nation's land.

When looking at the session laws of the thirty- first Congress, it is plain and unambiguous that Congress did not intend to extinguish Indian land title, when commissioning the land surveyors in the Cush-Hook Nation's territory. If this was Congress' intent, they would have explicitly acted on the issue.

The only reason the Cush-Hook Nation relocated was due to the encroaching settlers. However, the State may claim that the Cush-Hook Nation actually abandoned their land, and this voluntary cession from the land extinguishes their aboriginal title.

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[43] Cowlitz Tribe of Indians v United States, 467 F.2d 935, 937 (1972).
[44] Gila River Pima-Maricopa Indian Community v. United States 494 F.2d 1386, 1391 (1974).

This is contrary to the facts of the case. It was Anson Dart that originally wanted the Cush-Hook Nation's to relocate sixty miles away to allow the incoming settlers the opportunity to inhabit the rich farmlands in the Kelly Point Park area.

Looking at the plain meaning of the session laws, it is clear that Congress's intent, as well as that of Anson Dart, was not to deprive Indians from their right of occupancy but rather to encourage settlers to move out west.

5. **Congress's use of Kelly Point Park is not Inconsistent with how the Cush-Hook Nation utilization of the land**.

The United States government and the Cush-Hook Nation utilized Kelly Point Park for the same purpose. Therefore aboriginal title was not extinguished by inconsistent use. "Treatment of the land, which is wholly inconsistent with continued tribal occupancy has been deemed to suffice extinguishment."[45] In United States v. Gemmill, the court found that when the military removed the Indians from their ancestral land, they created a National Forest with active federal management, with the taken land. In that case the court concluded that this was totally inconsistent with how the Indians had previously utilized the land and therefore did constitute extinguishment.[46]

In this case, the government commissioned land surveyors to prepare and open the land to settlers for the purpose of homesteading in the Oregon Territory. This is parallel to the Cush-Hook Nation's use of the land. The Cush-Hook Nation relied on the area's game, fish, and wild plants, as well as cultivated the land for crops, for their substances. Since the

[45] William C. Canby, Jr., American Indian Law in a Nut Shell 413 (5th ed. 2009).
[46] Id.

government's intended use of the land was consistent with the Cush-Hook Nation use, therefore there is no extinguishment resulting form the inconstant past usage.

C. The Cush-Hook Nation is Entitled To Just Compensation

Cush-Hook Nation was involuntary deprived of their aboriginal lands when it was stolen from them. They are entitled to be justly compensated for their lands, legally and equitably. The Cush-Hook Nation also has a right to be compensated for their denied rights of making use of, living upon, and cultivating the land that they have held from time immemorial.

The court found in Tee-Hit-Ton Indians v United States, there is a distinction must be made between Indian land title that has been "recognized" by the federal government, through a treaty or statute, and is then taken by the government, is entitled to just compensation. However, aboriginal title, or "unrecognized title" which has been "extinguished", is not considered a taking under the Fifth Amendment and thus is not entitled to just compensation.[47]

In Tillamook's v United States, the court found in favor of a non-federally recognized tribe whose treaty was not ratified, and who had been involuntarily removed from their ancestral lands. The court's rational in the Tillamook's case was based not on a Fifth Amendment taking, but rather from a policy standpoint. The court found that the government had a moral obligation in Indian affairs based on their high standards for fair dealing. Therefore, the Tillamook's were awarded compensation but without interest.[48]

Similar to the facts in the Tillamook case, the Cush-Hook Nation was also a party to a non-ratified treaty and having been relocated from their ancestral lands. Whether the Cush-

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[47] Tee-Hit-Ton Indians v. United States, 348 U.S. 281, 281-90 (1955).
[48] United States v. Alcea Band, 329 U.S. 40, 54 (1946).

Hook Nation has aboriginal title or not should not deter the court to make just for the injustice that occurred to the Cush-Hook Nation. The Cush-Hook Nation was permanently divested of their property right to occupy the land in and around the Kelly Point Park area, in the absence of an Act of Congress. Furthermore, by denying just compensation in this case, violates the traditional norms of high standards for fair dealing and good faith, which the United States practiced when extinguishing aboriginal land title.[49] The method consisted of negotiations, followed by a ratified treaty and compensation.[50]

A Showing Of Recognized Title As An Alternative Argument In Order To Justify A Compensable Taking:

In the alternative, if the court concludes that the Cush-Hook Nation is barred from just compensation basing its rational to non-recognized title. One could argue that the United States did in fact "recognize" the Cush-Hook Nation throughout history including the present. Lewis and Clark who were commissioned by the United States, were acting as an agent by United States.

This can be seen in the political dealings that they engaged in with the Cush-Hook Nation. Specifically, by the sovereignty tokens that were given to the Indians that had political and diplomatic significance.[51] Thus, the relinquishment of the sovereignty tokens signified the government's willingness to recognize tribes.[52]

The United States' original intent was to enter into a treaty with the Cush-Hook Nation shows that the United States politically recognizes the Cush-Hook Nation. Based on the culmination of evidence rather than each act independently, one could conclude that throughout history United States had taken steps to "recognize" the Cush-Hook Nation to

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[49] U.S. v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946).
[50] Id.
[51] R. at 1.
[52] Id.

some degree. Thereby allowing for just compensation for lands lost by a taking by the United States.

C. Joe and Elise Meeks did not satisfy the requirements Stat 9 496 of the Land Donation Act of 1850, therefore their title to land is null and void.

Joe and Elise Meeks did not satisfy the requirements, as set forth in the Land Donation Act of 1850, to give them clear title to the land they possessed. Therefore their descendants did not have the legal right or ability to sell colored title to the state of Oregon.

> Sec. 4 And be it further enacted, That there shall be, and hereby is, granted to every white settler or occupant of the public lands American half-breed Indians included, above the age of eighteen years being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and *who shall have resided upon and cultivated the same for four consecutive years,* and shall otherwise conform to the provisions of this act, the quality of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right; and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided. Whether under the treaty with Great Britain relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land. [53]

The Land Donation Act, required settlers to reside upon and cultivate the land for four consecutive years. According to the facts in our case, the Meeks never cultivated or even lived upon the land for the required amount of time. It is not clear how the Meeks were able to receive a certificate of title from the surveyor-general, despite not having fulfilled the

[53] Oregon Land Donation Act of 1850, Pub. L. No. 63, ch.76 § 9, Stat. 496-500 (1850).

requirements of the Land Donation Act. In Hall v. Russell, which involved a grantee who died before fulfilling the conditions set forth in the Oregon Land Donation Act of 1850. The Supreme Court held that a grantee's land title does not vest until all the requirements have been fulfilled. [54] A person can only transfer what interest he has at the time of transfer. In our case, when the Meeks failed to cultivate the land or live upon it for the required amount of time their interest to the land was something less than a title in fee. This interest will remain until the Meeks are able to fulfill the conditions set forth in the Act. Therefore they were considered mere occupants of the land rather than true owners. Leaving their decedents an interest in the land but not fee simple. The defected title, was eventually sold to the state of Oregon. (R. at 2.) The lower court correctly held the United States erred in the Oregon Donation Land Act, when they included all of the land with in the Oregon territory as being open to the public. (R. at 3.) If the United States followed their traditional practice of extinguishing aboriginal title by treaty followed by compensation, [55] there would have been no defect in the chain of title, thereby giving the state legal and equitable title to Kelly Point Park. Like the Tillamook case mentioned before, the court held the Tillamook tribe was not entitled to compensation under the Fifth Amendment, but were entitled to compensation from the policy standpoint.

The United States had the ability to refuse to enter into a treaty, a promise, which they made to the Cush-Hook Nation. The Cush Hook Nation then relied on that promise to their determinant, receiving no compensation and no federal recognition as being a tribe, being deprived forever from their legal right to occupy their ancestral homeland. If the court is

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[54] Hall v. Russell 101 U.S. 503, 511 (1879).

[55] Alcea Band of Tillamooks, 329 U.S. 40 at 47.

unable to return the Cush-Hook Nation to its aboriginal land, then the court should make them whole by providing just compensation.

III. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA), GUARANTEES THE PROTECTION OF OJBECTS OF CULTURAL PATRIMONY TO NATIVE AMERICAN GROUPS, THEREFORE, OREGON CANNOT ENFORCE ITS REVISED STATUTES, 358.905-358.961 ET SEQ. AND 390.235-390.240 ET SEQ., ON THE CUSH-HOOK NATION OR ITS MEMBERS

Congress' intent is very clear when they enacted NAGPRA, which ensures the protection of Native American tribal cultures. NAGPRA seeks to "strengthen support for the policy of the United of protecting and preserving the traditional, cultural, and ceremonial rights and practiced of Indian Tribes, in accordance with Public Law 95-341."[56] NAGPRA also establishes ownership rights to items of cultural significance to Native Americans or Native Hawaiians.[57]

A. The Cush-Hook Nation qualifies for NAGPRA's protection under the definition of "Native American"

In order to fall under NAGPRA's protection, a group must meet the definition of "Native American. The Act defines a "Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States."[58] Furthermore, the Tenth Circuit held to be considered "Native American" the people must exhibit "some relationship to a presently existing tribe, people or culture."[59]

The Cush-Hook Nation is able to verify their existence as indigenous people to the land through the personal journals of William Clark (Clark). It was during the Lewis & Clark Expedition in April of 1806, that Clark observed the Cush-Hook's village and their longhouses near the Willamette River, south of the Columbia River, where Kelly Point Park

[56] See 25 U.S.C.A. § 3021 (7).
[57] See 25 U.S.C.A. § 3002.
[58] See 25 U.S.C.A. § 3001 (9).
[59] See Bonnichsen v. U.S., 367 F.3d 864, 875 (9th Cir. 2004).

is now located.[60] Clark depicted the Cush-Hook's village, longhouses as well as chronicled their way-of-life, "governance, religion, cultural, burial traditions, housing, agricultural hunting and fishing practices."[61] Since noted by Clark in 1806, the Cush-Hook Nation has continuously lived within the interior boundaries of the United States.[62] Based on the evidence the Cush-Hook Nation can establish they are considered "Native American" under NAGPRA.

B. The sacred totem and religious symbols carved into the trees in Kelly Point Park qualify as cultural patrimony, and are not alienable under NAGPRA

The Cush-Hook Nation's totems and religious symbols qualify as cultural patrimony, because the carvings have an ongoing historical, traditional, or cultural significance to them. Their totems and tree carvings must also be considered inalienable at the time the objects was separated from the Cush-Hook Nation.[63] In U.S. v. Tidwall NAGPRA's definition of cultural patrimony was challenged as unconstitutional however, the Ninth Circuit held that the definition was in fact constitutional for purposes under NAGPRA.[64]

For example, Zuni war gods and the wampum belts of the Iroquois have been considered cultural patrimony under NAGPRA.[65] The Zuni war gods, are carvings that are viewed by the Zuni as "living supernatural beings" that assist in the well-being of their people.[66] The war gods were looked upon "[d]uring times of confrontation," and "whom the

[60] R. at 1.
[61] Id.
[62] Id. at 1,2.
[63] 25 U.S.C.A. § 3001 (3)(D).
[64] See U.S. v. Tidwell, 191 F.3d 976, 979 (9th Cir. 1999).
[65] S. Rep. No. 101-473, 101st Cong., 2d Sess. 1, 7-8 (1990).
[66] http://articles.latimes.com/1991-08-12/news/vw-381_1_war-gods

Zuni warriors would seek strength and wisdom to overcome their enemies."[67] These war gods, which are held communally by the Zuni people, are unalienable by an individual.[68]

Similarly, the wampum belts of the Iroquois represent specific events within their culture. In Onondaga Nation v. Thacher, the United States Supreme Court noted that wampum belts are made from different beads and vary in size; representing significant events-such as the treaty signing between the Iroquois and United States.[69] The Onondaga people chose one of their own to be the "lawful keeper" of the wampum belts.[70]

In 1806, Clark documented the cultural and religious practices of the Cush-Hook leaders.[71] Who carved totem and religious symbols into tress, which were located in Kelly Point Park.[72] The tree carvings have great cultural significance to the Cush-Hook Nation, which also establishes the ongoing historical tie to the Kelly Point Park, as well as, the cultural and religious practices of their people.

C. The Cush-Hook Nation are rightful owners of the totems and religious symbols in Kelly Point Park, and the State of Oregon is consider a "museum" for purposes of NAGPRA, and cannot establish ownership in the totems and religious symbols

NAGPRA has established four elements that must be met in order for a tribe to establish ownership over objects of cultural patrimony. 1) The tribe needs to met the definition of Native American or Indian. 2) The object must be located on federal or tribal lands. 3) It object or cultural patrimony must have been either discovered or excavated after November 16, 1990. 4) The tribe had to have been separated from its cultural patrimony.

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[67] Id.
[68] Id.
[69] See Onondaga Nation v. Thacher, 189 U.S. 306, 307 (1903), dismissed on grounds that there was no federal question.
[70] Id.
[71] R. at 2.
[72] Id.

The Cush-Hook Nation can establish ownership over the totems and religious carvings through the personal journals of William Clark. The Cush-Hook Nation meets the definition of Native American, the tree carvings are located in and around Kelly Point Park, which was the ancestral lands of he Cush-Hook Nation. The tree carving that was desecrated was cut down after November of 1990. Lastly, the Cush-Hook Nation was separated from their patrimonial objects in 1850, when they were relocated sixty miles west of their original homelands at the request of Anson Dart. Lastly, the carvings have never been abandoned or relinquished by the Cush-Hook Nation.

The State of Oregon should have known and been on notice, that the carvings are located in Kelly Point Park. Through the journals of Clark, it was documented that the Cush-Hook Nation was responsible for creating the totems and religious symbols in the living trees in Kelly Point Park. The State of Oregon, which can be considered under NAGPRA as a "museum", has failed to protect and preserve all the totems and religious carving in the living trees, by allowing the ongoing vandalism of the carvings by various miscreants.[73] Under NAGPRA, the State of Oregon qualifies as a museum because "museum" is expanded to include institutions, states and local agencies, that receive federal funding and has possession of, or control over Native American cultural items.[74]

NAGPRA allows for entities and other individuals to establish ownership in objects of cultural patrimony through the "voluntary consent of an individual or group that has authority of alienation . . . over such object," or through a "Fifth Amendment taking by the United States or by the United Stated Court of Federal Claims."[75] The record does not reflect that the State of Oregon has ever received any "voluntary consent of an individual or

[73] R. at 2.
[74] 25 U.S.C.A. § 3001 (8).
[75] 25 U.S.C.A. § 3001 (13).

group that had the authority of alienation" by the Cush-Hook Nation.[76] Nor, has Oregon established a claim that the objects of cultural patrimony are apart of a Fifth Amendment taking by the United States regarding the totems or religious symbols, because the Cush-Hook Nation has never received any compensation for the land or the trees where the totems and religious symbols are located by the United States.[77]

The Cush-Hook Nation can establish its ownership, under NAGPRA, with their totem and religious carvings, which are located on tribal land. The carving that was removed from Kelly Point Park was do so, after November 16, 1990, as set forth by NAGPRA. Also the area where the totems and religious tree carvings were located where considered to be tribal land in 1806. Subsequently in 1850 the Cush-Hook Nation was separated from their sacred objects due to the relocation by the United States.[78] The State of Oregon also cannot establish any ownership rights to the totems and religious symbols through a right of possession by voluntary consent or a Fifth Amendment takings by the United States of the objects of cultural patrimony.

D. NAGPRA preempts Oregon's Revised Statutes, 358.905-358.961 et seq. and 390.235-390.240 et seq., over the Cush-Hook Nation's objects of cultural patrimony

Any state law that conflicts federal law will be preempted due to the Supremacy Clause.[79]

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[76] 25 U.S.C.A. § 3001 (13).
[77] 25 U.S.C.A. § 3001 (13), and R. at 2.
[78] R. at 1-2.
[79] U.S. Const. Art. VI, Cl. 2.

U.S. Const. Art. VI, Cl. 2

The Supreme Court of the United States has continually held that when a federal law conflicts with a state law, federal law will trump. The Supreme Court has also long recognized that state laws in conflict with federal law are "without effect."[80]

Congress was granted plenary power over Indians and their affairs through the Indian Commerce Clause and the treaty clause. For example, Congress can determine who qualifies as an Indian for purposes of federal legislation and programs.[81] "There is no single statute that defines "Indian" for all federal purposes."[82]

It is Congress' right to grant, transfer or wholly deny states any jurisdiction over Indians within their internal boundaries. In 1953, Congress transferred its criminal jurisdiction and granted limited civil jurisdiction to five states, including the State of Oregon, over Indians in Indian County, under Public Law 280.[83] However, a state will not have criminal jurisdiction over an Indian, where a state law violates federal legislation over Indian. Typically, Congress is rarely explicit in preempting state laws, when enacting legislation.[84] Therefore, courts must determine whether the state law is strengthening the federal law or weakening it.

The State of Oregon's statute regarding this case, 358.905-358.961 et seq. and 390.235-390.240 et seq., are in clear conflict with federal law. Congress' intent, by enacting

[80] See Maryland v. Louisiana, 451 U. S. 725, 746 (1981).
[81] Cohen's Handbook of Federal Indian Law, § 3.03[4] (2005 ed.).
[82] Id.
[83] 18 U.S.C. § 1162 (a)
[84] See

NAGPRA, is interested in restoring and reestablishing ownership in tribal patrimony objects of indigenous people of the United States.[85]

Oregon is allowed to pass its own legislation to strength NAGPRA, but their current legislation in facts weakens it. Oregon's definition limits who qualifies for protection under their state statute by limiting ownership of objects of cultural patrimony. Under Oregon's statutory scheme, an "Indian tribe" is any tribe of Indians recognized by the Secretary of the Interior, or as listed in the Klamath Termination Act, 25 U.S.C. 3564 et seq., or as listed in the Western Oregon Indian Termination Act, 25 U.S.C. 3691 et seq.[86]

Under Oregon's definitions of "Indian Tribe," the Cush-Hook Nation will not qualify for protection under Oregon's statutes because they were never a federally recognized tribe. NAGPRA protects all indigenous peoples within the United States, even those Indians who are not federally recognized currently or never have received federal recognition. NAGPRA, defines Indian tribes much more broadly than other federal statutes.[87] In Abenaki Nation of Mississquoi v. Hughes, the court held "[t]he regulation which sets out the procedures for establishing that an American Indian group exists as an Indian tribe, 25 C.F.R. § 83 (1992), defines Indian group or group to mean "any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe."[88]

It was Congress' intent, through its supremacy and plenary power to enact NAGPRA to benefit and vest ownership rights of objects of cultural patrimony in "Native Americans" and "Indian Tribes" that may not meet the definition of an "Native Americans" or "Indian Tribe" under any other piece of federal legislation.

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[85] 25 U.S.C.A. § 3051 (7).
[86] Or. Rev. Stat. 97.740 (4).
[87] See Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 251 (D. Vt. 1992) 251, order aff'd, 990 F.2d 729 (2d Cir. 1993).
[88] Id.

Therefore, Oregon's Rev. Stat. are without effect over the Cush-Hook Nation and the respondent, Thomas Captain because it seeks to preempt Congress' intent under NAGPRA.

IV. IN THE ALTERNATIVE, OREGON'S REVISED STATUTES, 358.905-358.961 ET SEQ. AND 390.235-390.240 ET SEQ., ARE CIVIL/REGULATORY AND NOT CRIMINAL/PROHIBITORY, THUS NOT APPLICABLE TO THOMAS CAPTAIN

A. Public Law 280 only transferred federal criminal/prohibitory regulation and granted limited private matter jurisdiction over Indians within Indian Country, but not civil regulatory jurisdiction to the State of Oregon.

In 1953, Congress passed Public Law 280 (PL 280), which transferred its criminal jurisdiction enforcement over Indians within Indian Country and granted limited private civil matter jurisdiction over Indians within Indian County to five mandatory states.[89] Congress was primarily concerned with the lawlessness in Indian Country and the lack of forums available to hear private civil disputes.[90] However, states began to over reach PL 280's original intent and began to apply all regulatory schemes, both criminal and civil regulation, to Indians in Indian County. As noted in Carole Goldberg's 1975 law review article, "[r]ecent social, economical, and political developments have made the Indians and states especially anxious that their respective interpretations of PL-280 prevail."[91]

In Bryant v. Itasca County, the State of Minnesota attempted taxing a mobile home located on trust land came before this court.[92] It was held that "the legislative history of Pub.L. 280 and the application of the cannons of construction applicable to congressional statues" that the State of Minnesota did not receive a clear grant to tax Indians in Indian

[89] 18 U.S.C. § 1162 (a)-The five original mandatory states are: California, Oregon-except the Warm Springs Indian Reservation, Nevada, Minnesota-except the Red Lake Indian Reservation and Wisconsin.
[90] 18 U.S.C. § 1162
[91] Goldberg, 22 U.C.L.A. L. Review 535, 537-59 (1975)
[92] See Bryant v. Itasca County, 426 U.S. 373 (1976).

Country under PL 280.[93] The lack of legislative history regarding Congress' express intent or policy of the does not give the Public Law 280 a "grant of civil jurisdiction to the States."[94] The primary intent is to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes."[95] Furthermore,

> Nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversation of the affected tribes into little more than "private, voluntary organizations", United States v. Mazure, 419 U.S. 544, 557 (1975)-a possible result if tribal governments and reservation Indians were subordinated to the fully panoply of civil regulation . . . of state and local governments.

Bryant v. Itasca County, 426 U.S. 373, (1976)

In the statue, Public Law 280 refutes such an inference, "there is notably absent any conferral of state jurisdiction to tribes themselves, and the Act provides that there is ""full force and effect" of any tribal ordinances or customs that are adopted heretofore or hereafter, if not inconsistent with any applicable civil law of the State."[96] Finally, the Supreme Court of the United States noted that during this time period, Congress, knew fully well how to "express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws" and choose not to expressly state that PL 280 states were given civil/regulatory jurisdiction over Indians in Indian Country, only private matter civil jurisdiction.[97]

B. The State of Oregon Cannot Meet its Burden Under the Cabazon Test

In California v. Cabazon Band of Mission Indians, the Supreme Court of the United States developed a test for whether a regulation scheme was criminal/prohibitory, that

[93] Id. at 379.
[94] Id. at 381.
[95] Id. at 383.
[96] Id. at 389.
[97] Id.

subjected Indians in Indian Country to state jurisdiction, or civil/regulatory, that will not apply to Indians in Indian County. Generally, if the intent of a state law is to prohibit a certain conduct, then Indians in Indian County will be subjected to the state's criminal law jurisdiction.[98] However, if the state law generally permits the conduct, subject to state regulation, then it is deemed civil/regulatory, and states cannot regulate the same conduct of the Indians within Indian Country, unless the regulation of a particular conduct is specifically stated and granted by Congress to the states to regulate.[99] "The short hand test is whether the conduct at issues violates the State's public policy."[100]

The Cabazon Test has been applied differently by various Federal and State Supreme Courts, because the language in Cabazon can be interpreted to allow a state to regulate permitted conduct if it is in violation of the "state's public policy". This variation of application of the Cabazon Test has yielded vastly different interpretations of Public Law 280.[101] "When the law at issue is not clearly civil or criminal, a court will resort to public policy in order to decide."[102] This exception allows for a state to assert generally permitted conduct within the state, to state that it is against public policy and apply its civil/regulatory scheme over Indians within Indian Country, by saying that it is criminal/prohibitory. Thus, a court can impose all of its civil/regulatory jurisdiction scheme over Indians within Indian Country because it is a "state public policy" issue.

For example, driving is permitted conduct, subject to state regulation. States may require a person to pass a driver's test, or insurance must be kept on the vehicle. The Ninth

[98] See California v. Cabazon Band of Mission Indians, 480 U.S. 202, (1987).
[99] Id. at 209.
[100] Id.
[101] Garrison, Baffling Distinctions between Criminal an Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty, 8 J. Gender, Race and Just. 449, 459 (Fall 2004).
[102] Id.

Circuit held that the State of Washington did not possess jurisdiction over on-reservation Indians regarding speed limits within and apart of the reservation.[103] "Laws which prohibit absolutely certain acts fall into" the criminal/prohibitory category, but if it is civil/regulatory, "then such power is lacking" for the state to regulate such acts. [104] However, other federal and state supreme courts have held that driving is criminal because a state public policy is interested in deterring dangerous driving.[105]

Regarding this case, Oregon's Revised Statutes**,** 358.905-358.961 et seq. and 390.235-390.240 et seq., are civil/regulatory, and thus do not apply to the respondent, Thomas Captain. Thomas Captain can be considered an "Indian" under 18 U.S.C. 1152, because the community in which he resides in considers him "Indian."[106] Also, the land where the event took place was determined to be owned by the Cush-Hook Nation, an Indian Tribe.[107]

The statutes must reviewed upon their face and legislative history to determine if it is civil/regulatory or criminal/prohibitory. Or. Rev. Stat. 390.325, explicitly states the removal "from public lands any material of an archaeological, historical, prehistorical or anthropological nature *without first obtaining a permit* (emphasis added) issued by the State Parks and Recreation Department."[108] The State of Oregon does outright prohibit the removal of material that is archaeological, historical, prehistorical or anthropological nature, but allows removal through a permitting process run by the state.[109]

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[103] See Confederated Tribes of the Colville Reservation v. State of Washington, 938 F.2d 146 (1991)
[104] Id. at 147.
[105] See St. Germaine v. Circuit Court for Vilas County, 938 F.2d 75, 77 (7th Cir. 1991).
[106] 18 U.S.C. 1152
[107] R. at 4.
[108] Or. Rev. Stat. § 390.235 (1)(a).
[109] Id.

Also, a person charged with violating these state laws can be charged in a civil proceeding and receive punishment through a civil remedy, or be charged criminally, or both.[110]

Furthermore, this case is different from other cases where federal and state supreme Courts have applied civil/regulatory schemes as criminal/prohibitory due to the state's public policy on matters of health and safety. Oregon's laws in question regarding this case differ because there is not a health or safety issue involved, but archaeological sites. Oregon asserts that the archaeological sites are "under the stewardship of the people of Oregon to be protected and managed perpetuity by the stat as a public trust."[111]

Therefore, Oregon's is unable to meet their burden under the Cabazon Test, nor are they able to establish a state public policy concern that rises to a health or safety issues to assert a higher standard of state public policy to apply criminal jurisdiction over Thomas Captain.

CONCLUSION

Based upon the foregoing reasons this Court should recognize the Cush-Hook Nation's aboriginal title to their land located in and around the Kelly Point Park area in the state of Oregon, and find that NAGPRA's protections extend to the Cush-Hook Nation and their members, thus preempting Oregon's Revised Statutes**,** 358.905-358.961 et seq. and 390.235-390.240 et seq., and reserving Thomas Captain's conviction under those statutes.

[110] Or. Rev. Stat. § 358.958.
[111] Or. Rev. Stat. § 358.910.