No. 11-0274

IN THE

SUPREME COURT OF THE UNITED STATES

State of Oregon,

Petitioner,

v.

Thomas Captain,

Respondent/Cross-Petitioner.

On Appeal From the Oregon Court of Appeals

Brief for Respondent/Cross-Petitioner

Team No. 15

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STATEMENT OF THE CASE

A. Statement of Proceedings

Petitioner State of Oregon charged Respondent and Cross-petitioner, Thomas Captain, with the criminal action of 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 in conjunction with OR. REV. STAT. 390.235-390.240. R. at 2-3. Respondent pleaded innocent to all charges and consented to a bench trial. R. at 3.

The Oregon Circuit Court for the County of Multnomah, the trial court, found the Respondent not guilty for trespass and for cutting timber without a state permit. They held this because the Cush-Hook Nation (the "Nation") still owned the land within Kelley Point Park (the "Land") because their aboriginal title to the Land was not extinguished by either the treaty it signed with an agent of the Oregon territory (the "Treaty") because Congress never ratified the Treaty and that the United States' grant of fee simple title land to Joe and Elsie Meek and their subsequent sale to the Petitioner were both void. R. at 3-4.

The trial court however found Respondent guilty for violating OR. REV. STAT. 358.905-358.961 and OR. REV. STAT. 390-235-390.240 for damaging an archaeological site and a cultural and historical artifact. A fine of $250 was handed down with this decision. The court ruled that these two statutes apply to all lands in Oregon, including tribally owned land, and thus the criminal action was proper. The court found these Oregon statutes to apply to the Land because of Public Law 280. R at 4.

Petitioner and Respondent both appealed to the Oregon Court of Appeals. The Court of Appeals affirmed with no opinion. Despite another appeal, the Oregon Supreme Court denied review. *Id*.

Petitioner filed a petition and cross petition for certiorari to the United States Supreme Court and the Respondent filed a cross petition for certiorari. The Supreme Court, the court of last resort under Article III of the Constitution, granted certiorari on two questions: (1) Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park and (2) Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the Land notwithstanding its purported ownership by a non-federally recognized American Indian tribe. *Id*.

B. Statement of Facts

Kelley Point Park is an Oregon state park located within the present day limits of Portland, Oregon. The area in which the park is situated is part of the original homelands of the Nation, which, while not politically recognized by either the federal government or the State of Oregon, is indisputably a tribe of Indians. The tribe's historical, pre-Euro American occupancy and traditional use of this land is verified by the journals of Lewis and Clark, who first encountered the Cush-Hook and visited their village, located within present day Kelley

Point Park, in April of 1806. R. at 1. In addition to documenting the tribe's existence, Lewis and Clark also presented the tribal leaders with "sovereignty tokens," used to signal mutual willingness between the tribe and the federal government to engage in commercial and political relations. In 1850, the Nation signed the Treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon territory (the "Superintendent"). Under the terms of the Treaty, the Nation would relocate 60 miles westward to a coast range of mountains conditional upon receiving compensation specified by the terms of the treaty. Subsequent to signing the Treaty but prior to congressional ratification, the Nation relocated to the area specified by the Treaty to avoid approaching settlers. In 1953, the United States Senate refused to ratify the Treaty, such that the Nation did not receive any of the compensation specified by its terms. R. at 2-3.

After the Cush-Hooks relocated, two American settlers, the Meeks, moved onto the Land. The Meeks were ultimately granted fee simple titles to this land supposedly pursuant to the Oregon Donation Land Act of 1850 (the "Act"), which required white settlers to reside upon and cultivate the land for four consecutive years in order to receive such a title. *Id*. The Meeks, however, failed to meet the requirements for a fee simple title under the Act. They did not reside upon the Land for the required time nor did they cultivate the Land. The Meeks' descendants eventually sold the Land to Oregon in 1880. Oregon used the Land to create Kelley Point Park. *Id*.

In 2011, Thomas Captain, a citizen of the Nation, moved from the coast range of mountains where the rest of the Nation presently resides to Kelley Point Park in an effort to reassert the Nation's ownership of the Land and to protect certain culturally and religiously significant trees within the park. *Id*. The trees are of great importance to the Cush-Hook, as

tribal shamans carved sacred totem and religious symbols upon the trees, a practice noted in the journals of Lewis and Clark. In recent years, vandals have begun climbing the trees to deface and, in some cases, to completely remove the culturally and religiously significant carvings. The State of Oregon has done nothing to prevent the destruction of these carvings by vandals. *Id*.

In order to protect and restore one such vandalized carving, carved by his own ancestor, Captain cut the tree down and removed the portion containing the carving. As he was returning to his tribe's location near the coast, state troopers arrested Captain and seized the carving. *Id*.

STANDARD OF REVIEW

Both questions that the Supreme Court granted certiorari to are questions of law. The first and second questions are both federal questions and thus should be reviewed de novo. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 US 845, 852 (1985). This Court does not have jurisdiction on the meanings of the state statutes in the second question; it can only make a determination of whether federal law allows the state to make such statutes. Both of these questions are appeals of final decisions of the trial court and thus judgments as a matter of law. FED. R. CIV. P. 50. The standard to reverse the trial court decision is that no reasonable trial court could have found for the victorious party. Practically speaking, this Court would have to find that the trial court incorrectly applied federal law in order to overturn either decision.

SUMMARY OF ARGUMENT

The Nation held aboriginal title to the Land before it signed the Treaty in 1850 because it fulfilled the common law test for aboriginal title. The Treaty did not eliminate this title because Congress did not ratify the Treaty. The grant of title over the Land to the Meeks under the Act did not eliminate aboriginal title because the grant was given in error and thus the subsequent sale of land from the Meeks' descendants to Oregon was also void. The Nation leaving the Land also did not eliminate aboriginal title, as they left due to pressure from unauthorized entities. Since there were no events that eliminated their aboriginal title, the Nation continues to own the aboriginal title to the Land.

Oregon does not have criminal jurisdiction to control the use of archeological, cultural, and historical objects on the Land. First, Public Law 280 only authorizes state criminal jurisdiction in Indian country. Because land held solely through aboriginal title does not constitute Indian country, Public Law 280 does not apply to the Land. Second, even if the Land does constitute Indian country, Public Law 280 only authorizes the enforcement of criminal and prohibitive, not civil and regulatory, state laws. Because the Oregon laws in question are civil and regulatory in nature, Public Law 280 does not authorize their application to Indian country.

ARGUMENT

I. THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK.

In order to prove that the Nation holds aboriginal title to the Land, we will show (1) that the Nation had aboriginal title before any of the relevant events addressed in this case,

(2) that the title was not transferred by the Treaty, (3) that the fee simple title granted under the Act was not proper and thus did not extinguish the title, and (4) that the Nation retained title even though they left the Land to settle elsewhere after agreeing to the Treaty. Since neither the federal nor state government recognizes the Nation, the only way that they can claim title over the Land is through the aboriginal title test established by federal common law.

A. The Nation had aboriginal title over the Land before signing the Treaty in 1850.

Before the Nation signed the Treaty, it definitely had aboriginal title over the Land. In order to have aboriginal title, tribes must prove that they had exclusive use and occupancy over the land in question for a long time. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941) (court used the occupancy test to establish that the tribe had aboriginal possession over the land). As stated in *Sac and Fox Tribe of Indians v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967), "courts have also construed the terms 'use and occupancy' requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." Through expert testimony, the trial court found that the Nation occupied, used, and owned the Land before the arrival of Euro-Americans in a manner consistent with traditional Indian life and custom. Courts have held that occupancy and use are questions of fact and thus should not be revisited by this Court. *See Santa Fe*, 314 U.S. at 345 ("Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact").

The long time requirement is used to deter the awarding of aboriginal title to tribes who gained land for a few years and then claimed that it was under their dominion. *See Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (Ct. Cl. 1974)

(rejecting the argument that land occupied after 1803 could not be claimed under Indian title, agreeing that occupation commencing before then would certainly fulfill the long time requirement); *see also Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 177 Ct. Cl. 184 (1966) (time requirement should not be fixed at a specific number of years in order to avoid making the Indian Claims Commission Act a way for Indians to establish aboriginal land after only a few years of settlement). Tribes that had held land before the establishment of the United States are accepted to have had used and occupied the land for a long time. Since the Nation used the Land since before the arrival of Euro-Americans, this long time requirement is definitely fulfilled.

The Nation thus held aboriginal title over the Land before the events of 1850. For them to lose such aboriginal title, there would need to be an event that extinguished their title as a matter of law.

B. The Treaty did not extinguish the Nation's aboriginal title to the Land.

While treaties can extinguish aboriginal title, the Treaty in this case did not because the United States Congress never ratified it. The Supreme Court has held that the federal government has the exclusive authority to interfere with the right to aboriginal title of the Nation. *See Santa Fe*, 314 U.S. at 345 (noting that this "policy was first recognized" in *Johnson v. McIntosh*, 21 U.S. 543 (1823) "and has been repeatedly affirmed"). Courts have held that even the executive branch does not have the authority to extinguish aboriginal title without the express consent of Congress. *See Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1394 (Ct. Cl. 1974) ("It is settled that the supreme power to extinguish Indian title is vested in Congress"); *see also Turtle Mountain*, 490 F.2d at 945 ("Constitution vests the power to deal with Indian tribes in Congress, and included in that

power is the exclusive right to extinguish Indian title.") In this case, the Superintendent signed the Treaty with the Nation. The Superintendent had "general responsibility for Indian affairs in a territory." PROVISIONAL AND TERRITORIAL RECORDS GUIDE: SUPERINTENDENT OF INDIAN AFFAIRS, http://arcweb.sos.state.or.us/pages/records/provisionalguide/SuperIndian.html (last visited Jan. 14, 2013). The Superintendent's action thus could not in itself give force to the Treaty with the Nation. Since Congress refused to ratify the Treaty, the Treaty was not effectuated and thus the Treaty did not extinguish the aboriginal title held by the Nation over the Land.

One counterargument that the petitioners make here is that since the Superintendent was "appointed by the President with approval of the Senate," the Congress acquiesced to the actions of the Superintendent and thus the Treaty did extinguish the Nation's aboriginal title. PROVISIONAL AND TERRITORIAL RECORDS GUIDE, *supra*. The problem with this this argument is that courts have held that "Congress's intention to extinguish must be clear; it will not be lightly implied." *Vill. of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir. 1984); *see Santa Fe*, 314 U.S. at 354 ("An extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards"). Courts are reluctant to dismiss the right to aboriginal title on the basis of implied or indirect congressional behavior. More direct and explicit approval, such as ratifying the Treaty, is thus required and clearly absent in this case. In addition, the Treaty was sent to Congress to ratify, which clearly means that there was an expectation in the treaty approval process that treaties would not be final until Congress approved them. If it were the case that Congress automatically blessed any treaties that the Superintendent made with tribes, it would not have been necessary to send the Treaty to Congress in the first place, let alone for it to be

approved by Congress. Congress clearly did not recognize the Treaty as effective, as the record shows that the United States never paid the Nation for its lands, nor did it provide the Nation with the other benefits under the Treaty.

The trial court's ruling that the Treaty did not extinguish the Nation's aboriginal title to the Land should be upheld.

C. The invalid grant of title under the Oregon Donation Land Act did not extinguish the Nation's aboriginal title to the Land.

The grant of fee simple title over the Land to the Meeks under the Act was invalid because the Meeks did not fulfill the requirements under the Act to receive title to the Land. The Act required that "every non-Indian settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. Oregon Land Donation Act of 1850, 9 Stat. 496-500 (1850). The record in this case clearly establishes that this did not take place and thus the Meeks should not have been granted the title.

Petitioners make the argument that it does not matter that the Meeks did not fulfill the terms of the Act because the United States granted them the title anyway, which it should be able to do as the sovereign entity with complete control over the Land. While this is a compelling argument, it is not supported by case law. This Court wrote in *Oregon & California R.R. Co. v. United States*, 190 U.S. 186, 195 (1903):

> It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those 'who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.' As these conditions were never complied with, the land continued to be the property of the United States.

In *Oregon & California R.R. Co.*, the same mistake as in this case was made by the United States in erroneously awarding the title over the land under the Act and the Supreme

Court ruled that the error should be overturned and the title to the land remained the property of the United States. Based on the precedent of *Oregon & California R.R. Co.*, the Nation's aboriginal title over the Land was not extinguished by the erroneous grant of the Land to the Meeks.

Since the Meeks' descendants sold land to Oregon that they did not hold proper title to, that sale of land should be declared void. One cannot sell something that one does not own. In this case, the Meeks' descendants could not have sold the Land to the State of Oregon because they did not have proper title to the Land. The trial court's ruling that the grant under the Act to the Meeks and the subsequent sale to Oregon are both void should be upheld.

D. The Nation retained title even though they left the Land to settle elsewhere after agreeing to the Treaty.

Petitioners finally make the argument that the Nation moved in 1850 to the coast and thus surrendered their aboriginal title to the Land. For example, in *Williams v. City of Chicago*, 242 U.S. 434 (1917), the Supreme Court held that the tribe's abandonment of their land extinguished their aboriginal right of occupancy. The Court in *Williams* however was making the decision based on the fact that the tribe abandoned the land long before 1795, not that the tribe abandoned the land at some point after they noticed that an unauthorized entity (such as the state, territory, or settlers) was trying to take over their land. That is, the Court was holding the tribe cannot claim land that it once lived on but left voluntarily for other land; if that was allowed, tribes could claim they held aboriginal title for almost any land in the United States because most did live in different places at different times. In our case, the tribe left well after the founding of the United States because they were compelled to do so

by an agent of the territory trying to move them so that American settlers could occupy the farming lands and then settlers encroaching onto the Land. The Nation reluctantly made a deal to secure land for their future. Absent the compulsion by the territory, it is safe to say that the Nation would have stayed on the Land that it had lived on for many years because the Land was very valuable for farming and the Nation had very significant cultural and historical tribal connections to the Land. It certainly was not looking to move voluntarily to establish a presence on other land like in *Williams*.

Another case that is important in establishing that settling elsewhere does not extinguish the Nation's aboriginal title is *Santa Fe*, in which the tribe was being forced off their land by the Santa Fe Pacific Railroad Company, a private company. *Santa Fe*, 314 U.S. at 343. The Supreme Court held that "no forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read." *Id*. at 355-56. Aboriginal title could not be extinguished by just forcing a tribe from their land and then claiming that the tribe no longer had aboriginal title because they left the land. This is very relevant to our case because the Nation moved out against their wishes and now the other side claims that the Nation no longer has aboriginal title because they moved out. The distinction between our case and *Santa Fe* that the petitioners bring up is that the Nation agreed to move out pursuant to a treaty while the tribe in *Santa Fe* was physically forced to move out. While these are different means of forcible removal, this is insufficient to distinguish this case from *Santa Fe*.

The important word in the Supreme Court's decision is "unauthorized" because the move of the tribe in *Santa Fe* was unauthorized by Congress. *Id*. In this case, the move was

unauthorized because Congress never approved the Treaty. If the territory properly conveyed to the Nation that they held the right over the Land until Congress ratified the Treaty, the Nation would not have abandoned the Land. *Santa Fe* required that the territory should have had "fair dealing" with the Nation, something that did not take place here as the territory allowed the Nation to leave without informing them of their rights and did not inform them after the Treaty was not ratified that they could move back to the Land. *Id.; see United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946) ("taking original Indian title without compensation and without consent does not satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs"); *see also Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902) ("the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon").

Another argument that Petitioners make is that the Meeks moving onto the Land extinguished the Nation's right to the aboriginal land. The argument is that courts have found that when settlers have come onto tribal land and begin to cultivate it, they may be granted title over that land. Courts have held that non-Indian incursion onto Native land can extinguish aboriginal title but such a determination "depends on (1) the extent of such incursion, (2) the intent of Congress, as regards the status of aboriginal title, manifested in the laws authorizing such non-Indian entry or manifested in matters pertaining to the region in general, or (3) both." Michael J. Kaplan, Annotation, *Proof and extinguishment of aboriginal title to Indian lands*, 41 A.L.R. FED. 425 (1979). Courts have found a compelling extent of incursion in cases where there were a significant number of non-Indians who settled on the land and cultivated the land. *See Plamondon ex. rel. Cowlitz Tribe of Indians v. United*

States, 467 F.2d 935, 937 (Ct. Cl. 1972) (1953 could not be the date aboriginal title was extinguished because only "150 settlements had been made" but by 1963 there was sufficiency because there had been substantial settlement); *see also Gila River*, 494 F.2d at 1390 ("as a result of increased white settlement after the Civil War the Indians' farming activities suffered"). The Meeks did not cultivate the land or even live on the Land for four years. Only the Meeks, according to the record, moved onto the land, thus definitely not fulfilling the significant number requirement. Thus, the extent of the incursion does not meet the burden established by courts. Additionally, Congress did not authorize the incursion in this case. There was no valid authorization (other than the Act, which we have dealt with already) for the Meeks to move onto and claim the land. As stated in *Turtle Mountain*, 490 F.2d at 444, the power of Congress to eliminate aboriginal title is exclusive and must be express even when considering non-Indian incursion onto land and thus the burden to prove that Congress approved the Meeks to move onto the Land is not met here. Nothing in the record supports that there were any individuals other than Meeks that moved onto the Land and thus incursion cannot be used to extinguish title in this case.

Petitioners also argue that after acquiring the Land, Oregon made it into a state park and thus used the Land sufficiently to extinguish aboriginal title, similar to how non-Indian use can extinguish aboriginal title. The problem with this argument is that this court has historically held that the doctrine of extinguishment of aboriginal title by incursions applies only when individuals move onto land and not when a state seizes land to improve and maintain. *See Plamondon*, 467 F.2d at 937 (settlement by individual settlers); *see also Gila River*, 393 F.2d at 1388 (settlement by individual settlers)*; see also Turtle Mountain*, 490 F.2d at 448 (settlement by individual settlers). As discussed earlier, states do not have the

power to extinguish aboriginal title in their sole capacity. *See Santa Fe*, 314 U.S. at 345 (noting that this "policy was first recognized" in *McIntosh*, 21 U.S. at 543 "and has been repeatedly affirmed"). Petitioners argue that the incursion principle should be extended to states as a matter of public policy. We disagree. This Court has recognized the delicate relationship between tribes and states over time. From the ability to make and effectuate treaties with tribes to the sole authority to extinguish the aboriginal right of tribes over land, the federal government has refrained from granting broad authority over tribes to states. There is no compelling reason to change this now. If Oregon feels that it expended a large amount of resources in maintaining its park (of which there is little evidence in the record as they did not even try to limit the destructive effects of vandals), it can appeal to Congress to extinguish the aboriginal right of the Nation. Since it already has this avenue to gain power over the Land, there is no public policy reason to create another one.

II. OREGON DOES NOT HAVE CRIMINAL JURISDICTION TO CONTROL THE USE OF ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS BY INDIANS ON THE LAND IN QUESTION.

The lower court erred in finding that Public Law 280 authorizes the application of OR. REV. STAT. ANN. § 358.905-358.961 (West 2012) and OR. REV. STAT. ANN. § 390.235-390.240 (West 2012) to all lands in the State of Oregon whether they are tribally owned or not. On the contrary, there are two independent arguments that conclusively show that Public Law 280 does not grant Oregon criminal jurisdiction in the instant case. First, the provisions of Public Law 280 only apply to "Indian country," the express definition of which does not

include tribal lands held solely through aboriginal title. Second, even if the Land does qualify as "Indian country," Public Law 280 only authorizes the application of criminal and prohibitory, not civil and regulatory, state laws. Because the Oregon laws in question are civil and regulatory in character, Public Law 280 does not authorize their application within Indian country. Consequently, the State of Oregon does not have criminal jurisdiction to try Mr. Captain for damaging an archeological site and a cultural and historical artifact on the Land.

Public Law 280, passed in 1953, was codified in the following statutes: 18 U.S.C. § 1162 (2011), 28 U.S.C. § 1360 (2011), and 25 U.S.C. §§ 1321–1326 (2011). 18 U.S.C. § 1162 and 28 U.S.C. § 1360 mandatorily transferred federal law enforcement authority within Indian country to six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 25 U.S.C. §§ 1321–1326 collectively established a process by which other, non-mandatory states could voluntarily assume such authority over Indian country within their boundaries. Because Oregon is one of the so-called mandatory states, analysis of jurisdiction in the instant case must focus on 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

A. Oregon does not have criminal jurisdiction over the Land.

Absent an express federal statute to the contrary, an Indian tribe—not the state in which that tribe is located—has the authority to regulate the conduct of tribe members on tribal land. The Nation qualifies as a tribe despite not being federally recognized. Aboriginal rights based on use and occupancy grant a tribe authority to regulate the conduct of tribe members on tribal land and such rights persist until expressly extinguished by Congress. Since Public Law 280 only applies to "Indian country" and since the express statutory definition of "Indian country" does not include lands held solely through aboriginal title,

Congress has not expressly extinguished the Nation's aboriginal rights to regulate the conduct of its members to the exclusion of state interference. Therefore, the State of Oregon does not have criminal jurisdiction over conduct on the Land.

i. The Nation has jurisdiction over its members' conduct on the Land by default.

The Nation meets the requirements to be considered an Indian tribe. In *Native Vill. of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (citing *Montoya v. United States*, 180 U.S. 261, 266 (1901)), the court held that an Indian community constitutes a tribe if it is federally recognized or it is a body of Indians of the same or similar race united under one leadership or government and inhabiting a particular although sometimes ill-defined territory. This disjunctive definition clearly establishes that a body of Indians, such as the Nation, can constitute a tribe without federal or even state recognition. In addition, the court held, an Indian community can only be a tribe if it is made up of the modern-day successors to a historical sovereign entity that acted, to at least some minimal degree, as a governing body. *Id.* So far as the facts provide, the Nation meets these criteria such that it qualifies as a tribe. Even without federal recognition, the Nation's aboriginal title is sufficient to establish its default jurisdiction over its members' conduct on the Land. As the court explained in *Gambell*, 746 F.2d at 574 (citing *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 667-69 (1974); *Santa Fe*, 314 U.S. at 345-47), a tribe's aboriginal rights based on occupation and use are superior to those of third parties, including the states, and are entitled to the protection of federal law even when they are not formally recognized by treaty or statute. Although ultimately subject to the powers of Congress, such rights persist until clearly and expressly extinguished by federal statute. Likewise, in *Native Vill. of Venetie I.R.A. Council*

v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991) (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)), the court held that an "Indian tribe need not wait for affirmative grant of authority from Congress in order to exercise dominion over its members." Finally, in *Colliflower v. Garland*, 342 F.2d 369, 376 (9th Cir. 1965), the court held that an Indian tribe has the authority to enact its own laws to govern its people and to enforce those laws absent some treaty provision or federal statute to the contrary. Therefore, provided there is no express federal mandate to the contrary, the Nation—not the State of Oregon—has the authority to regulate the conduct of tribe members on the Land.

The petitioner might respond that the aboriginal right to make and enforce substantive law (to the exclusion of state enforcement of state law) is not absolute, but rather, applies only to internal tribal matters. According to the court in *Montana*, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with dependent status of the tribes and cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. The petitioner may then argue that insofar as the State of Oregon is interested in preserving archeological sites and artifacts as a matter of state history, Mr. Captain's actions here have external effects and therefore fall outside the exclusive purview of the tribe. While perhaps appealing on its face, this argument is ultimately unconvincing. In *Montana*, the aforementioned limitations on tribal sovereignty concerned the tribe's authority to regulate their external relations, namely, their authority to regulate the conduct of nonmembers on non-Indian fee land within a reservation. *Id.* The instant case, however, does not involve the attempted tribal regulation of a nonmember on non-Indian land. On the contrary, Mr. Captain is plainly a member of the Nation and the actions giving rise to this case took place on tribal land. Nor does the assertion of a indirect

external effect on the State alter the fact that this case is fundamentally about the sovereign right of the Nation to regulate the conduct of its members on its own land with respect to the tribe's own historical and cultural artifacts to the exclusion of state involvement. If a tribe's control over its own culture, history, and artifacts with respect to its own members' conduct somehow represents a matter of external relations, then it is unclear what—if anything at all—would actually constitute an internal tribal matter. Consequently, because the conduct involved here is an internal tribal matter, the Nation's aboriginal sovereignty rights grant the tribe—and not the State of Oregon—jurisdiction over Mr. Captain's conduct on the Land, provided such rights have not been expressly extinguished by federal statute.

ii. Public Law 280 does not grant Oregon criminal jurisdiction on the Land.

18 U.S.C. § 1162 grants Oregon criminal jurisdiction over offenses committed by or against Indians in Indian country. The operative term "Indian country," as used in 18 U.S.C. § 1162, is explicitly defined by 18 U.S.C. § 1151 (2011), which states:

> [T]he term "Indian country", as used in this chapter, means (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.

Because the Land, which is held by the Nation solely through its aboriginal title, does not meet the requirements of any of these three definitions, it does not qualify as Indian country for the purposes of Public Law 280.

First, the Land is plainly not within the limits of an Indian reservation under the jurisdiction of the United States Government. The Bureau of Indian Affairs defines a federal Indian reservation as an area of land reserved for a tribe or tribes and held in trust by the United States Government pursuant to a treaty or other agreement with the United States, an executive order, or a federal statute. BUREAU OF INDIAN AFFAIRS, http://bia.gov/FAQs (last visited Jan. 14, 2013). According to the facts found by the Oregon Circuit Court for the County of Multnomah, no such federal treaty, agreement, executive order, or federal statute was ever passed with respect to the Nation. It follows that the Land cannot be within the limits of a federal Indian reservation and therefore does not qualify as Indian country under 18 U.S.C. § 1151(a).

Second, the Land does not constitute a dependent Indian community. In *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), the Court defined a dependent Indian community as a limited category of Indian lands, which are neither reservations nor allotments, which have been set aside by the federal government for Indian use, and which are under federal superintendence. So, for instance, the lands of the Pueblo Indians were considered Indian country because Congress had recognized the Pueblo Indians' right to these lands via federal statute and had furthermore enacted legislation regarding the lands with the aim of fulfilling the federal government's guardianship role over the Pueblo Indians. *United States v. Sandoval*, 231 U.S. 28, 39-40 (1913). In another case, the Court held that a non-reservation Indian colony was Indian country because the colony had been created out of

land purchased and held in trust by the federal government. *United States v. McGowan*, 302 U.S. 535 (1938).

The present case is substantially different. The Land here was not set aside by the federal government for Indian use. Given that the Nation has yet to receive federal recognition at all, there has certainly been no congressional act recognizing the its right to the Land and the federal government has taken no role in purchasing or providing the Land for the benefit of the Nation. The Land here likewise fails to meet the federal superintendence requirement. Because the tribe is not federally recognized, the federal government has so far taken no active guardian or trustee relationship with the Nation. Because the Land here fails both prongs of the test set out by *Native Vill. of Venetie*, 522 U.S. at 527, it does not constitute a dependent Indian community. Therefore the Land does not qualify as Indian country under 18 U.S.C. § 1151(b).

Third, the Land is not an allotment. An allotment, as the term pertains to Indian law, relates to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887). This act authorized the federal government to survey Indian reservation lands and to divide those reservation lands into property for individual Indians. Since the Land was never a reservation, it follows that it could not have been divided into allotments. Thus, the Land does not qualify as Indian country under 18 U.S.C. § 1151(c).

The traditional doctrine of Indian sovereignty forms an important background against which federal statutes must be measured. Statutes that diminish or abrogate Indian sovereignty must therefore be constructed narrowly. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In addition to this general presumption in favor of preserving sovereignty, as the above analysis shows, this statute clearly does not include

tribal land held solely through aboriginal title in its definition of "Indian country." Congress' decision to define "Indian country" through express, itemized list of specific criteria further precludes a broad reading of this statute. Therefore, because aboriginal sovereignty rights persist until expressly extinguished by Congress and furthermore, because Public Law 280 fails to expressly extinguish those rights on lands held solely through aboriginal title, the State of Oregon does not have criminal jurisdiction on the Land.

B. Public Law 280 does not grant Oregon criminal jurisdiction over the conduct in question.

Even if Land does constitute "Indian country" under 18 U.S.C. § 1151 and 18 U.S.C. § 1162, Public Law 280 still does not grant Oregon jurisdiction in the present case. Public Law 280 only authorizes the application of criminal and prohibitory, not civil and regulatory, state laws. Since the state laws in question are civil and regulatory in character, Public Law 280 does not authorize their application to Indian conduct in Indian country.

i. Public Law 280 only grants Oregon authority to enforce criminal and prohibitory laws, not civil and regulatory laws, in Indian country.

Despite being broad on its face, 28 U.S.C. § 1360 does not grant states general civil and regulatory authority over Indians in Indian country. The statute provides:

> Each of the States listed in the following table [Oregon being one such state] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private

> property shall have the same force and effect within such Indian country as they have elsewhere within the State[.]

In *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 383-85 (1976), the Court rejected an expansive reading of this statute and instead held that its purpose was primarily to redress the lack of adequate Indian forums for resolving private legal disputes involving Indians. In doing so, the Court held that the portion of the statute providing for enforcement of state civil laws of general application within Indian country only authorized state courts to use their own rules in resolving private legal disputes involving Indians. *Id.* Importantly, the Court held that 28 U.S.C. § 1360 did not provide states with general civil regulatory authority over Indians in Indian country. Public Law 280 was not meant to effect total assimilation, but granting states such broad authority over tribes would work to accomplish precisely that while simultaneously devastating tribal institutions and values. *Id.* at 387-89; *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (holding that granting states general civil regulatory authority over tribes would destroy important tribal institutions).

Therefore, in order to determine whether a state law can be validly applied to Indian conduct in Indian country, a court must determine whether the law is criminal and prohibitive in nature, in which case it is authorized by 18 U.S.C. § 1162, or civil and regulatory, in which case it is applicable only as it may be relevant to private civil litigation in state court. If the intent of the law is to generally prohibit certain conduct, then the law is criminal and prohibitive, but if state law permits the conduct at issue, subject to regulation, then the law is civil and regulatory. *Cabazon*, 480 U.S. at 208. Alternately, the court may employ a

shorthand version of the test whereby the state law is to be considered criminal only if the conduct at issue violates the state's public policy. *Id.*

ii. The Oregon laws in question are civil and regulatory.

OR. REV. STAT. ANN. § 358.905-358.961 (West 2012) and OR. REV. STAT. ANN. § 390.235-390.240 (West 2012) are best characterized as civil and regulatory. A thorough analysis shows that the Oregon laws allow the conduct at issue subject to regulation. Furthermore, Mr. Captain's conduct does not violate Oregon's public policy. And finally, even if Mr. Captain's conduct did violate Oregon's public policy, there are countervailing factors that demand characterizing the laws in question as civil and regulatory. Consequently, Public Law 280 does not authorize the application of the laws in question to Indian conduct in Indian country.

First, while violation of these statutes is punishable as a class B misdemeanor according to OR. REV. STAT. ANN. § 358.920(8), this is not dispositive of whether the law is civil and regulatory or criminal and prohibitive. That an otherwise regulatory law is enforceable by criminal as well as civil means does not make that law criminal and prohibitive. *Cabazon*, 480 U.S. at 211-12. For instance, the Court held that California's bingo laws were regulatory and therefore not enforceable pursuant to Public Law 280 even though violation of the laws in question was punishable as a misdemeanor. *Id.* at 210-12. If the attachment of a criminal penalty to an otherwise regulatory law were sufficient to authorize that law's application to Indian conduct in Indian country under Public Law 280, then a state could, with liberal application of criminal penalties, abrogate tribal sovereignty entirely. Since Public Law 280 was not meant to effect such a destruction of tribal institutions and furthermore, because Public Law 280 clearly differentiates between criminal and civil

statutes, the mere presence of a criminal penalty cannot be sufficient for a law to qualify as criminal for Public Law 280 analysis. *Id.*

Second, Oregon does not broadly prohibit conduct such as Mr. Captain's. On the contrary, Oregon law allows and, under some circumstances, encourages the removal and recovery of archeological objects, especially for the sake of contributing to the Oregon Museum of Anthropology (the museum is mentioned no fewer than nine times in OR. REV. STAT. ANN. § 358.920 and OR. REV. STAT. ANN. § 390.235 alone). OR. REV. STAT. ANN. § 358.920(1)(b) broadly permits the collection of arrowheads, which constitute cultural and historical artifacts. Furthermore, OR. REV. STAT. ANN. § 358.920(1)(a), in conjunction with OR. REV. STAT. ANN. § 390.235, allows the recovery of artifacts from archeological sites by individuals that meet certain qualifications and apply for the appropriate permits. In this way, the recovery of cultural and historical objects here is similar to the operation of gambling facilities in *Cabazon*. In both cases, the state in question has a vested interest in encouraging the conduct in at least some way. In *Cabazon*, the state operated a lottery designed to generate revenue; here, the state operates a museum designed, in part, to store the product of archeological excavations. Likewise, both states permitted private actors to engage in the regulated activity. In *Cabazon*, low-stakes bingo games for charity and other purposes were allowed; here, the state issues permits to private archeologists so the latter can excavate and recover cultural and historical artifacts. *Cabazon*, 480 U.S. at 210-12. The recovery of archeological objects here ought to be classified as regulated, rather than generally prohibited, conduct just as gambling was determined to be a regulated rather than a prohibited activity under state law. *Id.* In a particular light, Mr. Captain's violation did not arise simply because he recovered and sought to restore a cultural and historical artifact of

his tribe, but because he failed to meet certain state qualifications and did not obtain the requisite state permits. Thus understood, the laws in question are designed to regulate rather than prohibit the conduct at issue. Consequently, Public Law 280 does not authorize their application to Indian conduct in Indian country, such that Oregon does not have criminal jurisdiction over Mr. Captain here.

Third, Mr. Captain's conduct did not violate the state's public policy. OR. REV. STAT. ANN. § 358.910, which expresses the policy underlying the Oregon statutes in question, states that archeological sites are a valuable cultural resource of the people of Oregon. This section then goes on to say that archeological sites and objects must therefore be preserved and protected for sake of the people of Oregon. But Mr. Captain's conduct was aimed at accomplishing precisely the preservation and protection of this cultural and historical artifact. Furthermore, given the verified and repeated acts of vandalism that had occurred with respect to these artifacts in general and the artifact removed by Mr. Captain in particular as well as Oregon's failure to mitigate or prevent such attacks on the Nation's cultural resources, it seems that Mr. Captain's actions could reasonably be expected to achieve the state policy of protecting such artifacts more effectively than state inaction would have done. Because Mr. Captain's conduct did not violate the state's public policy, but, in fact, was reasonably calculated to fulfill those very same policy objectives, the shorthand public policy test described in *Cabazon* requires that the state laws in question be categorized as civil and regulatory and therefore, not applicable to Indian conduct in Indian country pursuant to Public Law 280.

Finally, even if Mr. Captain's conduct did violate some aspect of state public policy, countervailing considerations still require that the Oregon laws in question be categorized as

civil and regulatory pursuant to *Cabazon* analysis. In *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 148-49 (9th Cir. 1991), the court held that state speeding laws were civil and regulatory rather than criminal and prohibitive even though speeding was against Washington's public policy. It held this way because tribal governments had substantial incentives to prevent speeding in Indian country—in particular, Indians would be the most likely to suffer from lax enforcement of tribal speeding regulations—such that allowing tribes to regulate traffic in Indian country would not detract from the state's determination to discourage speeding overall. In the instant case, allowing the tribe to enforce preservation of cultural and historical artifacts by tribe members will similarly not detract from Oregon's determination to protect such artifacts. Not only does the Nation have a robust interest in protecting their own cultural and historical artifacts, but the tribe is also uniquely competent at determining the sort of conduct that actually constitutes desecration of such artifacts. This fact is even recognized within the Oregon laws in question. *See* OR. REV. STAT. ANN. § 390.235 (1)(f)(B)(ii) (requiring consultation with the appropriate Indian tribe before issuing an archeological permit). Therefore, because allowing the Nation to regulate the conduct of its own members with respect to its own cultural and historical artifacts will not detract from Oregon's determination to protect those same artifacts, the Oregon laws in question must be categorized as civil and regulatory. Public Law 280 thus does not grant Oregon criminal jurisdiction to control the use of archeological, cultural, and historical artifacts. Consequently, Oregon does not have criminal jurisdiction over Mr. Captain here.

CONCLUSION

Based on the arguments above, Respondent/Cross-petitioner respectfully requests this Court to affirm the Oregon Court of Appeals' affirmation of the trial court's ruling of not guilty against Thomas Captain for trespass and cutting timber without a state permit on the basis that the Nation still owns the aboriginal title to the Land. Also based on the arguments above, Respondent/Cross-petitioner respectfully requests this Court to reverse the Oregon Court of Appeals' affirmation of the trial court's ruling of guilty against Thomas Captain for damaging an archaeological site and a cultural and historical artifact because Oregon does not have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe.