No. 11-0274

IN THE

Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

THOMAS CAPTAIN.
Respondent.

On Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR RESPONDENT

TEAM 17

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 FACTS

Thomas Captain, a citizen of the non-federally recognized Cush-Hook Nation, was arrested after he erected temporary housing in Kelley Point Park in order to protect religiously significant tree carvings that had been subjected to vandalism and theft. R at 2. Kelley Point Park was the ancestral home of the Cush-Hook Nation. In 1806, William Clark (of the Lewis and Clark expedition) met with the Cush-Hook chief and bestowed a "sovereignty token" upon him. R at 1. Generally, these medals signified that the recipient tribe would be recognized by the United States government. R at 1. In 1850, after reaching a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, the Cush-Hook Nation withdrew from Kelley Point Park and relocated to the Oregon coast range of mountains. The agreement, however, was never ratified by the United States Senate and the Cush-Hook Nation was denied the promised reimbursement for vacating its lands. R at 1-2.

Despite never compensating the Cush-Hook Nation, the United States allowed Joe and Elsie Meek to claim the former Cush-Hook land under the Oregon Donation Land Act of

1850. Under the Act, White settlers who lived on and cultivated the relevant land for four consecutive years were able to obtain fee title to it from the United States. Even though the Meeks only lived on this land for approximately two years and never cultivated it, they were granted fee title. This land was later sold to Oregon by descendants of the Meeks, and Oregon used it to create Kelley Point Park. R at 2.

Kelley Point Park contains trees considered by the Cush-Hook Nation to be culturally and religiously significant. R at 2. The trees are over three-hundred years old, and tribal shamans carved sacred totem and religious symbols into them. Tragically, vandals have begun climbing these trees in order to deface and, in some cases, steal the images. Due to Oregon's ineffective response to these crimes, Mr. Captain opted to protect these artifacts himself. R at 2. After cutting down one of the trees and removing the sacred image from it, Mr. Captain was arrested on his way back to the Cush-Hook Nation's coastal mountain range location. His preservation efforts led him to be charged with trespassing on state lands, cutting timber in a state park without a permit, and desecrating an archaeological site under Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). R at 2-3.

STATEMENT OF PROCEEDINGS

The Circuit Court made a variety of findings of fact and conclusions of law contributing to its holding that the Cush-Hook Nation still owns the lands in question under aboriginal title, and that Mr. Captain was therefore not guilty of trespass or of cutting timber without a state permit. R at 4. However, despite determining that the Nation's aboriginal title was never extinguished, the Circuit Court found Mr. Captain guilty of damaging an archaeological site and a cultural and historical artifact under Or. Rev. Stat. 358.905-358.961

(Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). R at 4. The court fined Mr. Captain $250 for these violations. R at 4.

Both parties appealed this decision and the Oregon Court of Appeals affirmed the lower court's ruling without writing an opinion. R at 4. After the Oregon Supreme Court denied review, the State filed a petition and cross petition for certiorari and Mr. Captain filed a cross petition for certiorari to the United States Supreme Court. R at 4. The Supreme Court granted certiorari to review whether the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park. The Supreme Court also granted certiorari to determine whether Oregon has criminal jurisdiction to protect and control the uses of archaeological, cultural, and historical objects on the land in question despite its alleged ownership by a non-federally recognized American Indian tribe. R at 4.

The issues before this court require the review of legal conclusions based on the Circuit Court's findings of historical fact and statutory interpretation. Findings of historical fact are reviewed for clear error and are deserving of great deference. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988). The statutory interpretation of the Circuit Court is reviewed *de novo*. *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 718 (9th Cir. 1986). The ultimate legal conclusions of the Circuit Court are also reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF ARGUMENT

The Circuit Court's decision finding that the Nation still owns the aboriginal title to the land in question should be affirmed. The historical record and factual findings of the lower court indisputably establish the Nation's use and ownership of the land prior to the arrival of any Euro-American settlers. R at 2-3. This means that the Nation did, as a matter of

fact, hold aboriginal title to the land in question. Such aboriginal title would persist unless it was extinguished, which clearly did not take place.

The 1850 treaty the Nation signed with superintendent Dart could not have extinguished aboriginal title because the Senate failed to ratify the treaty and Dart lacked the authority to accept the transfer of Indian lands. *See: Johnson v. M'Intosh*, 21 U.S. 543 (1823). Similarly, the granting of fee simple title to the Meeks was also insufficient to extinguish aboriginal title. A clear and obvious intent by Congress to extinguish aboriginal title must be present. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985). Such a clear and discernible intent is noticeably absent, especially considering that the land in question was vacant when the United States granted fee title to the Meeks. And while a laches defense may be considered when affording relief based on wrongful possession of lands, it is not a factor in simply determining whether an aboriginal title exists. *Id*. Thus, the Circuit Court correctly held that the Nation owns the land in question under aboriginal title.

Since the Nation retains aboriginal title to the land, Oregon does not possess the criminal jurisdiction to control the use of archaeologically significant objects in Kelley Point Park. Oregon asserts this jurisdiction under Public Law 280. This statute, however, does not authorize jurisdiction in this case for a multitude of reasons. First, the Oregon statutes that the State seeks to enforce clash with a federal law. Public Law 280 does not permit the exercise of criminal jurisdiction on Indian lands when such regulation would be inconsistent with a federal statute. 18 U.S.C.A. § 1162 (West 2010).

Second, the Oregon archaeological statutes are regulatory, rather than criminal, in nature. Public Law 280 has been interpreted by courts to apply only to criminal statutes. In

California v. Cabazon Band of Mission Indians, the Court explained the test for determining whether a statute is regulatory or criminal. Courts will look to the public policy of the state and whether the state generally prohibits the conduct at issue or permits it subject to regulation. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 209 (1987). Upon examining this case in the context of Oregon's public policy, it is clear that the statutes at issue are regulatory and not prohibitory, and criminal jurisdiction is therefore not authorized.

Finally, authorizing jurisdiction in this case would be contrary to the legislative intent of Public Law 280. The statute was enacted to combat lawlessness on Indian reservations. This goal, coupled with the longstanding federal policy of protecting Indian sovereignty, shows that to authorize criminal jurisdiction in this case would be a misinterpretation of Congressional intent, as Mr. Captain's actions were not carried out with criminal intent.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK.

Aboriginal title is the right of native people to occupy and use their native lands. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). *Johnson v. M'Intosh* first established this concept when the court asserted that Indians have "a legal as well as just claim to retain possession of" their land, and that such right was subject only to the claim laid by the United States as sovereign. *M'Intosh*, 21 U.S. at 574 (1823). This aboriginal right to possession does not need to be based on any treaty, statute, or other formal government action. *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339 (1941). Rather, the "occupancy necessary to establish aboriginal possession is a question of

fact" and if it is established that certain lands were the ancestral home of an Indian tribe, then that tribe would hold aboriginal title until it was extinguished. *Id.* at 345.

In the present case, the historical record and factual findings of the Oregon Circuit Court establish just this. Records of interactions between the Nation and the Lewis and Clark expedition evidence their presence and ownership of the land prior to the arrival of any Euro-American settlers. R at 1. The fact that William Clark's journals noted the archaeological artifacts relevant to the current proceedings, and that they are now over twenty-five feet from the ground, further demonstrate the Nation's longstanding inhabitance of the disputed lands. R at 2. Thus, the Nation clearly held initial claim to the disputed lands through aboriginal title and such title would persist unless it was extinguished.

A. THE 1850 TREATY DID NOT EXTINGUISH ABORIGINAL TITLE BECAUSE THE SENATE FAILED TO RATIFY IT.

It is well established that the United States and only the United States has the capacity to extinguish the Indian right of occupancy. *M'Intosh*, 21 U.S. at 587. After the adoption of the Constitution, Indian relations became the exclusive responsibility of the federal government. *Oneida Indian Nation of New York State v. The County of Oneida, New York*, 414 U.S. 661 (1974). In particular, aboriginal title constituted a claim that was good against all but the United States, with the United States federal government having the exclusive capacity to extinguish such Indian title. *Id.* at 667. This stance, based upon a policy of respecting the Indian right of occupancy, is codified in 25 U.S.C.A. §177 which states "[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C.A. §177

(West 2012). For example, a collection of eighteen treaties entered into between California executives and Indians were rendered "legal nullities" because the Senate never ratified them. *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed. Cir. 2000).

The Nation signed a treaty in 1850 with Anson Dart, the superintendent of the Oregon Territory, agreeing to sell the title to their native lands and relocate sixty miles away. R at 1-2. This treaty is of no legal consequence, however, because the Senate refused to ratify the agreement. The treaty could not extinguish aboriginal title because the federal government neither took part in nor condoned the agreement. Just as with the aforementioned California treaties that carried no legal weight, superintendent Dart simply did not possess the authority to treaty with the Nation or accept the transfer of the title to their native homelands.

It may be conceded that in certain circumstances, the acceptance of treaty terms and removal to a reservation can constitute a release of aboriginal title to those lands being vacated. For example, an instance where Indians accepted a reservation that was specifically created for them constituted a relinquishment of their aboriginal title to lands outside of the reservation. *See*: *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449 (7th Cir. 1998). In another instance, payment by the United States of a tribe's claim for the taking of their land extinguished the aboriginal title. *See*: *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991). However, it should be noted that Congress' power over the Indians, while plenary, is not absolute. Thus, this power does not "enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946), *citations omitted*.

Two crucial facts distinguish the current case from the aforementioned examples that resulted in the extinguishment of aboriginal title. First, the United States never provided the Nation with the promised compensation. R at 2. The fact that the federal government took no action whatsoever, neither towards ratifying the agreement nor seeing its promises delivered, continues to be a fatal flaw to any extinguishment argument. The requirement of federal action is unambiguous and the absence of it at present is indisputable.

Secondly, the context is important because it must be understood that the Nation did not merely abandon their native home or give away their claim to the land when they relocated. They were engaged in an exchange. Even though the transaction was never honored, and their departure from the disputed land cannot be conceived of as a voluntary cession. The context of an exchange indicates their continuing claim to the land not just because the terms were not adhered to, but also because the exchange was not valid in the first place.

The precedent is longstanding and unambiguous that the extinguishment of aboriginal title can only come at the hands of the federal government. Based on the patently clear lack of such federal involvement, the Oregon Circuit Court's conclusion that the Nation's title was never extinguished as required by *Johnson v. M'Intosh* must be affirmed.

B. THE OREGON DONATION ACT OF 1850 DOES NOT CONSTITUTE A SUFFICIENTLY INTENTIONAL ACTION BY CONGRESS TO EXTINGUISH THE NATION'S ABORIGINAL TITLE.

The granting of fee simple title to the Meeks through the Oregon Donation Land Act of 1850 did not extinguish the Nation's aboriginal title to the land because it did not represent an intentional action by the federal government to do so. The original methods for transfer of

Indian title by the federal government were either through purchase or conquest. *M'Intosh*, 21 U.S. at 587. The federal government may also extinguish aboriginal title by simply taking Indian lands. However, such a taking will not be "lightly implied." *Santa Fe Pacific RR Co.*, 314 U.S. at 354. The federal intent to extinguish title must be clear. *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005). For instance, military action removing Indians from the land, followed by the inclusion of the land in a National Forest and active federal management of the land for forest purposes constituted a taking in *United States v. Gemmill*. *See*: *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976). On the other hand, ambiguous acts such as the inclusion of land in a federal grazing district may be insufficient to establish a taking. See: *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983) *rev'd on other grounds*. Thus, motivated by the established federal policy of respecting the Indian right of occupancy, "[c]ongressional intent to extinguish Indian title must be 'plain and unambiguous' and will not be 'lightly implied.'" *County of Oneida, New York*, 470 U.S. at 247-248 (1985), *citations omitted.*

The present case clearly lacks the explicit congressional intent required to extinguish the Nation's aboriginal title. Specifically, the Circuit Court's determination that the United States' grant of fee title to the Meeks under the Oregon Donation Land Act was void *ab initio* is correct for two reasons. First, the Meeks claimed the disputed land after it had been vacated by the Nation, but while their aboriginal title persisted. R at 2. Thus, what the United States believed to be a vacant 640 acre plot ripe for settling still rightfully belonged to the Nation. Indeed, the fact that the land was vacant at the time the United States granted fee title to the Meeks only reinforces the notion that the federal government was not intentionally or

explicitly extinguishing any preexisting claim to the land, but rather unknowingly bequeathing land that already had a rightful owner.

Secondly, the Meeks never fulfilled the requirements for earning fee simple title. The Act stipulated that fee title would be granted to settlers who had "resided upon and cultivated the [land] for four consecutive years." R at 2. The Oregon Circuit Court correctly found as a matter of fact that the Meeks never cultivated the land nor did they live there for more than two years. R at 3. Therefore, notwithstanding the continuing aboriginal title to the land, the United States' grant of fee title to the Meeks remained improper. Thus, the Circuit Court's determination that the grant of fee simple title to the land was void *ab initio* and that the subsequent sale of the land back to Oregon was also void should be respected.

Even if the Meeks, and subsequently Oregon, received fee title, such a claim would not extinguish aboriginal title and would be subject to the Nation's right of occupancy. An extension of the policy that aboriginal title is subject only to the will of the federal government is the principle that an Indian claim to land is superior to the claim of all but that of the federal government. Indeed, because only Congress can extinguish aboriginal title, any fee simple title to lands that are subject to an existing aboriginal title is inferior to that aboriginal title. *See*: *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (holding "where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title"). Therefore, even if fee title was granted to the Meeks and subsequently to Oregon, this would not extinguish the Nation's aboriginal title. Rather, the aboriginal title would persist and be a superior claim to the land while Oregon's fee title would merely be "a reversionary right to possession". *Id.* at 1448.

C. A LACHES DEFENSE WOULD NOT COMPROMISE THE NATION'S ABORIGINAL TITLE.

The opposing counsel will likely assert a laches defense, claiming the failure of the Nation to assert their claim over the land earlier prevents them from doing so now. But this argument is unconvincing. The basis for such an assertion would find its support in a handful of recent cases that indicate a laches defense can be presented against Indian possessory claim suits. For instance, in *City of Sherrill v. Oneida Indian Nation*, respondent Indian nation was barred from reasserting sovereignty over parcels of land once part of their reservation and which they reacquired through purchase. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, (2005). The court cited concerns about the disruptive nature of allowing the reestablishment of sovereignty piecemeal over land that had long since passed from Indian hands and the checkerboard effect that would result in a situation where most of the surrounding territory was still privately owned. *Id.* at 221. Additionally, the court referenced the dramatic change in the nature of the land, transitioning from wilderness during the time it was reservation land to fully developed at present. *Id.* at 221. The decision in *City of Sherrill* has been cited as precedent in other Second Circuit cases that also seek to bar suits seeking damages based on possessory claims *See, e.g.: Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2nd Cir. 2005).

However, an attempt to analogize these decisions to the present case would be unconvincing. First, and most significantly, the Supreme Court explicitly noted that its decision in *City of Sherrill* did not disturb its previous holding from *County of Oneida v. Oneida Indian Nation* stating "the tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in [*County of Oneida*]." *City of Sherrill*, 544 U.S.

at 221. Thus, the most important, and most relevant precedent established by this court in *County of Oneida* remains true: aboriginal title cannot be extinguished by anyone other than the federal government and laches do not preclude a rightful claim based on that title. *County of Oneida,* 470 U.S.

Another crucial distinction is the fact that these other cases generally sought damages based on the wrongful possession of Indian lands, whereas the present case is not seeking to determine what damages may be due to the tribe. Rather, the issue is simply whether the Nation's aboriginal title persists. In that sense, it is also significant that none of the policy concerns that motivated the decisions in *City of Sherrill* or the subsequent Second Circuit decisions are implicated even should they be considered relevant. Whereas those cases dealt with land converted from wilderness to actively managed and developed real estate, the Nation's native home has not been developed and has simply been maintained as a state park. While the aforementioned cases implicated the rights and legal standing of thousands of different private landowners, the fee title to the land that now comprises Kelley Point Park only exchanged hands twice after the 1850 treaty: first to the Meeks and then back to the state of Oregon. The fact that the land has not been developed, that it is not subject to a plethora of different claimholders, and that the single title to the land is held by the essentially the same party as was involved in the invalid treaty that originally prompted the Nation's departure from their homeland all indicate that acknowledging the Nation's extant aboriginal title could hardly be construed as disruptive.

II. SINCE THE CUSH-HOOK NATION OWNS THE LAND IN QUESTION, OREGON LACKS CRIMINAL JURISDICTION TO REGULATE THE

ARCHAEOLOGICAL, CULTURAL AND HISTORICAL OBJECTS UNDER PUBLIC LAW 280

It is imperative to consider this issue in light of the earliest interpretations of American Indian sovereignty. In *Worcester v. Georgia*, Chief Justice Marshall noted that "the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832). The Court also held that the laws of Georgia were unenforceable in Cherokee territory. *Id.* at 520. This opinion serves as a microcosm for the Supreme Court's continued policy of protecting American Indians' rights to regulate their own tribes.

It is true that the enactment of Public Law 280 marked a shift in this policy, as it grants the state of Oregon jurisdiction over "offenses committed by or against Indians in the areas of Indian country…to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory" and "the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory" 18 U.S.C.A. § 1162(a) (West 2010). "Indian country" includes "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (2012). Since the Cush-Hook Nation retains aboriginal title to Kelley Point Park, its lands constitute Indian country as provided in the statute. The reach of Public Law 280, however, is narrow. Section two of Public Law 280 does not authorize the "regulation of the use of such [Indian] property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 18 U.S.C.A. § 1162 (West 2010). Here, the permit requirements of Or. Rev. Stat. 358.905-358.961 et seq.

(Archaeological Sites Statute) and Or. Rev. Stat. 390.235-390.240 et seq. (Historical Materials Statute) directly clash with a federal statute, 16 U.S.C. §470cc. This conflict prohibits Oregon from exercising criminal jurisdiction in this case.

Additionally, the Oregon statutes at issue diverge from the way courts have interpreted Public Law 280. Courts have held that Public Law 280 only authorizes the enforcement of state laws that are criminal in nature, rather than regulatory. *See: California,* 480 U.S at 208. The Archaeological Sites Statute and the Historical Materials Statute seek to regulate the excavation of archaeological materials. The statutes thus do not qualify as criminal, and they cannot be enforced under Public Law 280. Finally, courts have considered the legislative history behind Public Law 280 when ruling on its scope. Congress' intent in enacting the statute was to remedy the lawlessness that had plagued Indian reservations lacking adequate criminal justice mechanisms. *See: Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 379 (1976). Convicting Mr. Captain would not further this legislative aim, as his actions were taken to protect an archaeological object from vandalism and were not carried out with criminal intent. For these reasons, the Court should not authorize Oregon to exercise criminal jurisdiction over Mr. Captain, as this would be in clear violation of Public Law 280.

A. PUBLIC LAW 280 DOES NOT AUTHORIZE JURISDICTION IN THIS CASE BECAUSE IT DIRECTLY CLASHES WITH 16 U.S.C. §470CC.

The lower courts erred in holding that the Oregon statutes at issue extend to tribally owned areas in the state. Public Law 280 grants Oregon limited criminal jurisdiction over "all Indian country within the State, except the Warm Springs Reservation." 18 U.S.C.A. § 1162 (West 2010). The Cush-Hook Nation does not reside on the Warm Springs Reservation,

and is thus subject to Oregon criminal jurisdiction in many cases. Here, however, enforcing the Archaeological Sites Statute and the Historical Materials Statute is inappropriate.

Public Law 280 explicitly prohibits the authorization of the regulation of any real or personal property belonging to any Indian tribe that is inconsistent with a federal statute. 18 U.S.C.A. § 1162 (West 2010). In this case, Public Law 280 conflicts with 16 U.S.C. §470cc. According to the Archaeological Sites Statute, a "person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235." Or. Rev. Stat. § 358.920 (2011). Or. Rev. Stat. § 390.235 requires a permit to be obtained from the State Parks and Recreation Department before altering an archaeological site. Based solely on its text, this statute would seemingly pertain only to public lands: "A person may not excavate or alter an archaeological site on public lands…or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department." Or. Rev. Stat. § 390.235 (2011). A literal reading of the language, however, is misleading, as this statute has been interpreted to require permits for altering archaeological sites on private lands as well. Oregon Administrative Rule 736-051-0090 states that "a person may not knowingly and intentionally excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object from private lands in Oregon unless that activity is authorized for a permit issued pursuant to this rule." Or. Admin. R. 736-051-0090**.** The Rule cites Or. Rev. Stat. § 390.235 as the statutory authorization for its issuance. Additionally, the inclusion of permits for "private lands" in the Archaeological Sites Statute implies that the Historical Materials Statute was intended to extend beyond public lands. Thus,

notwithstanding the language of latter law, it is evident that the statutes at issue mandate a permit issued by the Oregon Parks and Recreation Department in order to remove or alter archaeological objects from private lands.

The Oregon laws at issue are directly in conflict with 16 U.S.C. §470cc. This federal law states that no permit is required "for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section." 16 U.S.C. § 470cc (2012). This language is clearly at odds with the Oregon laws. The federal statute allows for Indian tribe members to remove archaeological resources on their own lands so long as there is tribal law that regulates such activity. Even in the absence of such tribal regulation, the statute requires the tribe member to obtain a permit from the Federal land manager. The term "Federal land manager" refers to the "Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior." 16 U.S.C. § 470bb (2012). The law makes no mention of state permits and therefore excludes the states from regulating Indian archaeological excavation and removal on tribal lands. Thus, even in the absence of tribal regulation, Mr. Captain would have been required to obtain a permit from the Federal land manager and not from Oregon's Parks and Recreation Department.

By granting Indians broad permission to excavate archaeological sites on Indian lands, 16 U.S.C. § 470cc comports with the federal policy of protecting Indian sovereignty.

See, e.g., Worcester, 31 U.S. at 519; *Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that Arizona courts lack jurisdiction over a civil suit brought by a non-Indian against an Indian when the cause of action arose on an Indian reservation); *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 172 (1973) (holding that the Arizona individual income tax did not extend to reservation Navajo Indians for reservation-based income). This policy is ignored by the Oregon archaeological statutes. By mandating that Indians acquire permits before altering archaeologically significant artifacts on their lands, Oregon is attempting to infringe upon the inherent sovereignty of the Cush-Hook Nation that is supported in 16 U.S.C. § 470cc.

Since 16 U.S.C. § 470cc authorizes Indians to excavate archaeological sites on their lands with either tribal or federal approval and makes no mention of state permits, the Oregon statutes at issue are in conflict with federal law. Public Law 280 explicitly prohibits enforcing state laws regulating Indian lands that are inconsistent with federal statutes. The lower courts were thus incorrect in concluding that Public Law 280 allows for the enforcement of the Archaeological Sites Statute and the Historical Materials Statute, and Mr. Captain should not be subjected to the force of Oregon archaeological law.

B. PUBLIC LAW 280 DOES NOT AUTHORIZE JURISDICTION IN THIS CASE BECAUSE THE OREGON STATUTES AT ISSUE ARE REGULATORY AND NOT PROHIBITORY.

A state may not enforce a law on Indian land unless it is "criminal in nature." *California*, 480 U.S. at 208. The Court has held that if the intent of a state law is "generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian

reservation." *Id.* at 209. The Court also noted that the "shorthand test is whether the conduct at issue violates the State's public policy." *Id.* In many cases, courts have held that laws pertaining to gambling on Indian reservations are regulatory in nature, and thus do not fall under the purview of Public Law 280. *See: Id.* at 212 (holding that a California statute regulating bingo was not enforceable on Indian reservations under Public Law 280); *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185, 1189 (9th Cir. 1982); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 315 (5th Cir. 1981); *Oneida Tribe of Indians of Wisconsin v. State of Wis.,* 518 F. Supp. 712, 719 (W.D. Wis. 1981). By contrast, fireworks laws have generally been found to be prohibitory when the legislative intent is to bar the possession or sale of fireworks. *See: United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977); *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1993) (holding that California fireworks statute is prohibitory even though fireworks are permitted for sale eight days per year). Courts also consider the tribal interests at stake when deciding whether to enforce a state law under Public Law 280. *See: California* 480 U.S. 202 at 218-219; *Barona* 694 F.2d at 1190.

This case is far more analogous to the *California* line of cases than it is to the fireworks cases, as the Oregon statutes at issue are regulatory in nature and not prohibitory. Firstly, Oregon does not prohibit archaeological excavation. It simply requires that this activity be authorized by a permit. Or. Rev. Stat. § 358.920 (2011). A common aspect of the aforementioned line of gambling cases is that those states did not prohibit all forms of gambling. California, for instance, operates a state-run lottery and Florida allows for regulated horse races and bingo games. *Seminole Tribe,* 658 F.2d at 314. The fireworks cases, by contrast, pertained to states that prohibited the sale of these dangerous products

except in very limited circumstances. *Quechan,* 984 F.2d at 307. The altering and excavation of archaeological sites are not banned by the Oregon statutes at issue. The opposing counsel will argue that archaeological excavation without a permit is prohibited by the statutes, and they should therefore be classified as criminal laws. However, this is a similar argument to that made in *California*, in which California argued that unregulated bingo was a misdemeanor and thus should be prohibited on Indian reservations. The Court dismissed this argument: "But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." *California,* 480 U.S. at 211. Oregon simply seeks to regulate the excavation of archaeological sites, and the statutes are thus not criminal in nature as required by the *California* test.

The actions of Mr. Captain do not violate the Oregon public policy set forth in these statutes. According to *California*, the public policy of the state at issue is the preeminent factor in determining whether a statute is regulatory or prohibitory. *California,* 480 U.S at 209. The primary intent of the Oregon statutes at issue is to "preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance." Or. Rev. Stat. § 358.910 (2011). This is precisely what Mr. Captain's actions were intended to do. Yes, Mr. Captain removed an archaeological significant artifact from a tree in Kelley Point Park. He only did so, however, due to the state of Oregon's continuous failure to protect trees in the Park that are considered by the Cush-Hook Nation to be religiously significant. Mr. Captain's actions were thus in line with the public policy behind the Oregon statutes at issue, and it would be a mistake to authorize their enforcement in this instance.

Finally, the tribal interests of the Cush-Hook Nation outweigh any state interests that Oregon possesses in this case. In *California*, the Court acknowledged that denying the state criminal jurisdiction over the tribes' bingo games comported with the tribal interests of generating revenue and providing employment for tribe members. *California,* 480 U.S. at 218. In *Barona*, the Ninth Circuit considered that the purpose of the bingo games was to collect funds to promote the "health, education, and general welfare" of the Barona Tribe and found it to be a worthy justification for denying California criminal jurisdiction over the Tribe. Here, the interests of the Cush-Hook Nation are paramount. Mr. Captain was protecting a religiously and culturally significant artifact from defacement because of Oregon's failure to enforce these archaeological statutes against non-Indian vandals. Without his bold action, this tree would not have been restored and would have been subjected to further vandalism. The state of Oregon, on the other hand, lacks a clear interest in this case. Oregon purportedly wants to protect archaeological sites from vandalism, and this is precisely what Mr. Captain sought to do. The waiting period inherent to any permit application would have left the tree vulnerable to further vandalism until the application for excavation was approved. Clearly, the interest of a Cush-Hook tribe member in protecting a tribally important religious and cultural artifact outweighs Oregon's goal of preventing archaeological excavation without a permit.

C. PUBLIC LAW 280 DOES NOT AUTHORIZE JURISDICTION IN THIS CASE AS ENFORCEMENT OF THE OREGON STATUTES WOULD VIOLATE THE LEGISLATIVE INTENT OF THE LAW.

In order to accurately apply Public Law 280, it is imperative to interpret it against the larger context of federal Indian law. This Court has explained that "the Indian sovereignty

doctrine is relevant…because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan,* 411 U.S. at 172. Additionally, the Court has held that "the primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan,* 426 U.S. at 379. Public Law 280 "was not intended to effect total assimilation of Indian tribes into mainstream American society." *California*, 480 U.S. at 208.

Enforcing Oregon's archaeological statutes against Mr. Captain goes against the legislative intent of Public Law 280. Mr. Captain's actions were not carried out with any criminal intent; in fact, the opposite was true as he was seeking to prevent lawlessness by others. Mr. Captain was simply trying to protect the cultural and religious heritage of the Cush-Hook Nation. It is doubtful that Congress enacted Public Law 280 with the intent of stopping American Indians from managing their cultural artifacts on tribe-owned land. This is especially true when considered alongside the general federal policy of protecting Indian sovereignty. The Court found that Public Law 280 was not passed to assimilate Indian tribes into American society. It follows that the governance of culturally significant objects would not fall under the purview of the statute. This type of regulation is inherent to maintaining a sovereign and distinct tribe, a task that federal law encourages the Cush-Hook Nation to achieve. Enforcing these Oregon statutes against Mr. Captain would contradict the overarching goal of federal Indian law, and would not further the Congressional intent of preventing lawlessness on Indian reservations.

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's finding that the Cush-Hook Nation owns aboriginal title to the land in Kelley Point Park. The respondent requests, however, that this Court reverse the decision of the lower court that Oregon has criminal jurisdiction to control the uses of archaeologically significant objects on the land in Kelley Point Park.