No. 11-0274

UNITED STATES SUPREME COURT

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent – cross-petitioner.

On petition for a writ of certiorari
to the Oregon Court of Appeals

<u>Brief for Petitioner</u>

Team 26

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QUESTION PRESENTED

I. Did the Oregon Court of Appeals err in affirming the Circuit Court's holding that the Cush Hook Nation retained aboriginal title to the land within Kelly Point Park despite the extinguishment of aboriginal title by the federal government as established by the Oregon Donation Land Act, subsequent treatment of the land, as well as complete physical abandonment of the land by the Cush Hook Nation?

II. Does the State of Oregon have criminal jurisdiction to control the uses of, and to protect cultural objects when the cultural objects are found on state lands and when federal statutes give states criminal jurisdiction over crimes pertaining to cultural objects?

STATEMENT OF THE PROCEEDINGS

Mr. Captain was arrested and charged with trespass on state lands, cutting timber in a state park without a permit, as well as desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961. However, the Oregon Circuit Court for the County of Multnomah only convicted Mr. Captain for damaging an archaeological site and a cultural and historical artifact under Or. Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq*. The Court held that the Cush-Hook possessed aboriginal title to the land within Kelley Point Park. Therefore, Mr. Captain was not guilty of trespass or cutting timber without a permit.

Both the State of Oregon and Mr. Captain appealed, but the convictions were affirmed by the Oregon Court of Appeals. The Oregon Supreme Court denied review, and the State filed a petition and cross petition for certiorari to the United States Supreme Court. Mr. Captain filed a cross petition for certiorari as well.

STATEMENT OF THE CASE

The Cush-Hook community is not federally recognized as a tribe, nor are they recognized as a political entity by the State of Oregon. R. at 1. In addition, they no longer reside within the boundaries of Kelley Point Park, and have not resided there since 1850. R. at 2. The Cush-Hook community physically deserted their aboriginal lands which they occupied since time immemorial, and relocated sixty miles west towards the Oregon Coast range, after signing a treaty that was never ratified by Congress. R. at 1, 2. Even though the treaty they signed with the superintendent of Indian Affairs for the Oregon Territory was not ratified, and consequently they were not granted recognized ownership to the lands where they relocated, they did not return to their aboriginal territory. R. at 2.

The land within Kelley Point Park was subsequently opened for settlement by the Oregon Donation Land Act in 1850. R. at 2. In fact, the original purpose for entering into a treaty with the Cush-Hook people was to expel the Cush-Hook community so that American settlers could farm the valuable land they occupied. R. at 1. Joe and Elsie Meek claimed the land of Kelley Point Park, and even though the Meeks did not cultivate or reside on the land for the requisite number of years, they still received fee title from the United States. R. at 2. The land was later sold by their heirs to the State of Oregon in 1880, at which time the State of Oregon established the land as Kelley Point Park.

One-hundred and sixty-one years after the Cush-Hook people deserted the land, and one-hundred and thirty-one years after the establishment of the park, Thomas Captain, a Cush-Hook citizen, moved into the park to reassert the Cush-Hook's ownership interests in the land. R. at 2. In addition, he sought to "protect culturally and religiously significant trees" that grew in the park and were inscribed with "sacred totem and religious symbols." R. at 2.

Because the trees were being vandalized, Mr. Captain thought it was acceptable to fall the tree, and remove the section with the carvings. R. at 2. He was arrested, and the log was confiscated, when state troopers caught him taking the tree back to the now permanent location of the Cush-Hook people. R. at 2.

STANDARD OF REVIEW

The appropriate standard of review is *de novo* review because aboriginal title and state criminal jurisdiction over a cultural object is a question of law. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989).

ARGUMENT

Aboriginal title to the land within Kelley Point Park was extinguished by the Oregon Donation Land Act of 1850 and through subsequent treatment of the land. Aboriginal title was also abandoned by the Cush-Hook people. Most importantly, aboriginal title is a permissive right of occupancy to land that can only be disturbed by the federal government. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). The United States has fee title to the land, and thus control of the land, whereas the American Indians only have a right to occupancy, subject to control of the government. Buttz v. N. Pac. R.R. Co., 119 U.S. 55, 66 (1886). Unrecognized aboriginal title can also be defeated by showing abandonment of the land in question. *See* Williams v. City of Chicago, 242 U.S. 434, 437 (1917).

Whether aboriginal title to an area exists is a question of fact, and is shown by proof of actual occupancy of the land at issue, to the exclusion of others, for a long period of time. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941); Sac & Fox Tribe of Indians of Okl. v. United States, 315 F.2d 896, 903 (Ct. Cl. 1963). These elements need not be proven by "treaty, statute, or other formal government action." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347.

Claims to aboriginal title can be based on historical evidence. Zuni Indian Tribe of New Mexico v. United States, 16 Cl. Ct. 670, 671 (1989).

This Court, in discussing the history of aboriginal title, stated that there was a recognized notion that tribes hold aboriginal title to lands they occupied since time immemorial. Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 233-34 (1985). Consequently, this has been interpreted by some circuits to mean that aboriginal title is vested in a tribe showing occupancy since time immemorial. Greene v. Rhode Island, 398 F.3d 45, 49 (1st. Cir. 2005); Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 460 (Ct. Cl. 1959).

In addition, the Non-intercourse Act was enacted to protect aboriginal lands, on the premise of this principle that aboriginal tiles vest in those who occupied the land since time immemorial. Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). Because of these long standing principles and precedent we do not contest that the Cush-Hook Nation never held aboriginal title. Alternatively, we argue that Congress's intent was to extinguish title and that the property was abandoned by the Cush-Hook people.

The federal government can extinguish title "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347. Evidence of extinguishment must manifest a plain and unambiguous intent to deprive the Indians of aboriginal title, but does not have to be express. *Oneida*, 470 U.S. at 248. The power of Congress to extinguish Indian title is supreme however, and the "manner, time, and conditions of its extinguishment" are not subject to review by the courts, as they are non-justiciable decisions of a political nature. *Buttz*, 119 U.S. at 66. In addition, "the justness or fairness of the methods used to extinguish the right of

occupancy" cannot be questioned. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). Essentially, once aboriginal title is extinguished the extinguishment is irrevocable, and occupancy cannot be resumed.

In this case, title was extinguished through actions that were adverse to the occupancy of the natives. To divine the intent of Congress, it is acceptable to look at the language of the statute itself and the surrounding circumstances of the time. Confederated Tribes of Chehalis Indian Reservation v. State of Wash., 96 F.3d 334, 342 (9th Cir. 1996).

To determine whether aboriginal title was extinguished, one must consider factors surrounding the termination. An amalgamation of events can lead to the termination of aboriginal title, and there need not be one specific instance alone that terminates title. State v. Elliott, 159 Vt. 102, 115 (1992). In addition, a historical event by itself may create ambiguity and may not extinguish title when viewed alone, but when considered holistically with other facts that resolve the ambiguity, title will be considered extinguished if the intent is clear. United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976). When considering the factors surrounding termination of aboriginal title to Kelley Point Park, it is evident that aboriginal title was extinguished. Even if title was not extinguished by one of the following factors alone, title then was unquestionably terminated by a culmination of the facts.

I. ABORIGINAL TITLE TO THE LAND WITHIN KELLEY POINT PARK WAS EXTINGUISHED BECAUSE CONGRESS CLEARLY EXPRESSED THEIR INTENT TO EXTINGUISH TITLE THROUGH THE OREGON DONATION LAND ACT'S PURPOSE AND LANGUAGE, IN ADDITION TO THE CIRCUMSTANCES SURROUNDING ITS ENACTMENT.

The Oregon Donation Land Act itself extinguished aboriginal title, as is evident by the purpose of the act, and the historical context. First, these events transpired during a time that the Oregon Territory was in fact being opened to develop the land. *Alcea Band of*

Tillamooks, 329 U.S. at 43. Consequently, the original reason for negotiating any treaties with area tribes was to extinguish aboriginal title to the Oregon district. *Id.*; Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States, 87 Ct. Cl. 143, 150 (1938).

In addition, the Oregon Donation Land Act's purpose was to encourage people to permanently inhabit the land in the Oregon territory. United States v. Ashton, 170 F. 509, 513-14 (C.C.W.D. Wash. 1909); Coos Bay, 87 Ct. Cl. at 150. In fact, in *United States v. Ashton*, the court held that because the Oregon Donation Land Act's purpose was to open the land to permanent settlement, the Act alone terminated all aboriginal title within the Oregon territory. 170 F. at 513.

In this case, the superintendent of Indian Affairs in the Oregon Territory sought to remove the Cush-Hook people from the land within Kelley Point Park so that American settlers could utilize the lands along the river for farming. R. at 1. The intent for American settlers to develop the land is evident by the fact that Congress approved executive orders from 1855 and 1865 that reduced the size of the Siletz reservation in for the purpose of "open[ing] more land for public settlement." *Alcea Band of Tillamooks*, 329 U.S. at 43-44. Later, Congress also appropriated money to expel the non-treaty Indians residing in the Oregon and Washington territories. Plamondon ex rel. Cowlitz Tribe of Indians v. United States, 467 F.2d 935, 936 (Ct. Cl. 1972).

Congress intended the Oregon territory, which includes the lands within Kelley Point Park, to be permanently developed by white settlers at the exclusion of Native Americans, as demonstrated by the purpose of the Oregon Donation Land Act. In addition, tribes that did have reserved lands experienced a diminishment in their lands to make way for more settlers.

Id. The context and surrounding circumstances of the time establish a general attitude that was exclusionary and adverse to exclusive occupancy.

A. <u>The statutory language used demonstrates an unambiguous intent of Congress to extinguish aboriginal title because American Indians are expressly excluded.</u>

While it is true that statutes must be construed liberally and ambiguities should be solved in favor of Indians, here there is no ambiguity, so this particular canon of construction is inapplicable. <u>Montana v. Blackfeet Tribe of Indians</u>, 471 U.S. 759, 766 (1985). If Congress intended to preserve a right of aboriginal occupancy, Congress would have intentionally added wording to be more inclusive. Instead, Congress deliberately excluded American Indians as takers under the Oregon Donation Land Act.

The Oregon Donation Land Act set up a system in which "every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years," and who met other requirements, would be granted patent to the land. 9 stat. 496-500 § 4. In addition, they made sure to specifically include women, "half-breed Indians" and those who were gaining citizenship, but excluded American Indians, as being able to take land. *Id*. There are no express provisions regarding Indians or aboriginal title. Therefore, Congress intentionally excluded Indians and any recognition of rights to occupancy so as to extinguish title.

Even if American Indians could be considered as "occupant[s] of the public lands," they failed to make a claim under the act, and their rights were therefore forfeited. For example, the American Indians' failure to submit a claim by the designated time frame under a California Land Act consequently resulted in a forfeiture of rights to that land. <u>Barker v. Harvey</u>, 181 U.S. 481, 490-491 (1901).

In addition, the Oregon Donation Land Act is similar to the California Private Land Claims Act and the Louisiana Land Claims Act, both of which have been held to extinguish title. Chitimacha Tribe of La v. Harry L. Laws Co., Inc., 490 F. Supp. 164, 166 (W.D. La. 1980) aff'd, 690 F.2d 1157 (5th Cir. 1982); Barker v. Harvey, 181 U.S. at 499. "The Louisiana and California Acts establish systems for filing, deciding and confirming land claims; both acts require claims to be asserted within a designated period or be forever barred." *Chitimacha Tribe of La.*, 490 F. Supp. at 168.

The Oregon Donation Land Act is unlike the New Mexico and Arizona Land Acts that only required "a report to Congress on the status of land claims in the territories." *Id*. Consequently, these Acts alone did not extinguish title to the land in question. In addition, conveyances requiring that "settlement and cultivation commence and continue in order to avoid forfeiture directly undermine[s] competing aboriginal rights to the land." *Elliott*, 159 Vt. at 119-20. This illustrates that the requirements of the act necessitated and exercise of complete dominion adverse to the right of occupancy over the parcels.

In this instance, the Act is similar to the conveyance in *State v. Elliot*, because if the lands were not lived upon and cultivated for four consecutive years, the land would revert back to the United States, thus effectuating forfeiture. *See* Silver v. Ladd, 74 U.S. 219, 228 (1868). By passing the Oregon Donation Land Act, it is evident that aboriginal title to the territory as a whole, including Kelley Point Park, was extinguished, as held by *United States v. Ashton*. 170 F. at 517.

II. ABORIGINAL TITLE TO THE LAND WITHIN KELLEY POINT PARK WAS EXTINGUISHED BECAUSE THE LANDS WERE TREATED AS PUBLIC LANDS WHICH IS ADVERSE TO ANY RIGHT OF OCCUPANCY.

The treatment of land is a significant factor in determining whether title was extinguished. Havasupai Tribe v. United States, 752 F. Supp. 1471, 1478 (D. Ariz. 1990) aff'd sub nom. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991). Century-long conduct can extinguish title, even if the exact date of termination is difficult to ascertain. Gemmill, 535 F.2d at 1149. Once land is treated as public lands, title is effectively extinguished. *Plamondon*, 467 F.2d at 938.

A. Aboriginal title to the land within Kelley Point Park was extinguished when the land was reserved as a park, because designating the land for a public use is adverse to any right of occupancy.

The mere fact that the land at issue became Kelley Point Park establishes termination of aboriginal title. When land is managed as public lands title is effectively extinguished. *Id*. Public lands are defined as land held by the state or federal government, without regard to how they were obtained. Black's Law Dictionary 956 (9th ed. 2009). For example, designating land for a forest reserve was in itself enough to extinguish aboriginal title. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391-92 (1975). Here, the court held that aboriginal title to the lands included in the San Jemez Forest Reserve was extinguished on the date the reserve was created. *Id*. This forest reserve later became the Santa Fe National Forest. *Id*. at n. 2.

In addition, designating the land as a forest reserve when combined with other factors, extinguishes title. Gemmill, 535 F.2d at1149. For example, even though a tribe was forcibly removed from their aboriginal land at issue, the fact that the land was and is continuously used for recreation and conservation as part of a national forest made it clear that title was terminated. *Id*. Also, using the land as a forest reserve in addition to

compensation was enough to extinguish aboriginal title. Ute Indian Tribe v. Utah, 716 F.2d 1298, 1314 (10th Cir.1983).

In this instance, the land at issue was treated as public lands from the inception of the Oregon Donation Land Act. The act repeatedly labels the land "public lands."9 stat 496-500 §§ 2, 3, 4, 6, 14. In addition, the land at issue became a state park in 1880. R. at 2. Although Kelley Point Park is not a national forest, the land is still a forest reserve and classified as public lands because the state owns the property. Even if the sale from the Meeks was void, the land would revert back to the federal government, and the land would still be classified as public lands. *See* Silver v. Ladd, 74 U.S. 219, 228 (1868). Also, this land has been a state park for more than a century, and surely such century long conduct is enough to extinguish title, as stated in *Gemmil*. Alternatively, if the mere fact that the land was treated as public lands is not enough to extinguish title alone, the creation of the state park in addition to the other factors mentioned is enough to determine an intent to extinguish title.

B. Aboriginal title was extinguished when the land was designated for non-Indians settlement and settled by non-Indians because opening the lands for and subsequent settlement of are adverse to any right of occupancy.

Simply preparing the land for non-Indian settlement, such as surveying and compiling reports about the land, is not in itself enough to extinguish title. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 578. However, actual encroachment on the land and making American Indian lands available for non-Indian settlement can extinguish title. *Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975); Gila River Pima-Maricopa Indian Cmty. v. United States, 494 F.2d 1386, 1391 (1974). For example, the Ninth Circuit held that opening land to non-Indian settlement, albeit through an executive order, exemplified action that was adverse to the exclusive use and occupancy of a tribe and therefore extinguished title. *Confederated Tribes*

of Chehalis Indian Reservation, 96 F.3d at 341. Furthermore, actual conveyances of lands under public land laws to various recipients at differing times, coupled with the inclusion of the land as a forest reserve and within a grazing district was enough to extinguish aboriginal title to the land. *Pueblo of San Ildefonso*, 513 F.2d at 1386.

In addition, "the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost." *Id*. at 1390. For instance, substantial settlement by non-Indians in areas that were aboriginally occupied by Natives, plus intermingling was enough to adversely affect the exclusive occupancy of aboriginal lands. *Id*. at 937 Cf N. Paiute Nation v. United States, 7 Indian Cl. Comm'n 322 (1959). Likewise, non-Indian settlement was a factor considered that led to a finding of extinguishment because "there was actual settlement and appropriation to the exclusion of other competing claims, and ratification by Congress when it admitted Vermont to the Union." *Elliott*, 159 Vt. at 118.

Unlike these cases, title was not extinguished due to white settlement because Congress had specifically protected rights to the land at issue from white settlers through an Act that created the Dakota Territory. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 947 (Ct. Cl. 1974). In another instance, title was not considered extinguished due to the fact that settlement was gradual and it took many years for the American Indians to be displaced. *Pueblo of San Ildefonso*, 513 F.2d at 1391.

III. ABORIGINAL TITLE WAS ABANDONED WHEN THE CUSH-HOOK PEOPLE PHYSICALLY LEFT THE LAND WITHIN KELLEY POINT PARK TO PERMANENTLY RESIDE ELSEWHERE BECAUSE THEY NEVER POSSESSED RECOGNIZED TITLE TO THE AREA.

Unrecognized aboriginal title is distinguishable from recognized Indian title. Recognized title is authorized by Congress through numerous means, but there must be a

concrete, congressional intent to grant the occupants recognized title which affords certain legal rights, such as compensation for takings under the 5th amendment, and is a slightly greater "ownership" right than mere aboriginal title. *Tee-Hit-Ton Indians*, 348 U.S. at 278-79. Aboriginal title can be abandoned, whereas recognized title cannot be abandoned but only extinguished by Congress. Cayuga Indian Nation of New York v. Cuomo, 758 F. Supp. 107, 110 (N.D.N.Y. 1991).

Generally, title is recognized through treaties and statutes. *Greene*, 398 F.3d at 50. Un-ratified treaties do not show recognition of Indian title. *Coos Bay*, 87 Ct. Cl. at 153. In addition, "when an Indian tribe ceases for any reason…to actually and exclusively occupy and use an area of land, clearly established by clear and adequate proof," the land is considered abandoned, and any right to occupancy is lost. Quapaw Tribe of Indians v. United States, 120 F. Supp. 283, 286 (Ct. Cl. 1954) overruled on other grounds.

Unrecognized title can be abandoned by leaving the property. *Williams*, 242 U.S. at 437. For example, when a group of Indians relocated to a treaty reservation, they relinquished occupancy of the other lands which effectively was an abandonment of their right to occupancy. *Buttz*, 119 U.S. at 69-70. Having no ancestor to occupy the land, and thus physically abandoning the property, for 114 years was a sufficient time frame to prove abandonment. United States v. Kent, 679 F. Supp. 985, 987 (E.D. Cal. 1987) aff'd in part, rev'd in part, 912 F.2d 277 (9th Cir. 1990) opinion withdrawn and superseded on reh'g, 945 F.2d 1441 (9th Cir. 1991). Similarly, when there was adequate evidence that the Turtle Mountain Band of Chippewa Indians did not give up all ties to their land, by still tried to utilize the area, title was not abandoned. *Turtle Mountain Band of Chippewa Indians*, 490 F.2d at 948.

In this case, absolutely no rights were recognized through a ratified treaty, and therefore do not demonstrate recognition of title. R. at 2. In addition, the Oregon Donation Land Act did not expressly or indirectly carve out any rights of occupancy or otherwise, and were therefore intentionally left out. There is no evidence in the record of other acts by the United States to recognize title to the land or to politically recognize the Cush-Hook people as a sovereign tribe. *Id*. In addition, the Cush-Hook people have never been recognized as a tribe by the state of Oregon. R. at 1. Nothing in the record indicates an unequivocal intent to recognize title to the land within Kelley Point Park. Therefore, the Cush-Hook people do not, and never had recognized title to the land within the park. Since they never had recognized title, claims to their aboriginal title could be and were abandoned when the Cush-Hook people relocated.

IV. THE STATE OF OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL AND CULTURAL OBJECTS UNDER THE NATIVE AMERICAN GRAVES REPATRIATION ACT, ESPECIALLY WHEN THE SACRED TOTEM WAS NOT ON FEDERAL OR TRIBAL LAND.

The Native American Graves Repatriation Act (NAGPRA) is an act that applies to the human remains of Native American people, funerary objects, and sacred and cultural patrimony objects. 42 C.F.R. § 10.1(b). As defined in NAGPRA, objects of cultural patrimony are defined as objects that have "ongoing historical, traditional, or cultural importance central to the tribe rather than property owned individually." 42 C.F.R. § 10.2(d)(4). These specific objects are so important that the objects may not be alienated, appropriated, or conveyed by any individual tribal or organization member. San Carlos Apache Tribe v. U.S., 272 F. Supp. 2d 860, 887 (D. Ariz. 2003) aff'd, 417 F.3d 1091 (9th

Cir. 2005). So, there must be consent from the appropriate tribe before cultural patrimony objects are allocated. 25 U.S.C. § 3002(c)(2), (4)

One of the primary goals of Congress when Congress enacted NAGPRA was to preserve and protect the graves and cultural artifacts that belonged to modern American Indians ancestors. Bonnichsen v. United States, 367 F.3d 864, 876 (9th Cir. 2004). NAGPRA oversees and prohibits the intentional excavation or removal of Native American human remains and objects from federal or tribal lands. 25 U.S.C. § 3002(c)(1). This act also governs the ownership and control of Native American cultural items which are intentionally excavated or removed. *Id*.

NAGPRA contains a two part test when evaluating human remains and cultural objects. Geronimo v. Obama, 725 F. Supp. 2d 182, 185 (D.D.C. 2010). The first test is determining whether the cultural objects or human remains are Native American. *Id*. If the remains or objects are not Native American according to the definition in NAGPRA, then NAGPRA does not apply. *Bonnichsen*, 367 F.3d at 875. However, if the cultural objects or human remains are Native American, then NAGPRA will apply and the second part of the test must be determined. *Id*. Determining which person or tribes that are most closely affiliated with the remains or cultural objects is the second part of the NAGPRA test. *Id*.

A. The portion of the tree that contains Cush-Hook religious symbols will be subject to the NAGPRA provisions only if the tree was discovered on property owned by the federal government or on tribal land.

If a Native American cultural or historic object is found on state land then NAGPRA does not apply. For example, the chief of the Western Mohegan Tribe and Nation, a non-federally recognized Native American tribe, filed an injunction against the state of New York. W. Mohegan Tribe and Nation of N.Y. v. New York, 100 F. Supp. 2d 122, 124

(N.D.N.Y. 2000) aff'd in part, vacated in part, 246 F.3d 230 (2d Cir. 2001). The Mohegan Tribe claimed that a series of connected peninsulas located on the eastern shore of the Hudson River was a site of religious and cultural significance to the Tribe that contained cultural objects. *Id*. The State of New York planned to change the connected peninsulas into a state park for recreational activities such as picnicking, fishing, boating and camping. *Id*. In that case, the court held that NAGPA did not apply because the peninsulas did not fall within the scope of NAGPRA's jurisdiction since the peninsulas were neither federal nor tribal land within the statute's meaning. *Id.* at 125. The court further explained the definitions of “federal lands” and “tribal lands” as the definitions are explained in NAGPRA. *Id*. Federal lands were defined as “land other than tribal lands which are controlled or owned by the United States.” § 3001(5), and “tribal lands” were defined as “all lands within the exterior boundaries of any Indian reservation.” § 3001(15)(A). The court held that since the peninsulas were not federal lands, nor on tribal lands and that the artifact was on the peninsulas, then NAGPRA did not apply. *Id*. at 126.

In another case, a descendant of a chief of the Lipan Apache Band of Texas filed a complaint alleging that the construction of a golf course in Universal City, Texas on the alleged burial grounds of the Lipan Apache violated NAGPRA. Castro Romero v. Becken, 256 F.3d 349, 352 (5th Cir. 2001). The City of Universal City accumulated enough land through private landowner’s donation to build an eighteen-hole golf course. *Id*. Within the area where the golf course was being constructed human remains were discovered. *Id*. In that case, the court held that since the remains were found on the land of the City of Universal City, and that the human remains were found on municipal land rather than on federal or

tribal land. Thus, because the remains were not on tribal or federal lands, NAGPRA did not apply and the state court maintained jurisdiction over the remains. *Id.* at 354.

Here, the sacred totem was on the premises of Kelley Point Park (Park). Like the peninsula in *W. Mohegan Tribe*, where the land was not federal or tribal land, the Park is also not a federal or tribally owned land because the Park is state owned. Also, similar to *Castro Romero*, where Native American human remains were found on municipal land, the sacred totem was also found on non-federal and non-tribal land. In fact, the property at issue in this case was sold to the state of Oregon in 1880. Since the sacred was on state land, NAGPRA does not apply and the state of Oregon maintains criminal jurisdiction.

B. <u>The sacred totem is not proven to be culturally affiliated to a presently existing tribe because the Cush-Hook community is not federally recognized.</u>

If an artifact or cultural object can be proven to be culturally affiliated to a "presently existing tribe," then that tribe is most closely culturally affiliated with the cultural object. A presently existing tribe refers to an Indian tribe that is indigenous to the United States. *Bonnichsen*, 367 F.3d at 875. Under NAGPRA, an Indian tribe is defined as "a tribe, organized group or community of Indians who are recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C.A. 2001(7). Tribes that are federally recognized typically receive benefits from the special programs and services offered by the United States. "Acknowledgment of tribal existence by the Department [of Interior] is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2. Meaning, in order for an Indian community to be protected under any federal regulation, the Indian tribe must be federally recognized.

A Native American community's status is crucial where determining whether the Tribe receives federal benefits and protections. For example, a community of Indians filed a claim against the state of Vermont under NAGPRA. Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 251 (D. Vt. 1992) aff'd, 990 F.2d 729 (2d Cir. 1993). In that case, the court held that the Indian people bringing forth the claim was not an Indian tribe that was recognized by the Secretary of the Interior. *Id*. The court further explained NAGPRA if there is proof that the Indian community received federal funds, then the Indian group may be considered an Indian tribe as defined in. *Id*. In another instance, Indian community filed suit in the state of Washington because they were not receiving federal benefits based on their political status. Samish Indian Nation v. United States, 58 Fed. Cl. 114, 115-16 (Fed. Cl. 2003) aff'd in part, rev'd in part and remanded, 419 F.3d 1355 (Fed. Cir. 2005). In that case, the court recognized that the Indian community bringing forth the action was not receiving any federal aid as a tribe because the Indian community was not federally recognized, and the political status affected the plaintiff's federal services and benefits. *Id*.

Here, the Cush-Hook community would probably not be considered an Indian tribe based on the definition in NAGPRA because the Cush-Hooks are not federally recognized by the Secretary of Interior. Similar to the Indian community in *Abenaki Nation of Mississquoi*, who were not federally recognized, the Cush-Hooks are also not a federal recognized tribal Nation. Even though the Cush-Hooks may be indigenous to the United States, the Cush-Hooks are not an Indian tribe based on the in NAGPRA based on different reasons. First, the Cush-Hooks are not politically or federally recognized by the United States. Secondly, since the Cush-Hook people are not federally recognized, the Cush-Hooks are not eligible to receive services and protection, which is similar to the Indian community from *Samish*

Indian Nation, where the Indian community also did not receive protections and benefits from the federal government based on the political status. Being protected under NAGPRA is benefit that is typically provided for federally recognized Tribes. Therefore, since the Cush-Hooks are not federally or politically recognized by the Bureau of Indian Affair and the Secretary of the Interior, then the Cush-Hooks are not protected under NAGPRA, and NAGPRA should not apply in this case. Thus, federal laws would not apply in this instance, and the state of Oregon has criminal jurisdiction over the sacred totem and the perpetrator.

C. The portion of the tree that contains Cush-Hook religious symbols will be subject to the NAGPRA provisions only if the tree was discovered on property owned by the federal government or on tribal land.

Scientific evidence will need to be provided that a cultural object is culturally affiliated with a presently existing Tribe. For instance, a 9,000 year old human remain did not fall under the provisions within NAGPRA because the remains were not considered to be Native American based on the scientific evidence that were found. *Bonnichsen*, 367 F.3d at 876. There, the court held that because there was not enough scientific evidence or indication that the remains were closely affiliated the Indian people that brought forth the claim. *Id*. The court further held that the 9,000 year old human remains did not belong to the Tribe who claimed to be the owner of the remains, but that state of Washington has jurisdiction and ownership of the remains. *Id*. Thus the statute definitely requires that human remains bear some relationship to a presently existing tribe, people, or culture to be considered Native American. *Id*.

Here, there is no scientific evidence that indicate that the sacred totem belonged to the Cush-Hook. Even though William Clark noted the importance of the sacred totem that had carvings or religious symbols, that notation is not exactly scientific evidence. Like,

Bonnichsen, where there was not enough evidence to prove that the human remains belonged to a particular Tribe, there is also not enough evidence in this case that the sacred totem belonged to Thomas Captain. In fact, scientific, anthropological, and historical evidence should be evaluated. Additionally, the notation in Clark's journal is the only evidence that may show that the sacred totem belonged to the Cush-Hooks. However, that journal entry is not enough prove that the evidence scientifically determined the cultural affiliation of the totem. Similarly as determined in the *Bonnichsen*, where the state of Washington had jurisdiction of the human remains, the state of Oregon should also have jurisdiction over the totem. Therefore, Oregon has criminal jurisdiction to control the use of and to protect the sacred totem.

V. THE STATE OF OREGON HAS CRIMINAL JURISDICTION OVER THE TOTEM BASED ON THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT (ARPA), ESPECIALLY WHEN THE TOTEM WAS INTENTIONALLY REMOVED FROM STATE LAND.

The Archaelogical Resource and Protection was designed to "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. §§ 470aa(a)(1), (b). The legislative history of this act indicated that Congress created ARPA with the intention to protect archaeological sites and objects on federal and Indian land. *Id*. The trafficking provision within ARPA is only subject to federal jurisdiction. However, the other provisions within ARPA indicate that states are responsible for state-owned and controlled lands. *Id*. There are several types of conduct that are prohibited under this act. A person is "unauthorized to the excavation, removal, damage, alteration, or defacement of archaeological resources" located in Indian or public lands. 16 U.S.C.A. § 470ee. ARPA also prohibits the sale, purchase, exchange, transportation, receipt of any archaeological resource

which was removed or transported in violation of State or local law. United States v. Gerber, 999 F.2d 1112, 1115 (7th Cir. 1993).

In order for ARPA to apply in a case, the act must involve an archaeological resource that is more than 100 years old. 16 U.S.C.A. § 470. ARPA provided that an "archaeological resource" is: (1) material remains of past human life of (2) archaeological interest (3) over 100 years old (4) including, but not limited to, pottery, basketry, bottles, weapons, projectiles, tools, structures, pit houses, rock paintings, graves, and human skeletal materials. *Id*. In order for a defendant to be criminal liable under the ARPA, there must be evidence that shows that the defendant acted "knowingly" when removing, damaging, excavating or defacing was an "archaeological resource." *Id*. Yet, this *mens rea* requirement knowingly element is a decision that is split among several courts.

For example, a man transported Indian artifacts that he had stolen from a burial mound on privately owned land in violation of Indiana's criminal laws of trespass and conversion. *Gerber*, 999 F.2d at. The court held that in order for that defendant to be criminally liable, the defendant must have known that he was stealing and archaeological object. *Id*. In another example, defendants were arrested for excavating an archaeological site on public property in New Mexico. United States v. Quarrell, 310 F.3d 664, 668-69 (10th Cir. 2002). When the defendants were arrested, they possessed backpacks, sleeping bags, a specialized probe used to determine the alignment of rock walls, shovels, a firearm, and pieces of pottery. *Id*. The defendants used the tools to intentionally excavate and remove cultural artifacts on the site. *Id*. The court held that the defendants knowingly and illegally excavate public land because there was evidence that defendants' objective of driving and hiking to the site was to excavate the land. *Id*. at 678. In another case, a camper intentionally

searched for caves and while searching, the camper discovered bones and a skull. United States v. Lynch, 233 F.3d 1139, 1145-46 (9th Cir. 2000). The court held that the camper knew or had reason to know that the skull that was removed from the cave was an archaeological resource because after the camper discovered the skull, the camper researched the remains. *Id*. at 1147. Because of the camper's research and knowledge about the bones, the court held that the camper knew that he was removing an archaeological resource. Therefore, the camper is criminally liable under the ARPA. *Id*.

Here, Thomas Captain is criminally liable because Mr. Captain knowingly removed the portion of the tree with the sacred carvings, which is a violation of ARPA The sacred totem is dated to be carved in the early 1800's, which makes the totem over 100 years old. The totem is also a material remain of past human life with archaeological interest, which makes the totem an archaeological resource. Similar to the defendant in *Gerber,* who knowingly stole the Indian artifact, Mr. Captain also knowingly stole the totem from state land. Mr. Captain moved to Kelley Point Park which indicates that his intentions were to remove the totem from state lands. Also, similar to the defendant in *Quarrell*, where the defendant excavated and removed artifacts on public state lands, Captain also removed artifacts from state land. Even though ARPA permits states to have jurisdiction over criminal activities that are specified in the ARPA provisions, the state of Oregon will also have criminal jurisdiction in this case because the crime occurred on state property. Furthermore, Captain is analogous to the defendant in *Lynch*, who also had the knowledge of the artifacts that were removed from public lands. Here, Captain knew that the sacred totem was carvings of the religious symbols of the Cush-Hooks, and he intentionally and purposefully removed the totem when he cut down the tree and removed the carving. Removing the carvings from a

specific area of a tree demonstrates that Captain knew that the tree was an archaeological resource. Since there is ample evidence that show that the Captain knew that the totem was an archaeological resource and that he intentionally and knowingly removed the totem from state lands, the state of Oregon has criminal jurisdiction based on ARPA.

CONCLUSION

The State of Oregon respectfully requests that this Court reject the Circuit Court's holding, and hold that the Cush Hook Nation does not have aboriginal title to the land within Kelly Point Park. Additionally, we ask that this Court find the State of Oregon has criminal jurisdiction over the sacred totem.