No. 11-0274

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In the Supreme Court of the United States

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State of Oregon, Petitioner

v.

Thomas Captain, Respondent and Cross-Petitioner

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On Writ of Certiorari

to the Oregon Court of Appeals

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**BRIEF FOR RESPONDENT**

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Team Number 27

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## QUESTIONS PRESENTED

I. Does the Cush-Hook Nation own unextinguished aboriginal title to the land within present-day Kelley Point Park when the Nation's permanent exists within the present-day park and there has been no congressional action intended to extinguish Cush-Hook title?

II. Does Public Law 280 grant Oregon criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question?

## STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Kelley Point Park, the locus in quo, is presently considered an Oregon state park. The park is part of a much larger area that was the aboriginal homeland of the Cush-Hook Nation. The Cush-Hook Indians have occupied the area since time immemorial. The Cush-Hook Nation used its homeland to cultivate crops, as well as harvest plants, hunt, and fish. Their permanent village was located within present-day Kelley Point Park.

In April of 1806, William Clark, of the Lewis and Clark expedition, encountered the Cush-Hooks and visited their village. He recorded an account of his interactions in the Lewis and Clark Journals. While traversing the present day Willamette River, Clark encountered some Multnomah Indians fishing and gathering on the bank of the river. The Multnomah Indians took Clark to the Cush-Hook village and were allowed to enter to village after making peace signs. Along with these interactions, Clark recorded ethnographic materials that included information about Cush-Hook governance, religion, burial traditions, culture, housing, agriculture, and fishing and hunting practices. Clark noted the carvings that Cush-Hook medicine men carved hundreds of years previously.

The Cush-Hook Nation continued to occupy their village and engage in their traditional uses of their territory after Clark's visit. In 1850, the Cush-Hook Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory,

wherein the Nation agreed to relocate in exchange for compensation for their lands—including those within present day Kelley Point Park and other benefits. The Cush-Hooks thereafter relocated, however the United States never honored the treaty. The treaty was never ratified by Congress and therefore the Cush-Hook Nation never received compensation for their lands or any of the benefits promised to them.

Subsequent to the Cush-Hook Nation acting to honor their end of the treaty, two American settlers, the Meeks, moved onto what is now Kelley Point Park with the purpose of acquiring land under the Oregon Donation Land Act of 1850. The Act granted fee simple title to "every white settler" who had "resided upon and cultivated the [land] for four consecutive years[.]" The purpose of the 1850 Act was to encourage permanent settlement and cultivation of the American west. Ultimately the United States granted a patent, however the Meeks resided upon the land for less than two years and never cultivated the land in derogation of the statute. Their descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park.

In 2011, Thomas Captain, a Cush-Hook citizen, began occupying the Park to reassert his Nation's ownership of the land and to protect the culturally and religiously significant trees that Clark had noted in his Journals. Over 300 years after their initial carving, the symbols are 25-30 feet off the ground and vandals are defacing the symbols and, in some cases, cutting them off of the trees and selling them. In order to restore and protect one of the vandalized symbols, Mr. Captain cut down the tree and removed the section that contained the symbol. He was returning the symbol to his Nation's present location when he was arrested by state troopers and seized the image.

STATEMENT OF PROCEEDINGS

After Mr. Captain was arrested, the State of Oregon brought a criminal action against him for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under OR. REV. STAT. § 358.905-358.961 and OR. REV. STAT. § 390.235-390.240. Mr. Captain consented to a bench trial at the Oregon Circuit Court for the County of Multnomah. The court concluded that the Cush-Hook Nation owns the land in question under aboriginal title and as such Mr. Captain is not guilty of trespass. However, the court determined that the Oregon statutory provisions pertaining to archeological and historical sites applied to all lands in the State of Oregon under Public Law 280 and tribal ownership of the land was immaterial. Accordingly, Mr. Captain was found guilty for damaging an archeological site and a cultural and historical artifact and fined $250.

The State of Oregon and Mr. Captain appealed the decision and the Oregon Court of Appeals affirmed without writing an opinion. The Oregon Supreme Court denied review. After denial of review, the State of Oregon filed a petition and cross petition for certiorari and Mr. Captain filed a cross petition for certiorari to the United States Supreme Court. The United States Supreme Court granted certiorari for two issues: whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park and 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.

## STANDARD OF REVIEW

For the first issue, the Oregon Circuit Court for the County of Multnomah determined that the Cush-Hook Nation owns aboriginal title for the land in question. The determination of occupancy necessary is a question of fact that is determined as any other question of fact. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). Since the court was the trier of fact, clearly erroneous is the standard that must be met in order to reverse any findings of fact. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The second issue addresses an interpretation of federal law in order to determine whether the state of Oregon had criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question. Statutory interpretation is a question of law that is to be reviewed *de novo. Barton v. Adang*, 162 F.3d 1140, 1144 (Fed. Cir. 1998).

## SUMMARY OF THE ARGUMENT

The Cush-Hook Nation of Indians owns aboriginal title to the land in question because it actually and continuously occupied the land to the exclusion of others for a long period of time. Since aboriginal title, or the aboriginal right of occupancy, derives from aboriginal possession of lands, and not from an action of congress, aboriginal title does not depend on the recognition of the United States government to exist. Moreover, ownership of aboriginal title gives the citizens of a tribe the right of occupancy that can only be extinguished by the United States. However it has consistently been federal policy to respect aboriginal title and extinguishment will not be lightly implied. Congressional intent to extinguish aboriginal title must be unambiguous and ambiguous expressions of intent must be resolved in favor of the tribe or Indian party. In this case, congressional intent to

extinguish Cush-Hook title to lands within Kelley Point Park ambiguous at best and therefore the Cush-Hook Nation holds unextinguished aboriginal title to the land in question.

The state of Oregon does not have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question because it lacks the authority. Public Law 280 grants the power of state jurisdiction over tribal reservations for criminal and limited civil purposes. Public Law 280 does not apply to state laws if they are civil/regulatory laws. The Oregon statutes at issue do not prohibit the conduct of altering archeological sites and objects but rather regulates that conduct with a permit system. Since the statutes are regulatory, Public Law 280 does not apply and the state of Oregon does not have the criminal jurisdiction.

## ARGUMENT

### I. THE CUSH-HOOK NATION OF INDIANS OWNS ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK BECAUSE IT HAD OCCUPIED THE LAND SINCE TIME IMMEMORIAL AND ITS ABORIGINAL TITLE HAS NEVER BEEN EXTINGUISHED.

The Oregon Circuit Court for the County of Multnomah was correct in holding that the Cush-Hook Nation owns aboriginal title to its aboriginal homelands, including the area within Kelley Point Park, because the Cush-Hook Nation has occupied the area from time immemorial and its aboriginal title has never been extinguished as required by *Johnson v. M'Intosh*. The Court in *Johnson v. M'Intosh* held that tribal nations were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). Therefore "aboriginal title" refers to land claimed by tribes, the ownership of which derives from aboriginal possession and sovereignty. Citizens or members of a tribe that owns aboriginal title to land retain the right

of occupancy to those lands based on ancestral ownership and occupancy of those lands since time immemorial. *Santa Fe Pac. R.R. Co.*, 213 U.S. at 344-5.

First aboriginal title springs from tribal occupancy and not from recognition by or a conveyance from the United States government. While the doctrine of discovery connotes that discovering sovereigns obtained fee title to the land due to "discovery" of lands held by tribes since time immemorial, the sovereign did not obtain fee simple absolute title to the lands "discovered" because the land was encumbered by the right of aboriginal occupancy and possession. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 758 (1835). Therefore the majority of lands within the present-day United States were originally subject to the aboriginal right of occupancy. *See Johnson*, 21 U.S. (8 Wheat.) at 588-9. The encumbrance of aboriginal title remains to this day unless aboriginal title has been extinguished. *Johnson*, 21 U.S. (8 Wheat.) at 583.

First, tribes may establish aboriginal title by "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *See Santa Fe Pac. R.R. Co.*, 314 U.S. at 345; *Strong v. United States*, 207 Ct. Cl. 254, 260 (1975). Since aboriginal title springs from tribal occupancy of an area for a long period of time, aboriginal title does not depend on the United States' recognition for its existence. *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). Therefore formal government recognition (by treaty, statute, or other governmental action) is not required to establish the existence aboriginal title. Indeed, all that is required to prove aboriginal title is that a tribe had actual, exclusive, and continuous use and occupancy of the land in question for a long time. *See Johnson*, 21 U.S. (8 Wheat.) at 569-70 (stating "[t]he measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply

them. . . . Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over[.]"); *see also Santa Fe Pac. R.R. Co.*, 314 U.S. at 345; *Strong*, 207 Ct. Cl. at 260.

Second, it has unquestionably been the policy of the United States federal government to respect the occupancy right preserved by aboriginal title, which could only be extinguished by the sovereign. *Cramer v. United States*, 261 U.S. 219, 227 (1923). In *Johnson v. M'Intosh*, the power to extinguish aboriginal title was held to be the exclusive province of the United States government. *Johnson*, 21 U.S. (8 Wheat.) at 587. Extinguishment occurs "either by purchase by or conquest" or the "exercise of complete dominion adverse to the right of occupancy." *Id.*; *Santa Fe Pac. R.R. Co.*, 213 U.S. at 347.

Despite the United States' exclusive right to extinguish the aboriginal right of occupancy, aboriginal title is not easily extinguished. It has consistently been federal policy to respect aboriginal title. This policy was initially acknowledged in *Johnson v. M'Intosh* and has subsequently been reaffirmed on many occasions. *Johnson*, 21 U.S. (8 Wheat.) at 592; *Worchester v. Georgia*, 6 U.S. (6 Pet.) 515, 584 (1832); *Mitchel*, 34 U.S. (9 Pet.) at 713; *Buttz v. N. Pacific R.R.*, 119 U.S. 55, 68(1886). In fact, the Court has stated that aboriginal title "is considered as sacred as the fee simple of the whites." *Mitchel*, 34 U.S. (9 Pet.) at 746. Therefore congressional intent to extinguish aboriginal title must be "plain and unambiguous," that is, it must either "be expressed on the face of the [instrument] or . . . clear from the surrounding circumstances." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276-7 (1985); *see also Santa Fe Pac. R.R. Co.*, 314 U.S. at 344. Moreover extinguishment will "not be lightly implied" and, as a rule of construction recognized without exception, "doubtful expressions . . . are to be resolved in favor of [the

tribes or individual Indians]." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354. In this case, congressional intent to extinguish aboriginal title is ambiguous at best and, therefore, the Cush-Hook owns aboriginal title to the lands within Kelley Point Park because it actually, exclusively, and continuously occupied those lands for a long time.

A. The Cush-Hook Nation owns aboriginal title to its homelands, including the area within present-day Kelley Point Park, because the Cush-Hooks had actual, exclusive, and continuous use and occupancy of the lands for a long time.

Since the Cush-Hook Nation had actual, exclusive, and continuous use and occupancy of its aboriginal homelands, including the area within modern-day Kelley Point Park, the Oregon Circuit Court for the County of Multnomah was correct in holding that the Cush-Hook Nation owns aboriginal title to the land in question. Since aboriginal title derives from original Indian occupancy of the land before European colonists arrived, government recognition of aboriginal title, whether by treaty, statute, or other governmental action, is not required to establish aboriginal title. *Holden*, 84 U.S. (17 Wall.) at 244. All that is required to show possession sufficient to establish aboriginal title is that the tribe: (1) actually and continuously used and occupied the land in question, (2) to the exclusion of all others, and (3) that the tribe's occupancy was "for a long time." *See Santa Fe Pac. R.R. Co.*, 314 U.S. at 345; *Strong*, 207 Ct. Cl. at 260.

*1. The Cush-Hook Nation had actual, continuous use and occupancy of the area within present-day Kelley Point Park because the Cush-Hook Nation's occupancy was permanent and accorded with the way of life of the Cush-Hook Nation.*

The Cush-Hook Nation had the requisite "actual" and "continuous" use and occupancy to establish aboriginal title because its occupation was permanent and its use was consistent with the way of life and usages of the Nation. The "use and occupancy" required to establish aboriginal title to lands must be both "actual" and "continuous." *Strong*, 207 Ct.

Cl. at 260. However actual and continuous use and occupancy is not limited to areas of permanent settlement. *Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 194 (1966). Actual and continuous use is found when there is such use and occupancy as accords with the way of life, and usages of the Indians who are the users and occupiers. *See Mitchel*, 34 U.S. (9 Pet.) at 713 & 746 (stating that "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way[.]"); *Native Village of Eyak v. Blank*, 688 F.3d 619, 622-3 (9th Cir. 2012). Therefore a tribe or individual may establish the requisite use and occupancy on the basis of expert testimony, first-hand historical accounts, and testimony about the oral history of the nation by citizens of the tribe concerning the tribe's culture and way of life. *See Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 450-1 (1974).

Since actual and continuous use is interpreted in light of the Indian occupiers' way of life, the requirement that occupancy be "actual" and "continuous" does not limit ownership to areas where the tribe had permanent villages. *Mitchel*, 34 U.S. (9 Pet.) at 713 & 746; *Confederated Tribes of Warm Springs Reservation of Or.*, 177 Ct. Cl. at 194. In fact, the requisite "continuous" occupancy is established even for lands used seasonally or lands used for hunting, fishing, or gathering. *Native Village of Eyak*, 688 F.3d at 623; *United States v. Seminole Indians of Fl.*, 180 Ct. Ct. 375, 384-5 (1967). For example, a tribe had established use and occupancy to areas where there were permanent settlements, as well as areas used for cultivating crops, gathering, and even areas used for trade. *Seminole Indians of Fl.*, 180 Ct. Ct. at 384-5. In that cast, evidence of relatively few settlements was not fatal to a claim of

aboriginal title because the use and occupancy required to establish aboriginal title is not based solely on actual possession, but derives from the use to which a tribe puts the land. *Id.* at 385.

The Cush-Hook Nation can establish use and occupancy of its aboriginal homelands, including the land within modern-day Kelley Point Park, based on the first-hand account of William Clark's encounter with the Nation and his notes on the Nation's way of life. Similarly to *Seminole Indians of Fla.*, the Cush-Hook Nation had a permanent settlement within modern-day Kelley Point Park that William Clark visited and made note of. Specifically, Clark included notes concerning the Cush-Hook longhouses, which indicate permanent settlement. Moreover, Clark wrote first-hand accounts concerning other practices of the Cush-Hook Nation—including hunting and fishing practices, governance, and specifically noted the practice of carving religious totems into living trees that grew within the boundaries of present-day Kelley Point Park. Since there is substantial evidence that the Cush-Hook Nation used and occupied the land as the true Indian owners and occupiers, the Cush-Hook Nation owns aboriginal title to the land within present-day Kelley Point Park.

*2. The Cush-Hook Nation had exclusive use and occupancy to the land within present-day Kelley Point Park because the Nation had the ability of a sovereign to exclude others which indicates true ownership of the land.*

The Cush-Hook Nation exclusively used and occupied the land in question because the Nation occupied the land to the exclusion of other Indian groups and had the ability to exclude others. Exclusivity of use and occupancy is a necessary element for establishing aboriginal title because the ability of a sovereign to exclude others from its territory is an inherent characteristic necessary to show ownership or control of the land. *United States v. Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 669 (1975). Generally the true owner of a land

exercises full control over it and, therefore, has the right and ability to oust unwelcome intruders. *Id.*

A tribe or individual Indians may establish exclusive use and occupancy by showing that the tribe occupied the land to the exclusion of other Indian groups the tribe was capable of expelling intruders. *Native Village of Eyak*, 688 F.3d at 623. For example, where two tribes used the same parcels of land and there was cooperation between the tribes in the use and management of the land, there was no "exclusive" use because several factors that indicated that the inter-tribal relationship was nothing more than an alliance.[1] *Strong*, 207 Ct. Cl. at 262. However, where a tribe merely allows other Indians to use the land under its control, the tribe retains aboriginal title. *Id.* at 279-80. For example, where there is evidence that the Wyandot permitted another tribe to use a portion of the Wyandot controlled land, aboriginal title was in no way diminished. *Id.*

In this case, the Cush-Hook Nation had exclusive use and occupancy of the land within Kelley Point Park because it occupied the land to the exclusion of all others and had the power to expel intruders. Unlike the parcel in *Strong* where the land was used in cooperation and none had dominion, there is no evidence that other tribes used the land in question to the detriment of Cush-Hook ownership. The State may argue that the presence of a few Multnomah Indians fishing near the Cush-Hook Village destroys exclusivity; however permissive use of land will not destroy exclusivity. In this case, when Clark and the Multnomah approached the Cush-Hook village, the group had to make peace signs—indicating that the Cush-Hook had the power of control over their land. While true ownership may be called into question when the land is controlled or wandered over by multiple groups,

[1] These factors included: (1) the lack of need for intertribal warfare due to the vastness of the territory, (2) cooperation due to a common enemy (American settlers), and (3) minimal to no evidence that the two groups considered themselves to be "one nation."

that is not the case where the Cush-Hook exercised complete dominion over their village and the surrounding lands, but merely permitted individuals to use certain portions of the land. Since the Cush-Hook exercised complete dominion and evidenced the ability to exclude others from the land in question, the Cush-Hook's use and occupancy was exclusive for the purpose of establishing aboriginal title.

*3. The Cush-Hook Nation had used and occupied the land for "a long time" because the Nation established dominion over its homeland and has occupied present-day Kelley Point Park since time immemorial.*

Since the Cush-Hook Nation had occupied and exercised dominion over the land within Kelley Point Park since time immemorial. Aboriginal title is not obtained merely by acquiring full dominion over the land. There must have been some amount of time sufficient to convert the land into a "domestic territory." However, courts have held that aboriginal title attached to lands where the tribe obtained dominion relatively late in their history. *Turtle Mountain Band of Chippewa Indians*, 203 Ct. Cl. at 448-449. In this case, expert witnesses in history, sociology, and anthropology establish that the Cush-Hook Nation owned and occupied the lands before the arrival of Euro-Americans.

Since the Nation had actually and continually occupied the area within Kelley Point Park since time immemorial to the exclusion of others, the Cush-Hook Nation owns aboriginal title to the lands in question.

B. <u>The Cush-Hook Nation Holds unextinguished aboriginal title because there has been no congressional action intended to extinguish Cush-Hook title to the land within Kelley Point Park.</u>

Since there is no evidence tending to show "plain and unambiguous" congressional intent to extinguish Cush-Hook aboriginal title, the Cush-Hook Nation continues to own the aboriginal right of occupancy to the land within present-day Kelley Point Park.

Extinguishment may occur "by treaty, by the sword, by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy . . . ." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 374. However, it should be noted that federal policy respects aboriginal title and that this policy has been in place since *Johnson v. M'Intosh*. Therefore aboriginal title is not easily extinguished. Despite the fact that the United States has the exclusive power to extinguish when it comes to aboriginal title, it has often dealt with tribes instead of unilaterally extinguishing tribal rights of occupancy. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 592 (1823); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 713 (1835); *Buttz v. N. Pacific R.R.*, 119 U.S. 55, 68 (1886).

Since federal policy dictates that aboriginal title is to be respected, congressional intent to extinguish aboriginal title must be "plain and unambiguous." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276-7; *see also Santa Fe Pac. R. R. Co.*, 314 U.S. at 344. That is, congressional intent must either "be expressed on the face of the [instrument] or . . . clear from the surrounding circumstances" for aboriginal title to be extinguished. *Mountain States Tel. & Tel. Co.*, 472 U.S. at 276-7. The relevant question when it comes to alleged extinguishment is not the means used, but whether Congress intended for a governmental action to be cause aboriginal title to extinguish. *United States v. Gemmill*, 535 F. 2d 1145, 1148 (9th Cir. 1976). However congressional intent to extinguish aboriginal title will "not be lightly implied" because of the strong federal policy respecting aboriginal title. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354; *see also Cramer v. United States*, 261 U.S. 219, 227 (1923). Given this policy consideration, any ambiguity on the issue of congressional intent must be resolved in favor of the Indian tribe or individual. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354. In this case, there was no congressional intent to extinguish

aboriginal title, or, alternatively, congressional intent was ambiguous and therefore the Cush-Hook Nation's title remains unextinguished.

*1. The Cush-Hook Nation's aboriginal title was not extinguished by the 1850 treaty because the treaty remains unratified and the Cush-Hook Nation has never received the compensation promised by the treaty.*

Since the United States government has not ratified the 1850 treaty signed by the Cush-Hook Nation and Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, and the United States government has not paid any of the promised compensation or conveyed any of the other promised benefits, the 1850 treaty does not represent the intent of Congress to extinguish the Cush-Hook Nations aboriginal title. Since the power of the United States government derives from the United States Constitution, which requires that treaties be ratified by Congress, an unratified treaty negotiated by an arm of the executive branch does not speak to congressional intent. *See* U.S. CONST. art II, § 2, cl. 2 (stating that: "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . ."). Therefore there can be no congressional intent to extinguish aboriginal title where a treaty remains unratified and compensation unpaid. *Buttz,* 119 U.S. at 69-70.

However, the question of congressional intent as to extinguishment is circumstance specific and aboriginal title is only extinguished when specific circumstances, including historical context, warrant that conclusion. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 358; *Pueblo of San Ildefonso*, 206 Ct. Cl. at 657-8. For example, in *Santa Fe*, the Walapais approached the United States requesting a reservation and the tribe accepted the executive order reservation by actually occupying the land. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 358. Since the tribe and the government had a history of failed negotiation, the tribe's request for a

reservation was tantamount to extinguishment of aboriginal title by a "voluntary cession" of all lands outside the reservation. *Id.* at 357-8.

Moreover, extinguishment may be achieved by a through treaty where Congress ratified the treaty and the tribe relocated to the reservation designated in the treaty. Where both Congress and the tribe acquiesce to removal to a reservation, congressional intent to extinguish title outside the reservation may occur because these factors indicate intent to extinguish aboriginal title. *Buttz*, 119 U.S. at 69-70. Moreover, the aboriginal right of occupancy could not be resumed once full compensation had been paid as required by the treaty stipulations. *Id.* Conversely, it was implied that the aboriginal right of occupancy could be resumed, even where a tribe signed on to a treaty and relocated, when the treaty was not ratified by the United States and full compensation remained unpaid. *Id.*at 70 (stating that that aboriginal title could not be resumed once Congress ratified the treaty and full compensation had been paid).

The treaty in this case is not indicative of congressional intent to extinguish aboriginal title to tribally owned land by the Cush-Hook Nation and, therefore, Cush-Hook title remains unextinguished. Unlike *Santa Fe*, the Cush-Hook Nation did not request a reservation. Moreover, unlike the treaty in *Buttz*, the 1850 treaty signed by the Cush-Hook Nation was never ratified by Congress and none of the promised compensation was paid. Therefore the 1850 treaty did not indicate congressional intent to extinguish the Cush-Hook Nation's aboriginal title. The State may argue that since the Cush-Hook Nation actually relocated to the area set apart in the unratified treaty, there was a voluntary cession and the Nation's title was extinguished. However, there is no voluntary cession where the Cush-Hook Nation received none of the promised benefits of its cession. Indeed, according to

*Buttz*, the Cush-Hooks may resume their aboriginal right of occupancy because the 1850 treaty went unratified by Congress and the United States has therefore not paid the promised compensation.

*2. The Oregon Donation Act did not extinguish Cush-Hook aboriginal title because the expectation of future settlement is insufficient to extinguish aboriginal title and there was no valid settlement of the land within Kelley Point Park.*

The Cush-Hook Nation's aboriginal title was not extinguished by the enactment of the Oregon Donation Land Act of 1850 because the expectation of future parcel-by-parcel settlement inherent to general land donation acts is not sufficient to show congressional intent to extinguish aboriginal title. Moreover, the Meeks did not meet the central requirements necessary to receive valid patent by the Oregon Donation Land Act. Therefore the Meek's patent was void and Cush-Hook occupancy remained unextinguished.

The Oregon Donation Land Act was a comprehensive measure designed to convey title to white settlers for the purpose of residency and cultivation of the land. *Dawamish v. United States*, 79 Ct. Cl. 530, 569 (1934). Section 4 of the Oregon Donation Land Act of 1850 states:

> That there shall be . . . granted to every white settler or occupant of the public lands . . . who shall become a resident [of the Oregon Territory] . . . and who shall have resided upon and cultivated the [land] for four consecutive years, and shall otherwise conform to the provisions of this act [shall receive patent to the land claimed.]

Oregon Donation Land Act, 9 Stat. 497 (1850). The 1850 Act was intended to encourage American settlers to take up permanent residency in the Oregon Territory. *Dawamish*, 79 Ct. Cl. at 569. The State may argue that since the purpose of the Act of 1850 was to promote settlement and cultivation of the public lands, an activity that would directly contravene the aboriginal right of use and occupancy, that Congress intended for the extinguishment of all

aboriginal title within the Oregon Territory when passing the 1850 Act. However Congress had recently passed legislation expressing its intent to extinguish aboriginal title in the Oregon Territory by treaty.[2] 9 Stat. 437 (1950). The passing of that Act evidences congressional intent to remain true to federal policy of respecting aboriginal title, even in the face of American settlement of the West. *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, 199 Ct. Cl. 523, 526 & 528 (1972).

In light of the Act expressing congressional intent to extinguish aboriginal title by way of treaty and considering the fact that Acts affecting aboriginal title are to be construed most favorably to Indian parties, it cannot be said that Congress intended to extinguish aboriginal title by enacting the Oregon Land Donation Act. *Plamondon ex rel. Cowlitz Tribe of Indians*, 199 Ct. Cl. at 528. Therefore the Act of 1850 did not extinguish Cush-Hook aboriginal title as a matter of law upon its enactment.

Due to strong policy considerations with respect to aboriginal title and extinguishment, an Act of Congress will deprive a tribe of its aboriginal title only when congressional intent to extinguish that title is clearly and unequivocally expressed. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 345. The 1850 Act by its express terms required that a settler reside upon the land for four consecutive years and cultivate the land before acquiring fee title. 9 Stat. 497 (1950). Or, in other words, a valid patent under the 1850 Act extinguishes title only after the settler complies with all statutory requirements. *Id.*; *Duwamish*, 79 Ct. Cl. at 569. It has been determined that aboriginal title could be extinguished by actual settlement by American settlers; however this requires that the settlers exercise complete dominion and occupancy over the land adverse to aboriginal title. *Plamondon ex rel. Cowlitz Tribe of*

[2] The Act was entitled "An Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for other Purposes."

*Indians*, 199 Ct. Cl. at 529. Since the Meeks did not comply with the requirements of the 1850 Act, voiding their patent, and further did not reside upon the land for more than two years or use the land in a manner adverse to aboriginal title, the Cush-Hook Nation's title to the land remains unextinguished.

Since congressional intent to extinguish Cush-Hook aboriginal title is ambiguous and there is substantial evidence indicating that the Nation actually, exclusively, and continuously used and occupied its aboriginal homeland since time immemorial, the Cush-Hook Nation owns unextinguished aboriginal title to the land within present-day Kelley Point Park.

## II. THE STATE OF OREGON DOES NOT HAVE CRIMINAL JURISDICTION OVER ARCHEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION BECAUSE THE PUBLIC LAW 280 DOES NOT APPLY TO CIVIL/REGULATORY STATUTES.

The state of Oregon does not have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question because the land is owned by the Cush-Hook Indian tribe via aboriginal title and Public Law 280 does not apply since the Oregon Statutes in question are regulatory in nature. The federal government has plenary power over tribal affairs but in the 1950's it began to delegate some of its authority to the states. *Middletown Rancheria of Pomo Indians v. W.C.A.B.*, 71 Cal. Rptr. 2d 105, 111 (1998). Public Law 280 is an example of this delegation and confers both civil and criminal jurisdiction over Indian country to six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C.A. § 1162 (West, Westlaw through P.L. 112-207 (excluding P.L. 112-199 and 112-206) approved 12-7-12). The motivation of Congress for enacting Public Law 280 was to address the "problem of lawlessness on certain Indian reservations and the absence of adequate tribal institution for law enforcement." *Bryan v.*

*Itasca County, Minnesota*, 426 U.S. 373, 379 (1976). Since the statute contains ambiguity as to the extent it grants states power, the Supreme Court interpreted it.

The Supreme Court examined the extent that Public Law 280 granted criminal and civil jurisdiction and determined that the "central focus" of the law was "for state criminal jurisdiction over offenses committed by or against Indians on the reservations." *Id.* at 380. Nevertheless, the Supreme Court also acknowledged that Public Law 280 confers a limited scope of civil jurisdiction covering the adjudication of civil laws applicable to private person and/or private property. *Id.* at 384. The Supreme Court notes that Public Law 280 does not include anything "remotely resembling an intention to confer general state civil regulatory control over Indian reservations." *Id.* 384. In order to help differentiate between a regulatory law and a non-regulatory law, for the purposes of Public Law 280, the Supreme Court adopted a test quantified by the Ninth Circuit Court of Appeals. If the state law's intent is to generally prohibit particular conduct, it falls within Public Law 280's grant of criminal jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). If the state law generally allows the particular conduct, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement in Indian Country. *Id.* The Supreme Court also provided a "shorthand test" taken from the Fifth Circuit of whether the conduct at issue violates the State's public policy to determine if it is regulatory or prohibitory. *Id*. This test is not a bright line test but the Supreme Court still finds it persuasive in determining jurisdiction for Public Law 280. *Id*. at 1088-9.

*Bryan v. Itasca County, Minnesota* is the example of how the Supreme Court first analyzed an issue pertaining to Public Law 280. *Bryan*, 426 U.S. 373 at 375. In *Bryan*, an Indian resident of an Indian reservation brought an action seeking declaratory judgment that

the state and county lacked the authority to tax his mobile home which was located on an Indian Reservation. *Id.* The issue was whether Public Law 280 granted the state and the county the authority to levy a personal property tax on Indian residents of an Indian reservation. The Court utilized the legislative history of Public Law 280 to determine that the civil jurisdiction conferred by Public Law 280 does not include general state civil regulatory control over Indian reservations and lacks the express grant of power to tax. *Id.* at 383-4. The Supreme Court narrowly construed Public Law 280, explaining that if Congress had desired to confer more than the narrow scope of civil jurisdiction it would have done so expressly. *Id.* at 390.

Approximately ten years later, the Supreme Court had an opportunity to modify *Bryan* in *California v. Cabazon Band of Mission Indians* but choose not to. Instead, the Supreme Court adopted tests that are consistent with the reasoning in *Bryan*. *Cabazon*, 480 U.S. 202 at 210. In *Cabazon*, the Indian tribes filed an action for declaratory and injunctive relief and for damages against the county. *Id.* at 206. The plaintiffs asserted that the county had no authority to apply ordinances regulating bingo and prohibiting playing of draw poker and other card games inside reservations. *Id.* The test used to determine jurisdiction is to determine if the conduct at issue is generally prohibited or generally allowed. *Id.* at 209. If the conduct is generally prohibited by the statute then it likely falls within criminal jurisdiction and if the conduct is generally allowed, but is subject to regulation, it is likely a civil/regulatory statute and there is no criminal jurisdiction. *Id.* Since California does not prohibit all forms of gambling, and even operates a lottery itself, the ordinances were regulatory in nature and thus Public Law 280 did not confer criminal jurisdiction. *Id.* at 210. The Court notes that even if an otherwise regulatory law is enforceable by criminal means, it

does not automatically convert it to a criminal law under which Public Law 280 confers jurisdiction. *Id.* at 211. *Cabazon* also provides a shorthand public policy test to utilize when it is a close call. *Id.* at 209. This test determines if the conduct at issue violates the State's public policy and is criminal or if it does not and it is likely civil/regulatory. *Id.*

In *State v. Stone*, the Court adopts a two-step approach to applying the *Cabazon* test. *State v. Stone*, 572 N.W.2d 725, 730 (Minn. 1997). The first step is to determine the whether the focus of the *Cabazon* test will be on the broad conduct as is standard or if the narrow conduct presents "substantially different or heightened public policy concerns" that require attention. *Id.* The second step is to apply the *Cabazon* test and to use the shorthand public policy test to help make the distinction in close cases. *Id.* In *Stone*, members of an Indian tribe were cited for various motor vehicle violations within the boundaries of their reservation but contended that the state of Minnesota lacks the jurisdiction to issue the citations. *Id.* at 727. The court identified the broad conduct of driving as the proper focus and held that since driving is generally permitted with regulation, Public Law 280 does not apply and criminal jurisdiction is not granted. *Id.* at 731.

When the underlying conduct is particularly criminal in nature, a law that is usually viewed as civil/regulatory can be considered criminal for that particular circumstance. In *State v. Losh*, the Defendant, an enrolled member of Native American Tribe, was convicted of driving after revocation of his driver's license, which occurred on the reservation of another band of Indians. *State v. Losh*, 755 N.W.2d 736, 738 (Minn. 2008). The Court noted that although revocation of a driver's license is typically civil/regulatory, there, alcohol impaired driving triggered the revocation and that conduct carries a greater threat of harm and is indicative of a criminal/prohibitory statute. *Id.* at 745.

In the present case, the circumstances of Mr. Captain are similar to that of the defendant in *Bryan v. Itasca County, Minnesota*. Although there are different laws being applied in these two cases, they are both civil laws that are outside the scope of criminal and constitute types of general civil/regulatory laws that Public Law 280 does not apply to. In *Bryan*, the general regulatory law was a tax and here the goal is to regulate the use of archeological sites in order to protect them. OR. REV. STAT. § 358.910 (2012). Evidence of the permit process instituted by the state of Oregon regulating the interaction with archeological sites is supportive of the finding that this is a civil/regulatory law. OR. REV. STAT. § 358.920 (2012).

The situation of the defendants in *California v. Cabazon Band of Mission Indians* is highly comparable to the situation of Mr. Captain in this present case. The court in *Cabazon* rejected the argument that the statute regulating gambling was a criminal statute because it had criminal penalties. Similarly, this regulatory statute does not constitute a criminal statute just because it is enforceable with a misdemeanor penalty. When applying the *Cabazon* test to the current case, the permit system displayed by the statute shows that the conduct is allowed subject to regulation and thus qualifies as civil/regulatory and thus Public Law 280 does not confer criminal jurisdiction.

Moreover, if the shorthand public policy test was also applied, the statute still is determined to be civil/regulatory. The conduct itself is altering an archeological site for the purpose of protecting objects within. The policy expressed in OR. REV. STAT. § 359.910 is the desire to preserve and protect archeological sites and objects. Mr. Captain's conduct does not violate the policy of valuing and preserving archeological sites, particularly because his motivation and purpose was to protect the symbols from vandals in the area. Since the Mr.

Captain's conduct does not violate the public policy, the statute is considered civil/regulatory and Public Law 280 does not grant criminal jurisdiction.

If the two-step analysis for determining jurisdiction from *Stone* is applied to the case at hand, the same result is reached as was in the decision of *Stone*: the law is civil/regulatory and there is no criminal jurisdiction. Step one is to identify the scope of the conduct at hand. The general conduct at hand is altering archaeological sites with the narrow conduct being trying to protect culturally-significant religious symbols from vandals that Mr. Captain's ancestor's carved into the trees. Since the narrow conduct raises the heightened public policy concern of protecting archaeological sites and objects within, it is the proper scope to use. Protecting archaeological sites and objects is not prohibited by the Oregon Revised Statutes but it is regulated through a permit process. This means that the statutes in question are civil/regulatory and Public Law 280 does not confer criminal jurisdiction.

The situation of Mr. Captain differs from the situation of the defendant in *State v. Losh*. In *Losh*, the defendant's driver's license was revoked due to driving while intoxicated and he was later charged with driving with a revoked license. The court determined that although the revocation of a driver's license is generally civil/regulatory, the conduct of driving while intoxicated that caused the revocation initially is criminal in nature and it is generally prohibited to drive after a license is revoked for that conduct. In the present case, there is no such special circumstance that changes this civil/regulatory statute into a criminal one for these particular facts. His conduct would have been acceptable with the proper permit, not generally prohibited, so this statute is civil/regulatory in nature and Public Law 280 does not apply and does not grant the state of Oregon criminal jurisdiction.

Since both OR. REV. STAT. § 358.905-358.961 and OR. REV. STAT. § 390.235-390.240 are civil/regulatory statutes with an established permit process regulating conduct, Public Law 280 does not apply. Without the grant of jurisdiction from Public Law 280, the state of Oregon lacks the 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.

## CONCLUSION

Mr. Captain respectfully requests that this court affirm the holding of the Oregon Circuit Court for the County of Multnomah that the Cush-Hook Nation owns aboriginal title to its aboriginal homelands, including the area within present-day Kelley Point Park. Mr. Captain further requests that this court reverse the Oregon Circuit Court's holding that Public Law 280 applies and that Mr. Captain violated OR. REV. STAT. § 358.905-358.961 and OR. REV. STAT. § 390.235-390.240.