No. 11-0274

In the

Supreme Court of the United States

State of Oregon,

*Petitioner*,

v.

Thomas Captain,

*Respondent – Cross-Petitioner*

On Writ of Certiorari to the

Oregon Court of Appeals

Brief for Petitioner

Team No. 28

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## INTRODUCTION

Thomas Captain, a member of the Cush-Hook Nation of Native Americans, chopped down a tree within Kelley Point Park. After chopping down the tree, Thomas Captain proceeded to dissect a piece of the tree containing an image sacred to the Cush-Hooks. After his destructive act, Thomas Captain drove away from the park, and was pulled over by Oregon state troopers. The state of Oregon subsequently brought criminal charges against Thomas Captain. Thomas Captain was convicted by an Oregon circuit court for his impacts on the resource.

Thomas Captain appeals challenging whether or not a state may criminalize the destruction of archeological resources on land, when the land on which the crime occurred may be owned by a group of Native Americans. Oregon appeals from the circuit court's decision that the title to Kelley Point Park is held in aboriginal title. Title should be held by the state of Oregon because the Cush-Hooks were not the exclusive users, or because the Oregon Donation Land Claim Act nonetheless stripped aboriginal title from the Cush-Hooks. And Thomas Captain's challenge should be brought down because it has been long recognized that states may criminalize acts originating on private land, as the federal government does for certain acts against archaeological resources, even if the acts originated on private lands.

## QUESTIONS PRESENTED

I. Whether Oregon has title to public park land that was originally subject to the Oregon Donation Land Claim Act of 1850, or if the title vested in a group of Indians who are not federally recognized, and who the United States Senate refused to ratify a treaty with.

II. Whether Oregon may protect against and criminalize acts against the destruction, obliteration, or other misuses of archeological or historical objects that are located on private land, even if owned by a group of non-federally recognized Indians, within the external boundaries of the state of Oregon.

## STATEMENT OF THE CASE

*Kelley Point Park and the Protection of Resources*. Within the state of Oregon, and within the city of Portland, is Kelley Point Park. Kelley Point Park's beautiful 640 acres include an abundance of wild and natural things. Among them are trees that have historical significance to certain groups of people in the state of Oregon. These trees, specifically, include sacred carvings and totems from many years ago, carved by indigenous groups. Unfortunately, some of these carvings have been damaged by vandals who have defaced or otherwise misused the resources.

To curb the destruction of these resources, the Oregon Legislative Assembly created legislation that addressed the destruction of archaeological and historical resources. Indeed, the Oregon Legislative Assembly made quite clear that it was passing the act in the attempt to curb the destruction of valuable archeological resources. It found these resources to be "fine, irreplaceable and nonrenewable … and are an *intrinsic part of the cultural heritage of the people of Oregon*." In Oregon, "archaeological sites and their contents on public land are under the stewardship of the people Oregon, [and are] to be protected and managed in perpetuity by the state as a public trust." Furthermore, "[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" without a permit. And, thus, the Oregon Legislative Assembly made the unauthorized destruction of these resources a misdemeanor.

*The Cush-Hook Nation*. The explorers Lewis and Clark originally passed through Oregon in 1806. In that year, William Clark traveled a different path from Meriwether Lewis. At one location, near Kelley Point Park, William Clark saw Native Americans gathering items near a

village. The village was located within what is now a portion of Kelley Point Park. The Native Americans Clark saw were Multnomah Indians. Yet, the village immediately adjacent to the area where the Multnomah Indians were gathering their sustenance was not a Multnomah village. No, the village belonged to another group of Native Americans who referred to themselves as the Cush-Hook Nation.

The Multnomah Indians first made peace signs to the leaders of the Cush-Hook Nation and proceeded to introduce Clark to the Cush-Hook leaders. Clark proceeded to gift one of many medals provided to the expedition by President Jefferson, but Clark also made notes of some of the totems and other carvings in trees that the Cush-Hook found to be sacred. These carvings and the like are located in Kelley Point Park. One is at the heart of this dispute.

*The U.S. Senate Refuses a Treaty*. In 1850, the superintendent of the federal Indian Affairs for the Oregon Territory contacted the Cush-Hook Nation. After discussion, the Cush-Hook Nation proceeded to move all of their people sixty miles to the west to an area nearer the Oregon coast. The superintendent, on behalf of the United States, and the Cush-Hooks also entered into a treaty with one another, subject to United States Senate ratification.

The Senate refused to act on the proposed treaty until 1853 and then refused to ratify the treaty. Since that time, most of the Cush-Hooks lived nearer the Oregon coast. Yet, neither Oregon nor the federal government recognizes the Cush-Hooks as an Indian tribe.

*The Oregon Donation Land Claim Act of 1850*. Following the Cush-Hooks' decision to move their people closer to the Oregon coast, the United States retained the land. In an effort to

dispose of the land, the federal government enacted the Oregon Donation Land Claim Act. This Act allowed settlers to cultivate and live upon the land for four years in exchange for title to the land. Two settlers, Joe and Elise Meek, applied for and received title to the land that would become Kelley Point Park. But the Meeks lived on the land for less than two years, and chose to utilize the land for a purpose other than cultivation. Still, the United States granted title to the Meeks. The land later became public land.

*The Occupation and Destruction of a Tree*. Respondent, Thomas Captain, is a member of Cush-Hooks, and claims to be an "Indian." Yet, the Cush-Hooks are not federally recognized. Even without this recognition, Thomas Captain has asserted that he is an Indian. Thomas Captain began to occupy Kelley Point Park in 2011, and he erected a temporary structure so that he might occupy the park.

Thomas Captain claimed to have one goal in mind when he occupied the park. That is, he claimed that he was protecting and preserving the historically and archaeologically significant carvings in the trees. Thomas Captain then took his next step. His next step was not what one would normally associate with the preservation of a fine quality piece of art, such as a Picasso painting. Thomas Captain did not erect a thick, plastic shell around the tree, as might be expected at an art gallery.

Instead, Thomas Captain decided to chop down a tree with historical markings. And then, Thomas Captain proceeded to further dissect the tree by removing the area where the markings were specifically located.

*The Getaway*. After Thomas Captain dissected the tree, he did not proceed with his preservation at the site where he chopped the tree down. Nor did Thomas Captain proceed with his preservation anywhere within the 640 acres of Kelley Point Park. Instead, Thomas Captain proceeded to head away from the park. Oregon state troopers stopped Thomas Captain, and upon discovery of the dissected tree section, reclaimed the sacred image. Thomas Captain was subsequently charged.

## PROCEDURAL HISTORY

The state of Oregon charged Thomas Captain for trespass on state land, cutting timber in a state park without a permit. Oregon also charged Thomas Captain with desecrating an archeological and historical site under Or. Rev. Stat. §§ 358.905-.961 (archeological site) and 390.235-.240 (historical site). After a bench trial, the circuit court held that aboriginal title in Kelley Point Park for the Cush-Hooks was not divested, and found that the trespass and improper chopping of the tree could no longer be maintained by the state of Oregon. The court did hold that Thomas Captain was properly charged for his destructive acts to an archeological and historical site. After finding Thomas Captain guilty for the acts to the tree, Thomas Captain was fined $250.

Oregon and Thomas Captain appealed to the Oregon Court of Appeals. The Court of Appeals affirmed without a written opinion. The parties appealed to the Oregon Supreme Court, which declined review. The matter is now before this Court.

## ARGUMENT

### I. Title to the Kelley Point Park is Held by the State of Oregon Because the Cush-Hook Nation Does Not Have Aboriginal Title to Kelley Point Park.

The case at hand comes down to an issue of "aboriginal title." In a First Circuit case, the term "aboriginal title" is said to derive from a "tribe's continuous possession of lands and is a right of occupancy." In 1823, the Supreme Court of the United States first addressed the concept of aboriginal title in *Johnson v. M'Intosh*. In this case, Chief Justice Marshall explains how aboriginal title originates from the Discovery Doctrine. The Discovery Doctrine is an international law theory that the "discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained" and limited property rights of the indigenous peoples to the right of occupancy. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

Based on the Discovery Doctrine, the *M'Intosh* court concluded that Indian title or aboriginal title is merely a right of occupancy and not fee title. *Johnson v. M'Intosh*, 21 U.S. 543, 585 (1823). Additionally, the Court held that aboriginal title might be extinguished by either purchase or conquest by the federal government. *Id.* at 587. Chief Justice Marshall stated, "[i]t has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." *Id.* at 603. In other words, aboriginal title has never been questioned and is derived from being the original inhabitants of this land; however, the United States government holds complete ultimate title of the lands within the United States' boundaries. When aboriginal title comes into question, two questions should be asked and answered: (1) did aboriginal title ever exist, *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012)

and (2) if aboriginal title did exist, was aboriginal title extinguished. *M'Intosh*, 21 U.S. at 587; *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976). Furthermore, it should be noted that Indian Claims Commission Courts (ICC) handled cases concerning Indian property rights. When the ICC was disbanded in 1976, cases concerning aboriginal title were transferred to the Court of Claims. 25 U.S.C. § 70v (1976); *Pueblo of Santo Domingo v. United States*, 16 Cl. Ct. 139, 140 (1988). Thus, many of the cases used to help determine the various issues concerning aboriginal title will come from cases from the Court of Claims.

*A. The Oregon Circuit Court erred in its findings of fact concerning the Cush-Hook Nation's "exclusive use and occupancy" of the Kelley Point Park; thus, aboriginal title was never established.*

The Supreme Court of the United States has recognized that Indians have the right to occupy and posses land that is considered their aboriginal homeland. *M'Intosh*, 21 U.S. at 574. However, when the aboriginal title of a Tribe comes into question, the tribe has the burden of proving that aboriginal title has been established. *Alabama-Coushatta Tribe v. United States*, 2000 U.S. Claims LEXIS 287 at *31 (Fed. Cl. June 19, 2000). Two elements must be determined to establish aboriginal title: proof of exclusive use and occupancy of that portion of the land for a long time and whether the requisite occupancy and use has been deemed to present a question of fact.

The rights concerning aboriginal title derive from being the original inhabitants of the land in question. In *United States v. Santa Fe P. R. Co.*, the Supreme Court discusses how establishing aboriginal title requires the proof of exclusive use and occupancy. 314 U.S. 339, 345 (1941). This Court, also, stated that establishing aboriginal title is a factual question and should "be determined as any other question of fact." *Id*. The party that has the burden of persuasion needs to prove the fact by a preponderance of the evidence. *Native Vill. of Eyak*,

688 F.3d at 622-623. Moreover, a four-part test has been developed by the Court of Claims to determine if a Tribe has demonstrated use and occupancy. *Sac & Fox Tribe of Indians of Okla. v. United States,* 383 F.2d 991, 998 (Ct. Cl. 1967). The use and occupancy of area claimed must be (1) actual, (2) continuous, (3) exclusive, and (4) for a long time prior to contact with Europeans. *Id*. It is often difficult to obtain the essential proof necessary to establish aboriginal title. *Native Vill. of Eyak,* 688 F.3d at 623. Thus, use and occupancy requirement is measured by the factual findings which can take a more "liberal approach" such as looking at life style, habits, and customs. *Native Vill. of Eyak*, 688 F.3d at 623; *Sac & Fox Tribe,* 383 F.2d at 998; *Mitchel v. United States*, 34 U.S. 711, 733-734 (1835). Furthermore, the requisite occupancy and use need not be shown when a governmental act has shown acknowledgement of the aboriginal title. *Miami Tribe of Okla. v. United States,* 146 Ct. Cl. 421, 474 (1959). The issue most relevant to the case at hand is exclusivity.

Exclusivity is shown when a tribe or a group demonstrates that they used and occupied the land in question to the exclusion of other Indian groups and whites. *United States v. Pueblo of San Ildefonso,* 206 Ct. Cl. 649, 669 (1975). Likewise, the use of the land in question is not sufficient alone to show exclusive possession. The tribe must have exercised full dominion and control over the area to show that it possesses the right and power to expel intruders. *Native Vill. of Eyak*, 688 F.3d at 623. Also, the Ninth Circuit has held in *Eyak* that "a tribe must have an exclusive and unchallenged claim to the disputed area to be entitled to aboriginal title." *Id*. at 624. Additionally, the court stated areas that are "continually traversed by other tribes without the permission of the claiming tribe cannot be deemed exclusive." *Id*.

In a 1955 Court of Claims case, the court held that aboriginal title was established due to evidence that "no other tribes claimed or used the areas involved and that neighboring tribes recognized these lands as being the exclusive property" of the tribe in dispute. *Otoe & Missouria Tribe v. United States*, 131 Ct. Cl. 593, 631 (1955). Furthermore, the Otoe & Missouria Tribe were found to have aboriginal title because of evidence presented by expert testimony of historians and statements made by governmental officials concerning the exclusive use and occupation of the tribe. *Id*.

In another Court of Claims case, the court held that the findings of fact failed to show sufficient proof of the Six Nations' aboriginal tile over the land in dispute. *Six Nations v. United States*, 173 Ct. Cl. 899, 911 (1965). This lack of substantial evidence concerning the exclusive use and occupancy of the dispute land caused the Court of Claims to deem that the Six Nations lacked aboriginal title to the disputed area. *Id*. at 912.

In the case at hand, ample evidence has been given by an expert witness to prove that the Cush-Hook Nation held aboriginal title prior to the arrival of Euro-American settlers; however, little to no evidence concerning the exclusivity of the use of the land by the Cush-Hook Nation, here. Unlike *Otoe & Missouria Tribe*, no evidence was provided by neighboring tribes recognizing the exclusivity of the Crush-Hook Nation's use of the land in dispute. For all we know, Crush-Hook Nation could have been sharing the disputed land with neighboring tribes. Like the *Six Nations* case, here, the court lacks substantial evidence concerning the exclusive use and occupancy of land in dispute.

The State asks that the Court find that the Circuit Court erred in finding the Cush-Hook established aboriginal title due to the lack of substantial evidence concerning the exclusive use and occupancy of land in dispute.

*B. The Oregon Circuit Court erred in its interpretation of the Oregon Donation Land Claim Act; thus, any aboriginal title that may have been held by the Cush-Hook Nation was extinguished.*

Even, if aboriginal title may have been established, the Oregon Donation Land Claim Act of 1850 would have extinguished the Cush-Hook's aboriginal title. Congress holds the exclusive authority to extinguish aboriginal title. *M'Intosh*, 21 U.S. at 587. Moreover, the Supreme Court has stated, "[t]he manner, method and time of such extinguishment raise political, not justiciable, issues." *Santa Fe P. R. Co.*, 314 U.S. at 347. Thus, Congress has the exclusive right to determine the manner of guardianship the U.S. has over Indians and not the courts. However, Congress's intent to extinguish aboriginal title must be clear. *Greene v. Rhode Island*, 398 F.3d 45, 50 (1st Cir. 2005). While no bright line rule exists in determining extinguishment of aboriginal rights, several courts have found the following events sufficient to extinguish aboriginal rights: treaties or voluntary cession of land, *Buttz v. Northern P. R.*, 119 U.S. 55, 69 (1886), 25 U.S.C. § 177 (2011); the creation of a reservation, *Gila River Pima--Maricopa Indian Community v. United States*, 204 Ct. Cl. 137, 146 (1974), 5 Stat. §§ 453, 456 (2011); governmental acts in preparation or anticipation of non-Indian settlement or entry, *Santa Fe P. R. Co.*, 314 U.S. at 351; actual settlement or entry by non-Indians, *Marsh v. Brooks*, 55 U.S. 513, 524 (1853); express statutory extinguishment, *United States v. Atlantic Richfield Co*., 435 F. Supp. 1009, 1025 (D. Alaska 1977); general land-claims settlement statute, *Santa Fe P. R. Co.*, 314 U.S. at 344; military conquest, forcible removal, involuntary confinement to reservation, *Santa Fe P. R. Co.*, 314 U.S. at 357-358; inclusion of land in forest reserves, and grazing districts, *Pueblo of San Ildefonso*, 206 Ct. Cl. at 654; and voluntary abandonment, *Williams v. Chicago*, 242 U.S. 434, 437-438 (1917). Furthermore, the Supreme Court has held that compensation is not necessary when the government extinguishes aboriginal title by a taking. *Tee-Hit-Ton Indians*, 348 U.S. at 279. We will have

little difficulty proving that there was no creation of a reservation; no military conquest, forcible removal, or involuntary confinement to reservation; and no inclusion of land in forest reserves or grazing districts. Rather, the issues to be discussed are whether the Cush-Hook Nation's aboriginal title was extinguished by a governmental act in preparation or anticipation of non-Indian settlement or entry, and/or voluntary abandonment. Additionally, whether the Cush-Hook Nation's aboriginal title was extinguished by treaty is an issue even though their treaty was never ratified.

It has been shown that governmental acts merely in preparation or anticipation of non-Indian settlement or entry has normally been found not to extinguish aboriginal title. *Santa Fe P. R. Co.*, 314 U.S. at 351. The mere expectation that lands would be settled at some future time would not be sufficient to deprive Indian's of their aboriginal rights. *Pueblo of San Ildefonso*, 206 Ct. Cl. at 660. However, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may act as an important indicator of when aboriginal title was lost. *Id*. at 661.Various factors should be considered in determining when a tribe may have lost aboriginal title due to anticipation of future white settlement: (1) the extent of authorized settlement in the Indians' aboriginal areas, (2) the declared policy of protecting unextinguished aboriginal title, (3) the evidence indicating an express congressional purpose to terminate aboriginal title, and (4) the lack of any clear and convincing evidence from which to imply an intent to terminate the Indians' entire aboriginal title. *Id*. at 662. Furthermore, the Supreme Court in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945), declared that exclusive title to the lands passed to the white settlers are subject to the aboriginal title. However, the power to extinguish that right by "purchase or conquest," rests in the white sovereign alone. *Id*. Thus, white settlers'

land granted by the government could be still subject to aboriginal title, if aboriginal title had not been extinguished.

In *United States v. Pueblo of San Ildefonso*, Congress passed an act in 1858 that opened New Mexico to being settled by whites. *Pueblo of San Ildefonso*, 206 Ct. Cl. at 659. Several pueblos lost ancestral land due to this act. The court used the four factors to determine if the Act of December, 1858 extinguished the pueblos' aboriginal title. *Id*. at 662. First, the facts of *United States v. Pueblo of San Ildefonso* showed that the Government allowed and sanctioned white settlement in the disputed area over a period of decades starting in 1870. *Id*. at 663. Thus, the encroachment by the white settlers was gradual. *Id*. The court inferred that the Government's policy in New Mexico at that time was to protect the pueblos' rights. *Id*. at 661. The court inferred this policy due to the national policy of respecting unextinguished aboriginal title and the lack of clear and convincing evidence to imply intent to terminate aboriginal title. *Id*. Therefore, the court determined that the pueblos' aboriginal title was not extinguished.

In 1972, the Court of Claims heard a case similar in nature to the case at hand. The case concerned the date of extinguishment of the Cowlitz Tribe, a non-treaty tribe. The tribe's aboriginal rights were determined extinguished. In *Plamondon v. United States*, the court analyzed the Oregon Donation Land Claim Act of 1850. *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, 199 Ct. Cl. 523, 526 (1972). First, the facts indicated limited white settlement up to 1855 in the disputed area. *Id*. at 529. The court determined that the limited settlement up to 1855 was insufficient to extinguish aboriginal rights. *Id*. However, by 1863, settlement became much more substantial. *Id*. at 526. In 1863, the court determined that the Cowlitz Tribe was deprived of the use of exclusive occupancy of their

aboriginal title. *Id*. Second, the court said the Government allowed and sanctioned white settlement in the disputed area. Third, although the court determined that Congress's intent for all the tribe west of the Cascade Mountains should be extinguished by treaty, the court stated that congressional policy gradually changed to a more aggressive intent to extinguish aboriginal title. *Id*. The court said the change of intent was shown by Congress's enactment of the Act of February 14, 1853 that allowed settlers to purchase land in lieu of the four-year requirement. *Id*. Additionally, in 1861, Congress began to appropriate money for removing non-treaty Indians within the Oregon Territory. *Id*. Fourth, the court affirmed the Indian Claims Commission's finding clear and convincing evidence of Congress's intent to terminate aboriginal title. *Id*. The court held that the Government extinguished the Cowlitz Tribe aboriginal title in March 20, 1863 due substantial interference by white settlers. *Id*. at 530.

The case at hand involves a land grant act similar to the acts in *Pueblo of San Ildefonso* and *Plamondon*. Here, Congress enacted the Oregon Donation Land Claim Act of 1850, 9 Stat. §§ 496-500, with the intent to persuade white settlers to claim land within the Oregon Territory. *Brazee v. Schofield*, 124 U.S. 495, 497 (1888). Thus, the Oregon Donation Land Claim Act was a governmental act in preparation or anticipation of non-Indian settlement or entry. Like *Plamondon*, the Oregon Donation Land Claim Act must be analyzed by the facts at hand to determine if Congress has extinguished the aboriginal title of the Cush-Hook Nation, using the factors determined by the Court of Claims in *Pueblo of San Ildefonso*.

The facts in *Plamondon* are similar to those in the case at hand concerning the Oregon Donation Land Claim Act. Congress's intent for all the tribe west of the Cascade

Mountains should be extinguished by treaty. However, Congress's intent gradually changed to a more aggressive intent to extinguish aboriginal title. This change was shown by the enactment of the Act of February 14, 1853, and the appropriation of money for removing non-treaty Indians within the Oregon Territory. Like in *Plamondon*, where the Cowlitz Tribe was a non-treaty tribe so is the Cush-Hook Nation. Although, the Cush-Hook Nation signed a treaty but Congress never ratified the treaty; thus, the treaty is void.

Where the real difference between *Plamondon* and the case at hand lies is the use of exclusive occupancy of their aboriginal title. Here, the facts show that the Joe and Elise Meeks settled the land in dispute, which could be seen as limited white settlement. Unlike the Cowlitz Tribe in *Plamondon*, the Cush-Hook Nation left their aboriginal homelands with the intent to avoid the encroachment of white settlers. However, the action taken by the Cush-Hook Nation to intentionally leave their homelands to avoid white encroachment should be seen as an interference sufficient to constitute an extinguishment of aboriginal title.
On another note, opposing counsel may argue that the Meeks never fulfilled the "cultivate or live upon the land" for the required four years. However, the facts also show that the Meeks received fee title for this land from the United States government. Although there is no record of it, it is plausible that the Meeks took advantage of the Act of February 14, 1853 and purchased the land to avoid the four-year requirement.

Even though in *Plamondon*, the court found that limited settlement of white settlers was not sufficient to extinguish aboriginal rights. This court should find that because Congress's intent was to extinguish the aboriginal title of non-treaty tribes and that the Cush-Hook Nation left its aboriginal title to intentionally avoid the encroaching of Americans that aboriginal title was extinguished.

a. Voluntary abandonment

Aboriginal title can also be extinguished by the tribe's voluntary abandonment of its ancestral land. Moreover, a court may infer voluntary abandonment when a tribe willingly accepts a federal proposal for the establishment of a new reservation or the grant of other treaty rights. *Santa Fe P. R. Co.*, 314 U.S. at 354. However, courts will not find voluntary abandonment on the basis of prior acts of third parties that have wrongfully divested the tribe of its ability to continue in possession. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985). Furthermore, when possession of the tribe's land is abandoned, the land attaches itself to the fee simple title. *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877). Thus, once a tribe abandons their aboriginal land, any aboriginal title that a white settler would have been subjected to would revert to the white fee simple titleholder.

The theory of voluntary abandonment extinguishing aboriginal title derives from the idea of "complete dominion." *Santa Fe P. R. Co.*, 314 U.S. at 347. In *United States v. Santa Fe P. R. Co.*, the court states that the right of the United States to extinguish aboriginal title may be exercised by complete dominion adverse to the right of occupancy. *Id.* So a tribe, in the absence of a treaty reservation, has only occupancy and use title with the fee being in the United States. Furthermore, when a tribe ceases for any reason to actually and exclusively occupy and use an area of land, established by clear and adequate proof, that land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full, beneficial interest and ownership to such land. *Quapaw Tribe of Indians v. United States*, 128 Ct. Cl. 45, 49 (1954), *overruled on other grounds*, *United States v. Kiowa*, etc., 143 Ct. Cl. 545 (1958), *cert. den.* 359 US 934.

This Court should follow the principle given by the court in *Santa Fe P. R. Co.* and infer that voluntary abandonment when the Cush-Hook Nation did not wait for their treaty to

go before Congress to leave. As further proof of abandonment, the tribe voluntarily abandoned their ancestral land to relocate 60 miles away with the intent to avoid the encroachment of white settlers. The facts show that they were not forced or wrongfully divested of their land. Therefore, the Cush-Hook Nation would not fall under the "wrongfully divested" measure found in *County of Oneida v. Oneida Indian Nation*. Furthermore, this court should use the concept found in *Quapaw Tribe of Indians v. United States.* Hence, the Cush-Hook Nation ceased to actually, exclusively occupy, and use the land now known as Kelley Point Park and that land became public land.

b. Treaty

Finally, a tribe's aboriginal title can be extinguished by treaty. *Santa Fe P. R. Co.*, 314 U.S. at 347. The Indian Claims Commission court has acknowledged that by signing a treaty an Indian tribe losses control of aboriginal title to the Government. *Plamondon*, 199 Ct. Cl. at 529-530 (citing *Chinook Tribe* v. *United States*, 6 Indian Cl. Comm'n 177 (1958)). In *Plamondon*, the court compared the Cowlitz Tribe with the Chinook Indian Nation. *Id*. The Cowlitz Tribe never signed a treaty with the United States; where the Chinook's signed a treaty that was never ratified. *Id*. The court in *Plamondon* found that the *Chinook* case was inapplicable because the Cowlitz Tribe never signed a treaty. *Id*.

This court should use the same approach taken by the Indian Claims Commission in *Chinook Tribe* v. *United States* and extinguish the Cush-Hook's aboriginal title solely because the tribe signed a treaty with the intent to give control of their land to the United States. In the case at hand, the Cush-Hook Nation did sign a treaty. Like the *Chinook* case, Congress did not ratify the treaty; thus, this court should also find that this event extinguished the aboriginal title of the Cush-Hook Nation. Thus, if the Cush-Hook Nation ever held aboriginal title to the land in Kelley Point Park, the aboriginal title was extinguished by the

United States by implementation of Oregon Donation Land Claim Act, the Cush-Hook Nation's voluntary abandonment of the land to avoid encroachment of white settlers, and/or the fact that the Cush-Hook Nation signed a treaty with the U.S. with the intent to relocate.

## II. Oregon can Criminally Prosecute Perpetrators Who Deface, Destroy, Obliterate, or Otherwise Misuse Archaeological or Historical Resources on Lands Within Oregon Because the Acts are Crimes Against Society.

The next issue is whether Oregon may criminalize destructive acts against or other misuses of archaeological, cultural, and historical objects on land that is within the external boundaries of the State of Oregon even though the land might be owned by a group of non-federally recognized Indians. The answer is yes because Oregon can criminalize acts that create social harm; for example, even though the act may be directed at an individual, the state may sue the perpetrator for the wrong he has done on society as a whole. This first question, though, raises a related question, which is whether Oregon has jurisdiction over non-federally recognized Indians.

There is, indeed, a broader question that is similar to the one posed—a question with an answer that is taken for granted. That question is whether a State may criminalize acts that occur within the State's external boundaries, even if they occur on private land. The obvious answer is that the state may exercise criminal jurisdiction over acts that occur within its external boundaries, even on private land. The issue, here, in this matter is how is a State's ability to enforce laws that make certain acts against society a crime any different when the land upon which the despicable acts occur on land that is owned by a tribe or group of Indians. Does the ownership of land in this situation impact the jurisdiction of Oregon if it is within the external boundaries of Oregon?

Jurisdiction is appropriate in this manner in favor of the state of Oregon. Whether or not Oregon has criminal jurisdiction over destructive acts against or other misuses of archaeological, cultural, and historical objects is a question of law.

*A. Oregon can criminalize the destruction of or other misuses of archaeological or historical resources because the acts are crimes against society.*

If this Court were to adopt Thomas Captain's position, the decision would overlook a fundamental tenet of criminal law. Indeed, it would overlook longstanding Supreme Court precedent. It should not, and does not, matter in Oregon that the land upon which the acts occurred are determined by a lower court to be held in title by the Cush-Hooks.

As to lands owned by Indians, this Court has already spoken. In *Kagama v. United States*, this Court stated,

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.

118 U.S. 375, 379 (1886). This statement was reaffirmed in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 211 (1978).

i. States can criminalize acts that are against society.

Since the founding of this Nation, the power to criminalize acts that are wrongs against society is well recognized. Crimes involve "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity." 4 William Blackstone, Commentaries on the Laws of England [*]5 (1769). In the United States, Congress is generally recognized to have the power to make laws, especially criminal laws. *See generally*, U.S. Const. art. I, § 8. In Oregon, the Legislative Assembly is recognized as the body that makes criminal laws, and the Legislative Assembly must

consider these principles in forming a criminal law "protection of society, personal responsibility, accountability for one's actions and reformation." Or. Const. art. I, § 15 (2012). In the laws at issue here, Oregon has established that it is attempting to protect against a social wrong: the destruction of archaeological and historical resources.

ii. The State of Oregon sought to criminalize acts against archaeological resources.

The Oregon Legislative Assembly clearly defined the policy it was attempting to achieve by enacting its archeological and historical resources protection acts. The archaeological act contains clear language from the Legislative Assembly; the Legislative Assembly declared that archaeological sites were "finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon." Or. Rev. Stat. § 358.910 (2012). Furthermore, Oregon recognized that, for objects located within state public land, the state was trusted with the care of these sites. *See id.* Then the legislature declared for all land within the state of Oregon that "[t]he State of Oregon shall preserve and protect the cultural heritage of this state embodied in objects and sites that are of archaeological significance." *Id.* That is, these sites are important to the society at large.

It does not matter that only a small percentage or portion of the society is fascinated with the objects. A demonstration can be made with a hypothetical, simple robbery statute. If a perpetrator were to break into a household with the goal to steal a twenty-four karat gold sewing thimble, it does not matter that the "society" who would be interested in this special sewing thimble are but only a few people in the state of Oregon. This is not the society that the criminal law is necessarily referring to. The society, instead, is the general public who is hurt by the act that the perpetrator caused: the act of attempting to steal from another. Because Kelley Point Park, whether owned by the state or by the Cush-Hook Nation, is within the external boundaries of Oregon, the Oregon Legislative Assembly can establish

what the society sees as important. Oregon thought it important protect resources within the external boundaries of the state.

Nor does it matter, in this case, whether the crime takes place on public or private land. For the Oregon statute, the policy outlined above is applicable within all of the state. The Legislative Assembly criminalized the act of "excavat[ing], injur[ing], destroy[ing] or alter[ing] an archaeological site or object or remov[ing] an archaeological object *located on public or private lands*" without a permit. Or. Rev. Stat. § 358.920 (2012).

iii. The United States, too, criminalizes certain acts against archaeological resources.

Oregon is not the only governmental entity to criminalize certain acts against archaeological resources. Archaeological resources have been a major concern of the federal government for more than one hundred years, beginning with the American Antiquities section (act) of 1906, 16 U.S.C. § 433 (2011). That section is limited to lands owned or controlled by the Government. *Id.* But the section also has its flaws according to the Ninth Circuit which determined the statute to be vague and, thus, in violation of the due process clause. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974); *but see United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (disagreeing with the Ninth Circuit that the act was necessarily vague, but instead insisting that the facts were much different in *Smyer* than they were in *Diaz*, and that the act could be applied).

In the years following the *Diaz* decision, the United States Congress sought a new statute to address the problem, and the answer was found in the Archaeological Resources Protection Act ("ARPA"). 16 U.S.C. §§ 470aa–470mm (2011). This statute, enacted in 1979, begins with the congressional findings and a declaration of purpose. ARPA, like the Oregon statute, acknowledges that certain resources "are an accessible and irreplaceable part of the nation's heritage," and that the resources may be subject to commercial exploitation. 16

U.S.C. § 470aa(a). Furthermore, Congress found that the existing laws were not strong enough to handle the misuse of the resources. *Id.* The purpose is, thus, to protect these archaeological resources and sites. 16 U.S.C. § 470aa(b). Oregon, too, takes a similar approach.

But ARPA does more than to establish an ideal goal of Congress. It does provide criminal penalties for either (1) the unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources, or (2) for illegal trafficking that is illegal under either federal or state law. 16 U.S.C. § 470ee(a)-(c). Lacking from the criminal penalties section, though, was explicit reference to the illegal trafficking or unauthorized excavation, etc., of archaeological resources from private lands. *Id.* Instead, subsections (a) and (b) refer only to federal and Indian lands, while subsection (c) does not state which lands it applies to.

The issue of the applicability of ARPA on archaeological resources from private lands was addressed in *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (Posner, J.). Gerber was arrested for trafficking in interstate commerce objects which were obtained from private land. *Id.* at 1113. Gerber argued that ARPA was inapplicable based on the statutory language to objects removed from private land, even if his acts were against state law. *Id.* Judge Posner, writing for the panel, was not persuaded by Gerber's argument. *Id.* at 1115. In looking at 16 U.S.C. § 470ee(c), the panel found that subsection (c) "resembles the Mann Act, the Lindbergh Law, the Hobbs Act, and a host of other federal statutes that affix federal criminal penalties to state crimes that, when committed in interstate commerce, are difficult for individual states to punish…."*Id.* And, thus, the panel held ARPA to apply to the objects purloined from private land. *Id.* But the panel also had to address an issue raised by an amicus brief.

In one amicus brief for *Gerber*, a group of archaeologists argued that the interpretation supported by the court would "infringe [upon the archaeologists'] liberty to seek to enlarge archaeological knowledge by excavating private lands." *Id.* In response, the panel resounded that "there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." *Id.* at 1115-16. It did not matter who owned the mound because the perpetrator lacked any rights to the artifacts that were stolen. *Id.* at 1116. The same is true in this case.

In this case, it does not matter whether the land is owned by Oregon or Cush-Hook Nation, as Oregon can criminalize the wrongful acts that may hurt society. In this case, the Oregon Legislative Assembly explicitly stated its purpose for the statute. Furthermore, the Oregon Legislative Assembly criminalized certain activities against archaeological resources located on either public or private lands. Although this law is different than ARPA in this respect, ARPA is based upon the idea that the government can exercise the protection over archaeological resources, no matter who they are owned by. *Gerber* indirectly recognizes that the government can protect and control the uses of archaeological resources, even if the acts occur on private land. Oregon has the power to criminalize wrongs against society, and the Oregon Legislative Assembly, speaking on behalf of the people of Oregon, spoke by declaring that society would be negatively impacted by the further destruction of the archaeological resources in Oregon. Oregon enacted criminal penalties as a deterrent, and they are applicable in this case. The next question is whether the criminal penalties can apply to the Cush-Hooks, and, specifically, Thomas Captain.

*B. Oregon has criminal jurisdiction over Thomas Captain because he is a "non-Indian" or, alternatively, through Public Law 280.*

The question of jurisdiction is something that is always at the forefront of the case, but placed on the backburner. The question of jurisdiction over the perpetrator, moreover, is a question that should be answered before bringing suit against a perpetrator. If the statute under which the criminal charge is brought is proper, as is the case here, then the criminal can be charged, so long as the state can show it has jurisdiction over the person. In this case, Oregon maintains criminal jurisdiction over Thomas Captain in one of two ways. First, Thomas Captain is considered a "non-Indian" because his tribe is not federally recognized and is, therefore, subject to state jurisdiction. And second, even if Thomas Captain was considered an "Indian," Oregon would have criminal jurisdiction over him via Public Law 280.

i. Because Thomas Captain is not a member of a federally recognized tribe, Thomas Captain is considered a "non-Indian," and is subject to state criminal jurisdiction.

The United States Supreme Court has long recognized that states have exclusive jurisdiction over crimes involving a non-Indian victim and non-Indian perpetrator. The first keystone case is that of *United States v. McBratney*, 104 U.S. 621 (1881). In *McBratney*, a white man murdered another white man on the Ute Indian reservation in Colorado, and was brought before a federal court. *Id.* at 621. The issue was whether jurisdiction was appropriate in the state or federal court, and the Supreme Court held that the United States federal courts lacked jurisdiction over the killer. *Id.* at 621, 624. The federal courts lacked jurisdiction because Colorado entered the union on equal footing, and therefore retained jurisdiction over crimes committed by Colorado citizens or by other non-Indians, as long as the person committed the crime within the external boundaries of the state of Colorado, including the Ute Indian reservation. *See id.* at 624. Without a provision expressly delegating jurisdiction

to the federal government upon statehood, the court found that state courts held jurisdiction over those non-Indians who committed crimes within the external boundaries of Oregon, even if the crime against another non-Indian was committed on lands belonging to the Ute tribe.

The Supreme Court, too, limited the jurisdiction of tribes over non-Indians. In *Oliphant v. Suquamish Tribe*, two non-Indian petitioners were charged by the Suquamish tribe with crimes that were committed by the petitioners on the Port Madison Reservation. 435 U.S. at 194. After charges were filed by the Suquamish tribe, the petitioners sought habeas relief. *Id.* The Court found that a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians" existed and "carrie[d] considerable weight" in its analysis. *Id.* at 206. The Court then held that the tribal court lacked jurisdiction over non-Indians because Congress did not exercise its power to extend jurisdiction over non-Indians to the tribes, and that the tribes were still subordinate to the state or federal government. *See id.* at 208–211.

Thus, *McBratney* and *Oliphant* are quite clear that criminal jurisdiction over non-Indians is in the hands of the state. State jurisdiction is, thus, proper if the criminal is non-Indian. But who is a non-Indian? Stated differently, who is an Indian. The term Indian does not have a single statutory definition. Cohen's Handbook on Federal Indian Law § 3.03 (2012). Instead, it is defined by the courts. Even in the mid-nineteenth century, the Supreme Court determined that to be an Indian, for criminal jurisdiction, "an individual must have an ancestral connection to an Indian tribe in addition to a current social affiliation with the tribe." *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846)). According to Cohen's handbook, "[t]he common test that

has evolved after *United States v. Rogers*, for use with both of the federal Indian country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally recognized tribe." Cohen's Handbook of Federal Indian Law § 3.03 (2012). Yes, for criminal jurisdiction, both Indian descent and federal tribal recognition are required.

The requirement of federal tribal recognition is central element to determining if an individual is an Indian. Federal acknowledgement of an individual's tribe determines if that individual is an Indian, and if the individual receives the special federal jurisdiction, generally. In *LaPier v. McCormick*, LaPier appealed the dismissal of a habeas petition after he was convicted in a Montana state court for various crimes committed on an Indian reservation. 985 F.2d 303, 304 (9th Cir. 1993). LaPier claimed that as an Indian, the state court lacked jurisdiction. *Id.* The Ninth Circuit panel looked to the *United States v. Rogers* principle, and found that "[t]here is a simpler threshold question that must be answered first, and in this case it is dispositive: Is the Indian group with which LaPier claims affiliation a federally acknowledged Indian tribe?" *Id.* at 304–05. This is because the federal criminal jurisdiction that LaPier sought to exercise himself in is Federal legislation treating Indians distinctively is rooted in 'the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes.'" *Id.* at 305 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Federal acknowledgement is key for federal criminal jurisdiction to attach

Federal acknowledgement is important because, "[i]t is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal

jurisdiction for crimes committed in Indian country." *Id.* at 305 (citing *United States v. Antelope*, 430 U.S. 641, 646-647 n.7 (1977)). Deferring to the determination of the executive branch, the panel found that the tribe to which LaPier claimed he was affiliated was not federally recognized, and it held that LaPier could not be tried in federal court. *Id.* at 305–06.

The reasoning in *LaPier* finds that the federal criminal jurisdiction only exists when the special relationship between the federal government and the federally recognized tribes exists. That is, the tribe to which the individual claims to be affiliated must be federally recognized. The Ninth Circuit, again, addressed whether an individual is an Indian in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). The *Bruce* panel considered two prongs: "(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian." *Id.* at 1223 (quotations omitted). Yet federal recognition of the tribe is still key. In *United States v. Maggi*, the Ninth Circuit again recognized that "implicit in this discussion of Indian blood is that the bloodline be derived from a federally recognized tribe." 598 F.3d 1073, 1080 (9th Cir. 2010) (citing *United States v. Antelope*, 430 U.S. at 646; *LaPier*, 986 F.2d at 305).Therefore, federal recognition of an individual's affiliated tribe is key in determining whether the individual is an Indian.

In this case, Thomas Captain is a non-Indian and, therefore, subject to the jurisdiction of Oregon. As discussed in the findings of fact of the Oregon circuit court, Thomas Captain is not a member of a federally recognized tribe. Without federal tribal recognition, Thomas Captain is considered a non-Indian, *LaPier*, and is subject to the jurisdiction of the state for crimes committed by him. *McBratney* and *Oliphant*.

ii. Alternatively, if Thomas Captain were an Indian, or for any other Indian, Oregon has jurisdiction over the Perpetrator through Public Law 280.

Even if Thomas Captain were an "Indian," in terms of criminal jurisdiction, Oregon also has jurisdiction over Indians. Public Law 280 granted Oregon criminal jurisdiction over all Indians, except for offenses committed on the Warm Springs Reservation. 18 U.S.C. § 1162 (2011). Since the applicability of Public Law 280's criminal jurisdiction grant has long been recognized by this Court, *see, e.g., Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463 (1979), we need delve into detail as to why Oregon retains criminal jurisdiction over Thomas Captain, even if he is an "Indian" in terms of criminal jurisdiction.

## CONCLUSION

For the foregoing reasons, the state of Oregon respectfully requests this Court to affirm the decision of the Oregon Court of Appeals in part, as to the applicability of criminal jurisdiction to the acts committed by Thomas Captain, and reverse in part, as to the issue of title to Kelley Point Park.