No. 12-345

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN.

Respondent and Cross-Petitioner.

On Writ Of Certiorari To The Oregon State Court of Appeals

BRIEF FOR RESPONDENT

Team Identification Number: 31

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QUESTIONS PRESENTED

1. The Oregon Circuit Court for the County of Multnomah determined, and the Oregon Court of Appeals affirmed, that as a matter of law, the Cush-Hook Nation holds aboriginal title to land in question. Was this determination proper?

2. The Oregon Circuit Court for the County of Multnomah determined, and the Oregon Court of Appeals affirmed, that as a matter of law, Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. apply to all lands in the state of Oregon under Public Law 280, whether they are tribally owned or not. Was this determination proper?

3. In light of Congress's enacting of the Archaeological Resources Protect Act, and notwithstanding the purported ownership of the land in question by a community of Indians, did the Court err in determining Oregon retained criminal jurisdiction over the land in question?

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

In 2011, the State of Oregon brought a criminal action against Respondent Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site pursuant to Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240. (R. 3-4).[1] Respondent Captain consented to a bench trial. (R. 3-4).

The Oregon Circuit Court for the County of Multnomah made the following findings of fact: 1) that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans; 2) the superintendent of Indian Affairs for the Oregon Territory signed a treaty with the Cush-Hook Nation in 1850 wherein the Nation agreed to sell its land and relocate westward; 3) in 1853, the United States Senate refused to ratify the treaty and the Cush-Hook Nation was never compensated for its lands; 4) the Oregon Land Donation Act was enacted in 1850 and thereafter occupied for two years by Joe and Elsie Meek; 5) the Meeks did not live on the land more than two years nor did they cultivate the land; 6) in 2011, Thomas Captain of the Cush-Hook Nation erected temporary housing at the site of an ancient Cush-Hook village, in Kelly Point Park; 7) Thomas Captain cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol; and 8) the Cush-Hook Nation is not a federally recognized Indian tribe. (R. 3).

The District Court also made the following conclusions of law: 1) that Congress erred in the Oregon Donation Land Act when it described all lands in the Territory as public lands

[1] "R." citations denote the consecutively paginated record of facts.

of the United States; 2) The Cush-Hook's aboriginal title has never been extinguished; 3) the United States' grant of fee simple title to the Meets was void *ab initio* and therefore the Meek's sale of land to the Oregon was also void; 4) the Cush-Hook Nation owns the land in question under aboriginal title; 5) Oregon state law applies to all lands under the provisions of Public Law 280, there the action against Respondent Captain is proper. (R. 3-4).

The District Court held that the land in question was still owned by the Cush-Hook Nation. (R. 4). The District Court also found Thomas Captain not guilty for trespass or for cutting timber without a state permit, but found him guilty for violating Oregon state laws for damaging an archaeological site and a cultural and historical artifact. (R. 4). Captain was fined $250. (R. 4). The State and Captain both appealed the decision. (R. 4).

The Oregon Court of Appeals affirmed the District Court, and the Oregon Supreme Court denied review. (R. 4). The State then filed a petition and cross petition for certiorari, followed by Captain filing a cross petition for certiorari to the United States Supreme Court. (R. 4). The Supreme Court granted certiorari on two questions: 1) Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park?; and 2) Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe? (R. 4).

STATEMENT OF THE FACTS

Thomas Captain, Respondent, is a citizen of the Cush-Hook Nation of Indians, a tribe of Indians located in the State of Oregon. (R. 1, 2). The Cush-Hook Nation has occupied lands within of the modern State of Oregon from time immemorial to the present. (R.1, 2).

The Cush-Hook territory included a permanent village located in what is currently known as Kelley Point Park, a state park located at the confluence of the Columbia and Willamette Rivers. (R. 1). The Cush-Hook Nation is not politically recognized by the United States or the State of Oregon. (R. 2).

Prior to the arrival of American settlers, the Cush-Hook Nation lived by growing crops, harvesting wild plants, and hunting and fishing in the area surrounding their village. (R. 1). Much of the recorded information regarding the Cush-Hook's pre-settlement customs originate from the journals of the Lewis & Clark expedition. (R. 1). The expedition first made contact with the Cush-Hook in April of 1806 when William Clark was introduced to the Cush-Hook headman by the neighboring Multnomah Indians. (R. 1). The Multnomah and Cush-Hook tribes both fished and cultivated the aquatic plants located near the Cush-Hook village. The expedition journals include significant ethnographic material regarding the Cush-Hook, including a sketch of the tribe's permanent village located at the confluence of the Columbia and Multnomah (now Willamette) Rivers. (R. 1). The sketch included depictions of the village's permanent structures, known as longhouses. (R. 1). The journals also include significant notations regarding tribal governance, religion, culture, burial traditions, agriculture, and hunting and fishing methods. (R. 1). The expedition's journal entries regarding the Cush-Hook give insight into the geography of the tribe's lands, tribal customs, and practices. (R. 1).

Lewis and Clerk further engaged the Cush-Hook and subsequently presented the tribe's headman with a peace medal from President Thomas Jefferson. (R. 1). The peace medal was intended to indicate both parties' willingness to engage in political and commercial relations. These medals, frequently called "sovereignty tokens" by modern

historians due to their political and diplomatic importance, were meant to demonstrate which tribes and tribal leaders would be recognized by the United States. (R. 1).

Following their contact with the Lewis & Clark expedition the Cush-Hook continued to live in their village on land located within what is now Kelley Point Park. (R. 1). This land was incorporated into the Territory of Oregon on August 14, 1848 with Congressional passage of the Oregon Territorial Act. Ch. 177, 9. Stat. 323 (1848).

In 1850 the superintendent of Indian Affairs for the Oregon Territory, Anson Dart, entered into treaty negotiations with the Cush-Hook Nation. (R. 2). Dart and the United States government desired to move the Cush-Hook off the valuable farmland that comprised their tribal territory to allow for cultivation by American settlers. (R. 1). That same year, the Cush-Hook signed a treaty with Dart agreeing to relocate to a specific location in the foothills of the mountains along Oregon coast, in exchange for compensation. (R. 2). Following the treaty signing the entire tribe relocated to the coast range to fulfill their treaty obligations. (R. 2). In 1853 the United States Senate failed to ratify the treaty with the Cush-Hook. (R. 2). Because the treaty was never ratified the United States never paid the promised compensation negotiated for the tribe's relocation or provided any other benefit promised in the treaty. (R. 2). As a result, a large portion of the Cush-Hook Nation continues to live a subsistence based existence in the foothills of the mountains along the Oregon coast. (R. 2).

In 1850, as the Cush-Hook engaged in treaty negotiations with Anson Dart, the United States Congress passed the Oregon Donation Land Act of 1850. (R. 2). This Act provided for a survey and subsequent homesteading of the public lands of the Oregon Territory. Ch. 76, 9 Stat. 496 (1850). The Donation Act required that every white settler

seeking fee simple title under the Act must reside upon and cultivate the land for four consecutive years. (R. 2). Following the Cush-Hook removal to the coast, two American settlers moved onto the land that comprised the Cush-Hook permanent village. (R. 2). The settlers, Joe and Elsie Meek, did not meet the required four year residency and cultivation threshold to establish fee simple title. (R. 2). Despite the Meek's non-compliance with the Donation Act requirements, the surveyor granted fee simple title to the Meeks. (R. 2). In 1880, the Meek's descendants sold the fee simple title to the State of Oregon. The State of Oregon used the land to create Kelley Point Park. (R. 2).

In 2011, Thomas Captain, a Cush-Hook Nation citizen, discovered that vandals were destroying sacred totems and religious symbols carved into trees located within the boundaries of the Cush-Hook's permanent village at Kelley Point Park. (R. 2). The tree carvings and totems are over 300 years old and located some 25 to 30 feet from the ground. (R. 2). The carvings are central to the Cush-Hook religion. (R. 2). The State of Oregon took no action to stop the destruction of these sacred artifacts. (R. 2). Thomas Captain moved from the Cush-Hook tribal lands and erected temporary housing inside Kelley Point Park in an attempt to protect these sacred objects and to assert Cush-Hook ownership over the property. (R. 2). In furtherance of this goal, Mr. Captain cut down a tree and removed from it a section containing a sacred image. (R. 2). Mr. Captain was attempting to return the image to the Cush-Hook tribal area in the coastal mountain range when he was stopped by Oregon State Troopers. (R. 2). The police arrested Mr. Captain and seized the sacred image. (R. 2). The State of Oregon brought three criminal claims against Mr. Captain for trespass on state lands, cutting timber in a state park, and desecrating an archaeological and historical site. (R. 2-3).

SUMMARY OF ARGUMENT

The Oregon Court of Appeals, affirming the decision of the Oregon Circuit Court for the County of Multnomah, properly found that the Cush-Hook Nation owns the land in question by aboriginal title. Having determined the land to be held in aboriginal title, the Oregon Court of Appeals improperly found that the State of Oregon had criminal jurisdiction over the land pursuant to Public Law 280. Therefore, the charges and verdict against Respondent Thomas Captain must be vacated.

In the alternative, should this Court determine that the land in question is not held in aboriginal title by the Cush-Hook, then the land is federal public land. Because Congress has enacted a statute that governs the uses of this land, the State of Oregon remains without criminal jurisdiction on the land in question. Similarly, the charges and verdict against Respondent Thomas Captain must be vacated.

ARGUMENT

I. BECAUSE THE CUSH-HOOK NATION'S ABORIGINAL TITLE TO KELLEY POINT PARK IS CLEARLY ESTABLISHED VIA THE HISTORICAL RECORD AND HAS NOT BEEN EXTINGUISHED OR ABANDONED, THE TRIBAL POSSESSORY INTEREST TO CONTINUES TO THE PRESENT.

A. Historical records establish the Cush-Hook's initial aboriginal title to Kelley Point Park.

The concept of aboriginal title has been argued before and maintained by the Supreme Court for over 190 years. First articulated by the United States Supreme Court in the 1823 case of *Johnson v. M'Intosh*, aboriginal title recognizes the rights, albeit limited, of native peoples to the lands they occupied prior to the arrival of European settlers. 21 U.S. 543 (1823). A tribe's aboriginal title originates from their possession and use of land prior to the arrival of the discovering powers. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279 (1955). In *Johnson v. M'Intosh*, Chief Justice John Marshall states that discovery by a European power gave title and full dominion to the discovering nation and stripped the native tribes of all but the permissive right to occupy. *Johnson*, 21 U.S. at 574. The tribe's right to occupy, however, is considered as sacred as the fee simple to the United States. *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877).

The existence of aboriginal title in a particular case is a matter of fact to be determined by the court. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). A party may establish aboriginal title without any federal government action recognizing the tribe's right to possess the land, although recognition is a possible method to proving its existence. *United States v. Alcea Band of Tillamooks*¸ 329 U.S. 40, 50 (1948); *Cramer v. United States*, 261 U.S. 219, 229 (1923). Once established, aboriginal title grants a native

tribe and its citizens the right to use and occupy the lands that constitute their historical territory. Aboriginal title continues uninterrupted until extinguished or abandoned. See *Santa Fe Pac.*, 314 U.S. at 345.

The historical facts available in this case clearly establish the Cush-Hook Nation's aboriginal title to the disputed area through at least 1850, when questions of extinguishment or abandonment arise. The case law is clear that a tribe must maintain exclusive control over a definable area to establish aboriginal title to their ancestral territory. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 345 (1941); *United States v. Pend Oreille Pub. Util. Dist.*, 926 F.2d 1502, 1508 (9th Cir. 1991), cert. denied, 502 U.S. 956 (1991).

The Oregon Circuit Court rightly concluded that expert witness testimony presented ample evidence to prove the Cush-Hook Nation occupied and used the land in question prior to the arrival of white settlers. (R. 3). The District Court's determination on this issue is bolstered by evidence contained in the journals of the Lewis & Clark expedition. These journals show the Cush-Hook's exclusive occupation of the land in question well before the arrival of settlers. Included in the expedition journals is a sketch of the Cush-Hook's permanent village as early as 1806. (R. 1). The journals indicate the village was established at the confluence of the Columbia and Willamette Rivers, the area that currently makes up Kelley Point Park. (R. 1). The journals also show that the village contained a number of permanent structures identified as longhouses. (R. 1). These entries, along with others, present a clear indication that the area visited by William Clark was inhabited solely by the Cush-Hook, a unique political and cultural entity.

The Cush-Hook's status as a unique political body is further evidenced by William Clark's grant of a Jefferson peace medal to the tribal headman. (R. 1). These medals were

intended to indicate the beginning of political and commercial relations between the federal government and the recipient tribe. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 97-99 (2005) (describing the intended significance of peace medals). Furthermore, the United States government's willingness to consummate a treaty with the Cush-Hook in 1850 is itself evidence that the government considered the Cush-Hook a separate political body with rights to the land they occupied. (R. 1) Taken together, the recorded facts provide ample evidence that the Cush-Hook Nation was an independent tribe that exclusively occupied the land comprising their permanent village from time immemorial to the arrival of settlers in 1850.

The Petitioner argues that the Cush-Hook cannot establish the necessary proof of exclusive use to establish aboriginal title over Kelley Point Park. The Petitioner seizes on a reference in William Clark's notations indicating that the Cush-Hook and neighboring Multnomah Indians jointly used the waterways near the permanent village. (R. 1). The joint use of the area surrounding the permanent village is not at issue. The sole question presented here is the Cush-Hook aboriginal title to the land now contained within Kelley Point Park, not the surrounding waterways or lands that may have comprised the greater Cush-Hook territory. The mere proximity of the two tribes is not valid evidence of a joint, non-exclusive occupancy. Without specific evidence that the Cush-Hook lived together with the Multnomah there can be no legitimate argument that the Cush-Hook did not exclusively occupy the land in question. The evidence presented above justifies this Court's determination that the Cush-Hook Nation had established aboriginal title through their exclusive use and occupancy of the land now comprising Kelley Point Park, and that this title

would continue unabated until extinguished or abandoned. See *Santa Fe Pac. R.R. Co.*, 314 U.S. 336, 345 (1941).

B. The Federal government took no action to extinguish the Cush-Hook's aboriginal title, preserving the tribe's right to occupy its ancestral territory.

1. Extinguishment case law is explicit in requiring the federal government affirmatively act to extinguish a tribe's aboriginal title.

The case law regarding is aboriginal title is clear that the right to occupy is maintained at the pleasure of the United States, which can extinguish aboriginal title at any time. *Santa Fe Pac.*, 314 U.S. at 347. The Congress' power to extinguish is derived from Article I, Section 8, Clause 3 of the United States Constitution. Known as the Indian Commerce Clause, this section grants Congress plenary power over Indian affairs. *See Antoine v. Washington*, 420 U.S. 194, 204 (1975).

This Court requires that any government action purporting to extinguish aboriginal title must be clear in its intent, as extinguishment should not be "lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe Pac.*, 314 U.S. at 353, 357. Extinguishment of aboriginal title may be accomplished by "[T]reaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise…." *United States v. Alcea Band of Tillamooks*¸ 329 U.S. 40, 46 (1946). A tribe may also abandon aboriginal title. See *Williams v. City of Chicago,* 242 U.S. 434, 437 (1917).

The State argues that any aboriginal title held by the Cush-Hook over the land in question has been extinguished by a series of federal government actions. At issue is whether any of the purported acts of extinguishment contains the requisite clear intent to

extinguish required by case law. *See Santa Fe Pac.*, 314 U.S. at 357. The historical record is clear that the tribe held aboriginal title, that the tribe was never conquered, and that any act of extinguishment must rather be found in Congressional legislation regarding the creation and settlement of the Oregon Territory. The Respondent urges the Court to affirm the Oregon Circuit Court's determination that the Cush-Hook Nation maintains its aboriginal title, as the record lacks evidence of a federal government action clear in its intent to extinguish. *See Id.*

2. Government policy toward Indian tribes of the Oregon Territory favored compensated extinguishment of aboriginal title via voluntary cessation by treaty.

At the creation of the Oregon Territory the United States maintained a clear policy that the tribes of the region had the right to occupy their lands under aboriginal title, and that this right should be extinguished via a voluntary cessation by treaty. The United States Congress passed the Oregon Territorial Act on August 14th, 1848 officially making Oregon a Territory of the United States. *Oregon Territorial Act*, Ch. 177, 9. Stat. 323 (1848). This act contains two sections particularly applicable to the present case. Section 1 of the Oregon Territorial Act states that organization of the Oregon Territory and the act itself has no effect on "[t]he of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." 9 Stat. at 323. The Act also preserves the federal government's right to make any regulation regarding the Indians of the territory by law, treaty, or otherwise. *Id.* Section 1 of the Oregon Territorial Act clearly demonstrates the federal government's appreciation of tribal occupancy rights in the region. *Id.*

Under Section 14 of the Oregon Territorial Act, the Congress specifically applied the rights and privileges established in the Ordinance of 1787 to the newly formed Oregon

Territory. 9 Stat. at 329; *Ordinance of 1787,* Ch. 8, 1. Stat. 50, §14 (1789). Article 3 of the Ordinance of 1787 states that "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken without their consent…." 1 Stat. at 52. The Oregon Territorial Act, with its incorporation of the good faith requirement mandated by the Ordinance of 1787, clearly establishes Congress' policy of compensated extinguishment of aboriginal title via treaty.

Two years after announcing its policy to extinguish aboriginal title in the Oregon Territory via treaty the Congress authorized the process required to achieve its goal. The Act of June 5th, 1850 authorizes the negotiation of treaties to extinguish the aboriginal title of the tribes of the Oregon Territory. *Act of June 5, 1850,* Ch. 16, 9 Stat. 437 (1850). Section 5 of the Act of June 5th also explicitly applied the Indian Nonintercourse Act of 1834 to the Oregon Territory. 9 Stat. at 437; *Indian Nonintercourse Act of 1834,* Ch. 161, 4 Stat. 729 (1834). The Nonintercourse Act requires federal government approval for all acquisition of Indian lands. 4 Stat. 729, 730.

No reasonable argument may be made that these acts themselves serve to extinguish aboriginal title held by any native tribe located in the Oregon Territory. Rather, this Court interpreted the aforementioned acts as evidence of the federal government's overall policy preference towards non-coercive and compensated extinguishment of aboriginal title in the Oregon Territory. *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 50 (1946). There can be no doubt that Cush-Hook aboriginal title continued through the formation of the Oregon Territory and into 1850. Any analysis of a subsequent federal government action purporting to extinguish the Cush-Hook's aboriginal title should be considered in light of Congress' clear policy in favor of compensated extinguishment via treaty.

3. The unratified treaty with the Cush-Hook did not serve to extinguish the aboriginal title of the tribe.

In 1850 the United States began treaty negotiations with the Cush-Hook, intending to extinguish the tribe's aboriginal title to their historical territory and to remove the tribe to a new location. (R. 1). The Cush-Hook land was considered prime agricultural territory for the increasing numbers of American settlers moving into the Oregon Territory. (R. 1). In keeping with the policy announced in Oregon Territorial Act and the Act of June 5th 1850 the Superintendant of Indian Affairs for the Oregon Territory, Anson Dart, concluded a treaty with the Cush-Hook Nation. (R. 1). In that treaty the tribe agreed to give up their ancestral lands and move to a location approximately 60 miles away near the coastal mountain range. (R. 1). In consideration, the Cush-Hook were promised payment for the Cush-Hook lands, recognized ownership of their new tribal area, and other promised benefits. (R. 1).

The treaty with the Cush-Hook was never operative, however, as the United States Senate failed to ratify the treaty in 1853. (R. 2). The provisions of a treaty carry no force until ratified by the Senate and thus given the force of law. *See Antoine v. Washington*, 420 U.S. 194, 204 (1975); *Coos Bay, Lower Umpqua, & Siuslaw Indian Tribes v. United States*, 87 Ct. Cl. 143, 153 (Ct. Cl. 1938), *cert. denied* 306 U.S. 653 (1939). Without ratification, the Cush-Hook treaty could not have altered the rights of either the tribe or the United States. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 339 (9th Cir. 1996), *cert. denied* 520 U.S. 1168 (1997); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). It is highly likely that the treaty, if ratified, would have extinguished the tribe's aboriginal title to the land in question. *See Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 68-69 (1886). The negotiation of the treaty was done in accordance with

Congressional policy towards the tribes of the Oregon Territory; but the Senate's refusal to ratify the treaty precludes it from demonstrating the clear intent required to extinguish aboriginal title. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357 (1941). Thus the Cush-Hook aboriginal title survived the unratified treaty and continued unextinguished. To rule otherwise would contradict the stated policy of the United States at the time of the treaty and would undermine this Court's requirement that acts of extinguishment be explicit in light of the federal government's special status as guardian over its native peoples.

4. The settlers failure to comply with provisions of the Oregon Land Donation Claim Act preclude a valid grant of fee title, preserving the aboriginal title of the Cush-Hook, and voiding the subsequent sale of the land to the State of Oregon.

In September of 1850 Congress passed the Oregon Land Donation Claim Act of 1850 ("Donation Act"). This Act authorized the creation of a surveyor general of the public lands in the Oregon Territory and the homesteading of these surveyed lands by settlers complying with the provisions of the Act. *Oregon Land Donation Claim Act of 1850*, Ch. 76, 9 Stat. 496 (1850). The Donation Act was passed by Congress only months following its passage of the Act of June 5, 1850 that authorized treaty negotiations to extinguish aboriginal title held by the tribes of the Oregon Territory. Ch. 16, 9. Stat. 437 (1850). The facts of this case are unclear as to when exactly the unratified treaty with the Cush-Hook was signed or when the tribe moved from Kelley Point Park to fulfill their tribal obligations. What is known, however, is that the Donation Act itself is silent regarding extinguishment of aboriginal title and cannot be viewed to extinguish the Cush-Hook title. The record further shows that no

person settled the land in question in compliance with the provisions of the Oregon Land Donation Act. (R. 2).

No reading of the text of the Donation Act indicates that Congress specifically intended to extinguish the aboriginal title of the native tribes located in the Oregon Territory. The text of the Donation Act makes no mention of Indian lands and only references Indians once insofar as it allowed "American half-breed Indians" to make settlement claims under the Act. *Oregon Land Donation Claim Act of 1850,* Ch. 76, 9 Stat. 496, 497 (1850). Lacking specific language indicating the desire to extinguish aboriginal title the Donation Act does not meet the clear intent threshold required to imply extinguishment of aboriginal title. *See Santa Fe Pac.*, 314 U.S. at 357.

The Petitioner argues that the Donation Act's authorization to survey the lands of the Oregon Territory is evidence of Congress' intent to extinguish aboriginal title held by the tribes located therein and itself extinguish the Cush-Hook aboriginal title. Although this Court has not ruled whether opening lands for survey extinguishes aboriginal title, lower courts have routinely ruled that it does not. *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, 467 F.2d 935, 937 (Ct. Cl. 1972); *See also United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1389 (Ct. Cl. 1975), *Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1391 (Ct. Cl. 1974), *cert. denied* 419 U.S. 1021 (1974). In *Plamondon* the Court of Claims specifically analyzed the Donation Act and determined that because the Act did not require surveying to begin after aboriginal title had been extinguished, the Congress did not intend the authorization of surveying itself to extinguish aboriginal title. 467 F.2d at 937. In that case the court specifically stated that "[i]t is apparent that Congress did not intend the mere act of surveying to have any effect upon the

Indian title of these tribes." *Id*. The passage of the Donation Act itself had no effect on the aboriginal title maintained by the Cush-Hook as it lacked the requisite clear intent required by this Court's jurisprudence. *See United States v. Santa Fee Pac. R.R. Co.*, 314 U.S. 339, 357 (1941).

The Petitioner contends, however, that the operation of the statute and the settlement by Joe and Elsie Meek succeeded in extinguishing the Cush-Hook's rights established by aboriginal title. The Oregon Donation Land Claim Act of 1850 opened the vast public lands of the Oregon Territory to settlement by American homesteaders. The Donation Act contained a number of conditions to be fulfilled before any settler could gain title under its authority. The condition most applicable to the present case is located in Section 4, which required that a settler must reside upon and cultivate any land claimed for four years before a patent granting fee title is issued. *Oregon Land Donation Claim Act of 1850*, Ch. 76, 9 Stat. 496, 497 (1850). This Court has consistently ruled that without fulfilling the conditions precedent mandated by the Donation Act, the fee title held by the United States cannot validly transfer to the settler. *Hall v. Russell*, 101 U.S. 503, 512 (1879); *See also Oregon & California R.R. Co. v. United States*, 190 U.S. 186, 196 (1903). A settler, prior to fulfilling the conditions mandated by the Donation Act, holds only a possessory right that is shared with all other potential settlers whose citizenship satisfies the requirements of the statute. *Hall*, 101 U.S. at 510. This Court has also ruled that a patent, when granted without compliance with the law, is void. *See Stoddard v. Chambers*, 43 U.S. 284, 316 (1844).

Joe and Elsie Meek sought to settle upon the lands held under unextinguished aboriginal title by the Cush-Hook Nation. (R. 2). Following the signing of the treaty with the United States the Cush-Hook removed to the Cascade Mountains in accordance with their

treaty obligations. (R. 2). At this point, the tribe's aboriginal title had not been extinguished. The treaty with the Cush-Hook had not been ratified and no prior government action evidenced the necessary intent to extinguish as is required by law. [2] The land at this time was unoccupied, but the status quo was maintained with the tribe's right of possession and the fee simple held by the United States.

The facts give no indication whether the Cush-Hook lands were included in the public lands by the surveyor of the Oregon Territory, but given the signed but unratified treaty it is not unlikely as the surveyor may have relied on the likely Senate ratification that never occurred. (R. 2). Public lands generally include any land owned by the United States and administered by the Secretary of the Interior. 43 U.S.C. §1702 (2012). Inclusion of the Cush-Hooks territory into the public lands should not itself extinguish aboriginal title as the United States may grant its underlying fee title to land encumbered by the right of occupancy that accompanies aboriginal title. *See Santa Fe Pacific R.R. Co*., 314 U.S. 339, 348 (1941) (citing *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 66 (1886)). Once granted, the new fee holder cannot unite the underlying fee with the right of possession until aboriginal title is extinguished. *See Santa Fe Pac*., 314 U.S. at 348.

The facts of this case are clear that once the Meeks established their homestead location the couple never lived on or cultivated the land for the full four years as required by Section 4 of the Donation Act. (R. 2).; Ch. 76, 9 Stat. 496, 497 (1850). Despite their failure to comply with the Donation Act, the Meeks were incorrectly given a patent indicating their ownership of the fee title to the land in question. (R. 2). This Court's prior rulings clearly

[2] The Petitioner argues that the Cush-Hook abandoned aboriginal title; this argument and the issue of abandonment are discussed later in this brief.

preclude the Meeks from gaining valid fee title to the claimed area due to their failure to comply with the requirements of the Donation Act. *Hall*, 101 U.S. at 512; *Vance v. Burbank*, 101 U.S. 514, 521 (1879). Unless the government grants valid title via patent the title remains with the United States. *See Swending v. Wash. Water Power Co.*, 265 U.S. 322, 331 (1926) (citing *United States v. Schurz*, 102 U.S. 378, 396 (1880)*; Fenn v. Holme*, 62 U.S. 481, 488 (1858). Lacking full compliance with the conditions set forth in the Donation Act the patent issued by the surveyor is invalid and the only right transferred by the federal government was naked possession. *See Vance*, 101 U.S. 521. Furthermore, the patent itself is void as it was issued in contravention of the requirements of the law under which it is assigned. *See Stoddard v. Chambers*, 43 U.S. 284, 316 (1844).

Although fee title to lands held by aboriginal title may be granted encumbered by tribal rights of possession it does not logically follow that a third party may gain possessory rights to land when aboriginal title to that land is unextinguished. To rule otherwise would be against this Court's requirement that aboriginal occupancy rights be extinguished explicitly by a government action, and that the government should protect unextinguished aboriginal title against intrusions by third parties. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (protection against third party intrusion); *Santa Fe Pac.*, 314 U.S. at 357 (clear act required for extinguishment). Furthermore, to rule that Cush-Hook aboriginal title was extinguished by the Meeks directly undermines the stated policy of the time. By passing the Oregon Territorial Act of 1848 and the Act of June 5, 1850, Congress established a policy that aboriginal title is to be respected until extinguished by a validly concluded treaty. Ch. 16, 9 Stat. 437 (1850); Ch. 177, 9. Stat. 323 (1848). Because the Cush-Hook maintained aboriginal title following treaty negotiations with the United States, and

because the Meeks never gained property rights under a valid patent, the tribe's aboriginal right of possession continued. Without a valid transfer of the United States' land rights the Meeks never gained a legal right to occupy or devise the land they claimed under the Donation Act.

The Petitioner cites the case of *Marsh v. Brooks* in support of its proposition that the Meeks possession of the land constitutes extinguishment of the Cush-Hooks aboriginal title. 55 U.S. 513 (1852). In *Marsh* a person settled on unextinguished Sac and Fox tribal lands. *Id.* This case is easily distinguishable from *Marsh* because the Court in that case found that the settlement extinguished aboriginal title because it was done with the permission of the Spanish government, the settler maintained possession and cultivated the land for over 20 years, and the settlement was specifically confirmed by Congressional statute. *Id.* at 524. None of those factors are present in this case, where the only government action purporting to extinguish the aboriginal title is a void patent given in violation of Oregon Donation Act. *See* Ch. 76, 9 Stat. 496, §4 (1850); *Stoddard v. Chambers*, 43 U.S. 284, 316 (1844). This Court's precedent, and the federal government's extinguishment policy in the early 1850s, strongly supports the affirmation of the Oregon Circuit Court's ruling that the United States' grant of land rights to the Meeks was void *ab initio*. (R. 4).

Lacking this required government action there is no method by which the Meeks themselves could extinguish Cush-Hook aboriginal title. Any argument regarding adverse possession is barred by the Act of June 5, 1850 which applied the Indian Nonintercourse Act to the Oregon Territory. Ch. 16, 9 Stat. 437 (1850). The Indian Nonintercourse Act prohibits any individual from acquiring Indian lands without federal government permission. Ch. 161, 4 Stat. 729, §12 (1834).

In 1880 the descendants of Joe and Elsie Meek sold the land in question to the State of Oregon. (R. 2). The Meeks' descendants gained their purported land rights via Joe and Elsie's attempted homestead of the land in question. (R. 2). Joe and Elsie Meek never complied with the requirements of the Donation Act and thus the fee title never passed to them; leaving them without fee title to pass to their descendants and an invalid land patent. *See Stoddard v. Chambers*, 43 U.S. 284, 316 (1844). The only rights that could be devised by a settler without a valid patent signifying the transfer of fee title is that of bare possession. *Hall v. Russell*, 101 U.S. 503, 513 (1879). The intention of this restriction was to allow the heirs of a deceased settler to establish their own independent claim after their own satisfaction of the requirements mandated by the Donation Act. *Id.* The descendants of the Meeks therefore were devised nothing more than their own right to perform in accordance with the Act to establish their own claim. *See Id.*

There are no facts that indicate the descendants of Joe and Elsie Meek independently established their own claim. The descendants, lacking fee title and holding a void patent, thus had no rights to convey to the State of Oregon when the sale occurred. *See Hall*, 101 U.S. at 513; *Stoddard*, 43 U.S. at 316. The State of Oregon is itself barred from independently extinguishing the Cush-Hook aboriginal title by Section 12 of the Indian Nonintercourse Act, applied to the Oregon Territory by Congress in the Act of June 5th, 1850. Ch. 16, 9 Stat. 437 (1850) (applying Indian Nonintercourse Act, Ch. 161, 4 Stat. 729 (1834)). The fee title to Kelley Point Park is presently held by the United States and the possessory rights are maintained by the Cush-Hook Nation by unextinguished aboriginal title.

C. The Cush-Hook Nation never voluntarily abandoned aboriginal title and lacked the required intent to abandon its tribal lands.

1. The tribe's removal to new lands was involuntary because no compensation was given.

The Petitioner argues that the Cush-Hook aboriginal title, if not lost by extinguishment, was abandoned by the tribe upon their relocation to the foothills of the coastal mountain range. It is well established that a tribe may abandon their possessory interest in land held by aboriginal title. *See Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 355-356 (1941); *Williams v. Chicago,* 242 U.S. 234, 438 (1917); *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 69 (1886); *Wichita Indian Tribe v. United States,* 696 F.2d 1378, 1380 (Fed. Cir.1983). Abandonment, although established as a method of losing aboriginal title, is not frequently invoked by the courts. Cohen's Handbook of Federal Indian Law §15.9 (Nell Jessup Newton ed., 2012). This Court has been clear that abandonment of aboriginal title must be voluntary. *Santa Fe Pac.*, 314 U.S. at 356; *United States v. Arredondo*¸ 31 U.S. 691, 747-748 (1832). Forced abandonment is not a voluntary cessation and would be "insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read." *Santa Fe Pac.*, 314 U.S. at 356. Lower courts have also indicated that abandonment requires the intent to relinquish, surrender, and unreservedly give up all claims to the land in question. *Indians of Ft. Berthold Indian Reservation v. United States,* 71 Ct.Cl. 308, 334 (Ct. Cl. 1930). The Cush-Hook did not voluntarily abandon the land, rather the record is clear that whatever rights the tribe gave up was done in exchange for consideration that was never paid by the United States. (R. 2). This precludes a finding of voluntary abandonment or an unreserved intention to abandon all rights to their land.

After signing its treaty with the United States the Cush-Hook Nation performed its treaty obligations and moved to the foothills of the coastal mountain range. (R. 2). The Oregon Circuit Court determined that due to the Senate's failure to ratify the treaty the tribe never received any form of consideration promised by the United States in exchange for their land holdings. (R. 3). This factual situation is unique and there appears to be only one case based upon a similar set of historical facts.

In the case of *Indians of California by Webb v. United States* eighteen separate tribes signed treaties with the United States, moved to comply with their treaty obligations, and the treaties were never ratified and no compensation was provided. 98 Ct. Cl. 583 (Ct. Cl. 1948). In that case the Congress subsequently recognized the dispossession of the Indian lands without compensation and by private act authorized suits for compensation. *Id.* at 592-593. Congress has taken no such action in this case and the Cush-Hook Nation tribal territories have been dispossessed without compensation for over 130 years. This case likely presents the sole opportunity for the Cush-Hook to reestablish their rights to their tribal lands that were taken from them without compensation.

To rule that the Cush-Hook voluntarily abandoned their aboriginal title due solely to tribal performance of treaty obligations runs against this Court's requirement that the United States be held to high standards of fair dealings in its interactions with Indian tribes. *See Santa Fe Pac.*, 314 U.S. at 356. The historical record cannot be read to infer that the tribe's move was voluntary. Rather, it was part of a bartered for agreement that conditioned the tribe's removal on the establishment of a permanent reservation and other promised consideration. (R. 2). This conditional move precludes a finding that the tribe intended to unreservedly abdicate all its rights to the land, a vital component of the intent requirement.

See Indians of Ft. Berthold Indian Reservation v. United States, 71 Ct.Cl. 308, 334 (Ct. Cl. 1930). Ultimately, the Cush-Hook Nation was moved via a government action more similar to a forced removal than a voluntary cessation by treaty. A forced removal precludes a finding of abandonment of tribal aboriginal title. *Santa Fe Pac.*, 314 U.S. at 356.

2. The record does not reflect the Cush-Hook Nation ever ceased use of its ancestral lands.

In *Wichita Indian Tribe v. United States*, a Federal Circuit case, the court indicated a finding of abandoned aboriginal title must be supported by a record indicating the tribe ceased to use the claimed territory. 696 F.2d 1378, 1383 (Fed. Cir.1983). In that case the court was faced with a claim of abandonment by a tribe that moved to avoid potential violence by another tribe. The court noted that the Wichita's move itself, even to an area a significant distance away, did not establish abandonment of aboriginal title unless it can be shown that the tribe ceased tribal use of its ancestral territory. *Id.* at 1382. The record in the present case contains no evidence that the Cush-Hook completely ceased use of their ancestral territory. Furthermore, the court in Wichita stated that the tribe's emotional attachment to the land was a factor to consider in determining the likelihood that a tribe continued to use the area. *Id.* at 1383.

The record in this case is clear that the Cush-Hook permanent village carried significant cultural and religious significance to the tribe. (R. 2). The fact that, 130 years after the tribe "abandoned" its permanent village, the Respondent was aware of its religious significance and felt compelled to move from home to protect it suggests the tribe maintained some use of and connection to its ancestral territory. The current record simply does not provide sufficient certainty to determine that the tribe ceased all use of its ancestral territory.

3. The failure to compensate the Cush-Hook Nation for its ancestral lands leaves open the tribe's right to return and reassert its aboriginal title.

The Supreme Court has, in at least two separate cases, indicated that tribes alleged to have abandoned their aboriginal title have a right to reassert that title if they were forced to abandon their land, or went uncompensated for their property rights. *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 69-70 (1886); *United States v. Arredondo*¸ 31 U.S. 691, 747-748 (1832). In *Buttz*, this Court stated the treaty itself affected the tribe's right of occupancy stating, "Their right of occupancy was, in effect, abandoned; and, full consideration for it being afterwards paid, it could not be resumed." 119 U.S. at 69-70. This statement clearly indicates that a tribe may reassert its aboriginal title, even after cessation via treaty, if consideration is not paid. This theory complies fully with the federal government's policy during the 19th century that aboriginal title should be extinguished via a treaty that compensated the tribe for its loss of aboriginal title. *See United States v. Alcea Band of Tillamooks*¸ 329 U.S. 40, 50 (1948). As has been stated earlier, the Cush-Hook entered into a treaty with the United States, performed its obligations under the treaty, but was never compensated by the United States. (R. 2). If abandonment occurred in the present case, then under *Buttz* Thomas Captain's 2011 reentry and residence within the tribe's ancestral territory reestablished the Cush-Hook's aboriginal title. *See* 119 U.S. at 69-70; (R. 2). The tribes' aboriginal title must then continue from the Respondent's reentry until extinguished or abandoned.

This result is supported by *United States v. Arredondo* where this Court stated that forced abandonment allowed the tribe to resume its aboriginal title whenever it had the

"power or inclination to return." 31 U.S. 691, 748 (1832). The Cush-Hook never voluntarily left their ancestral territory, but rather was urged to leave by the government in exchange for payment never provided. (R. 2). Should this Court determine, as the Respondent asserts, that this is analogous to a forced removal by the federal government, then Thomas Captain reasserted his tribe's aboriginal title by reentering and living upon his tribe's ancestral homeland in 2011. *See Id.* Under either scenario, the Cush-Hook aboriginal title was reestablished in 2011 and continues until extinguished or abandoned.

D. The historical record clearly establishes the Cush-Hook Nation's aboriginal title and, lacking evidence of abandonment or extinguishment by the federal government, this Court must uphold the Oregon Court of Appeals affirmation of the tribe's aboriginal title rights over Kelley Point Park.

The Petitioner is unable to prove that the Cush-Hook Nation's aboriginal title, established by the historical record and affirmed by the Oregon Circuit Court, was ever abandoned or extinguished. The federal government took no action that evidenced the clear intent required to extinguish the tribe's possessory rights over the land in question. *See Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). Without such a showing this Court must affirm the Oregon Court of Appeals and determine that the Cush-Hook aboriginal title over their ancestral territory in Kelley Point Park continues until the present day. The Cush-Hook Nation maintains the right to use and occupy Kelley Point Park at the pleasure of the United States, which holds the underlying fee title.

II. BECAUSE THE CIRCUIT COURT IMPROPERLY APPLIED LAW TO FACT, THE STATE OF OREGON DID NOT HAVE CRIMINAL JURISDICTION UNDER PUBLIC LAW 280 TO CHARGE THOMAS CAPTAIN, AND THE GUILTY VERDICT MUST BE VACATED.

A. Public Law 280 does not confer upon the State jurisdiction over Indian Country in civil regulatory matters.

The Circuit Court held that the Cush-Hook Nation owns the land in question under aboriginal title. This makes the land Indian County, for

> Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of congress.' In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians…(emphasis in original).

Ex parte Kan-gi-shun-ca, 109 U.S. 556, 561 (1883). The Circuit Court subsequently erred in determining that Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* applied to Thomas Captain under Public Law 280's extension of jurisdiction to the State.

18 U.S.C. § 1162 sets out six states where Pub. L. 280 are mandated; Oregon, with the exception of the Warm Springs Reservation, is one such state. 18 U.S.C. § 1162(a). While Pub. L. 280 confers criminal, and some civil, jurisdiction upon the State, the central focus of Pub. L. 280 was "to confer criminal jurisdiction with respect to crimes involving Indians." *Bryan v. Itasca County*, 426 U.S. 373, 373 (1976). The legislative record is sparse, but indicates the intent was to address the problem of lawlessness on certain Indian reservations and the absence of comprehensive tribal law enforcement. *Id.* at 379. The House Report stated, "[t]hese States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian Country, with limited exceptions." As stated in Carole Goldberg's *Public Law 280: The Limits of State Jurisdiction over*

Reservation Indians, Pub. L. 280 clearly confers jurisdiction upon the State over Indian County when the statute is criminal. 22 UCLA L.Rev. 535, 541-542 (1975).

As to civil statutes, the State has bifurcated applicability, basing it on the determination of whether the statute is civil regulatory or civil adjudicatory. Statutes that are civil adjudicatory in nature confer jurisdiction on the State. 18 U.S.C. § 1162(a)

> seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, be permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in…Indian country…to the same extent that such State…has jurisdiction over other civil causes of action."

Bryan, 426 U.S. at 383. The Court goes on to note "the absence of anything *remotely resembling* an intention to confer general state civil regulatory control over Indian reservations." *Id.* at 384 (emphasis added).

Such an absence is not to be construed as Congressional oversight, either, for "nothing in its legislative history remotely suggest that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist." *Id.* at 388. Congress was concerned with the potentially devastating impact on tribal governments that may results from an interpretation of 28 U.S.C.A. § 1360(4) as conferring upon states general civil regulatory control. *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 662-668 (9th Cir. 1975). Thus, Congress did not intend to extend civil regulatory jurisdiction over Indian Country to the states. As this Court held, "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers…it would have expressly said so." *Bryan*, 426 U.S. at 390.

B. The Circuit Court erred in determining Pub. L. 280 applied to confer criminal jurisdiction over Thomas Captain because Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* are not criminal statutes; each is civil adjudicatory.

The nature of the Oregon Statutes employed here determines the ability of the State to enforce the provisions of each. A determination must be made as to whether the statutes are criminal prohibitory or civil regulatory. Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.*, despite containing a mechanism for criminal enforcement, are not criminal prohibitory statutes. Therefore, the State of Oregon is without criminal jurisdiction.

Where, as here, a State seeks to enforce a law within in Indian Country under the authority of Pub. L. 280, "it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1987). The test is rather simple:

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it *must* be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Cabazon, 480 U.S. at 209; See *Bryan,* 426 U.S., *supra.*

At issue in *Cabazon* was a statute that authorized bingo games to be run by certain types of organizations under certain restrictions. The Oregon statutes here authorize the taking of archaeological artifacts by certain persons under certain restrictions: persons who have received permits from the state. The Oregon and California statutes are similar; both permit a specific act or activity when accomplished pursuant to state guidelines or

regulations. As the Court in *Cabazon* found, the bingo statute was "not a "criminal/prohibitory" statute falling within Pub. L. 280's grant of criminal jurisdiction, but instead is a "civil/regulatory" statute not authorized by Pub. L. 280 to be enforced on Indian reservations." *Id.* at 202.

Under Title 30 (Education and Culture) of the Oregon Revised Statutes, the State legislature recognizes the need to protect archaeological sites and manage them in perpetuity by the state. Or. Rev. Stat. Ann. § 358.910. The chapter prohibits the excavation, injury, destruction, or alteration of an archaeological site "*unless that activity is authorized by permit issued under ORS 390.235."* Or. Rev. Stat. Ann. § 358.920(1)(a) (emphasis added). Section 358.920(8) states that "[v]iolation of the provisions of this section is a Class B misdemeanor." Similarly, Or. Rev. Stat. Ann. § 390.235(1)(a) directs that a person may not excavate or alter an archaeological site on public lands, or explore to determine the presence of an archaeological site, "*without first obtaining a permit issued by the State Parks and Recreation Department*." (emphasis added). The Chapter also contains an enforcement provision, wherein "[v]iolation of the provisions of subsection (1)(a) of this section is a Class B misdemeanor." Or. Rev. Stat. Ann. § 390.235. It is clear under the test employed in *Bryan,* and articulated in *Cabazon,* that the Oregon statutes at issue here are civil regulatory. It seems, however, that it is the enforcement provisions in each chapter that was relied upon, in error, to qualify each statute as criminal and extend jurisdiction to the State of Oregon.

Both Or. Rev. Stat. Ann. 358.905-358.961 *et seq.* and Or. Rev. Stat. Ann. 390.235-390.240 *et seq.* are statues that are regulatory in nature. Neither is an outright prohibition on removing archaeological artifacts; each merely sets a process, or regulations, as to how such artifacts are to be taken. As this Court held, "[t]hat an otherwise regulatory law is

enforceable (as here) by criminal as well as civil means *does not necessarily convert it into a criminal law within Pub. L. 280's meaning.*" *Cabazon,* 480 U.S. at 202-203 (emphasis added). Because the statutes upon which Oregon relies are civil regulatory, the State does not have criminal jurisdiction pursuant to Pub. L. 280 on the lands in question. As a result, the charges and verdict against Thomas Captain must be vacated.

III. NOTWITHSTANDING THE LAND IN QUESTION'S PURPORTED OWNERSHIP IN ABORIGINAL TITLE, THE STATE OF OREGON IS WITHOUT CRIMINAL JURISDICTION OVER THE LAND.

A. Pursuant to powers in the Property Clause and the Supremacy Clause of the United States Constitution, the federal government has jurisdiction when Congress enacts a statute governing federal lands.

In general, absent consent or cession, a state retains jurisdiction over federal lands within its boundaries. U.S. Const. art. IV, § 3, cl. 2. Congress, however, retains the power to enact legislation respecting those lands pursuant to the Property Clause. *Id.* When Congress acts, federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. *Kleppe v. New Mexico,* 426 U.S. 529, 530 (1976); U.S. Const. art. IV, §3, cl. 2. Such is the case with the Archaeological Resources Protection Act (ARPA).

Article IV, Section 3, Clause 2 of the United States Constitution, the "Property Clause," grants Congress the power to make all rules and regulations necessary for property belonging to the United States. The Clause is to be given an expansive reading, for "(t)he power over the public lands thus entrusted to Congress is without limitations." *United States v. San Francisco,* 310 U.S 16, 39 (1940). *See also Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Alabama v. Texas,* 347 U.S. 272, 273 (1954).

The question presented under the Property Clause is whether or not the legislation can be sustained as a "needful" regulation "respecting" public lands. These determinations are

primarily entrusted to the judgment of Congress. *See Kleppe*, 426 U.S. at 535.*; Light v. United States,* 220 U.S. 523, 537 (1911). In passing the Archaeological Resources Protection Act ("ARPA" or "Act"), Congress clearly delineated why the Act was needed regulation for respecting public lands.

The APRA was passed by Congress in 1979. In passing the Act, Congress found that:

> (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
> (2) these resources are increasingly endangered because of their commercial attractiveness;
> (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and…

Congress went on to note the purpose of the ARPA "is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands…" 16 U.S.C. § 470aa. Congress clearly and succinctly demonstrated why the ARPA was "needful" legislation "respecting" public lands. Without passage of the ARPA, archaeological resources would continue to be endangered. To this end, Congress clearly met its burden to sustain the legislation.

B. Because the Archaeological Resources Protection Act (ARPA) is a federal statute directing the uses and protection of the archaeological, cultural, and historical objects on the land in question, the State of Oregon does not have criminal jurisdiction to do so.

Under the Supremacy Clause, federal law can supersede federal law in three ways. First, Congress may preempt state law in express terms. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Second, preemption can be inferred in areas of law where Congress has

created comprehensive legislative, in that Congress has "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Third, state law is superseded where it is direct conflict with federal law. Such conflict results when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). In the matter at hand Or. Rev. Stat. Ann. 358.905-358.961 *et seq.* and Or. Rev. Stat. Ann. 390.235-390.240 *et seq.* are superseded under the third prong, in that there is a direct conflict with the federal ARPA.

1. Because Or. Rev. Stat. Ann. 358.905-358.961 *et seq.* and Or. Rev. Stat. Ann. 390.235-390.240 *et seq.* are in conflict with the Archaeological Resources Protection Act, the State of Oregon cannot exercise criminal jurisdiction on the land in question.

Provisions in both Or. Rev. Stat. Ann. 358.905-358.961 *et seq.* and Or. Rev. Stat. Ann. 390.235-390.240 *et seq.* allow an individual to excavate or alter an archaeological site with a permit issued by the State Parks and Recreation Department. The provisions of the ARPA direct the same individual to apply to the Federal land manager for a permit. 16 U.S.C. § 470cc. This alone creates a conflict wherein federal law supersedes state law, because the state law "interfere[s] with, or [is] contrary to," federal law. *Hillsborough Cnty., Florida v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985). Functionally, a process wherein an individual is apply to two governments for access to the same is confusing, and may easily result in legal actions in either jurisdiction.

Importantly, the ARPA contains a provision that requires when a permit "may result in harm to, or destruction of, any religious or cultural site…before issuing such a permit, the Federal land manager *shall* notify any Indian tribe which may consider the site as having religious or cultural importance." 16 U.S.C. § 470cc (emphasis added). The Oregon statutes

contain no comparable provision or requirement, and are thus in conflict with federal law. An actor can comply with State law without meeting the requirements of Federal law, evidencing yet another conflict between the statutes. Where, as here, state and federal statutes are in conflict, the federal statute controls. To this end, the State does not have jurisdiction over the uses of, and to protect, the resources on the land in question.

2. Federal jurisdiction need not be exclusive to override State law.

Congress does not have to vest the federal government with exclusive jurisdiction over its lands in a particular act in order for the federal government to have jurisdiction. In *Kleppe v. New Mexico, supra,* the Court found that with regard to regulating the use and taking of wild horses and burros, the federal legislation did not establish exclusive jurisdiction over public lands. Federal law did, however, override the state law, insofar as is attempted to regulate the same subject on federal lands. *Kleppe,* 426 U.S. at 530. Similar to the statute at issue in *Kleppe,* the ARPA does not expressly establish exclusive federal jurisdiction over the uses of the archaeological artifacts; however, because the Oregon statutes are in conflict with the federal Act, the federal government obtains jurisdiction to the exclusion of the state.

Moreover, the federal government "has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Camfield v. United States,,* 167 U.S. 518, 525 (1897). As discussed above, Congress saw great urgency in the protection of archaeological artifacts on federal and Indian lands. Because the State of Oregon did nothing in the way of protecting the archaeological artifacts in Kelly Point Park, great

exigency existed. (R. 2). Congress reacted to this exigency by enacting the ARPA, and thereby conferring jurisdiction to protect these artifacts in the federal, not state, government.

Finally, the Court has stated that the Property Clause gives Congress the power over public lands "to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them…" *Utah Power & Light, supra,* at 405. The ARPA is an exercise of such power. Because Or. Rev. Stat. Ann. 358.905-358.961 *et seq.* and Or. Rev. Stat. Ann. 390.235-390.240 *et seq.* are in conflict with the federal Archaeological Resources Protection Act, the State of Oregon's jurisdiction over the lands in question must yield to federal jurisdiction. As a result, the State of Oregon does not have criminal jurisdiction over the lands in question, and the charges and verdict against Respondent Thomas Captain must be dismissed.

CONCLUSION

As to the determination that the Cush-Hook Nation holds aboriginal title to the land in question, the judgment of the Oregon Court of Appeals should be affirmed. As to the determination that the State of Oregon has criminal jurisdiction to control the uses of, and to protect, the archaeological, cultural, and historical objects on the land in question, the judgment of the Oregon Court of Appeals should be reversed.

Respectfully submitted,

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