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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

Dated: January 12, 2013

The Law Firm of Team 33

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QUESTIONS PRESENTED

1. Does the Cush-Hook Nation own aboriginal title to the land in Kelley Point Park?
2. Does Oregon have criminal jurisdiction to control the use of, and to protect, archaeological, cultural, and historical objects in Kelley Point Park?

STATEMENT OF THE CASE

Procedure

In 2011, Thomas Captain, a member of the Cush-Hook Nation of Indians, was arrested for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site. The Oregon Circuit Court for the County of Multnomah held that the Cush-Hook Nation owns aboriginal title to Kelley Point Park and therefore Captain was not guilty of trespass or cutting timber in a state park. The Circuit Court found that Oregon had criminal jurisdiction to charge Captain with desecrating an archaeological and historical site and found Captain guilty of those charges. Both parties appealed and the Oregon Court of Appeals upheld the decision. The Oregon Supreme Court denied review.

Facts

The Cush-Hook Nation of Indians (the Nation) has been a tribe since time immemorial. Since April 1806, the tribe has interacted with the United States government as a self-governing entity. (R. 1).[1] First encountered by Lewis and Clark, the Cush-Hooks originally inhabited the land that is now Kelley Point Park in Portland Oregon. *Id.* The Cush-Hook Indians lived on their land until 1850 when they signed a

[1] "R" refers to the paginated 2013 NNALSA Moot Court Question.

treaty agreeing to move sixty miles away to new land that would be set aside for the tribe. (R. 1-2). The treaty was brokered by Anson Dart, superintendent of Indian Affairs for the Oregon Territory. (R. 1). In exchange for giving up its traditional homeland, the Nation was supposed to receive compensation and other benefits including recognition of the new lands as belonging to the tribe. (R. 2). The new lands were supposed to be considered a reservation and the Nation was meant to receive federal recognition. *Id.* The Nation abided by the treaty and moved the village west with the understanding that the government's promises would be fulfilled. (R. 1-2). However, the U.S. Senate in 1853 refused to ratify the treaty and the Nation was never compensated for its land, never federally recognized, nor was the new land ever designated a reservation. (R. 2).

The title to the Nation's land was given to Joe and Elsie Meek under the Oregon Donation Land Act of 1850 (ODLA). *Id.* ODLA stated that if a white settler had lived and cultivated open land for four years, the settler was given fee simple title. 9 Stat. 496-500. The Meeks were given fee simple title but did not live on or cultivate the land for four years. (R. 2). Records show that the Meeks lived on the land for only two years. (R. 4). In 1880, the Meeks' descendants sold the land to Oregon. (R. 2).

Thomas Captain (Respondent) is a member of the Nation. (R. 2). In 2011, Captain moved to the Park in order to reestablish the Nation's ownership of the land. *Id.* He built a small, temporary dwelling on the land where the Nation's village had been. (R. 4). Captain was also concerned about the safety of the 300 year old trees in the Park. (R. 2). The trees have enormous religious and cultural meaning to the Nation. (R. 2). This fact has been consistently recognized by Americans who came into contact with the Nation. *Id.* During the last several years, the sacred trees were being vandalized by non-

Cush-Hook people. *Id*. Criminals were climbing the trees and cutting off ancient Cush-Hook carvings. *Id.* At the time, the State of Oregon had not responded in any way to these acts of vandalism and disrespect to the tribe. *Id.* Captain, wanting to protect the carvings, cut down a tree, removed a tribal carving, and attempted to return the object to his tribe in western Oregon. *Id.* Captain was arrested and charged with trespass, cutting down a tree in a state park, and desecrating an archaeological and historical site. *Id.*

SUMMARY OF ARGUMENT

The Cush-Hook Nation owns aboriginal title to the land that is now Kelley Point Park. The petitioner's reliance on the Doctrine of Discovery to give the United States or Oregon right to the land is racist and antiquated and the entire Doctrine should be overturned. However, even if the Doctrine of Discovery is valid, the United States never extinguished the Nation's aboriginal title and right to occupy the land. The Nation still holds title because: the Treaty was never ratified, the Nation was never compensated, the Oregon Land Donation Act did not extinguish title, and the Nation's land was never conquered through force. Furthermore, the Meeks never held valid title to the land and therefore could not sell the title to Oregon. For these reasons, Captain is not guilty of trespass or of cutting timber in a state park.

The State of Oregon does not have criminal jurisdiction to control the uses of or protect the trees in question because the state laws are preempted by federal law. The laws are preempted because they conflict with federal and tribal interests in protecting the same objects. Even if the Court does not consider tribal interests in its analysis, the state laws are still preempted because federal statutes concerning archaeological objects are the standard for protection and the state laws in question conflict with those standards. State laws are also preempted because they impede the federal government's goal of promoting the protection of Indian objects and religion. Finally, the state does not have criminal jurisdiction in this matter because enforcement of state law violates the First Amendment of the United States Constitution.

Respondent requests that the lower court be upheld with respect to question 1 and overturned with respect to question 2.

ARGUMENT

I. The Cush-Hook Nation of Indians owns aboriginal title to Kelley Point Park

A. The Doctrine of Discovery, under which the United States and Oregon claim title to Kelley Point Park, is an antiquated, racist law that should be overturned

The Doctrine of Discovery is the reason the Cush-Hook people were coerced into leaving their land. The holdings of the Marshall Trilogy[2] in the early 1800s created a supposed Constitutional justification for automatically divesting Indian people of the majority of title to their own lands. While the lower court in this case has correctly determined that the Nation currently retains aboriginal title (discussed further below), its analysis stems from inherently flawed law. (R. 3-4). The Court should take this opportunity to overturn the Marshall Trilogy's reliance on the Doctrine of Discovery and recognize that the Cush-Hook people have complete title to their ancestral lands since no money was ever paid to the tribe for the property.

The Doctrine of Discovery was first established in U.S. jurisprudence by Justice Marshall in *Johnson v. M'Intosh*. 21 U.S. 543 (1823). Marshall went through a drawn-out analysis of how a "discovering" nation can go about taking land from aboriginal people without consequence. *Id.* The main idea was that once a Native people were "discovered" by a powerful, Christian, conquering nation, the Native tribe was stripped of all title to their land except for the right to use and occupy it. *Id.* at 591-92. The rest of the title to the land would be held by the "discovering nation." *Id.* This Doctrine was the legal justification for the systematic removal and termination of Indian tribes throughout the last three centuries. Furthermore, Marshall declared that a firm tenant of the Doctrine

[2] The Marshall Trilogy is a term referencing Chief Justice John Marshall's decisions in *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

of Discovery is that only the discovering nation could purchase or otherwise take land from the tribe in order to create complete title. *Id.* at 604-05.

Respondent in this case is not arguing that the federal government, or indeed the Oregon state government, does not have the right to buy land from Indian tribes. However, as established in the factual record, no payment was ever made to the Nation for Kelley Point Park. (R. 2). The Petitioner is relying on the fact that the Doctrine of Discovery automatically gives the United States most of the title to the land and allows for the federal government to divest the tribe of any remaining title through force. Respondent respectfully requests that the Court acknowledge that the Doctrine of Discovery is an antiquated, racist law used to justify the forced removal of Indian people, unfair treaty negotiation, and even genocide of Indian people.

This case would not be the first time the Court has overturned a precedent legal theory rooted in racism and Christian dogma. In 1954, the Court decided that the "separate but equal" doctrine should be overturned with regards to public schools. *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494-95 (1954). In 1958, the Court held that states had to follow desegregation laws regardless of the state's position on the law. *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). And in the 1960s, the Court completed the desegregation of the country, fully overturning the idea of "separate but equal." *See, e.g., Boynton v. Virginia*, 364 U.S. 454 (1960) (segregation in public transportation is illegal); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the 1964 Civil Rights Act's prohibition of racial discrimination in public places); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down the prohibition of

interracial marriage); *Alexander v. Holmes County Bd. of Ed*.,396 U.S. 19 (1969) (reiterating the requirement of desegregated schools).

Finally, the Court need only look to the similarities between decisions relying on the Doctrine of Discovery to the decision in *Dred Scott v. Sandford* to understand how grave an error Justice Marshall made in adopting the Doctrine of Discovery. Marshall justifies the taking of title from Indians by stating "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible." *Johnson*, 21 U.S. at 590. In *Dred Scott*, Justice Taney stated that "there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed." 60 U.S. at 411. While the Court in *Dred Scott* attempted to distinguish the relationship between government and slaves from the relationship between the government and Indians, the basic idea that European, Christian society is superior to all other is the basic tenant of both doctrines. *Id.* at 404. The Court held that United States had control over the land/person because there was nothing else for a civilized society to do.

Marshall wrote that when a native population is discovered by a Christian society, "the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves." *Johnson*, 21 U.S. at 574. Essentially, the Europeans (and then the American government) get all title other than occupancy simply because they are western and Christian. Fifty years after *Johnson*,

Justice Field wrote in *Beecher v. Wetherby* that "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." 95 U.S. 517, 525 (1877). Even in 1955, the Court continued to use the Doctrine to justify the belief that Indians could not hold any real title to land when, in *Tee-Hit-Ton Indians v. United States,* Justice Reed stated, "every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." 348 U.S. 272, 289 (1955).

The Court should compare the dicta in *Johnson, Tee-Hit-Ton*, and *Beecher* to the explanation in *Dred Scott* of how the founding fathers never intended the Declaration of Independence to include African Americans in the western form of government:

> They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery.

60 U.S. at 410. It is evident in the opinion language that both of these areas of law, one current and one long since overturned, share the same levels of white privilege and perceived European supremacy.

Ultimately, the Doctrine of Discovery, under which the State of Oregon claims any title to Kelley Point Park, is a doctrine of racism and Euro-centric thinking that has no place within the jurisprudence of the United States. In *Brown*, the Court stated that ever since the creation of separate but equal, American courts had "labored with the

doctrine for over half a century." 347 U.S. at 491. *Johnson* was decided in 1823 and American courts have been struggling with the ramifications of the Doctrine of Discovery ever since. The Doctrine should be overturned and complete title over Kelley Point Park and all of the Cush-Hook ancestral lands should be returned to the Cush-Hook Nation.

B. The Aboriginal Title owned by the Cush-Hook Nation under the Doctrine of Discovery was never extinguished.

1. Aboriginal title, which gives the Nation the right to occupy and use the land, was conferred when Lewis and Clark first encountered the Nation

According to Justice Marshall and the Doctrine of Discovery, title over the Nation's land passed to the United States when the Nation was discovered by Lewis and Clark. *Johnson,* 21 U.S. at 573-74. The Court has long held that once a tribe was discovered by Europeans (or, later, Americans) the title to the tribe's land is passed to the discovering government. *Tee-Hit-Ton,* 348 U.S. at 279. Marshall was clear however, that the title held by the Federal government was subject "to the Indian right of occupancy." *Johnson,* 21 U.S. at 574.

Even in cases that vehemently dismissed Indian rights, the Court has been clear that tribes maintained a right to occupancy until that right was abrogated by the United States. *See, e.g., United States v. Cook*, 86 U.S. 591, 592 (1873); *Beecher*, 95 U.S. at 521-22; *Tee-Hit-Ton*, 348 U.S. at 279; *United States v. Santa Fe Pac. R. Co*.,314 U.S. 339, 345 (1941); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339-40 (1945). When Lewis and Clark gave the Nation a Jefferson Peace Medal, they may have succeeded in claiming fee title to the land for the United States, but the exchange also granted the Nation the right to occupy the land. (R. 1).

2. Aboriginal title can only be extinguished by the federal government

In *Cherokee Nation v. Georgia*, the Court stated that "Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government." 30 U.S. 1, 17 (1931). In *Oneida Indian Nation of New York State v. Oneida County, New York* (Oneida I), the Court held that "Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States." 414 U.S. 661, 667 (1974). Granting the power to extinguish title in the federal government alone is consistent with Congress's plenary power over Indian affairs. *United States v. Kagama*, 118 U.S. 375, 379-80 (1886). In addition, the Nonintercourse Act of 1790 declared that only the federal government, not individuals or states, may purchase land from Indian tribes. 1 Stat. 137, 138. For all these reasons, only the federal government had the power to extinguish the Nation's title to Kelley Point Park, regardless of what actions the State of Oregon or any individual citizen has taken on the land since 1806.

3. The federal government has never extinguished the Nation's aboriginal title

The general rule held in *Johnson* is that the United States may extinguish aboriginal title through either purchase or conquest. 21 U.S. at 587. Purchase, traditionally, was through the ratification of treaties and some sort of compensation for the land. Conquest in the legal sense refers to either the forcible removal of Indians from their land, or removal through legislative intent.[3] In addition, the Court has held that "an extinguishment cannot be lightly implied" due to the responsibility of the United States to protect tribal interests. *Santa Fe Pac. R. Co*., 314 U.S. at 354. In the present case, there

[3] In *Johnson v. M'Intosh*, Marshall gives an extensive history lesson on the subject of how European nations went about conquering Indian and other aboriginal lands. Johnson uses phrases like "bloody wars" and "military occupation" to describe how the lands were conquered. 21 U.S. at 546, 583. *See, also, Tee-Hit-Ton*, 348 U.S. at 289.

was no extinguishment of the Nation's aboriginal title through either purchase or conquest.

a. There was no ratification of the Cush-Hook Treaty and no payment was ever made to the Nation

In order for a treaty with an Indian tribe to be valid, the treaty must be ratified by the Senate. 1 Stat. 137, 138. While the Nation may have signed the treaty with a legitimate federal representative, the fact remains that the Cush-Hook treaty was never ratified by the Senate. (R. 2). By not ratifying the treaty, Congress actively chose to allow the Nation to maintain their aboriginal title. The question of whether or not a treaty was ratified has been consistently used by the Court as evidence of whether or not aboriginal title has been extinguished. *See, e.g., United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 43-44 (1946), *Idaho v. United States*, 533 U.S. 262, 267 (2001), *Cramer v. United States*, 261 U.S. 219, 225-26 (1923).

Compensation of some sort is also an important factor the Court considers when determining whether or not aboriginal title has been extinguished. In *United States v. Dann*, the Court focused on the fact that the government had placed money into a trust account for the Shoshone Tribe in order to determine that the tribe no longer had aboriginal title. 470 U.S. 39, 48-49 (1985). It did not matter that the Shoshone had never received the money; the Court held that the transfer of funds was sufficient to extinguish title through purchase. *Id.* at 48. The Court stated that "The common law recognizes that payment may be satisfied despite the absence of actual possession of the funds by the creditor. Funds transferred from a debtor to an agent or trustee of the creditor constitute payment." *Id.*

In the present case, no payment was ever authorized, no money was transferred to an agent for the Nation, and the Cush-Hook people never received any compensation for their land. (R. 2). To claim that the Cush-Hook Treaty somehow extinguished the Nation's aboriginal title through purchase would be to say that payment may be satisfied if the creditor believes that payment will actually be made. From a common law contracts point of view, the Nation signed an agreement, the agreement was never signed by the other party, and the other party never made any attempt or even good faith gesture to fulfill the agreement. Even under the generous rule set out by *Dann*, the Nation's aboriginal title was never extinguished through purchase.

b. The Oregon Donation Land Act did not extinguish aboriginal title

The Petitioner argues that the ODLA extinguished the Nation's aboriginal title when it described all the land in Oregon as being public land. This is an incorrect reading of the ODLA. At no point in the ODLA is the entirety of the Oregon territory labeled "public." The ODLA merely states the rules by which settlers could claim title to public lands. 9 Stat. 496-500, Sec. 4. In fact, the Act always uses the phrase "public lands" when it lays out how an individual may get title to a homestead. *Id.* Ultimately, the Act states that settlers may only get fee title if they are settled on public land, but it does not define public land and the entirety of the Territory of Oregon. *Id.*

To hold that the ODLA extinguished the Nation's aboriginal title through conquest would be contrary to how the Court has traditionally viewed the diminishment and abrogation of Indian rights. As the court stated in *Santa Fe Pac.*, we cannot lightly infer extinguishment of aboriginal title. 314 U.S. at 354. There is no indication in the ODLA that Congress had any intent to extinguish the aboriginal title of any tribe living

within the Oregon Territories. In *Cramer*, the Court made mention of the fact that the Act which gave settlers land rights in California specifically mentions Indian land and how that land should be treated. 261 U.S. at 230-31. The only mention of Indians in the ODLA is one provision which states that "American half-breed Indians" are eligible to acquire land through the Act. 9 Stat. 496-500, Sec. 4. There is no obvious intent by Congress to abrogate any Indian title in the ODLA.

In *Beecher*, the Court points out that even though an act of Congress allowed for the sale of land that may have included Indian land, the lands where the tribe had aboriginal title were not included in the act. 95 U.S. at 523-24. The ODLA should be interpreted in the same way and the Nation's land was not included in the definition of "public lands." Finally, *State of Minnesota v. Hitchcock* states that just because Congress declares public land open for sale does not mean that we assume Congress to terminate the restrictions on title to the land. 185 U.S. 373, 393-94 (1902). For these reasons, the Petitioner is incorrect when they argue that the ODLA can be construed as Congress extinguishing the Nation's aboriginal title.

c. <u>The fact that the Nation left Kelley Point Park did not extinguish title</u>

The Petitioner argues that when the Nation moved their village away from Kelley Point Park, they lost their aboriginal title through conquest. However, as previously discussed, only the federal government can conquer an Indian tribe under the Doctrine of Discovery. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 203 (2005). While it is true that a tribe may lose aboriginal title to land if the tribe removes to a new location, this historically occurs either when a tribe is moved to a new reservation through a ratified treaty or when a tribe is physically removed from land

through military force. In the present case, there was no reservation created for the Nation because the treaty was never approved by Congress. (R. 2). The Nation was not forcibly removed from Kelley Point Park, the tribe left of its own volition because they had been promised reservation land where they would have rights and sovereignty. (R. 1-2).

To allow the Nation's aboriginal title to be extinguished simply because the tribe moved their village west would be to say that if a person sells their home to a buyer and then moves out of the home, they have lost all rights to their home even if the buyer never pays. In *Dann*, the Court is clear that one of the factors weighed in determining whether or not aboriginal title has been extinguished is the knowledge of any fraud or bad behavior on the part of the government. 470 U.S. at 49. In this case, the federal government acted fraudulently when it convinced the Nation to move their village on the promise of payment which was not, in actuality, assured. In previous cases where treaties have not been ratified, the Court has required other forms of payment or federal intent to show extinguishment of aboriginal title. *See, e.g., Idaho*, 533 U.S. at 274 (executive branch intended for rights to be abrogated), *Alcea*, 329 U.S at 54 (without ratification of a treaty the original removal of tribe was a taking).

In *Oneida I*, the Court held that sale of land from a tribe to a state was invalid after the passage of the Nonintercourse Act. 414 U.S. at 667-68. The Court reiterated this point a few years later in *Oneida Indian Nation of N. Y. State v. Oneida County, New York* (Oneida II) when it held that the tribe had a claim for a taking of their property when the State of New York signed treaties with the tribe in violation of the Nonintercourse Act. 470 U.S. at 245-46 (1985). In Justice Steven's dissent in *Oneida II*

he wrote that, "This decision upsets long-settled expectations in the ownership of real property in the Counties of Oneida and Madison, New York, and the disruption it is sure to cause will confirm the common law wisdom that ancient claims are best left in repose." 470 U.S. at 273. In a sense, this is the same reasoning behind the argument that since the Nation left Kelley Point Park so long ago, their interest in the land is gone. And while the majority in *Oneida II* disagreed with Steven's decision, it is clear from the further litigation in the matter that disruption of property rights is something the lower courts are concerned with as well.

In the present case, however, the only property rights that would be disturbed if the Court determines that the Nation still holds title would be the rights of the State of Oregon. There are no private property owners in Kelley Point Park as there are on the Oneida lands in New York. Granting title to the Nation would possibly disrupt some revenue for the state, but value gained in righting a centuries-old wrong must be considered as well.

Finally, the Petitioner argues that the Court should read the Western Oregon Indian Termination Act of 1954 (WOITA) as extinguishing any aboriginal title any tribe in Oregon may have held. WOITA did indeed terminate all federally recognized tribes west of the Cascade Mountains and if the Nation had been federally recognized, this act would have terminated their federal status. 25 U.S.C. § 692. However, the Court stated in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe* that termination of a reservation does not necessarily affect other rights a tribe may have. 473 U.S. 753, 766 (1985). There is no indication in the WOITA that Congress intended to extinguish the

Nation's aboriginal title, or indeed have any effect at all on an unrecognized tribe like the Cush-Hook.

Justice Marshall stated in *Johnson* that "The title by conquest is acquired and maintained by force." 21 U.S. at 580. While the Nation may have left their traditional homelands, they did not do so because they had been conquered. At no time in the history of the Nation's relationship with the federal government was there ever a show of force on either side. The Nation left Kelley Point Park because it believed it was relocating to a new reservation and that it would be compensated for the land through a treaty. (R. 1-2). The Petitioner's argument that this relocation extinguished aboriginal title is contrary to both Indian law and to the common law of land transactions.

4. The Meeks' title to the land was invalid and could not be conveyed to the State of Oregon

The ODLA clearly states that in order for an individual or family to receive fee title to public lands they must live on and cultivate the land for a period of four years. 9 Stat. 496-500, Sec. 4. In the present case, the record shows that Joe and Elsie Meek did not live on the property for the required four years and did not make any attempt to cultivate the land. (R. 3). The title the Meeks were given under the ODLA was void *ab initio*. Thus, not only did the government convey title to the Meeks which was invalid for reasons previously discussed, but the Meeks only had, at best, voidable title because they never completed their end of the bargain. When the Meeks sold the land to the State of Oregon, they were selling land they did not have valid title to in the first place.

If the Court believes that the Nation's aboriginal title was extinguished by the federal government prior to 1850, the State of Oregon still does not possess title to Kelley Point Park. The land was sold to Oregon by people with invalid title. The land therefore

would belong to the federal government under the ODLA and the Doctrine of Discovery and the federal government would have to bring a claim for trespass against Respondent.

II. The State of Oregon does not have criminal jurisdiction over the archaeological, cultural, and historical objects found in Kelley Point Park

The State of Oregon does not have the criminal jurisdiction over the archaeological, cultural and historical objects found in Kelley Point Park, regardless of who owns the land. Respondent cannot be convicted of damaging an archaeological site and a cultural and historical artifact under Or. Rev. Stat §§ 358.905-358.961 and Or. Rev. Stat. §§ 390.235-390.240 because the state laws in question are preempted by federal statutes and executive orders. Oregon's archaeological statutes are preempted because they conflict with federal laws and they impede federal objectives. Furthermore, enforcement of these statutes is unconstitutional because they violate the Free Exercise and Equal Protection provisions of the United States Constitution.

The lower courts used Public Law 280 to justify Oregon's claim of criminal jurisdiction over the trees in question. P.L. 280 granted Oregon the same authority to enforce state criminal laws within Indian country that the state always had authority to exercise outside Indian country. 18 U.S.C. § 1162(a). Essentially, P.L. 280 extended state jurisdiction to crimes committed by or against Indians within Indian Country. An analysis of the validity of these criminal charges under P.L. 280 requires a consideration of whether or not Kelley Point Park is considered Indian Country. Even if this Court agrees that the Nation has aboriginal title to Kelley Point Park, the land would still not be considered "Indian Country" for P.L. 280 purposes.[4] Therefore, the Court must look

[4] "Indian country" is defined as …(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the rights-of-way through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

beyond P.L. 280 to determine the validity of state criminal jurisdiction over archaeological and historical objects and sites.

A. The Oregon state laws in question are preempted by federal laws

The Oregon statutes §§ 358.905-358.955 prohibit damage to archaeological sites on public and private lands and prohibit removing an archaeological object from public or private land unless there is a permit authorizing the conduct. Or. Rev. Stat. § 358.920(1)(a). An "archaeological object" is defined in Oregon law as an object that is at least seventy-five years old, is part of the physical record or an indigenous culture found in the state, and is material remains of past human activity that are of archaeological significance, including symbols and monuments. Or. Rev. Stat. § 358.905(1)(a)(A)-(C). A "sacred object" is defined as an archaeological object or other object that is demonstrably revered by any ethnic group, religious group or Indian tribe as holy; is used in connection with religious or spiritual worship of a deity or spirit power; or is needed by traditional native Indian religious leaders for the practice of traditional Indian religion. Or. Rev. Stat. § 358.905(1)(k). The terms "burial," "funerary objects," human remains," "object of cultural patrimony," and "sacred object" must be interpreted in the same manner as similar terms interpreted pursuant the Native American Graves Repatriation Act (1983). Or. Rev. Stat. § 358.905(2).

Congress has the power to preempt state law pursuant to the Supremacy Clause of the United States Constitution. *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 108 (1992). Article VI provides that the Constitution, and laws and treaties made pursuant to the Constitution, are the "supreme law of the land." U.S Const. art. VI, cl 2. Congress's preemptive power also derives from its plenary power over Indian

affairs. Plenary power in Indian affairs is based in the Indian Commerce Clause of the U.S. Constitution. Art. I, sec. 8, cl. 3. This Court has continually interpreted this power to be a broad authority over Indians and matters concerning Indians.[5]

The statutes used by Oregon to convict Respondent are contrary to Cush-Hook interests, federal interests, and federal policy related to protecting Indian sacred objects. When state law conflicts with federal law or federal policy, the doctrine of preemption is invoked to invalidate the conflicting state laws. Any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1, 205-06 (1824).

1. State interests in the objects are outweighed by tribal and federal interests

Within the scope of Indian Law, state law can be preempted by an explicit congressional statement and also if balancing federal, tribal and state interests weigh in favor of preemption. *Confederated Tribes of Siletz v. State of Oregon*, 143 F.3d 481, 486 (9th Cir. 1998). Any ambiguities in the federal law are resolved in favor of tribal independence. *Id.* (citing Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 434 (9th Cir. 1994)). Federal and tribal interests stem from Congress's broad authority over Indian affairs and from the self-governing status of the tribes. *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982). State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico v. Mescalero Apache Tribe*, 462

[5] *See, e.g., Kagama*, 118 U.S. at 385 (Tribes status as wards gives Congress power to regulate felonies committed by Indians in Indian Country); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Plenary authority over Indian affairs is a political power exercised by Congress from the beginning); *United States v. Sandoval*, 231 U.S. 28 (1913) (Congress has plenary power to define who is an Indian and which Indians will receive federal services).

U.S. 324, 334 (1983). The more federal government and tribe have taken control of an activity, the more likely the state is preempted. *Id.* at 324.

a. The Cush-Hook Nation has a legitimate interest in its sacred objects

The tribal interests at stake here are the protection and preservation of culturally and religiously significant objects carved into trees. Respondent cut the tree down and removed the portion of the tree that contained a sacred totem and religious carving by one of his ancestors in an effort to preserve these "crucial tribal objects." (R. 2). The Cush-Hook Nation is a non-federally recognized tribe and Respondent is a citizen of that tribe. *Id*. Though the Nation is not formally recognized by the federal government, historical records do show that the Nation was recognized as inhabiting the area since at least 1806 – the year their tribe and lands were "discovered." (R. 1). These records also show that the Nation accepted sovereignty tokens meaning that they were to be recognized by the United States. *Id*. The Cush-Hook Nation was recognized by the federal government as a sovereign nation from 1806 until at least 1853, well before Oregon's admittance to the Union in 1859. The Nation then relocated to a promised reservation in the mountains along Oregon's coast. (R. 3). The Cush-Hook Nation survived these termination efforts. This is shown in the labeling of Respondent as a Cush-Hook "citizen." (R. 2). This shows that the Nation governs themselves, at least in part by having tribal membership criteria.

Or. Rev. Stat. § 97.740(4) defines "Indian tribe" as a tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act or listed in the Western Oregon Indian Termination Act if the tribe's traditional cultural area includes Oregon lands. The Western Oregon Indian Termination Act terminated sixty tribes

located west of the Cascade Mountains during the "Indian Termination Era." 25 U.S.C. § 692. Had the Cush-Hook Nation been federally recognized they would have been terminated by this legislation terminating tribes west of the Cascade Range. The Nation avoided specific legislative termination because the treaty they signed with Superintendent Dart was never ratified by Congress.

Because Oregon statutes only recognize the rights of federally recognized tribes to be included in the protection of archaeological and historical sites, this basically means that a non-federally recognized tribe does not have an interest in their own sacred objects. This is incorrect as historical records show that the Cush-Hook Nation is an ethnic group that used the trees as part of their religion, indicating a strong interest in these sacred objects. (R. 2). Protecting aspects of cultural and religious identity are in every tribe's interests as a unique ethnic group, regardless of whether a tribe has federal recognition. While the Nation was coerced into giving up their lands and moving to a reservation, they did not give up their fundamental rights and interests in their sacred objects.

The Cush-Hook Nation is a non-federally recognized tribe with a strong interest in protecting their religious and cultural objects. Because of their well-established history and previous treatment as a sovereign entity, the Cush-Hook Nation should be treated more akin to a federally recognized tribe in regard to treatment of their sacred objects as opposed to a non-federally recognized tribe with no recognized interest in sacred objects. Because the Cush-Hook Nation's religious beliefs are so entwined with the land, it is impossible to separate the idea of an archaeological site from a sacred object. These two concepts are virtually identical for Cush-Hook citizens.

b. <u>The federal government has a vested interest in protecting archaeological sites and Indian religions</u>

Federal interests may distinguish between the concept of an archaeological site and a sacred object but that does not mean that the federal and tribal interests are mutually exclusive. The federal government maintains a pervasive interest in the preservation of the country's cultural resources. Federal interest in protecting archaeological and historically significant sites and objects dates back to the early 1900s.

The federal government recognized that it needed to protect objects of historic and scientific interest and prevent destruction of these objects prompting the passage of the Antiquities Act in 1906. 16 U.S.C. § 431 *et seq*. Later, the Historic Sites Act of 1935 declared that it was the Nation's policy to preserve for public use historic American sites, objects and antiquities of national significance. 16 U.S.C. § 461. The National Historic Preservation Act of 1966 (NHPA) was passed with the intent to preserve historical and archaeological sites in the United States. 16 U.S.C. § 470 *et seq*. This legislation created a register listing the country's historic places, a list of the historic land marks and also created the State Historic Preservation Offices. *Id*. Oregon is a state that uses State Historic Preservation Officers to determine whether a site is archaeologically significant. Or. Rev. Stat. § 358.905(1)(b)(A). Section 106 of the NHPA was designed to minimize potential damages to historic properties. 16 U.S.C. § 470 *et seq.* From these few acts alone, and the fact that Oregon relies on the information from the federal government in its own laws, we can see that the federal government has created a scheme for the protection of archaeological and historical Indian sites and objects.

The National Environmental Policy Act (NEPA) was enacted in 1969 to promote the enhancement of the environment and to keep the environment in the forefront of federal projects. 42 U.S.C. § 4321 *et seq.* In NEPA, Congress declared the national

policy to be as follows: "It is the continuing responsibility of the federal government to use all practicable means to preserve important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4). This is further evidence that the federal government envisions the protection of these types of objects as primarily a federal responsibility. In 1960, Congress passed the Archeological and Historic Preservation Act (AHPA) which expanded on the Historic Sites Act of 1935. The AHPA was amended in 1974. This new legislation focused on preserving significant archaeological resources and data. 16 U.S.C. § 469. Five years later Congress determined that archaeological resources on public lands and Indian lands are an irreplaceable part of the national heritage. 16 U.S.C. § 470aa. Congress passed the Archaeological Resources Protection Act in 1979 because archaeological resources were endangered and there was not enough protection to prevent the loss and destruction of these resources. *Id.*

Taking all of this Congressional legislation together, it is clear that Congress has a vested interest in the protection of archaeological and historical sites, especially as they relate to Indian tribes. Furthermore, the broad scope and sheer number of these acts is evidence of the fact that the federal government's interest in sites like Kelley Point Park is significant and enough to outweigh any interest a state may have.

c. <u>The federal government also has an interest in protecting Indian religious sites and objects</u>

The federal government's interest in protecting Indian religion is shown in multiple federal statutes and executive orders. The American Indian Religious Freedom Act was enacted in 1978 to declare that the United States' policy was to protect and preserve American Indians' inherent rights of freedom of belief, expression and exercise traditional Native religions, including accessing sites, using and possessing sacred

objects, and enjoying the freedom to worship through ceremonials and traditional rites. 42 U.S.C. § 1996. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) requires the return of cultural items to lineal descendants and culturally affiliated tribes and criminalizes the possession of Native American cultural items obtained in violation of NAGPRA. 25 U.S.C. § 3001. These laws have been used since their inception to allow the federal government to protect Indian religious rights.

In 1971, President Nixon issued Executive Order No. 11593 to protect and enhance the cultural environment by requiring that federal agencies administer cultural properties under their control in a spirit of stewardship and trusteeship for future generations. President Clinton issued Executive Order No. 13007 in 1996 to protect and preserve Indian religious practices. This executive order required agencies that manage federal lands to accommodate access to sacred sites and the ceremonial uses of those sacred sites by Indian religious practitioners. In December 2010, President Obama issued a statement announcing the United States' support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[6] Adopted by the United Nations in 2007, the UNDRIP is an effort to identify and reinforce the religious and cultural rights of indigenous peoples worldwide. G.A. Res. 61/I.67 (Sept. 13, 2007).

These federal policies relating to protecting and preserving Indian religions shows that the federal government has taken the stance that Indian religions are just as important to the American cultural fabric as are historic and archaeological sites. By combining these policies with Congressional plenary authority in Indian affairs, the State's interest

[6]President Obama made this declaration, however as of now the United States has not signed the declaration. Krissah Thompson, *U.S. will sign U.N. declaration on rights of native people, Obama tells tribes*, The Washington Post (December 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

in these areas cannot possibly outweigh the clear congressional intent to protect both archaeological sites and American Indian religions.

d. The state interests in this case do not outweigh tribal and federal interests

Oregon has a duty to preserve and protect the cultural heritage of the state that is embodied in archaeologically significant objects and sites. Or. Rev. Stat. § 358.910(2). The State also has an interest in protecting items of cultural patrimony and sacred objects. Or. Rev. Stat. § 358.905(1)(h), (k). Based on the language in Oregon law, the State purports to have the same goals as the federal government in protecting archaeological and historical sites and objects. However, the State's interest in this situation cannot be given the same weight as the federal interests in the same because the State is not actually protecting these objects in furtherance of these goals. The reason Respondent cut down a tree was to save "crucial tribal objects" because the state had done nothing to stop the acts of vandalism. (R. 2). When we balance the state interests against the expansive tribal and federal interests, the scale is weighed in favor of federal preemption of state criminal jurisdiction.

While state enforcement of Oregon statutes which protect archaeological sites may indeed further the federal objectives, the failure to enforce them actually impedes the numerous federal objectives. This creates a conflict that allows for the doctrine of preemption to apply and invalidate State law. The Court in *Wyeth v. Levine* found the federal statute did not preempt state tort liability where the state would further the federal regulatory goal. 555 U.S. 555 (2009). Here, federal objectives should preempt state law because they do not further the federal government's policies outlined in the numerous statutes regarding archaeological and historic sites and sacred objects.

2. Even when ignoring tribal interests, the state laws still conflict with federal law

If the Court is unconvinced that federal and tribal interests outweigh state interests, the state laws are still preempted because they conflict with federal laws. As described above, the conflict arises when the State does not act to protect concurrent state and federal interests. However, conflict also arises when it is not possible to adhere to both the federal and state laws. The issue before the Court in *McDermott v. Wisconsin* was whether it was physically impossible to comply with both federal and state laws. 228 U.S. 115, 136-37 (1913). The Court determined that when it is impossible to comply with both state and federal laws, the federal law will triumph. *Id.*

In the present case, the American Indian Religious Freedom Act allows for Indians to access their sites and to use and possess sacred objects. 42 U.S.C. § 1996. NAGPRA defines "sacred objects" as specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. 25 U.S.C. § 3001(3)(C). These sacred objects can be returned to lineal descendants and culturally affiliated Indian tribes. 25 U.S.C. § 3002(a)(1). These federal statutes read together allow for a tribe to access their sacred sites and possess their sacred objects. If the state were following the federal standards, Respondent and the Nation would be able to take possession of the sacred carvings.

Under Oregon state law, a sacred object is an object that is demonstrably revered by any ethnic group, religious group or Indian tribe as holy; is used in connection with the religious or spiritual service or worship of a deity or spirit power; or was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion. Or. Rev. Stat. § 358.905(1)(k). Sacred objects and objects of cultural patrimony

that are seized as contraband but not claimed by a person shall be returned to the appropriate tribe for reinterment or other disposition. Or. Rev. Stat. § 358.924(4)(b). Oregon's definition of Indian tribe includes those recognized by the Secretary of the Interior, listed in the Klamath termination Act, or listed in the Western Oregon Indian Termination Act. Or. Rev. Stat. § 97.740(4). As discussed above, however, it would be difficult under these laws for Respondent or Respondent's tribe to have access to their sacred trees. Further evidence of this conflict is the fact that Respondent was charged with a crime while trying to protect his tribe's sacred objects, a goal that is in line with federal standards.

Essentially, the conflict here is that, under state law, a non-federally recognized tribe cannot use and possess their sacred objects while under federal law, Indians are allowed to access, possess and use their sacred sites and objects. The Cush-Hook Nation qualifies as an ethnic group that reveres these trees and sacred symbols as integral to their cultural sustainability. While an ethnic group may consider an object to be sacred and vital to their religious practices, the Oregon laws do not recognize ethnic groups as having a protected right in keeping their sacred objects. The Court has been clear that when a state law forbids something which a federal law requires, the federal law will preempt the state's jurisdiction. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). In this case, the Oregon statute prohibits the Nation and Respondent from access to their sacred objects, something which is required by multiple federal regulations.

It is impossible for the Native people of Oregon to comply with the federal laws protecting access to religious sites and objects and the Oregon laws which criminalize

such behavior. When it is impossible to comply with both federal and state law, this Court has been clear in its determination that under the supremacy clause of the Constitution, federal law must trump. U.S. Const. art. VI, cl. 2. Oregon, therefore, cannot have criminal jurisdiction over the trees in Kelley Point Park until their laws are in compliance with federal regulations.

B. The Oregon state laws in question violate the First and Fourteenth Amendments of the U.S. Constitution

The American Indian Religious Freedom Act doesn't give a specific cause of action but Indians can still challenge state laws as being unconstitutional for failing to meet strict scrutiny requirements. 42 U.S.C. § 1996. Enforcing Oregon statutes violates the Free Exercise Clause of the First Amendment because it substantially burdens Respondent's religious rights of exercising his beliefs and accessing his sacred sites. U.S. Const. amend. I. The state laws in question also violate the Equal Protection clause of the Fourteenth Amendment because Respondent and other members of the Cush-Hook Nation are treated differently than members of federally recognized tribes in the same geographic location. U.S. Const. amend. XIV.

1. The United States Constitution protects freedom of religion

Respondent in this case took the carving from Kelley Point Park in order to protect an object that has huge religious significance for himself and his people. (R. 2). The laws under which he was prosecuted are punishing his attempt to worship freely and are unconstitutionally targeting both Respondent and members of his unrecognized tribe. The laws violate the First Amendment right to free exercise of religion and violate Respondent's right to equal protection under the law.

The Free Exercise clause of the First Amendment states that Congress cannot make a law respecting the establishment of a religion, or prohibiting an individual's free exercise of a religion. U.S. Const. amend. I. The right to the free exercise of religion is incorporated to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303-05 (1940). In addition, the Court has held that Indian religious rights and freedoms must be protected. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-52 (1988). Or. Rev. Stat §§ 358.905-358.961 prohibits Respondent and members of his tribe from protecting their religious objects and from worshiping according to their long-held beliefs.

Respondent understands that there is "a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). The Court held in *Employment Division, Oregon Department of Human Resources v. Smith* that laws of general applicability do not violate the free exercise clause unless they also violate another constitutional provision. 494 U.S. 872, 881-82 (1990). However, in this case, there is a hybrid claim to be made. Respondent's rights to access and possess the religious objects are being denied because he is not a member of a federally recognized tribe. He is being denied his religious freedom rights, essentially because of his political and racial status. This is a violation of the Fourteenth Amendment right to equal protection under the law.

2. Respondent is being singled out because of his tribe's status and Oregon law unduly burdens the Cush-Hook people

If Respondent's tribe was a federally recognized tribe, then they would be able to apply for a permit to access their religious objects. Or. Rev. Stat. §§ 390.235-390.240 deal with historical materials and the requirements for an archaeological permit. A

permit is not effective unless approved by the state agency that manages the public land and approved by the appropriate Indian tribe. Or. Rev. Stat. § 390.235(1)(a)-(c). If the archaeological site in question is associated with a historic native Indian culture, the State Parks and Recreation Director must consult with the land managing agency, the Commission on Indian Services, and the most appropriate Indian tribe before issuing a permit. Or. Rev. Stat. § 390.235(1)(f). A permit may be issued to a person conducting an excavation for scientific or educational purposes; to a qualified archaeologist; or to a qualified archaeologist sponsored by a higher learning institution, private firm, or Indian tribe. Or. Rev. Stat. § 390.235(2). Any archaeological materials recovered by a person with a permit, except sacred objects and objects of cultural patrimony, are under the stewardship of the State to be curated by the Oregon State Museum of Anthropology. Or. Rev. Stat. § 390.235(3). Oregon's use of the term "Indian tribe" indicates that the State intends to exclude non-federally recognized tribes from the permit process. This means that Respondent is prohibited from practicing his religion because of his status as a member of an unrecognized tribe

The Court has also held that a law that is neutral on its face can be biased in its application when it unduly burdens the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972). In this case, the law against the removal of historical and sacred objects unduly burdens all Cush-Hook people from the free exercise of religion because the tribe does not live where the trees are. This law may seem neutral, just as the law which stated all children attend school until age sixteen seemed neutral, but it places a huge burden on the Cush-Hook people. The tribe does not have consistent access to

their sacred trees and have no way of applying to the State for return of the objects, as discussed above.

3. The Oregon laws in question do not survive strict scrutiny

The Court in *Smith* held that if a defendant can show a hybrid claim for religious freedom, the law receives strict scrutiny. 494 U.S. at 883. In *Yoder* the Court also held that laws that unduly burden free exercise also receive strict scrutiny. 406 U.S. at 215. Under strict scrutiny the government must show a compelling government interest in the law and show that the law uses the least restrictive means to achieve that goal. *Toyosaburo Korematsu v. United States,* 323 U.S. 214, 216 (1944). Even if the state can show a compelling government interest in the protection of historical, archaeological, and sacred objects, the means by which they are achieving that interest are not the least restrictive. Oregon has provided exemptions for the statutes under which Respondent was convicted but Respondent does not qualify for one of these exemptions. As the Court stated in *Bowen,* when a State has individual exemptions to a law, it may not refuse to extend that system of exemptions to cases of religious hardship without a compelling reason to justify the refusal. 476 U.S. 693, 708. There is no compelling reason in this case to refuse Thomas Captain the right to protect his people's religious symbols from vandals. If Captain was a member of a federally recognized tribe he would be permitted to remove the carvings. Respondent is being singled out because of his religious beliefs and his tribe's status as unrecognized.

The State of Oregon may not have criminal jurisdiction over the trees in Kelley Point Park if enforcement of those criminal laws would violate the Constitution. In this case, Respondent's right to the free exercise of religion and his right to equal protection

under the law have been violated. The laws under which Respondent was convicted are unconstitutional and his conviction should be overturned.

CONCLUSION

Thomas Captain is not guilty of trespass and cutting down a tree in a state park because the Cush-Hook Nation still holds title to Kelley Point Park. The Doctrine of Discovery, under which the State of Oregon and the federal government are attempting to claim title, is a legal precedent which should be overturned by the Court. The Doctrine is racist and relies upon a Euro/Christian centric view of history and has done nothing but justify the systematic removal and genocide of Indian people. The Doctrine should be overturned and full title to Kelley Point Park should be vested in the Nation.

In the alternative, even under the Doctrine of Discovery, the Nation still holds aboriginal title and the right to occupy Kelley Point Park. Aboriginal title is possessed by a tribe until that title is extinguished by the federal government and at no point was the Nation's aboriginal title extinguished. The land was never purchased from the Nation because the Cush-Hook Treaty was never ratified and no payment was every made to the tribe. The land was never conquered because the Nation relocated only on the false word of the government that the treaty would be fulfilled.

Finally, the State of Oregon only has title to Kelley Point Park because they purchased the land from people who never had valid title in the first place. The Meeks fraudulently obtained title under the Oregon Donation Land Act and therefore their title to the land was invalid. Oregon could not, therefore, have bought the land to create a state park and Captain could not be guilty of trespassing and cutting timber in a state park.

Regardless of who owns Kelley Point Park, Thomas Captain is also not guilty of desecrating an archaeological and historical site because the State of Oregon does not have criminal jurisdiction over the trees in Kelley Point Park. The Oregon laws are

preempted by federal law because the tribal and federal interests in the trees outweigh any potential state interest. Even without considering the tribal interests, the state laws are still preempted because they conflict with federal law and prevent the federal government from achieving its objectives in protecting Indian archaeological and sacred sites.

Furthermore, the Oregon state laws in question violate the First and Fourteenth Amendments of the U.S. Constitution. The laws prevent Respondent and the whole Cush-Hook Nation from the free exercise of their religion. The law treats the Cush-Hook people different from other citizens because they are not a federally recognized tribe and therefore cannot apply for a permit to remove the trees. This denies Respondent equal protection under the law. Oregon does not have criminal jurisdiction over the religious objects of the Cush-Hook Nation when that jurisdiction would violate Respondent's Constitutional rights.

Respondent respectfully requests that the Court uphold the lower court's decision that the Cush-Hook Nation has title to Kelley Point Park and overturn the lower court's decision that Oregon has criminal jurisdiction over the archaeological objects in the park.