

11-0274

The Supreme Court of the United States

STATE OF OREGON
PETITIONER

v.

THOMAS CAPTAIN
RESPONDENT AND CROSS-PETITIONER

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

RESPONDENT'S BRIEF ON THE MERITS

Team 35

COUNSEL FOR RESPONDENT

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PRIOR OR RELATED APPEAL

None.

QUESTIONS PRESENTED

WHETHER THE CUSH-HOOK NATION HAS ABORIGINAL TITLE OVER THE LAND IN QUESTION BECAUSE IT WAS NEVER EXTINGUISHED BY THE U.S. SENATE.

WHETHER THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THOMAS CAPTAIN WAS GUILTY OF DESECRATING AN ARCHEOLOGICAL SITE BECAUSE OREGON DOES NOT HAVE CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION.

STATEMENT OF THE PROCEEDINGS

In 2011, Thomas Captain, a Cush-Hook citizen, moved to the land in question to reassert his Nation's ownership of the land. Brief for *Oregon v. Captain*, (2011) (No. 11-0274) at 2. *Id.* In order to restore and protect a vandalized image that had been carved by one of his ancestors, Thomas cut the tree down and removed the section of the tree that contained the image. *Id.* When he was returning to his Nation's location in the coastal mountain range, Oregon State troopers arrested him and seized the image. *Id.*

The State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961. and Or. Rev. Stat. 390.235-390.240 (Historical materials). *Id.* Thomas Captain consented to a bench trial. *Id.* at 3.

The Oregon Circuit Court for the County of Multnomah held that the Cush-Hook Nation still owned the land within the land in question and found Thomas Captain not guilty for trespass or for cutting timber without a state permit. *Id.* at 4. However, the court found him guilty for violating Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq. for damaging an archaeological site and a cultural and historical artifact and fined him \$250. *Id.*

The State and Thomas Captain appealed the decision. *Id.* The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. *Id.* After the Oregon Supreme Court denied review, the State filed a petition and cross petition for certiorari and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court. *Id.*

STATEMENT OF THE FACTS

Since time immemorial, the Cush-Hook Nation resided in the woodlands of Oregon. Brief for *Oregon v. Captain*, (2011) (No. 11-0274) at 1, 3. The Nation fished from the riverbanks and grew crops, harvested indigenous plants, hunted within the territory. *Id.* at 1. The Nation resided on the land in question not as nomads but as a stabilized culture, with a village and longhouses structures. *Id.* Further, the Nation interconnected the trees into its religion; evidence of the Nation's shaman's sacred totem carvings can still be found today in Kelley Point Park. *Id.* at 2.

Confirmation of the Nation's existence on the land in question comes from the Clark Journals of 1806. In 1806, Clark of the Meriwether Lewis and William Clark came across an American Indian tribe known as the Multnomah Indians while they were fishing. *Id.* After Clark established peace with this tribe, the Multnomah took Clark to the Cush-Hook Nation's territory; it was through the Multnomah that Clark was first introduced to the Nation's chief. *Id.* While in the Nation's village, Clark documented the tribe's habits, culture, traditions, village structure, and religious practices. *Id.*

Clark established the Cush-Hook Nation was a peaceful American Indian tribe, eventually presenting the tribe's chief with President Thomas Jefferson's Peace Medal. *Id.* at 1. The Nation's acceptance of the medal symbolized to the United States it was willing to participate in politics and trade with Euro-American settlers while symbolizing to the Nation it would later become federally recognized as a tribal nation. *Id.* Because of the symbolism inherent in the medals, they quickly became known as "sovereignty tokens". *Id.*

In 1850, Anson Dart, the Superintendent of Indian Affairs for the Oregon Territory, discovered the Nation's village was positioned on farming land valuable to Euro-American

settlers. *Id.* To secure the land, Dart entered into a treaty with the Nation, moving the village sixty miles west of its homelands. *Id.* at 1-3. Later, in 1853, the U.S. Senate refused to honor the Cush-Hook Nation Treaty, even after the Nation had honored the treaty for three years. *Id.* The Nation thus did not receive the compensation promised by Dart in exchange for the Nation's land. Further, when the Senate reneged on the treaty, it also refused the Nation federal recognition. *Id.* at 2. Currently, the Nation's people maintain a desolate existence in the lands occupied in the foothills. *Id.* at 2.

Around the time of the Cush-Hook Nation Treaty, the Oregon Donation Land Act was created. The Act of 1850 provided a system for Euro-American settlers to acquire fee simple title to acreage on newly acquired Oregon lands. *Id.* The Act provided that "every white settler' who had 'resided upon and cultivated the [land] for four consecutive years' be granted a fee simple title." *Id.* Joe and Elsie Meek, Euro-American settlers, applied for fee title to the 640 acres in question under the Act. The Meeks however, did not follow the Act, neither cultivating the land nor staying on the 640 acres for the required four consecutive years. *Id.* at 2, 3.

In 1880, descendants of the Meeks sold the 640 acres in question to the State of Oregon. It was with these 640 acres that Oregon created the State park Kelley Point Park. *Id.* at 1. The Park covers the entirety of ancient Cush-Hook Nation land. *Id.* In 2011, miscreants began defacing and selling sacred totem symbols carved into the trees by ancient Nation people. *Id.* at 2. The sacred images have survived 300 years and still carry religious significance for the Nation people. The State of Oregon has done nothing to prevent the destruction of these religiously significant images, leaving the Nation's ancestral artifacts deprived of protection. *Id.*

Thomas Captain, a member of the Cush-Hook Nation tribe, moved from the Nation's reserved lands in the foothills, to the Park to protect his tribe's sacred artifacts and reassert the Nation's ownership over the land. To restore a section of a sacred image, Captain cut-down a tree and removed the damaged image so he could transport it back to the foothills. *Id.* at 2, 3. While transporting the sacred image, Oregon State Troopers arrested Captain and the image was taken into their possession. The State of Oregon charged Captain with "trespass[ing] on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site." *Id.* at 2.

Thomas Captain now petitions for certiorari on the grounds that the Cush-Hook Nation owns aboriginal title to the land Kelley Pointe Park sits on. Captain further petitions for certiorari on the grounds that the State of Oregon does not have criminal jurisdiction to control the uses of, and to protect archeological, cultural, and historical objects on the land in which the Cush-Hook Nation has aboriginal title to, notwithstanding its purported ownership by a non-federally recognized American Indian tribe.

SUMMARY OF THE ARGUMENT

The Cush-Hook Nation has aboriginal title over the land in question because the U.S. Senate never extinguished it. Historically, the Cush-Hook Nation lived on the land in question since time immemorial, and in that time, the Nation cultivated the land, maintained a village, and carved sacred totems into the forest. Therefore, the Cush-Hook Nation has established aboriginal title to the land in question through actual, exclusive, and continuous use and occupancy of the land prior to the arrival of Euro-American settlers. The failure of the U.S. Senate to ratify the Cush-Hook Nation Treaty of 1850 establishes that the United States Senate lacked the clear and unambiguous intent necessary to extinguish the Cush-Hook Nation's Aboriginal Title over the land in question. Moreover, the United States' grant of fee simple title to Joe and Elsie Meek under the Oregon Land Donation Act did not extinguish the Cush-Hook Nation's Aboriginal Title to the land in question.

The trial court erred when it concluded that Thomas Captain was guilty of desecrating an archeological site because Oregon does not have the criminal jurisdiction to control the uses of, and to protect, archaeological cultural, and historical objects on the land in question. The Cush-Hook Nation retains Aboriginal Title over the land in question; therefore, the burden is shifted to Oregon to assert criminal jurisdiction. The Statutes that Oregon seeks to enforce, Or. Rev.Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 et seq., are regulatory and therefore, Oregon does not have criminal jurisdiction. Furthermore, the discriminatory application of the Oregon laws protecting archeological and historic sites render them inapplicable against American Indian Citizens.

ARGUMENT

I. THE CUSH-HOOK NATION HAS ABORIGINAL TITLE OVER THE LAND IN QUESTION BECAUSE IT WAS NEVER EXTINGUISHED BY THE U.S. SENATE.

American Indian tribes can acquire interests in land through what is known as original Indian title or aboriginal Indian title. *Cohen's Handbook of Federal Indian Law* §15.04, at 999 (Nell Jessup Newton ed. 2012) [hereinafter, *Cohen's Handbook*]. An American Indian tribe claims aboriginal title not by formal conveyance or treaty but through possession and exercise of sovereignty over the lands in question. *Sac & Fox Tribe of Indians of Okl. v. United States*, 383 F.2d 991, 998-999 (Ct. Cl. 1967). Possession and exercise must be established through “actual, exclusive, and continuous use and occupancy ‘for a long time’ prior to the loss of the property.” *Id.*

Aboriginal title became a developed legal structure in 1823 with *Johnson v. M'Intosh*. *Johnson v. M'Intosh*, 21 U.S. 543, 573 (1823). The Court in this case adopted the Doctrine of Discovery, wherein European nations claim the right of ownership of lands from American Indian tribes based on discovery, conquest, or consent from the tribes. *Id.* at 562. Through discovery European nations first asserted the exclusive right to grant property rights to Euro-American settlers. *Id.* Pursuant to this doctrine, the Court held that American Indian tribes did not possess property rights to the lands occupied; however, the Court acknowledged sacred tribal interest held by the tribes “title of occupancy”, “right of occupancy”, or “right of possession”. *Id.* at 548, 562. *Cohen's Handbook* §15.04, at 1000. The right of possession developed in *Johnson v. M'Intosh* is aboriginal title as recognized today; presently, American Indian tribes have both a legal and a just claim to retaining possession of land through this occupational title. *Cohen's Handbook* §15.04, at 1001.

Whether an American Indian tribe has established aboriginal title exists as a question of fact to be determined by a court of law. *Confederate Tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 341 (9th Cir. 1996). Further, aboriginal rights are not dependent on Congressional act or treaty, but rather it is an American Indian tribe's burden to prove the title exists. *Native Village of Eyak v. Blank*, 688 F.3d 622 (9th Cir. 2012). The Cush-Hook Nation's aboriginal title over the land in question should be recognized because title has never been extinguished due to the U.S. Senate's refusal to ratify the Cush-Hook Nation Treaty of 1853. Brief for *Captain*, (2011) at 1, 3. Furthermore, without extinguishment, the grant of land to the Meeks under the Oregon Donation Land Act of 1850 is void. Successively, the descendants of to the state of Oregon in 1880 is further voided lac title. *Id.* at 4. In consideration of the Cush-Hook Nation's facts, aboriginal title is established.

A. The Cush-Hook Nation Lived on the Land in Question Since Time Immemorial, Cultivating the Land, Maintaining a Village, and Carving Sacred Totems into the Forest; Therefore Nation has Established Aboriginal Title to the Land in Question Through Actual, Exclusive, and Continuous Use and Occupancy of the Land Prior to the Arrival of Euro-American Settlers.

The acknowledgement of aboriginal title requires actual, exclusive, and continuous use and occupation of lands prior to loss. 41 A.L.R. Fed. 425 (1979). *Sac & Fox Tribe of Indians of Okl.*, 383 F.2d 998-999 (1967). An American Indian tribe can establish actual, exclusive, and continuous use and occupancy of its land by showing "way of life, habits, customs and usages of the Indians who are its users and occupiers". *Native Village of Eyak*, 688 F.3d 622 (2012). Additionally, to prove true aboriginal title a tribe must be able to show it used and occupied the land in question to the exclusion of all other tribes. *U.S. v. Pueblo of San Ildefonso*, 513 F.2d 669 (Ct. Cl. 1975).

The Ninth Circuit has maintained that an American Indian tribe must show it used and occupied the land in a manner consistent with the custom and usage practices of ancestral occupiers. *Native Village of Eyak*, 688 F.3d 623 (2012). In *Native Village*, Alaskan Native villages brought suit against the Secretary of Commerce claiming aboriginal title to land village members fished and hunted before European settlers made contact with the village. *Id.* at 621. In 1993, the Secretary implemented a regulation on fishing with the Native Village's region, thus prompting a dispute over land interests. The court in the case adopted a liberal approach to analyzing the Native Village's historical use and occupancy of the land. *Id.* at 623. Factors such as the village's heavy reliance on the region for substance hunting and fishing practices convinced the court that the Native Village "satisfied the continuous use and occupancy requirement for establishing aboriginal rights". *Id.* at 620.

Applying the approach of the Ninth Circuit in *Native Valley* to the present case highlights the fact that the Cush-Hook Nation has established continuous use and occupancy of the land now in question. William Clark illustrated the Nation's ancestral use and occupancy of the land in his journals. Brief for *Captain*, (2011) at 1, 3. Similar to the Alaskan Native villagers, the Nation tribal members are known to have previously resided on lands in Oregon since time immemorial, being present when Meriwether Lewis and William Clark first made contact with American Indian tribes in 1806. *Id.* the court in *Native Valley* found habits and customs such as using the land for substance particularly relevant when assigning aboriginal title to the Native Valley villagers. *Native Village of Eyak*, 688 F.3d 623 (2012). Therefore, the court should find the Nation maintained continuous use and occupancy of the land in question necessary to establish aboriginal title.

An additional requirement upheld by the Ninth Circuit is the necessary showing of ‘exclusive’ use and occupancy when establishing aboriginal title. *Pueblo of San Ildefonso*, 513 F.2d 669 (1975). In *Native Village*, the Alaskan Native villagers were unable to show exclusive use and occupancy over the land at issue. The villagers ancestral habit was to migrate up and down the land at issue, using the seasons to create opportune hunting and fishing conditions. *Native Village of Eyak*, 688 F.3d 623 (2012). The court in th case focused on the villager’s inability to show continuous dominion and full control over the land at issue. *Id.* Furthermore, the villagers were unable to provide persuasive evidence convincing the court of use and occupancy of the lands to the exclusion of all other tribes. *Id.* at 626.

The Ninth Circuit’s analysis of exclusivity in *Native Village* is distinguishable from the Cush-Hook Nation’s case. For instance, the Cush-Hook Nation exercised continuous dominion and control over the land in question through the use of its village, longhouses, religious totem structures throughout the forest, and general presence year round. Brief for *Captain*, (2011) at 2. Furthermore, other American Indian tribes in the area knew of the Nation’s territorial boundary fact is evident from Clark’s journal entry depicting his interaction with the Multnomah Indians who first directed him to the Nation’s village. *Id.* at 1. The Multnomah’s understanding of the Nation’s village boundary is indicative of the Nation’s exclusive dominion and control of the land in question. Thus, the court should find the Nation maintained exclusive use, dominion, and control of the land in question necessary to establish aboriginal title.

B. Failure to Ratify the Cush-Hook Nation Treaty of 1850 Shows the United States Senate Lacked the Clear and Unambiguous Intent Necessary to Extinguish the Cush-Hook Nation’s Aboriginal Title Over the Land in Question.

It is the traditional view of courts to require “plain and unambiguous” intent to extinguish American Indian aboriginal title. *Seneca Nation of Indians v. New York*, 382 F.3d 260 (2nd Cir. 2004). Extinguishment can be “expressed on the face of the [instrument] or...clear from the surrounding circumstances”. *Id.* how an American Indian tribe’s aboriginal title has been extinguished. *Id.* at 1465. Extinguishment of aboriginal title terminates all use and occupancy rights between the American Indian tribe and the land. *Confederate Tribes of Chehalis Indian Reservation*, 96 F.3d 341 (1996).

Predominately, the Ninth Circuit has held that American Indian aboriginal title exists at the “pleasure of the United States and may be extinguished by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupation, or otherwise”. . In *Confederate Tribes*, Washington tribal citizens brought suit claiming unextinguished aboriginal rights to lands used for fishing. *Id.* at 336. The tribes occupied Washington lands for fishing before Euro-American settlers came. *Id.* at 337. In 1863, an executive order opening the Tribe’s land up to Euro-American settlement and fishing. *Id.* at 341. The State of Washington argue the executive order expressly show a plain and unambiguous intent to extinguish the Tribe of its aboriginal title. a later Act the 1863 order awarded aboriginal hunting and fishing rights. *Id.* at 343. The court in this case found the 1863 executive order to be an express and unambiguous instrument that adequately extinguished the Tribe’s aboriginal title.

The Ninth Circuit’s scrutiny of extinguishment in *Confederate Tribes* is distinguishable from the Cush-Hook Nation’s case. At first glance the two cases appear similar because Confederate Tribes and the Cush-Hook Nation both initially entered into an agreement with the United States to relinquish aboriginal title to lands. *Id.* at 342. Brief for

Captain, (2011) at 1, 3. The Nation's case differs from the *Confederate Tribes* case most the U.S. Senate refused to honor its treaty with the Nation when it refused to ratify the agreement and did not pay the amount agreed upon in the treaty. Brief for *Captain*, (2011) at 2, 3. Without the treaty, a like instrument that is express on its face, or any action taken by the Senate to show intent to extinguish the Nation's aboriginal title, it cannot be inferred that the Nation's aboriginal title has been extinguished.

A circumstance that easily shows plain and unambiguous intent is the provision of compensation for tribal land in return for the removal of American Indian villages. Although extinguishment of aboriginal title does not create legal obligation to pay just compensation to American Indians, traditionally courts require clear, express, and unambiguous intent to extinguish an American Indian tribe's aboriginal title. *Seneca Nation of Indians*, 382 F. 3d 260 (2004). Once a tribal village has received compensation, courts have rule that aboriginal title has been extinguished. *U.S. v. Dann*, 470 U.S. 39 (1985). In *Dann*, the Shoshone Tribe sought compensation for lost lands and claimed aboriginal title over lands spanning from California to Wyoming. *Id.* at 39-42. In 1951, the Tribe was paid \$26 million to compensate for the loss of lands in several states. *Id.* at 39. With this payment, the government argued that aboriginal title was extinguished. *Id.* The Tribe alleged that aboriginal title still existed on the lands because payment the court held that the the Tribe's trust account counted as payment, thus aboriginal title was extinguished. *Id.*

Applying the Ninth Circuit's methodology in *Dann* to the present case reveals the fact that the Cush-Hook Nation's case is different from that of *Dann*. The U.S. Senate's failure to ratify the Cush-Hook Nation Treaty of 1850 directly resulted in the Nation's failure to receive compensation for lost lands. Brief for *Captain*, (2011) at 1-3. Furthermore, the

Nation's citizens have continued to live without compensation or treaty benefits, maintaining the barest of lifestyles in the Oregon foothills. *Id.* at 2. The Senate's refusal to pay due compensation further highlights an inferred lack of plain and unambiguous intent to extinguish the Nation's aboriginal title over the Kelley Point Park lands.

The U.S. Senate's unilateral decision to ratify the Cush-Hook Nation Treaty of 1850 casts severe doubt on the Senate express intent to extinguish the Nation's aboriginal title. Additionally, the lack of compensation or treaty benefits received by the Nation also weighs heavily toward eradicating any intent the Senate may have had. Inaction by the Senate and failure to ratify the Nation Treaty provides factual support to establish the Nation's aboriginal title still exists over the land in question.

C. The United States' Grant of Fee Simple Title to Joe and Else Meek Under The Oregon Land Donation Act Did Not Extinguish the Cush-Hook Nation's Aboriginal Title to the Land in Question.

Once the Cush-Hook Nation relocated to the Oregon foothills in anticipation of federal recognition and compensation for its lands, its homelands were freed-up for Euro-American settlers. Brief for *Captain*, (2011) at 2. In 1850, the Oregon Land Donation Act, providing a for Euro-American settlers to acquire fee simple title to lands provided resided and cultivated the lands for four continuous years. *Id.* Joe and Elsie Meek were such settlers, applying for 640 acres at the location of the Nation's former village in 1850. *Id.*

The Court has never explicitly enumerated the methods of extinguishing aboriginal title; one method negated however is the grant of American Indian lands to an individual. *U.S. ex rel. Chunie*, 788 F.2d 642 (1986). In *Ringrose*, a coastal band of Chumash Indians alleged the Tribe was never divested of its aboriginal title over California islands. *Id.* at 640. The Chumash claim to have occupied the islands in question since time immemorial. *Id.* at

641. In the 1830-1840's, the Mexican government conveyed the island land in question to individuals. *Id.* The Chumash argue the government's conveyances failed to extinguish its aboriginal title to the islands he court held that a government could not extinguish aboriginal title by granting lands to individuals. *Id.* at 642.

Applying the approach of the Ninth Circuit in *Ringrose* to the present case stresses the fact that the U.S. Senate did not extinguish the Cush-Hook Nation's aboriginal title grant Joe and Elsie Meek fee title to the land at issue. The Nation maintained aboriginal title. Brief for *Captain*, (2011) at 2. the Chumash, the United States conveyed title to individuals Joe and Elsie Meeks. *Id.* the United States' conveyance of title to the Meeks *U.S. ex rel. Chunie*, 788 F.2d 642 (1986). Accordingly, the court should find the U.S. Senate's failure to ratify the Cush-Hook Nation Treaty of 1850 never extinguished the Nation's aboriginal title; additionally, because the Nation maintains aboriginal title over the lands in question, the United States cannot grant land to Meeks in as a means to extinguish this title.

II. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THOMAS CAPTAIN WAS GUILTY OF DESECRATING AN ARCHEOLOGICAL SITE BECAUSE OREGON DOES NOT HAVE CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION.

The Cush-Hook Indian Nation still retained its sovereignty and for this reason Oregon must superficially be granted authority to exercise jurisdiction over it. Since "jurisdiction is a matter of law . . . such issues [are reviewed] de novo when the location of a crime is not in dispute. *State v. Jim*, 230 P.3d 1080, 1082 (Wash. App. Div. 3 2010) (Citing *State v. Eriksen*, 216 P.3d 382 (2009)).

A. The Cush-Hook Nation Retains Aboriginal Title Over the Land in Question Therefore Shifting the Burden to Oregon to Assert Criminal Jurisdiction.

When Thomas Captain returned to the foothills of his ancestors, he did so to reassert the Nation's ownership in the land and reclaim the sacred artifacts that belong to the Nation. Brief for *Captain*, (2011) at 2. American Indian Religions are different from other religions in that they are closely tied to the land. *Cohen's Handbook of Federal Indian Law* § 14.03(2)(c), at 968 (Nell Jessup Newton ed., 2012). The importance of the land in American Indian religions has led to an abundance of case law due to a significant number of the American Indian tribes attempting to assert ownership rights in order to protect their religious freedoms. However, the *Lyng* case has made these assertions exceptionally difficult. *Cohen's Handbook* § 14.03(2)(c), at 970. To counteract the draconian nature of the *Lyng* case, “[c]ongress amended the National Historic Preservation Act in 1992 to require federal agencies to consult with Indian tribes . . . whenever undertakings would affect historic properties of religious and cultural significance.” *Id.* This Act has reflected a more flexible federal public policy in favor of expanding some protections of American Indian culture and religion, which is so interconnected to the lands that American Indian citizens no longer have rights to because the land rights have been extinguished.

The state must prove that an American Indian Tribe is no longer sovereign. In *State of Idaho v. Andrus*, 720 F.2d 1461, 1465 (9th Cir. 1983), the court held that the state has the burden of demonstrating “clear congressional intent” to extinguish the Tribe's legal interest in the land. Additionally, the state must show that “[c]ongressional intent to abrogate rights reserved in American Indian treaties and agreements must be expressed clearly and unequivocally.” *Id.* at 1464.

American Indian tribal sovereignty is not entirely depended upon official federal recognition. In *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 558 (9th Cir. 1991), the court held that American Indian sovereignty extends from the historical roots of the Indian tribe and tribal sovereignty remains and exists “unless and until affirmatively divested by Congress.”

Generally, an American Indian tribe cannot be regulated by a state due to its sovereign status. In *Hester v. Redwood County*, CIV. 11-1690 ADM/JJK, 2012 WL 3230178 (D. Minn. 2012) (Citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)) the court held that because the American Indian tribes are considered to have sovereign status, the states generally cannot regulate or prescribe the activity of the American Indian citizens within Indian their territory. However, in 1953, Congress enacted Public Law 83-280 which delegated federal jurisdiction to five states over most crimes and many civil matters throughout most of the Indian Country within their borders. *Cohen’s Handbook at 537*. Oregon, is among the states specifically designated such jurisdiction.

Here, as stated earlier, the Senate refused to ratify the Cush-Hook Nation Treaty. Brief for *Captain*, (2011) at 2. This refusal to ratify the treaty indicates that the Senate did not clearly and unequivocally extinguish title in the land. Moreover, Congress has not in any way divested the Nation of its sovereignty. Historically, the Nation has maintained independent and sovereignty as expressed by Clark when he recorded his encounters with the Nation. Brief for *Captain*, (2011) at 1. Clark’s record indicates that this tribe had its own unique language, culture, and history of self-governance. *Id.* Congress has effectively not done anything to divest the Nation of its sovereignty. Because the constitution specifically

states that Congress has the sole authority in legislating over American Indian tribes, Congress must specifically confer jurisdiction to a state for a state to exercise it.

Furthermore, the Meeks did not rightfully obtain title to the land in question, and thus could not grant title to the land to the State of Oregon. Brief for *Captain*, (2011) at 1, 3. Therefore, Oregon does not have title over the land and in order to exercise jurisdiction over Indians on the land, they need to establish jurisdiction either pursuant to the grant of jurisdiction in Public Law 280 or pursuant some other act of Congress, or if the defendant is outside of his nation's territory, prove that they are applying it to Indians in a non-discriminatory manor.

B. The Oregon Statues Protecting Archeological and Historical Sites are Should be Classified as a Regulatory Laws Not Criminal Laws Leaving Oregon Without Criminal Jurisdiction Over Thomas Captain.

Although Oregon is a listed state in 18 U.S.C. § 1162(a) (2006), the jurisdiction conferred does not apply in this circumstance. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Cabazon and Morongo Bands of Mission Indians alleged that California had no authority to apply ordinances regulating gambling inside reservations. The court held that Public Law 280 “was not intended to effect total assimilation of Indian tribes into mainstream American society.” Justice White writing for the majority noted the importance of tribal sovereignty for the sustainment of tribal culture and values, and further held that when a state seeks to enforce one of its laws within an American Indian reservation under the state's authority pursuant Public Law 280, it must be determined whether the law is criminal or civil in nature. *Id.* at 208. Additionally, Justice White held that the test to determine if a state has jurisdiction to enforce a law under the jurisdictional grant of Public Law 280 is “if the intent . . . is generally to prohibit certain conduct, it falls within . . . [the]

grant of criminal jurisdiction, but if the state law generally permits the conduct . . . subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement.” *Id.* at 209.

In the present case the State of Oregon is prosecuting Thomas Captain under its criminal jurisdiction pursuant to Public Law 280. However, according to the language of Or. Rev. Stat. § 358.920(c)(1)(A)(2012), “[a] person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit.”

This language indicates that the actual crime that Oregon is charging Thomas Captain with is lack of a permit to excavate, alter or destroy an archeological site or object. Here, the law is plainly meant to regulate an activity as opposed to prohibit it outright. The removal of an archeological artifact is not prohibited outright, it is only prohibited when the individual who is removing it, is doing so without a permit. In this way the case is similar to *California v. Cazabon* in that like the gambling regulations this law is primarily regulatory as it does not seek to be a blanket ban on excavations or removal of artifacts but is instead banning doing so without a permit. Since the law seeks not to prohibit the activity, but to instead control or regulate it cannot properly be said to be criminal in nature but is instead civil and regulatory as per the definition supplied by Justice White in *California v. Cabzon*. Since the law is regulatory in nature, Oregon cannot claim jurisdiction within Public Law 280. Since Oregon cannot rely on asserting jurisdiction through Public Law 280, it must instead attempt to assert jurisdiction by claiming to do so outside of Indian lands and in a non-discriminatory fashion.

C. The Discriminatory Application of Oregon Laws Render them Inapplicable Against American Indian Citizens.

State laws have been held to apply to American Indian citizens going beyond the boundaries of their territory so long as there is no express federal law in the contrary, and that the state law is non-discriminatory in its applications to all citizens of the state. In, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), the court held that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”

According to Or. Rev. Stat. § 358.940(2) (2012), “[a]ny native Indian sacred object . . . shall be reported to the appropriate Indian tribe and . . . [t]he appropriate Indian tribe, with the assistance of the State Historic Preservation Officer, shall arrange for the return of any objects to the appropriate Indian tribe.” Additionally, Or. Rev. Stat. § 358.945(2) (2012) provides that “[i]f a sacred object or object of cultural patrimony is recovered on any land, the State Historic Preservation Officer shall assist the appropriate group to repossess the object”. Furthermore, Or. Rev. Stat. Ann § 358.945(4) (2012) states that a “[f]ailure to notify the appropriate Indian tribe as required by subsection (1)(b) of this section is a Class B misdemeanor.”

Here, Oregon recognizes that the site is one of cultural and historical significance to Cush-Hook Nation tribal members as is evident by the state’s attempt to designate the area protected under these statutes. However, the state has not arranged for the return of these objects to the Nation from which they belong, which is only the Nation. Oregon does not assert that Euro-American settlers created these items; nor does Oregon assert that these items belong to another tribe. Therefore, the state has not carried out the letter of its own

law, to the detriment of the tribe. Since Thomas Captain took the totems with the intention of bring them back to the tribe for repair, he is arguably carrying out the true intention of the law at hand, even if he was doing so without realizing it.

Additionally, others, presumably non-members of the Cush-Hook Nation have defaced the items. There is no evidence in the record that Oregon has prosecuted any non-Indian actor under these laws in regards the land and artifacts in question. Therefore, Oregon has been applying the law in a discriminatory fashion and cannot exercise jurisdiction over Thomas Captain as per the holding in *Mescalero Apache Tribe v. Jones*.

The Cush-Hook Nation has maintained its sovereignty because Congress has not specifically divested them of it. Since Public Law 280 does not apply in this case because the statute is regulatory and not actually criminal Oregon has limited means of asserting its jurisdiction. However, Oregon has not applied these regulatory laws in a non-discriminatory fashion. Fort these reasons, the decision of the lower court holding that Oregon had criminal jurisdiction should be overturned.

CONCLUSION

Throughout this analysis, the Cush-Hook Nation's habits, customs, usage of the land, and the brief acknowledgement of the occupiers of the land in question has provided factual support to show evidence of aboriginal title. Thus, the decision of the Oregon Circuit Court establishing that the Cush-Hook Nation owns the land in question should be upheld. However, since the factual evidence supports that the statutes that Oregon seeks to enforce are regulatory and are not applied in a non-discriminatory way, Oregon does not have jurisdiction. Therefore, it was an error by the Oregon Circuit Court to find Thomas Captain

guilty for damaging an archeological site and a cultural and historical artifact. Brief for *Captain*, (2011) at 4.