No. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent/Cross-Petitioner.

ON WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR THE PETITIONER

Team 36

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QUESTIONS PRESENTED

I. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park?

II. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe?

STATEMENT OF THE CASE

I. Statement of the Proceedings

The State of Oregon brought criminal charges against Thomas Captain for: 1) trespass on state lands, 2) cutting timber in a state park without a permit, and 3) desecrating an archaeological and historical site under the statutes, Or. Rev. Stat. 358.905 – 358.961 and Or. Rev. Stat. 390.235 – 390.240. *Record* (hereinafter, "*Rec.*") pg. 1 and 2. Thereafter, Thomas Captain consented to a bench trial. *Id.* at 2.

The Oregon Circuit Court (circuit court is the name designation for trial courts in the State of Oregon) for the County of Multnomah, thereafter, made several findings of fact and law. *Id.* at 3 and 4. Apart from the Statement of the Facts below, the finders-of-fact found that expert witnesses established that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans. The fact-finders further found that the Cush-Hook Nation is not on the 1994 tribal list act, which is a compiled list of federally recognized Indian tribes. *Id.* at 3.

Thereafter, the Oregon Circuit Court for the County of Multnomah made several conclusions of law. *Id.* at 3 and 4. First, the court determined that Congress erred in the Oregon Donation Land Act of 1850 by declaring all lands in the Oregon Territory as public lands of the United States. *Id.* at 3. Second, the court found that the treaty made between

Anson Dart and the Cush-Hook Nation was invalid because it lacked ratification by the senate, and therefore it did not extinguish aboriginal title of the Cush-Hook Nation. *Id.* at 3 and 4. Third, the court found that the United States' grant of fee simple title of Kelley Point Park to the Meeks under the Donation Act of 1850 was void *ab initio*, and therefore the subsequent land transaction between the descendants of the Meek's and the State of Oregon was also void. Fourth, the court found that due to the above, the Cush-Hook Nation retained aboriginal title of Kelley Point Park. Fifth, the court found that because Oregon is a Public Law 280 state, Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* apply to all lands of the state, whether tribally owned or not. Accordingly, the court found that Oregon properly brought the criminal actions for damaging an archaeological, cultural, and historical object against Thomas Captain and found him guilty assessing a penalty of $250.00. However, the court found that the Cush-Hook Nation still possessed aboriginal title to the land within Kelley Point Park, and found Thomas Captain not guilty for trespass for cutting timber without a state permit. *Id.*

Following the conclusion of trial, the State and Thomas Captain appealed the Oregon Circuit Court's decision to the Oregon Court of Appeals. The Oregon Court of appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. Consequently, the State filed a petition and cross-petition for certiorari to the Supreme Court of the United States. Thereafter, Thomas Captain filed a cross-petition. The Supreme Court of the United States granted certiorari on the two questions presented above. *Id.*

II. Statement of the Facts

An Oregon state park called Kelley Point Park is located at the point in which the Columbia and Williamette rivers flow together. This park is within the city limits of Portland, Oregon. *Rec.* pg. 1.

The Cush-Hook Nation, an Indian tribe not formally recognized by the federal or state governments, claimed Kelley Point Park and a larger area encompassing the park as its original homelands. The Cush-Hook Nation occupied the area since time immemorial and subsisted by hunting, fishing, growing crops, and harvesting many wild plants in the area. The permanent village of the Cush-Hook Nation was once located within Kelley Point Park boundaries. *Id.*

During the famed Lewis & Clark expedition, William Clark encountered the Cush-Hook Nation and visited their village in April of 1806. His visit with the tribe was recorded in the Lewis & Clark Journals. On April, 5 1806, William Clark turned south from the Columbia River and entered the Williamette (at the time called the Multnomah) River. He came upon Multnomah Indians who were fishing and gathering plants along the bank of the Williamette River, which was near the Cush-Hook Nation's permanent village. The Multnomah Indians showed Clark the Cush-Hook village, made peace signs to the Cush-Hooks before entering, and introduced Clark to the headman/chief of the Cush-Hook Nation. *Id.*

In his journals, William Clark drew sketches of the Cush-Hook Nation's village and longhouses, and recorded ethnographic materials regarding the tribe's governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. Additionally, Clark gave the headman/chief a President Thomas Jefferson peace medal,

which were medals handed out to chiefs during the Lewis & Clark Expedition. Lewis and Clark believed that when chiefs accepted these medals, they showed desire to engage in political and commercial relations with the United States. Further, Lewis and Clark believed that those chiefs who accepted were tribes which would be recognized by the United States. Historians have called these medals "sovereignty tokens" based on the political and diplomatic significance associated with the items. *Id.*

Until 1850, the Cush-Hook Nation continued to live upon its land and engage in its traditional ways of life across its territory. However, in 1850, the tribe made a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, which removed the tribe 60 miles westward to a location in the foothills of the Oregon coast range of mountains. *Id.* at 1 and 2. The treaty was signed by both parties, and the entire Cush-Hook Nation removed to the designated lands in the treaty. A majority of the tribe has lived there ever since. Following these events, the United States Senate refused to ratify the Cush-Hook Treaty in 1853. Because of this, the tribe never received compensation for lands and other promised benefits laid out in the treaty, including recognized ownership of the lands they removed to. Further, because the treaty was not ratified, the United States has not since taken action to federally recognize the tribe, and the tribe remains unrecognized to date. *Id.* at 2.

Pursuant to the Oregon Donation Land Act of 1850, two American settlers moved onto the lands that the Cush-Hook Nation removed from. These settlers received fee simple title to 640 acres of land pursuant to the Donation Land Act that today comprises Kelley Point Park. The Act only required that "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" would be granted fee simple status. 9 Stat. 496-500. The Meeks, however, never fulfilled the requirements under the Act. The Meek's

descendants sold the land to the State of Oregon in 1880 and Kelley Pont Park was created. *Id.*

Over a century later in 2011, Thomas Captain, a Cush-Hook Nation citizen, moved to Kelley Point Park from the treaty-designated lands to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the park for over three hundred years. The trees carried great importance to the Cush-Hook Nation's religion and culture because tribal shamans/medicine men had carved sacred totem and religious symbols into the trees hundreds of years ago. William Clark noted these practices in his journal in 1806. Now, although the images have grown to a height of 25-30 feet, vandals have recently begun climbing the trees to deface and remove the symbols to sell them. The State of Oregon has done nothing to stop these acts. Accordingly, Thomas Captain occupied the park to protect and preserve the carvings. He, thereafter, cut down one of the trees to restore and protect one of the vandalized images that had been carved by his ancestor. While he was returning to the Cush-Hook Nation's current lands, state troopers arrested him and seized the image. *Id.*

SUMMARY OF ARGUMENT

The Cush-Hook Nation does not own aboriginal title in the lands encompassed by Kelley Point Park because the United States has extinguished any title the Cush-Hook Nation may have owned in the land through the Oregon Donation Land Act of 1850, or in the alternative, through the treaty of 1850. The express and unambiguous act of Congress in passing the Oregon Donation Land Act of 1850 effectuated an extinguishment of the tribe's aboriginal title. Because the United States has never recognized the Cush-Hook Nation's ownership of the land, the United States could extinguish aboriginal title claims without

paying compensation. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Also, because the Donation Act of 1850 was clear in declaring all lands in the Oregon Territory as public lands, it expressed its desire to extinguish the lands. In addition, courts have found that a "historical event" or "century long course of conduct" may demonstrate extinguishment. *State v. Elliot*, 616 A.2d 210, 214 (Vt. 1992). As the facts indicate in the record, the Donation Land Act deemed all lands public lands, and white settlers began to move onto the land. Further, there was continuous white dominion of the area for over a century. *Rec.* pg. 2.

If this Court is not inclined to find an extinguishment occurred as a result of the Oregon Donation Land Act of 1850, this Court, in the alternative, can find that the signing of the treaty of 1850 and performance by both parties created a valid treaty under modern conventions of international treaty law. Vienna Convention on the Law of Treaties, art. 11, May 23, 1969, 1155 U.N.T.S. 331. Further, the removal effect of the treaty which involved the Cush-Hook Nation ceding its lands to the United States to gain other lands is characteristic of late nineteenth century removal treaties, in which relinquishment of rights to land effectuated extinguishment of rights to the land. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 358 (1941). With all of the above taken together, the United States extinguished aboriginal title claimed by the Cush-Hook Nation.

The Cush-Hook Nation is not a federally recognized tribe and therefore cannot claim jurisdiction over the lands contained within Kelley Point Park. Given the unambiguous stance of the other two branches of government, the Court should defer to those decisions according to *United States v. Holliday*, 70 U.S. 407 (1865). Consequently, without federal recognition, neither the Cush-Hook Nation nor the federal courts shall have jurisdiction, which leaves the State of Oregon as the only appropriate sovereign to exercise jurisdiction.

Alternatively, if the Court decides to confer federal jurisdiction upon the Cush-Hook Nation, the state of Oregon will still have jurisdiction over this criminal action. Oregon has criminal jurisdiction, as the crime did not occur in Indian country according to 18 U.S.C. § 1151 (1948). However if Kelley Point Park is Indian country, 18 U.S.C § 1152 (1948) does not divest Oregon of jurisdiction because Thomas Captain is not an Indian. Even in the event that the Court holds that Thomas Captain is an Indian, Oregon still has jurisdiction because Oregon is a Public Law 280 state, which does not exempt the Oregon statutes. Further, no federal law preempts the Oregon statutes.

ARGUMENT

I. THE CUSH-HOOK NATION DOES NOT OWN ABORIGINAL TITLE IN KELLEY POINT PARK BECAUSE THE UNITED STATES EXTINGUISHED ALL TITLE THE CUSH-HOOK NATION MAY HAVE OWNED THROUGH CONGRESS' EXPRESS AND UNAMBIGUOUS ACT OF PASSING THE OREGON DONATION LAND ACT OF 1850 OR ALTERNATIVELY THROUGH THE TRIBE'S RELINQUISHMENT OF TITLE IN SIGNING THE 1850 TREATY

A. The Supreme Court's Reaffirmation of the Discovery Doctrine, a Policy of Indian Law Existing from the Beginning of Indian and Federal Relations, Indicates the Cush-Hook Nation has Only a Claimed Right of Occupancy, of Which the United States has the Sole Right to Extinguish

This Court has continually reaffirmed the doctrine of discovery, as it applies to Indian tribes, which deems Indian title (or aboriginal title) a "mere possession not specifically recognized as ownership by Congress" *Tee-Hit-Ton Indians v. United States*, 348 U.S. at 279. This principle was borrowed from the English tradition, which designates that the conqueror has the right to acquire ownership of land from the natives in America. *Johnson v. McIntosh*, 21 U.S. 543, 573 (1832). Further, this Court has stated that aboriginal title is distinct from recognized title, in that "[e]xtinguishment of Indian title on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme."

United States v. Santa Fe Pacific R. Co., 314 U.S. at 347. It is important to consider the historical progression of the doctrine of discovery to understand its implications regarding Indian law today, beginning with *Fletcher v. Peck.*

Fletcher v. Peck began this Court's tradition of referring the Indian title as a mere right to occupancy. Chief Justice Marshall, in his opinion, wrote the "majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state." 10 U.S. 87, 142, 43 (1810). In this famed case, Georgia was referred to as holding seisin in fee, meaning it had ownership rights in the land and freedom to transfer its interest. *See generally Clark v. Smith*, 38 U.S. 195 (1839) (cites to *Fletcher* as authority for the State of Georgia to transfer land interests under aboriginal possession of Indians).

This Court moved on to have its first extended discussion of Indian title in *Johnson v. McIntosh*, a little more than a decade later. Chief Justice Marshall continued in the vein of *Fletcher* when he clarified that the discovering sovereign holds "a clear title to all lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." 21 U.S. at 585. However, the Chief Justice arguably attempted to alter the scope of the discovery doctrine to only include the right of preemption in *Worcester v. Georgia*. Chief Justice Marshall wrote that the doctrine gave "the sole right of acquiring the soil and of making settlements on it." 31 U.S. 515, 544 (1832). He continued that the doctrine "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." *Id.* This abrogation of the

discovery doctrine was short-lived, as this court re-instated and seemingly extended the doctrine's scope in *Tee-Hit-Ton Indians v. United States*.

This Court in *Tee-Hit-Ton* distinguished between recognized and aboriginal title in holding aboriginal title could be taken by the United States because such title is "mere possession not specifically recognized as ownership by congress." 348 U.S. at 279. The court reasoned further that such title does not constitute property within the meaning of the fifth amendment of the United States constitution. *Id.* Accordingly, no constitutional remedy was available to the tribe. Because "[m]ost tribal property has been recognized by treaty or statute", the rule in *Tee-Hit-Ton* has little application today. Cohen's Handbook of Federal Indian Law § 15.09[1][d][i], at 1055 (Nell Jessup Newton ed., 2012) [hereinafter, Cohen's Handbook]. However, some lands may remain unprotected by statute or treaty. *See State v. Elliot*, 616 A.2d at 213 (citing *Tee-Hit-Ton* as authority indicating that a historical event may contribute to finding of extinguishment of aboriginal title). *See also Kuruk Tribe of California v. Ammon*, 209 F.2d 1366, 1374 (Fed. Cir. 2000) (citing *Tee-Hit-Ton* in holding that a portion of an executive order reservation that deemed land aboriginal title only did not require compensation in taking). Tee-Hit-Ton's holding has never been overruled. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 n.1 (2005) (citing doctrine of discovery precedent as a reaffirmation of the doctrine).

With the historical progression of the doctrine of discovery as a backdrop, this Court, in following is precedent, should hold that the Cush-Hook nation did not have recognized title as its aboriginal title was extinguished by the Treaty of 1850 and the Oregon Donation Land Act of 1850, notwithstanding the lack of compensation paid for the land on which the Cush-Hooks resided.

B. Although the Cush-Hook Nation may Prevail in Showing it, at One Time, Owned Aboriginal Title to Kelley Point Park and its Surrounding Areas, All Such Claimed Aboriginal Title has Since Been Extinguished and the Tribe's Title has Never Been Recognized by the United States

The Cush-Hook Nation likely has a claim that it held aboriginal title in Kelley Point Park, and the area that encompasses the park, prior to the time when the United States extinguished the Cush-Hook's possessory title in the land. A tribe can claim rights to land through other means from "treaty, statute, or other formal government action." *Santa Fe R. Co.*, 314 U.S. at 339. Aboriginal title "refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters or patent or any formal conveyance." Cohen's Handbook § 15.04[2] at 999. To establish aboriginal title, a tribe must establish its "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *Sac & Fox Tribe of O.K. v. United States*, 383 F.2d 991, 997-998 (Ct. Cl. 1967).

The requisite showing of "actual, exclusive, and continuous use and occupancy" is a question of fact. *Santa Fe R. Co.* at 345. To determine whether occupancy has been actual, exclusive, and continuous, courts look to "the way of life, habits, customs and usages of the Indians who are the users and occupiers." *Sac & Fox Tribe of Oklahoma* at 998. Further, such use and occupancy must be exclusive as to other tribes. *See Strong v. United States*, 518 F.2d 556, 561 (1975).

It would seem that under the record, the Cush-Hooks had continuously occupied Kelley Point Park and its surroundings to the exclusion of other tribes. The record indicates that the Cush-Hook Nation grew and harvested crops, and hunted and fished in the area since time immemorial. *Rec.* pg. 1. Further, the permanent village of the Cush-Hooks was within the current boundaries of Kelley Point Park. However, as indicated by the record, Multnomah

Indians were found by William Clark to be fishing and gathering apparently within the boundaries of the claimed Cush-Hook land. *Id.* This could indicate that the Cush-Hooks did not occupy the claimed lands to the exclusion of other tribes, but because the Multnomah made peace signs to the Cush-Hooks before entering the village it is apparent the Multnomah were aware the lands belonged to the Cush-Hooks. Accordingly, it would appear that the Cush-Hook Nation could successfully claim that they had "actual, exclusive, and continuous use and occupancy of the land prior to extinguishment. The tribe must also show it had done so "for a long time."

Because the Cush-Hook Nation need not establish that it held aboriginal title prior to the existence of the United States, it will probably prevail in convincing a court that it had occupied its lands for a long time. *See Sac and Fox Tribe of Oklahoma* at 998-999. As earlier mentioned, the Cush-Hook Nation had occupied the claimed area since time immemorial until 1850 when the treaty extinguished their rights to the land. Accordingly, the Cush-Hooks could likely prove to a court that they owned aboriginal title to Kelley Point Park and its surrounding area prior to United States intervention. However, because the United States, in 1850, negotiated a treaty with the Cush-Hooks and passed the Oregon Donation Land Act of 1850, any claimed aboriginal title claimed in the past has since been extinguished.

1. Title Claimed by the Cush-Hook Nation is not Recognized Title as the United States has not Recognized the Cush-Hook's Ownership of the Land by Treaty or Statute

This Court held in *Tee-Hit-Ton* that "where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." 348 U.S. at 277, 78. This Court distinguished original or

aboriginal title from recognized title by requiring compensation for recognized title, but not for aboriginal title. *Id.*

The issue before this court is whether the Cush-Hook Nation owns aboriginal title to the land in Kelley Point; however, if the respondent were to compel this court to hold that the land in question was recognized by the United States as being owned by the Cush-Hook Nation, the title would not have been extinguished unless compensation was made as required by the fifth amendment of the United States Constitution. *Id.* Accordingly, the State of Oregon wishes to affirmatively rebut any argument by the respondents regarding recognized title.

As the record indicates, the United States has not undertaken any … act to "recognize" the Cush-Hooks, and the Nation has remained a non-federally recognized tribe of Indians. *Rec.* pg. 2. Because the Cush-Hook Nation remains to be recognized by the United States and no statute or treaty has ever been made recognizing the Cush-Hook's ownership to Kelley Point Park, the Cush-Hook Nation does not own recognized title in Kelley Point Park.

C. The United States, Under its Authority, Extinguished the Cush-Hook Nation's Aboriginal Title by the Historical Event of Declaring all Lands as Public Lands of the United States in the Oregon Donation Land Act of 1850 Which Created a Century-Long Course of Conduct Inconsistent with Tribal Occupancy

As the lengthy history of the discovery doctrine's development indicates above, the United States has no constitutional obligation to compensate tribes for the taking of land held under aboriginal Indian title. *See generally Tee-Hit-Ton*, 348 U.S. 272. Further, Chief Justice Marshall stated in *Johnson v. McIntosh* that "the exclusive right of the United States to Extinguish Indian title has never been doubted … whether it be done by treaty, by the sword,

by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy ..." 21 U.S. at 586. The United States, in the case at hand, had no obligation to pay compensation to the Cush-Hook Nation under the Oregon Donation Land Act of 1850 because the tribe merely had aboriginal title in the land. Further, the Act declaring the lands in the Oregon Territory as public lands, in addition to title ownership of the land being in the hands of settlers and the State of Oregon for over a century, was enough to extinguish aboriginal title because sovereign intent to extinguish does not need to be express, but evidence must exist demonstrating "plain and unambiguous" intent to extinguish aboriginal title. *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 246 (1985).

Treatment of land inconsistent with tribal use is typically treated as intent to extinguish aboriginal title. Similar to *Tee-Hit-Ton*, which held that the United States authorizing the removal of timber from aboriginal lands was a taking, the Oregon Donation Land Act of 1850 declaring lands as Public Lands of the United States was also a taking establishing extinguishment. *Id.* at 288. However, in *United States v. Dann*, the Ninth Circuit Court held that the inclusion of tribal land in a federal grazing district did not meet the standard of extinguishment. 706 F.2d 919 (9th Cir. 1983). *But see United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-92 (1975) (inclusion of aboriginal lands in forest reserve and federal grazing district, and various grants made, was evidence enough to support finding of extinguishment).

Unlike *United States v. Dann*, the United States has done much more than simple inclusion of the Cush-Hook Nation's land in a federal grazing district. Much like in *United States v. Pueblo of San Ildefonso* the United States showed intent to extinguish on many fronts. Not only did the United States deem the land in Oregon Territory (which includes the

land encompassed in Kelley Point Park) as public lands, but the United States also made land grants to white men and created the State of Oregon. *Rec.* pg. 2. Additionally, a strong inference can be made from the implications of the Donation Land Act including "American half-breed Indians" as eligible to take land under the Act (to the exclusion of Indians), is that the United States intended to make land eligible to nearly everyone other than Indians; thereby according actions inconsistent with tribal occupation and use. Oregon Donation Land Act of 1850, 9 Stat. 496, Sec. 4 (1850). All of this indicates that the United States intended to extinguish aboriginal title of the Cush-Hook Nation by taking actions inconsistent to the Nation's use and occupation of the land.

Courts have also found that extinguishment can be established under the "increasing weight of history." *State v. Elliot*, 616 A.2d at 218. Akin to the holding of *State v. Elliot*, which held that "a series of historical events, beginning with the Wentworth Grants of 1763, and ending with Vermont's admission to the Union in 1791, extinguished the aboriginal rights," the land grants by the United States under the Donation Land Act and subsequent admission of Oregon to the Union extinguished aboriginal title of the Cush-Hooks Nation.

Accordingly, taken as a whole, the declaration of the United States in the Donation Land Act that all lands in the Oregon Territory were public lands, and the subsequent history of Kelley Point Park remaining in possession of settlers and the State of Oregon, the United States clearly intended to take actions inconsistent with the occupancy and use of the tribe, which resulted in the extinguishment of aboriginal title in the Cush-Hook Nation.

D. In the Alternative, Anson Dart, Acting as Superintendant of Indian Affairs for the Oregon Territory, Created a Valid Treaty Between the United States and the Cush-Hook Nation Through the Consent and Signatures of Both Parties, Which Extinguished the Cush-Hook Nation's Aboriginal Title to Kelley Point Park

The United States entered into a valid treaty with the Cush-Hook Nation, in which the Cush-Hook Nation agreed to relocate 60 miles westward from its aboriginal lands. *Rec.* pg. 2. Although this treaty was not ratified by two thirds of the United States Senate, as required by Article II, Section 2, Clause 2 of the United States Constitution, the treaty is still valid based on modern conventions of treaty law and the federal government's amenability to suit by creating the Court of Claims. U.S. Const. art. II, § 2, cl. 2. Following that, this Court has indicated that treaties made between the United States and Indian tribes are "essentially a contract between two sovereign nations." *Washington v. Wash State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

To determine if a treaty was made between the Cush-Hook Nation and the United States, this Court should look to the Vienna Convention on the Law of Treaties. *See generally* Vienna Convention on the Law of Treaties, art. 11. Legal authorities, the courts, and government agencies of the United States have begun to look to the Vienna Convention to "determine whether States are parties to a substantive treaty by applying the customary international law of treaties … codified by the Vienna Convention." *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307 (2d Cir. 2000); *See* Vienna Convention on the Law of Treaties, U.S. Department of State: Diplomacy in Action, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Jan. 13, 2013) (indicating the United States views many provisions of the Vienna Convention on the Law of Treaties as customary international law on the law of treaties).

Article 11 of the Vienna Convention on Law of Treaties indicates that "the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means so agreed." 1155 U.N.T.S. at 331, art. 11. Further, although the Cush-Hook Nation is not federally recognized, the United States must uphold its duties in pre-existing treaties notwithstanding a lacking of official recognition. *See generally Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

In 1850, the Cush-Hook Nation and Anson Dart signed a treaty which effectively moved the entire Cush-Hook Nation 60 miles from its aboriginal lands. *Rec.* pg. 1 and 2. This action involved the acquiescence and acceptance of both parties to the treaty, as well as the signatures of both parties. Following the signing of the treaty, the record indicates that the Cush-Hooks immediately entered their new tribal lands where they have continued to live ever since. *Id.* at 2.

Although the Cush-Hook Nation has not received compensation for its lands, and other promises made by the United States in the treaty remain unfulfilled, the tribe has means through the Court of Claims to compel the United States to answer for its shortcomings. *Menominee Tribe of Indians* at 406. The Cush-Hook Nation has resided in its westward lands, which were set aside by the treaty, for over 150 years, yet they remain to receive compensation as promised. *See Record generally*. Understandably, the State of Oregon is not a party to such conflict; however, the federal government's waiver of sovereign immunity for such suits in the Court of Claims indicates its acquiescence to outstanding treaties. Although the senate never ratified this treaty, the United States has made itself amenable to suit for

claims like the Cush-Hook Nation may bring, which ultimately shows the United States accepting responsibility for past agreements it has made.

Accordingly, although the treaty was not ratified by the senate, the treaty was signed by both parties and certain aspects of the treaty were performed by both parties; therefore, the Vienna Convention and this Court should find this treaty valid.

1. Because the Treaty of 1850 was Valid, it Effectuated a Relinquishment of the Cush-Hook Nation's Aboriginal Title, Which Resulted in Extinguishment of such Title

Treaties made between the United States and Indian tribes like the one created between the Cush-Hook Nation and Anson Dart are characteristic of the removal treaties during the late nineteenth century involving the westward removal. *See e.g.* Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333; Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (provided for cession of aboriginal land for lands in the Indian Territory, now Oklahoma). Such cession of land shows relinquishment of the tribe's rights to its land, which effectuates an extinguishment of a tribe's rights to aboriginal title. *Santa Fe R. Co.* at 358; Cohen's Handbook § 15.04[3][a] at 1005.

In this case, it is apparent that the treaty formed between the United States and the Cush-Hook Nation is very similar to the Treaty of Dancing Rabbit Creek and the Treaty of New Echota. The United States wished to open lands for white settlement in the Kelley Point Park area, and accordingly moved the Cush-Hook Nation westward, akin to what happened to the Cherokee Nation and Choctaw Nation in the treaties above. *Rec.* pg. 1 and 2. Because Anson Dart and the United States were aware of impending westward movement, they were probably acting with the intention of "the desire to maintain just and peaceable relations with the Indians." *Santa Fe R. Co.* at 346. Accordingly, like the treaties cited above, the Cush-

Hook Nation relinquished its lands to the United States, which had the effect of extinguishing the Cush-Hook Nation's aboriginal title to the land.

II. THE STATE OF OREGON DOES HAVE CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION BECAUSE THE CUSH-HOOK NATION IS NOT AND SHOULD NOT BE FEDERALLY RECOGNIZED AND THERFORE THE STATE IS THE ONLY APPROPRIATE SOVEREIGN TO EXERCISE JURISDICTION. FURTHERMORE, THE STATE WILL STILL HAVE JURISDICTION IF THE COURT DETERMINES THAT THE CUSH-HOOK NATION IS FEDERALLY RECOGNIZED BECAUSE THE OFFENSE DID NOT OCCUR IN INDIAN COUNTRY NOR DID AN INDIAN PERPETRATE IT

A. Both Congress and the Executive Branch have Determined that the Cush-Hook Nation is not Federally Recognized and the Court Should Defer to their Decisions

The Cush-Hook Nation is not a federally recognized tribe, and thus lacks any power that accompanies such a designation. Congress has stated that "'recognized' is more than a simple adjective: it is a legal term of art." HR rep. 103-781, 103rd Cong., 2d sess., 2 (1994). Recognition "establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." *Id*. Recognition also furnishes the tribe with authority: "[I]t institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary." *Id.* The Cush-Hook Nation is not currently recognized by the executive branch, is in fact terminated by Congress. Additionally, the Court is not an appropriate avenue for recognition. Therefore, without recognition the Cush-Hook Nation will not be able to attain jurisdiction nor will they be able to prove that this crime is worthy of federal jurisdiction.

All three branches of the United States government can designate a tribe as federally recognized. The power of Congress to establish recognition is derived from the Indian commerce clause of the Constitution. The power of the Executive branch to make such a determination can also be found in the Constitution. For instance, presidents have exercised their constitutional power to "receive Ambassadors and other public Ministers" by sending agents to various Indian tribes and receiving delegations from them, thereby indicating recognition. U.S. Const. art. II, § 3. Unlike the other two, the power that purportedly provides the Judiciary the ability to confer federal recognition is not derived from the Constitution. Instead, it comes from the federal common law. Some courts have decided that given the federal government's historic guardianship role over Indian tribes, the courts can determine federal recognition. *See, e.g. United States v. Sandoval*, 231 US 28, 45-46 (1913). The position of the state is that since both Congress and the Executive branch has been unambiguous in their decisions the Court should defer to said decisions.

Despite the fact Mr. Clark gave the Cush-Hook Nation the "sovereignty tokens", the Cush-Hooks are not federally recognized. Although this action may have served as recognition at the time, the Nation's federal recognition status has since been terminated by the actions of the legislative branch and by the fact that the executive branch has made no further attempts at government-to-government interaction. Therefore the Cush-Hook nation is not currently a federally recognized tribe by way of the executive branch.

Additionally, it is clear that the Cush-Hook Nation is not a federally recognized tribe according Congress. The act of signing the removal-treaty with the Cush-Hook Nation in 1850 did indicate that at that point Congress viewed them as a federally recognized tribe. Thus, for a small time, the nation did have a federally set aside tract of land, however it was

never within the bounds of Kelly Point Park. The Cush-Hooks almost immediately lost their federal recognition status, however. By enacting the Oregon Donation Land Act of 1850 Congress made it clear and unequivocal that they no longer viewed the Cush-Hook Nation as a federally recognized tribe. Oregon Donation Land Act of 1850, 9 Stat. 496-500 (1850).

The 1850 Oregon Donation Land Act served as a termination of the Cush-Hook Nation. Congress in its plenary power indeed has the power to terminate a tribe. In the 1950s and early 1960s congress terminated nearly 110 tribes. Congress did so by enacting a bevy of legislation. Although the language of the different termination acts varied, the most common features of this legislation were: (1) the closing of tribal rolls; (2) fundamental changes in land ownership patterns were made, either by selling tribal land to the highest bidder and distributing proceeds to the tribal members, placing land in a private trust, transferring tribal land to a state corporation, or distributing tribal land in fee to individual tribal members; (3) the trust relationship was ended for most purposes; (4) state legislative jurisdiction was imposed; (5) exemptions from state taxing authority were ended; (6) most special federal programs to these tribes and their members were discontinued, and (7) federal protection for tribal sovereignty and jurisdictional prerogatives were ended.

It is obvious that the 1850 act is a termination act as it made fundamental changes to the land ownership in (2), and ended the trust relationship in (3). The intent of the Act was to give the land to "white settlers" thus clearly and unequivocally excluding the possibility that the Cush-Hooks would ever receive title to the land, which effectively changed the land ownership forever. Also, the trust relationship was clearly ended as the legislation intends to give the land to settlers in fee simple. This is a clear and unequivocal relinquishment of the trust responsibility because it would not be a prudent act on the part of a trustee to give away

its corpus, thus the only conclusion is that Congress no longer wished to serve as a trustee for the Cush-Hook Nation. Therefore, since the language of the 1850 Oregon Donation Land Act is completely in line with the language of the legislation from the termination era, the Court should view the act as a termination of the Cush-Hook Nation.

Further evidence of the tribe's federal recognition having been terminated is the fact that the Cush-Hook Nation is not on the list of the federally recognized tribes compiled pursuant to the 1994 tribal list act. The Cush-Hook Nation's 19-year absence can only serve to further substantiate their non-federally recognized status.

In light of both Congress and the Executive branch determinations, the State urges the Court to defer to their decisions so as not to violate the ruling in *U.S. v. Holliday*, 70 U.S. 407 (1865). The idea that the judiciary's power over Indians does not derive from the Constitution, but instead derives from outside the framework of specific constitutional provisions, conflicts with accepted notions of limited power. When Congress or the Executive branch has found that a tribe exists (or does not), courts will normally not disturb that determination. Some cases have even characterized such determinations as political questions outside the scope of judicial review. *See U.S. v. Rickert*, 188 U.S. 432, 445 (1903); *see generally Baker v. Carr*, 369 U.S. 186 (1962). The applicable rule for this case is derived from the Supreme Court decision in *Holliday.* The *Holliday* Court showed deference to the other branches when it held that federal liquor laws were applicable to a sale of liquor to a Michigan Chippewa Indian despite a treaty provision anticipating the dissolution of the tribe, because the facts indicated that the Department of the Interior continued to regard the tribe as existing. This Court made its stance of deferring very clear when by declaring:

> In reference to all matters of this kind, [referring to federal recognition] it is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. 407, 419 (1865). Therefore, this Court should follow its holding in *Holliday* and defer to the other political department's decisions not to federally recognize the Cush-Hook Nation.

The Cush-Hook Nation will unsuccessfully attempt to prove to the Court that it should recognize them because the Court has the delegated power and because the status of the tribe is necessary to resolve an issue in the litigation.

The purported delegation of power is not applicable to this case. In 1994, Congress affirmed that "Indian tribes presently may be recognized by act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations…; *or* by a decision of a United States court" 25 U.S.C. 479 (1934) (emphasis added). However, it is the State's position that this instance of delegation from the Legislative branch was not intended for this situation because the Court would not be the first to make a decision. It is clear by the language of the 1994 act Congress, that by using the word "or", meant for the recognition decision to only be made once. Moreover, Cohen makes it clear that the Nation would be misinterpreting the 1994 Act by stating, "While clear intentions from the political branches demonstrating federal recognition warrant judicial deference, *a separate question* is whether courts may make determinations affecting federal recognition when the intentions of those other branches are more ambiguous." Cohen's Handbook at 139 (emphasis added). The facts

of this case do not guide us to the *separate question* proposed by Cohen because the other branches have not been ambiguous. Therefore, since Congress has already made very clear that the Cush-Hook Nation is not federally recognized any decision otherwise by the Court would be in violation of its precedent set in *Holliday.*

The Nation will also attempt to persuade the Court to federally recognize them because some courts have been willing to rule on tribal existence when the determination is necessary to resolve an issue in litigation. *See, e.g. Gristiede's Foods, Imc. v. Unkechauge Nation*, 660 F. Supp. 2d 442, 466-469 (E.D.N.Y. 2009); *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 487 (E.D.N.Y. 2005). It is true; the status of the Cush-Hook Nation is an issue in the litigation. However, unlike in *Gristiede's Foods* and *Shinnecock,* the Court here does not have an adequate amount of information in the record to make the determination. The common law test to determine whether a group constitutes a tribe is if the people in question are "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901). The record is void of whether or not the Cush-Hook Nation is under one leadership or government. In fact, it seems that the actions of Mr. Captain are quite rogue and indicative of someone not under authority. Nonetheless, the record is void of important information and it would be imprudent for the Court to analyze whether or not the Cush-Hook Nation should be recognized.

Another reason for the Court not to change the current status of the Cush-Hook Nation from non-federally recognized is because the act of this Court making the determination may cause it to happen more often, and it is clear than the court system is not

equipped to fully examine every would-be tribe in the same meticulous manner that the Office of Federal Acknowledgement does. This over-use of the arguably less stringent Montoya factors would result in a less restrictive option for some tribes that otherwise would not met the requirements. As the General Accounting Office reported to Congress in 2001, the result of courts making themselves readily available to tribes as a means of recognition

> could be that the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving of a government-to-government relationship with the United States and more to do with the resources that petitioners and third parties can marshal to develop a successful political and legal strategy.

Thus, for the sake of the already recognized tribes and the truly proven and deserving tribes, the State requests that the Court refrain from engaging in a federal recognition analysis.

Despite the fact that the Cush-Hook's status as a non-federally recognized tribe is an issue in the litigation, the State urges the Court to decline to recognize the Cush-Hooks because the action may open the door to other, less responsible, courts making decisions adverse to the tight requirements promulgated by Congress.

The State requests that the Court defer to the unambiguous decisions of the other political branches in regard to the official recognition of the Cush-Hook Nation. In the alternative, if the Court decides to entertain recognizing the Cush-Hook Nation the State urges the Court to decline recognition because there is not enough information in the record to fully contemplate the *Montoya* factors.

B. Oregon Remains the Appropriate Sovereign to Exercise Jurisdiction if the Court Determines the Cush-Hook Nation to be Federally Recognized Because the Offense Did not Occur in Indian Country nor did an Indian Perpetrate it

1. The Offense did not Occur in Indian Country and thus Oregon has Criminal Jurisdiction over Thomas Captain

In order for the tribe to prove that any sovereign, but the State of Oregon, has criminal jurisdiction over Mr. Captain, they must prove that his crime occurred in Indian country. However, it is clear that Kelley Point Park is not Indian country because it does not fit into the statutory definition of Indian country. The statutory definition of Indian country can be found in 18 U.S.C. § 1151 (1948)[1]. The land in question is neither a reservation, a dependant Indian community, nor is it part of an Indian allotment.

The boundaries of Kelley Point Park are not within a reservation, as there is no legislation specifically reserving this land for the Cush-Hook Nation. Moreover, this land is not part of an Indian allotment as there is no legislation specifically placing it into trust or restricted status for the benefit of the Cush-Hook Nation. Therefore, the only legitimate question to be answered is whether Kelley Point Park is a dependent Indian community.

Kelley Point Park is not a dependent Indian community because it does not meet the requirements set forth in *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (9th Cir. 1992). The requisite test, from *Venetie*, for determining whether a tract of land is

[1]18 U.S.C. § 1151 reads: Except as otherwise provided in Sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (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 rights-of-way running through the reservation, (b) all dependant 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 the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian country by way of being a dependent Indian community is that the land must be both federally set-aside for the Indians and currently under federal superintendence. It is clear that the Kelley Point Park does not meet the requirements because the Cush-Hook Nation, assuming they have any land set aside for them, only includes the western land to which they were removed. Further, the land of Kelley Point Park was part of the 1850 Oregon Donation Land Act, which clearly, by giving the land up in fee simple to settlers, removes any remnants of federal superintendence. Thus, Kelley Point Park is not a dependent Indian community.

The Cush-Hook Nation may attempt to argue that Kelley Point Park is a reservation. The Cush-Hook Nation's stance will be that the land is a reservation under the word's original meaning and that the reservation boundaries have not been diminished despite the 1850 Oregon Donation Land Act. Before the mid-1850s the term "Indian reservation" meant any land reserved from an Indian cession to the federal government regardless of the form or term. *See* Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 478. It may be likely that the un-ratified treaty included much of the same verbiage as other treaties of that time, but the record is not clear on this point. After the mid-1850s the word "reservation" began to develop into its current meaning. If the Court finds that this minute semantic argument from the Cush-Hook Nation forms a genuine ambiguity then the canons of Indian law say this must be interpreted in favor of the Cush-Hook Nation.

The state will have jurisdiction even if the Court determines there was a reservation. It is the State's proposition that if a reservation existed, it has been diminished so as to not include Kelley Point Park. There have been many reservations diminished by acts much like the 1850 Oregon Donation Land Act, which opened the reservation up to non-Indian

settlement through purchase or homesteading. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329,343 (1998). The act of opening the reservation alone does not diminish a reservation. *See Mattz v. Arnett*, 412 U.S. 481, 503-504 (1973). *Solem v. Bartlett*, 465 U.S. 463 (1984) states that an opened reservation has been diminished if: the statutory language is clearly intending to diminish, or if the statute is not clear but the legislative reports to Congress imply an intent to diminish, or if the post-enactment history reveals a loss of Indian character.

Since Congress was never under the impression there was a reservation, the Court cannot expect the 1850 Oregon Donation Land Act to expressly diminish what the legislators never thought was in existence. Oregon Donation Land Act of 1850, 9 Stat. 496-500 (1850). This also applies to the legislative reports, as they would not have been using the word "reservation" in any of the reports. The third factor however, does prove diminishment of the reservation.

The area that is now Kelley Point Park lost its Indian character as soon as the Cush-Hook Nation removed itself. The record states that the "entire Cush-Hook nation relocated to the coast range to avoid the encroaching Americans" *Rec.* pg. 1. Therefore it is obvious that the land in question lost its Indian character when every Indian resident left and thus was no longer a part of the reservation.

Since the area of Kelley Point Park is not within the definition of Indian country, the State requests the Court hold that Oregon is the only appropriate sovereign to exercise jurisdiction over Mr. Thomas Captain.

2. If the Court Holds that Kelley Point Park is Indian Country, Oregon will Remain to have Jurisdiction as Thomas Captain is not an Indian for Purposes of Federal Recognition

In order for the tribe or federal court to have jurisdiction in this case, Mr. Captain would have to be considered an Indian because this is a crime against a non-Indian.[2] The Supreme Court has interpreted 18 U.S.C. 1152 (1948) to allow state prosecutions of crimes committed in Indian country by a non-Indian against another non-Indian. In *United States v. McBratney*, 104 U.S. 621 (1881) the Court held that state jurisdiction trumped federal jurisdiction over the murder of a non-Indian by a non-Indian inside of a reservation. Further, the Court has made clear that the holding in *McBratney* is settled precedent. *See, e.g. United States v. Wheeler*, 435 U.S. 313,324; *See also* H.R. Rep. No. 94-1038, at 2 (1976).

Mr. Captain is not an Indian and thus Oregon has criminal jurisdiction, as he does not completely fulfill the *Rogers* test nor is there an appropriate federal statute for which the Court can use to apply its definition of Indian. *United States v. Rogers*, 45 U.S. 567 (1846).

The Court has no federal statute that appropriately defines "Indian" for this situation. 18 U.S.C. 1152 (1948) does not provide a definition at all for the court to apply. The Cush-Hook Nation may attempt to persuade the court to apply a definition found in a statute that seems to factually apply to this crime. The Cush Hook Nation will urge the Court to use the definition found in N.A.G.P.R.A. 25 U.S.C., Ch. 32, (1990). The only possible proposed definition in NAGPRA can be found in § 3001 which defines "Native American" as of or

[2] 18 U.S.C. §1152 States: Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

relating to, a tribe, people, or culture that is indigenous to the United States. 25 U.S.C., Ch.32, § 3001, (1990). However, the application of this definition would be severely misplaced because "Native American" and "Indian" are not synonymous for purposes of jurisdiction and it is obvious that the statute is not intending to make a jurisdictional definition but rather a definition pertaining to objects. Therefore, the Court will not be able to use a definition found in any federal statute.

Since there is no statutory definition the Court must use its common-law definition. The Supreme Court case of *Rogers* provides the Court with a rule for defining who is an Indian. *Rogers* says that the Court must consider both Indian descent and recognition by a federally recognized tribe. The first requirement of *Rogers* is simple and needs no more explanation, but the second factor has required some clarification from the lower courts. The Ninth Circuit has provided a very clearly articulated test for second part of the *Rogers* rule. *See United States v. Cruz*, 554 F.3d 840, 852 (9th Cir. 2005). The *Cruz* test consists of four elements that should be considered in declining order of importance: "1) tribal enrollment; 2) government recognition formally and informally through the receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *Id.* at 846. The eighth circuit has also approved of these four factors. *United States v. Stymiest*, 581 F.3d 759, 763-766 (8th Cir. 2009).

Mr. Captain does not clearly, given the extent of the record, fulfill the first requirement of *Rogers*. Since tribes, especially non-federally recognized tribes, have the power to define their own membership it is not certain that Mr. Captain has Indian descent. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The record only mentions that Mr.

Captain is a citizen of the Cush-Hook Nation. Mr. Captain could have gained his citizenship any number of ways. For instance, he could have married into the Cush-Hook Nation or simply been adopted into the Cush-Hook Nation. Without more facts, the State must urge the Court to hold that Mr. Captain does not positively possess the Indian descent required and thus is not an Indian.

Mr. Captain does not fulfill the second requirement of *Rogers*. When applying the four factors proposed in *Cruz* to Mr. Captain it is obvious that he is not an Indian. Firstly, even though he is a citizen of the Cush-Hook Nation, it is unclear whether the factor requires it to be a federally recognized tribe. In both *Cruz* and *Stymiest*, the tribes involved were federally recognized. Furthermore, a non-federally recognized tribe cannot *officially* provide Indian ancestors from which one can descend. Secondly, the record does not mention Mr. Captain to have ever received any assistance reserved only to Indians. Thirdly, it is unclear whether Mr. Captain has enjoyed the benefits of tribal affiliation. The record mentions that he "moved from the tribal area" to the park. *Rec.* pg. 2. The phrase "tribal area" does not specifically mean he lived with and enjoyed benefits of the Cush-Hook Nation. It would be a safe assumption that "tribal area" could mean the town outside of the tribe's actual central residence. Lastly, Mr. Captain seems to participate in social life even though he does not currently live with the tribe; however, he has never lived on a reservation, as the Cush-Hook Nation does not have a reservation. Therefore, since Mr. Captain does not pass all of the requirements, the state urges the Court to hold that Mr. Captain is not an Indian for purposes of determining criminal jurisdiction.

3. If the Court Determines that Kelley Point Park is Indian Country and Thomas Captain is a Federally Recognized Indian, Oregon Remains to have Jurisdiction

The state of Oregon still has jurisdiction over the crime even if the Court finds that it occurred in Indian country and Mr. Captain is an Indian. In this scenario, the Cush-Hook Nation will attempt to prove that since, according to 18 U.S.C. 1152 (1948), crimes committed by an Indian against a non-Indian are under the jurisdiction of the federal government, and the tribal government thus state jurisdiction is inappropriate. The Cush-Hook Nation will in the alternative attempt to prove that the crime was against another Indian or victimless, and thus the Cush-Hook Nation has jurisdiction. However, the Cush-Hook Nation will fail to repossess Oregon of its jurisdiction as Oregon is a Public Law 280 state, which means that the federal government has delegated its jurisdiction to the state. 18 U.S.C § 1162 (1953). Also, the Cush-Hook Nation will fail to prove that Mr. Captain's crime was against another Indian or victimless.

Oregon is a Public Law 280 state and the federal grant of jurisdiction does not exclude Or. Rev. Stat. 358.905-358.961 or Or. Rev. Stat. 390.235-390.240 because they are purely prohibitory criminal statutes as opposed to regulatory criminal statutes. The Court has drawn a distinction between criminal laws that are "prohibitory" and laws that are "regulatory", holding that the latter are not included in Public Law 280 delegations of jurisdiction. The Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) stated this distinction when it rejected California's effort to apply its laws regulating the game of bingo to an Indian nation. The Court explained that "if the intent of a state law is generally to prohibit certain conduct," it falls within Public Law 280's grant of state

jurisdiction, but "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and thus outside of the purview of Public Law 280. *Cabazon* further stated that it was not creating a "bright-line rule" and that state laws governing a particular realm of activity would have to be "examined in detail before they can be characterized as regulatory or prohibitory" *Id.* at 210-211.

Despite the fact that there is a permit requirement in the statutes, the Court should not be view them as regulatory. Amidst all the confusing statements of the Court, there is however a final standard to apply. "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.* at p. 209. It is clear that the conduct of Mr. Captain violates the public policy of Oregon, which is to keep its parks safe and beautiful. The dangerous acts of Mr. Captain certainly took away from the majestic beauty of Kelley Point Park, therefore Oregon still has jurisdiction because Public Law 280 does apply.

The Cush-Hook Nation may, alternatively, argue that this crime was committed by one Indian against the person or property of another Indian, or that the crime was victimless, effectively removing federal jurisdiction and the delegation to the state. The Cush-Hook Nation will argue that 18 U.S.C. 1152 (1948) was not meant for victimless crimes involving only Indians. The Cush-Hook Nation will urge the Court to liken this case to *United States v. Quiver*, 241 U.S. 602 (1916). The Cush Hook nation will say that this is victimless like the adultery charge in *Quiver* because the Cush-Hook Nation purportedly owns the artifacts and they would consent to the removal. Therefore, under the Cush-Hook Nation's flawed version, the Court is faced with a victimless crime because it is between two consenting Indians. The facts of this case are easily distinguishable from those of *Quiver*. For instance, the actions of Mr. Captain do not only affect the Cush-Hooks like the two consenting Indians in *Quiver*

who were the only affected individuals. In fact, in this case, the public at large is affected. Anyone who has ever visited or has plans to visit the Kelley Point Park is affected by the actions of Mr. Captain because they too would enjoy visiting the park more so if the sacred totem and religious symbols were still present. Therefore, it is clear that this case is more akin to the case of *U.S. v. Thunder Hawk*, 127 F.3d 705 (1997). *Thunder Hawk* involved an Indian drunk driver who injured his Indian child in a wreck. His failing argument was that, since he only injured an Indian and the actual crime of drunk driving is victimless, the tribe should have jurisdiction. The eighth circuit did not agree. It held that the crime was more of an offense against the public at large; Indian and non-Indian, rather than a true "victimless" crime. *See, e.g., United States v. Sosseur,* 181 F.2d 873, 876 (7th Cir.1950) (holding that the United States had jurisdiction to charge the defendant under the A.C.A. with violating state law forbidding operation of slot machines; the offense impacts both Indians and non-Indians). The more appropriate fact application is that of the cases of *Thunder Hawk* and *Sosseur*, therefore the state urges the Court to hold that this is not a crime against an Indian, or a victimless crime, and thus Oregon has criminal jurisdiction over Mr. Captain.

4. Oregon has Jurisdiction, as its Statutes are not Preempted by the Native American Graves Protection and Repatriation Act (N.A.G.P.R.A.)

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. *See e.g. Williams v. Lee*, 358 U.S. 217 (1959); *Cent. Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

The Oregon Statutes are not incompatible with the federal statute of N.A.G.P.R.A. Indeed, the two statutes are intended for completely different purposes and thus can be enforced separately. The purpose of the Oregon statute is clearly to prohibit people from defacing archeological objects and sites and removing archeological or historical material. Whereas, the primary purpose of N.A.G.P.R.A, is to assist Native Americans in the repatriation of items that the tribes consider sacred. *See U.S. v. Corrow*, 941 F. Supp. 1663, 1567 (D.N.M. 1996). Since the two statutes differ wildly in purpose, there is no reason for N.A.G.P.R.A. to preempt the Oregon statutes, as they are completely compatible. Therefore, the state requests that the Court hold that federal law does not preempt the two Oregon statutes, and thus Oregon has criminal jurisdiction over Mr. Captain.

CONCLUSION

Although the Cush-Hook Nation may have historically owned aboriginal title to the lands now encompassed by Kelley Point Park, such title has since been extinguished by express and unambiguous acts of Congress. Due to the extinguishment of the Cush-Hook Nation's aboriginal title, the lands lie within the jurisdiction of the courts of the State of Oregon. Accordingly, for the reasons expressed herein, the State of Oregon respectfully requests that the Supreme Court of the United States affirm in part and reverse in part the decision of the Oregon Court of Appeals. The State of Oregon respectfully requests this Court reverse the lower court's holding that the Cush-Hook Nation still owned aboriginal title within Kelley Point Park, which led to the court finding Thomas Captain not guilty for trespass or for cutting timber without a permit. Additionally, the State of Oregon respectfully requests this Court affirm the lower court's holding which found Thomas Captain 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.