SUPREME COURT OF THE UNITED STATES

No. 11-0274

STATE OF OREGON,

PETITIONER

v.

THOMAS CAPTAIN,

RESPONDENT AND CROSS-PETITIONER

On Writ of Certiorari to the Supreme Court
of the United States

BRIEF FOR RESPONDENT

Team 37

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II. Whether the Oregon Court of Appeals erred by affirming Mr. Captain's conviction despite lack of jurisdiction to enforce Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* on Cush-Hook Nation land where Public Law 280 does not authorize Oregon to regulate tribal citizens on tribal land, the state statutes are civil/regulatory in nature, and the tribal interest in the activity outweighs the state interest in regulating the conduct.

STATEMENT OF PROCEEDINGS

In 2011, the Oregon Circuit Court for the County of Multnomah found that Congress erred when the Oregon Donation Land Act described all of the Oregon Territory as being public lands of the United States. Further, the court held that the United States never extinguished the aboriginal title of the Cush-Hook Nation of Indians (the "Nation") as required by Johnson v. M'Intosh because the United States Senate refused to ratify the treaty and compensate the Nation for its land.

With regard to the criminal proceeding against Mr. Captain, the Oregon Circuit Court found Mr. 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 and fined him $250. The court, however, found Mr. Captain not guilty for trespass or cutting timber without a state permit because the Nation still owned the land within the Park.

Both the State and Mr. Captain appealed the decision. The Oregon Court of Appeals affirmed the lower court, and the Oregon Supreme Court denied review. The State filed a petition and cross petition, and Mr. Captain filed a cross-petition, for certiorari to the United States Supreme Court.

STATEMENT OF FACTS

The Nation originally occupied the Kelley Point Park, an Oregon state park on both the Columbia and Williamette Rivers. The Nation occupied this area since time immemorial by setting up a permanent village and growing crops, harvesting wild plants, hunting, and fishing on the land and water.

In April 1806, William Clark visited the Nation's village after the Multnomah Indians acknowledged the Nation's village and introduced Clark to the Nation's headman/chief. Clark sketched the village and longhouses into the Lewis & Clark Journals as part of his expedition and recorded some ethnographic information about the Nation's governance, religion, culture, burial traditions, housing, agriculture, and hunting practices. Experts in history, sociology, and anthropology establish that the Nation occupied, used, and owned these lands before the Euro-Americans' arrival.

Later, in 1850, Anson Dart, the superintendent of Indian Affairs of Oregon Territory, signed a treaty with the Nation, where the Nation agreed sell its land and relocate 60 miles westward to a reservation, and Dart promised compensation for the lands in and around modern-day Kelley Point Park, recognized ownership of their new reservation, and other treaty benefits. In reliance on the treaty's validity, the entire Nation relocated to the reservation.

After the Nation relocated, two American settlers, Joe and Elsie Meek, moved onto the Nation's prior land. In 1850, Congress enacted the Oregon Donation Land Act which required "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. Under this Act, the Meeks claimed 640 acres

of the Nation's land, although they never cultivated or lived upon the land for the required four years.

In 1853, the United States Senate refused to ratify the 1850 Cush-Hook Treaty, thus denying the Nation of the treaty's benefits, including recognition of their reservation and compensation for their prior land. The Nation remains a non-federally recognized tribe of Indians since Congress refused to ratify the Treaty and the United States has not since assumed any other act to "recognize" the Nation.

In 1880, the Meek's descendants sold the land to Oregon, and Oregon created Kelley Point Park. In 2011, Cush-Hook citizen Thomas Captain moved from the tribal area in the coastal mountain range to Kelly Point Park. Mr. Captain occupied the land in order to reassert the Nation's ownership of the land and to protect culturally and religious significant trees that had grown on the land for over three hundred years. The trees have great religious and cultural significant to the Nation because, hundreds of years ago, tribal shamans or medicine men carved sacred totem and religious symbols into living trees. As far back as 1806, William Clark recorded this practice in the Journals.

Recently, vandals have begun climbing the trees to deface, or remove for sale, the images, which are at a height of 25-30 feet above the ground. Because Oregon did nothing to protect the historic images from such vandalism, Mr. Captain sought to protect and preserve these crucial tribal objects himself. After a certain image, which was carved into a tree by one of his ancestors, suffered damage by vandals, Mr. Captain cut down the tree and removed the section containing the image in order to restore and preserve the image. As Mr. Captain returned to the Nation's location in the coastal mountain range with the image, Oregon state troopers arrested him and seized the image. Oregon then brought a criminal

action against Mr. 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 (archaeological sites) and Or. Rev. Stat. 390.235-390.240 (historical materials). Mr. Captain consented to a bench trial.

SUMMARY OF ARGUMENT

The Oregon Court of Appeals correctly held that the Nation owns the land in the Kelley Point Park under aboriginal title. The United States Supreme Court should AFFIRM this Court's ruling because the Nation established its aboriginal title to this land, the government never extinguished the Nation's title, and the Nation never conceded its aboriginal title.

First, the Nation established its aboriginal title to this land by exclusively using and occupying the land in Kelley Point Park for a long time. Expert witnesses and ethnographic studies confirm that the Nation used and occupied this land since time immemorial. Therefore, the Nation's aboriginal title persists until Congress affirmatively acts to extinguish the Indian's occupancy rights.

Second, Congress never extinguished the Nation's aboriginal title by statute, treaty, or other affirmative action. This Court must strictly construe congressional acts, such as the Oregon Donation Land Claim Act and Cush-Hook Treaty, to protect Indian tribes' interests in their property. Additionally, under this canon of construction, this Court must find that Congress affirmatively refused to ratify the Cush-Hook Treaty, indicating its intent not to extinguish the Nation's aboriginal title. Congress' failure to fulfill the Cush-Hook Treaty's terms indicates the government's intent not to endorse the treaty, and, therefore, not to extinguish the Nation's aboriginal title. Therefore, the Nation's aboriginal title exists unless Congress affirmatively acts or the Indians voluntarily cede title.

Third, the Nation never conceded its aboriginal title to the lands at issue by moving to the coastal range. Without the ratification of the Cush-Hook Treaty and with the Nation's inability to cede its occupancy interest to an individual, the Nation could not concede its

aboriginal title as the government may suggest by moving to the coastal range and letting individual white settlers move onto the Nation's lands. Furthermore, the Meeks were not granted fee simple title because they did not fulfill the Act's terms, sufficient to vest ownership from the government to them. Finally, the government should not benefit from the Nation's reliance on a broken treaty's terms and potential governmental action. Therefore, this Court must find that the Nation did not voluntarily cede its aboriginal title to the Meeks.

For these reasons, this Court should AFFIRM the lower court's decision that the Nation owns the land in question under aboriginal title.

The Oregon Court of Appeals erred by affirming Mr. Captain's conviction despite lack of criminal jurisdiction to enforce Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* on Cush-Hook Nation land. This Court should REVERSE the lower court's conviction because Public Law 280 does not authorize Oregon to regulate tribal citizens on tribal land, the state statutes in question are civil/regulatory in nature, and the tribal interest in the activity outweighs the state interest in regulating the conduct.

First, legislative intent, national policy, and interpretive canons mandate a narrow construction of Public Law 280 that precludes Oregon from regulating the Nation's citizens on its tribal lands. Oregon lacked general regulatory power over the Nation because Congress intended Public Law 280 to address lawlessness, not to fully assimilate Indians into mainstream society. Moreover, national policy favors tribal sovereignty over assimilation, and traditional canons of construction requires that ambiguity in Public Law 280 be resolved in favor of the Nation's tribal sovereignty.

Second, Oregon lacked criminal jurisdiction because the Oregon Statutes are civil/regulatory, not criminal/prohibitory within the meaning of Public Law 280, and Oregon

does not have general regulatory power over Mr. Captain. The Oregon Statutes are permissive with a state permit, evidencing a classic regulatory scheme akin to licensing for hunting and fishing. Excavation, use, and protection of archaeological objects does not violate Oregon public policy, as demonstrated by the permissive nature of the Oregon Statutes and the statutory language explaining the public benefits of access to historical objects. Moreover, the placement of the Oregon Statutes within the regulatory scheme for Education and Culture in Title 30 and Highways, Roads, Bridges, and Ferries in Title 31 clearly reflects the civil/regulatory nature and intent of the Oregon Statutes.

Third, Oregon cannot enforce the Oregon Statutes against Mr. Captain because the Nation's interest in protecting and utilizing sacred tribal objects for religious purposes outweighs the state's interest in regulating the use of and protecting archaeological, cultural, and historical objects on land owned by the Nation.

For the foregoing reasons, this Court should REVERSE the Oregon Court of Appeal's holding that Oregon may, pursuant to Public Law 280, enforce Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* against Mr. Captain and DISMISS the charges for lack of jurisdiction.

ARGUMENT

I. THE OREGON COURT OF APPEALS CORRECTLY AFFIRMED THAT THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK BECAUSE THE NATION ESTABLISHED ITS TITLE TO THE LAND, THE GOVERNMENT NEVER EXTINGUISHED THIS TITLE, AND THE NATION NEVER CONCEDED ITS TITLE.

The Oregon Court of Appeals correctly affirmed the Oregon Circuit Court for the County of Multnomah's decision that the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park. This Court should affirm the decision below for three reasons: (1) The Cush-Hook Nation (the "Nation") exclusively used and occupied the land in Kelley Point Park for a long time, (2) the United States Congress never extinguished the Nation's aboriginal title, and (3) the Cush-Hook Nation never conceded its aboriginal title.

A. The Nation sufficiently established aboriginal title by exclusively using and occupying the land in Kelley Point Park for a long time.

This Court admits Native Americans to be the rightful occupants of the land with a retained possession, use, and occupancy, subject only to the discovery doctrine giving the United States government exclusive title. See Johnson v. M'intosh, 21 U.S. 543, 574 (1823) ("Their right of possession has never been questioned."). The rights relating to aboriginal title derive from the original inhabitants upon the land, requiring proof of aboriginal possession. See United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941). "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." Id. This Court must uphold the Commission's findings if supported by substantial evidence. See United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975). This Court determines aboriginal title from "actual, exclusive, and continuous use and occupancy for a long time" prior to the loss of land. Sac & Fox Tribe of Indians v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967) (internal citation omitted). See also Native

Village of Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012) (holding that aboriginal rights do not depend on Congressional act or treaty). This Court measures the "use and occupancy" requirement by the occupying Indians' "way of life, habits, customs, and usages." Sac & Fox Tribe of Indians, 383 F.2d at 998. First, the Nation established a permanent village; in April 1807, the Multnomah Indians acknowledged the village and longhouses to Clark and Clark sketched the village and longhouses in his journal. See Oteo & Missouria Tribe v. United States, 131 F. Supp. 265, 289 (Ct. Cl. 1955). Second, the Nation lived by growing crops and harvesting wild plants, along with hunting and fishing. See Tlingit & Haida Indians v. United States, 177 F. Supp. 452, 457 (Ct. Cl. 1959) (finding that the Indians used the claimed land's many available resources to the fullest potential). Third, expert witnesses established that the Nation occupied and used the land before Clark's arrival. See Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 194 (1966) (internal citation omitted) (finding, as a general rule, that Indians must hold and transform the land into domestic territory). The Nation clearly meets its burden of proving its actual, exclusive, and continuous use and occupancy for a long time of the claimed area. Therefore, the Nation established its aboriginal title to the land in Kelley Point Park.

B. Congress never extinguished the Nation's aboriginal title by statute, treaty, or other affirmative action.

The right to extinguish aboriginal title is held by the United States alone. See 25 U.S.C.A. § 177 (1970). Congress holds the supreme and exclusive power to extinguish a tribe's aboriginal title "by treaty, by sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." Santa Fe Pac. R. Co., 314 U.S. at 347. Congress solely determines when and how it extinguishes aboriginal title. See Buttz v. N. P. R.R. Co., 119 U.S. 55, 67 (1886) (determining the "manner, time, and conditions").

This Court must determine whether any Congress intended through any of its actions to revoke the Nation's occupancy rights. See United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976). "[A]n extinguishment cannot be lightly implied in view of the avoided solicitude of the Federal Government for the welfare of its Indian wards." Id. at 354. This Court resolves questions of Congressional action in favor of the Indian tribe. See id. (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)).

1. The Donation Land Claim Act and Cush-Hook Treaty must be strictly construed when determining the extinguishment of aboriginal title.

The Nonintercourse Act of 1834, a protection of aboriginal title, prevents ceding Indian lands to one other than the United States without the consent of the United States. See 25 U.S.C.A. § 177 (restricting Indian cessation by the federal government to federal treaty). The Nonintercourse Act's plain language indicates Congress' mandate for the strict construction of transfers. See id. (stating that no transfer "shall be of any validity in law or equity"). The Donation Land Claim Act of 1850 fails to mention any prior title to the designated lands, aboriginal or otherwise. See The Donation Land Claim Act of 1850, 9 Stat. 496; see also Santa Fe Pac. R. Co., 314 U.S. at 346 (finding that only "plain and unambiguous action" extinguishes aboriginal title). "Congress must make clear its intent to permit extinguishment as a result of any given piece of legislation." United States v. Dann, 706 F.2d 919, 929 (9th Cir. 1983) (citing Santa Fe P. R. Co., 314 U.S. at 353-54) (reversing judgment on other grounds). Through the 1850 Act, Congress only intended to extinguish tribes' claims to the land by, first, negotiating treaties. See Plamondon ex rel. Cowlitz Tribe of Indians v. United States, 467 F.2d 935, 936 (Ct. Cl. 1972) (citing Act of June 5, 1850, 9 Stat. 437 & Act of February 14, 1853, 10 Stat. 158) (finding that Congress did not indicate any inconsistency between Indian and public lands until 1853). Additionally, the 1850 Act

denoted no removal procedures or reservations. See id. (finding a changed congressional policy when Congress appropriated money and organized reservations for the tribe's removal). This Court should not consider any congressional change in policy after 1950 in this case because intervening factors, namely the Nation's signing of the 1850 Cush-Hook Treaty, affected the Indian-government relationship. See Sac & Fox Tribe of Indians, 383 F.2d 991, 999 (Ct. Cl. 1967) (setting the cutoff date at treaty's date).

Moreover, creation of an Indian reservation through such treaty does not extinguish aboriginal title claims to other areas except when specific circumstances warrant such conclusion. See Pueblo of San Ildefonso, 513 F.2d at 1388 (internal citation omitted). The Cush-Hook Treaty merely recognized the eventual settlement by white homesteaders. See id. at 1389 (finding that the mere anticipation of future white settlement did not affect Indian title); see also The Donation Land Claim Act of 1850, 9 Stat. 496 (requiring surveying and cultivating prior to granting a patent of land). Even if the "historical setting" of the Treaty indicates the Nation's acquiescence, the conditions of the treaty were not satisfied when Congress refused to ratify the Treaty or recognize the Nation and its relocation. See Santa Fe P. R. Co., 314 U.S. at 358 (finding that the Indians' agreement depended on the Indians' permanent provisions).

2. Government inaction must be construed as a Congressional intent not to extinguish aboriginal title.

Congress protects aboriginal title against any but the government, yet possesses the exclusive power to extinguish this title by affirmative action. See United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 46 (1946). Until Congress acts to extinguish this title, the tribe's rights to occupancy remain intact. See Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (internal citation omitted). This Congressional consent establishes the

essential affirmative action to extinguish the tribe's rights. See 25 U.S.C.A. § 177 (requiring Congress's consent prior to ceding land from a tribe to any individual); see also Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 666-67 (1974) (finding that federal approval a prerequisite for alienation of Indian land). Courts construe treaties more liberally than private agreements, often looking beyond the written words to the treaty's history, negotiations, and practical construction by the parties. See Choctaw Nation of Indians v. United States, 318 U.S. 423, 431 (1943) (internal citations omitted). This policy applies with even greater vigor to treaties with Indians, and courts must construe, "so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" Id. (citing Tulee v. Washington, 315 U.S. 681, 684 (1942)).

The government is precluded from diminishing Indian lands without "substantial and compelling evidence of a Congressional intent to exercise its power" to extinguish aboriginal title. Solem v. Bartlett, 465 U.S. 463, 472 (1984). This Court may not question the extinguishment only if the government clearly intended to extinguish Indian title. See Gemmill, 535 F.2d at 1147-48 ("The relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights . . . . ."). While recognition may be a political question, this Court may determine that Congress intended not to act when the Senate refused to ratify the treaty between the Nation and the United States. See Fellows v. Blacksmith, 60 U.S. 366, 372 (1856) (requiring that a treaty be executed and ratified by the government before the treaty becomes the supreme law of the land).

The United States Senate's intent not to ratify and recognize the Cush-Hook Treaty indicates a clear intent not to divest the Nation of its land. Not only did Congress have the

opportunity to decide the issue with a fully negotiated treaty, Congress also had peaceful means of accomplishing their presumed goal of encouraging white families to emigrate and settle the land. See United States v. Ashton, 170 F.2d 509, 514 (W.D. Wash. 1909) (noting Oregon Donation Act intended to remove the Indians); but see Plamondon, 467 F.2d at 936 (finding that Congress intended to extinguish Indian title only by treaty until 1853). Therefore, the Treaty should not extinguish the Nation's aboriginal title because Congress did not ratify it, giving the requisite governmental consent.

3. The government's failure to fulfill individual terms of a treaty or agreement indicates its intent not to endorse the treaty.

Furthermore, the United States government does not have the power to give Indian land "to others or to appropriate for its own use any part of the land without rendering, or assuming an obligation to pay, just compensation to the tribe." United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (holding that such action amounts to a "confiscation"). While courts may not examine whether the government used permissible means of extinguishing title, courts may look to whether the government followed the terms of its treaty and negotiations. See Buttz, 119 U.S. at 69-70 (finding that since consideration was paid, the Indians could not resume title). In Buttz, the Court also recognized the notions of "justice and equity" connected to the consideration attached to lands negotiated and extinguished by the government. Id. at 59. Both consideration, and justice and equity are absent in this case, however, as the Nation fulfilled their portion of the assumed deal without the government's benefits. This Court must distinguish this case from Tee-Hit-Ton Indians v. United States because the Tee-Hit-Tons sought a Fifth Amendment right implicit in their loss of land, not a negotiated treaty which failed to be granted or performed. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-80 (1955) (distinguishing between extinguished

lands by treaty or conquest). See also Johnson, 21 U.S. at 587. This Court recognized, however, that the government must pay compensation where negotiated by treaty or otherwise. See Tee-Hit-Ton Indians, 348 U.S. at 277-78 (citing United States v. Creek Nation, 295 U.S. 103, 109-110 (1935) and Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937)). This Court should not continue to ignore the Nation's reliance and government's unjust enrichment in their transaction.

Therefore, this Court should find that Congress, and the federal government, did not extinguish the Nation's title by statute, treaty, or affirmative action. Further, this Court should hold that the Nation continues to hold aboriginal title because the government did not extinguish this title.

C. The Nation never conceded its aboriginal title after being moved to the coastal range.

1. The Nonintercourse Act prevents ceding any tribal land to private individuals without the consent of the United States.

The government enacted the Nonintercourse Act partially to prevent Indians from "improvidently disposing of their land and becoming homeless public charges," a protective measure. See United States v. Candeleria, 271 U.S. 432, 441 (1926). The government further intended to prevent fraud. See United States v. Franklin Cnty., 50 F. Supp. 152, 156 (N.D. N.Y. 1943). However, this Act also establishes a fiduciary relationship between the tribe and the government. See Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (recognizing an obligation of trust between the government and the Indians). Furthermore, land held by aboriginal title cannot be alienated without the consent of the United States. See Oneida Cnty. v. Oneida Indian Nation, 470 U.S. 226, 246 (1985) (relying on 25 U.S.C.A. § 177).

In Beecher v. Wetherby, this Court held that valid land grants conveyed only the "naked fee," subject to the Indians' right of occupancy. Beecher v. Wetherby, 95 U.S. 517, 525 (1877). This decision reaffirms that Congress holds the ultimate power to extinguish aboriginal title. See United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 642 (9th Cir. 1986). Moreover, even the government's grant of Indian-occupied land will not extinguish aboriginal title. See id. (citing Johnson, 21 U.S. at 574). This Court should follow precedent that even if the government granted land to individual settlers under the Oregon Donation Land Claim Act, these land grant did not extinguish aboriginal title because Congress did not explicitly act and the Nation could not cede its land directly to these settlers. See id. Therefore, this Court should find that the Nation never conceded its aboriginal title and continues to retain its right of occupancy.

2. An unfulfilled land grant does not divest title from an Indian tribe.

The Oregon Donation Land Claim Act granted land to "every white settler or occupant of the public land." The Donation Land Claim Act of 1850, 9 Stat. 496. A married man could take six hundred and forty acres with his wife. See id. This Act restricted these grants, however, to settlers "who shall have resided upon and cultivated the same for four years." Id. In this case, the Meeks did not fulfill the requirements of the Act to establish even fee simple property rights in the Nation's lands. Like in United States v. Dann, only land held by aboriginal title actually granted by the government as a land grant or homestead was extinguished or lost. See United States v. Dann, 706 F.2d at 930. Therefore, since the Meeks did not fulfill the government's requirement to claim the land under the Act, their occupancy and ultimate transfer back to the State of Oregon did not extinguish the Nation's aboriginal title.

Moreover, the Court should distinguish this case from United States v. Gemmill because the Gemmill Indians were forcibly expelled from their lands and subsequently compensated for these lands, unlike the Nation. See Gemmill, 535 F.2d at 1148-49 (holding that including Indian lands within a national forest extinguished aboriginal title). This Court should examine that the Meeks did not have legal fee to sell, and, therefore, though the government could have legally taken the land for its own uses, Congress never intended, and the Nation never willingly conceded, this transfer from the Meeks to the State of the Oregon. See 25 U.S.C.A. § 177 (prohibiting states from extinguishing aboriginal title). Thus, this Court should affirm that the Nation retained aboriginal title to the land.

3. The federal government should not benefit from an Indian tribe's reliance on the government's actions.

Congress dealt with Native American tribes by treaties until 1871, and Congress held a "moral obligation . . . to act in good faith in performing the stipulations" within these treaties. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). While many decisions emphasize that courts lack a power to investigate Congress' motives in entering or abrogating treaties with Indians, these decisions leave choose to ignore any potential lack of good faith by Congress. See, e.g., id. (presuming that Congress acted in "perfect good faith in the dealings with the Indians"); Alcea Band of Tillamooks, 329 U.S. at 53 (recognizing that Congress's power over Indian affairs may be of a "plenary nature[,] but it is not absolute") (internal citations omitted).

Lower courts have recognized that Indian right of occupancy may be lost upon abandonment. See Santa Fe P. R. Co., 314 U.S. at 355-56 (relying on the language in a 1866 Act and a signed executive order). While this Act did not exist at the time of the Nation's move from their aboriginal title lands, Santa Fe Pacific Railroad Company's distinction

between a forced removal and a signed agreement between the government and the Indian tribe clearly emphasizes some of this Court's sensitivities to the government's "fair dealing" within an "unauthorized attempt to effect a forcible settlement of the reservation." See id. This Court should continue to respect the importance of protecting the "Christian duty" towards the Indians. See Johnson, 21 U.S. at 577 (recognizing the discovery doctrine to Christian people); see also Beecher, 95 U.S. at 525 (considering the importance of justice when dealing with "an ignorant and dependent race").

This Court should once again reinforce that the Indian's right of occupancy under aboriginal title is "as sacred as that of the United States to the fee." See Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831). To lightly dismiss the Nation's right to the lands within the Kelley Point Park because the Nation relied upon a broken promise by the government would amount to fraud and a gross injustice, which this Court should correct. See 25 U.S.C.A. § 70a (1946) (Indian Claims Commission Act) (identifying fraud as a reason to revise a treaty and to determine an Indian tribe's claim against the United States). The land in the Kelley Point Park is within the government's control and equity demands that this Court hold that the government must return this land to its rightful owners, the Nation.

For the foregoing reasons, this Court should AFFIRM the Oregon Court of Appeal's holding that the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park.

II. THE OREGON COURT OF APPEALS ERRED BY AFFIRMING MR. CAPTAIN'S CONVICTION DESPITE LACK OF JURISDICTION TO ENFORCE OR. REV. STAT. 358.905-358.961 *ET SEQ.* AND OR. REV. STAT. 390.235-390.240 *ET SEQ.* ON CUSH-HOOK NATION LAND BECAUSE PUBLIC LAW 280 DOES NOT AUTHORIZE OREGON TO REGULATE TRIBAL CITIZENS IN INDIAN COUNTRY, THE STATE STATUTES ARE CIVIL/REGULATORY IN NATURE, AND THE TRIBAL INTEREST IN THE ACTIVITY OUTWEIGHS THE STATE INTEREST IN REGULATING THE CONDUCT.

The Oregon Court of Appeals erred by affirming the Oregon Circuit Court for the County of Multnomah's conviction of Mr. Captain for damaging an archaeological site and a cultural and historical artifact in violation of Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* (collectively, the "Oregon Statutes"). The State of Oregon lacked criminal jurisdiction to enforce the Oregon Statutes against Mr. Captain, a Cush-Hook citizen, regarding his actions on Indian Country. Accordingly, this Court should reverse the conviction and dismiss the charges against Mr. Captain.

The question whether a court has proper subject matter jurisdiction over the issue at bar may be raised at any stage of litigation, including on appeal and after entry of final judgment. Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006). If at any time a court determines that it lacks jurisdiction over a matter, the case must immediately be dismissed and any judgment previously entered by a court that lacked jurisdiction is void. Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

A. Legislative intent, national policy, and interpretive canons mandate a narrow construction of Public Law 280 that precludes Oregon from regulating the Nation's citizens on its tribally owned lands.

The Oregon Circuit Court erroneously held that, pursuant to Public Law 280, the Oregon Statutes apply to all land, including tribally owned lands, within the state of Oregon. However, Oregon may not encroach on tribal sovereignty and exercise criminal jurisdiction over Mr. Captain's actions on the Nation's land, unless Congress explicitly delegated that

authority to Oregon. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) ("[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.").

In the case at bar, Oregon seeks to enforce the Oregon Statutes against Mr. Captain under the guise of Public Law 280, which granted Oregon criminal jurisdiction over Indians in Indian Country.[1] 18 U.S.C.A. § 1162 (2010) (granting specific states, including Oregon, criminal jurisdiction over offenses committed by or against Indians in most Indian country within the respective states). It is well settled, however, that Public Law 280 does not authorize states to exercise general regulatory powers over Indians. Cabazon Band of Mission Indians, 480 U.S. at 208 (holding that Public Law 280 did not allow California to enforce its bingo statute against reservation Indians where the statute's nature and intent is civil and regulatory); Bryan v. Itasca Cnty., Minn., 426 U.S. 373, 386-89 (1976) (holding that Public Law 280 did not grant states regulatory authority to tax reservation Indians). Rather, the legislative intent behind Public Law 280, national policy towards Indian tribes, and established interpretive canons favor a narrow construction of the statute that precludes Oregon from regulating the Nation's citizens on its tribal lands.

1. Oregon lacked general regulatory power over the Nation because Congress intended Public Law 280 to address lawlessness, not to fully assimilate Indians into mainstream society.

Tribal sovereignty over matters affecting members in Indian Country provides the "backdrop against which the applicable . . . federal [and state] statutes must be read."

[1] Given that Mr. Captain is a citizen of the Nation living on tribally owned land, Public Law 280 controls the inquiry of Oregon's jurisdiction, or lack thereof, over Mr. Captain in the case at bar. See 18 U.S.C.A. § 1162.

McClanahan, 411 U.S. at 172; see United States v. Wheeler, 435 U.S. 313, 323-26 (1978) (stating that all sovereign tribal communities have the right to create and enforce tribal law within its territory, notwithstanding dependent status on the federal government). "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Williams v. Lee, 358 U.S. 217, 220 (1959). Given the importance of tribal sovereignty, tribal courts have historically retained jurisdiction over matters affecting members in Indian country, subject only to federal law. Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."). Then, in 1953, Public Law 280 impacted the special relationship between federal and tribal government by authorizing some state jurisdiction over certain Indian matters. See Bryan, 426 U.S. 387-88. As a result of the passage of Public Law 280, federal, tribal, and state governments share concurrent jurisdiction over Indian Country. 18 U.S.C.A. § 1162 (granting six states, including Oregon, criminal jurisdiction over offenses committed by or against Indians in most Indian country within the respective states); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 118 (1993) (acknowledging concurrent tribal and federal jurisdiction).

Although Public Law 280 provides room for states to intercede in tribal matters, "[t]he Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society." Cabazon Band of Mission Indians, 480 U.S. at 208. Rather, Congress intended to "combat[] lawlessness on reservations," id., and to address "the absence of adequate tribal institutions for law enforcement." Bryan, 426 U.S. at 379. Consequently, Public Law 280 does not subject the Nation to Oregon's complete regulatory

framework, because "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values" equivalent to total assimilation. Cabazon Band of Mission Indians, 480 U.S. at 208. The language Section 4 of Public Law 280 does grant some civil jurisdiction to states, but this Court "has construed this section to mean that states have jurisdiction only over private civil litigation involving reservation Indians in state court." Barona Group of Capitan Grande Band of Mission Indians, San Diego Cnty., Cal. v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983) (citing Bryan, 426 U.S. at 385); 28 U.S.C.A. § 1360 (2010) (Section 4 of Public Law 280). Instead, courts interpret Public Law 280 to grant criminal jurisdiction over criminal matters relevant to combatting lawlessness, without granting broader jurisdiction over intrinsically civil regulatory matters couched as criminal infractions. Cabazon Band of Mission Indians, 480 U.S. at 208.

2. Ambiguity in Public Law 280 should be resolved in favor of the Nation's tribal sovereignty, given national policy towards Indians and traditional canons of construction.

A narrow construction of Public Law 280 is further supported by the traditional canons of statutory interpretation applicable to laws affecting Indians. One such principle of statutory construction mandates that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n. 17 (1978). This canon has "particular force in the face of claims that ambiguous statutes abolish by implication Indian [. . .] immunities." Bryan, 426 U.S. at 392 (applying the canon to resolve an ambiguous statute alleged to abolish Indian tax immunities in favor of Indians and, as such, unenforceable against Indians). Moreover, national policy strongly favors tribal sovereignty over assimilation,

justifying a narrow construction of any ambiguous grant of external power over Indian tribes. See Wheeler, 435 U.S. at 322-26; Bryan, 426 U.S. at 388-89 n. 14. As a result, Congress must "manifest[] a clear purpose to terminate . . . and [to] allow states to treat Indians as part of the community" before a statute is read to reduce or eliminate an aspect of tribal sovereignty. Bryan, 426 U.S. at 392 (quoting Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)). Accordingly, the "'admittedly ambiguous'" Public Law 280 must be narrowly construed in favor of Indians such that it does not abolish tribal sovereignty from general state regulation. See Bryan, 426 U.S. at 392 (holding that Public Law 280 did not grant states the authority to tax Indians) (quoting Bd. of Comm'rs v. Seber, 318 U.S. 705, 713 (1943)). Thus, although Public Law 280 expressly granted Oregon criminal jurisdiction over Indian Country, Congress clearly did not endow Oregon with a general regulatory power over the Nation.

B. Oregon lacked criminal jurisdiction because the Oregon Statutes are civil/regulatory, not criminal/prohibitory within the meaning of Public Law 280, and Oregon lacks general regulatory power over Mr. Captain.

Given that Public Law 280 must be narrowly construed to exclude jurisdiction to enforce general regulatory laws, whether the Oregon Statutes apply to Mr. Captain depends on the primary nature and intent of the statutes. See Cabazon Mission Tribe of Indians, 480 U.S. at 209. "[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction." Id. If, as here, "the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation." Id. Ultimately, the test does not offer a bright-line rule and requires a fact-based inquiry into whether the Oregon Statutes are primarily "criminal/prohibitory," and thus enforceable in Indian Country,

or primarily "civil/regulatory," and thus unenforceable under color of Public Law 280. See Id.

Oregon's impermissible attempt to control the tribal citizens' use and protection of archaeological, historical, and cultural objects on tribal land constitutes a regulatory initiative beyond the scope of Public Law 280. The Oregon Statutes are permissive civil/regulatory measures exceeding the authority over Indian Country granted to Oregon by Public Law 280. See Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (1981), cert. denied, 455 U.S. 1020 (1982) (employing civil/regulatory and criminal/prohibitory distinction to render Florida's bingo statute unenforceable on Indians reservations where the statute permitted playing bingo subject to regulations and restrictions). Consequently, Oregon improperly exercised jurisdiction over Mr. Captain because the Oregon Statutes are not "criminal/prohibitory" statutes within the meaning of Public Law 280's grant to Oregon of criminal jurisdiction over Indian Country. See Barona Group of Capitan Grande Band of Mission Indians, San Diego Cnty., Cal., 694 F.2d at 1189 (finding that California lacked jurisdiction to enforce bingo statutes against tribal members because the statute was not "criminal/prohibitory" within the meaning of Public Law 280). Thus, the Oregon Circuit Court lacked jurisdiction to enforce the Oregon Statutes against Mr. Captain, rendering his conviction void and requiring dismissal of the charges against him. See Kontrick v. Ryan, 540 U.S. at 455 (stating that lack of jurisdiction mandates dismissal).

1. The Oregon Statutes are permissive with a state permit, evidencing a classic regulatory scheme.

In the case at bar, the Oregon Statutes have a clearly regulatory operation. Although portions of the Oregon Statutes contain prohibitory wording, the provision certainly does not operate by prohibiting archaeological exploration and excavation altogether. Compare

United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977) (finding the Washington fireworks statutory scheme to be prohibitory where "its intent is to prohibit the general possession and/or sale of dangerous fireworks and [it] is not primarily a licensing law"); with Barona Group of Capitan Grande Band of Mission Indians, San Diego Cnty., Cal., 694 F.2d at 1189 (finding the California bingo statutory scheme to be permissive, given "that so many diverse organizations are allowed to conduct bingo operations, albeit under strict regulation"). Rather than prohibiting working with archaeological objects, the Oregon Statutes simply require individuals to obtain a state permit from its regulatory authorities before engaging in the activity. Or. Rev. Stat. §§ 358.920(1)(C) & § 390.235(1)(a) (2011) ("A person may not excavate . . . or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature *without first obtaining a permit* issued by the State Parks and Recreation Department.") (emphasis added). Indeed, the third element of Chapter 358's offense regarding archaeological objects is the absence of a permit. Or. Rev. Stat. § 358.920(1)(C). ("It is prima facie evidence of a violation of this section if: . . . [a] person does not possess a permit . . . .").

Requiring a permit in order to engage in a certain an activity constitutes evidence of a regulatory framework. See, e.g., Barona Group of Capitan Grande Band of Mission Indians, San Diego Cnty., Cal., 694 F.2d at 1189 (citing Marcyes, 557 F.2d at 1364) (explaining that the Marcyes court distinguished criminal fireworks scheme from regulatory bingo scheme because "possession of dangerous fireworks was 'generally' prohibited and not merely licensed"). Consequently, this Oregon paradigm functions like typical regulatory statutes requiring permits for fishing or hunting, and less like criminal statutes prohibiting murder or theft. See Marcyes, 557 F.2d at 1364 (noting a clear purpose "to regulate described conduct

and to generate revenues" when states employ "regulatory schemes such as hunting or fishing, where a person who wants to hunt or fish merely has to pay a fee and obtain a license"). In Barona, "the California statute regulate[d] bingo as a money making venture by limiting size of prizes, requiring that all proceeds be applied to charitable purposes, and requiring that the game be operated by volunteers from the authorized organization." Barona Group of Capitan Grande Band of Mission Indians, San Diego Cnty., Cal., 694 F.2d at 1189. Despite stringent regulation and somewhat limited parties permitted to operate bingo, the nature and intent of the statute was deemed civil/regulatory. Id. The Oregon Statutes at issue here are more permissive and less stringent than the Barona statute and, accordingly, are even more clearly civil/regulatory. Ultimately, the Oregon Statutes are permissive with a permit, evidencing the civil/regulatory nature of the laws and placing the Oregon Statutes outside of Public Law 280's grant of jurisdiction.

Violation of the Oregon Statutes is couched as a Class B misdemeanor, Or. Rev. Stat. §§ 358.920(8) & 390.235(7), "[b]ut that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." Cabazon Band of Mission Indians, 480 U.S. at 211. Such an interpretation would make it too easy for a state to circumvent the outer limits of Public Law 280 by simply couching regulatory measure as criminal violations, which is, in any event, a common practice. See id.

2. Excavation, use, and protection of archaeological and historical objects does not violate Oregon public policy, affirming the regulatory nature of the Oregon Statutes.

"The shorthand test [for distinguishing criminal/prohibitory laws from civil/regulatory laws] is whether the conduct at issue violates the State's public policy." Cabazon Mission Tribe of Indians, 480 U.S. at 209. In evaluating whether utilizing or

protecting archaeological objects is against Oregon's public policy, this Court may look no further than the plain language of the Oregon Statutes. Clearly, archaeological exploration and excavation is an activity that Oregon and the public benefits from, as evidenced by the stated policy objective of the statute. Or. Rev. Stat. § 358.910(1) ("Archaeological sites are . . . an intrinsic part of the cultural heritage of the people of Oregon. As such, archaeological sites and their contents . . . are . . . to be protected and managed in perpetuity by the state as a public trust."). The statute's clear implication is that Oregon wishes for archaeological exploration and excavation to occur because it provides valuable cultural benefits to the public, but seeks to regulate archaeological activities in order to protect valuable and finite historical objects. See id. Consequently, Oregon cannot argue that use and preservation of archaeological object is against public policy, since the statute itself heralds the cultural value inherent in studying, viewing, and learning from such objects.

Moreover, Mr. Captain's specific actions in this case are even more aligned with, and clearly not contrary to, Oregon's public policy. See id. (explaining that conduct that does not conflict with state public policy is construed as regulated, not prohibited, conduct). Mr. Captain, recognizing the real threat to tribally significant objects presented by vandals in the Kelley Point Park, sought to preserve those objects for tribally significant and religious uses. Certainly, Oregon's public policy cannot prohibit Mr. Captain from protecting historical tribal objects under the guise of a stated policy to protect historical objects. It would be a bizarre and unworkable public policy indeed that sought to protect historical objects and, nevertheless, required Mr. Captain to apply for a permit and stand idly by as vandals desecrated tribally significant objects. Consequently, the conduct at issue here is regulated

conduct that is not contrary to Oregon's public policy, affirming that the Oregon Statutes are civil/regulatory in nature.

3. The placement of the Oregon Statutes within Title 30 and Title 31's regulatory schemes for Education and Culture and Highways, Roads, Bridges, and Ferries respectively, is a clear reflection of the civil/regulatory nature and intent of the provisions.

The placement of the Oregon Statutes within the Title 30 and Title 31's regulatory schemes speaks to the civil/regulatory nature and intent of the Oregon Statutes. First, Title 30, which contains Or. Rev. Stat. 358.905-358.961 *et seq.*, is entitled "Education and Culture." See Or. Rev. Stat., Title 30 (2011). Likewise, Title 31, which contains Or. Rev. Stat. 390.235-390.240 *et seq.*, is entitled Highways, Roads, Bridges, and Ferries. See Or. Rev. Stat., Title 31 (2011). Second, both Title 30 and 31 consist of quintessential regulatory chapters dealing with infrastructure for the education and transportation of Oregon citizens. See Or. Rev. Stat. Titles 30 & 31. For example, Title 30 chapters include: "State Administration of Education" in Chapter 326, "Local Administration of Education" in Chapter 332, "Books and Instructional Materials" in Chapter 337, "School Attendance; Admission; Discipline; Safety" in Chapter 339, and "Libraries; Archives; Poet Laureate" in Chapter 357. Or. Rev. Stat. §§ 332, 337, 339, & 357 (2011). Likewise, Title 31 chapter include: "State Highways and State Highway Fund" in Chapter 366 and "Mass Transportation" in Chapter 391. Or. Rev. Stat. §§ 366 & 391 (2011). Third, the broader Chapter 358 regulates cultural and educational infrastructure, namely "Oregon Historical and Heritage Agencies, Programs and Tax Provisions; Museums; Local Symphonies and Bands; [and] Archaeological Objects and Sites." Or. Rev. Stat. § 358 (2011). Likewise, Chapter 390 regulates "State and Local Parks; Recreation Programs; Scenic Waterways; [and] Recreation Trails." Or. Rev. Stat. § 390 (2011).

Clearly, none of the chapters in Titles 30 and 31 can be characterized as criminal provisions that address alleged lawlessness. In fact, few subject areas are more inherently civil in nature than how a state regulates the education, culture, and transportation of its citizens through schools, libraries, museums, and highways, as Oregon does in Title 30. See Barbier v. Connolly, 113 U.S. 27, 31 (1884) (defining the general state police power as authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the people"). Building and maintaining travel infrastructure, as well as regulating the use of such infrastructure, as Oregon has done in Title 31 is also a very typical exercise of general state regulatory power supporting public safety and welfare. See Confederated Tribes of Colville Reservation v. Wash., 938 F.2d 146, 148 (9th Cir. 1991) (evaluating state traffic and transportation framework and holding that state traffic laws regarding speeding are civil/regulatory in nature). Typically, a primarily criminal statute that deals with a civil activity, such as driving while intoxicated, is very clearly distinguished from general regulatory laws. Id. Here, however, the Oregon Statutes are melded within the general regulatory framework for education and culture of citizens and the maintenance of transportation infrastructure, supporting a civil/regulatory construction of the statutes.

Most specifically, the Oregon Statutes themselves reflect Oregon's intent to protect cultural artifacts as "an intrinsic part of the cultural heritage of the people of Oregon" by regulating archaeological excavation and curation of historical objects. Or. Rev. Stat. § 358.910 ("[A]rchaeological sites and their contents located on public land are under the stewardship of the people of Oregon to be protected and managed in perpetuity by the state as a public trust."). The chapters in Title 30, including Chapter 358, each regulate a certain piece of Oregon's framework for administering education through schools, libraries, and

museums, which are clearly civil and not criminal concerns. If Oregon possessed the power to regulate the Nation's education, culture, libraries, museums, and historical objects, Oregon would effectively possess the power to force the Nation's citizens to assimilate into mainstream society. Oregon lacks such intrusive regulatory authority, however, because neither the intent of Public Law 280 nor the federal policy of recognizing tribal sovereignty mandates assimilation. See Cabazon Band of Mission Indians, 480 U.S. at 208 (intent of Public Law 280); Wheeler, 435 U.S. at 322-26 (tribal sovereignty).

C. Oregon cannot enforce the Oregon Statutes against Mr. Captain because the Nation's interest in protecting and utilizing sacred tribal objects outweighs the state's interest in regulating the use of and protecting archaeological, cultural, and historical objects on land owned by the Nation.

Federal supremacy may mandate that conflicting state interests yield to superseding federal and tribal interests. See Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. at 154. The "comprehensive pre-emption inquiry in the Indian law context [. . .] examines not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). The state interest at issue – the preservation of historically and archaeologically significant objects – is an undeniably important interest. See Or. Rev. Stat. § 358.910(1) ("Archaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon."). The tribal interest at stake, however, is the same significant interest of protecting crucial tribal objects with great cultural and religious significance to the Nation, augmented by vital religious concerns. See 42 U.S.C.A. § 1996 (2010) (formalizing in the Indian Religious Freedom Act the federal policy to protect and

preserve traditional Indian religious practices "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites").

In addition to the clear federal interest in protecting tribal sovereignty and religion, the importance of the tribal interest at stake is reflected in the Oregon Statutes themselves. The Oregon Statutes even provide for returning permanent possessory rights in historical material to an appropriate Indian tribe. Or. Rev. Stat. § 390.235(4). The Oregon Statutes also consistently require collaboration with and approval from the relevant tribe before working with historical tribal objects, demonstrating the compelling nature of the tribal interest in using and protecting historical objects. See Or. Rev. Stat. § 390.235(1)(c) ("No permit shall be effective . . . without the approval of the appropriate Indian tribe."). These measures, which take tribal interests into consideration within the statutory framework, suggest that Oregon recognized that its interest should be subordinated to tribal interests in this matter.

Moreover, without Mr. Captain's intervention, these historical objects may have been permanently damaged or lost because Oregon failed to prevent vandals from damaging the carved images. If the objects were permanently destroyed, neither the state nor tribal interest could be satisfied. Accordingly, Mr. Captain furthered, not hindered, the state interest at issue in the Oregon Statutes by rescuing culturally and historically significant tribal objects and seeking to return them to the Nation who values them most. Notwithstanding the vandalism presented by the facts of this case, it would be an untenable infringement on tribal sovereignty for Oregon to require tribes to wait and seek a state permit before protecting, handling, or utilizing sacred tribal objects. See Bryan, 426 U.S. at 392 (resolving

ambiguities about the statute's purpose in favor of Indians due to concern for protecting tribal sovereignty from state infringement). Intuitively, the tribal interest at stake clearly outweighs the state interest, precluding Oregon from infringing on tribal sovereignty and religious freedom by enforcing the Oregon Statutes against Mr. Captain.

For the foregoing reasons, this Court should REVERSE the Oregon Court of Appeal's holding that Oregon may, pursuant to Public Law 280, enforce Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* against Mr. Captain and DISMISS the charges for lack of jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully requests that this Honorable Court AFFIRM the judgment of the Oregon Court of Appeals regarding the continued existence of the Cush-Hook Nation's aboriginal title to the land in question, and REVERSE the judgment of the Oregon Court of Appeals regarding Oregon's criminal jurisdiction over the Respondent pursuant to Public Law 280.

Respectfully submitted,

Thomas Captain

By his attorneys

APPENDIX: STATUTORY PROVISIONS

Section 2 of Public Law 280, 18 U.S.C.A. § 1162 (2010):

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and
(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.