No. 11-0274

SUPREME COURT OF THE UNITED STATES

STATE OF OREGON

Petitioner

v.

THOMAS CAPTAIN

Appellee - Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONER'S BRIEF ON THE MERITS

TEAM NO: 42

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1) Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park?
2) Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe?

STATEMENT OF THE CASE

Statement of the Proceedings

Petitioner, the State of Oregon ("State"), brought a criminal action in Oregon state court against Respondent, Thomas Captain ("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 (2013). R. at 2-3. In his defense, Captain testified that he was a member of the Cush-Hook Nation ("Cush-Hook"), asserted that the Cush-Hook had "aboriginal title" to Kelley Point Park, and by virtue of his tribe's "title," he should be found not guilty of all charges. R. at 3. The trial court held that the Cush-Hook had "aboriginal title" to Kelley Point Park and found Captain not guilty of trespass on state lands and cutting timber in a state park. R. at 4. However, the trial court held that Or. Rev. Stat. §§ 358.905-358.961 et. seq. (2013) and Or. Rev. Stat. §§ 390.235-390.240 et. seq. (2013) apply to all lands in Oregon under Public Law 280[1] whether tribally-owned or not. Thus, the State had criminal jurisdiction over Captain for damaging an archaeological, cultural, or historic object. R. at 4.

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

[1] Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1994)).

Court. R. at. 4.

Statement of Jurisdiction

This Court has appellate jurisdiction of this appeal of the final judgment of a state court pursuant to 28 U.S.C. § 1257 (2006).

Statement of Facts

The State of Oregon owns fee simple title to Kelley Point Park located at the convergence of the Columbia and Willamette Rivers in Portland, Oregon. R. at 1. The lands comprising Kelley Point Park were the former village lands of the Cush-Hook. R. at 1. The Cush-Hook, along with the Multnomah Indians ("Multnomah"), historically cultivated and subsisted in this area, growing crops, harvesting various wild plants such as wapato, hunting and fishing. R. at 1. The United States never formally recognized the Cush-Hook. Today, they are neither state nor federally recognized. R. at 1.

In April of 1806, William Clark, of the Lewis and Clark expedition discovered the Cush-Hooks and visited their village. R. at 1. Clark recorded his interactions in his journal. On April 5, 1806, Clark discovered some Multnomah fishing and gathering wapato along the Willamette River near the Cush-Hook's village. R. at 1. The Multnomah pointed out the Cush-Hook's village and longhouses to Clark. R. at 1. After making peace signs, the Multnomah took Clark to the Cush-Hook village and introduced him to the headman/chief of the Cush-Hook Nation. R. at 1.

Clark later drew an illustration of the Cush-Hook's village in his journal and recorded general observations regarding the Cush-Hook's governance and traditional religious and cultural practices. R. at 1. Clark gave the headman/chief one of President Thomas Jefferson peace medals, often referred to as "sovereignty tokens," that Clark routinely gave out to chiefs

throughout his expedition. Lewis and Clark distributed the medals because they signified a tribe's desire to engage in political and commercial relations with the United States. R. at 1.

Subsequent to Clark's interactions with the Cush-Hook, the tribe remained on the land. R. at 1. In 1850, the Cush-Hook signed a treaty with the superintendent of Indian Affairs for the Oregon Territory, Anson Dart. R. at 1. The superintendent wanted to move the tribe to accommodate arriving American settlers. R. at 1. The Cush-Hook voluntarily agreed to move sixty miles west to a location in the foothills of the Oregon coastal mountains. R. at 1-2. After the Cush-Hook signed the treaty, the entire tribe moved to the Oregon foothills because they direly wanted to avoid encroaching settlers. R. at 2. The United States did not ratify the treaty following the land swap. R. at 2. The Cush-Hook did not receive financial compensation or ownership recognition in the foothills. R. at 2. The United States has not since undertaken any act to recognize the tribe. R. at 2.

After the Cush-Hook moved to the Oregon foothills, Joe and Elsie Meeks moved onto 640 acres of land now comprising Kelley Point Park. R. at 2. The United States transferred fee simple ownership of Kelley Point Park to the Meeks' under the Oregon Donation Land Act of 1850, 9 Stat. 460. R. at 2. The Act granted fee simple title to American settlers who had resided on and cultivated the land for four consecutive years. R. at 2. Their descendants sold the land to the State in 1880 and the State created Kelley Point Park. R. at 2.

In 2011, Captain, a Cush-Hook tribe member, moved from the Oregon foothills to Kelley Point Park. R. at 2. Captain occupied Kelley Point Park in an attempt to reassert the Cush-Hook's ownership in the land and to protect a tribal object. R. at 2. The tribal object was located on timber that had grown in Kelley Point Park for over a hundred years. R. at 2. Cush-Hook tribal shamans/medicine men carved sacred totems and religious symbols into the living

trees long ago. R. at 2. In 1806, Clark noted these carvings in his Journals. R. at 2. Recently, vandals have begun climbing the trees to take the tribal objects, which are located twenty-five to thirty feet in the air. R. at 2. The State has regulations in place to protect archaeological objects on public lands, but has not actively pursued any new measures to stop these acts. R. at 2. Thus, in an unapproved attempt to protect the remaining tribal object, Captain cut down the timber and removed the section of the tree containing the tribal object. R. at 2. On his return to the Oregon foothills, a state trooper arrested him and seized the image. R. at 2.

ARGUMENT

Standard of Review

Establishment of Aboriginal Title

Whether "occupancy necessary to establish [aboriginal] title has been established is a question of fact to be determined as any other question of fact." United States v. Santa Fe P.R. Co., 314 U.S. 339, 345 (1941). Questions of fact are reviewed under the clearly erroneous standard of review, which provides that findings of fact made by the trial judge shall not be set aside unless clearly erroneous. See Maine v. Taylor, 477 U.S. 131, 144-45 (1986).

Extinguishment of Aboriginal Title

Whether the federal government extinguished aboriginal title presents a mixed question of law and fact. See United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976) (holding that what constitutes extinguishment of aboriginal title turns on "whether the governmental action was intended to be a revocation of Indian occupancy rights."). Because this determination requires the consideration of legal principles, i.e. whether government's conduct amounted to extinguishment, it is reviewed *de novo.* See Masayesva v. Zah, 65 F.3d 1445, 1453 (9th Cir. 1995).

State Criminal Jurisdiction

"Jurisdiction is a question of law subject to *de novo* review." United States v. Vargas–Amaya, 389 F.3d 901, 903 (9th Cir.2004).

I. The trial court clearly erred in determining that the Cush-Hook hold aboriginal title to Kelley Point Park.

A. Background –Aboriginal Title

The concept of aboriginal title traces its origins to the international law principle of the doctrine of discovery, which provided that "discovering nations held fee title to [discovered] lands, subject to the Indian's[2] right of occupancy and use." Oneida County, N.Y, v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985). The doctrine of discovery developed during the fifteenth through nineteenth centuries and was widely used by European colonial powers to reconcile their claims to newly discovered lands with competing claims of other European powers and the indigenous people already inhabiting these lands. See generally Robert J. Miller, et. al., Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies 26-46 (2010).

This Court formally adopted the doctrine of discovery in Johnson v. McIntosh, 21 U.S. 543 (1823), holding that discovery provided the first European settlers with fee simple title to what would eventually become the United States "subject only to the Indian right of occupancy." Id. at 574. The Court characterized this "right of occupancy," or aboriginal title, as a limited property right which allowed an Indian tribe to lawfully occupy, possess, and use their lands in their own discretion, but did not allow them to sell or transfer these lands to anyone other than

[2] There is no single all-purpose federal definition of "Indian", "Indian tribe", or "Indian nation" that has operated consistently across time. Cohen's Handbook of Federal Indian Law 135 (2005 ed.). For federal purposes, the terms "Indian tribe" or "Indian nation" refers to an indigenous North American group with which the United States has established a legal relationship and "Indian" refers to a member of one of these groups. Id.

In this brief, we use the term "Indian tribe" to refer to a federally recognized native Indian tribe. As discussed in infra Section II, the Cush-Hook are not a federally recognized tribe.

the federal government because to do so would contradict the "original fundamental principle [ ] that discovery gave exclusive title to those who made it." Id. Although earlier decisions of this Court considered aboriginal title to be as "sacred" as fee simple title, see Mitchel v. United States, 34 U.S. 711, 746 (1835), it is now clear that the right of occupancy and use founded in aboriginal title is not a property right per se. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955).

The right of occupancy inherent to aboriginal title arises out of an Indian tribe's exclusive use and occupation of a definable territory prior to European settlement. See United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941). The validity of this right of occupancy is not dependent on treaty, statute, or other formal governmental recognition, Cramer v. United States, 261 U.S. 219, 229 (1923); however, a tribe making an aboriginal title claim must show that it had exclusive occupancy and use of the subject property for an extended period of time. See Santa Fe, 314 U.S. at 345. The length and exclusive nature of occupancy necessary to establish aboriginal title is a question of fact to be determined as any other question of fact. Id.

Even if a tribe is able to establish a legally cognizable aboriginal title claim, it is well-established that Congress has the exclusive power to extinguish aboriginal title and that the "manner, method, and time of such extinguishment raise political not justiciable issues. Santa Fe, 314 U.S. at 347. "[T]he exclusive right of the United States to extinguish [aboriginal] title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." Id. (citations omitted). While it was the early policy of the federal government to acquire Indian lands through negotiations and treaties, an extinguishment without the consent of the Indian tribe is valid. See United States v. Gemmill, 535 F.2d 1145,

1147-48 (9th Cir. 1976). Further, the power to extinguish aboriginal title may also be exercised by the President where a Presidential act is authorized and ratified by Congress. See Gila River Pima-Maricopa Indian Community v. United States, 204 Ct. Cl. 137 (1974).

In sum, aboriginal title is a right of occupancy arising out of an Indian tribe's exclusive use and occupation of a definable area for an extended period of time; aboriginal title cannot be sold or transferred to anyone other than the federal government; and the federal government can extinguish aboriginal title at any time.

For the reasons set forth below, the trial court clearly erred in determining that the Cush-Hook held aboriginal title to Kelley Point Park.

B. The Cush-Hook never had aboriginal title to Kelley Point Park because they did not establish that their use and occupancy of Kelley Point Park was "exclusive" of other Indian tribes.

To establish aboriginal title to a particular property, an Indian tribe must show "actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property." Sac & Fox Tribe of Okl. v. United States, 161 Ct. Cl. 189, 201-02 (1963) (international quotations and citations omitted). Accordingly, the general rule is that mixed and nonexclusive use and occupancy of a region precludes the establishment of aboriginal title by any of the users of the subject property. See, e.g., Strong v. United States, 518 F.2d 556, 561 (Ct. Cl. 1975); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Here, there is no dispute that the Cush-Hook did not have the requisite exclusive use and occupancy to establish aboriginal title to Kelley Point Park. In an April 1806 journal entry, William Clark noted that members of the Multnomah fished and gathered wapato along the banks of the Willamette River which surrounds modern-day Kelley Point Park. The presence of the Multnomah exercising at least partial dominion and control over the land and natural resources of Kelley Point Park

contradicts the conclusion that the Cush-Hook had the requisite exclusive use and occupancy to establish aboriginal title to this area.

Captain may argue that, while the Multnomah fished and gathered in this region, the Cush-Hook nonetheless hold aboriginal title by virtue of their "joint and amicable possession" of Kelley Point Park with the Multnomah. This argument is without merit because, although courts have acknowledged the general possibility that two or more tribes might acquire aboriginal title by "joint and amicable possession", see, e.g., Sac & Fox Tribe v. United States, 161 Ct. Cl. 189, 202 n.11 (1963), Confederated Tribe of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 194 n. 6 (1993), an amicable relationship between separate and distinct Indian tribes does not necessarily confer aboriginal title to one tribe or the other. See Iowa Tribe of Iowa Reservation in Kan. and Neb. v. United States, 195 Ct. Cl. 365, 370 (1971). In Iowa Tribe, the court held that the Indian Claims Commission was justified in concluding that the Iowa and Sac & Fox tribes did not hold joint aboriginal title to a large parcel of land used by both tribes because the tribes considered themselves as "separate political groups" who did not share a "single or closely integrated identity." Iowa Tribe, 195 Ct. Cl. at 370. Additionally, where a common subsistence area is used by more than one Indian tribe, there must be substantial evidence that the various bands did not constitute a single political unit and that they were not an identifiable group or tribe in the ethnic or cultural sense, i.e. similar language, cultural practices, religious practices, etc. See Confederated Tribe of Warm Springs Reservation, 177 Ct. Cl. at 206.

In the instant case, the record does not establish that the Multnomah and Cush-Hook comprised a single political unit or were so unified in an ethnic or cultural sense that they were essentially the same group; therefore, neither tribe could establish an aboriginal title claim to

Kelley Point Park. In his journal, Clark recorded the Cush-Hook's distinct governance, religion, culture, burial traditions, housing, agriculture, hunting and fishing practices. He made no mention of similar practices of the Multnomah. While the Multnomah knew the location of the Cush-Hook village, the identity of their Chief, and appear to have had friendly relations with the Cush-Hook, it does not follow that they constituted a "single or closely related entity" giving rise to joint aboriginal title to this area. See Iowa Tribe, 195 Ct. Cl. at 370. Because the establishment of aboriginal title generally requires a showing of actual, exclusive, and continuous use and occupancy for a long time prior to the loss of land, see Sac & Fox Tribe of Indians of Okla. v. United States, 161 Ct. Cl. at 201-02, and because there is no substantial evidence to support a finding that the Multnomah and Cush-Hook were culturally or politically unified, the Cush-Hook have no aboriginal title claim to Kelley Point Park.

C. Even if the Cush-Hook established aboriginal title to Kelley Point Park, aboriginal title was extinguished by (1) voluntary cession of Kelley Point Park to the United States by treaty and creation of a reservation for the Cush-Hook in the Oregon foothills or (2) issuance of a federal land patent to the Meeks' pursuant to the Oregon Donation Land Act of 1850, 9 Stat. 496.

1. Voluntary cession by treaty and subsequent relocation to the Oregon foothills extinguished Cush-Hook aboriginal title to Kelley Point Park.

"A formal act of cession by a tribe, by treaty or otherwise, operates to determine the [aboriginal] title, and is the usual method in which such rights have been extinguished." Bennett County, S.D. v. United States, 394 F.2d 8 (8th Cir. 1968) (emphasis added). Moreover, under appropriate circumstances, the creation of a reservation by the federal government constitutes an extinguishment of aboriginal title by voluntary cession. See United States v. Santa Fe P.R. Co., 314 U.S. 339, 357-58 (1941). Here, the facts and circumstances of this case indicate that, even if the Cush-Hook held aboriginal title to Kelley Point Park, aboriginal title was extinguished by the

Cush-Hook's voluntary cession of Kelley Point Park and consensual relocation to the Oregon foothills.

In 1850, the Cush-Hook signed a treaty ("1850 Dart Treaty") with Anson Dart, the Superintendent of Indian Affairs for the Oregon Territory, agreeing to abandon Kelley Point Park in exchange for a parcel of land in the Oregon foothills. The record shows that the Cush-Hook's relocation was voluntary and that their decision to relocate was an informed one, motivated in large part by a desire to avoid encroaching American settlers and to continue living a traditional lifestyle. Further, the fact that the entire Cush-Hook relocated to the Oregon foothills and never returned to Kelley Point Park strongly supports the conclusion that the tribe understood this relocation would be a permanent relinquishment of any aboriginal title claims they had to Kelley Point Park.

This Court's decision in United States v. Santa Fe P.R. Co., 314 U.S. 339 (1941), supports a finding that any purported Cush-Hook aboriginal title claim was extinguished by the 1850 Dart Treaty and subsequent consensual relocation to the Oregon foothills. In Santa Fe, petitioner Walapai Indian tribe brought suit against the respondent railroad company asserting that it held aboriginal title to a parcel of land owned in fee by the respondent. Id. at 343-45. The Walapai tribe asserted, inter alia, that, under the circumstances, the creation of two reservations for the Walapai (1) by congressional act in 1865 and (2) by executive order in 1883 did not extinguish aboriginal title to the subject property. Id. at 353-57. The Court held that while the reservation created by congressional act in 1865 was not a "clear and plain" expression of Congress' intent to extinguish aboriginal title, the creation of a reservation by executive order in 1883 extinguished aboriginal title to lands outside the reservation by voluntary cession. Id. at 357. In support of this conclusion, the Court noted that the 1883 executive order reservation was

created at the request of the Walapai, that they were satisfied with the proposed renovation, and that they accepted these lands, which constituted a "release of any tribal rights which they may have had in lands outside the reservation." Id. Moreover, the Court found that aboriginal title was voluntarily ceded despite the fact that only a few members of the Walapai relocated to the reservation and that there were repeated calls for the creation of a new and different reservation. Id.

Like the petitioners in Santa Fe, the Cush-Hook recognized the impact of increasing non-Indian settlement in and around modern-day Kelley Point Park and voluntarily accepted land in the Oregon foothills offered to them in the 1850 Dart Treaty. Unlike the petitioners in Santa Fe, virtually all Cush-Hook members relocated to the reservation lands and the majority of these members continue to reside in this area today, indicating widespread tribal acceptance of this relinquishment of aboriginal claims to Kelley Point Park. Accordingly, applying this Court's holding in Santa Fe, 314 U.S. at 339, to the unique circumstances of this case, it is clear that the Cush-Hook's voluntary acceptance of and subsequent relocation to the Oregon foothills set aside by the 1850 Dart Treaty should be construed as a "relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to extinguishment." Santa Fe, 314 U.S. at 357-58.

Captain may argue the Cush-Hook's acceptance of land in the Oregon foothills did not constitute a voluntary cession of aboriginal title. While it is true that the creation of a reservation does not always extinguish aboriginal title to lands outside of a reservation, see, e.g., Gila River Pima-Maricopa Indian Comty. v. United States, 204 Ct. Cl. 137 (1974); Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct. Cl. 426 (1974), the facts and circumstances of this case are distinguishable from the circumstances in which courts have found that the creation of a

reservation did not extinguish aboriginal title. For example, in Gila River Pima-Maricopa Indian Comty. v. United States, 204 Ct. Cl. 137 (1974), the court was presented with the issue of whether the creation of a reservation by a congressional act extinguished aboriginal title to areas outside of the original reservation. Id. at 140. The original reservation was approximately 100 square miles in size; over the course of the next twenty-five years, the land area of the reservation grew to over twice its original size via a series of executive orders. Id. The United States argued that the 1859 Act creating the original reservation extinguished aboriginal title to land outside the original reservation area and thus the Pima and Maricopa Indians were not entitled to a claim for compensation for any lands outside the original reservation, including those lands granted to them by executive order. Id. at 141. The court held that the creation of the reservation did not extinguish aboriginal title to lands outside the original reservation. Id. at 142. Specifically, the court found that the primary purpose of the 1859 Act was to appropriate funds to survey the area traditionally occupied by the Pima and Maricopa tribes; nothing was said about extinguishing aboriginal title to lands outside the reservation. Id.

Unlike the congressional act establishing the Gila River reservation, the sole purpose of the 1850 Dart Treaty was to extinguish aboriginal title by relocating the Cush-Hook from Kelley Point Park to allow for non-Indian settlement of the region. Although this treaty was never formally ratified by Congress,[3] it was negotiated by Dart in his official capacity as superintendent of Indian Affairs for the Oregon Territory at the direction of the President and Congress. Accordingly, the combination of the Cush-Hook's voluntary abandonment of Kelley Point Park and relocation to the Oregon foothills pursuant to the 1850 Dart Treaty constituted a voluntary cession extinguishing aboriginal title.

2. Issuance of a federal land patent extinguished aboriginal title

[3] The impact of Congress' failure to ratify the 1850 Dart Treaty is discussed infra Sec. I.D.2.

In addition to extinguishment by treaty, the requisite intent to extinguish aboriginal title may also be established by "an otherwise lawful conveyance of public lands pursuant to a federal statute." U.S. v. Atlantic Richfield Co., 43 F. Supp. 1009, n. 45 (D. Alaska 1977). "Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands." Id. The relevant federal statute in this case is the Oregon Donation Land Act of 1850, 9 Stat. 496 ("ODLA"), which provided white settlers with the opportunity to receive up to 640 acres of land for married couples in the Oregon Territory upon providing proof that they had resided upon and cultivated that parcel for a period of four consecutive years. See 9 Stat. 496 § 4. By providing fee simple title from the public domain to non-Indian settlers who complied with certain statutory requirements, Congress clearly intended issuance of patents pursuant to the ODLA to be a "revocation of Indian occupancy rights" sufficient to extinguish aboriginal title to modern-day Kelley Point Park. See United States v. Gemmill, 545 F.2d 1145, 1148 (9th Cir. 1976).

On the basis of the trial record below, Captain appears to attack the validity of the conveyance from the United States to the Meeks' under two theories: (1) Congress erred in the ODLA when it described all the lands in the Oregon Territory as being public lands of the United States, implying that the government did not have the authority to issue the patent for Kelley Point Park and (2) the issuance of a patent to the Meeks' was void *ab initio* and, therefore, the subsequent sale of the land by the Meeks' descendants to Oregon was also void. As set forth below, both arguments are without merit and this Court should hold that aboriginal title to Kelley Point Park was extinguished by a lawful conveyance of public land pursuant to an Act of Congress.

a. All of the lands in the Oregon Territory were the "public lands" of the United States and thus, Congress had the authority to issue patents under the ODLA.

"Public lands" of the United States are defined as government lands "subject to sale or disposal under general laws." Union Pac. R. R. v. Harris, 215 U.S. 386, 388 (1910). The trial court below determined that, at the time of enactment of the ODLA, not all of the lands in the Oregon Territory were the public lands of the United States. This conclusion is clearly erroneous because (1) as discussed supra Section I.A., the United States acquired paramount title to all public lands under the doctrine of discovery and (2) although England, Spain, and Russia had competing claims to the Oregon Territory during the early to mid-19th century, these claims were ultimately resolved through a series of treaties with all three countries, culminating with the formal absorption of the Oregon Territory into the Union in 1848. See Robert J. Miller et. al., Discovering Indigenous Lands: The Doctrine of Discovery 90-95 (2010). Because no reasonable argument exists to undermine federal ownership of these lands, the United States undoubtedly had the authority to issue patents to qualified settlers under the ODLA.

b. The issuance of a federal land patent to the Meeks' for Kelley Point Park was a valid conveyance of public land.

A patent is a government conveyance of land that is the functional equivalent of a deed in a private conveyance. Patton and Palomar on Land Titles § 292 (3rd ed.). As a general rule, issuance of a land patent passes legal title from the federal government to the grantee, see United States v. Detroit Timber & Lumber, 200 U.S. 321, 338 (1906), and creates a presumption that all requisite steps, requirements of law, and departmental regulations have been fully complied with and that the patent is valid. See, e.g., United States v. Eaton Shale Co., 433 F. Supp. 1256, 1267 (1977); Wright-Blodgett Co. v. United States, 236 U.S. 397, 403 (1915). Consequently, the issuance of a land patent to the Meeks pursuant to the ODLA presumes that all

requirements of the Act were fulfilled to the satisfaction of the Surveyor General of the Oregon Territory and the Secretary of the Interior, that legal title passed from the United States to the Meeks', and that aboriginal title was extinguished as a result of the lawful conveyance of public land.

Captain will argue that the Meeks' failure to reside upon and cultivate Kelley Point Park for a period of four consecutive years as required under ODLA, § 4 rendered the transaction void *ab intio*. This argument lacks merit for several reasons. First, as discussed supra, the issuance of a federal land patent enjoys a presumption of validity due to its unique nature as a "deed of the United States." De Guyer v. Banning, 167 U.S. 723, 740 (1897). The unique nature of a federal land patent and the policy giving rise to its presumption of validity was clearly articulated by Justice Harlan in De Guyer v. Banning, 167 U.S. 723 (1897):

> "It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rests would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid or was not properly located, and therefore he could not be disturbed by the patentee."

Id. at 740.

In light of this principle, this Court should uphold the validity of the conveyance from the United States to the Meeks' because the presumptive validity of a patent clearly outweighs any statutory compliance deficiencies with the ODLA. The ODLA contained a number of requirements that needed to be satisfied in order to receive a patent, including providing the Surveyor General with the location of the settlement tract within three months of the initial

survey or settlement, satisfactory proof that cultivation and residence had commenced within twelve months of the initial survey, and a requirement that each case be submitted to the commissioner of the general land office for final approval and issuance of a patent, assuming there were no valid objections to the settlers claim. See 9 Stat. 496, §§6-8. These procedural safeguards protected the integrity of the patent process and provided numerous checkpoints along the way at which either the government or competing private claimants could challenge the validity of the Meeks' claim. Because there were no valid objections at the time, any deficiencies in the Meeks' compliance with the original requirements of the ODLA are superseded by the presumptive validity of the patent lawfully issued to them.

Even if the Meeks' failure to comply with the requirements of the ODLA was due to fraud or deception, the issuance of a patent is not void or subject to collateral attack unless the government brings suit to annul the patent. See Wright Blodgett Co. v. United States, 236 U.S. 397, 403 (1915). Here, the United States did not file suit to contest the validity of the patent. Accordingly, Captain's argument that the transaction should be void for failure to comply with the requirements of the ODLA due to mistake or fraud is without merit and this Court should find that the Cush-Hook's aboriginal title was extinguished by issuance of a land patent pursuant to the Meeks' under the ODLA.

D. Congress' failure to ratify the 1850 Dart Treaty or provide compensation for Kelley Point Park does not invalidate the United States' extinguishment of aboriginal title.

1. Failure to ratify the 1850 Dart Treaty does not invalidate extinguishment of aboriginal title.

Congress' failure to ratify the 1850 Dart Treaty does not invalidate the government's extinguishment of aboriginal title. It is well settled that Congress' power to extinguish aboriginal title is supreme; extinguishment may be accomplished "by treaty, by the sword, by

purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, [and] its justness is not open to inquiry." United States v. Santa Fe P.R. Co. 314 U.S. 339, 347 (1941); see also United States v. Gemill, 535 F.2d 1145, 1147- 48 (9th Cir. 1976). Although early federal policy favored extinguishing aboriginal title through negotiation rather than by force, the current view is that extinguishment may be accomplished by a wide array of governmental acts and is not limited to treaty or voluntary cession. See Gemill, 535 F.2d at 1148. "The relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights [and] not whether the revocation was effected by permissible means." Id.

In this case, Congress demonstrated its clear intent to extinguish aboriginal title when it authorized Dart, as superintendent of Indian Affairs for the Oregon Territory, to acquire the lands comprising modern-day Kelley Point Park and to negotiate a relocation of the Cush-Hook to the Oregon foothills. As discussed supra Section I.C.1, these acts extinguished aboriginal title. Further, as discussed supra Section I.C.2, the issuance of a land patent to Kelley Point Park pursuant to the ODLA demonstrated Congress' intent to permanently abrogate Cush-Hook's occupancy rights. Accordingly, Congress' failure to ratify the 1850 Dart Treaty does not invalidate its extinguishment of aboriginal title when there is clear and plain evidence of Congress' intent to extinguish this title.

2. Failure to provide compensation does not invalidate extinguishment of aboriginal title.

Congress' failure to provide compensation to the Cush-Hook Nation for Kelley Point Park also does not invalidate extinguishment of aboriginal title. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), this Court held "that the taking by the United States of unrecognized [aboriginal] title is not compensable under the Fifth Amendment." Id. at 285. The

Court distinguished recognized title (i.e. legal title to land formally recognized by Congress) from aboriginal title, holding that recognized title was a legal property interest giving rise to a right of compensation whereas aboriginal title was not a property right but a right of occupancy subject to extinguishment without any obligation on the government's part to provide compensation. Id. at 277-79. Here, the record is devoid of any evidence that Congress recognized any legal rights that the Cush-Hook had to Kelley Point Park to warrant compensation. On the contrary, the record establishes that the only right, if any, that the Cush-Hook had prior to relocating to the foothills was that of mere possession which, under this Court's ruling in Tee-Hit-Ton, does not give rise to a right of compensation. Accordingly, Congress' failure to pay compensation to the Cush-Hook for Kelley Point Park does not invalidate extinguishment of aboriginal title.

II. The Oregon trial court correctly held that the State has criminal jurisdiction to control historical objects in Kelley Point Park, notwithstanding ownership by a non-federally recognized tribe.

A. The State of Oregon has criminal jurisdiction in Kelley Point Park.

The State of Oregon rightfully owns fee simple title to Kelley Point Park. As discussed supra Section I, Congress correctly described all the lands in the Oregon Territory as being public lands of the United States pursuant to the doctrine of discovery as adopted by this Court in Johnson v. McIntosh, 21 U.S. 543 (1823), the United States' grant of fee simple title to the land at issue to the Meeks' under the ODLA was not void *ab initio*, thus the State's subsequent purchase of the land in 1880 from the Meeks' descendants was not void. Consequently, the State owns the fee simple title to Kelley Point Park and, because it is well settled that Oregon courts have jurisdiction over all state criminal offenses occurring on public lands, Anderson v. Britton, 212 Or. 1, 318 P.2d 291 (1957), *cert den* 356 U.S. 962 (1958); State v. McGill, 115 Or. App.

122, 836 P.2d 1371 (1992), and because the charged crimes were state and not federal offenses, this case was properly tried before state courts.

As a defense, Captain may attempt to challenge the validity of Oregon's fee simple title to Kelley Point Park by asserting that the ODLA was an unlawful conveyance of public land and, alternatively, that the issuance of a land patent to the Meeks' was void *ab initio* and, therefore, did not convey fee simple title to Kelley Point Park to the State. As discussed supra Section I.C.2, not only is this argument completely meritless, but finding in favor of the respondent on this claim would repudiate the doctrine of discovery, effectively overturning Johnson v. McIntosh, thus placing ownership of all public lands of the United States into question.

Even if this Court were to hold that the issuance of the land patent to the Meeks' was void *ab initio*, the State still has criminal jurisdiction pursuant to Public Law 280. Hypothetically, if the transfer is void *ab initio* and the Cush-Hook retains aboriginal title, then fee simple title reverts to the federal government with the Cush-Hook's possessory interest therein. Under this scenario, Captain may assert a claim that Kelley Point Park is "Indian country" and thus outside of Oregon state criminal jurisdiction. Under 18 U.S.C. § 1151 (2006), "Indian country" is defined as:

> a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,
> b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Captain may assert that the Cush-Hook fall within the definition of "dependent Indian communities" as set forth in 18 U.S.C. § 1151(b). "Dependent Indian communities" refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements - first, they must have been set aside by the federal government for the use of the

Indians as Indian land; second, they must be under federal superintendence. See United States v. Sandoval, 231 U.S. 28, 46 (1913), United States v. Pelican, 232 U.S. 442, 449 (1914), and United States v. McGowan, 302 U.S. 535, 538-539 (1938). Captain may argue that because the federal government set aside land in the Oregon foothills for the Cush-Hook under the superintendence of the federal government, the Oregon foothills lands are "Indian country." Moreover, because the United States did not expressly extinguish aboriginal title via treaty or other formal method, Captain will argue that the designation of "Indian country" would be extended to Kelley Point Park.

Even if this tenuous argument were to be accepted by this Court, the State would still have criminal jurisdiction under Public Law 280. Generally, state laws have no force or effect in Indian country. Worcester v. Georgia, 31 U.S. 515, 561, 590-95 (1832). This Court has since held that states have limited authority over Indian country absent an express grant by Congress. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). This limited authority infringed on a state's rights to ensure compliance with criminal laws within its borders. To combat lawlessness in Indian country, Congress enacted Public Law 280 mandating the transfer of federal civil and criminal jurisdiction over Indian country to six state's governments, including Oregon. See 18 U.S.C. § 1162 (1994); 28 U.S.C. § 1360 (1994); Native Vill. of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 559-60 (9th Cir. 1991); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 488 (1979). Therefore, the State of Oregon has criminal jurisdiction over Indian lands pursuant to the criminal portion of Public Law 280, codified at 18 U.S.C. § 1162(a), which states that:

> (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…

18 U.S.C. § 1162(a) (1988). In Cabazon, this court held that when a state tries to enforce its laws in Indian country, it must first determine if that law is civil and regulatory or criminal and prohibitory in nature. California v. Cabazon Band of Mission Indians, 480 U.S. 205, 212 (1987). If the law is criminal and prohibitory, it is enforceable under Public Law 280. See Id. at 208. On the contrary, if it is civil and regulatory it is unenforceable. Id. at 209. The law pertaining to trespass, cutting timber, and damage and removal of archaeological objects are criminal and prohibitory in nature. Thus, even if this Court were to conclude that Kelley Point Park was "Indian country," the State would still have jurisdiction to enforce these laws under Public Law 280.

Alternatively, as a second defense, Captain may argue that the Cush-Hook have aboriginal title, and that the right of occupancy inherent to aboriginal title shields him from criminal liability. This Court recognized that although the right of Indians to occupy their lands is sacred, aboriginal title is a lesser right than the property right of fee simple ownership. United States v. Cook, 86 U.S. 591, 593 (1874). This court held in Tee-Hit-Ton Indians v. United States that aboriginal title is "not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). Indian title merely conveys usufruct rights, or the right of enjoyment. Marsh v. Brooks, 49 U.S. 223, 232 (1850). In United States v. Cook, this Court held that the usufruct rights inherent in aboriginal title did not convey the power of alienation. United States v. Cook, 86 U.S. 591, 22 L. Ed. 210 (1873). In that case, the Oneida Indians sold timber from their territorial lands in Wisconsin to William Cook, a non-Indian. Id. The Menominees originally owned the lands on which the timber grew, but were forced to cede it to the United States. Id. Subsequently, the U.S. government removed the Oneidas from their homelands in the

east to the new territory in Wisconsin. Id. The questions before this Court were whether the Oneidas legally owned the timber on their former lands and whether the United States could seize the timber sold to a non-Indian. Id. This Court held that the timber belonged to the United States because it held fee simple title to the land. While the Indians held aboriginal title rights to the land where the timber was taken, this right allowed removal only when used to "improve" the land, which the Court equated to acts of maintenance and upkeep. Id. at 593. The theory behind this exception was that the land would be better off and more valuable with the timber off than with it on. Id.

Applying the principle articulated in Cook, this Court should hold that Captain did not have the power to alienate the timber from Kelley Point Park. Even using separate analyses for the tree and the archaeological object, it can be easily shown that the damage to the tree decreased the value of the park. The tree was over a hundred years old, in good health, and of historical importance. Moreover, the portion of the tree removed had a highly valuable archaeological object upon it. Captain's removal of the object marred the tree and created an eyesore. Further, Captain did not remove the timber to improve the lands; he did so for his own personal benefit. His desire was to have a sound mind resulting from the timber being removed from possible harm. Therefore, this warrantless removal of timber did not leave the land better off or more valuable than it had been with the timber on it and Captain should not be relieved from criminal responsibility.

Lastly, Captain is not immune from Oregon state criminal jurisdiction because the Cush-Hook are not a federally recognized tribe, which in some instances would allow federal law preemption. A federally recognized tribe has a formal government-to-government relationship with the United States federal government. Richmond v.Wampanoag Tribal Court Cases, 431 F.

Supp. 2d 1159, 1163 (D. Utah 2006). An Indian tribe may be federally recognized through an act of Congress, administrative process, or judicial decision. Richmond at 1163. Federal recognition is a formal political act, which creates a legal and political relationship between the Indian tribe and the federal government. Cohen's Handbook of Federal Indian Law 139 (2005 ed.). Recognition makes those Indian tribes eligible for programs and services created by Congress. Id. On the other hand, non-federally recognized tribes do not have a legal relationship with the federal government. Cohen at 140. As a result, those tribes rarely have the authority to function legally and politically independent of the federal government. Federally recognized tribes also lack protection from state jurisdiction and access to repatriation rights and cultural protection under federal law. Cohen at 139.

In this case, Captain is not a member of a federally recognized tribe and, therefore, not exempted from state criminal jurisdiction. Even if Captain was a member of a federally recognized tribe, the state has jurisdiction because the offense was committed on state land. Even this court confirmed such powers in Organized Village of Kake, et al. v Egan, stating "[i]t has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country." Organized Village of Kake, et al. v. Egan, 369 US 60, 75 (1962). Accordingly, the trial court correctly held that the state had criminal jurisdiction over Captain.

B. The State of Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects in Kelley Point Park.

In 1983, the State of Oregon adopted public policy and a statutory regime to protect its archaeological objects and sites. As a matter of policy, the State wholly recognizes that archaeological sites are a "finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon." Or. Rev. Stat. § 358.910(1)

(1983). Oregon's statutory regime is modeled after the National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1970) ("NHPA"), which declares: "The Spirit and direction of the nation is founded upon and reflected in its historic past; . . . the historical and cultural foundations of the nation should be preserved...in order to give a sense of orientation to the American people; [and] it is...necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, (and) to give maximum encouragement to agencies and individuals undertaking preservation (as well as) State and local governments." 16 U.S.C. §470 (1970). It is indisputable that a state's police power can be used to preserve and regulate the use of resources necessary for public welfare. Skiriotes v. Florida, 313 U.S. 69 (1941). This Court affirmed such powers in a case involving a city's use of police power to effectuate landmark preservation by holding that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 129 (1978).

Under Or. Rev. Stat. § 358.910, all archaeological objects and sites 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." Or. Rev. Stat. § 358.910(1) (2013). The statute defines multiple types of protected archaeological objects, three of which are applicable here: (1) archaeological objects; (2) sacred objects; and (3) object of cultural patrimony.

Under Or. Rev. Stat. § 358.905, an archaeological object must be at least seventy-five years old, part of the physical record of an indigenous people of the State, and is material remains of past human life or activity including monuments, symbols, and tools. Or. Rev. Stat. § 358.905(1)(a)(A)-(B) (2013). Applying this definition to the facts at hand, it is clear that the timber is an archaeological object. The timber is very important to the general public and the

Cush-Hook because it is a part of the unique natural and historic heritage of all people of Oregon. Further, it is invaluable because tribal shamans/medicine men carved sacred totem and religious symbols into the living trees hundreds of years ago. The significance of the totems and religious symbols is further evidenced in the 1806 Journals of William Clark.

The timber, now to be referred to as a "tribal object", also qualifies as a "sacred object," defined as:

> an archaeological object or other object that is (A) demonstrably revered by any ethnic group, religious group or Indian tribe as holy; (B) Is used in connection with the religious or spiritual service or worship of a deity or spirit power; or Was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion.

Or. Rev. Stat. § 358.905(1)(k)(A)-(C) (2013). The tribal object also clearly qualifies as a sacred object because tribal shamans/medicine men, or traditional native Indian spiritual leaders, used the objects to practice traditional native Indian religion.

The tribal object is also an "object of cultural patrimony," defined as:

> any object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore, cannot be alienated appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object shall have been considered inalienable by the native Indian group at the time the object was separated from such group.

Or. Rev. Stat. § 358.905(1)(h)-(h)(A) (2013). It is obvious the tribal object is highly important to Captain. It may be assumed from the facts that the object has historical, traditional or cultural importance to the Cush-Hook. Therefore, based on the foregoing definitions, the State rightfully asserted jurisdiction over the tribal object.

Or. Rev. Stat. § 358.920 expressly prohibits a person from excavating, injuring, destroying or altering an archaeological site or object and from removing an archaeological object located on public or private lands in Oregon unless any of those activities is authorized by a permit issued under Or. Rev. Stat. § 390.235. Or. Rev. Stat. § 358.920 (2013). Accordingly, Captain's removal of the tribal object directly violated Or. Rev. Stat. § 358.920. Further,

Captain did not follow the clear process established to apply for a permit pursuant to Or. Rev. Stat. § 390.235. Additionally, even if this court holds the Cush-Hook own the land in fee simple because the ODLA wrongly classified the lands comprising Kelley Point Park as public lands and the transfer of lands from the Meek's descendants is void *ab initio*, the state would still have jurisdiction because the lands would be considered "private lands" covered by the statute. See Or. Rev. Stat. § 358.920(5) (2013) ("a person may not excavate an archaeological site on privately owned property unless that person has the property owner's written permission.").

Although the statutes governing archaeological objects are not ambiguous, even applying the canons of construction to these statutes, the state retains criminal jurisdiction over the tribal object. The canons of construction analysis requires that once a court determines a particular statute affects Indian tribes or individuals, it should apply the statute in a light most favorable to the Indians. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). This Court held that statutes passed for the benefit of Indians should be liberally construed, with doubtful expressions resolved in favor of the Indians. See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Furthermore, statutes should be interpreted not according to their technical meaning, but as the Indians would have understood them. See Carpenter v. Shaw, 280 U.S. 363 (1930). The court may analyze the statutes legislative history and purpose when applying of the canons of construction to the statutes.

The purpose of the Oregon statutes is to protect and preserve the State's archaeological resources because the State has deemed such resources invaluable. Or. Rev. Stat. § 358.910 (2013). This protection even extends so far as to protect native Indian tribes and Nations as a whole from the individual acts of a tribe member. The statutes expressly recognizes that an individual Indian does not have the right to take an object of cultural patrimony unless that

person owns the object in his individual capacity or the Indian tribe permitted that taking. Or. Rev. Stat. § 358.905 (2013). This provision honors Indian tribal laws and notions concerning cultural property. Under tribal law, cultural property is not individually owned, but is held in trust by an authorized caretaker or caretakers for a particular group or subgroup within a tribe or often for the tribe as a whole. See, e.g., In re guardianship of William Bell, Sr., 24 Indian L. Rep. 6105 (Ft. Bert. Tribal Ct. 1997); see also Onondaga Nation v. Thacher, 61 N.Y.S. 1027, 1029-1030 (N.Y. Sup. Ct. 1899). Thus, any assertion by Captain that State archaeological protection laws unreasonably infringe on his cultural rights are unfounded because these laws incorporate tribal notions of cultural property ownership. The State statutes protect native Indian tribes from culturally inappropriate actions of individual Indians. The Cush-Hook does not have state recognized tribal laws because they are neither a state recognized nor a federally recognized tribe. However, the use of recognized tribal law clearly illustrates that the state correctly asserted criminal jurisdiction over Captain. Therefore, Captain was not only in violation of state law when he took the tribal object, but also in violation of cultural norms because he did not ask his tribe for permission to do so.

The State's purported failure to protect the tribal object does not excuse Captain's culpability. The State's existing mechanisms to protect the tribal object are reasonably sufficient; the State could not have reasonably foreseen the extraordinary lengths that vandals would go to in order to obtain tribal objects. The statutes also established a permit process to allow individuals to excavate archaeological objects when necessary or when removal would benefit the public, which Captain did not follow. Or. Rev. Stat. § 390.235 (2013). Further, although Kelley Point Park is a public park, it is a restricted area. It could be assumed that Kelley Point Park, like most public parks, has recreational rules, hours of operation, and park

staff. Any further protective mechanisms, such as erecting barricades, would unduly burden the State and inhibit public enjoyment of Kelley Point Park.

Additionally, the State had no duty to inform the Cush-Hook Nation about the vandalism because the Cush-Hook Nation is not an Indian tribe as defined in the statutes, which would have required notification and consultation. Or. Rev. Stat. § 358.905(1)(d) adopted Or. Rev. Stat. § 97.470's definition of "Indian tribe" as "any tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act, 25 U.S.C. 3564 et seq., or listed in the Western Oregon Indian Termination Act, 25 U.S.C. 3691 et seq., if the traditional cultural area of the tribe includes Oregon lands." Or. Rev. Stat. Ann. § 97.740 (2013).[4] The Cush-Hook are not a federally recognized tribe nor are they it listed in either of the named acts; therefore the State is not required to treat the Cush-Hook as such.

Lastly, the Respondent will argue without merit that federal laws, including tribal laws, preempt state laws in this case. The Respondent will unsuccessfully assert the applicability of the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA). ARPA protects archaeological resources on federal public lands and Indian lands. 16 U.S.C. § 470aa(b) (2010). The Act defines "Indian lands" as the lands of "Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual." 16 U.S.C. § 470bb(4 (2010). Similarly, under ARPA, excavation and removal of archaeological resources from a site require a permit. 16 U.S.C. 470cc (2010). The Act exempts Indian tribes and members of Indian tribes from applying for a permit if the excavation takes place on Indian

[4] Assuming the Cush-Hook Nation is a fictitious tribe, it could not be listed on either of the named Acts as required by the statute.

lands of such tribe, "except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section." 16 U.S.C. § 470cc(g)(1) (2010). ARPA does not authorize private rights of action. 16 U.S.C. § 470ff (2010). NAGPRA's protections extend only to cultural objects found on federal or Indian land. 25 U.S.C. § 3001 (2006). NAGPRA similarly defines both federal lands and Indian lands, however it slightly expands Indian lands to include all dependent Indian communities.

An analysis of the facts will clearly illustrate the inapplicability of both acts. The tribal object was located on state public lands. A non-federally recognized tribe owns the tribal object. Captain failed to apply for a permit to remove the tribal object. Lastly and most importantly, Captain failed to pursue an individual claim under NAGPRA as a lineal descendent (of which the facts do not indicate); because he did not do so he is barred from seeking relief under it. Lastly, there is no conflicting Cush-Hook tribal laws recognizable by the State because the Cush-Hook is not a state recognized or federally recognized tribe. Therefore, it is obvious there are no countervailing tribal or federal interests present in this case and the State clearly has authority to protect the tribal object.

C. Public policy favors exertion of State criminal jurisdiction over the archaeological object.

As adopted in Or. Rev. Stat. § 358.910, the State has a public trust responsibility for the lands comprising Kelley Point Park and everything upon it, including the tribal object as a "archaeological object" under State law. Or. Rev. Stat. § 358.910 (2013). This Court recognized the public trust doctrine as substantive state common law early in United States history. Martin v. Waddell, 41 U.S. 367, 413 (1842). The public trust doctrine vests states with the duty to hold public resources in trust for the people of the state to ensure maximum use and enjoyment. See

Id. In other instances, governments are forced to balance its public trusts responsibilities with Indian trust interests. Because neither the State nor the federal government have a legal relationship with the Cush-Hook, neither entity is required to balance its public trust responsibilities against Captain's cultural interests.

Even if the state were found to have a trust responsibility to the Cush-Hook, the State's interest in managing Kelley Point Park and the archaeological objects therein at its discretion will substantially outweigh Captain's cultural and religious interests. In his defense, Captain may assert that the American Indian Religious Freedom Act ("AIRFA") protects him from criminal liability. The AIRFA was enacted to "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of American Indians . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996 (1978). This Court has consistently held that the statute does not create any justiciable rights. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1328 (1988). Therefore, many native Indian plaintiffs have unsuccessfully relied solely on the Free Exercise Clause of the First Amendment to support their claims. U.S. Const. amend. I (stating that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . . "). In Sherbert v. Verner, a Free Exercise Clause analysis puts the initial burden on the plaintiff to establish that an action or policy of the government has burdened a sincerely held religious belief. Sherbert v. Verner, 374 U.S. 398, 405 (1963). Once this is established, the burden shifts to the government to show the infringement is justified by a "compelling state interest." Captain is barred from using the Free Exercise clause because he failed to assert the claim in the lower courts.

Even if he were not barred from raising this defense, two cases clearly hold that the

government's public trust interest outweighs any purported Indian trust responsibility. Additionally, these rulings were not found to be in violation of religious freedom rights ensured by various religious acts and the Constitution. First, in Sequoyah v. Tennessee Valley Authority, Cherokee Indians attempted to enjoin construction of a government dam, which would flood the "sacred homeland" of the tribe. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159, 1160 (6th Cir. 1980). The rising waters would invariably destroy various sacred sites. The court found that the Indians' claims "demonstrate 'personal preference' rather than convictions 'shared by an organized group.'" Id. at 1164. The court was not required to balance the government's interest against protection of the Indian sites because the Indians failed to establish that the sacred land in jeopardy is "central" or "indispensable" to the exercise of the religion. Id. Likewise, Captain has not established that protection of the tribal object is central or indispensable to Cush-Hook religion.

Second, in Lyng v. Northwest Indian Cemetery Protective Association, this court upheld the government's right to harvest timber and build a road in a national forest considered sacred by three federally recognized Indian tribes. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1330 (1988). The tribes historically used the area for religious rituals that depend upon privacy, silence, and an undisturbed natural setting. Id. at 1320. A study concluded that construction would cause irreparable damage to sacred sites, so the road should not be completed. Id. at 1322. The government decided not to follow the recommendation. Id. Justice O'Connor found the government's need to use and access its own lands was a compelling interest. Further, the court distinctly stated "the Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the

extent that it is feasible, is for the legislatures and other institutions." Id. at 1327. Thus, it is clear that Lyng effectively precludes the possibility of future suits against the government by American Indian plaintiffs to enjoin governmental action or inaction on sacred lands absent express congressional or legislative authorization.

As illustrated in the previous cases, Captain does not have a viable defense against the State for its purported failure to protect the tribal object. It is clear that the State has the right to manage its parklands as it sees fit, which outweighs Captain's interest in the tribal object. The State has an affirmative duty to manage Kelley Point Park and the archaeological object as a public trust for the use and enjoyment of native Indians and the general public alike. The State cannot be required to unnecessarily restrict public use or access to the area any more than it already does in order to protect the tribal objects. As stated in Bowen v. Roy, 476 U.S. 693 (1986), the Free Exercise Clause cannot be understood to require governments to "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . The Free Exercise Clause affords protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Id. at 709. Forcing the State to do more than it already does would dictate internal procedures, such as staffing, hours of operation, security measures, and so forth.

Although the facts of this case are distinguishable from the previous cases, this Court should rule in the same manner. The State did not actively desecrate the tribal object or allow another entity to do so. Further, the State's regulations did not unreasonably infringe on Captain's rights to exercise his cultural practices. Therefore, the State has upheld its trust responsibilities for Kelley Point Park and the tribal object and this Court should rule in favor of the State.

CONCLUSION

In conclusion, the Oregon Court of Appeals incorrectly affirmed without writing an opinion that the Cush-Hook had aboriginal title to Kelley Point Park and that the State did not have exclusive criminal jurisdiction over Captain.

The United States originally acquired the fee simple interest in the lands comprising modern-day Kelley Point Park upon discovery of the continent under the doctrine of discovery as articulated in Johnson v. McIntosh, 21 U.S. 543 (1823). Although the Johnson Court recognized that this "paramount title" was generally encumbered by an Indian right of occupancy, see id. at 574, the Cush-Hook never made the requisite showing of exclusive use and occupancy necessary to establish an aboriginal title claim. Alternatively, even if this Court should hold that the Cush-Hook established aboriginal title, this right of occupancy was extinguished either by voluntary cession or a lawful conveyance of public land and, therefore, the issuance of a land patent to the Meeks pursuant to the ODLA was valid and unencumbered by any Cush-Hook tribal claims.

The State subsequently purchased modern-day Kelley Point Park from the Meeks' free and clear of any Cush-Hook tribal claims. Kelley Point Park is a public park and thereby exclusively under the State's criminal jurisdiction. Captain committed state criminal offenses in Kelley Point Park, thus he is rightfully subject to all charges put forth by the State. Captain has no viable defenses warranting waiver of State jurisdiction.

The United States Supreme Court should overturn the Oregon Court of Appeals' affirmation of the trial courts holding.