No. 11-0274.

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent.

On Writ of Certiorari to the State of Oregon Court of Appeals

BRIEF FOR RESPONDENT

Team 47

Attorneys For Respondent

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The lower court held that the Cush-Hook Nation still owned the land within Kelley Point Park. (R.4)[1]. Additionally, the lower court found Thomas Captain not guilty for violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq*[2]. for damaging an archeological site and a cultural and historical artifact and fined him $250. *Id.*

The Oregon Court of Appeals affirmed without writing an opinion. *Id.* The Oregon Supreme Court denied review. *Id.*

STATEMENT OF THE FACTS

A. Protection of the Sacred Tribal Totem

Thomas Captain, a Cush-Hook citizen, relocated to Kelley Point Park from the coast range of mountains, where the majority of the tribe resided. (R. 2,¶6). Mr. Captain returned to the Park to reaffirm the tribe's possession of the Park and to defend the tribe's sacred totem and religious symbols carvings. *Id.* Hundreds of years ago, tribal shamans/medicine men carved sacred totem and religious symbols into living trees. *Id.* The carved symbols are now 25 to 30 feet from the ground. *Id.* Recently, vandals have defaced the sacred tribal images. *Id.* In

[1] "R" citations denote the pages of the record developed by the District Court including the findings of fact and conclusions of law. "¶" denote the paragraph number in the record. "CL" denotes an enumerated conclusion of law while "F" denotes a finding of fact as stipulated on pages 3 and 4.

[2] Or. Rev. Stat. §§'s 358.905-358.961, et. seq and Or. Rev. Stat. §§'s 390.235-390.240 et. seq., are hereinafter ORS, accompanied by the corresponding section symbol denoted by "§."

addition, some vandals have even removed the symbols from the trees to sell them. *Id.* In order to defend his tribe's religious carvings, Mr. Captain cut down a Park tree and removed the section of the tree with the tribe's carvings. *Id.*

B. Appellant's Criminal Charges & Lower Court's Ruling

Mr. Captain was returning to the tribe's current site in the coastal mountain range when state troopers arrested him and confiscated the tribal carvings. *Id.* Mr. Captain was criminally charged by the State of Oregon with trespassing on state lands, cutting timber in a state park without a permit, and desecrating an archeological and historical site under ORS. 358.905-358.961. *Id.* ORS. 358.905-358.961 *et seq.* and ORS. 390.235-390.240 *et seq.* apply to all state of Oregon land under Public Law 280 whether they are tribally owned or not. (R. 4, CL 5). The lower court also concluded the United States have never extinguished Cush-Hook Nation's aboriginal title pursuant to *Johnson v. M'Intosh* because the United States Senate declined to ratify the treaty to compensate the tribe for its land. (R. 3, CL 2).

C. Cush-Hook Nation's Original Homeland & Culture

Kelley Point Park is an Oregon state park positioned between the Colombia and Willamette Rivers inside Portland, Oregon. (R. 1, ¶ 1). But more importantly, the Park is the homeland of the Cush-Hook Nation of Indians, prior to be relocated to the foothills of the Oregon coast range of mountains. *Id.* The Cush-Hook Nation inhabited what is now known as the Park since time immemorial. *Id.* The Cush-Hooks grew crops by cultivating wild plants, such as wapato on the Park grounds. In addition, the tribe hunted and fished within the Park boundaries. *Id.*

D. Lewis & Clark Journals

In April 1806, William visited the Cush-Hooks. More specifically, on April 5, 1806, Mr. Clark met the Multnomah Indians, who were settled near the Cush-Hook Indians. (R. 1, ¶ 2). The Multnomah Indians directed Clark's attention to the Cush-Hook village and longhouses. *Id.* Then, the Multnomah Indians introduced Clark to the headman/chief of the Cush-Hook Nation. *Id.* Clark gave the headman/chief a President Thomas Jefferson peace medal also known by historians as a "sovereignty token" because of the political and diplomatic significance. (R. 1, ¶ 3). Clark understood this gesture as both parties agreeing to engage in political and commercial relations with the United States. *Id.* Essentially, the United States would recognize the tribal leaders and governments. *Id.*

Clark sketched the village and longhouses in the journals. *Id.* Also, Clark wrote about his observation of the Cush-Hook Nation's governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing traditions. *Id.*

E. Cush-Hook Nation Relocates Pursuant To A Never Ratified Treaty

In 1850, the Cush-Hooks signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. 2, ¶ 4). The Cush-Hooks moved 60 miles westward to the foothills in order for the American settlers to utilize the tribe's precious agricultural land along the river. *Id.* The Nation continues to live at this location today. *Id.* However, the United States Senate declined to ratify the Cush-Hook relocation treaty. *Id.* As a consequence of this failed treaty, the Cush-Hooks never received the compensation or other promised benefits they were assured they would receive for their lands in and around the location of Kelley Point Park today. *Id.* Even more damaging to the Cush-Hook Nation was the fact that United States never

recognized ownership of the lands they moved to in the coastal mountains. *Id.* Finally, the Cush-Hook Nation was not "recognized" as a federally recognized tribe of Indians. *Id.*

F. Kelley Point Park Subsequent To the Tribe's Relocation

Two American settlers, Joe and Elise Meek, moved onto the tribe's original homeland in Kelley Point Park. (R. 2, ¶ 5). Later, the United States granted the Meeks fee simple titles to the land pursuant to the Oregon Donation Land Act of 1850. *Id.* The Act required "every white settler" who had "resided upon and cultivate the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500. However, the Meeks did not cultivate the land nor did the Meeks live on the land for the required four years. *Id.* The United States' grant of fee simple title to the Meeks was void *ab initio*. (R. 4,CL 3). Therefore, the following sale of the land by the Meeks descendants to the state of Oregon was also void. *Id.* In 1880, the Meeks' descendants sold this land to Oregon. Oregon established Kelley Point Park. (R. 2, ¶ 5).

SUMMARY OF ARGUMENT

The Cush-Hook Nation owns aboriginal title in the land encompassing Kelley Point Park because the tribe has proven each element of aboriginal title. First, Cush-Hook Nation has demonstrated that they have had actual and continuous occupancy of Kelley Point Park. Second, the tribe has proven exclusive possession of the Park. Finally, the United States government has not extinguished aboriginal title.

Oregon does not have criminal jurisdiction over Thomas Captain for the removal of the cultural, historic, and religious totems located within Kelley Point Park. The only in which the state could assert criminal jurisdiction is by express delegation of Congress, more specifically, by Public Law 280. The Or. Rev. Stat. §§'s 358.905-358.961 et. seq. and 390.235-390.240 et. seq. are "civil/regulatory" and not "criminal/prohibitory," and therefore, the statutes do not reach into nor apply to Indian country pursuant to Public Law 280. Applying the canons of construction applicable to Indian law, all ambiguities in the Oregon statutes should be resolved in favor of the Cush-Hook Nation and Thomas Captain. Accordingly, Oregon does not own the land in Kelley Point Park and is without state criminal jurisdiction since the law does not apply by Public Law 280.

ARGUMENT

I. CUSH-HOOK NATION HAS LIVED AND OCCUPIED KELLEY POINT PARK FROM TIME IMMEMORIAL. THE TRIBE HAS SUBSISTED BY GROWING CROPS AND HARVESTING WILD PLANTS, SUCH AS WAPATO, AND BY HUNTING AND FISHING. IN ADDITION, THE TRIBE HAS CARVED SACRED TOTEM AND RELIGIOUS SYMBOLS INTO LIVING TREES. THEREFORE, THE COURT SHOULD UPHOLD THE OREGON COURT OF APPEALS DECISION THAT CUSH-HOOK NATION HAS ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK.

A. Standard of Review

In the case at bar, the court is presented with mixed questions of law and fact. The court must first address how the lower court interpreted the doctrine of aboriginal title and how the lower court applied the doctrine to the facts in the record. More specifically, the court must address whether the Cush-Hook Nation owns aboriginal title to the land. When the court has mixed questions of law and fact, "the standard of review turns on whether factual or legal matters predominate." *United States v. Owens*, 789 F.2d 750, 753 (9th Cir. 1986), *rev'd on other grounds*, 484 U.S. 554, (1988). "Unless a mixed question of fact and law is primarily factual, mixed questions are reviewed de novo." *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir.1984) (en banc), *abrogated on other grounds by Pierce v. Underwood*, 487 U.S. 552, (1988); *Wilcott v. Matlack*, Inc. 64 F.3d 1458, 1460 (10th Cir.1995).

Second, the court must address whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on Kelley Point Park, which turns on the interpretation of ORS. 358.905-358.961 *et seq.* and ORS. 390.235-390.240 *et seq.* Statutory interpretation is a question of law that requires a *de novo* standard of review. *See United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003); ("[t]he construction or interpretation of a statute is a question of law that we review de novo").

B. Analysis

1. Because the title of the Cush-Hook nation was not extinguished by purchase or by conquest pursuant to Johnson v. M'Intosh, the tribe still owns the land under original or "aboriginal title"—possessing rights of inherent sovereignty as distinct political communities as contemplated in Worcester v. Georgia.

The seminal case analyzing aboriginal title is *Johnson v. M'Intosh*, where the United States Supreme Court held that Native Americans do not have the right to convey land title simply because they possessed the land. *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823).

> "The United States, then, have unequivocally acceded to that great and broad rule [Discovery] by which its civilized inhabitants now hold this country. They hold, and assert themselves, the title by which it was acquired. They maintain, as all other have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."

Id. In other words, the Native Americans had a right to possess the land they occupied, but once they left, they no longer had possession. *See Id.* Only the United States government could convey the land title. *See Id.* Native Americans lost two very important rights without their consent and without their knowledge. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 67 (2005). First, Native Americans lost the right to freely sell their land to any party at any price they negotiated. *Id.* Second, the Native Americans lost the power to collaborate with other nations, both commercially and diplomatically (unless it was the discovering country). *Id.*

Discovery was not a new concept in *Johnson* because the English colonies and American states had already been utilizing the doctrine of discovery in their dealings with native nations. *Id.* at 23. Thus, the *Johnson* court was essentially mirroring historical colonial traditions. Colonial laws addressed discovery in two ways. *Id* at 23. First, the colonies ratified statutes, which gave the colonies the right to Indian land sales. Second, the colonies regulated all trade

between the colonists and the Indians. *Id.* at 23. *Johnson* remains important today because it "tested the ownership of all real property in the United States," and "Indian title is the original link in almost all land titles in the United States." *Id.* at 62-63.

Another relevant case is *Worcester v. Georgia*, where the United States Supreme Court decided, "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves..." *Worcester v. State of Georgia*, 31 U.S. 515, 520 (1832) *abrogated by Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Despite this abrogation, the court has recognized that Native American tribes maintain "attributes of sovereignty over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323, (1978). Thus, the court does not have a strict rule as to whether a specific state law applies to an Indian reservation or tribal members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

2. The lower's court's decision that Cush-Hook Nation proved aboriginal title is adequately supported by the evidence in the record. Whether aboriginal title exists is determined by a test to determine whether the tribe can show proof of actual, exclusive and continuous use and occupancy for a long time prior to the loss of land; use of the land to the exclusion of other Indian tribes; and federal government did not extinguish title.

Aboriginal title "is the right of Indian tribes to use and occupy 'lands they had inhabited from time immemorial.' " *Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 481-82 (1st Cir.1987 (*quoting County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, (1985)). "Aboriginal title does not trace its roots to a written document or land grant, but is established by offering historical evidence of the tribe's long-standing physical possession" of the land. *Zuni Indian Tribe of New Mexico v. United States*, 16 Cl.Ct. 670, 671 (1989).. The inhabitant

asserting individual aboriginal title has the responsibility of proving such title. *United States. v. Lowry*, 512 F.3d 1194 (2008).

There are three elements that a claimant needs in order to prove aboriginal title. First, the claimant must show proof "'of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land.'" *United States v. Pueblo of San Ildefonso*, 206 Ct.Cl. 649, 669, 513 F.2d 1383, 1394 (1975) (*quoting Confederated Tribes of the Warm Springs Reservation v. United States* 177 Ct.Cl. 184, 194 (1966)). "A long time" means the Indians have remained on the tract of land long enough to make the area into a domestic territory. *Confederated*, 177 Ct.Cl. 184 at 194. In order to show the claimant made the area domestic, the claimant may have enclosed, cultivated, or improved the land in some way. *See Barber v. Simpson*, No. ITCN/AC CV-05-018, 2006 WL 6358357 at *2 (Am. Tribal Law Oct. 3, 2006). In order to show "use and occupancy," a tribe will typically show evidence relating to traditions, culture, and how they use their land. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746, 9 L.Ed. 283 (1835); *Sac & Fox Tribe*, 179 Ct.Cl. at 21-22, 383 F.2d at 998 (1967). A tribe is required to prove actual and continuous possession up until the date of the alleged taking. *Uintah Ute Indians of Utah v. United States*, 26 Fed.Cl. 768, 787 (1993). Second, the claimant must prove exclusive possession of the land in question, i.e., "'that it used and occupied the land to the exclusion of other Indian groups.'" Finally, the claimant must show the aboriginal land the government did not extinguish the claim. *United States v. Dann*, 873 F.2d 1189, 1196-99 (1989). The government's consent to create a national park extinguishes aboriginal title. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1391

The trial court found that the Appellant, Cush-Hook Nation still owned the land within Kelley Point Park under the doctrine of aboriginal title. (R. 4.). Appellant respectfully requests the court to affirm the lower court's ruling.

Cush-Hook Nation has the burden of proving aboriginal title. First, Cush-Hook Nation must show actual and continuous use of occupancy for a long time. Here, Kelley Point Park is a state park located within Portland, Oregon. (R. 1,¶ 1). The Cush-Hook Indians have lived in what is today known as Kelley Point Park since time immemorial. *Id.* In addition, Lewis & Clark recorded their interactions with the Cush-Hook Nation in April 1806. (R. 2, ¶ 2). More specifically, another tribe, Multnomah Indians, identified the Cush-Hook Nation village and longhouses to Clark. *Id.* The Multnomah Indians introduced Clark to the headman/chief of the Cush-Hook Nation. *Id.* Clark gave the Cush-Hook headman/chief a President Thomas Jefferson peace medal, also known by historians as "sovereignty tokens" because of the political and diplomatic significance. (R. 1,¶ 3). Clark understood this gift acceptance, as such the United State would recognize the tribal leaders and governments. *Id.* Clark later wrote journal entries about the Cush-Hook Nation's governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. *Id.*

In 1850, the Cush-Hook Nation relocated 60 miles westward, where the majority of Cush-Hooks remain. (R. 2, ¶ 4). In 2011, Thomas Captain, a Cush-Hook Nation citizen, moved from the tribal area back to Kelley Point Park in order to reaffirm the Nation's land ownership. (R. 2, ¶ 6). Between 1850 and 2011, Kelley Point Park no one officially received a fee simple title.

The Cush-Hook Nation made the land domestic, as evidenced by the Lewis & Clark journals. (R. 1, ¶ 3). The Cush-Hook Indians lived by growing some crops and by harvesting

many wild plants, such as wapato, and by hunting and fishing. (R. 1, ¶ 1). Clark noted the Cush-Hook Nation's practice of the medicine men carving totem and religious symbols into living trees. (R. 2, ¶ 6). These facts indicate that not only did Cush-Hook Nation domesticate their land, but they also cultivated and improved the land. The totem carvings also showed evidence of the Cush-Hook nation's traditions and customs.

Next, Cush-Hook Nation must prove they had exclusive possession of Kelley Point Park. Cush-Hook Nation must prove they had actual, continuous, and exclusive possession of the land up until the alleged taking. Here, Cush-Hook Nation's permanent village is located in the area now known as Kelley Point Park up until 1850. (R. 1-2, ¶ 1 & ¶ 4). In 1850, the Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. 2.¶ 4). Pursuant to the treaty, Cush-Hook Nation relocated 60 miles westward in the foothills of the Oregon coastal mountains. *Id.* However, this treaty was never ratified. *Id.* When a treaty between the government and the Indian Tribe is not ratified, they are not effective. *Blackfeet et al. Nations v. U.S.*, 81 Ct.Cl. 101, 130 (1935). Thus, they do not bind the parties to the terms of the treaty. *Id.* "Private rights are not affected by such a treaty until it is ratified; for only then, under our Constitution, does it become the law of the land." *United States v. Grand Rapids & I.R. Co.*, 165 F. 297, 301 (1908). Furthermore, as a result of the failed treaty, the United States did not recognize the tribe's ownership of the coastal mountains. (R. 2, ¶ 4).

In addition, after the Cush-Hook nation moved, two Americans, Joe and Elsie Meek, moved onto the 640 acres that encompasses Kelley Point Park. (R. 2, ¶ 5). The Meeks ultimately received fee simple title to the land from the government under the Oregon Donation Land Act of 1850. *Id.* According to the Oregon Donation Land Act of 1850, "every white settler" who had "resided upon and cultivated the [land] for four consecutive years" will be

granted a fee simple title. 9 Stat. 496-500. However, the Meeks did not live on the land for the required four years. (R. 2,.¶ 5). In addition, the Meeks never cultivated the land known today as Kelley Point Park. *Id.* Thus, the Meeks were not effectively granted a fee simple title. The United States' grant of fee simple title to the Meeks was void *ab initio*. (R. 4, CL 3). Therefore, the following sale of the land by the Meeks descendants to the state of Oregon was also void. *Id.* The Meeks descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park. (R. 2, ¶ 5).

Cush-Hook Nation had exclusive possession of Kelley Point Park because the treaty signed with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory was never ratified. Since the treaty was never ratified, the treaty was never effective and did not bind the parties to the treaty's terms. Second, Mr. and Mrs. Meek did not satisfy the requirements for a fee simple title under the Oregon Donation Land Act of 1850 because they did not live on the land four consecutive years and they did not cultivate the land. Since the treaty was ineffective and the fee simple title was deemed *void ab initio*, the Cush-Hook Nation has proved that they have lived at Kelley-Point Park continuously and exclusively up until the alleged taking.

Finally, Cush-Hook Nation must prove that the government has not extinguished aboriginal title. The government may extinguish aboriginal title regardless of who holds the aboriginal land title. Felix Cohen, *Cohen's Handbook of Federal Indian Law* at 489 (Strickland, 1982 ed.) (2005), (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, (1941). If a national park is created according to a congressional action, the government may effectively extinguish aboriginal title. However, Kelley Point Park is a state park and not a national park. Thus, the government may not extinguish aboriginal title on that basis. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1391. Here,

according to the conclusions of law, Cush-Hook Nation owns the land in question under the doctrine aboriginal title pursuant to *Johnson v. McIntosh* because the United States Senate declined to ratify the treaty to compensate the tribe. (R. 3-4, CL 2). Respondent respectfully requests the court to affirm the lower court's ruling that the Cush-Hook Nation has aboriginal title.

II. ORS §§'S 358.905-358.961 ET SEQ. AND ORS 390.235-390.240 ARE CIVIL REGULATORY AND NOT CRIMINAL PROHIBITORY, AND THEREFORE, THE STATUTES ARE NOT APPLICABLE TO THE CONDUCT OF RESPONDENT PURSUANT TO PUBLIC LAW 280. SPECIFICALLY, THE OREGON STATUTES SEEK TO "CONTROL THE USE OF, AND TO PROTECT, ARCHEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS," WITHIN INDIAN COUNTRY, THEREBY GENERALLY PERMITTING THE CONDUCT AT ISSUE WHILE SUBJECT TO REGULATION AND OUTSIDE OF PUBLIC LAW 280 JURISDICTION.

A. Introduction

There is a presumption against state jurisdiction in Indian country. *Worcester*, 31 U.S. 515; *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987); (*citing California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n. 18 (1987)). The United States Supreme Court has consistently recognized tribal sovereignty over its members and territory, holding that tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon*, 480 U.S. 202, 207 (*quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Additionally, the Supreme Court has held that tribal sovereignty is dependent and subordinate only to the Federal government; not the states. *Id*. at 207, (*citing Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)); *see also New Mexico v. Mescalero Apache Tribe*, 426 U.S. 324, 331-33 (1983). Inherent tribal sovereignty may act as a barrier to the illegitimate assertion of state jurisdiction. Felix Cohen,

Cohen's Handbook of Federal Indian Law, §2.01[2] at 112 (Nell Jessup Newton ed., 2012) (*citing Williams v. Lee*, 358 U.S. 217, 220 (1959)).

Chief Justice John Marshall articulated the extent of that sovereignty and state jurisdiction in Indian country in *Worcester v. Georgia*. 31 U.S. 515. The Supreme Court refused to extend acts of the Georgia legislature, exerting government over all of the Cherokee lands and people. *Id*. The Court held that the laws of the state were "repugnant to the constitution, laws and treaties of the United States." *Id*. Justice Marshall went on to define the extent of Indian sovereignty, describing the Cherokee Indians as "nations" and "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States." 31 U.S. 515, 557. The Chief Justice was deliberate to limit the scope of state law within Indian country, stating, "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force,…, but with the assent of Cherokees themselves, or in conformity with treaties, and with the *acts* of congress." 31 U.S. 515, 561. (emphasis added). *Worcester* affirmed the plenary power of Congress over Indian affairs, holding, "[t]he whole intercourse between the United States and this nation [Cherokee], is, by our constitution and laws vested in the government of the United States." 31 U.S. 515, 561; *see also* U.S. Const. art. I, §8, cl. 3 (Congress shall have the power, "[t]o regulate Commerce with foreign Nations, and among the several states, and with *Indian Tribes*") (emphasis added).

In construing the applicable statutes as "repugnant" to the laws and treaties of the United States, Justice Marshall help lay a foundation for a doctrine of statutory and treaty interpretation in Indian law. The canons of construction to laws made for the benefit of the "dependent"

peoples. *Id*. at 582, ("[t]he language used in treaties should never be construed to their prejudice…). Since *Worcester*, the Supreme Court has reaffirmed the principle. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("the standards principles of statutory interpretation do not apply in cases involving Indian law"); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (stating, "[t]he canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians). Legal scholar Felix Cohen first articulated the basic canons of the construction—requiring that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and ambiguities resolved their favor, *County of Oneida, 470 U.S. 226, 247, Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico,458 U.S. 832, 846* (1982). Treaties and agreements are to be construed as Indians would have understood them; and tribal property rights are to be preserved unless intent from Congress is clear and unambiguous. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136. *Cohen's Handbook of Federal Indian Law* at 119-120 (2005). The canons were first developed in the context of treaty interpretation but have since been extended to non-treaty law such as "agreements." *Winters v. U.S.*, 207 U.S. 564 (1908). However, the Supreme Court has acknowledged that state laws may be applied to Indians in Indian country by express congressional delegation pursuant to the plenary power of Congress affirmed by Chief Justice Marshall in *Worcester* and codified in Public Law 280 (hereinafter, Pub. L. 280). *Worcester*, 31 U.S. 515, 561; 18 U.S.C. §1162; 28 U.S.C. §1360; *see also*, *Cabazon*, 480 U.S. 202, 207.

The Cush-Hook Nation owns aboriginal title to Kelley Park, possessing inherent sovereignty against an assertion of criminal jurisdiction from the state. (R. 2.¶7). The district court, however, held that Pub. L. 280 confers criminal jurisdiction over "all lands in the State of Oregon…whether they are tribally owned or not." (R. 4, CL 5). For that holding to be accurate

and correct, the statutes must be construed by the Court as criminal in nature and applicable to Indian country under Pub. L. 280.

B. Standard of Review

The Respondent appeals the Oregon Court of Appeals conclusion that Pub. L. 280 confers criminal jurisdiction to Oregon over the conduct at issue in this dispute—cutting and removal of trees of cultural, historic, and religious significance to the Cush-Hook Nation. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on Kelley Point Park, turns upon the interpretation of ORS. 358.905-358.961 *et seq.* and ORS. 390.235-390.240 *et seq.* Statutory interpretation is a question of law that requires a *de novo* standard of review. *See United States v. Cabaccang*, 332 F.3d 622, 624-25; ("[t]he construction or interpretation of a statute is a question of law that we review de novo").

C. Analysis

1. Pub. L. 280 is a congressional delegation of jurisdiction to the states, granting limited civil jurisdiction over "causes of action" and authorizing the application of state criminal law in specified areas of "Indian country."

In 1953, the United States Congress enacted Pub. L. 280, delegating jurisdiction to six states criminal jurisdiction over offenses and civil jurisdiction over civil claims throughout Indian country within their borders. Public Law 280 was enacted by Congress in 1953 as a response to the concern with "[t]he problem of lawlessness on certain Indian reservations" and "[a]bsence of any adequate tribal institutions for law enforcement." *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, (1976)(*citing* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A.L.REV. 535, 541 (1975)). Legislative history

indicates the same concern, specifically, "[i]n many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." 426 U.S., 373, 380, (*quoting* the House Report, H.R.Rep.No.848, 83d Cong., 1st Sess., 5-6 (1953)). Moreover, "[t]hese states lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions… applicability of Federal criminal laws in States having Indian reservations is also limited." *Id*.

The construction of the statute, as originally codified in 1953, grants specified states, or "mandatory" states, criminal and civil jurisdiction. 18 U.S.C.§1162; 28 U.S.C. §1360. Section 1162 confers criminal jurisdiction, stating that the state shall have jurisdiction over offenses:

> "committed by or against Indians in the areas of Indian country listed opposite the name of the State…to the same extent that such State… has jurisdiction over offenses committed elsewhere within the State…, and the criminal laws of such State… shall have the same force and effect within such *Indian country* as they have elsewhere within the State..."

18 U.S.C. §1162(a),67 Stat. 588 (emphasis added). Section (b) of 1162 provides, "Oregon…All Indian country within the State, except the Warm Springs Reservation." *Id*. Section (b) of the statute, however, subjects criminal jurisdiction to limitation, stating:

> "[n]othing 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 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[3], or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

[3] *See* 55 A.L.R.Fed.2d 35 (2011), suggesting the "agreement" within the meaning of section 1162(b) of Public Law 280 may be agreements other than formal written agreements according to the court in *Elser v. Gill Net No. One*, 246 Cal. App. 2d 30, (1st Dist. 1996).

18 U.S.C.A. §1162(b). State criminal jurisdiction in Indian country shall be exclusive, divested of specific federal criminal jurisdiction pursuant to the Major Crimes Act (MCA) and Indian Country Crimes Act (ICCA). *See*, §1162(c) ("[t]he provisions of sections 1152 [MCA] and 1153 [ICCA] 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") (emphasis added). However, federal criminal statutes of general applicability have been held by lower courts to apply[4].

Section 1360 confers jurisdiction "over civil causes of action" to which Indians are parties, and which "arise in the areas of Indian country… to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws… that are of general application to private persons or private property shall have the same force and effect within such Indian country..." 25 U.S.C. §1360(a). The language of §1360 is subject to restraint as in §1162(b), stating, "nothing in this section…; …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 confer jurisdiction upon the State to adjudicate…" 28 U.S.C. §1360(b). However, modern Supreme Court jurisprudence suggests that civil jurisdiction may be even narrower. *See, e.g., Bryan*, 426 U.S. 373, 388-390; *Cabazon*, 480 U.S. 202, 210 (precluding entire subject areas from state civil jurisdiction, namely taxation and regulation).

Consequently, the distinction between criminal and civil jurisdiction is critical and determinative for application of Pub. L. 280. Because Oregon is listed a "mandatory" state pursuant to §§'s1162(a), 1360(a); it must be determined whether Kelley Park is "Indian country"

[4] *See U.S. v. Anderson*, 391 F.3d 1083, 1085 (9th Cir. 2004),([s]ection 1162(a) on its face gives California jurisdiction in Indian country to the same extent it has jurisdiction over offenses committed within the state as a whole. Nothing in the text suggests that this jurisdiction is exclusive") Moreover, the question on certiorari is whether the state has criminal jurisdiction, not whether the state has criminal jurisdiction concurrent to the federal or tribal government.

within the meaning of Pub. L. 280 and whether the statutes are criminal or civil in function regardless of label. (R. 4,CL 5)

2. Whether Kelley Point Park constitutes "Indian country" for purposes of Pub. L. 280 is determinative to whether ORS §§'s 358.905-961 et. seq and 390.235-240 are applicable pursuant to Pub. L. 280.

As evident from the language of the statutes, Pub. L. 280 are statutes of limited as well as broad jurisdiction, enacted specifically to extend state jurisdiction over otherwise sovereign territory and peoples. For the Oregon statute's to apply, Kelley Point Park must be considered to be "Indian country." *See e.g.*, §1162(a) ("[e]ach of the States or Territories listed…shall have jurisdiction over offenses committed by or against Indians in the areas of *Indian country*…") (emphasis added); *see also, e.g.,* §1360(a) ("[e]ach of the States…shall have jurisdiction over civil causes of action…which arise in the areas of *Indian country* …") (emphasis added). Since the time of European colonization of North America, "Indian country" or "territory" has been subject to conflicting definition and interpretation.[5] In 1948, Congress codified "Indian country" and defined it as:

> "[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all 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."

18 U.S.C.A. §1151 (1948).

[5] *See* Trade and Intercourse Act, Act of July 22, 1790, 1 Stat. 137, 138, §3, (making it unlawful to be in "Indian country… with such merchandise in his possession" to be traded with the Indians without first obtaining a license). *See* Act of March 30, 1802, 2 Stat. 139, (first delineating boundary lines between the "Indian territory" and the United States.)

Whether a particular tract of land in question qualifies as "Indian country" pursuant to §1151 is the "benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc*., 829 F.2d 967, 973; (*quoting, Cohen's Handbook of Federal Indian Law*, 27-46, 5-8 (2005), stating, "Indian country" usually the governing legal term for jurisdictional purposes and generally determines the allocation of tribal, federal, and state authority). Whether a particular land is "Indian country" is a question of law. *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (holding that the trial court acts appropriately when it makes the jurisdictional ruling a particular tract of land or geographic area is Indian country); *see also, United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985) (finding, the judge did not commit a plain error in instructing the jury because "the issue of what constitutes Indian country is a matter for the judge and not the jury."); *see also, United States v. Deon*, 65 F.2d 354, 356 (8th Cir. 1981) (the requirement that a crime take place in Indian country is for jurisdictional purposes). While §1151 of the United States Code defines "Indian Country" for the purposes of criminal jurisdiction, "the classification generally applies to questions of both civil and criminal jurisdiction." *Indian Country, U.S.A., Inc.*, 829 F.2d 967, 973 (*quoting Cabazon*, 107 S.Ct. at 1087 n. 5) (*citing DeCouteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975)).

A formal designation of Indian lands as a "reservation" is not required for them to have Indian country status. *Indian Country*, 829 F.2d 967, 973-74 (*quoting United States v. McGowan*, 302 U.S. 535, 538-39 (1938), holding that Congress controls determining what is Indian country); *see also, United States v. Chavez*, 290 U.S. 357, 364 (1933) (Indian country includes "any unceded lands owned or occupied by a tribe"). Indian Country cannot be confined to land formerly held by the Indians and to which their title remains unextinguished. *Donnelly v.*

United States, 228 U.S. 243 (1913). Indian country consists of land held under the doctrine of aboriginal title and stops being Indian country when that title is extinguished, "unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case." *Bates v. Clark*, 95 U.S. 204, 208 (1877); *see also, United States v. John*, 437 U.S. 634, 649 n.18 (1978).

The lower court found that the land in question at Kelley Point Park was owned under aboriginal title by the Cush-Hook nation. (R. 4,.CL 4). Title to that land was not extinguished, nor was it voluntarily relinquished. (R. 3-4, CL 2). As held by the Supreme Court, the definition of what is Indian country cannot be confined to land formerly held and has recognized lands held under which their title has not been extinguished. *Donnelly*, 228 U.S. 243. Moreover, the designation of what constitutes "Indian country" is a question of law, already affirmed in the lower court. *See United States v. Roberts*, 185 F.3d 1125. Further, as *McGowan* makes clear, "Indian country" is not confined strictly to lands formerly designated or delineated as "reservations." Perhaps most importantly, the lower court found the agreement for cessation of land or removal null and void, not ratified by the senate and thus a legal nullity. (R. 3-4, CL 2). Yet, as *United States v. Chavez* makes clear, any unceded land owned that is occupied by the tribe remains Indian country. 290 U.S. 357, 364. Because the land in question can be considered to be Indian country, it may be determined whether and to what extent Pub. L. 280 can be asserted over Thomas Captain.

3. Public law 280 applies to "Indian country," however, the statute sought to be enforced pursuant to Pub. L. 280 must be "criminal/prohibitory;" not "civil/regulatory."

The central focus of Pub. L. 280 is §1162, which confers state criminal jurisdiction over "offenses committed by or against Indians" on reservation land. *Bryan*, 426 U.S. 373, 380.

Thus, when a state seeks to enforce a statute within Indian country pursuant to Pub. L. 280, "it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under s 2 [§1162], or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Cabazon*, 480 U.S. 202, 208.

In *Bryan v. Itasca*, the Supreme Court was confronted by the proposition that Public Law 280 implied other powers of civil jurisdiction, namely, a power to levy personal property tax on an enrolled tribal member living on tribal land held in trust. 426 U.S. 373,378. The Supreme Court looked to the language of section 1360 and held that "[t]he statute does not in terms provide that the tax laws of a State are among civil laws…of general application to private persons or property." *Id*. Supreme Court looked further, drawing upon congressional policy toward Indians, stating "[t]oday's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. *Bryan*, 426 U.S. 373, 378-88.

Most importantly, the Supreme Court adhered to the canons of construction in interpretation of statutes enacted under the authority of Pub. L. 280 by resolving ambiguity in favor of the tribe. *Bryan*, 426 U.S. 373, 392 (stating, "that statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *see also, Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (*citing Bryan*, "[t]he Supreme Court in interpreting Public Law 280 has stated that statutes passed for the benefit of the dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indian tribe," and holding, that a statute prohibiting a gambling that may arguably be interpreted as prohibitory must be resolved in favor of the tribe) (internal quotations omitted). The Supreme Court also rejected the idea Pub. L. 280 extended the

"full panoply of civil regulatory powers, including taxation" because of potential destruction of such tribal governments, contrary to congressional policy. *Id*. at 388, (*citing United States v. Mazurie*, 419 U.S. 544, 557) (emphasis added). In consideration of the legislative history[6], congressional policy[7], and adherence to the canons of construction[8]; the Court construed Pub. L. 280's delegation of civil jurisdiction narrowly.

The Court reaffirmed the central purpose of Pub. L. 280 being section §1162, confronting the lawlessness on reservations and vesting criminal jurisdiction in the state for "offenses by or against Indians" *Id*. at 383. However, the Court did not resolve the question left unanswered involving regulatory laws that carry a criminal penalty.

Following *Bryan*, the Supreme Court affirmed the determination about state regulatory jurisdiction under Pub. L. 280. *Cabazon*, 480 U.S. 202, 208 (holding the grant of criminal jurisdiction was broad while the grant of civil jurisdiction was more limited). The Court acknowledged the *Bryan* analysis is not a bright-rule, and statutes would have to be examined in detail before they could be characterized as regulatory or prohibitory. *Id*. at 210-211. Further, the Court resolved the question left unanswered in *Bryan*, specifically holding that a misdemeanor penalty against unregulated high stakes bingo did not convert the statute to a criminal statute for purposes of Pub. L. 280. *Id*. at 211. Specifically, the court stated: "[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. *Id*. at 211. The Court continued, "[o]therwise, the distinction between §2[1162] and §4[1360] of that law could

[6] *Bryan*, 426 U.S. 373, 381 ("[i]n marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting s 4's grant of civil jurisdiction to the States").
[7] *Id*. at 387, ("[t]he Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society.")
[8] *Id*. at 392 ("[f]inally, in construing this admittedly ambiguous statute,… we must be guided by that eminently sound and vital canon…, that statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in the favor of the Indians") (internal citations and quotations omitted).

easily be avoided and total assimilation permitted." *Id*. at 211, *see also, Id*. at 208 (holding that granting general civil regulatory authority could result in destruction of tribal institutions and values in pursuit of total assimilation in contravention of stated congressional policy.)

The statute in question in *Cabazon* was California Penal Code §326.5. The statute did not prohibit bingo, rather subjects it to certain restrictions. *Id*. at 205. Namely, the statute requires that the games are operated and staffed by unpaid members of designated charitable organizations; profits must be kept in special accounts and used only for charitable purposes; and prizes may not exceed $250.00. *Id*. at 205. In other words, it allowed certain organizations to conduct the bingo operations and for certain purposes. *Id*. at 209. In determining whether a law is civil or criminal for purposes of Pub. L. 280, the Supreme Court has relied upon a criminal, civil law dichotomy as described in *Bryan*, quoting:

> "[i]f the intent of the state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if 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. The shorthand test is whether the conduct at issue violates the State's public policy."

Cabazon, 480 U.S. 202, 209; (holding the test applied by the Court of Appeals in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (CA 9 1982), was a proper construction of the Court's holding in *Bryan v. Itasca)*.

In applying the test, the court concluded that the law was "civil/regulatory" and therefore not applicable under Pub. L. 280's grant of jurisdiction. *Cabazon*, 480 U.S. 202, 210. The Court found that California itself operates its own lottery, often encouraging its own citizens to participate, and permits horse betting. Consistent with the "criminal/prohibitory" and "civil/regulatory" dichotomy, the Court found that the findings California regulates rather than prohibits gambling in general and bingo in particular. The Court also rejected the State's

argument that Cal. Penal Code §330, which enumerates prohibited games and subjects violators to misdemeanor offense was criminal for purposes of Pub. L. 280. *See, Id*. at 210-211. The Court held that because a statute is enforceable by criminal as well as civil means does not convert it to a criminal statute for purposes of Pub. L. 280. *Id. See also, Burgess v. Watters*,467 F.3d 676 (7th Cir. 2006) (holding a law committing a violent sex offender is criminal prohibitory for purposes of Pub. L. 280 regardless of what the state labels, providing, "[t]he state court's choice of label cannot be the last word on the matter. Ultimately, it is federal law, as authoritatively interpreted by the Supreme Court of the United States that provides the answer we seek.)

Following *Cabazon,* lower courts have had difficulty determining the "regulatory/prohibitory" distinction and what violates state public policy—the shorthand test. *Compare, St. Germaine v. Circuit Court for Vilas,* 938 F.2d 75, 77 (7th Cir. 1991) (holding a Wisconsin statute against driving with a suspended license was criminal prohibitory carrying a mandatory criminal penalty and protecting the lives and property of the citizens is the public policy of the state); *and State v. Johnson*, 598 N.W.2d 680, 684 (Minn. 1999) (holding Minn. Stat. §171.24, carrying misdemeanor penalty for violation of driving after revocation as regulatory, not prohibitory).

Scholars have also suggested that the emphasis should be on the "nature of the regulated conduct in relation to the forms of unregulated conduct." *Cohen's Handbook of Federal Indian Law* at 551. "If the subset of outlawed conduct is small relative to the entire class of activity, the law is regulatory in nature." *Id*. Importantly, it is suggested that "only when the specific conduct outlawed under state law presents substantially different or heightened public policy

concerns associated with risks of grave harm to persons or property" should the court find the law to be authorized by Pub. L. 280. *Id.*

In the case at bar, ORS sought to be enforced against Thomas Captain are similar to Cal Penal Code §326.5 in its function. In *Cabazon*, the operation of the bingo site would be permitted subject to employment of unpaid staff with a cap on prizes and proceeds deposited toward charitable organizations. The Oregon statutes contain permit processes, declared policy, and criminal misdemeanor liability.

However, the loopholes for private excavation and unearthed materials prove Thomas's conduct of cutting down culturally significant trees is merely regulated subset activity part of a larger regulation. Section 358.920(1)(a) states: "[a] person may not excavate, injure destroy or alter an archeological site or object or remove an archeological object[9] located on public or private lands in Oregon unless that activity is authorized by a *permit* issued under ORS 390.235" (emphasis added). Just as in *Cabazon*, such conduct is permitted subject to regulation from the state, and in this case, in the form of a permit process as stipulated in ORS §390. 235. Furthermore, different processes for permission or discovery are stipulated under the Or. Rev. Statutes—some forms altogether exempt. Statute 358.920(b) states, "collection of an arrowhead from the surface of public or private land is permitted if collection can be accomplished without the use of any tool," while section (1)(a) prohibits the excavation, injury, or removal of an archeological object located on public or private lands unless that activity is authorized under ORS §390.235. Contrasting provisions 358.915, 358.920, and 390.235; sacred objects and archeological objects are subject to different standards of regulation—some types permitted and

[9] ORS §358.905(1)(a) "'Archeological object' means an object that: (B) Is part of a the physical record of an indigenous or other culture found in the state or waters of the state; and…(C) Is material remains of past human life or activity that are of archeological significance including, but not limited to, monuments, symbols, tools, facilities…"(sections omitted).

unregulated. *Compare* §358.915,(§§'s 358.905-358.961 do not apply to a person who unintentionally discovers an archeological object that has been exposed by the forces of nature on public land or private property and retains for personal use, *except* for sacred objects[10], human remains, funery objects or objects of cultural patrimony) (emphasis added); *see also*, 390.237 (removal of any materials from any of archeological, historical, prehistorical or anthropological nature without obtaining the permit, with the exception of native Indian human remains, funery goods, sacred objects). Applying Cohen's principles, there are exceptions for some type of conduct, such as accidental discovery of archeological objects but not sacred objects, which suggests that the outlawed conduct may be small relative to the entire class of activity and therefore "regulatory in nature." *See* §358.915, §390.327. *Cohen's Handbook of Federal Indian Law* (2005), at 551.

Section(8) of the same statute provides, "[v]iolation of the provisions of this section is a Class B misdemeanor." It is important to emphasize that the Court in *Cabazon* expressly held in reference to Cal. Penal Code §330, that because a 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." 480 U.S. 202, 211. In *Cabazon*, statute 330 of the Cal. Penal Code to criminal punishment for violation, providing "shall be punishable by a fine…or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment." The ORS's may be prosecuted either criminally or civilly. Specifically, violations of the provisions may result in a "Class B misdemeanor" or a "civil forfeiture" of the illegally obtained objects. ORS §358.905 ("violation this section is a Class B misdemeanor); ORS §358.925(1) ("[a]n action for civil

[10] ORS §358.905(1)(k), "'Sacred object means an archeological object or other object that: …(A) Is demonstrably revered by any ethnic group, religious group, or Indian tribe as holy;"(sections omitted).

forfeiture under this section may be commenced by the Attorney General or by the district attorney for the county in which any of the property is seized")

The state may claim the "shorthand" test of Cabazon should be applied, drawing upon the declared "policy" of the legislative assembly. ORS §358.910. It states, "[a]rchaeological 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…their contents located on public land… to be protected and managed in perpetuity by the state as a public trust." ORS §358.910(1). The Court in *Cabazon* looked to state lotteries and other forms of gambling permitted under state law to reject that bingo was criminal prohibitory in violation of state public policy. 480 U.S. 202, 213; Cal. Penal Code, §§'s 330, 326.5. While Oregon's stated policy may be illustrative, it is not indicative as to whether the statute is "criminal/prohibitory" or "civil regulatory" for purposes of Pub. L. 280. Moreover, it would be prudent to adhere to the canons of construction requiring that all ambiguities resolved in favor of the Indians—construing the Oregon statutes as "civil/regulatory," thereby in favor of the tribe and for their benefit.

CONCLUSION

For the reasons set forth above, the Cush-Hook Nation still owns the land in question at Kelley Point Park under the doctrine of aboriginal title. Pursuant to the construction and interpretation of Pub. L. 280, State of Oregon did not have criminal jurisdiction because the law was "civil/regulatory" and not "criminal/prohibitory" as required by the Supreme Court's prior decisions. Furthermore, in adhering to the canons of construction applicable to Indians, the statutes should be construed liberally and in favor of the tribes, resolving any doubt or ambiguity in their favor. Therefore, the decision of the Oregon Circuit for the County of Multnomah as affirmed by the Oregon Court of Appeals, that found criminal jurisdiction to apply pursuant to Pub. L. 280 must be reversed.

Dated this 14th day of January, 2013

Respectfully submitted,

Team #47

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Attorneys for Respondent