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 UNITED STATES COURT OF APPEALS FOR THE OREGON COURT OF APPEALS

BRIEF FOR RESPONDENT

Team 49

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QUESTIONS PRESENTED

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

II. Does Oregon have criminal jurisdiction to control and protect archaeological, cultural, and historical objects on the land in question, even if owned by a non-federally recognized American Indian tribe?

STATEMENT OF THE CASE

Statement of the Proceedings

The Oregon Circuit Court, for the County of Multnomah, found that the Cush-Hook Nation's aboriginal title to its homelands inside Kelley Point Park endures, and has never been extinguished by the United States. It held that the Cush-Hook Nation still owned the land within the Park and found Thomas Captain not guilty for trespass or for cutting timber in that area. The Oregon Circuit Court found Mr. Captain guilty of damaging an archaeological site and a cultural and historical artifact, according to Oregon Revised Statutes §§ 358.905-358.961 *et seq.* and Oregon Revised Statutes §§ 390.235-390.240 *et seq.*

The Oregon Court of Appeals affirmed the Circuit Court's ruling, without writing an opinion. The Oregon Supreme Court denied review. The State filed a petition and cross-petition. Mr. Captain filed a cross-petition for review in this case. This Court granted certiorari review of the decision below.

Statement of Facts

In 2011, Thomas Captain erected housing in Kelley Point Park. (R. 2, ¶3). He moved there to act as a guardian, of a sacred site contained within the bounds of the park. *Id.* The Cush-Hook Tribe, of which Thomas Captain is a member, lived on that site since time immemorial. (R. 1, ¶2). They grew crops, harvested wild plants, hunted, and fished. *Id.* Trees, on the site, hold sacred religious and cultural carvings, carved by Cush-Hook medicine-men. (R. 2, ¶3). Currently, after more than 300 years, those carvings—fundamental components of Cush-Hook history—live on, 30 feet above ground. *Id.*

Recently, vandals began to surreptitiously desecrate the site. *Id.* They climb trees and deface the images. *Id.* Occasionally, the vandals cut images from the trees and sell these irreplaceable culturally, and historically, significant artifacts. *Id.* Because he believed it to be his duty, Mr. Captain left his mountain range home, hoping to deter these culturally corrosive actions. *Id.* To protect and restore a mutilated image, Mr. Captain cut that section from the tree. *Id.* Before he could return the sacred object to the Cush-Hook Tribe, for restoration, state troopers arrested him and seized it. *Id.*

The history of the Cush-Hook, regarding this matter, began in the spring of 1806. (R. 1, ¶3-4). William Clark, of the famous Lewis & Clark expedition, traveled to the Pacific Northwest on a quest of discovery, for the United States. *Id.* Clark encountered the Multnomah Indians fishing and gathering wapato along the Multnomah River. (R. 1, ¶2). The Multnomah Indians informally introduced Clark to the Cush-Hook Nation of Indians. (R. 1, ¶3). Like the Multnomah, the Cush-Hook originated in that area, along the river. (R. 1, ¶3). At that time, the Cush-Hook Nation functioned as a high-level civilization. (R. 1, 2-3). They lived "off-of-the-land,[1]" but in a village of long houses. The culture included traditional burial areas, a system of government, designated sacred sites, and religious practices. (R. 1, ¶3; R. 2, ¶8). Clark, presented a "peace medal" to the Cush-Hook Chief, as a gesture, to engage in political and commercial relations. (R. 1, ¶3). Historians now recognize these objects as "sovereignty tokens," acknowledging a nation-to-nation political relationship. (R. 1, ¶4).

In 1850, Anson Dart, the Superintendent of Indian Affairs began negotiations with the Cush-Hook, which resulted in an agreement to relocate the Tribe 60 miles westward. (R. 1, ¶5). That same year, Congress enacted the Oregon Donation Land Act. (R. 2, ¶6). Under the

[1] They fed themselves by hunting, fishing, and gathering.

Act, settlers were required to cultivate agreed upon land for a period of four years, to obtain a certificate of title. (R. 2, ¶6).

American settlers, Joe and Elsie Meek, obtained land through the Oregon Donation Land Act. (R. 2, ¶6). But, the Meeks never cultivated, or lived upon, the land for the prescribed four-year term. *Id.* Oddly, the certificate of ownership passed onto their descendants, who sold the land to Oregon in 1880. (R. 2, ¶6).

In 1853, Congress declined to ratify the Cush-Hook treaty. (R. 2, ¶5). Thus, the Cush-Hook never received compensation, even though they moved from their ancestral homeland.

According to the Oregon Circuit Court of the County of Multnomah, the Cush-Hook Nation owns the land inside Kelley Point Park, under an aboriginal title. (FF4). Congress erred by including the Cush-Hook's ancestral lands as land open for settlement, under the Oregon Donation Land Act. (FF1). The United States grant of fee simple title to Joe and Elsie Meek under the Oregon Donation Land Act is void *ab initio* and therefore, the subsequent sale to Oregon State by the Meek descendants is also void. (FF 3).

In the instant matter, the lower court found Thomas Captain not guilty of all, but one of the charges—damaging an archaeological site—even though they acknowledged the Cush-Hook's right to the aboriginal title.

SUMMARY OF THE ARGUMENT

The Oregon Circuit Court correctly held that the Cush-Hook Nation's aboriginal title was never extinguished, by the United States. Exclusive occupation establishes aboriginal title. The Cush-Hook never abandoned their right to occupy the Tribe's ancestral homeland. No other party, citizen or tribe—inhabited, occupied, or interfered with—the land in a manner that could extinguish the aboriginal title.

The Cush-Hook pursued no compensation, and ceded no dispensation, in regards to their ancestral homelands. The Tribe filed no claim, in regards to land that they continuously held as their own, and maintained their duty, and commitment, to sustain and protect their sacred religious sites, within the bounds of Kelley Point Park.

Congress took no affirmative, or unambiguous, action to extinguish the Cush-Hook's aboriginal title. Conversely, Congress declined to ratify the treaty that arguably softened the Cush-Hook right to the land at issue. The Tribe received no compensation for the alleged transfer or title here. The inclusion of this land in the Oregon Donation Land Act was pure oversight – a mistake, and the lower court acknowledged this as such.

The State of Oregon's authority to prosecute an Indian, for an act committed on Indian land, exists uniquely under Public Law 280. Here, that authority is preempted and excepted by commonly applied principles of tribal sovereignty. State authorities cannot usurp tribal authority in matters that are fundamental to the function, and existence of a tribe, without Congress's express consent.

Additionally, letter-of-the-law application, of 18 U.S.C. § 1162 (hereinafter "Public Law 280," or "PL 280"), does not authorize criminal punishment of Indians, under this Oregon statute. Application of criminal penalties here, administers punishment unavailable beyond the bounds of tribal land. PL 280 only authorizes state jurisdiction that has the same force and effect throughout the state, Indian country, and relevant territories. The statutes implicated here are non-criminal. PL 280 does not permit transmutation of laws. This is especially egregious where the government applies the law errantly and uniquely, for desired results on tribal lands.

Finally, State prosecution of Thomas Captain, for removing a sacred object from Indian lands, contradicts the purpose and intent of Oregon Revised Statutes §§ 358.905-358.961 and §§ 390.235-390.240. By the Oregon Revised Statutes, that are the focus here, Thomas Captain's actions are the allowed, and often preferred, method of resolving matters related to—historical, archaeological, and cultural—sacred objects. These statutes exist to preserve and protect the type of sacred object at the center of this litigation. The State's posited methods of preservation and restoration include: notifying, the appropriate Indian tribe; delivering items to the appropriate Indian tribe; and seeking guidance from the appropriate Indian tribe. Here, the Cush-Hook is the appropriate Indian tribe, and Thomas Captain is their representative.

We ask that you hold that the Cush-Hook Tribe possess aboriginal title to their ancestral homeland, and also that the State of Oregon does not have criminal jurisdiction to prosecute a Cush-Hook Indian.

ARGUMENT

I. The Oregon Circuit Court Correctly Held that the Cush-Hook Tribe's Aboriginal Indian Title to the Land in Kelley Point Park is Enforceable Because Their Rights Endure; They Never Abandoned the Right to Occupy Their Ancestral Homeland and Oregon Does Not Possess a Legitimate Claim to this Ancestral Homeland

The Cush-Hook Tribe possesses a right to occupy land in Kelley Point Park, under their aboriginal title. An aboriginal title right arises from a tribe's exclusive occupation of their ancestral homeland, which, is established before the onset of European colonization. *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). The federal government recognizes aboriginal Indian title, where exclusive tribal occupation exists and no other tribes wander freely on that land. *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345, (1941). The validity of

aboriginal title is not dependent on a treaty, statute, or other formal governmental recognition. *Cramer v. United States*, 261 U.S. 219, 229 (1923).

The federal government and courts, agree that aboriginal Indian title exists where the land is subject to continuous possession, without extinguishment by the United States. *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345, (1941); *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 71 (1886). Unless tribes must file for compensation, a right to occupy is never a question. *Id.* In this case, the Cush-Hook Tribe holds aboriginal Indian title to the land in Kelly Point Park because they have never abandoned their right to occupy. Furthermore, in 1853 the United States federal government declined to extinguish the rights of the Cush-Hook.

A. The Cush-Hook People never relinquished rights to their aboriginal homeland and assumed ownership continuously since time immemorial

The Cush-Hook People never abandoned their aboriginal title, and their right to occupy ancestral homelands inside Kelly Point Park. Courts affirm a right to occupy—under aboriginal title—when the area is a part of the tribe's original ancestral homeland, and the tribe does not eschew their right to access it. The Cush-Hook Tribe holds—and has continuously held—the right to occupy and use their aboriginal Indian title, to land inside Kelley Point Park.

Since 1823, in the seminal case *Johnson v. M'Intosh*, and repeatedly reaffirmed[2] thereafter, this Court recognizes that the federal government mandates respect of the Indian right of occupancy. *Johnson v. M'Intosh*, 21 U.S. 543, 563 (1823).

[2] The cases here affirm the Indian right-of-occupancy holding. *Cramer v. U.S.*, 261 U.S. 219, 227; *Worcester v. State of Ga.*, 31 U.S. 515, 593 (1832); *Holden v. Joy*, 84 U.S. 211, 212 (1872); *See also, Mitchel v. United States*, 34 U.S. 711 (1835); *Chouteau v. Molony*, 57 U.S. 203 (1853); *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941); *U.S v. Shoshone Tribe*, 304 U.S. 111; and *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 71 (1886).

The Cush-Hook holds, and continuously held, aboriginal Indian title from time immemorial, without interruption. In 1946, the government enacted the Indian Claims Commission Act ("ICCA"). Pub. L. No. 726, 60 Stat. 1049 (omitted from codification on termination of the Commission in 1978). The ICCA provides an opportunity for tribes that lost land, to seek compensation by filing compensation claims in federal court. *Id.* For example, in response to a trespass charge, two members of the Western Shoshone Tribe asserted an aboriginal Indian title claim to the land. *U.S. v. Dann*, 470 U.S. 39, 39 (1985). The Court denied their claim because compensation was awarded previously, on behalf of the entire tribe. *Id.* In *U.S. v. Sioux Nation*, the tribe originally brought action to quiet title to the Black Hills, a sacred area in South Dakota, by alleging an unconstitutional taking under the Fifth Amendment. This claim stemmed from a ratified treaty. Initially, the tribe sought restoration of its territorial rights to the land, and damages, through an ICCA claim. See e.g., *U. S. v. Sioux Nation of Indians*, 448 U.S. 371, 372, (1980). Although the tribe preferred rights and access to the land, rather than compensation, the court dismissed the claim due to the "waiver" affected through the ICCA process. *Id*. at 435.

The Yankton Sioux Tribe and the federal government agreed to keep the Red Pipe-Stone Quarry—a religious resource—as "free and unrestricted use" for the tribe to visit and procure stone for pipes, but this Court dismissed the action. *Yankton Sioux Tribe of Indians v. U.S.*, 272 U.S. 351 (1926). The Court advised the tribe to seek remedy through the ICCA because the area was physically possessed by another. *Id.* The Navajo Nation asserted an aboriginal Indian title to lands, within an executive order reservation, but was denied because they missed their opportunity to assert claim under the ICCA, and because the land was

already occupied by another. *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455 (10th Cir. 1987).

In this case, expert witnesses established that the Cush-Hook Tribe holds, and continuously held aboriginal Indian title to their ancestral homeland, inside Kelley Point Park for time immemorial, without interruption. The lower court held this as fact, in the related decision. Prior to first contact in 1806, the Cush-Hook maintained their aboriginal Indian title claim to land in Kelley Point Park. Throughout generations they held a duty, and commitment, to sustain and protect their sacred religious sites.

Like the Yankton Sioux Tribe, the Cush-Hook Tribe connects spiritually to the land and requires access to certain religious resources to sustain the lifeline of the Tribe. In this case, Congress declined to ratify the treaty. Therefore, the Cush-Hook never reached the point of negotiating the terms of use, and the land endures as Cush-Hook property. The Cush-Hook retains full possession of their rights to use and access their religious sites inside Kelley Point Park. Unlike the Cush-Hook, the Yankton Sioux Tribe's claim arose in 1926, when judicial remedy was available through the ICCA. The ICCA provided compensatory remedies for claims occurring prior to 1946. At that time, the Cush-Hook's aboriginal title remained undisturbed. More importantly, the Cush-Hook never abandoned their aboriginal title. Consequently, when they learned that their sacred site had been vandalized they immediately took action to protect it.

Thomas Captain relocated to the area to guard the sacred site. Unlike the tribe in *U.S. v. Sioux Nation*, the Cush-Hook never dealt with broken treaty promises, in an effort to protect their sacred site. Some tribes found the ICCA process amenable. But, the Cush-Hook never had a claim to file. The Navajo Nation dealt with foreign settlers; the Cush-

Hook did not suffer similar interference. The area inside Kelley Point Park remains unsettled, by persons external to the tribe. Finally, the Court cannot reject aboriginal title, as it did in *U.S. v. Dann*, because the Cush-Hook treaty was never ratified. Furthermore, as a tribe they never received compensation for the area. The Cush-Hook never abandoned their right to occupy the land inside Kelley Point Park.

B. The federal government never extinguished the Cush-Hook Tribe's aboriginal Indian title to their ancestral homeland inside Kelley Point Park by action that shows clear and unambiguous intent

The lower court ruled that the Cush-Hook Tribe hold aboriginal title, to ancestral land inside Kelly Point Park, because they continuously exercise possession, and their title has never been extinguished. Aboriginal Indian title can only be extinguished with "plain and unambiguous" congressional intent, which, will not be "lightly implied." *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 354 (1941). Here, Congress has not shown "plain and unambiguous" intent. Conversely, they refused to extinguish aboriginal Indian title, when they declined to ratify the treaty in 1853. Considering the full history, and circumstances, of the Cush-Hook-federal government relations, the Cush-Hook Tribe's aboriginal Indian title endures.

Federal policy mandates that only the United States Government can extinguish aboriginal Indian title. *Johnson v. M'Intosh*, 21 U.S. 543, 603 (1823). Moreover, aboriginal Indian title can only be extinguished by an express and unambiguous act of Congress. *U.S v. Sante Fe Pac. R. Co.*, 314 U.S. 339 (1941). In *Cherokee Nation v. Georgia*, this Court noted that "the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government." 30 U.S. 1, 2 (1831). This Court also stressed that the preferred method of

extinguishment be made by purchase, with conquest being a legitimate method of acquisition only in cases where Indians were hostile to negotiation. *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832). In *Gemmill*,[3] the court found that compensation for land, awarded to the Pit River Indians through an ICCA claim, resolved any ambiguity of extinguishment. *U.S. v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976). Additionally, in *Wahkiakum Band of Chinook Indians v. Bateman*, the court found that a long history of established aboriginal fishing rights was extinguished. 655 F.2d 176, 180 (9th Cir. 1981). There, legislative history of a congressional act provided payment to the tribal members, for settlement of lands described in an un-ratified treaty signed by the tribe. *Id.* Likewise in *U.S. v. Dann*, Congress expressly extinguished the aboriginal Indian title of two Western Shoshone tribal members, through payment - compensation from a claim brought into the Court of Claims by the tribe. 470 U.S. 39 (1985).

Here, Congress never extinguished the Cush-Hook Tribe's aboriginal Indian title, by clear and unambiguous intent. The Oregon Donation Land Act included Cush-Hook ancestral land into other public lands for settlement – likely by mistake. No authority indicates that Congress specifically intended to extinguish Cush-Hook aboriginal title. Courts find extinguishment where government action is purposed for revocation of aboriginal Indian title. *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 66, (1886). A land grant, enacted by Congress, does not rise to the level of extinguishment, unless Congress demonstrates intent to extinguish. *See e.g., U.S. v. Cook*, 86 U.S. 591, 594. Historical events, combined with other factors, can spur assessment. *U.S. v. Gemmill*, 535 F.2d at 1148. But, historical events alone cannot constitute extinguishment. *Id.*

[3] The *Gemmill* facts parallel facts of the instant case: a tribal member cut and removed Christmas trees from a National Forrest. When charged, the tribe claimed an aboriginal Indian title right.

Though not binding on this Court, scholars and courts look to *State v. Elliott*, 159 Vt. 102 (1992), for guidance in extinguishment matters.[4] In *Elliott*, the state brought charges against members of an Indian tribe, for fishing without a state license. *Id.* They argued that their aboriginal Indian rights allowed the alleged violative acts. *Id.* After a complex examination, of a series of transfers, the court could not determine the intent of Congress. The court found that "the increasing weight of history" extinguished aboriginal Indian title. *State v. Elliottt*, 159 Vt. 102 (1992).

In this case—following the ruling in *Johnson v. M'Intosh*—the lower court held that the Cush-Hook's aboriginal Indian title to land inside Kelley Point Park is not extinguished. Again in *U.S. v. Santa Fe Pac. R.*, this Court held that aboriginal Indian title could only be extinguished through an unambiguous act by Congress. *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941). When the Cush-Hook Tribe began negotiations with Anson Dart—a representative from Congress—this Court gave much weight to Indian tribes' ability to choose to peacefully negotiate. In our case, the Cush-Hook Tribe remains peaceful in government negotiations, from time immemorial. When Congress declined to ratify the treaty in 1853, the Tribe did not pursue any further dealings, thereafter, retaining their aboriginal right to the land inside Kelley Point Park.

Courts find extinguishment where clear and unambiguous congressional intent exists, or where a series of several events support that the aboriginal right is extinguished. These circumstances afford tribes an opportunity to file an ICCA claim. In this case, the Cush-Hook Tribe has not had the opportunity to file an ICCA claim, because no authority or

[4] *See e.g.*, John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 Buff. L. Rev. 77 (1994); Gene Bergman, *Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"*, 18 Am. Indian L. Rev. 447, 448 (1993); Charles P. Lord & William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. Envtl. Aff. L. Rev. 1, 3 (1994); 1-18 Cohen's Handbook of Federal Indian Law § 18.01 Aboriginal Hunting, Fishing, and Gathering Rights.

principle indicated that their aboriginal Indian title has ever been extinguished. Currently, courts examine the history of ICCA claims to determine extinguishment status. Here, that is not an option.

Today, the Cush-Hook's aboriginal Indian title remains un-extinguished, by the law of this Court. First, this Court has long recognized the rights of Indians to occupy ancestral lands, under an aboriginal Indian title. Additionally, the Oregon Donation Land Act mistakenly included the Cush-Hook land. The Tribe had no knowledge of the errant inclusion. From the Tribe's perspective, the land remained untouched. Unlike *Wahkiakum Band of Chinook*, where extinguishment existed due to the legislative history of a congressional act, here, there is no legislative history to examine. A court could not determine Congress's purpose for passing the Oregon Donation Land Act. This Court also finds extinguishment by examining treaty terms, and the litigation of those terms, in the Court of Claims. In this case, that examination is not possible. The Cush-Hook Tribe never fully negotiated a treaty, with the United States. The Cush-Hook Tribe's aboriginal Indian title and the allocated rights, endure.

C. Congress erred when they included this disputed land in the Oregon Donation Land Act because the Cush-Hook Tribe possesses an aboriginal Indian title and therefore the state of Oregon does not possess a legitimate claim to this ancestral homeland

The lower court held that Congress erred when it described all lands in Oregon Territory as being public lands of the United States. In 1850, Congress passed the Oregon Donation Land Act ("ODLA"), which made land available for settlement. Oregon Donation Land Act, 9 Stat. 496. The ODLA designates Oregon Territory as public land for settlement.

It did not extinguish aboriginal Indian title. In fact, the term "Indians" does not appear in the text of the Act.

The ODLA required settlers to show proof of cultivation, for a period of four years, before they could obtain certificates of entitlement to land. 9 Stat. 496, Sec. 7. In *Hall v Russell*, a single-man obtained a homestead under the Oregon Donation Land Act, but the court held that his title was never effectuated. 101 U.S. 503, 25 L. Ed. 829 (1879). He died a year after he settled. *Id.* Therefore, he did not complete the four year cultivation period required by the act. *Id.* Furthermore, his heirs had no devisable estate in the land. *Id.* During that period, other federal land grants explicitly provided that the grantee could not take possession until Indian title was extinguished. *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 68 (1886) (railroad grant provided for extinguishment of Indian title by government "as rapidly as might be consistent with public policy and the welfare of the Indians").

The Meek's invalidly obtained a claim to land, under the ODLA, much like the single-man in *Hall v. Russell*. They never provided proof of the required four-year cultivation. The State of Oregon has no valid claim to the Cush-Hook's aboriginal Indian title. As mentioned above, the federal government commonly expressed whether or not Indians could be affected by congressional acts, including land grants. *Buttz*, 119 U.S. 55, 68 (1886).

In this case, the lower court held that the federal government erred by including the Cush-Hook's ancestral homelands, as public lands, for purpose of settlement, under the Oregon Donation Land Act. The inclusion was a mistake; the State of Oregon does not own title to this Indian land. The lower court's ruling should be affirmed.

I. Oregon Does Not Have Criminal Jurisdiction to Control and Protect Archaeological, Cultural, and Historical Objects on the Land in Question Where Congress Did Not Provide Express Consent and Jurisdiction Contradicts Principles of Tribal Sovereignty and Court Efficiency

A. Traditional Oregon State Criminal Jurisdiction is Inapplicable Here, on Land That Belongs to the Cush-Hook Nation, an Indian Tribe

As argued above, the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park. Therefore, the state of Oregon lacks criminal jurisdiction over Indians in Kelley Point Park, absent express authorization by Congress. *See, e.g.,* 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360).

By definition, the Cush-Hook nation is an Indian tribe: "[a] body of Native Americans united in a community under one leadership of government and inhabiting a particular territory." *Ballentine's Law Dictionary* 252 (1994). Even in absence of recognition, Indian tribes exist where there is a "de facto collective existence [and] type of group life characteristic of . . . Indians." Op. Sol. Interior, M-35029 (Mar. 17, 1948). As established by the facts, and due to the Nation's prior occupancy, they have the right to occupy the land in question. *Id.* (defines aboriginal title).

The lower court concluded—and we argue here—that the Cush-Hook Nation's aboriginal title has not been extinguished, and that the Cush-Hook owns the land in question, under aboriginal title. Congress holds the power to regulate Indian tribes, including the power to abrogate treaties or take Indian land. U.S. Const. art. II, § 2, cl. 2; *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937). Though the Cush-Hook signed the treaty to relocate, and subsequently relocated, that treaty is void. The U.S. Senate—as the appropriate body to regulate Indians and Indian land—refused to ratify the treaty. Therefore, the treaty is null and void. Furthermore, because the

Cush-Hook received none of the promised benefits the treaty is void, as a matter of common law contract principles. In essence, the Cush-Hook received no consideration[5] for their actions, which makes the agreement void. Here, the state of Oregon is unjustly enriched through its purported ownership of Indian land not acquired through: an act of Congress, or mutual exchange or fair agreement.

Neither Oregon state or the federal government has recognized the Nation, but recognition does not designate or legitimate tribe status. Recognition establishes a government to government relationship with tribes, recognizing tribes as dependents. *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913). Non-recognition does not necessarily deprive a tribe of rights, or extinguish a tribe's treaty rights. *U.S. v. Washington*, 384 F.Supp. 312, 406 (W.D. Wash. 1974), aff'd, 520 F.2d. 676 (9th Cir. 1975). Indian sovereignty, though not a bar on state jurisdiction, remains a key concern in jurisdictional inquiries. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171-72 (1973).

Federal preemption governs questions of State authority, formerly governed by Indian sovereignty. *Id.* State actions are barred, where those actions infringe on federal power or the rights of Indians to make and rule by their own laws. *Id.* Oregon does not have the authority to prosecute Thomas Captain—an Indian on Indian land, *but for* an express act of Congress.

A. The State of Oregon Does Not Have Criminal Jurisdiction Here Because Application of PL 280 Would Assign a Criminal Penalty to Non-Criminal Conduct, Result in a Force and Effect Inconsistent with Force and Effect Elsewhere Within the State, and Constitute Unwarranted Arbitrary Encroachment on Tribal Sovereignty

[5] The common law "consideration" principle states that the normal nature of agreements is to exchange; any party that stands to profit or gain in an agreement must relinquish something to another party to that agreement as compensation. Here, the Cush-Hook Nation gains nothing, if the Court finds that they must relinquish their rights to the land in Kelly Point Park.

Oregon's best argument, for criminal jurisdiction here, is based on the power granted under Public Law 280. But Public Law 280 is inapplicable here because: 1) PL 280 does not authorize criminal punishment for the regulatory laws implicated here; 2) application penalizes Indians in a manner inconsistent with penalties "elsewhere within the State or Territory;" and 3) application of the law encroaches on tribal sovereignty.

i. Conduct that is not criminal cannot be criminalized under PL 280

A state can only enforce criminal punishment, under PL 280, if the implicated conduct is criminal in nature, and thus fully applicable to Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

In *California v. Cabazon Band of Mission Indians*, the Supreme Court held that Public Law 280 does not "criminalize" laws of the state, for enforcement on Indian land, when those laws are otherwise solely regulatory. 480 U.S. 202 (1987). In that case, the law at issue concerned bingo regulation. *Id.* The state sought to force two bands of Indians—that conducted profitable bingo games—to comply with related state regulations. *Id.* at 205. The Court defined crime—for purposes of PL 280 jurisdiction—as *laws that prohibited conduct*. *Id.* at 209. When laws permit certain conduct, guided by regulation, those laws are *regulatory* - not criminal. *Id.* Those regulatory laws cannot be criminally enforced, on Indian land, under the jurisdiction of PL 280. *Id.* at 202. Even when a state regulatory law is enforceable by criminal means, that regulatory law does not constitute criminal jurisdiction under PL 280. *Id.* at 211. The state had no authority, to criminally enforce game regulations, without Congress's express consent. *Id.* at 207.

In this case, Oregon seeks criminal jurisdiction to enforce statutes that are regulatory, by definition. The alleged crime—damaging an archaeological, cultural, and historical

object—is governed by a set of statutes that do not wholly prohibit conduct. The actions taken by Mr. Captain are allowed, by statute, under O.R.S. 258.905 to 358.961, in specific circumstances. O.R.S. § 358.924. The prohibitions are excepted when the implicated party: obtains a permit; obtains written consent from the private owner; or holds the object(s) in-state and makes them available for study. O.R.S. § 358.920; O.R.S. 358.923; O.R.S. 358.953. These facts parallel those in *Cabazon Band of Mission Indians* where the conduct was not wholly prohibited and ruled non-criminal. Here, Oregon's statutes are merely regulatory and not criminal in nature. Under PL 280, Oregon cannot pursue a criminal penalty for an alleged breach of a state regulation. Furthermore, Oregon governs criminal activity by Titles 14-16 of Oregon Statutes & Court Rules. The statutes at issue here fall under Title 30, *Education and Culture*, divisions that do not inherently implicate crime. Mr. Captain's conduct constitutes a non-crime facially, and as ruled by the Supreme Court. Oregon lacks criminal jurisdiction in this matter, unambiguously.

ii. PL 280 does not extinguish tribal sovereignty or grant state jurisdiction over Indian tribes

PL 280 does not waive tribal authority or grant the type of general jurisdiction over Indians that Oregon seeks to apply here. Indian tribes retain sovereignty to govern and control matters that pertain to Indian affairs within the territory of an Indian tribe.

Tribal sovereignty, as a key principle in Indian law and policy, is well established, throughout history, in the United States. *Rice v. Olson*, 324 U.S. 786, 789 (1945). Accordingly, tribal sovereignty is the crux of this argument against state usurpation.

The court held that Congress did not waive tribal sovereignty or grant state jurisdiction over Indian tribes in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002) (vacated on other grounds). The state of California sought to enforce a warrant

against the tribe, on Indian land, for casino employee records. *Id.* The court found that Congress, in enacting Public Law 280, did not extinguish tribal jurisdiction over uniquely tribal property – the casino employee records. *Id.* at 556. The court also invoked the canons of construction saying that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* (*quoting Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 391 (1976)). Congress adopted PL 280 to tamp lawlessness in Indian Country.[6] *Id.* (*citing Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 379 (1976)). Any statutory ambiguity attached to PL 280 must be construed liberally in favor of the tribe. *See id.*

In the instant case, Oregon seeks to extinguish tribal jurisdiction over uniquely tribal property – a sacred object. Oregon's only legitimate claim to jurisdiction, in Indian country, remains tethered to PL 280. As cited above, PL 280 is a statute passed for the benefit of Indian tribes. Such laws should be construed in favor of Indians tribes. In *Bishop Paiute Tribe*, the court blocked California's attempt to employ PL 280 as a grant of general jurisdiction in Indian country. Oregon's attempt to assert general criminal jurisdiction—over uniquely tribal property—in relation to statutes that in essence are non-criminal, far exceeds the limitation of state authority under PL 280.

Indian tribes retain control over uniquely tribal property. PL 280 does not waive tribal sovereignty. Therefore, Oregon cannot use its limited authority under PL 280 to wrest control of tribal property, without the express consent of Congress.

iii. Jurisdiction, under PL 280, cannot function in a different manner in Indian country than it does elsewhere in the state

[6] Arguably, reduction of crime in Indian country is a benefit to Indian tribes.

Public Law 280 grants Oregon "jurisdiction over offenses committed by or against Indians . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory." 18 U.S.C. § 1162. But, "the criminal laws of such State or Territory [must] have the same force and effect within such Indian country as they have elsewhere within the State or Territory." 18 U.S.C. § 1162.

The *force and effect* of criminal punishment, based on the implicated statutes here, could not be instituted elsewhere in the state in a similar manner. In this case, criminal enforcement punishes the rightful owners and caretakers of an historical object, for taking measures to protect that object that are otherwise lawful. This measure is a factual impossibility beyond the bounds of Indian country. A non-Indian could not be similarly punished—under these statutes—for efforts to protect their own sacred object. Because this implementation would result in a punishment beyond the bounds of possibility elsewhere in the state it violates PL 280.

In this distinct matter, Public Law 280 does not grant criminal jurisdiction to the state of Oregon.

C. Even if the court rules that Oregon possesses criminal jurisdiction to control and protect archaeological, historical, and cultural objects, prosecution of Thomas Captain would directly contradict the relevant statutes' purpose and intent thereby nullifying Oregon's claim

Prosecution of Thomas Captain, in this matter, would contravene the ultimate purpose of the statutes: 1) protect cultural heritage of the state; and 2) ensure that the appropriate Indian tribe possesses, or oversees handling and care of the object.

If the Court disagrees with the arguments above (A and B), and affirms criminal jurisdiction in this matter, the remedies as—prescribed by statute—will mimic the actions

taken by Thomas Captain. Because Thomas Captain removed a desecrated Cush-Hook sacred object, for repossession and care by the Cush-Hook tribe, any affirmative action by the state is redundant and wastes the Court's time and resources.

For cultural heritage reasons, the state preserves and protects objects of archaeological significance, including American Indian sacred objects. O.R.S. § 358.910. Tribes can remove their sacred objects from private property, when they pay the expense of removal and "restore the private property to its condition prior to the removal." O.R.S. § 358.953. When any party removes an object from a state park, without permit, those objects "go directly to the appropriate Indian tribe." O.R.S. § 390.237. If these associated—Oregon, Title 30 Education and Culture—statutes are violated, proceeds or instrumentalities are subject to civil forfeiture to the appropriate Indian tribe. O.R.S. § 358.928. When any person conducts an excavation associated with an American Indian tribe, they must notify the *most appropriate* Indian tribe. O.R.S. § 358.950. And when "a sacred object . . . is recovered on any land, the State Historic Preservation Officer shall assist the appropriate group to repossess the object." O.R.S. § 358.945.

Here, the Cush-Hook is the appropriate Indian tribe. The remedies and exceptions prescribed by these Oregon statutes dictate that in all violative circumstances, regarding sacred objects, the appropriate Indian tribe recovers or repossesses the object. Thomas Captain acts as an agent for the Cush-Hook, the appropriate Indian tribe. Although, arguably, Mr. Captain violated an Oregon state statute, all statutory remedies and resolutions result in possession of the object by Thomas Captain and his tribe, the Cush-Hook.

CONCLUSION

For the above reasons, we respectfully request that the court: 1) reaffirm the holding of the lower court, that the Cush-Hook Tribe retain aboriginal title to their ancestral homeland; and 2) rule that the State of Oregon does not possess criminal jurisdiction to control and protect archaeological, cultural, and historical objects on the land in question, which is owned by an American Indian tribe.