NO. 11-0274

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2012

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent and cross-petitioner.

On Writ of Certiorari to the
Oregon Court of Appeals

BRIEF FOR PETITIONERS

TEAM 52
Attorneys for Petitioners

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QUESTIONS PRESENTED

I. Whether a non-federally recognized group with Native American ancestry, can be held to have maintained continuous use and occupancy of lands which were abandoned over a century ago by their ancestors

II. Whether a state retains criminal jurisdiction to protect archaeological, cultural, and historical objects on lands within its boundaries, which are not controlled by other recognized sovereign.

STATEMENT OF THE CASE

Factual Background

Thomas Captain Violates Kelley Point Park. Thomas Captain, is a member of the non-federally recognized Cush-Hook nation, a historical tribe of indigenous Americans. R. at 2. Kelley Point Park is an Oregon State Park, established in 1880, at the confluence of the Willamette and Columbia Rivers. R. at 1-2. A historically significant state park, Kelley Point embraces the site of the Cush- Hook peoples' permanent village, which was visited by the Lewis and Clark expedition in 1806. R. at 1. In 2011, more than one hundred sixty years after the Cush-Hook left their homes and village at Kelley Point Park, Thomas Captain entered the open state park to allege Cush-Hook ownership of the park. R. at 2. Under the pretense of protecting culturally and religiously important three-hundred-year-old trees in the Park, Thomas Captain hacked down a tree and cleaved out a carved totem. R. at 2. As he fled to the heart of the Cush-Hook nation in the coastal mountain range, Oregon state troopers arrested him and recovered the totem. R. at 2.

The Cush-Hook. The Cush-Hook occupied the lands in and around Kelley Point Park from time immemorial until 1850, and subsisted by harvesting wild plants, hunting and fishing. R. at 1. William Clark noted some details about Cush-Hook culture and daily activities in the expedition journals. R. at 1. Clark extended the Cush-Hook chief a President Jefferson Peace Medal, a token handed out by Lewis and Clark to friendly tribes along the expedition route. R. at 1. Forty-four years later, pressure from white encroachment resulted in the Cush-Hook signing a treaty with the United States to cede valuable farming lands on the river and relocate to coast range mountains. R. at 1-2. Following the treaty signing the Cush-Hook abandoned the lands along the Willamette River and sought relief form white

encroachment in the coast range. R. at 2. The Cush-Hook still reside in the coast range and never returned to their aboriginal home. R. at 2. The Senate refused to ratify the Cush-Hook treaty in 1853 and was never obligated to fulfill the treaty provisions for compensation or establishment of a reservation. R. at 2.

Kelley Point Park. Subsequent to the Cush-Hook abandonment of the land, the United States classified the land as public land under the Oregon Donation Land Claim Act of 1850. R. at 2. Two white Americans, Joe and Elsie Meek, moved on to the land and were conveyed fee title to 640 acres of land by the United States. R. at 2. In 1880 the State of Oregon purchased all 640 acres of the Meeks land and established Kelley Point Park. R. at 2.

Procedural History

Oregon Circuit Court, Multnomah County. The State of Oregon filed criminal charges against Thomas Captain for desecration of an archaeological and historical site under OR. REV. STAT. ANN. § 358.905-958.961 (West 2012) and OR. REV. STAT. ANN. § 390.235-390.240 (West 2012), trespass on state lands, and cutting timber in a state park without a permit. R. at 2-3. Thomas Captain consented to a bench trial. R. at 3. Finding that the Cush-Hook currently own the land at Kelley Point Park under aboriginal title, the circuit court found Thomas Captain not guilty for trespass or cutting timber without a state permit. R. at 4. Because Oregon assumed criminal and civil jurisdiction over Indians and Indian lands under Public Law 280, the circuit court found Tomas Captain guilty of damaging an archaeological site and desecrating a cultural and historical artifact. A fine was issued for $250.00. R. at 4.

Oregon Court of Appeals. The State of Oregon and Thomas Captain appealed to the Oregon Court of Appeals. R. at 4. Affirming the decision without writing a decision, the Oregon Supreme Court then denied review. R. at 4.

SUMMARY OF THE ARGUMENT

This Court should vacate the ruling of the Oregon Court of Appeals finding that the Cush-Hook hold aboriginal title to the lands at Kelley Point Park. Contrary to the conclusions of the courts below, Cush-Hook aboriginal title cannot be established under the clear and settled principles of federal Indian law. Further, aboriginal title to the lands does not remove the State of Oregon's criminal jurisdiction over archaeological and historical sites and artifacts; therefore this Court should affirm the Oregon Court of Appeals decision upholding State jurisdiction.

First, federal law has long recognized the plenary power of Congress over Indians and Indian affairs, including disposal and recognition of tribal lands. In 1823, this Court under Chief Justice Marshall decided the landmark case of *Johnson v. M'Intosh*, expressly recognizing the rights of Indians to aboriginal possession of their lands subject only to the supreme power of the United States to extinguish their aboriginal rights. Although this Court has long recognized aboriginal rights of use and occupancy, in *Tee-Hit-Ton Indians v. United States*, this Court held that as a matter of law aboriginal title stemming from aboriginal possession of the land is not a property interest and not protected under the Fifth Amendment.

Second, the Cush-Hook held aboriginal title to the lands at Kelley Point Park from time immemorial to 1850, when those rights were extinguished. The State of Oregon does not contest the finding that the Cush-Hook historically held aboriginal title to the lands at Kelley Point Park, but objects to the ruling that the Cush-Hook hold aboriginal title today. Present aboriginal title, held by an Indian tribe is extremely rare, given that the court must find continuous occupation and use of aboriginal lands, never subject to extinguishment.

Third, the Cush-Hook ceased occupation of their lands at Kelley Point Park in 1850. Following the singing of the treaty, the Cush-Hook, pressured by white encroachment, left their homes and village at modern day Kelley Point Park and relocated to the coast range. This abandonment of use and occupancy terminated any rights the Cush-Hook had in their aboriginal lands. Further, following the abandonment of these lands the United States undoubtedly extinguished any aboriginal rights the Cush-Hook may have still had in these lands through federal action. The United States refused to ratify the Cush-Hook Treaty, classified the lands as public domain, opened the lands to white settlement, and conveyed fee title to the lands.

The lower court's reliance on the unratified treaty and lack of compensation, while just and equitable, disregards the United States Constitution, this Court's past decisions, and the established principles of federal Indian law. Specifically, the lower courts failed to acknowledge that unratified treaties are not the supreme law of the land and that Congress has plenary power over Indian affair thereby effectuating extinguishment of aboriginal title through exercise of sovereign dominion adverse to Indian rights of occupancy. The lower court further erred by ignoring the undeniable fact that the Cush-Hook voluntarily left their aboriginal land thereby ending aboriginal possession, upon which aboriginal title was extinguished.

Finally, this Court should uphold the lower court's ruling that Oregon has criminal jurisdiction to control the use of archaeological and historical objects within the state. The land in Kelley Point Park is Oregon public land, subject to jurisdiction and control by the state. The State of Oregon exercises criminal jurisdiction over all public land in Oregon and through Public Law 280 over Indian land, except the Warm Springs Indian Reservation.

Oregon jurisdiction over indigenous archaeological objects on state land is established in OR. REV. STAT. ANN. § 358.905. The Oregon statutes on archaeological objects and sites are a permissible exercise of criminal authority, and are not preempted by federal law because they only govern activities and objects on state lands. The lower court correctly found in favor of state jurisdiction over archaeological and historical object.

This Court should reverse the Oregon Court of Appeals ruling that the Cush-Hook hold aboriginal title to the lands at Kelley Point Park and affirm the finding of State criminal jurisdiction over archaeological and historical sites.

ARGUMENT

I. This Court should overturn the Oregon Court of Appeals because Cush-Hook aboriginal title to the lands at Kelley Point Park was extinguished in 1850.

The United States Supreme Court in a landmark case, *Johnson v. M'Intosh,* recognized the rights of Indians to occupy and use their aboriginal homelands. Manifest Destiny compelled white Americans to emigrate and settle the lands between the Atlantic and the Pacific. As white settlement pushed further into Indian territories, frequent and bloody conflict required the federal government's action to quell the hostilities. The government relied on negotiation and treaty making to secure cession of the vast aboriginal land holdings and promote Indian settlement on smaller reservations in an attempt reduce Indian and non-Indian conflict. The right of Indian nations to use and occupy aboriginal territory encumbers the land until extinguished by the United States.

This Court has yet to address whether aboriginal title survives over a century of inoccupation and use by a tribe. Although the facts of this case raise issues of fairness and

honor in the United States dealing with the Cush-Hook Indians, it is clear that aboriginal title cannot survive an Indian tribe's century long separation from the land.

A. A permissive right of occupancy, aboriginal title exists only as long as an Indian tribe exclusively occupies and uses its aboriginal territory.

The United States has long recognized the rights of American Indians as original inhabitants of the country to occupy and use lands within their possession under aboriginal title. The roots of aboriginal title lie in the discovery doctrine, under which the European nations claimed the right to acquire lands from the American Indians, exclusive to the rights of other European nations and their citizens. Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 970 (2005). The United States acquired ultimate dominion over the lands held by Great Britain in the United States and such, acquired the preemptive and exclusive power to convey lands subject only to the Indian right of occupancy. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

Congress has plenary power over Indians and Indian affairs and from this absolute control, Congress has the power to enter into treaties, extinguish aboriginal title, abrogate treaties, divest tribal sovereignty, recognize federal status of tribes and terminate federal status of tribes. *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913). In *United States v. Kagama*, the Supreme Court reasoned that Congress' plenary power over Indians must exist because Congress alone could enforce its laws on all the tribes, the tribes were in the territorial control of the federal government and such power has never existed in any other governing body. 118 U.S. at 384-85. Further, the Constitution recognizes this plenary power through the Indian Commerce Clause, U.S. Const. art. 1 §8, cl. 3, and the Treaty Clause, U.S Const. art. II, §2, cl. 2. Through conquest the United States divested tribal nations of full sovereignty but

recognized inherent tribal sovereignty of Indian nations, likening them to domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). As such, the United States has a duty to protect the Indians and as the trustee of Indian lands and resources, the United States is bound by a fiduciary duty to the Indians. *Id.*

As Indian rights were extinguished through purchase, conquest, or abandonment, the United States acquired unencumbered title to the Indian lands. *Mitchel v. United States*, 34 U.S. 711, 713 (1835). The Supreme Court recognized that tribes had a "legal as well as just claim to retain possession" of their aboriginal lands. *Johnson*, 21 U.S. at 574. Although aboriginal title has been described as "sacred as the fee-simple" being accorded the protection of complete ownership against individuals and states, it is vulnerable to affirmative action by the United States to extinguish Indian occupancy at will. *Cherokee Nation*, 30 U.S. at 48; *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946). Aboriginal title is not a property right; therefore the United States is not obligated to pay for extinguishment of aboriginal title and the disposal of aboriginal lands. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

1. Aboriginal title is established aboriginal possession: The continuous and excusive occupation and use of lands for an extensive period of time

Whether a tribe has aboriginal title is a question of fact, established by showing that the land in question was part of a tribe's ancestral homeland and that the tribe has maintained exclusive occupation and use of the land. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). The elements that must be proven are (1) actual, (2) exclusive and continuous, (3) use and occupancy, (4) for a long time prior to the loss of the land. *Confederated Tribes of Warm Springs Reservation v. United States*, 177 Ct. Cl. 184, 194 (Ct. Cl. 1966) (internal quotations omitted); *United States v. Pueblo of San Ildefanso*, 513 F.2d 1383,

1389 (Ct. Cl. 1975). If a tribe fails to establish these elements, aboriginal title is defeated. *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 787 (Fed. Cl. 1993). If a tribe can show uninterrupted use and occupation of the land in question, the tribe is deemed to have aboriginal title, which may extend to all a tribe's vast territorial holdings. *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983).

Evidence of actual, exclusive and continuous use and occupancy establishes that the lands in question constituted a definable ancestral territory, occupied exclusively by a tribe, as distinguished from lands used or wandered over by many tribes. *Santa Fe Pac.*, 314 U.S. at 345. Continuous use does not, however, limit a tribe from establishing aboriginal title to lands used seasonally, such as hunting and fishing grounds. *Confederated Tribes of Warm Springs*, 177 Ct. Cl. at 194. There is no standard amount of time that a tribe must have used and possessed its land to prove aboriginal title. Rather, the tribe must have used and possessed its land for a long enough period to support a finding that lands were the domestic territory of the tribe. *Id.*

Finally, aboriginal title does not have to be "based upon a treaty, a statute, or other formal government action." *Oneida Indian Nation of N.Y. State v. Oneida Cnty.*, 414 U.S. 661, 669 (1974) (*Oneida I*). Once aboriginal title is established in fact, it survives until it is abandoned or extinguished by the federal government. *Santa Fe Pac.*, 314 U.S at 345.

Although a claim of present aboriginal title to lands in the United States is very rare and difficult to prove, the Oneida Indian Nation successfully litigated their claim in federal court. The Oneida Indian Nation successfully claimed aboriginal title to lands in New York that had not been in tribal possession since 1795. The Oneida land claims litigation has been

complex and extensive; the litigation has been before the Supreme Court three times and is still being litigated in federal district court.[1]

The Oneida claimed aboriginal title to lands in upstate New York under the theory that the conveyance of lands to the State of New York was void because the conveyance violated the Nonintercourse Act of 1793. *Oneida I*, 414 U.S. at 664-65. Claiming aboriginal title to six million acres held since time immemorial to the American Revolution, the Oneida also asserted that treaties signed in the 1780s and 1790s confirmed the Oneidas' right to possess their lands until purchase by United States. *Id.* at 664. The treaties are not dispositive on the issue of aboriginal title. If Oneida aboriginal title existed and was never extinguished by the federal government, it continues into the present.

In *Oneida I*, the Supreme Court held that there is federal subject matter jurisdiction for possessory land claims based on aboriginal title. 414 U.S. at 665. Following *Oneida I*, the district court concluded that the New York counties were liable for "wrongful possession" of Oneida lands. *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S 226, 230 (1985) (*Oneida II)* (the District Court found the Oneida Nation's "right of occupancy and possession to the land in question was not alienated." *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 434 F. Supp. 527, 548 (N.D. N.Y. 1977). The court further concluded that the Oneida retained aboriginal title to the land because the federal government never extinguished aboriginal title, despite almost two hundred years of state possession and regulation.

In *Oneida II*, the Supreme Court held that aboriginal land rights are possessory rights arising from federal common law and the Oneida's claims, though dating back more than a

[1] *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661 (1974) (finding subject matter jurisdiction); *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) (recognizing federal common law action for possessory land claims based on aboriginal title); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (holding that land purchased on the open market, but within the aboriginal territory, did not revive tribal sovereignty over the land and therefore subject to taxation.)

century, were not barred by the statute of limitations, laches, abatement, ratification of subsequent treaties, or nonjusticiability. 470 U.S. at 236.

The Supreme Court noted that there was a serious question as to whether the Oneida abandoned their aboriginal territory in New York when the Tribe, in the Treaty of Buffalo Creek of 1838, ceded lands in Wisconsin in exchange for a reservation in Indian Territory. *Id*. at n. 24. This query was presented subsequent to the district court's finding that the Oneida had not abandoned their land, still occupied a small area of land within the aboriginal territory, and had never accepted the loss of their lands. 434 F. Supp. 527, 541.

2. Aboriginal title is not a property right and is not protected against by government takings.

In order to open aboriginal lands to white settlement, the United States negotiated treaties with western tribes to extinguish aboriginal title and to settle tribes on smaller reservations. Treaties require ratification by two-thirds of the Senate and upon ratification become the supreme law of the land. U.S. Const. art. II, §2, cl. 2; U.S. Const. art. VI, cl. 2. An unratified treaty has no legal effect.

Tribes with no treaty and tribes with signed, but unratified treaties, possess only aboriginal title to their homelands. Without either treaty recognition or recognition by Congress of a legal interest in the land, the Indians' right in the land is a permissive right of occupancy. *Tee-Hit-Ton,* 348 U.S. at 279. Aboriginal title, unrecognized by the United States by treaty or patent, only instills the tribe with a use right, and the government at any time may withdraw that right. *Prairie Band of Potawatomi Indians v. United States*, 165 F. Supp. 139, 148 (Ct. Cl. 1958). The United States may freely terminate a tribal right of occupancy and has no legal obligation to compensate the tribe for the land taken. Tee-Hit-Ton, 348 U.S. at 279; *Robinson v. Salazar*, 838 F. Supp.2d 1006, 1017 (E.D. Cal. 2012). Moreover, an

unratified treaty cannot serve as "evidence of governmental recognition of Indian title to the lands described therein." *Coos Bay, Lower Umpqua, and Siuslaw Indian Tribes v. United States*, 87 Ct. Cl. 143, 153 (Ct. Cl. 1938).

A treaty is not a grant of rights to the Indians from the United States, but a grant of rights from the Indians, "a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). The treaty, which has been described as a contract between two sovereigns, provides for recognition and protection of tribal property and serves as the foundation the tribal trust relationship with the United States. 41 AM. JUR. 2d *Indians; Native Americans* § 56 (2012); *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658 (1979). The recognition of a tribal property rights in a treaty provides Fifth Amendment protection and compensation for government takings. Thus, while Congress has the power and authority to abrogate Indian treaties and seize Indian land, Congress must pay for the seizure. *Lone Wolf*, 187 U.S. at 566; *Shoshone Tribe of Indians of Wind River Reservation v. United States*, 299 U.S. 476, 487 (1937) (noting that seizure of treaty lands without just compensation would amount to an unjust "confiscation.").

Congress has enacted several jurisdictional statutes that open the federal courts to claims by Indian tribes against the United States for taking of aboriginal lands and extinguishment of aboriginal title. *See e.g.*, Indian Claims Commission, 60 Stat. 1049 (1946) (terminated 90 Stat. 1990); Act of May 18, 1925, 45 Stat. 602 (1925); Act of 1935, 49 Stat. 801 (1935) Rhode Island Claims Settlement Act, 25 U.S.C. § 1701 (1978); Alaska Native Claims Settlement Act, 43 U.S.C §1601 (1971). These jurisdictional acts waived sovereign immunity for suits brought by Indians for extinguishment of aboriginal title, historical

wrongs, unratified treaties and Fifth Amendment takings. *See Alcea Band of Tillamook*, 329 U.S. at 44-47.

B. Aboriginal title is extinguished upon government action inconsistent with aboriginal possession or by abandonment of aboriginal territory.

Extinguishment of aboriginal title is an exclusive power held only by the United States and whether "by treaty, by sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise," it is a political issue, not reviewable by the courts. *Santa Fe Pac.*, 314 U.S. at 347 (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)). Additionally, the Nonintercourse Act recognizes Congress's exclusive power to extinguish aboriginal title. Codified at 25 U.S.C. § 177 (2012).

In *United States v. Santa Fe Pacific Railroad Company*, the Supreme Court acknowledged the authority of Congress to extinguish aboriginal title, but limited finding extinguishment to explicit and purposeful acts. 314 U.S. at 354. The Court explained that extinguishment was not to be "lightly implied" because the United States has a duty to protect Indian lands under the guardian/ward relationship. *Santa Fe Pac.*, 314 U.S. at 354.

The "relevant question" in a court's determination of whether Congress extinguished aboriginal title "is whether the governmental action was intended to be a revocation of Indian occupancy rights, not whether the revocation was effected by permissible means." *United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976). Therefore, extinguishment of aboriginal title can be found where are a tribe voluntary cedes all lands held under aboriginal title through a treaty, abandons their aboriginal territory, or through federal action adverse to the rights of use and occupancy.

1. Termination of aboriginal occupancy and use evidences extinguishment of aboriginal title by abandonment.

It has long been recognized that abandonment of aboriginal homelands extinguishes all rights in those lands and that the United States as sovereign can dispose of abandoned tribal lands free of encumbrances. *Johnson v. M'Intosh*, 21 U.S. at 590-91. Under the plain meaning abandonment is "the relinquishing of a right or interest with the intention of never against claiming it." BLACK'S LAW DICTIONARY 1 (9th ed. 2009).

Indian tribes, without a recognized land, have only a right of occupancy and use of the lands possessed under aboriginal title "and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands." *Quapaw Tribe of Indians v. United States*, 120 F. Supp. 283, 286 (Ct. Cl. 1954) *rev'd on other grounds, United States v. Kiowa, Comanche, and Apache Tribes of Indians*, 166 F. Supp. 939 (Ct. Cl. 1958).

A claim of aboriginal title must be rejected if a tribe cannot show aboriginal possession by actual use and possession. *Uintah Ute Indians*, 28 Fed. Cl. at 787. The Supreme Court rejected the Pottawatomie Nation's claim of aboriginal title to the submerged lands and waters of Lake Michigan, finding that the tribe had abandoned the lands. *Williams v. City of Chicago*, 242 U.S 434, 437 (1917) (finding that "for more than a half century [the Pottawatomie Nation] has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois").

2. Congressional action adverse to Indian occupancy and use effectuates extinguishment of aboriginal title.

The United States exercise of dominion over aboriginal lands, adverse to the rights of the Indian occupiers, extinguishes aboriginal title to those lands. *Beecher v. Wetherby,* 95 U.S. 517, 525 (1877); *Santa Fe Pac.*, 314 U.S. at 347; *Nw. Band of Shoshone Indians v. United States*, 95 Ct. Cl. 642, 690 (Ct. Cl. 1942). An exercise of dominion can be established by a course of government action, in the aggregate, inconsistent with the right of occupancy, even if the government's particular actions, when isolated, would be insufficient to effectuate extinguishment. *Gemmill*, 535 F.2d at 1149.

i. Extinguishment upon treaty signing.

The Chinook Indians and their neighboring nations occupied the lands at the mouth of the Columbia River in present day Oregon and Washington. When Lewis and Clark encountered the Chinook during their historic expedition, they recorded the Chinook's daily activities and culture. *Chinook Tribe and Bands of Indians v. United States*, 6 Indian Claims Comm'n 177, 177 (1958), http://digital.library.okstate.edu/icc/v06/iccv06p177.pdf. In 1851, the Chinook and their neighboring bands entered into treaties with the United States through the Superintendent of Indian Affairs for the Oregon Territory, Anson Dart. *Id.* at 184. After signing, Dart forwarded the Oregon tribe's treaties to United States Senate, but the Senate rejected the treaties and they were never ratified. *Id.* at 184.

When the Chinook Indians brought claims based on their 1851 treaties before the Indian Claims Commission ("ICC"), the ICC found that the United States "assumed definite control over the lands exclusively used and occupied by [the] . . . Lower Band of Chinook Indians . . . disregarding the aboriginal rights of said Indians" upon the signing of the treaties. *Id.* at 207. The ICC held that the Chinook Indians' aboriginal title to lands along the

Columbia River was extinguished upon the signing of the treaty and that extinguishment was not contingent upon ratification of the treaties by the Senate. *Id.* at 226.

ii. Extinguishment by federal action.

Another tribe in the pacific northwest, the Cowlitz, appealed the ICC's determination that the Cowlitz's aboriginal title was extinguished when the United States placed Cowlitz land for sale. *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, 467 F.2d 935, 935 (Ct. Cl. 1972). The Cowlitz Tribe never entered into a treaty with the United States and was never subject to removal by the United States. *Id*. at 936. The ICC concluded, however, that aboriginal title was extinguished as of March 20, 1863 when United States offered for sale a portion of Cowlitz land. *Id.* at 935-36. The ICC found Congress had intended to extinguish aboriginal title to all lands west of the Cascades through treaties and had anticipated that by April 1, 1855 all lands west of the Cascades would be open to public sale. *Id*. at 936 (Act of June 5, 1850, 9 Stat. 437 (1850) and Act of February 14, 1853, 10 Stat. 158 (1853)). It was not important that the actual negotiations with the Cowlitz had failed to produce a treaty because, by1861, Congressional policy had shifted from negotiation to removal of all non-treaty tribes. *Id.* at 936. This was evidenced by Congress's creation of the Chehalis Reservation for the non-treaty tribes of southwest Washington in 1860. *Id.* at 936.

On review of the ICC's findings, the Court of Claims dodged the question of whether Congress's actions were independently sufficient to extinguish the Cowlitz's aboriginal title. Instead, the Court of Claims held that, regardless of the effect of each action independently, the establishment of the Chehalis Reservation, the opening of Cowlitz lands for sale, and the shift in Congressional policy from negotiation to removal together extinguished the Cowlitz's aboriginal title. *Id.* at 937.

iii. Extinguishment by opening aboriginal lands to settlement.

Congressional decision to open Indian lands to surveying and non-Indian settlement does not necessarily extinguish aboriginal title. *Santa Fe Pac.*, 14 U.S. at 350. The process of surveying lands and other actions in anticipation of white settlement does not affect aboriginal title, nor does the opening of Indian lands for entry imply prior extinguishment of aboriginal title. *Pueblo of San Ildefanso*, 513 F.2d at 1389; *Plamondon*, 467 F.2d at 937. Nevertheless, under the appropriate factual context, the opening of lands to white settlement can serve to extinguish aboriginal title. 513 F.2d at 1389.

The Court of Claims, after analyzing a long series of similar cases, found "that (a) authorized settlement is one factor to be taken into account in determining when Indian title ceased, and (b) '(i)n an appropriate factual context'… the opening up of an area for settlement can be tantamount to the ending of aboriginal title over the whole region." *Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1391 (Ct. Cl. 1974); *See also Pueblo of San Ildefanso*, 513 F.2d at 1389.

The Western District of Washington Circuit Court held that the aboriginal title to land within the Oregon Territory[2] was terminated by the act of Congress creating Oregon Territory and by the Oregon Land Claim Act (9 Stat. 496). *United States v. Ashton*, 170 F. 509, 513 (W.D. Wash. 1909). Finding that Congress passed these two acts to promote emigration and permanent settlement of Oregon, the court concluded that aboriginal title was "terminated by the Oregon donation law" and further relinquished by treaty. *Id.* at 517.

[2] The Oregon Territory included the state of Washington. 170 F. at 513.

C. Cush-Hook aboriginal title could only survive if it was never subject to extinguishment by Congress and the Cush-Hook continued to use and occupy the lands at Kelley Point Park.

The law is clear, aboriginal title requires aboriginal possession: the continuous use and occupancy of lands by an Indian tribe for a long period. Further, the law is clear on what constitutes extinguishment: cession, abandonment, conquest, and federal action clearly inconsistent with the Indians rights of occupancy. The Oregon Court of Appeals held as a matter of law that Cush-Hook aboriginal title has never been extinguished because the Senate refused to ratify the treaty and to compensate the Cush-Hook the lands along the Columbia River. R. at 4. Thus, the Oregon Court of Appeals held that the Cush-Hook hold aboriginal title to Kelley Point Park. R. at 4.

The law is clear; there cannot be a finding of aboriginal title without aboriginal possession of the land. The Cush-Hook have not used or resided on the lands at Kelley Point Park in over a hundred-years and therefore cannot still hold aboriginal title to Kelley Point Park.

1. Cush-Hook's aboriginal title to Kelley Point Park terminated when the Cush-Hook abandoned the land, thereby ceasing aboriginal possession of the land.

The Cush-Hook held the lands along the Willamette River and at modern day Kelley Point Park in aboriginal possession from time immemorial to 1850, when the nation abandoned their lands to relocate to the coast range. This Court has long recognized that when Indians abandon their lands in response to white settlement any claim to those lands is terminated. *Johnson*, 21 U.S. at 590. The accepted and common meaning of abandonment is the relinquishment of an interest or right. The rights held by Indians under aboriginal title are the possessory rights of occupancy and use.

To establish aboriginal title, a tribe must prove aboriginal possession by demonstrating are (1) actual, (2) exclusive and continuous occupancy, and (3) exclusive and continuous occupancy (4) for a long time prior to the loss of the land. *See Pueblo of San Ildefanso*, 513 F.2d at 1389. A tribe that cannot prove continuous and exclusive, occupation and use cannot be found to have aboriginal possession of their lands and, therefore, cannot hold aboriginal title. The Oneida's successful claim of aboriginal title to lands in New York is not an example of a tribe proving aboriginal title without proving the elements of aboriginal use. On the contrary, the Oneida were continuously present within their lands. *See Onedia Indian Nation*, 434 F. Supp. at 541. The Oneidas claim was strengthened by their refusal to acknowledge New York's claim for the land at any time. *See id.* On the other hand, Indians that abandon their land clearly cease to occupy and use their land.

The Cush-Hook, unlike the Oneida, removed from their aboriginal territory and effectively terminated aboriginal title to the land. R. at 2. The Cush-Hook voluntarily left their aboriginal territory in an effort to avoid white settlement. R. at 3. The Cush-Hook remained in the coast range, never returning to Kelley Point Park, and never claiming aboriginal title to the Kelley Park Point land. R. at 2. Thomas Captain, as an individual (there is an absence of evidence demonstrating that Thomas Captain's claim was supported or sponsored by the Cush-Hook) reasserted Cush-Hook ownership of the lands in 2011, one hundred and sixty-one years after the Cush-Hook abandoned their land. R. at 1. The Cush-Hook relocation and absence from Kelley Point Park for over a century is clearly dispositive of the issue of aboriginal title: the Cush-Hook removal and abandonment of their homes and village at modern Kelley Point Park extinguished any claim it, or its members, have to aboriginal title.

2. Congressional action adverse to the Cush-Hook aboriginal rights of use and occupancy establish Congressional extinguishment of aboriginal title, regardless of whether the tribe abandoned the lands or not.

After the signing of the Cush-Hook treaty and the Cush-Hook's relocation, Congress demonstrated extinguishment of Cush-Hook aboriginal title through a series of federal actions clearly adverse to any right of occupancy or use. First, Congress classified the Cush-Hook lands as public domain under the Oregon Donation Land Claim Act of 1850. R. at 2. Second, Congress conveyed fee simple title to the land to white settlers and third the Senate refused to ratify the Cush-Hook treaty. R. at 2. Further, Congress's listing of Cush-Hook lands as public domain evidences a clear intent to revoke the Cush-Hook's occupancy rights to its homelands. *See Santa Fe Pac.*, 314 U.S at 353; *Gemmill*, 535 F.2d at 1148 (9th Cir. 1976).

The Indian Claims Commission's ruling in *Chinook Band of Indians* is not binding, only persuasive, because Congress created the Indian Claims Commission to provide tribes a forum in which to bring and settle claims for historic and governmental wrongs. 25 U.S.C. § 70 (omitted upon termination). Indian Claims Commission decisions are reviewable in the Court of Claims, which is followed by certiorari review to the Supreme Court. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992). The Cush-Hook Treaty is not binding upon the United States because it was never ratified. Additionally, the United States' failure to ratify the Cush-Hook treaty was also a failure to recognize Cush-Hook property rights. Because the United States has never recognized Cush-Hook property rights, the tribe has only ever had aboriginal title to lands in Kelley Point Park.

The Chinook Indians, similarly to the Cush-Hook, occupied lands along the Columbia River in present day Oregon and Washington. R. at 1; *Chinook Tribe,* 6 Indian Cl. Comm'n at 177. Further, both the Chinook and Cush-Hook entered into treaties with the United States that were never ratified the Senate. R. at 1; 6 Indian Cl. Comm'n at 184. The Indian Claims Commission determined that aboriginal title held by the Chinook was extinguished upon signing the its treaty because the United States asserted dominion and control over the Chinook lands and disregarded the Chinook rights of occupancy and use. 6 Indian Claims Commission at 207, 226.

Likewise, following the signing of the unratified treaty, the United States designated Cush-Hook lands for homesteading in the Oregon Donation Land Claim Act of 1850. R. at 2-3. Following passage of the Donation Land Claim Act, two white settlers moved onto what had previously been Cush-Hook land, at modern day Kelley Point Park, and were conveyed fee simple title to the land by the United States. R. at 2. Thus, the United States clearly showed its intent to extinguish the Cush-Hook's aboriginal title through the signing of the unratified treaty.

Although authorized settlement alone does not extinguish aboriginal title, the signing of the unratified treaty between the Cush-Hook and the United States, the Cush-Hooks subsequent abandonment of their homeland, the classification of the Cush-Hooks former land as public domain designated for homesteading in the Oregon Donation Land Claim Act, and the conveyance of fee title to the white settlers cumulatively and unambiguously show that the Cush-Hook's aboriginal title was extinguished in 1850.

The Cush-Hook nation does not have a valid claim to aboriginal title to the lands in Kelley Point Park. The tribe is no longer in aboriginal possession of the lands, has not used

or occupied the lands in over a century, and it is clear that Congress extinguished aboriginal title through federal actions inconsistent with any Cush-Hook right of occupancy. Therefore, this Court should reverse the judgment of the Oregon Court of Appeals finding the Cush-Hook still hold aboriginal title to Kelley Point Park.

II. This Court should affirm the Oregon Court of Appeals because Oregon has criminal jurisdiction over archaeological objects located on public lands such as Kelley Point Park.

It is well recognized that a sovereign maintains jurisdiction over matters that occur within its borders, and that a state has jurisdiction over criminal matters that take place within its territory. In the United States, territorial state jurisdiction is rooted in the Tenth Amendment, which reserves rights to the state that are not enumerated within the Constitution.

OR. REV. STAT. ANN. § 358.920(1)(a) grants criminal jurisdiction to the State of Oregon over the excavation, injury, destruction or alteration of "archeological objects located on public or private lands in Oregon." An "archaeological object" is an object that is 75 years or older, the material record of an indigenous culture found in the state, and the physical remains of past human life or activity. OR. REV. STAT. ANN. § 358.905. "Public lands" are any lands owned by the State of Oregon. OR. REV. STAT. ANN. § 358.905(j).

The Oregon Donation Land Claim Act of 1850 opened up the lands of Oregon territory for settlement, and allowed citizens of the United States to move to newly designated public land. Fee simple patents for 320 acres of land were granted to "every white settler" over eighteen years of age, who resided upon and cultivated that land for four years. R. at 3.

A. Public Law 280 applies to lands held by aboriginal title.

Public Law 280 was enacted as a more efficient measure to police Indian country. It applies to six mandatory states and other states if they chose to accept its application. Public Law 280 gives the criminal laws of the state the "same force and effect" within areas of Indian country as they have elsewhere within the state. 18 U.S.C. § 1162 (West 2013).

Indian Country includes all reservation lands, all dependent Indian communities and all Indian allotments with Indian title intact. 18 U.S.C. § 1151 (West 2013). Aboriginal title "exists at the pleasure of the United States," which should place aboriginal title within the federal scheme of Indian country. *Santa Fe Pac.*, 314 U.S. at 347.

Public Law 280 was designed to give state courts jurisdiction over criminal and civil matters in Indian country. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 385-86 (1976). This court has found that the primary concern of Congress when enacting this law was the problem of lawlessness in Indian country. *Id.* at 379. "If the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 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 Public Law 280 does not authorize its enforcement on an Indian reservation." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987).

This court and lower courts have listed factors to help determine if a statute is regulatory or criminal in nature, such as: the nature of the penalty and the title of the code;[3] the number of exceptions within the statute;[4] tribal sovereignty, concurrent jurisdiction, and

[3] *Cabazon*, 480 U.S. 202 at 211 (recognizing the manner of enforcement and title of code are not decisive, but are relevant factors).
[4] *Confederated Tribes of Colville Reservation v. State of Wash.*, 938 F.2d 146, 148-49 (1995) (finding that statutes with few exceptions to a basic prohibited activity are more likely criminal).

the public policy of the state.[5] By analyzing these factors, the court can determine if the statute in question is criminal or regulatory.

B. Oregon statutes regulating archaeological objects do not apply federal lands, and therefore, are not preempted by federal statute.

Preemption is the principle that a federal law supersedes a state law, which eliminates the state's ability to legislate in that area. In Indian country this doctrine is unique, and traditional applications of preemption do not apply. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

Congress may impede state laws through express preemption, field preemption or conflict preemption. The first classification, express preemption, takes place when Congress states its authority to preempt in express terms. "It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms." *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Development Com'n*, 461 U.S. 190, 204 (1983).

If clear language to preempt is not present, Congress's intent to supersede state law is implied from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may

[5] *Cabazon*, 480 U.S. 202 at 210, 214-15 (recognizing the significance of tribal self-governance and state public policy).

reveal the same purpose." *Id.* at 205. This pervasive federal scheme amounts to field preemption.

Conflict preemption occurs when the state statute is in direct conflict with the federal statute, or the state statute frustrates the intentions of Congress. "Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulation is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id* at 204.

There are two primary federal statutes that regulate Native American archaeological, cultural and religious objects. The Archaeological Resources Protection Act (ARPA) imposes criminal and penalties on people who disturb archaeological items on federal land or Indian land. The Native American Graves Protection and Repatriation Act (NAGPRA) prohibits the removal of Native American remains and objects from federal land or Indian land. Both of these statutes are designed to protect archaeological objects in the United States on federal lands or Indian lands, but do not regulate items on state lands.

C. Oregon has criminal jurisdiction over the archaeological, cultural, and historical objects at Kelley Point Park.

1. Oregon's exercise of criminal jurisdiction was valid pursuant to Public Law 280 and was not contingent upon whether the Cush-Hook held aboriginal title to the lands at Kelley Point Park.

After the Oregon Donation Land Claim Act was passed, Joe and Elsie Meek applied for and received fee title to the land in present day Kelley Point Park. R. at 5. Although the Meeks did not meet the requirements of living on the land for four years or cultivating the land, they were issued a patent in fee simple for the land. The United States' grant of fee

simple title to the Meeks was found to be void *ab initio*. Consequently, the subsequent sale of the land was also void.

However, when Oregon was admitted into the Union, Congress established the boundaries of the state. In the declaration of boundaries Congress made no express reservation of lands. 11 Stat. 383 § **(**1859) (*repealed* 1955). Through the Oregon Admission Act, the land in Kelley Point Park was transferred to the State of Oregon. The Oregon Admission Act was an effective extinguishment of aboriginal title through government action.

Consequently, the land in question is the public land of the state of Oregon regardless of the void sale of the land by the Meeks to Oregon. Because the land in Kelley Point Park is not owned in aboriginal title by the Cush-Hook nation, the land is Oregon public land. The State has criminal jurisdiction over actions committed on Oregon public land.

When Thomas Captain, a non-Indian, cut a tree down in Kelley Point Park to removed the religious symbols therein, he was in violation of OR. REV. STAT. ANN. § 358.920. The trees and the sacred symbols are important religious and cultural symbols to the Cush-Hook nation, and were carved into the living trees hundreds of years ago. R. at 2.

The removal of this living tree to transport it to another location outside Kelley Point Park is an injury and alteration to the symbols, because the tree is no longer in a living state. The religiously significant symbols are directly related to the Cush-Hook nation, because tribal medicine men carved the totems into the trees. R. at 2. Kelley Point Park is public land within the state of Oregon, which has criminal jurisdiction over the actions of Thomas Captain.

Oregon has criminal jurisdiction over archaeological objects on the land in question because the land is not owned in aboriginal title by the Cush-Hook nation. OR. REV. STAT. ANN. § 358.920 is a proper regulation of activities on Oregon land regarding archeological, cultural and historical objects.

If the court determines that the land in question is owned in aboriginal title by the Cush-Hook nation, the state continues to retain jurisdiction through Public Law 280. Public Law 280 grants jurisdiction to the state over all areas of Indian country within Oregon. Aboriginal title is a recognized federal possessory right that places the land under the federal definition of Indian country and, therefore, under Oregon jurisdiction pursuant to Public Law 280.

The Oregon statutes regarding archaeological objects and sites apply to state lands, and through Public Law 280, Indian lands. Aboriginal title is encompassed within the definition of Indian country, thus extending The State jurisdiction over the lands in Kelley Point Park if it is held in aboriginal title by the Cush-Hook nation.

The Oregon statutes are criminal statutes meant to prohibit harmful and destructive conduct to historical, cultural and archaeological items. The statute is enforced through criminal penalty. The title of the code, *Archaeological Objects and Sites,* does not reflect the legislator's intent on whether it is considered criminal or regulatory. The only exceptions written into the statutes are for permits allowing the discovery and removal of relevant items on state land. This does not change the criminal nature of the statute. When the relevant factors are analyzed, it is clear that the statutes in question are criminal in nature, and therefore are permissible under Public Law 280.

2. **The federal statutes do not prohibit state regulation of archaeological objects.**

Express preemption does not apply to the case at hand, because the federal statutes do not explicitly object to state regulation. The Supreme Court, however, has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *White Mountain Apache Tribe*, 448 U.S. 136 at 144.

Turning to field preemption, it is clear that the federal government has not pervasively legislated on Native American cultural, religious or archaeological objects because the federal statutes only apply to federal land or tribal land. Congress has not legislated on state land in this field. Because the land in question is state public land, the Oregon statutes are not preempted through field preemption. When analyzed in light of tribal sovereignty, there is no overriding tribal legislation or concurrent tribal jurisdiction that The State is transgressing. This leaves the state free to legislate over these matters on state land.

The same is true for conflict preemption. The Oregon statutes do not conflict or frustrate the purposes of Congress and the federal statutes. The Oregon statutes fill in the gaps that the federal statutes had left for Native American archaeological items on state land. Without any tribal legislation on point, the state is free exercise jurisdiction over the items in question.

Sections 358.905 through 358.961 of the Oregon Statutes are valid regulations because they regulate archaeological objects on Oregon state land and because they have not been preempted by federal law.

CONCLUSION

This Court should reverse the Oregon Court of Appeals judgment finding that the Cush-Hook hold aboriginal title to Kelley Point Park. Aboriginal title cannot be found to survive a century-and-a-half after the Cush-Hook voluntarily abandoned their aboriginal lands. Even if this Court does not find that relocation by the Cush-Hooks terminated aboriginal title at Kelley Point Park, it is clear that Congress effectuated extinguishment by federal action in 1850.

This Court should affirm the Oregon Court of Appeals judgment finding that Oregon's exercise of criminal jurisdiction over archaeological and historical sites and object was proper and therefore the criminal charges against Thomas Captain for the desecration of archaeological objects at Kelley Point Park should stand. The land in Kelley Point Park is Oregon public land and the State's exercise of criminal jurisdiction is absolute. Even if this Court finds that the Cush-Hook hold aboriginal title to the land in question, Public Law 280 extends state jurisdiction over Indians and Indian land in Oregon.

This Court should REVERSE the Oregon Court of Appeals on the issue of aboriginal title.

This Court should AFFIRM the Oregon Court of Appeals on the issue of state jurisdiction over archaeological and historical sites and artifacts.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX TABLE OF CONTENTS

APPENDIX "A"

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, §8, cl.1, 3. Indian Commerce Clause

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States

[. . .]

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. Const. art. II, §2, cl.2. Treaty Clause

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. Const. art. VI, cl. 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX "B"

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 1151. Indian country

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all 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. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

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

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

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

or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

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

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

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

25 U.S.C. § 177. Purchase or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty

APPENDIX "C"

OREGON STATUTORY PROVISIONS

Section 358.905. Definitions; interpretation

(1) As used in ORS 192.005, 192.501 to 192.505, 358.905 to 358.961 and 390.235:

(a) "Archaeological object" means an object that:

(A) Is at least 75 years old;

(B) Is part of 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 archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.

(b) "Site of archaeological significance" means:

(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or

(B) Any archaeological site that has been determined significant in writing by an Indian tribe.

(c)(A) "Archaeological site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with:

(i) Each other; or

(ii) Biotic or geological remains or deposits.

(B) Examples of archaeological sites described in subparagraph (A) of this paragraph include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.

(d) "Indian tribe" has the meaning given that term in ORS 97.740.

(e) "Burial" means any natural or prepared physical location whether originally below, on or above the surface of the earth, into which, as a part of a death rite or death ceremony of a culture, human remains were deposited.

(f) “Funerary objects” means any artifacts or objects that, as part of a death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.

(g) “Human remains” means the physical remains of a human body, including, but not limited to, bones, teeth, hair, ashes or mummified or otherwise preserved soft tissues of an individual.

(h) “Object of cultural patrimony”:

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

(B) Does not mean unassociated arrowheads, baskets or stone tools or portions of arrowheads, baskets or stone tools.

(i) “Police officer” has the meaning given that term in ORS 181.610.

(j) “Public lands” means any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon.

(k) “Sacred object” means an archaeological object or other object that:

(A) Is demonstrably revered by any ethnic group, religious group or Indian tribe as holy;

(B) Is used in connection with the religious or spiritual service or worship of a deity or spirit power; or

(C) Was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion.

(L) “State police” has the meaning given that term in ORS 181.010.

(2) The terms set forth in subsection (1)(e), (f), (g), (h) and (k) of this section shall be interpreted in the same manner as similar terms interpreted pursuant to 25 U.S.C. 3001 et seq.

Section 358.920. Conduct Prohibited

(1)(a) A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235.

(b) 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.

(c) It is prima facie evidence of a violation of this section if:

(A) A person possesses the objects described in paragraph (a) of this subsection;

(B) A person possesses any tool that could be used to remove such objects from the ground; and

(C) A person does not possess a permit required under ORS 390.235.

(2) A person may not sell, purchase, trade, barter or exchange or offer to sell, purchase, trade, barter or exchange any archaeological object that has been removed from an archaeological site on public land or obtained from private land within the State of Oregon without the written permission of the landowner.

(3)(a) A person may not sell, trade, barter or exchange or offer to sell, trade, barter or exchange any archaeological object unless the person furnishes the purchaser a certificate of origin to accompany the object that is being sold or offered. The certificate shall include:

(A) For objects obtained from public land:

(i) A statement that the object was originally acquired before October 15, 1983.

(ii) The location from which the object was obtained and a brief cumulative description of how the object had come into the possession of the current owner in accordance with the provisions of ORS 358.905 to 358.961 and 390.235.

(iii) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.

(B) For objects obtained from private land:

(i) A statement that the object is not human remains, a funerary object, sacred object or object of cultural patrimony.

(ii) A copy of the written permission of the landowner to acquire the object.

(b) As used in this subsection, "certificate of origin" means a signed and notarized statement that meets the requirements of paragraph (a) of this subsection.

(4)(a) If the archaeological object was acquired after October 15, 1983, from public lands, any object not described in paragraph (b) of this subsection is under the stewardship of the state and shall be delivered to the Oregon State Museum of Anthropology. The museum shall work with the appropriate Indian tribe and other interested parties to develop appropriate curatorial facilities for artifacts and other material records, photographs and documents relating to the cultural or historic properties in this state. Generally, artifacts shall be curated as close to the community of their origin as their proper care allows. If it is not feasible to curate artifacts within this state, the museum may after consultation with the appropriate Indian tribe or tribes enter into agreements with organizations outside this state to provide curatorial services; and

(b) If the object is human remains, a funerary object, a sacred object or an object of cultural patrimony, it shall be dealt with according to ORS 97.740, 97.745 and 97.750.

(5) A person may not excavate an archaeological site on privately owned property unless that person has the property owner's written permission.

(6) If human remains are encountered during excavations of an archaeological site on privately owned property, the person shall stop all excavations and report the find to the landowner, the state police, the State Historic Preservation Officer and the Commission on Indian Services. All funerary objects relating to the burial shall be delivered as required by ORS 358.940.

(7) This section does not apply to a person who disturbs an Indian cairn or burial. Any person who disturbs an Indian cairn or burial for any reason shall comply with the provisions of ORS 97.740 to 97.760.

(8) Violation of the provisions of this section is a Class B misdemeanor.