No. 11-0274

In the

Supreme Court of the United States

October Term, 2013

STATE OF OREGON,
Petitioner

v.

THOMAS CAPTAIN,
Respondent/Cross-Petitioner

On Writ of Certiorari to the
Oregon Supreme Court

BRIEF FOR RESPONDENT/CROSS-PETITIONER

Team 53

Attorneys for Respondent/Cross-Petitioner

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QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

The State of Oregon (Petitioner) brought criminal charges against Thomas Captain (Respondent) for three violations of Or. Stat. §§ 358.905-961 and 390.235-240. (R. at 2-3.) Specifically, the charges relate to: trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site. (R. at 2-3.) The charges were brought in the Oregon Circuit Court for the County of Multnomah. (R. at 3.) Captain consented to a bench trial where the trial judge found him not guilty of trespass and cutting timber without a state permit. (R. at 3.) The trial court found Captain guilty of damaging an archaeological site and a cultural and historical artifact. (R. at 3.) The trial court made detailed findings of fact and conclusions of law. (R. at 3-4.) Captain was sentenced to a monetary fine of $250. (R. at 4.)

Both the State of Oregon and Thomas Captain appealed the trial court's ruling to the Oregon Court of Appeals. (R. at 4.) The Court of Appeals affirmed without opinion. (R. at 4.) Subsequent to the Court of Appeals ruling, the Oregon Supreme Court denied review. (R. at 4.) This Court granted a Writ of Certiorari. (R. at 4.)

STATEMENT OF FACTS

Since time immemorial, the Cush-Hook Nation of Indians has resided in their homelands in the state now known as Oregon. (R. at 1.) They developed a sophisticated, peaceful society in the area now known as Kelley Point Park, an Oregon State Park. (R. at 1.) In April 1806 William Clark of the Lewis and Clark expedition encountered the Cush-Hook tribe. (R. at 1.) On April 5, 1806, Clark turned south on the Multnomah River (modern-day Willamette River) where he came upon the Multnomah Indians fishing and gathering Wapato. (R. at 1.) The Multnomah made peace signs and greeted Clark. (R. at 1.) Thereafter, the tribe pointed out the nearby Cush-Hook longhouses and village. (R. at 1.)

The Multnomah guided Clark to the Cush-Hook village where they introduced him to the chief of the Cush-Hook Nation. (R. at 1.) Clark gave the chief a President Thomas Jefferson Peace Medal which Lewis and Clark traditionally offered to Native American chiefs during their expedition. (R. at 1.) The Cush-Hook chief accepted the medal, thereby indicating his desire to engage in a relationship with the United States. (R. at 1.) Historians call these medals "sovereignty tokens" because they have great political and diplomatic significance. (R. at 1.) Clark drew a sketch of the village and houses. (R. at 1.) He recorded ethnographic details about tribal life including tribal governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. (R. at 1.)

The Cush-Hooks continued to live in their village, engaging in traditional ways of life for nearly fifty years. (R. at 1.) In 1850, the Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. at 1-2.) The Treaty of 1850 provided that the tribe would relocate sixty miles westward in exchange for compensation. (R. at 1-2.) In accordance with the treaty, the tribe relocated, but they never received the

compensation promised for their lands, recognized ownership of their new lands in the mountains, or any of the other benefits agreed upon. (R. at 2.)

After the treaty was signed, the Senate declined to ratify the treaty. (R. at 2.) Furthermore, neither the federal government, nor the State of Oregon have taken any action to recognize the Cush-Hook Nation. (R. at 2.) That same year, Congress passed the Oregon Donation Land Act of 1850, also known as The Donation Land Claim Act, 1850. (R. at 2.) The Act required every white settler who had resided upon and cultivated the land for four consecutive years be granted a fee simple title. (R. at 2.) Pursuant to this Act, Joe and Elsie Meek claimed 640 acres of the Cush-Hook land; however, they never cultivated nor lived upon the land for the required four years. (R. at 2.) The Meeks descendants sold the land they inherited from Joe and Elsie Meek to the State of Oregon. (R. at 2.) Oregon established Kelley Point Park. (R. at 2.) Barely able to eek out an existence, the Cush-Hook Nation has continued to reside on the land agreed upon in the Treaty of 1850. (R. at 2.)

In 2011, Thomas Captain, a Cush-Hook citizen moved from the foothills of the Oregon costal mountain range to reassert the Cush-Hook's ownership of the area now known as Kelley Point Park. (R. at 2.) Captain made the move to Kelley Point Park to assert ownership of the land and to protect cultural and religiously significant symbols. (R. at 2.) Specifically, the property contains many large trees that are several hundred years old. (R. at 2.) Clark's written account from his 1806 contact with the Cush-Hooks notes religious and cultural carvings of tribal shamans and medicine men in a fashion that is commonly referred to as a "totem." (R. at 2.) To the tribe's dismay, vandals have recently begun defacing the totems and cutting down parts of the trees to sell. (R. at 2.) The State of Oregon has taken no action to prevent or punish the vandals and purchasers of these sacred religious objects.

(R. at 2.) Captain was worried about the integrity of the ancient totems and decided to remove a particular totem that was carved by one of his ancestors. (R. at 2.) Captain successfully saved the totem, and was transporting it to a safe location at the tribe's village in the coastal mountain range when he was stopped by Oregon State Troopers. (R. at 2.) The troopers seized the totem and arrested Captain for trespass, cutting a tree without a state permit and damaging an archaeological, cultural, and historical object. (R. at 2-3.)

SUMMARY OF THE ARGUMENT

The Cush-Hook have both established aboriginal title to their lands in Kelley Point Park and retained their title to this day. By developing villages and engaging in tribal life from time immemorial on their homelands in Oregon, the Cush-Hook gained title. They retained their title throughout history because Congress never extinguished their rights to occupy their land.

Thomas Captain, a current member of the Cush-Hook Nation, acted in good faith to preserve his Tribe's religious object. Oregon's criminal prosecution against Captain was made without proper jurisdiction and violates both the legislative intent of Congress and the text of Public Law 280. Furthermore, Or. Rev. Stat. §§ 358.905-61 and 390.235-240 are regulatory in nature and thus, inapplicable to Captain's actions on his own land. Finally, Captain's conviction is against public policy and exceeds the intent of the regulatory statute.

ARGUMENT

I. THE CUSH-HOOK NATION HAS ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK

The concept of aboriginal title was first set forth in the landmark decision of this Court, *Johnson v. M'Intosh.* 21 U.S. 543, 568 (1823). While Native Americans lost full dominion over their lands when this country was colonized by Europe, they retained their aboriginal title as "occupants by virtue of a discovery made before the memory of man." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832). Even though Native Americans did not retain all of their property rights after European conquest, their "right of occupancy is considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. 711, 746 (1835).

Article I, Section 8 of the United States Constitution provides Congress with the sole power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Through their plenary power, Congress retains the authority to extinguish aboriginal title. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). Courts are prohibited from inquiring into whether Congress made the right decision in extinguishing aboriginal title, but they retain the power to determine whether Congress has in fact done so with regard to a particular tribe. *Id*.

A. The Cush-Hook Gained Aboriginal Title Because They Occupied, Used, and Owned Their Sacred Homelands from Time Immemorial

In order to establish aboriginal title, the Cush-Hook must demonstrate that they owned their lands "for a long time" before the arrival of European Americans. Michael J. Kaplan, J.D., Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41

A.L.R. Fed. 425, at §2 (1979). The Oregon Circuit Court for the County of Multnomah found that the Cush-Hook have aboriginal title because they owned their land from time immemorial. (R. at 3.) This finding deserves a high degree of deference on appeal. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857-858 (1982) (hereinafter "*Inwood Labs"*); *Native Village of Eyak v. Blank*, 688 F.3d 619, 623 (9th Cir. 2012) (hereinafter "*Eyak"*). The Oregon court's finding is supported by ample evidence from historical, sociological, and anthropological experts as well as the Journals of Lewis and Clark, and a treaty with Anson Dart. No evidence suggests that the Cush-Hook had anything other than complete dominion of these lands from the beginning of human occupation.

1. The Oregon Circuit Court for the County of Multnomah's Factual Finding that the Cush-Hook Owned Their Lands Before the Arrival of European Settlers Warrants a High Degree of Deference on Appeal

Trial courts are uniquely situated to make factual determinations by virtue of their ability to observe witness' demeanor and view all evidence first-hand. In recognition of this distinct perspective, this Court held that "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give facts another construction." *Inwood Labs*, 456 U.S. at 857-858. The need for deference to trial court determinations of aboriginal use, occupancy, and ownership of land is especially paramount due to the "difficulty of obtaining the essential proof necessary to establish Indian title during ancient times." *Eyak*, 688 F.3d at 623. As a result, courts have adopted a "liberal approach" to "weighing evidence regarding aboriginal title claims." *Id*.

Here, the Oregon court found that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of the Euro-Americans based on its review of

historical, sociological, and anthropolical expert witnesses testimony. Without the opportunity to hear this testimony first hand, the appellate court should not discard the trial court's finding simply because it would give the evidence a different construction. Instead, the finding warrants a high degree of deference.

2. The Cush-Hook Lived on Their Lands from time Immemorial

The historical, anthropolical, and sociological evidence demonstrating that the Cush-Hook continuously lived in the lands that now form Kelley Point Park more than meets the legal standard for poof of aboriginal title. To establish aboriginal title, a tribe must show extended, historical, occupation of the land. "Indians presently seeking to establish either present, or past, aboriginal title to lands must do so by reference to the activities of their ancestors upon such lands." Michael J. Kaplan, J.D., Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, at §2 (1979). Proving occupancy from the dawn of time is not a requirement for establishing aboriginal title, but establishing ownership of the land in question from "time immemorial," certainly meets the standard. *Greene v. State of R.I.*, 398 F.3d 45, 49 (1st Cir. 2005). In *Sac & Fox Tribe of Indians v. United States*, this Court held the tribe fell short of the occupancy time requirement to obtain aboriginal title in 1804, because they had only gained possession of their lands in the late 1700s. 315 F.2d 896, 903 (1963). Alternatively, in *Eyak*, a tribe of Alaskan Native villagers successfully established aboriginal title by showing that they resided on their lands continuously before 1661. 688 F.3d at 623.

Like the villagers in *Eyak*, the Cush-Hook easily satisfy the occupancy requirement for establishing aboriginal title by proving their ownership for as far back as anyone can remember. The Journals of Lewis and Clark document the existence of permanent Cush-

Hook villages as well as tribal governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices on the land in 1806. The record also reveals that the Cush-Hook continued to occupy their village until 1850 when Anson Dart signed a treaty with the tribe. Ample evidence supports the trial court's finding that the Cush-Hook occupied the land from time immemorial. This finding warrants a high level of deference, but even if this Court sets that finding aside, undisputed facts establish that the tribe occupied the area in excess of fifty years by virtue of their established villages on the land in 1806 and continuous occupancy there until 1850.

3. The Cush-Hook Exclusively Controlled the Land where Their Permanent Village Stood, and may have Shared Fishing Grounds Jointly and Amicably with the Multnomah Indians

In addition to continuous occupation, a tribe must also prove that they held the land either exclusively, or jointly and amicably with another tribe. To demonstrate aboriginal title, "an Indian group has the burden of proving actual, exclusive, and continuous use and occupancy for a long time of the claimed area." *Id.* at 622. In *Eyak*, the court held that the tribe failed to demonstrate that they had exclusive control of the area claimed because other tribes continuously traversed the periphery areas of the claimed territory without the permission of the tribe. *Id.* at 624. Because the other tribes did not have permission to use the land, the tribe could not establish aboriginal title. *Id*. at 625. The court noted that aboriginal title remains intact when a tribe is joined in common use with other native groups. *Id*.

Anthropological studies of Native American culture and property systems "frequently disclose more than one identifiable group of Indians using and occupying a particular area of

land at the same time." Michael J. Kaplan, J.D., Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, at §2 (1979). The Court of Claims has found exclusivity to be important for establishing aboriginal title because "one of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed." *Strong v. United States,* 518 F.2d 556, 561 (1975). Ownership is not lost simply because more than one tribe uses a given area because "there is a built-in exception to the exclusivity requirement." *Id*. When two or more tribes have "joint and amicable" possession of one region or resource, exclusivity of occupancy is not destroyed. Tribes are deemed to have joint and amicable occupancy when they are treated as a single or closely integrated entity. *Id*. at 561-62.

By virtue of their flourishing permanent village, the Cush-Hook demonstrated the ability to exclude unwanted intruders from their land. Had the tribe been unable to exclude others, they would not have been able to preserve the food, clothing, and shelter resources therein for their own use given the other tribes in the area. Clark documented the sophisticated nature of the Cush-Hook society, which included a governmental structure, religious and cultural practices, burial traditions, housing, agriculture, and hunting and fishing practices. Had the tribe been focused in a bitter battle over territory, they wouldn't have had the opportunity to invest in the advanced governmental structure, agriculture, and housing Clark recorded in his journal. In contrast, the tribe in *Eyak*'s land use was not exclusively used because their society was nomadic and lacked permanent housing.

Additionally, the Cush-Hook may have shared fishing grounds with the Multnomah or other Native Americans without destroying their aboriginal title to those lands because their use of the resource was "joint and amicable." Here, the Cush-Hook and the Multnomah

were closely integrated, friendly tribes who shared a common way of life and supported each other in dealing with outsiders such as Lewis and Clark. When Lewis and Clark arrived, it was the Multnomah Indians who pointed out the Cush-Hook village to them and introduced them to the Cush-Hook chief. The mere fact that Multnomah Indians entered the Cush-Hook village with Lewis and Clark does not destroy the Cush-Hook's title to the land. The Cush-Hook need only prove that they had the ability to exclude unwanted intruders on their land. Friendly visitors to the land pose no threat to the nation's title claim. Similarly, both tribes may have fished in the same river without destroying their aboriginal title to their homelands where that use was joint and amicable.

B. The Cush-Hook Title has not been Extinguished

Aboriginal title comes not from a grant by the government of the United States, but from Native American sovereignty rights over the land they inhabited before the settlement of Europeans. Felix S. Cohen, *Handbook of Federal Indian Law* 122 (U.S. Government Printing Office, 1945). Felix Cohen famously articulated this principle in his *Handbook of Federal Indian Law* saying "[t]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." *Id*. While aboriginal title is inherent, it is not immune from extinguishment, and in that regard, the power of Congress is singular. *United States v. Sante Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941) (hereinafter "*Sante Fe Pac."*).

Upon judicial review, "extinguishment can not be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Sante Fe*

Pac., 314 U.S. at 354. Because the Federal Government has a responsibility to the native population, any

> "intent to deprive Indian tribes of their rights in land, or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other congressional legislation must be clearly and unequivocally stated, and language appearing in such grants and statutes is not to be construed to the prejudice of the Indians."
>
> *Bennett County v. United States*, 394 F.2d 8, 11 (8th Cir. 1968).

1. The Oregon Treaty with Britain Setting the Boundary of the United States at Forty-nine Degrees North did not Extinguish the Cush-Hook's Title

Only through an express act of Congress can aboriginal title be extinguished. *Sante Fe Pac.*, 314 U.S. at 354. The Oregon Treaty between the United States and Britain did not include any reference to Indian title, so Indian title could not have been extinguished by that treaty. Treaty between Her Majesty and the United States of America, for the Settlement of the Oregon Boundary, U.S.-Britain, Jun. 15, 1846. Following the United States' acquisition of the Oregon Territory, federal treaty officials behaved as though Indian title was intact. Ralph James Mooney, *Formalism and Fairness: Mathew Deady and Federal Public Land Law in the Early West*, 63 Wash. L. Rev. 317, 323-24 (1988). They spent the next decade negotiating extinguishment of aboriginal title with individual tribes. *Id*. The provisional government of the newly established territory authorized male settlers to stake claims to land by occupying and improving them, but Congress declared these local laws "null and void," leaving Oregon without any land law until the Oregon Land Donation Act was passed in 1850. *Id*.

2. Congress Refused to Ratify the Treaty of 1850 so it had no Intent to Extinguish the Cush-Hook's Aboriginal Title

The Oregon court properly found that the Treaty of 1850 did not extinguish the Cush-Hook's aboriginal title to its homelands because the Senate refused to ratify the treaty. Treaties only extinguish aboriginal title where it was the intent of Congress to do so. Michael J. Kaplan, J.D., Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, at §2 (1979). A "[u]nilateral action by an officer of the executive branch cannot eliminate Indian title." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (1974). (hereinafter "*Turtle Mountain*")

Aboriginal title is only extinguished by ratification of a treaty or other manifestation of Congress's intent. The Supreme Court of Idaho found an unratified treaty insufficient to extinguish aboriginal title in *State v. Coffee*. 556 P.2d 1185, 1191-92 (1976). There, the court held title was not extinguished at the treaty signing, but only when the treaty was ratified four years later. *Id*. No congressional intent was manifest in the executive branch's decision to enter into a treaty with the tribe, so the title was not extinguished at that time. *Id*. Similarly, in *Wahkiakum Band of Chinook Indians v. Bateman*, the Ninth Circuit found a tribe's aboriginal title to fish on the Columbia River was not extinguished when the tribe entered into a treaty with the federal government in 1851 agreeing to abandon its fishing grounds. 655 F.2d 176, 180 (9th Cir. 1981). The court held that the tribe's aboriginal title was not extinguished until sixty-one years after the treaty signing, when Congress passed the Act of August 24, 1912. *Id*. Through that Act, Congress compensated the Wahkiakum for their lands in accordance with the treaty provisions. *Id.* Because the Act of August 24, 1912

and its legislative history manifested congressional intent to extinguish the tribe's aboriginal fishing rights, those rights were extinguished with its passage. *Id*.

Anson Dart's treaty with the Cush-Hook Nation in 1850 included no manifestation of congressional intent to extinguish the tribe's aboriginal rights, so it was insufficient to extinguish the Cush-Hook's aboriginal title. The Senate refused to ratify the Cush-Hook Treaty in 1853 and no other legislation relating to the tribe has been passed. Congress's decision not to ratify the treaty or pass legislation manifesting its intent to extinguish the Cush-Hook's title leaves the tribe's original land rights intact.

3. The Oregon Land Donation Act did not Extinguish the Cush-Hook's Title Because it was mere Preparation for White Settlement

Acts "that are merely in preparation for, or in anticipation of, white settlement or entry upon Indian lands have generally been held not to constitute extinguishment of aboriginal title thereto." Michael J. Kaplan, J.D., Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, at §2 (1979). This Court held in *United States v. Pueblo of San Ildefonso*, that the process of surveying lands or otherwise preparing for settlement has no impact on aboriginal title. 513 F.2d 1383, 1389 (1975). In *Pueblo of San Ildefonso*, this Court held Indian title was not extinguished by opening lands to settlement that the United States had secured from Mexico. *Id*. Instead, it was "merely an act in recognition of the inevitable western migration and eventual settlement of white homesteaders" that "did not translate into a present intention on the part of Congress to destroy Indian title." *Id.* Like the opening of the land ceded from Mexico to settlement in *Pueblo of San Ildefonso*, the opening of the Oregon Territory to settlement was a mere

acknowledgement of western migration and Manifest Destiny, not a blanket extinguishment of title in the Territory of Oregon.

The Oregon Land Donation Act established the position of the Surveyor General in Oregon and provided him with the authority to survey the lands and administer their settlement under the Act. *Oregon Donation Act*, ch. 76, § 4, 9 Stat. 496, 497 (1850).[1] In *Plamondon ex rel. Cowlitz Tribe of Indians v. United States*, the United States Court of Claims has held that the Oregon Land Donation Act did not extinguish *any* aboriginal title in the Oregon Territory. 467 F.2d 935, 936 (1972). The court reasoned, "it is apparent that Congress did not intend the mere act of surveying to have any effect upon the Indian title of the tribes in question." *Id*. Congress's intention in passing the Oregon Land Donation Act was to "create the office of Surveyor General of the Oregon Territory" and to "direct him to survey the lands west of the Cascade Mountains, which at that time were all still Indian land." *Id*. Because "earlier legislation expressed congressional intent to extinguish the title of the Indians in this area only by treaty," the Land Donation Act did not extinguish any Indian title. *Id*.

[1] "That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, and enter the same on the records of his office; and in all cases where such married persons have compiled with the provisions of this act, so as to entitle them to the grant as above provided... Provided, further, That all future contracts by any person or persons entitled to the benefits of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void." *Id.*

4. The Meeks' Title and Subsequent Sale of the Land was Invalid Because the Meeks did not Reside on and Improve the Land for Four Years

The Oregon court's appropriately found that the United States' grant of fee simple title to Joe and Elsie Meek under the Oregon Donation Land Act was void. (R. at 3.) It also appropriately found that the Meeks's decedents sale of the same land to the State of Oregon was also void. (R. at 3.) Under the Oregon Land Donation Act, married couples were eligible to receive 640 acres of land on the condition that they resided on and cultivated the land for four years.[2]

The plain language of the act allows only those who cultivated and resided on the land to gain title. Having only resided on the land for two years, the Meeks failed to meet the criteria for securing title to the Cush-Hook land. The Meeks also fell short of the requirements to secure title because they did not cultivate the land. The remedy for handling situations where a landholder falls short of the title requirements is provided by the act: "contracts by any person or persons entitled to the benefits of this act, for the sale of land to which he or they may be entitled under this act before he or they have received a patent therefore, shall be void." *Id*.

The Meeks title was not acquired in accordance with federal statute, so it is void and leaves the Cush-Hook's aboriginal title to the land intact. The District Court of Alaska found "congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands." *United States v. Atlantic Richfield Co*., 435 F. Supp. 1009 (D. Alaska 1977) affd. 612 F.2d

[2] The *Oregon Donation Act* provides eligibility for married couples who "resided upon and cultivated the [land] for four consecutive years ... where such married persons have compiled with the provisions of this act, so as to entitle them to the grant as above provided... Provided, further, That all future contracts by any person or persons entitled to the benefits of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void." ch. 76, § 4, 9 Stat. 496, 497 (1850).

1132 (9th Cir. 1980). Unauthorized encroachment does not. *Turtle Mountain*, 490 F.2d 935, 947 (1974). In *Turtle Mountain*, the court found the Chippewas' aboriginal title unaffected by white encroachment that had not been Congressionally authorized. *Id*. Here, Congress did not authorize the Meeks' settlement on the Cush-Hook land because the Meeks did not reside on and cultivate the land for four years. Therefore, the Cush-Hook's title was not extinguished by the Meeks' unauthorized settlement on their homelands.

In a nearly factually identical scenario to the case at bar, this Court held a settler's title invalid in when he sought to gain title under the Oregon Land Donation Act without residing on the land and cultivating it for four years. *Hall v. Russell*, 101 U.S. 503, 509-510 (1879). This Court found the settler had only "a present right to occupy and maintain possession, so as to acquire a complete title to the soil," and never secured full title to the land. *Id*. Whether the United States provided the settler the fee in error before he proved that he had resided on the land and cultivated it for four years *was irrelevant* to whether the settler's title was valid upon judicial review. *Id*. This Court held the settler's title could not stand because to uphold it would extend the law "beyond the just interpretation of the language Congress has used to make known its will." *Id*. at 512.

C. Congress never Extinguished the Cush-Hook's Aboriginal Title, so the Cush-Hook have the Right Under Domestic and International Law to Reassert Claim to Their Homelands

The use of the Cush-Hook homelands as a public park has not destroyed the tribe's aboriginal title because there was no Congressional intent to extinguish it, and the tribe has retained access to its land. This Court has always required a strong showing of Congressional intent to extinguish aboriginal title. *Sante Fe Pac.*, 314 U.S. at 354.

Moreover, "extinguishment can not be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id*. Petitioner has been unable to point to any expression of congressional intent to extinguish the Cush-Hook's title to their homelands. None the less, when the United States exercises complete dominion adverse to the Indian right of occupancy, a court may find aboriginal title is extinguished. *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 787 (1993). In this case, the Cush-Hook's lands were erroneously purchased from the holder of an invalid title. These lands now form a park that is open to the public, including Cush-Hook Nation members. Petitioner has not shown congressional intent to deprive the tribe of its land, nor actual deprivation on the part of the United States government. Congress has plenary power with regard to Indian affairs, so the state of Oregon's actions against of Respondent Thomas Captain from the park are insufficient to destroy the tribe's title to their sacred homelands lands.

The Cush-Hook's unilateral compliance with the treaty does not extinguish their title to their homelands because the United States never complied with its end of the agreement nor manifested intent to abrogate the treaty. In *Turtle Mountain Band of Chippewa Indians*, the court held that the establishment of a reservation for the Nation did not "vitiate" the tribe's claim to aboriginal title of its homelands. 490 F.2d at 947. "Indian settlement on a reservation does not invariably extinguish aboriginal title claims to outside areas and Indian settlement on a reservation should be seen as an abandonment of claims only when the specific circumstances warrant that conclusion." *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388 (1975). In the case of the *Pueblo of San Ildefonso*, the court found no circumstances warranting a conclusion that the tribe had abandoned their aboriginal title by their settlement on a reservation because "[n]owhere is there to be found any implication that

Congress intended to exact the relinquishment of the pueblos' aboriginal rights." *Id*. Furthermore, there was no evidence that the tribe agreed to abandon their homelands. *Id*.

The Cush-Hook did not agree to abandon title to their lands anymore than a homeowner selling a house agrees to give his home away for free because the buyer defaults. The Cush-Hook did not receive any compensation to their lands. Their compliance with their obligations under the treaty only shows good faith on the part of the tribe, not an intention to abandon. The Cush-Hook agreed to relocate only in exchange for payment for their fertile farmlands. Ever since they relocated to the reservation, they have only been able to eek out a bare existence. The Nation has suffered not only a loss of its homeland, but has also been forced to build its livelihood in an inhospitable environment.

Since the founding of our government, the United States has aspired to take its responsibility towards the native population very seriously. The Northwest Ordinance set forth that policy stating

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."

Northwest Ordinance, ch. 8, 1 Stat. 52, § 14, Art. 3 (1787).

By upholding the Cush-Hook's title, this nation will maintain its commitment to treat the Native Americans with good faith, and preserve peace and friendship with them.

Similarly, international law supports a finding that the Cush-Hook's aboriginal title remains intact and requires tribal involvement in state decisions impacting tribal lands. In the United Nations Human Rights Committee Comment on Article 27 of the International Covenant on Civil and Political Rights, the committee states that "positive measures by

States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture." S. James Anaya Robert A. Williams, Jr. *The Protection of Indiginous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J. 33, 74 (2001). This responsibility requires that at a minimum, states "consult with the indigenous groups concerned about any decision that may affect their interests and to adequately weigh those interests in the decision-making process. *Id*. at 78.

II. THE STATE OF OREGON LACKS CRIMINAL JURISDICTION TO REGULATE OR CONTROL ARCHAEOLOGICAL, CULTURAL, HISTORICAL, AND RELIGIOUS OBJECTS ON TRIBAL LAND

The United States' authority to exercise criminal jurisdiction in Indian country[3] dates back as early as adoption of the Constitution. Article I, Section 8, of the United States Constitution states in part Congress' plenary authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*;" U.S. Const. Art. I § 8. (emphasis added). A myriad of Supreme Court cases hold that Indian tribes are treated as independent domestic nations that are subject to Congressional assertion of federal criminal jurisdiction. (*See generally, Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *Johnson v. M'Intosh,* 21 U.S. 543 (1823), et al.). However, state authority to assert criminal jurisdiction over an individual Indian citizen (when in Indian country), or over collective tribes is constantly being tested and redefined in our system of criminal jurisprudence. (*See generally*, *United States v. Kagama,* 118 U.S. 375 (1886); *Duro v. Reina*, 495 U.S. 676, 692

[3] 18 U.S.C. 1151 defines "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, *(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state***,** and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (emphasis added)

(1990). Pursuant to its plenary power, Congress has enacted many statutes to deal with concurrent and exclusive jurisdictional authority between the federal and state governments. *Id.* Nevertheless, case law and federal statutes have carved out exclusive federal criminal jurisdiction for Major Crimes[4], and at the same time have declined to extend state jurisdiction to many civil actions and nearly all regulatory provisions. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 213 (1987).*

The Major Crimes Act specifically reserves certain criminal prosecutions under the exclusive jurisdiction of the Federal Government. 18 USC § 1153. Congress chose to apply its plenary power and exercise exclusive criminal jurisdiction for "major crimes" due to historical disparities in punishment between federal, state, and tribal courts. 48th Cong., 2d Sess., 16 Cong. Rec.934 (1885). In *Ex parte Crow Dog*, the Defendant, Crow Dog, was member of the Brulé tribe and he was involved in a dispute with another member, whom Crow Dog eventually murdered. 109 U.S. 556, 557 (1883). The Brulé tribal court, adhering to Sioux tradition, ordered Crow Dog pay monetary restitution to the victim's family. Subsequently, when federal authorities charged and eventually convicted Crow Dog of murder, he was sentenced to death by hanging. *Id.* In a landmark decision, this Court heard Crow Dog's *habeas* petition, holding that federal courts do not have jurisdiction to try a criminal case after tribal courts have previously imposed sentence. *Id.* at 572. Consequently, Congress then passed legislation providing exclusive federal jurisdiction for more serious crimes and yet was surprisingly silent on lesser offenses. 18 USC § 1153. This abstention from vesting jurisdiction for all offenses has led to appellate court intervention that is constantly testing and redefining federal, state, and local prosecutorial power. *U.S. v. High*

[4] 18 USC § 1153 (a), "Offenses committed within Indian country" specifically gives exclusive federal jurisdiction for the most serious crimes such as murder, manslaughter, kidnapping, maiming, felony child abuse or neglect, arson, burglary, robbery, et al.

Elk, 902 F.2d 660 (8th Cir. 1990). Due to uncertain and competing jurisdictional authorities, Congress eventually passed legislation that was intended to vest jurisdiction in the discretion of certain states. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976). However, this legislation has raised more questions than it has provided jurisdictional guidance.

A. The Lower Court Erred as a Matter of Law when It Concluded that the Statutes in Question are Applicable to all Land in the State of Oregon.

The Oregon Circuit Court for Multnomah County erred by failing to dismiss all of the counts against Thomas Captain for want of jurisdiction. Specifically, Or. Rev. Stat. §§ 358.905-961 and §§ 390.235-240 regulate under what circumstances archeological, cultural, and historical artifacts and objects may be removed, altered, destroyed, and transferred. As with all criminal statutes, jurisdiction is an implicit element in order to impose a valid judgment and sentence for a violation. However, in the case at bar, the State incorrectly asserted criminal jurisdiction that it did not have, for conduct that is merely regulatory. Furthermore, the trial court, in finding Thomas Captain guilty of one of the three counts, (damaging an archeological, cultural, or historical site or object) exceeded his jurisdictional authority. The trial judge also erred as a matter of law in the findings of fact and conclusions of law. Specifically, the trial judge improperly ruled that the statutes in question apply to *all* lands in the State of Oregon under "Public Law 280, and thus Oregon properly brought this criminal action against Thomas Captain."

1. Congress has Narrowly Vested Criminal Jurisdiction to State Courts by Enacting Public Law 280

When a state attempts to prosecute a violation of its law for a crime committed on tribal territory, it *must* comply the jurisdictional limits set forth in the Major Crimes Act,

Public Law 280 and other controlling federal statutes. *Kennerly v. Dist. Ct. of Ninth Jud. Dist. of Mont.*, 400 U.S. 423, 425-26 (1971). Public Law 280 was originally enacted in 1953 to combat lawlessness and to reform deficiencies within the tribal justice system. *Bryan v. Itasca County*, 426 U.S. at 379. Public Law 280 is "a federal statute passed during the height of an assimilationist period. [It] gives certain states . . . the authority to enforce their criminal laws on tribal reservations. States, however, are not given the authority to enforce their regulatory laws." Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/regulatory Distinction*, 46 UCLA L. Rev. 1333, 1333 (1999).

Six states[5] are specifically vested (also known as mandatory states) with jurisdiction in Public Law 280: Alaska, California, Minnesota, Nebraska*, Oregon* (*except the Warm Springs Reservation*), and Wisconsin. There are nine additional states that have optional jurisdictional powers: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/regulatory Distinction*, 46 UCLA L. Rev. 1333, 1374 (1999). However, some of these states, such as North Dakota, chose to allow tribes to opt-in and consent to 280's provisions. Ada Pecos Melton and Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country* (2004), available at http://www.aidainc.net/Publications/pl280.htm. Interestingly, tribal concerns over the state-federal dichotomy have led to no tribe within North Dakota consenting to state criminal jurisdiction. *Id.* Another example of the state/tribe relationship rejecting 280's provisions is

[5] Public Law 280, 18 U.S.C.A. § 1162 reads in part: (a) "Each of the States or Territories listed . . . [Alaska, California, Minnesota, Nebraska, Oregon] have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . 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."

Arizona; where the State chose *only* to exercise criminal jurisdiction relating to air and water pollution. Yet five states - Washington, Montana, Arizona, North Dakota, and Utah - have not amended their state constitutions and, consequently, their claims of jurisdiction are subject to legal challenges. *Id.*

2. This Court Should Hold that Public Law 280 Fails to Vest Oregon with Proper Criminal Jurisdiction for all Violations of §§ 358, 390 Because the Statutes are Merely Regulatory

The landmark case concerning the scope of Public Law 280 is *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, Riverside County and the State of California moved to subject the Cabazon and Morongo Bands of Mission Indians to regulation of their Bingo and poker games that the tribes were conducting on their tribal lands. *Id.* at 202. The tribes moved for declaratory action against the County and State, seeking to prevent enforcement of any gaming law imposed upon the tribes by California through Public Law 280. *Id.* On review, this Court adopted the criminal/regulatory dichotomy and articulated a determinative test: "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209.

After *Cabazon,* the Minnesota Supreme Court sculpted a more narrow and specific two-part test in *State v. Stone*.

> "The first step is to determine the focus of the Cabazon analysis. The broad conduct will be the focus of the test unless the narrow conduct presents substantially different or heightened public policy concerns. If this is the case, the narrow conduct must be analyzed apart from the broad conduct. After

> identifying the focus of the Cabazon test, the second step is to apply it. If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory. In making this distinction in close cases, we are aided by Cabazon's 'shorthand public policy test,' which provides that conduct is criminal if it violates the state's public policy."

State v. Stone, 572 N.W.2d 725, 730 (Minn. 1997).

It is the Respondent's position that the case at bar is most analogous to *California v. Cabazon*. Although the Respondent recognizes the lower court's appropriate resolution of two of the three counts, it is the Respondent's contention that any and all counts relating to Or. Rev. Stat. §§ 358 and 235 *regulate conduct and permits* rather than *categorically prohibit acts*, and thus, cannot be construed as a criminal statute. Therefore, this Court should apply the *Cabazon* test to determine the category of statutes that are in question.

Under the *Cabazon* test, the statutes in question allow for a broad range of conduct, including the activities that Captain was charged with pursuant to a permit. (Although the trial record lists a range of statutes under which Captain was charged, the sole conviction for damaging an archeological site, and a cultural and historical artifact purports to cite to ORS 358.920 ("Conduct Prohibited"). Or. Rev. Stat. Ann. § 358.920 reads, "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." The plain language of 358.920 provides criminal penalties *unless* a proper permit is obtained by the remover or modifier of the property in question. It is commonsensical that criminal acts generally prohibit conduct (e.g. driving under the influence of alcohol) and do not incorporate the affirmative defense of licensure/permit within the statute itself. The licensure statute cited by 358.920, that absolves a would-be defendant of liability, 390.235 (c), states that

> "No permit shall be effective without the approval of the state agency or local governing body charged with management of the public land on which the excavation is to be made, and *without the approval of the appropriate Indian tribe*."

Or. Rev. Stat. Ann. § 390.235 (West) (emphasis added).

In applying either of the *Cabazon* or *Stone* tests, Thomas Captain should have his conviction reversed for violation of a purported criminal statute that is truly regulatory. The statutes involved, Or. Stat. 358 and 390 are codified in Oregon's titles "Parks and Recreation and Archaeological Objects and Sites, respectively. These titles are to be differentiated from title 16, "Crimes and Punishments". Although the Respondent recognizes that a portion of Section 358 includes a criminal section, the plain language of the statute seeks to prevent a person from removing or damaging another's property or State property without the owner's consent. Additionally, there are numerous exceptions that proscribe the process for obtaining a proper permit to remove objects. Some of these exceptions actually require the landowner's consent. If the intent of the Oregon State Legislature is to criminalize *others* from taking, moving, selling, or destroying property, then it is contrary common law property rights and tribal sovereignty to forbid actual owners from using their property as they wish.

It is non-dispositive that the statute Thomas Captain was convicted of is titled "conduct prohibited" and classifies violations of Title 30, Chapter 358 as "Class B misdemeanors." Just because an otherwise regulatory law is enforceable by criminal, as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise total assimilation could be permitted. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987). Even under the simple *Cabazon* test, the statutes in question would have to violate Oregon's public policy. This is not the case because the intent of § 358 is merely regulating removal of objects from public property within Oregon.

The legislative intent is clear,

> "The Legislative Assembly hereby declares that: (1) Archaeological sites are acknowledged to be a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Oregon. As such, and their contents located on public land are under the stewardship of the people of Oregon to be protected and managed in perpetuity by the state as a public trust."

Or. Rev. Stat. Ann. § 358.910 (West) (emphasis added).

Therefore, because the state of Oregon's intent is to protect public property by requiring a permit to disturb a cultural or historical site, and seeks to heavily regulate the conditions of obtaining a permit (written consent of landowner, tribe, and state), 280 *cannot* vest these regulatory statutes with state criminal jurisdiction.

3. The Cush-Hook Tribe's Aboriginal Title Includes Federally Recognized Privileges That Preclude Oregon from Employing 280

The only way that anyone could take, use, modify, excavate, transfer, or sell any historical objects within Kelley Point Park would be with the Cush-Hook's express consent. However, because it is undisputed that Thomas Captain is a member of the Cush-Hook tribe, his only impediment to obtaining a permit would be a state agency that manages the land. Public Law 280 clearly expresses Congress's intent to *forbid* States from interfering with the property rights and privileges enjoyed by treaty or legislation.

> "(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 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."
>
> Public Law 280 codified at 18 U.S.C.A. § 1162 (b) (West).

Consequently, the State of Oregon lacks criminal jurisdiction to enforce or punish a legitimate Cush-Hook member to comply with §§ 358 and 390. Subsection (b) of 280 sets out Congresses intent to allow state jurisdiction, but *only* when it does not interfere with the superseding federal authorities listed or tribal property rights.

B. Respondent's Conviction for Damaging an Archaeological Site or Artifact is Against Public Policy

Assuming, *arguendo*, that Respondent's first proposition (and that of the lower courts) is affirmed regarding the Cush-Hook's aboriginal and superior title, Thomas Captain should have his conviction for damaging an "archeological site and cultural or historical artifact" reversed. General policy between the United States and the Indian tribes encourages tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885).

1. These Regulatory Statutes Encroach on Tribal Sovereignty Rights and Lack a Public Policy Justification for State Criminal Jurisdiction

If tribal autonomy and self-governance is vital, then criminalizing Thomas Captain's action to preserve a religious symbol carved by his ancestors under threat of vandalism should not be brought *ex rel* state prosecution. Instead, public policy dictates that a tribal member removing or "damaging" artifacts is best left to the tribe to adjudicate. Capatain's actions are clearly not that type of activity that endangers society or has a compelling governmental public-policy interest (*contrast with* The Major Crime's Acts: Violent crimes).

The legislative intent of §358 merely expresses concern with culture and heritage of archaeological sites and Oregonians enjoyment of them on *public land*. If § 358 and § 390 were intended by the legislature to apply to private lands, then the statutes should be amended to include such rationale. Otherwise, the statutes violate the fear of states encroaching on tribal sovereignty and creating the "total assimilation" that this very Court expressed in *Cabazon*, 480 U.S. at 211.

Because Thomas Captain was found not guilty of trespass and cutting timber without a permit, public policy also dictates that the act of removing the timber from his own land should not impose criminal liability. Although inconsistent verdicts are Constitutionally allowed, they have been recently disfavored. *Harris v. Rivera*, 454 U.S. 339, 346 (1981). "[A] verdict as to a particular count shall be set aside" as repugnant "only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury" *People v. Muhammad*, 959 N.E.2d 463, 467 (N.Y. 2011). Nevertheless, because the trial judge found that Thomas Captain could not have trespassed upon land that he had a superior property interest in (including timber rights), it seems counterintuitive that Captain could be convicted of a statute that requires permits regarding *public* land.

The statutes in question lack any legislative intent to criminalize the actions of a tribal member exercising his own autonomous property right. The underlying criminal action was brought upon the premise that Captain was a trespasser and took the Kelley Park's timber without a proper permit. The state and trial judge incorrectly relied upon Public Law 280 as an ultimate and limitless authority to criminalize tribal activity on tribal land. However, 280 has never been held by any court to confer regulatory jurisdiction, and is contrary to Congress's intention to respect Tribal sovereignty.

CONCLUSION

In conclusion, this Court should uphold the Cush-Hook's right to occupy its sacred homelands in the absence of any showing of Congressional intent to terminate that title. Ample evidence including expert testimony, the Journals of Lewis and Clark, and a treaty with Anson Dart all support a finding that the Cush-Hook owned their lands from time immemorial. The treaty with Britain, the Treaty of 1850, the Oregon Land Donation Act, and the unsubstantiated claim of the Meeks all leave their claim to aboriginal title intact. Thomas Captain's actions were made in good faith to protect his tribe's rightfully owned religious objects. Although Respondent agrees with the trial court's resolution of the trespass and timber permit violations, assertions of Public Law 280 for this regulatory conduct are contrary to Congress's intent and public policy. Finally, the principles on which this nation was founded and international human rights law support upholding the rights of the Cush-Hook to occupy their land today.

WHEREFORE, Respondent prays this honorable Court affirm the trial court's finding regarding the aboriginal title of the Cush-Hook Nation, and reverse Thomas Captain's conviction.

Respectfully Submitted,

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_____

Attorneys for Respondent, Thomas Captain