No. 11-0274

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

***Petitioners*,**

v.

THOMAS CAPTAIN,

Respondent and Cross Petitioner.

ON WRIT OF CRITIORARI
TO THE OREGON COURT OF APPEALS

BRIEF FOR THE RESPONDENT

TEAM 55
Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the Cush-Hook Nation owns the aboriginal title to the land in Kelley Point Park.

2. Whether Oregon has criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in question notwithstanding its purported ownership by a non-federally recognized American Indian Tribe.

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v.

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ON WRIT OF CERTIORARI
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FOR THE DISTRICT COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. STATEMENT OF THE PROCEEDING

The State of Oregon brought criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological

and historical site under Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (historical materials). Respondent consented to a Bench trial.

The district court found that Congress erred in the Oregon Donative Land Act when it described all the lands in the Oregon territory as being lands of the United States. The Cush-Hook nation's aboriginal title has never been extinguished because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook nation for it's land and therefore the Cush-Hook Nation owns the land under aboriginal title. Further, Or. rev. Stat. 358.905-358.961 *et seq.* and Or. rev. State. 390.235-390.240 *et seq.* apply to all lands in the sate of Oregon under PL 280 whether they are tribal lands or not. The district court found him guilty for violating the statute and was fined $250.00.

Both Petitioner and respondent appealed the decision. The Oregon Court of Appeals affirmed without writing a brief and the Oregon Supreme Court denied review.

2. STATEMENT OF THE FACTS

The Cush-Hook Nation has occupied the area located at the confluence of the Columbia and Willamette Rivers since time immemorial. Traditionally, they have adapted to this area by subsisting on wild plants as well as wild game and fish. Additionally, they have developed agricultural practices and grew some crops along with the other forms of subsistence. They maintained this lifestyle from a time of pre-contact with Europeans. The first recorded contact with Europeans came in April of 1806 with the expedition of Lewis and Clark. William Clark of the expedition recorded information about the Cush-Hook Nation's governance, religion, culture, housing, agricultural and hunting and fishing practices. Additionally, Clark gave the Cush-Hook Nation headman a President Thomas Jefferson

peace medal during the encounter. The medal was often said to symbolize recognition by the Untied States of tribes that were given the medal.

Nearly 50 years later, the nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon territory. The treaty was for a removal of the Cush-Hook Nation from their ancestral homeland to an area 60 miles westward to a location in the foothills of the Oregon coast range of mountains. The benefits of the treaty for the Cush-Hook Nation included compensation for the ancestral homeland and an ownership of the newly occupied land along the Oregon coast. In 1953 the United States Senate refused to ratify the Cush-Hook treaty. The treaty remained ungratified to this day and the Cush-Hook Nation has never been formally recognized as Indians by the United States.

Two American Settlers occupied the land from which the Cush-Hook Nation relocated. The Settlers ultimately received fee simple titles to the land from the United States under the Oregon Donation Land Act of 1850. Under the act, fee simple title was to be given to settlers who had "resided upon and cultivated the [land] for four consecutive years." The two American settlers however did not cultivate or live on the land for four consecutive years. The descendents of the settlers sold the land to Oregon and Oregon created Kelly Point Park.

Thomas Captain is a Cush-Hook citizen. In 2011 he moved to Kelly Point Park and occupied the park as a means to assert the Cush-Hook Nation's ownership of the land. He also sought to protect culturally and religiously significant trees from vandals that had recently defaced the images. Thomas cut a tree down and removed an image from the tree. State troopers arrested him and sexed the image as he was returning to the tribe's new inhabitance along the coastal mountain range.

The State of Oregon brought Criminal action against Captain for trespass on state lands, cutting timber in a state park without a permit and desecrating an archeological and historical site under and Oregon State law.

ARGUMENT

I. THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLY POINT PARK.

Indigenous populations in North American have maintained strong ties to the land for centuries. This held true even after the moment of European contact. The tribal homelands of Indigenous peoples were central to an established way of life. Maintaining the ties to the land was often essential to supporting and preserving cultural customs. Because of the importance of maintaining a tribal homeland, indigenous populations have long-maintained a desire in keeping an occupancy interest on that land.

The desire from Indigenous populations to have an occupancy interest in their traditional tribal homelands has been a factor in this issue being addressed by this Court. This Court has long since recognized that the United States has accepted the notion that Indigenous populations have controlled an occupancy interest in certain land as part of "aboriginal title." First addressed by this Court in *Johnson v. M'Intosh*[1], this Court stated that the right of Indigenous populations to possess the land they had occupied at a time of contact and conquest had never been in question. The Indian tribes maintained that right of possession. And while the court held that the conquering sovereign has the complete ultimate title, and that any other claim of title to the land was subject to the right of Indian

[1] 21 U.S. 543, 603 (1823).

occupancy.[2] This right of occupancy has become known as "aboriginal title" or "original title." This court, in *Tee-Hit-Ton Indians v. United States* further establishes the notion of aboriginal title.[3]

In order for an Indian tribe to claim that it has aboriginal title to certain lands, the Indian tribe must show that it has exclusive use and occupancy of that land for a long period.[4] This court has determined that "occupancy necessary to establish aboriginal possession is a question of fact."[5] This court has also held that a showing that land is a tribe's ancestral home is sufficient to determine that the tribe occupied the land exclusively. [6]

A. The Cush-Hook Nation historically had exclusive use and occupancy of the land in Kelly Point Park for a length of time that is sufficient for maintaining aboriginal title.

Although aboriginal title can be created by recognition by the United States government, that is not the only means by which aboriginal title can be said to exist. In the United States, a tribe owns aboriginal title to land if, at the time of conquest, it had exclusive and continuous use and occupancy of that land for a long time. [7] This Court established that "Indian possession or occupation was considered with reference to their habits and modes of life."[8] The United States Court of Claims, the court that historically had the authority to determine whether a tribe had aboriginal title has further established that the Indian occupancy must be "in accordance with the way of life, habits, customs and usages of the

[2] *Id.* at 562.
[3] 348 U.S. 272, 279 (1955).
[4] *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Mitchel v. United States*, 34 U.S. 711, 713 (1835)

Indians who are its users and occupiers."[9] This court and others have held time and time again that when an Indian tribe has demonstrated a requisite exclusive and continuous occupation of a land the Indian tribe owns a right of aboriginal title.

This court, in *Santa Fe Pac. R. Co.*[10] held that tribal claim of aboriginal title does not need to be "based upon a treaty, statute, or other formal government action."[11] In the same case, this court opted to "respect the Indian right of occupancy" and held that the Walapais tribe of Indians maintained a claim of aboriginal title because of their exclusive occupancy of the land in question. This court, as a question of fact, determined that the land in question was in fact the Walapis ancestral home which met the requisite exclusive and continuous use and occupancy for aboriginal title.[12]

In *Mitchel v. United States*, this court in weighing the use and occupation of land by Indians, took into account the Indian tribe's "habits and modes of life."[13] The court considered a tribe's desire to use the land in a manner that was consistent with traditional tribal customs and practices sufficient usage and occupancy. Even if the tribe did not use the land in the same manner as a non-Indian occupier would, that was not to mean that the Tribe was not occupying and using the land in manner sufficient to develop a right of occupancy. Although this court in *Mitchel* ultimately did not find aboriginal title on the land in question, the issue turned on the fact that the specified pieces of land were not being used at all. It stands to reason that if the tribe were using and occupying the land, "their rights to its

[9] *Sac & Fox Tribe of Indians of Okl. v. U. S.*, 383 F.2d 991, 998 (Ct. Cl. 1967)
[10] *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).
[11] *Id.* at 347.
[12] *Id.* at 360.
[13] *Mitchel, 34 U.S. 711, 713, (1835).*

exclusive enjoyment in their own way and for their own purposes" would have been upheld.[14]

In addition to this court, the United States Court of Claims, historically an arbiter of many cases involving whether a tribe maintains aboriginal title, has recognized that aboriginal title may come from an Indian tribe's traditional and customary use of land. Getting guidance from this court in cases like *Mitchel and Johnson*, the Court of Claims has repeatedly offered opinions that uphold aboriginal title for Indian tribe's traditional and customary use of the land. The Court of Claims in *Sac & Fox Tribe of Indians of Okl.* held that the Sac and Fox tribe's use of that land in question was continuous even though it was not constant because there was evidence that the tribe used the land during certain parts of the year, i.e. wintering grounds.[15] The Sac and Fox tribe did not settle on or otherwise occupy all of the land in question at all points throughout the year. However, because it seemed well known that they used the land in question consistently during specified periods of the year, the Court of Claims found allowed that to show they had exclusive and continuous use of the land.[16]

Like in *Santa Fe Pac. R. Co.*, the Cush-Hook has occupied that land in question since pre-contact. In the instant case, the record shows that the court below has determined from expert witness that the Cush-Hook Nation of Indians have occupied, used and owned the lands in question before the arrival of the Euro-Americans. This Court has held that an ancestral home of a tribe of Indians was sufficient to show the requisite exclusive and continuous use and occupancy for aboriginal title. This Court should consider the land in Kelly Point Park as part of the ancestral homeland for the Cush-Hook Nation and because of

[14] *Id.*
[15] *Sac and Fox Tribe of Indians of Okl.* 383 F.2d 991, 997 (Ct. Cl. 1967).
[16] *Id.*

that the Cush-Hook Nation should be determined to have aboriginal title of the land in question.

Additionally, at the time of contact with Europeans, the Cush-Hook Nation had used the land in question in a manner that was traditional and customary to their way of life. This is evidenced by their use of the land. The Cush-Hook nation had developed a traditional sustenance of wild plants, game and fish that are native to the area. Additionally, the tribe had developed agriculture by growing crops that thrived in the environment of present-day Oregon. Further, the Cush-Hook Nation had even incorporated the natural environment into their traditional spiritual beliefs by craving sacred totems and religious symbols into living trees. The ways that the Cush-Hook Nation has incorporated and used the land is indicative of the way they lived their lives prior to contact with the Europeans. In fact, this way of life was maintained for decades after their initial contact with the European explorer William Clark. Like in *Mitchel,* their use of the land points to use that was traditionally and of custom for their social, spiritual and political structure. There is nothing to indicate that the ancestral home of the Cush-Hook Nation had been left unused or unoccupied by them prior to the time of relocation.

Finally, in addition to the agriculture practices the Cush-Hook Nation utilized there is evidence that the tribe had set up a permanent village in the area of the land in question where members of the tribe lived. The agricultural practices and permanent village point to a use that is far greater than intermittent. It would seem then that the Cush-Hook Nation used the land in question for more than specific seasons on the year like the tribes in *Sac & Fox Tribe of Indians of Okl.* Because the use of the land was more than the use of the of the land by the Sac and Fox Indians, and the Court of Claims reasoned that seasonal use was

sufficient for requisite occupancy, the Cush-Hook Nation's continuous use would also be considered sufficient exclusive use and occupancy.

Because the land in question had been inhabited and used by the Cush-Hook Nation since a time long prior to European contact, and because they used the land exclusively in a manner that was traditional and consistent, the Cush-Hook Nation should be found to have maintained aboriginal title of the land in question.

II. THE CUSH-HOOK NATION CLAIM OF ABORIGINAL TITLE WAS NOT EXTINGUSHED BY THE TRIBE OR FEDERAL GOVERNMENT.

It has long been established that the United States has the power to extinguish aboriginal title. This can be done by Congress or may be done by an authorized and ratified Presidential act. In *Johnson v. McIntosh*, this court adheres the principles of the doctrine of discovery that gives the discovering sovereign the power to extinguish aboriginal title by purchase, treaty or conquest.[17] The *Johnson* case held that the extinguishment of aboriginal title is not justiciable. This Court in *Buttz v. Northern Pac. R. Co.* this court further affirmed that the "manner, time, and conditions of its extinguishment were matters solely for the consideration of the government. . . ."[18] However, if a government intends to extinguish Indian title, it must be clear in its intention. Ambiguous intentions will be ruled on in favor of the Indian tribes and not the federal government.[19]

In addition to the exclusive authority of the government to extinguish aboriginal title, this court in Cherokee Nation v. State of Ga. acknowledged that Indian tribes are allowed to

[17] *Johnson*, 21 U.S. 543, 587 (1823).
[18] *Buttz v. N. Pac.* R. Co., 119 U.S. 55, 66 (1886).
[19] *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

extinguish aboriginal title through voluntary cession to the government.[20] Voluntary cession to the government is not be inferred lightly. There must be a plain intent on the tribe's part to voluntarily cede their land and extinguish aboriginal title. Any ambiguities arising from a lack of clear and plain intent are to be ruled in favor of the Indian tribes and not the government.[21]

This Court in *Johnson*, established that the government, in adherence with the doctrine of discovery may extinguish Indian title. And it may do so in a number of ways. The ways outlined by this court are through treaty, purchase or conquest.[22] In *Johnson*, the chain of title of the land in question began with the United States.[23] Although the Indian tribes did not own title to the land, they did have a right of occupancy. This right was not to be extinguished unless the United States compensated the tribes, entered into a treaty with the tribes, or conquered the tribe outright.[24] Barring those or voluntary cession, which this court addresses in other situation, the aboriginal title, or an otherwise right of occupancy, remains intact. Additionally, this Court in *Buttz*, further establishes that the authority to extinguish Indian title remains and exclusive authority of the United States.[25]

While the United States has an exclusive authority to extinguish Indian title, if the government wishes to do so, it must be clear in its intention. In *Choate,* this court used the rule of construction as it relates to Indian law to distinguish between situations that might be more narrowly construed.[26] This court pointed out that in Indian law cases, the construction

[20] *Cherokee Nation v. State of Ga*., 30 U.S. 1, 2 (1831).
[21] *Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941).
[22] *Johnson*, 21 U.S. 543, 587 (1823).
[23] *Id.*
[24] *Id.*
[25] *Buttz,* 119 U.S. 55, 66 (1886).
[26] *Choate,* 224 U.S. 665, 675 (1912).

of ambiguous statutes, laws or other forms of administrative construction are to be resolved in favor of the Indian tribes, and not the federal government.[27]

Further, this court in *Cherokee Nation*, established that Indian tribes may voluntarily cede original title, or the right of occupancy on specified land to the government.[28] This voluntary cession would still be considered an extinguishment of Indian title. Barring this and the other methods outlined in *Johnson*, aboriginal title would not be extinguished. Additionally, this Court in *Santa Fe R. Co.*, assed whether the Walapai tribe had a clear intent to abandon their ancestral homeland and give up aboriginal title. This court found that the Walapai tribe did not have a clear intent of giving up their homeland. The court considered the facts of the case to be forcible removal to a reservation and this did not constitute as intent to extinguish aboriginal title.

In the instant case, the Cush-Hook Nation maintained the occupancy of their ancestral homeland up until 1850. In 1850, the Cush-Hook Nation moved from their homeland to an area 60 miles westward to a portion of the Oregon coast range. The move was prompted by the tribe's agreement to enter into a treaty with the United States government at the request of Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. The United States Senate refused to ratify the treaty signed by the Cush-Hook Nation. Therefore the United States neither purchased nor entered into a treaty with the Cush-Hook Nation in order to extinguish aboriginal title of the lands in question.

Additionally, the United States did not enter into a conflict with the Cush-Hook Nation and aboriginal title was not extinguished by conquest. None of the methods of

[27] *Id.*
[28] *Cherokee Nation*, 30 U.S. 1, 2 (1831).

extinguishment as outlined in *Johnson* are present and there is otherwise no clear intent from the United States to extinguish aboriginal title of the land in question. Even though a government agent, Anson Dart, negotiated with the tribe for their removal, this action is not without ambiguity. Because this action is ambiguous, it would be resolved in favor of the Cush-Hook Nation and they should retain the aboriginal title for their ancestral homeland.

Although the Cush-Hook Nation agreed to move 60 miles westward, dealing prompted the move with a government agent. The Cush-Hook Nation was under the impression that they were going to be entering into a legally binding treaty with the United States. Had the treaty been ratified and fulfilled, the Cush-Hook Nation would have received compensation for the ancestral homeland they left behind. Although the Cush-Hook Nation were willing to enter into the treaty voluntarily, without the promised compensation, the voluntariness of the move becomes ambiguous. Because the intent of the Cush-Hook Nation is ambiguous, this matter should be resolved in favor of the Cush-Hook Nation.

The Cush-Hook Nation was not compensated for the lands they left. They were led away under the promise of rights to another parcel of land and compensation for the land they left behind. Because there is no indication that the government wanted to extinguish aboriginal title, nor is there any clear indication that the Cush-Hook Nation wanted to extinguish aboriginal title, the aboriginal title of the Cush-Hook aboriginal homeland remains in place.

III. PUBLIC LAW 280 DOES NOT AUTHORIZE STATES TO REGULATE INDIAN CULTURAL AND RELIGIOUS OBJECTS ON TRIBAL LANDS

A. Public Law 280 and Inherent Tribal Sovereignty.

Indian Tribes are self-governing political communities whose original sovereignty predates that of the United States. Therefore, Indian tribes have long been recognized a "domestic dependent nations," vested with inherent tribal sovereignty.[29] Self-governing powers of tribes are not federally delegated, but derive from aboriginal possession and occupancy; therefore, tribes maintain a self-governing political status that predates the European settlement of the Americas. *See Johnson v. M'Intosh,* 21 U.S. 543, 573 (1823) (explaining the "discovery doctrine"); and *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896) (holding that the Due Process Clause of the Fifth Amendment does not diminish or alter tribal sovereignty as possessed by the Indians before the U.S. Constitution was written).

This Court has interpreted incidents of inherent tribal sovereignty, which include: (1) the power to "regulate their internal and social relations; (2) sovereignty immunity from suit; and (3) the power to prescribe laws for their community and enforce these laws against their members.[30] Inherent tribal powers of self-government are not subject to judicial defeasance, and remain unless expressly limited or extinguished by Congress through treaty or statute. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

During the "Termination Era," Congress enacted Public Law 280, 18 U.C. § 1162, which unilaterally imposed state jurisdiction over tribal lands. Public Law 280 grants certain States civil and criminal jurisdiction over Indian affairs that occur on tribal lands within the state's boundaries. Public Law 280 transfers federal civil and criminal jurisdiction "over offenses committed by or against Indians" within Indian Country to the six mandatory states,

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[29] *See Cherokee Nation v. Georgia,* 30 U.S. 1, (1831) (declaring that the Cherokee Nation is in fact "a distinct political society, separated form others, capable of managing its own affairs and governing itself").

[30] *See United States v. Kagama*, 118 U.S. 375, 382 (1886); *Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); and *United States v. Wheeler*, 435 U.S. 313, 323-34 (1978).

which include Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. §1162.

Congresses' primary concern and Public Law 280's main focus was to address the problem with lawlessness on reservations and lack of adequate tribal courts. Public Law 280 did, however, grant certain Indian Reservations within the designated areas and exemption from state jurisdiction because their systems of law enforcement "function[ed] in a reasonably satisfactory manner."[31] Congress was willing to exempt those reservations from state jurisdiction where the problem Public Law 280 intended to solve were not an issue. In Oregon, under Public Law 280, the only "Indian Country" over which Congress expressly reserved federal jurisdiction was on the Warm Springs Reservation. 18 U.S.C. 1162(a). Although the Cush-Hook Nation was not included, this does not automatically grant Oregon criminal jurisdiction on Indian land. Public Law 280 still has many limitations, which prohibit state law from obtaining jurisdiction over tribal land.

B. Oregon's Criminal Statute is a Civil Regulatory Law in Nature and Therefore May Not Be Applied to Tribal Land Under the Authority of Pubic Law 280.

Public Law 280 grants state courts the jurisdiction to apply state law in the adjudication of private claims involving Indians, but the state cannot use its courts to enforce violations of state regulatory law. *Bryan v. Itasca County*, 426 U.S. 373 (1976). The landmark decision in *Bryan,* this Court held that Public Law 280 did not confer general civil regulatory power over tribes. The issue in *Bryan* was whether section four of Public Law 280

[31] Emma Garrison et.al. *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy and Trump Tribal Sovereignty*, 8 J. Gender Race & Just. 449, 3 (2004).

constituted congressional consent for states to tax reservation Indians. The Supreme Court in *Bryan* stands for the proposition that Public law 280 does not confer jurisdiction upon a state if the underlying law is regulatory in nature. *Id.* at 389.

Regulatory powers in Indian country are limited. In *Bryan*, this Court interpreted Public Law 280 as not authorizing a state to impose its "civil/regulatory" laws within Indian county. This Court specifically held that state "civil/regulatory" laws were not included *within* Public Law 280's grant of jurisdiction. *Id*. at 384. In *Bryan,* this Court held that Public Law 280 did not authorize Minnesota's attempted taxation and whatever powers of taxation or regulation states have in Indian County must be derived from some other source; therefore, Public Law 280 confers not such authority. *Id.* at 388. This is similar to *U.S. v. Menominee Indian tribe of Wisconsin*, 694 F. Supp. 1373 (E.D. Wis. 1988), wherein the court recognized that Wisconsin could not enforce its gambling laws on the reservation through Public law 280; rather, the general laws of the United States applied to the reservation.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987), this Court determined that California's bingo statute was "civil/regulatory" in nature because it generally permitted bingo, subject to certain regulations. The test first applied in the Ninth Circuit and later adopted by the Supreme Court called for a distinction between "criminal/prohibitory" laws and "civil/regulatory" laws. This Court made the distinction between "criminal/prohibitory" laws and state "civil/regulatory" laws and stated:

> [I]f the intent of state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state lawn generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and

Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the state's public policy.[32]

This Court accepted the view of the Ninth Circuit and held that the statute and ordinance on bingo and other forms of gambling were in fact regulatory in nature. Further the this Court in *Carbazon*, held that event though someone who violated the bingo statute could be charged with a misdemeanor, this Court determined that California's bingo statute was "civil/regulatory" in nature because it generally permitted bingo, subject to certain regulations. *Id.* at 211. Although a regulatory law may add criminal penalties when violated, it does not automatically "convert it into a criminal law enforceable on an Indian reservation pursuant to Public Law 280." *Id.* at 209. This Court in *Carbazon* held, in essence, that to be enforceable under Public Law 280's grant of criminal jurisdiction, the law must prohibit, rather than regulate, the conduct at issue. *Id*. at 211.

Both the Or. Rev. Stat. §§ 358.905-358.861 and Or. Rev. Stat. §§ 390.235-390.240 are regulatory in nature and therefore falls outside the scope of Public Law 280. Or. Rev. Stat.§ 390.235 (1)(a) states, "a person may not excavate or alter any archaeological site on public lands…without first obtaining a permit." Further, Or. Rev. Stat. § 358.920(1)(a) provides that, " a person may not excavate, injure, destroy, or alter an archaeological site or object or remove and archeological object located on public land…unless… by a permit…." Here, both Or. Rev. Stat. § 390.235(1)(a) and Or. Rev. Stat. § 358.920(1)(a) allows for excavation or removal of religious, archeological, or historical material provided that a permit is sought and approved. This is similar to the issue in *Carbazon*, in which bingo was generally permitted subject to certain regulations. Although Or. Stat. § 390.235 is a

[32] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

misdemeanor, it generally allows for the conduct provided a permit is sought. Here, the Oregon statutes attempt to regulate rather than prohibit removal of archeological objects; therefore Public Law 280 does not grant Oregon criminal jurisdiction. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). Without Public Law 280, the Oregon statutes fail to grant criminal jurisdiction to the land owned in aboriginal title by the Cushing-hook Nation and therefore Oregon does not retain criminal jurisdiction on tribal land.

IV. OREGON STATUTE IS EXPRESSLY PREEMPTED BY THE NATIVE AMERICAN GRAVES REPARATION ACT

States may regulate within native territory only when state control is not preempted by federal law. Preemption is determined largely through a balancing of tribal, federal, and state interest, or when state control does not infringe upon tribal sovereignty. In *Bryan*, this Court applied cannons of statutory construction and held that state laws generally are not applicable on Indian reservations except where Congress has expressly provided that they shall apply. *Bryan v. Itasca County*, 426 U.S. at 377. Absent express congressional grant of jurisdiction, such as that found in Public law 280, a State may nonetheless exercise jurisdiction over on-reservation activities by tribal members if "exceptional circumstances" exist and federal law does not preempt state jurisdiction. *See State v. Jones*, 729 N.W. 2d 1 (Minn. 2007).

Here, in this present case federal law preempts state law and there are no "exceptional circumstances " which apply. To permit the States to restrict possession of tribal cultural objects by a tribal member on Indian land would directly impede and hinder the

Congressional purposes for which these laws were enacted. *See New Mexico v. Mescalero Apache Tribe*, 426 U.S. 324, 344 (1983) (holding "State jurisdiction is pre-empted by the operation of federal law if it *interferes with or is incompatible with federal and tribal interest reflected in federal law*…") (Emphasis added).

A. The Native American Graves Protection and Repatriation Act Preempts Oregon Statutes that Control the Uses of, and to Protect, Archeological, Cultural, and Historical Objects on Indian Land.

The Oregon Donative Land Act of 1850 did not extinguish title and therefore the Cushing-Hook Nation retained aboriginal title, thus making it "Indian land." Under Or. Rev. Stat. §358.920 (1)(a), a person may not "excavate, injure, destroy or alter an archaeological site or object or remove an archeological object located on public lands in Oregon unless that activity is authorized by permit…." In *State v. Holloway*, 138 Or. App. 260, 267 (1995), the Oregon Court of Appeals stated that Or. Rev. Stat. §358.905(1)(j) defines public lands to mean "any land owned by the State of Oregon, a city, country, district or municipal or public corporation in Oregon." Because the statute only applies to "public lands" owned by a unit of state government, it does not extend jurisdiction onto Indian land owned through aboriginal title.

Since Oregon does not have criminal jurisdiction to control the use of, and to protect, archaeological, cultural, and historical objects on land owned in aboriginal title, ***on Indian land***, federal law still applies. The Federal statute on point is the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, (NAGPRA). The NAGPRA prohibits the intentional excavation or removal of Native American human remains and

objects from ***federal or tribal lands*** unless done pursuant to a permit. 18 U.S.C. § 1170(b). The NAGPRA only applies to violations on federal or Indian land. *See Castro Romero v. Becken*, 2001 WL 726422 (5th Cir. 2001) (holding that claims of violations of NAGPRA with regard to human remains found on municipal land in connection to a golf course did not warrant the statutes protection).

To be recognized as "Indian country", usually the land must be within an Indian reservation, dependent Indian community or federal trust land. 18 U.S.C. 1151(b). In *U.S. v. Sandoval*,231 US 28 (1913), this Court ruled that Pueblo tribe lands in New Mexico are "Indian country." In *U.S. v. McGowan*, 302 U.S. 535 (1938), this Court ruled that Indian colonies in Nevada are also considered "Indian country" and noted that the colony was (1) under the superintendence of the federal government; (2) the government retained titled to the land; and (3) the government had authority to enact regulations and protective laws for the lands. *Id.* at 539. This was later codified in 18 USC 1151(b) as "dependent Indian communities," which is land that is federally supervised and which have been set aside for the use of Indians.

Here, the land is owned by the Cush-Hook Nation in aboriginal title. The Cush-Hook Nation retains a right to occupancy, which the sovereign protects against intrusion by third parties; and these possessory rights, until extinguished, must be safeguarded from intrusion. The land owned by the Cush-Hook Nation meets the requirements for the classification as independent Indian communities, therefore it falls under "Indian land" and NAGPRA applies.

Further, Congress may preempt state authority by stating it in express terms. *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, 461

U.S. 190, 203 (1983). In *Pacific Gas,* this Court stated that Congress' intent to supersede state law altogether may be found 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 reveal the same purposes." *Quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 102 U.S. 3014, 3022 (1982*); Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). This Court further noted that 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. *Pacific Gas & Electric*, 461 U.S. 190 at 403. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 324 (1983) (holding that "state jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law").

Here, to apply Oregon criminal jurisdiction would directly conflict with federal law under 25 U.S.C. § 3013, NAPGRA, which specifically provides for enforcement for such violations with archeological, cultural, and historical objects occurring on federal or Indian land. The NAGPRA states, "the U.S. District court shall have jurisdiction over any action brought by any person alleging a violation of this [act]." Since the NAGPRA applies to Indian land, and federal interest is dominant which precludes state law on the same subject, Oregon law is preempted by the federal statute of NAGPRA. Therefore, Oregon does not retain criminal jurisdiction to control the uses of, and to protect, archeological, cultural, and historical objects on the land in question.

V. PUBLIC LAW 280 AND THE NATIVE AMERICAN GRAVES REPARATION ACT LIMITS ENFORCEMENT OF STATE LAWS THAT INTERFERE WITH AND REGULATE TRIBAL PROPERTY

A. Right to Possession Under Public Law 280.

Another exception to state criminal and civil jurisdiction under Public Law 280 is the right to possess communal property. The purpose of these provisions is to preserve the trust status of Indian property and to protect Indian treaty rights. The exception to federal government ownership arises only if the items are located on tribal land, which creates a presumption of ownership in the tribal owner. *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203 (1983). Public Law 280 includes explicit limitation of state authority, precluding the "alienation encumbrance, or taxation or any real or personal property" belonging to any Indian or any Indian tribe, band, or community, as well as the enforcement of state laws that regulate the use of tribal property "in a manner inconsistence with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 18 U.S.C. § 1162(b); 28 U.S.C.A. § 1360(b).

It has been generally held that ownership of the objects contained on real property passes with the title of that real property. *Dillon v. Antler Land Co.,* 507 F. 2d 940 (9th Circuit. 1974). So there is a strong argument that title to religious and cultural objects found on private property would apply to any land, which was owned in fee by Native Americans. *Id.* at 944. Here, applying *Dillon,* since the land belongs to the Cush-Hook Nation through aboriginal title, the title to the tribal property would pass to tribal members of the Cush-Hook

Nation through the theory of communal property. Thus, Thomas Captain retains possessory interest in the carved images.

Generally, communal property is that which belongs to the community as a whole; no individual has a private right to it and the community holds it in trust.[33] In *Journeycake v. Cherokee Nation*, 155 U.S. 196, 217 (1894), the U.S. Court of Claims characterized and framed a definition of communal property:

> The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property…as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs, but as communal owners.[34]

The Court in *Journeycake* went on further to state that "if the lands of the Nation were and are the common property of citizens, then no citizen can be deprived of his or her right and interest in the property without doing an injustice, and without a violation of the Constitution, which we are equally bound to observe and defend." *Journeycake*, 155 U.S. 196 at 217.

Further, the court in *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), applying Oregon state law, held that despite the fact that Klamth Indians had elected to withdraw from the tribe pursuant to the Termination Act and sell their interest in tribal property in exchange

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[33] John Moustakas, *Group Rights in Cultural Property: Justifying Inalienability*, 74 Cornell L. Rev. 1179, 1195 (1989).

[34] *Journeycake v. Cherokee* Nation, 28 Ct.Cl. 281 (1893), aff'd 155 U.S. 196 (1894).

for money; nonetheless, they still retained their treaty rights to hunt, trap, and fish free of state regulations on their former Indian land. *Id.* at 569. The court relied in part on the portion of 18 U.S.C. § 1162 that provides that nothing in the grant of criminal jurisdiction would "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." Because Congress refused to ratify the treaty and to compensate the Cush-Hook Nation, the Cush-Hook Nation still retained aboriginal title and therefore are entitled to the protections under 18 U.S.C. § 1162, which prohibits enforcement of state laws to regulate tribal property.

In *Chilkat Indian Village v. Johnson*, 643 F. Supp. 535, 536 (D. Alaska 1986), aff'd, 870 F.2d 1469 (9th Cir. 1989), the court stated that the Chilkat Indian Village Council members retained a "paramount possessory interest" in four carved wooden posts and wooden partition known as a rain screen. The main issue in this case was jurisdictional and the case was ultimately dismissed on jurisdictional grounds since the Village's claim for conversion was a matter of state law. *Id.* at 1472-73. The court further held that the enforcement of the tribal ordinance against a non-Indian was held to be a matter of federal law and falls within federal jurisdiction; however, the enforcement against the Indian defendants arose under tribal law. *Id*. at 1475-76.

The dissent in *Chilkat* focused on the communal aspect of the tribal member's possessory interest. The dissent by Judge Ferguson, which focused on the entitlement to Native American cultural property, described the village owned communal property as "playing a central role in the spiritual, cultural, and social practices of the Chilkat tribal members. Thus, these artifacts implicate important Indian and federal interest which provide

a federal foundation." *Id*. at 1474-75. Here, applying the rational from the dissent, the carved images were of cultural and religious value and sacred to the Cush-Hook Nation. Thomas Captain retain possessory interest in his tribes cultural objects through communal ownership, and he had a duty to preserve, restore, and protect the cultural items from being vandalized. When no one (federal or state) steps in to take ownership and protect these sacred items, the tribe and it's members must step in to preserve their cultural objects and that's exactly what Thomas Captain did.

B. Right to Possession Under the Native American Graves Reparation Act.

Under the NAGPRA, Native American cultural items discovered that have been excavated or discovered intentionally or inadvertently, are subject to the "ownership and control" provisions of the Act. Under §3002(a)(2)(c)(1), the act provides ownership "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribes state a claim for such remains or objects." Under this statutory scheme, the ownership or control of the cultural objects remains with the lineal descendants of the Native American who has left them. Further, for sacred objects of patrimony, the NAGPRA develops a similar scheme for determining which tribe has the closest relationship, and hence the strongest entitlement to the items. *Id*.

Further, it has been held that an "Indian tribe" is defined in and protected by the NAGPRA need not be defined as a "tribe" by the Secretary of the Interior under other statutes to be entitles to the acts protection. 25 USCA §3001(7). In *Abenaki Nation of Mississquoi v. Hughes*, 990 F.2d 729 (2d Cir. 1993), the court stated that the NAGPRA, 18 USC § 3001(7), defines "Indian tribes" much more broadly than other federal statues,

including therein not only governmentally defined and listed tribes, but also any other "organized group or community of Indians…which is recognized as eligible for the special programs and service by the united states to Indians because of their status as Indians."

In order to be in violation of the this statute, 18 USC §1170, penalizing trafficking in Native American human remains and cultural objects as a criminal offense, the government must prove that the object was (1) not owned by an individual Native American; (2) that could not be alienated, appropriated, or conveyed by an individual; and (3) has an ongoing historical, traditional, or cultural importance central to the Native American group. *U.S. v. Corrow*, 119 F. 3, 796 (1997).

Here, since Thomas Captain was a member, and/or direct lineal descendent of the Cushing-Hook Nation, he retained communal property possessory interest in the three hundred year old carved images. Applying Public law 280 or NAGPRA, Thomas Captain retained possessory interest in the carved images and therefore Oregon does not retain state criminal jurisdiction to regulate and control Indian property on tribal land. Thomas Captain was protecting and preserving his tribe's cultural objects and not attempting to sell or market the objects. Thomas Captain was a communal owner of Indian property and therefore should be afforded the protections under 18 U.S.C. § 1162, which prohibits enforcement of state laws to regulate tribal property, which does not convey criminal jurisdiction to Oregon.

CONCLUSION

The judgment of the court of appeals should be affirmed in that the Cush-Hook Nations owns the aboriginal title to the land in Kelley Point Park and reversed in the Oregon does not have criminal jurisdiction.

Respectfully submitted.

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