No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondents and cross-petitioner

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE RESPONDENT

IDENTIFICATION NUMBER

56

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Did the Oregon Court of appeals err in affirming that an Indian tribe possessed aboriginal title to an area of land when the tribe occupied the land since immemorial with tribe, never received recognition from the US federal government and moved from the land in 1850 and failed to return?

2. Under Public Law 280, does the State of Oregon have criminal jurisdiction over a land purportedly owned by a non-Federally recognized American Indian tribe, to control the use of, and to protect, archaeological, cultural, and historical objects when Congress has explicitly granted the State criminal jurisdiction over Indians in Indian Country?

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Kelley Point Park is an Oregon state Park located between two rivers, the Columbia river to the north and the Willemette river to the south. (R. 1.) The park encompasses an area that originally belonged to many Indian tribes including the Cush-Hook Nation of Indians ,a non-politically recognized tribe of Indians pursuant to the 1994 tribal list act. (R. 1.) The Cush-Hook nation's original homeland and their permanent village of the tribe lies within the Kelley Point Park boundaries which the tribe occupied since before the arrival of the Euro-Americans. (R. 1.)

This area was explored by William Clark of the Lewis & Clark Expedition in April of 1806. (R. 1.) William Clark visited the Cush-Hook village and recorded his interactions with and impressions of the tribe in the Lewis & Clark Journals. Later, Clark headed south from the Columbia River towards the Willemette Rriver where he encountered another tribe of Indians, the Multnomah Indians, near the Cush-Hook village. (R. 1.) The Multnomah Indians spoke with Clark and pointed out the Cush-Hook village to him (R. 1.) Later, the Multnomah Indians even guided Clark to the Cush-Hook's permanent village and introduced Clark to the chief of the Cush-Hook Nation but only after first making peace signs with the Cush-Hook tribesmen. (R. 1.) Clark spoke with the chief for some time and even gifted the Chieftain a peace medal. (R. 1.)

The Cush-Hook persisted to live in their village and engaging in their traditional ways of life until 1850. (R. 1.) In 1850, the entire Cush-Hook nation signed a treaty with the superintendent of the Indian affairs wherein the tribe agreed to relocate 60 miles westward to the foothills of the Oregon Coastal Mountains. (R. 2.) The tribe continued to live at this new

location in the foothills following the signing of the treaty until today. (R. 2.) Later, in 1853 the Congress refused to ratify this treaty and as a result the Cush-Hook nation did not receive any of the promised compensation for signing of the treaty nor was the tribe's ownership of land in the foothills ever recognized. (R. 2.)

Following the tribe's settlement in the foothills the two American settlers, Joe and Elsie Meek, moved onto the land in Kelley Point Park and were granted fee simple titles under the Oregon Land Act of 1850. (R. 2.) This act granted land in fee simple title to any white settler who "had resided upon and cultivated the land for four consecutive years." (R. 2.) The Meeks claimed 640 acres of land that comprised the park and sold the land to the State of Oregon. (R. 2.) However, the Meeks never lived upon this land longer than 2 years and it was never cultivated. (R. 2.)

Several months ago in 2011, Thomas Captain, a Cush-Hook citizen moved from the tribal area in the foothills to Kelley Point Park. (R. 2.) Captain camped in the park as his attempt to reassert the Cush-Hook nation's ownership of the land. (R. 2.) Captain also sought to protect the trees of the park from vandals since the trees occupied an important cultural and religious significance for the tribe. (R. 2.) Shamans of the tribe in the past had carved totems and religious symbols into the trees located near their dwellings. (R. 2.) Captain eventually decided to cut one of the trees down and to remove the section depicting one of the tribe's religious images to preserve the tree carving from any more damage and vandalism. (R. 2.) Upon attempting to return to his nation in the foothills Thomas was arrested by police who seized the section of the tree and changed him under Or. Rev. Stat 358.905-358.961. *Id.*

PROCEDURAL HISTORY

The present case is on appeal before the United States Supreme Court. (R. 4.) The case was originally heard by the Oregon Circuit Court of Multnomah County. (R. 3.) At trial the court affirmed the facts above and entered into the follow conclusions of law: (1) Congress erred in the Oregon Land Donation Act by describing all lands in the Oregon Territory as being public lands of the United States; (2) the Cush-Hook Nation's aboriginal title had never been properly extinguished as required by *Johnson v. M'Intosh*; (3) the United States' grant of fee simple title to the land in question under the Oregon Land Donation act was void *ab initio* and thus, the subsequent sale of the land by the Meeks to the state was also void; (4) Cush-Hook nation owns the land in question under aboriginal title; (5) Or. Rev. Stat. 358.905-358.961 et seq. and Or. Rev. Stat. 390.235-390.240 apply to all lands in the state. (R. 3-4.) As a result of these conclusions of law Captain was found not guilty of trespass, or for cutting timber without a permit. Captain however, was found guilty of violating Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 for damaging an archaeological site and a historical artifact and was thus fined $250. (R. 3-4.) Following this decision the case was appealed to the Oregon Court of appeals where it was affirmed without an writing an opinion. (R. 4.) The case was then appealed to the Oregon Supreme Court which denied review. *Id.* Thereafter the state and Thomas Captain petitioned the United States Supreme court for certiorari. *Id.* Certiorari was granted and is to be heard on February 18th. *Id.*

The District court found that aboriginal title for the Cush-Hook Nation was never extinguished. The proof of aboriginal title presents a question of law over which this Court exercises *de novo* review. *Sac & Fox Tribe of Indians v United States* 179 Ct Cl 8, (1967).

Under a *de novo* standard of review, this Court owes no deference to the lower court's determination that aboriginal title was not extinguished. *Fox,* 179 Ct Cl 8.

The District court found that State criminal jurisdiction was proper over the land in question. *Oliphant v. Suaquamish Indian Tribe,* 435 U.S. 191 (1978). Whether a State can exercise jurisdiction over land held in as aboriginal title presents a question of review plain error. Oliphant v. Suaquamish Indian Tribe, 435 U.S. 191 (1978). Under the plain error standard, the burden of proof is on the opposing party to show that plain error occurred. Cravatt v. State, 825 P.2d 277 (Okla. Ct. App. 1992).

SUMMARY OF ARGUMENT

The Cush-Hook nation did not own the land in question under aboriginal title. The US government never recognized the Cush-Hook nation or any claim of theirs to the land in question. As a result it is necessary for the tribe to show they occupied the land exclusively, continuously, and actually since immemorial. The Cush-Hook fails to establish aboriginal title because they did not occupy the land exclusively but also shared the land in question with another Indian tribe.

The US government extinguished any title to the land that the Cush-Hook nation possessed. The US government has the exclusive right to grant and extinguish the title of land held under aboriginal title. Any claim of aboriginal title to the land was extinguished by the Oregon Land donation act, the occupation of the land by non-Indians, and by complete dominion of the land adverse to the Cush-Hook nation’s property interest.

Lastly, the Cush-Hook nation abandoned the land and any claim to it by leaving in 1850 and failing to return. When a tribe ceases to exclusively occupy they forfeit their right

of occupancy. The Cush-Hook failed to make any attempt to return in the 150 years subsequent to their exodus in 1850 thereby losing any right of occupancy they may have once possessed.

The District court properly held that Oregon has criminal jurisdiction over Kelly Point Park notwithstanding purported ownership by a non-federally recognized American Indian tribe. Generally States lack jurisdiction over crimes in Indian country where Federal jurisdiction exists. However, Kelly Point Park is not "Indian country" as defined by 18 U.S.C. §1151 because; the land in question was never held in trust; doesn't meet the requirements necessary to be considered a "dependent Indian community"; nor is it individual Indian allotments. The land in question is not Indian country and State jurisdiction is appropriate.

Even if Kelly Point Park is considered "Indian country" within the meaning of 18 U.S.C. § 1151, State jurisdiction has been granted by Congress through Public Law 280. Public Law 280 allows State criminal jurisdiction over Indians and on Indian country. However, past Supreme Court cases have further required the application of State law in Indian country to "generally prohibit criminal conduct," rather than civil regulatory. The State statutes in question are criminal prohibitory and not civil regulatory because it is not generally conduct that is permitted. Oregon State statutes in question are within the scope of Public Law 280's grant of criminal jurisdiction, and the District court's ruling should be upheld.

ARGUMENT

I. THE CUSH-HOOK NATION NEVER POSSESED ABORIGINAL TITLE TO THE LAND IN KELLEY-POINT PARK

Aboriginal title and Federal Indian law is an area of law that has been well-litigated in our nation’s history. In the seminal case *Johnson v. Mcintosh,* 21 U.S. 543 (1986) it was held

that Native Americans have a right of aboriginal title unless it is extinguished or they are conquered. *Id*. at 586, 589. Later, in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), it was held that Congress may abrogate treaties in the best interests of the Indians or themselves. Congress may extinguish aboriginal title without any legally "enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians v United States* 348 US 272, 279 (1955). However, in allowing a taking to occur without compensation the government "would not satisfy the "high standards for fair dealing' required of the government in Indian affairs. *United States v Alcea Band of Tillamooks* 329 US 40, 63 (1946). Most recently in the decision *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 216 (2005), the Supreme court in applying a doctrine of laches and inaction held that a recognized tribe was precluded from reasserting their sovereignty over land that was granted to them in a treaty because the city had a just expectation that their sovereignty over the land would not be disputed.

The Cush-Hook nation maintains a "moral claim" for compensation for the taking of their land that occurred in 1850. *Tillamooks,* 329 US 46; (R. 3.) However, this Court is not the proper forum under the laws of our country for the Cush-Hook nation to redress their injury. The Cush-Hook nation should seek compensation and exhaust their remedies through the relevant administrative agency the Indian Claims Commission (ICC) under a claim of general applicability under 25 U.S.C.A. §§ 70.

Questions concerning "the manner, method, and time of extinguishment of aboriginal title [have] raised political, not justiciable issues" that would best be resolved by the ICC. *United States v Sante Fe P. R. Co*. (1941) 314 US 339, 347; *see also* (holding that the court did not have jurisdiction to determine aboriginal rights) *Edwardsen v Morton* 369 F Supp

1359 (1973). Similarly this Court in *Buttz v. Northern P. Railroad* 119 US 55, 66 (1886), held that the manner, time, and conditions of extinguishment of Indian right of occupancy are not open to contestation in judicial tribunals. Thus, the Cush-Hook nation should exhaust their administrative remedies first before asking this court to affirm a judgment contrary to precedent. (explaining judicial deference to an administrative agency) *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

The courts have defined aboriginal title as a unique right of occupancy that can only be extinguished by the United States. *Johnson,* 21 U.S, 585. Such title is derived from the nation's ancestral use of the land and granted only to those tribes whose occupation of the land predated the arrival of European Americans. *Greene v. Rhode Island,* 289 F. Supp. 2d 5, 10 (D.R.I. 2003); *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York,* 278 F. Supp. 2d 313, 343 (N.D. N.Y. 2003). The property right to the land is 'virtually equivalent to a fee interest against all but the United States." F. Cohen, FEDERAL HANDBOOK OF INDIAN LAW, 489 (1982 ed.).

In other words an Indian nation has a right of occupancy guaranteed that can only be extinguished by the United States. Aboriginal title is not legal title, but rather a grant or right of occupancy given to the tribe as a whole to use the land and occupy in it a manner consistent with their traditional ways of life. *Johnson,* 21 U.S. 583.

Aboriginal title does not need to be solemnized but rather it is established through a variety of ways. *Narragansett Tribe of Indians v Southern Rhode Island Land Development Corp*., 418 F Supp 798, 807 (1976). Aboriginal title can be granted through official

government recognition. *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 446 (Ct. Cl. 1959).

A nation may prove they have aboriginal title by showing: (1) actual, (2) exclusive, and (3) continuous use and occupancy of the claimed area since immemorial. *Native Village of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012); *see also* Miami, 146 Ct. Cl 43;. *Sac & Fox Tribe of Indians v United States* 179 Ct Cl 8, 22 (1967).

Since the Cush-Hook nation's claim to the land in Kelley Point Park was never recognized by the US government it is incumbent upon the Cush-Hook nation to prove before the court they had aboriginal title. (R. 2.) *Miami*, 146 Ct. Cl. 446.

In our case the Circuit court erred in granting aboriginal title to the Cush-Hook nation. (R. 3.) The Respondent failed to sufficiently establish aboriginal title through a historical. There is no dispute that the Cush-Hook nation actually used and lived the land in Kelley Point Park from immemorial until 1850. (R. 3.) However, the record and facts of this case demonstrate that the Cush-Hook nation failed to exclusively occupy the land sufficient to establish aboriginal title.

A. The Cush-Hook nation's claim of aboriginal title was never recognized by the US federal government

The Cush-Hook nation never received recognition from the federal government. If a nation receives federal recognition of their ownership of lands then it is not necessary for them to prove they continuously and exclusively occupied in the land. *Id.* at 175.

There is no particular form by which aboriginal title or a tribe may be recognized by congress and this can be shown by a variety of actions. *Tee-Hit-Ton, 3*48 US 278. For

example, a treaty may operate to determine title and grant recognition and indeed this is usual method by which rights are recognized. *Bennett County v United States*, 394 F2d 8, 18 (1968, CA SD). However, the government needs to make some affirmative action to show recognition and "permissive occupation" alone is not evidence of government recognition. *Minnesota Chippewa Tribe v United States*, 161 Ct Cl 258, 267 (1963). In an analogous case from the State of Oregon an unratified treaty was not enough for a tribe to receive recognition of their title to an area of land. *Coos Bay, Lower Umpqua and Siuslaw Indian Tribes v. U.S.*, 87 Ct. Cl. 143, 152 (1938). In that case the tribe had sought to prove title by showing evidence of the unrratified treaty and presenting oral testimony from members of the tribe. *Id*. at 153.

The historical and appellate record fails to evidence any official recognition of the Cush-Hook nation. Similar to the Oregon case mentioned above the unratified treaty does not establish recognition of the Cush-Hook's title to the land. (R. 2.) Congress refused to recognize the Cush-Hook nation's title to the land in 1853. (R. 2) Decades later the Cush-Hook nation has remained a federally unrecognized tribe and is not included on the 1994 list of federally recognized tribes. (R. 3.) The fact that the Cush-Hook nation occupied the land for nearly 50 years subsequent to the discovery of this land by Clark does not serve as recognition.

As explained in the *Chippewa* decision there needs to be an affirmative action by the government to show recognition of the tribe and its title. The unilateral actions of Clark, who was not an official representative of Congress, in gifting the Cush-Hook elder a peace medal is not enough alone to establish recognition of the tribe by the Federal government. Congress made no such recognition by failing to ratify or compensate the Cush-Hook nation in any

way. Thus, the Cush-Hook tribe and its claims of aboriginal title to the land in Kelley Point Park remain unrecognized before our government today.

B. The Cush-Hook nation did not exclusively occupy the land in question

The Cush-Hook nation did not exclusively occupy the land of Kelley Point Park. An Indian nation "must occupy the land to the exclusion of other Indian tribes or persons" and have continuous and exclusive occupation of the area of land to establish aboriginal title. *Francis,* 278 F. Supp. 2d 313, 343 These requirements are in place to prevent conflicting and multiple claims to property.

Occupancy is a question of fact that is to be shown in court. *Sante Fe,* 314 US 339, 359**.** A nation must prove continuous and exclusive occupation before the court to be granted aboriginal title. *Eyak,* 688 F. 3d 622. An Indian nation provides such proof through an accurate historical record *Fox,* 179 Ct. Cl 15. In *Fox* an Indian nation sought compensation for land that they claimed to have held under aboriginal title. *Id*.at 189. The Court of Claims ruled that there was insufficient evidence to show the tribe occupied the land exclusively as there had been other tribes present in the area and a record of warfare between them as late as 1804. *Id*. at 11.

There is an exception to the exclusive use requirement when there is a joint and amicable possession by two or more tribes. *Confederated Tribes of Warm Springs Reservation v United States* (1966) 177 Ct Cl 184, 194. However, in order for a tribe to qualify for this exception they must be "extremely close." *Strong* v. U. S. 207 Ct.Cl. 254, 262 (1975). In *Fox* two tribes were found to be close because they had formed an alliance together against the French and they had an "intimate alliance, politically and socially" and were even "referred to as a single nation both in their relationship with the other Indian tribes

and in treaty negotiations and other matters with the United States." *Fox*, 179 Ct. Cl 16.

In *Iowa Tribe of Iowa Reservation v. United States*, 195 Ct. Cl. 365, 371 (Ct. Cl. 1971), it was found that two Indian tribes did not have joint title to an unawarded parcel of land since the two tribes were not of an integrated political unit but rather separate bodies that were mostly allies. Later, in *Sioux Tribe v United States* 205 Ct Cl 148, 174 (Ct. Cl. 1974), it was even held that land situated between two tribes often remains unawarded. The court explained "it is not unusual in Indian litigation" to find unawarded lands between two tribes because the "land was not exclusively used or occupied by either" tribe. *Id.* at 175.

In another case *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 442 (Ct. Cl. 1974), the court held that even if two groups were different political units they may "still sustain the proposition that the two bands were in "joint and amicable" possession because of the extensive cooperation between them."

The record shows that Cush-Hook nation did not have exclusive use of the land in Kelley point park. The land in question is not a large area comprising only 640 acres or 1 square mile as it sits between the two rivers of the Columbia and the Willemette. (R. 1-2.) The location at the confluence between the two rivers is a lush and green area full of vegetation and was probably frequented by several tribes or nations. (R. 1) In 1804 the land was also occupied by another non-recognized federal tribe, the Multnomah Indians. (R. 1) These Indians encountered spoke with William Clark near the Cush-Hook village. The fact that the Clark encountered the Multnomah engaged in traditional activities of fishing and gathering suggests that the Multnomah Indians also lived and occupied the territory. (R. 1.) In fact, Clark encountered Indians of this tribe in an area close enough to see and point out

the Cush-Hook village. (R. 1.) The Multonomah Indians had a familiarity with the area and they were able to take Clark directly to the permanent village of the Cush-Hook nation. (R. 1.) Thus, the facts and the record indicate that the Cush-Hook nation did not exclusively occupy the area.

There is also not sufficient evidence that the Multnomah and Cush-Hook Indians qualify for the joint and amicable exception to the exclusivity requirement. First there is no showing that the two tribes did not comprise a single political unit. There would be little reason for Clark to gift the Chief of the Cush-Hook nation a peace medal if the Multnomah and Cush-Hook were already an integrated political unit. (R. 1.) In fact Clark's gift to the chief suggests Clark differentiated the tribes as two different political bodies.

There is also no evidence that if the tribes were extremely close or had significant cooperation between them. The record explains that the Multnomah Indians made peace signs as they neared the Cush-Hook village. (R. 1.) This action provides an inference that again the tribes were of a different political unit and at the very least the two tribes found it necessary to make such a sign to avoid conflict. (R. 1.) Moreover, there is nothing in the record like to suggest that the Cush-Hook nation and the Multnomah Indians had extensive cooperation between them sufficient to qualify for the exception. In *Fox* the tribes were of such a close relationship that they were referred to as a single nation in treaty negotiations. Unlike the tribes in *Fox*, the record and the unsuccessful treaty of 1850 does not contain any mention or reference to the Multnomah Indians to suggest that the Multnomah Indians were of the same political body. (R. 2.)

Lastly, the findings of fact from the Circuit court do not state that the Cush-Hook nation occupied the area exclusively or that they occupied the area in jointly and amicably with another tribe. The exclusivity requirement must be proven before a court before a court may grant aboriginal title. The Oregon circuit erred in granting aboriginal title without proof of exclusivity. This Court should not allow a grant of aboriginal title without sufficient proof of exclusivity.

Thus, for these reasons the Cush-Hook nation should not be held to have aboriginal title to the land in Kelley Point Park.

II. THE CUSH-HOOK'S ABORIGINAL TITLE WAS EXTINGUISHED

The Cush-Hook nation's claim of aboriginal title was extinguished by the Oregon Land Donation act, a lawful conveyance, and occupation of the land by non-Indians. Aboriginal title may be extinguished only by the consent United States government. *Johnson,* 21 U.S. 583. As the sovereign the United States through congress possesses exclusive power and control to grant or extinguish title or in the case of Indian reservations define boundaries as it sees fit. Several cases have affirmed this principle, *Tee-Hit-Ton Indians,* 348 US 280.

Aboriginal title exists as nothing more than a treaty right of occupancy which can be changed by congressional fiat. *Shoshone Tribe v. United States,* 299 U.S. 476, (1937), *see Tee-Hit-Ton Indians,* 348 US 279.

Aboriginal title and the Indian's right of occupancy has been "held to be sacred" and not to be taken without congressional consent. *Minnesota v. Hitchcock,* 185 U.S. 373, 388-89 (1902). Thus, extinguishment is "not to be implied lightly." *Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1068 (9th Cir.2010). *US v. Dann,* 706 F2d 919, 929-931 (1978),

sets forth a clear statement rule requiring a "clear indication of congressional intent to extinguish aboriginal title." This clear statement rule is in line with a well-founded rule of construction that doubtful expressions are to be resolved in favor of an Indian nation rather than the United States. *Sante Fe*, 314 US 339, 354.

Similarly, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (U.S. 1970), sets forth a canon of interpretation that "Indian treaties should "be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor. Thus, extinguishment of aboriginal title must be clearly implied and there should be federal consent.

There is no "precise formula" for determining the end of aboriginal title. *United States v Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 661 (Ct. Cl. 1975). In each case one is to consider the appropriate factual circumstances in determining when aboriginal title is to be extinguished. Thus, "extinguishment of Indian title may be accomplished by treaty, by sword, by purchase, by exercise of complete dominion adverse to right of occupancy." *United States v Bouchard*, 464 F Supp 1316, 1348 (WD Wis 1978). The factual circumstances surrounding the land in question indicate that the aboriginal title had been extinguished.

A. The Oregon Land Donation act of 1850 extinguished the Cush-Hook's aboriginal title claim to the land.

The Oregon Circuit court incorrectly concluded that the Oregon Donation Land Act of 1850 did not extinguish title to the land in question. (R. 4) As mentioned earlier congress has exclusive control of extinguishment and may extinguish aboriginal title as it sees fit. *Johnson*, 21 U.S. 587. Acts that are in preparation of non-Indian settlement may extinguish

title. *Sante Fe*, 314 US 339, 350. In *Sante Fe*, it was held that an act requiring Indian nations to present their land claims before the court had the machinery to extinguish any claims to the territory. *Id*. at 350. Another case from Oregon cited the Oregon Land Donation Act as extinguishing aboriginal title. *United States v Ashton* (1909, CC Wash) 170 F 509.

Acts opening land to entry should be considered in the appropriate factual context to determine if they extinguish aboriginal title. *Pueblo*, 206 Ct Cl 649, 660. In this case it was held that the act alone did not extinguish title but opened up and led to the eventual extinguishment of Indian title. *Id.* In one case *United States v Atlantic Richfield Co*. 435 F Supp 1009, 1024 (1977, DC Alaska), it was held that a conveyance alone pursuant to federal statue shall extinguish title.

Applying the law to our case, the Oregon Land Donation was an appropriate context for the extinguishment of title. In 1850 Congress passed the Oregon Land donation act to encourage settlers to cultivate and occupy the land in the Oregon territory. The law brought a mass exodus of people to the territory and generously offered one square mile of territory to each married couple. The act clearly had the machinery to extinguish title and caused the region to be increasingly dominated by non-Indian settlers. Congress clearly went so far as to encourage and incentivize settlers to cultivate and take up the land in the Oregon territory. The Cush-Hook lacked any rights as a result of the unsuccessful treaty and despite their claims to the land the evidence strongly suggest that the statute should be interpreted to extinguish aboriginal title. As held in the *Ashton* case the Oregon Land Donation should be considered as extinguishing any claim of aboriginal title to the land in question. As mentioned above the loss of control and dominion of an area leads to the extinguishment of

aboriginal title. The Cush-Hook nation following 1850 lacked control or any occupancy following 1850.

The language of the act is clear in its interpretation and text to satisfy the clear statement rule set forth in *US v. Dann.* The act reads that "every white settler" shall receive fee simple title if they complete the statutory requirements. Although it is very unfortunate that Cush-Hook nation lost title and occupancy of their homeland the actions of the Federal government indicate a desire and an attempt to extinguish any aboriginal title to the land in Kelley Point Park. The Meek's failure to fulfill the statutory requirements and cultivate the land for four years is irrelevant in light of the prevailing factual circumstances.

B. The occupation of the land by non-Indians extinguished the Cush-Hook's aboriginal title

The settlement and control of the land by the Meeks extinguished the aboriginal title to the land. In *United States v Four Bottles Sour-Mash Whisky* 90 F 720, (1898, DC Wash), it was held that a law offering citizens the opportunity to receive grants of land near mineral deposits extinguished any Indian title to the land thereof when a citizen completed the requirements of the act. A loss of control or dominion over the parcel may extinguish title. *Bouchard,* 464 F Supp 1348. Such extinguishment may occur even parcel by parcel. Gila *River Pima--Maricopa Indian Community v. United States,* 204 Ct. Cl. 137, 141 (Ct. Cl. 1974).

In the present case the Meeks extinguished the title through their occupation and exercise of complete dominion adverse to the Cush-Hook nation. This occupation was granted for their parcel of 640 acres in accordance with a legitimate federal statue. Such

possession and control of the land extinguished any right of occupancy held by the Cush-Hook nation.

III. CUSH-HOOK NATION ABANDONED ANY CLAIM TO THE LAND

The Cush-Hook abandoned their property interest by failing to return to the land following 1850. Physical abandonment exists as a defense to a claim of aboriginal title. *Williams v Chicago*, 242 US 434, 437 (1917). Several cases clarify this principle. In *Williams*, a tribe near the great lakes could no longer claim aboriginal title to the land as they had had abandoned the land long ago and any legal interest to the land had ended. Later, *Barker v. Harvey* 181 U.S. 481, 492 (U.S. 1901) held that an Indian Nation's failure to present their claim to a tract of land before authorities constituted an abandonment of the land. Lastly, the language of *Quapaw Tribe of Indians v United States* 128 Ct Cl 45, 49 (Ct. Cl. 1954) wherein it states that when "Indian tribe ceases for any reason" … "to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands." Thus, even if aboriginal title is granted through the treaty, the abandonment and lack of exclusive occupation of the land extinguishes the aboriginal title. *Id.*

The Cush-Hook abandoned the land of Kelley Point Park in 1850 and failed to return. The nation no longer exclusively occupied or made any recorded attempt to again reassert their rights to the land. Similar to the tribe in *Williams*, the Cush-Hook's legal interest in the land ended following their movement to the foothills. Admittedly, this is a difficult case compounded by the unsuccessful ratification of the treaty. This is indeed an unfortunate case for the Cush-Hook nation. However, the nation's failure to make any attempt to return to the

territory following 1850 indicates an abandonment of the Cush-Hook's interest in the land of Kelley Point Park.

IV. THE DISTRICT COURT PROPERLY HELD THAT OREGON HAS CRIMINAL JURISDICTION OVER THE LAND IN QUESTION BECAUSE THE STATE PARK WAS; NEVER HELD IN TRUST, NOT A DEPENDENT INDIAN COMMUNITY, NOR AN ALLOTMENT QUALIFIED AS INDIAN COUNTRY.

It is a well defined principle that Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 577 (1975). It is through this recognized sovereignty and the special federal trust relationship that tribes are "dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). Generally, States lack jurisdiction in Indian Country absent a special grant from Congress. *Fisher v. District Court*, 424 U.S. 382, 386 (1976). A state may not have concurrent criminal jurisdiction to prosecute crimes in Indian country where Federal jurisdiction exists. See generally *United States v. John*, 437 U.S 634 (1978).

Additionally, "[c]riminal jurisdiction of the state, the federal government, and the Indian nations is a complex matter that may depend on the nature of the crime, the location of its commission, and the nationalities of the defendant and any victims." *State v. Jim*, 178 Or.App. 553, 556 (2003) citing generally Monroe E. Price and Robert N. Clinton, Law and the American Indian, 207-21 (2d ed. 1983); Felix S. Cohen, Handbook of Federal Indian Law, 281-385 (1982). This portion of the brief will only address the "location" or "land in question" and the importance of the land status where the act was committed. Furthermore,

"[c]hallenges to the legal status of the land are questions of law decided by the court." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §9.02 at 2 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK]. Indian Country, as defined in 18 U.S.C. § 1151 has three categories of land. First, "all land within the limits of any Indian reservation; second, all dependent Indian communities; and third, all Indian allotments where Indian titles have not been extinguished. §1151. If Kelly Point Park fits within the any of these three definitions of Indian Country, it follows that Tribal Jurisdiction or Federal Jurisdiction would preempt State Jurisdiction. If the land in question is not "Indian Country" then State jurisdiction is proper.

A. Kelly Point Park or the larger area that encompasses the original homelands of the Cush-Hook Nation, were never held in trust, cannot be considered Indian Country, and State criminal jurisdiction is appropriate.

Trust land, even outside the reservation boundaries, is considered "Indian Country." *John*, 437 U.S. 634 (1978). In *John*, the defendant a Mississippi resident and of Choctaw ancestry, was convicted of assault under the Major Crimes Act. *Id.* at 635. The question presented to the Court was whether the lands in question are "Indian Country," as defined in 18 U.S.C. § 1151 (1976 ed.). *Id.* at 634. The court first looked at the Major Crimes Act, (18 U.S.C. § 1153) and determined that the crime and persons in question fall within the meaning of the Act. *Id.* at 647. However, the term "Indian Country" raised issues when the crime took place on a "checkerboard" portion of land in Mississippi. *Id.* The Court concluded that land was held in trust for the Choctaw and was indeed Indian country, preempting state jurisdiction. *Id.* at 649.

Land patented to a state under a congressional act prior to creation of a reservation omits such land from "Indian Country." *Moses v. Dep't of Corr.*, 736 N.W. 2d 269 (Mich. Ct.

App. 2007). In *Moses* the land in question was swampland (originally part of a reservation) that the United States Government issued land patent to the state of Michigan. *Moses,* 736 N.W. 2d at 247-75. The court held that state jurisdiction was proper because the swampland that had been patented to the State too place prior to the reservation treaties and the swampland was not "Indian country." *Id.* at 283.

Based on the principles outlined above, the Kelly Point Park is not part of a reservation or land held in trust and is not "Indian country" as defined by §1151 and state jurisdiction is appropriate. Unlike *John*, State jurisdiction is appropriate because the land in question is not held in trust. (*R.* 4). The District Court's finding that the Cush-Hook Nation owns the land in question under aboriginal title, is distinguished from land held in trust. *Id.* Furthermore, The U.S. Senate refused to ratify the treaty with the Cush-Hook Nation, and as a result are not politically recognized by either the United States or Oregon. (*R.*1, 4). Under the definition of "Indian Country" in §1151, the land in question is not trust land to be considered "reservation land" and State jurisdiction is not preempted by Federal or Tribal Jurisdiction.

The Oregon Land Donation Act of 1850 is much like the swampland issuance in *Moses*. The land in question had been issued by the United States to the State of Oregon. (*R.* 2). However, unlike *Moses*, the larger part of the Cush-Hook Nation surrounding Kelly Point was never considered a reservation. *Id.* at 1. Furthermore, Congress refused to ratify the treaty with the Cush-Hook Nation, by doing so, no reservation was ever created. *Id.* Even if the land in question were a reservation created after the Oregon Land Donation Act in 1851, the land in question would still not qualify as "Indian country" according to *Moses*.

Kelly Point Park is in no way "Indian country" as defined by 18 U.S.C. § 1151 (a), and as such, State Jurisdiction over the land in question is appropriate.

B. Kelly Point Park or the larger area that encompasses the original homelands of the Cush-Hook Nation, are not lands subject to Federal superintendent nor is the Nation a recipient of services within the meaning of a "dependent Indian Community," and therefore cannot be considered Indian Country, and State criminal Jurisdiction is appropriate.

Purported ownership of land by a non-federally recognized American Indian tribe, is not within the definition of a dependent Indian community. Dependent Indian communities,

> refer to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements-first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 at 527 (1998). In *Venetie*, 1.8 million acres of land in Alaska were owned in fee simple by the Native Village of Venetie Tribal Government. *Id.* at 523. In 1943 the Secretary of the Interior created a reservation out of the land surrounding Venetie and remained as such until 1971. *Id.* However, Congress enacted the Alaska Native Claims Settlement Act, which ended federal supervision over the Alaskan Natives and ended a reservation system and wardship or trusteeship. *Id.* at 524. The Court concluded that the land in question was not a dependent Indian community within the meaning of "Indian Country" as defined in §1151. *Id.* at 534. Furthermore, the Court also recognized that Court of Appeals for the Ninth Circuit found it persuasive that the Tribe's receipt of "desperately needed health, social, welfare, and economic programs" a factor; but such need for programs cannot support a finding of "Indian Country." *Id.*

Based on the precedent on dependent Indian communities outlined above, there is no indicia that the Cush-Hook are recipients of "desperately needed" programs, nor are had they every been part of a reservation system. (*R.* 1). Rather, the Cush-Hook currently live 60 miles from the land in question, and if were considered to be a dependent Indian community within the definition of Indian Country in § 1151, would be considered at their current location in the Oregon coast range of mountains. (*R.* 2). The land in question, Kelly Point Park, is not nor has ever been under federal supervision and the United States has taken any other action to "recognize" the Cush-Hook or the land in question. *Id.* Furthermore, Kelly Point Park is currently an Oregon state park, and has been under the supervision and care of the State of Oregon, not the Federal Government.

Criminal jurisdiction over Kelly Point Park is proper because the land is not a dependent Indian community within the meaning of "Indian country" as defined by §1151 and *Venetie*.

C. Kelly Point Park or the larger area that encompasses the original homelands of the Cush-Hook Nation, are not allotted lands to be considered Indian country, and State criminal jurisdiction is appropriate.

The third and final way the land in question could be considered Indian country would be through qualified allotments. An allotment describes a tract of land that is owned by the United States in trust for an individual Indian or the land owned by an individual Indian is "subject to a restriction on alienation in the United States or it's officials." COHEN'S HANDBOOK, § 16.03 at 1.

The When a crime has occurred on an allotment, it could qualify as Indian country. *Compare, United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997) (qualifying an allotment that the an assault took place on as Indian country); *and, United States v. Sands*, 968 F.2d

1058 (10th Cir. 1992) (holding that a restricted allotment is Indian country); *with, Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992) (overturning a murder conviction because the crime occurred on allotment held to be Indian country).

There is no evidence in the record that shows that Kelly Point Park has ever been an allotted parcel of land. The court below, acknowledged it at best "aboriginal title" which is not land held in trust for an individual Indian. (*R.* 4). The land in question is not allotted land to be considered "Indian Country" as defined in §1151(c); therefore, it is appropriate for the State of Oregon to maintain jurisdiction over Kelly Point Park.

Based on the definition of "Indian country" as outlined above; Kelly Point Park is not trust land or a traditional reservation to be considered "Indian country"; neither is it a dependent Indian community outlined by *Venetie*; nor is it an individual Indian allotment to be considered Indian country. Because Kelly Point Park is not Indian country, federal jurisdiction does not apply through the Major Crimes Act nor the Indian Country Crimes Act. Oregon State criminal jurisdiction for the prohibitory conduct of removing of an archeological object is necessary. It would be absurd to deny both federal and state criminal jurisdictions and allow a crime in a small anomalous pocket of land to go without punishment or law.

V. THE OREGON REVISED STATUTES PROHIBIT CONDUCT BY PROTECTING ARCHEOLOGICAL OBJECTS AND THEREFORE WITHIN THE REACH OF PUBLIC LAW 280.

Even if Kelly Point Park is within the definition of "Indian Country", Oregon still has criminal jurisdiction through the passage of Public Law 83–280 ("P.L.280") (codified at 18 U.S.C. §1162). "In order for a state to exercise criminal jurisdiction within Indian Country there must be a clear and unequivocal grant of authority." *Oliphant*, 435 U.S. at 208 n. 17

(1978). P.L.280 is such a grant of criminal jurisdiction to states over Indian country under certain circumstances, and is the primary exception to the general rule of federal jurisdiction over Indian country. *Langley v. Ryder*, 778 F.2d 1092, 1096 (1985). Oregon is such a state that was granted special jurisdiction by P.L.280.

In addressing the application of P.L.280, courts have considered whether the conduct the State intends to persecute, or the law the State is attempting to enforce is truly criminal in nature. The Supreme Court put forth a test in *Cabazon*. 480 U.S. 202 (1987). The Court held, that for a State to enforce a law under P.L.280, the law must prohibit, rather than regulate, the conduct at issue. *Id.* at 209-10. This portion of the brief will address whether laws in Or. Rev. Sat. 358.905-.961 and 390.235-.240 ("Or. Rev. Stat.") are criminal prohibitory and within the reach of P.L.280 or civil-regulatory and beyond the scope of P.L.280.

A. The Oregon Statutes are criminal prohibitory because it is state law that generally prohibits the conduct.

Conduct that is generally allowed but governed by regulations is civil regulatory an beyond the jurisdictional grant of P.L.280. *Cabazon*, 480 U.S. at 210. In *Cabazon*, the Indian tribe filed a declaratory and injunctive relief against the county for applying ordinances regulating bingo and prohibiting draw poker within the reservation. *Id.* at 204. The Supreme Court held that P.L.280's grant of state criminal jurisdiction over the reservation did not authorize the enforcement of statutory regulation of bingo, since the statue was regulatory rather than criminal. *Id.* at 209-10. The Court went on to reason, that "if the intent of the state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but the state generally permits the conduct at issue, subject to regulation." *Id.*

In comparison to *Cabazon*, it appears that Or. Rev. Stat. are regulatory at first glance. However, removal archeological objects, is not "conduct that state law generally permits,"

rather the conduct is generally prohibited. Unlike *Cabazon*, the operations of bingo halls and card draws are a lot more frequent than issuances of permits to excavate archeological objects, let alone the actual conduct of removing such an object. It is one thing to apply for a permit while it is another to satisfy all requirements to lawfully remove the object. Unlike bingo and poker draw which are types of conduct generally permitted in California, where a substantial amount of gaming activity occurred, the removal of an archeological object is not.

While the Or. Rev. Stat. include provisions that will allow the removal of an archeological object, such conduct is generally not prohibited and is labeled criminal prohibitory and the P.L.280; therefore, State criminal jurisdiction over the land in issue is proper.

B. The conduct of removing an archeological object violates the State's public policy and State criminal jurisdiction is not pre-empted because it does not interfere with tribal self-government.

In considering state authority on reservations, the Supreme Court has recognized that "any applicable regulatory interest of the State must be given weight." *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170 (1973)). Furthermore, "tribal sovereignty is dependent on, and subordinate to only the Federal Government, not the states." *Id.* These two conflicting notions must be reconciled by balancing the pre-emption of State laws with tribal sovereignty. *Id.* at 720.

Congressional divestment of tribal self-government in a certain area of law permits States to impose regulations. *Id.* at 723. In *Rice*, the Court considered the tribal self-government in the backdrop of regulations relating to liquor transactions. *Id.* The Court looked beyond the limits of the reservation and the impact such conduct would have beyond

reservation boundaries of the. *Id.* The Court in its conclusion acknowledged that Congress was aware of the void created by the federal laws and wanted to fill that void by delegating a portion of its authority. *Id.* at 733.

In an effort to address the lack of adequate tribal law enforcement institutions and to resolve a "perceived problem of lawlessness" in Indian Country, Congress enacted P.L.280. COHEN'S HANDBOOK, §6.04 at 5 (citing *Yakima Nation,* 439 U.S. 463, 479 n.22 (1979)). The Legislative history of P.L.280 indicated that it was intended to redress the lack of adequate Indian forums or in instances where there was no federal government regulation or Tribal regulation. *Id.*

Based on the above considerations, State public policy opposes the specific conduct in question and as such State criminal jurisdiction over the land in question is appropriate. When considering the inherent sovereignty an Indian tribe has with the Federal Government, the special relationship a political body, such as a tribe, only exists where there is sovereign-to-sovereign relationship. The Cush-Hook Nation is not a non-federally recognized tribe of Indians. (*R.* 3). The Cush-Hook Nation's treaty with the superintendent of Indian Affairs was not ratified, but the U.S. Senate refused to ratify it. *Id.* at 2. There exist no special relationship between the Cush-Hook Nation and the United States, as such the extent of the Cush-Hook Nation's right to make laws and govern themselves is drastically impaired.

Furthermore, the State of Oregon has an interest in keeping its State Parks intact to preserve cultural and historical objects. The Or. Rev. Stat. identifies an "archeological object" that is at least 75 years old; and is a part of the physical record of a culture found in the state. OR. REV. STAT. § 358.905 (1)(a)-(b). The definition of "archeological object" is broad as to include more than just the physical record of indigenous peoples. The State's

interest are broad and the policy to protect such objects carry a weight greater than that of the Cush-Hook Nation's ability to redress problems.

It is clear that there if State criminal jurisdiction over the land in question were denied, such a ruling would effectually create a void in the jurisdictional scheme. Such conduct in question would not warrant Federal jurisdiction, but turning such matters over to the Cush-Hook would result in a grant of jurisdiction to a group that is not recognized as a sovereign, where there exists no forum to redress such conduct.

Oregon criminal jurisdiction over the land in question notwithstanding its purported ownership by a non-federally recognized American Indian tribe, is appropriate. The criminal statutes in question are criminal prohibitory, the population doesn't generally engage in such conduct and as such P.L.280 grants the State of Oregon criminal jurisdiction in Indian country and over this specified conduct. Additionally, State policy and interests are broader and outweigh those of a group of non-federally recognized Indians with a severely diminished remnant of sovereignty; in such an instance Oregon criminal jurisdiction is appropriate.

CONCLUSION

For the foregoing reasons this Court should hold that Cush-Hook does not own the land in Kelley Point Park under Kelley Point and that it has criminal jurisdiction over Thomas Captain.

Respectfully Submitted,

_____

Counsel for Respondent

January 14, 2013