Case No. _____

IN THE COURT OF
THE UNITED STATES SUPREME COURT

THE STATE OF OREGON

Petitioner,

v.

THOMAS CAPTAIN,

Respondent.

BRIEF FOR RESPONDENT

Counsel on Record for Respondent:
Team 57

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QUESTIONS PRESENTED

1. Was the Oregon Court of Appeals correct in affirming that the Cush-Hook Nation owns the aboriginal title to land in Kelley Point Park because the United States government failed to extinguish aboriginal title and that the United States' grant of fee simple title to the land under the Oregon Donation Land Act was void *ab initio*?

2. Is the State of Oregon without criminal jurisdiction to control the use of a Cush-Hook Nation archaeological, cultural, and historical artifact on the lands in question, when Thomas Captain, a member of the Cush-Hook Nation took actions to preserve and protect the artifact from vandalism and theft?

STATEMENT OF THE CASE

This Court is being asked to affirm that the Cush-Hook Nation holds aboriginal title to the land within Oregon's Kelley Point Park and find that the state court lacks criminal jurisdiction over Thomas Captain to control the uses of archaeological, cultural, and historical objects on the land within the park.

Statement of the Proceedings

The State of Oregon brought a criminal action against Mr. Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site. The Oregon Circuit Court for the County of Multnomah was the court of original jurisdiction and, after trial, held that the Cush-Hook Nation owned the land within the Park under aboriginal title and that Mr. Captain was not guilty of trespass or of cutting timber without a permit. The court, however, also found that Mr. Captain was guilty of violating Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 *et seq.* for removing a historical Cush-Hook artifact from the Park and fined him $250. The State and Mr. Captain appealed the decision and the Oregon Court of Appeals affirmed without writing an opinion and the Oregon Supreme Court denied review.

In the current action, the State of Oregon appeals from the Oregon Court of Appeals decision affirming that the Cush-Hook Nation of Indians owns the area of land encompassing the Kelley Point Park, an Oregon State Park, under aboriginal title and petitioned the United States Supreme Court for certiorari. Mr. Captain filed a cross petition for certiorari and appeals the Oregon Court of Appeals decision arguing that the State of Oregon lacks criminal jurisdiction over the removal of Cush-Hook Nation historical artifacts. The United States Supreme Court granted certiorari.

Statement Of The Facts

Kelley Point Park is an Oregon State park located within the city limits of Portland, Oregon at the point where the Columbia and Willamette Rivers merge. (R. 1.) The park is located within a much larger area of land that consists of the original homelands of the Cush-Hook Nation of Indians. (R. 1.) The Cush-Hook Indians used the land to grow crops and harvest wild plants, animals, and fish. (R. 1.) Their permanent village was located in the area that is now Kelley Point Park. (R. 1.)

In April 1806, a group of Multnomah Indians in the area introduced William Clark of the Lewis and Clark expedition to the Cush-Hook Nation. (R. 1.) Clark recorded ethnographic information about Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing. (R. 1.) Within these recordings, Clark included sketches of the village and tribe longhouses. (R. 1.) Clark presented the Cush-Hook Nation's headman with a President Jefferson "sovereignty token" which the headman accepted. (R. 1.) After Clark left, the Nation continued to live on the land following their cultural norms. (R. 1.)

In 1850, the Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. (R. 1.) In the treaty the Nation agreed to relocate sixty miles westward to the foothills of the Oregon coast range of mountains. (R. 1, 2.) Subsequent to the treaty, the Nation moved to the new location; however, in 1853, the U.S. Senate refused to ratify the Cush-Hook treaty and the Nation never received any of the promised compensation or benefits of the treaty nor were they recognized for having ownership of the lands they were moved to. (R. 2.) Consequent to the failure of the treaty and despite being given a "sovereignty token," the Cush-Hook Nation is a non-recognized tribe of Indians. (R. 2.)

After the Cush-Hook nation was relocated without compensation for their lands, the United States attempted to issue fee simple title of 640 acres of land, which today comprises Kelley Point Park, to Joe and Elsie Meek under the Oregon Donation Land Act of 1850. (R. 2.) The Meeks never cultivated or lived on the land for the required four years as established by the Act. (R. 2.) The Meek's descendants sold the land to Oregon in 1880 and the state created Kelley Point Park.

Today, Kelley Point Park has a number of trees that have grown on the land for over three hundred years. The trees are culturally and religiously significant to the Cush-Hook nation because tribal shamans carved sacred totem and religious symbols into living trees hundreds of years ago. (R. 2.) William Clark noted the practice in 1806 in his journal and many of the totems now sit 25-30 feet off the ground as the trees have continued to grow. (R. 2.) Unfortunately, vandals have begun to climb the trees and deface and remove the symbols and the State of Oregon has done nothing to stop them. (R. 2.) In 2011, Mr. Captian occupied the park in order to stop the vandalism and protect the religious symbols of his tribe and culture. (R. 2.) In one particular instance, Mr. Captain determined the best way to restore an already vandalized symbol was to cut it down and take it back to the Cush-Hook Nation for repair and protection. It was during this act that state troopers arrested Mr. Captain and the current charges were brought against him.

SUMMARY OF ARGUMENT

The Oregon Court of Appeals was correct in affirming that the Cush-Hook Nation holds aboriginal title and a review of the record does not reveal a clear error made by the lower courts. The Cush-Hook Nation occupied the land in question from time immemorial and established aboriginal title through actual, exclusive, and continuous use and occupancy

for a long time. The U.S. government never expressly extinguished aboriginal title and any subsequent transfers of title failed to extinguish aboriginal title. Additionally, principles of equity and justice determine that this Court should uphold the rulings of the lower courts and find that the Cush-Hook Nation holds aboriginal title to the lands in question.

The Oregon Court of Appeals erred in finding that Oregon Revised Statute §§ 358.905-358.96 and §§ 390.235-390.249 apply to the land in question under Public Law 280 because under Public Law 280 state criminal law applies on Indian country only when such law is prohibitory in nature. The land in question is Indian country because it is held in aboriginal title that has not been extinguished and is Indian trust land. Public Law 280 gives the State of Oregon criminal jurisdiction on the land in question so long as the criminal law applied is prohibitory. The relevant Oregon statutes are not prohibitory as they merely regulate behavior that is otherwise generally permitted by permit and, therefore, Oregon Revised Statute §§ 358.905-358.96 and §§ 390.235-390.249 are not applicable on the land in question.

ARGUMENT

I. THE OREGON COURT OF APPEALS WAS CORRECT IN AFFIRMING THAT THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO LAND IN KELLEY POINT PARK AND THE UNITED STATES GOVERNMENT FAILED TO EXTINGUISH ABORIGINAL TITLE AND THE UNITED STATES' GRANT OF FEE SIMPLE TITLE TO THE LAND UNDER THE OREGON DONATION LAND ACT WAS VOID AB INITIO

The Cush-Hook Nation holds aboriginal title to the land encompassing Kelley Point Park. Historical documents show and expert witnesses agree that the Cush-Hook Nation occupied the land in question and established aboriginal title before the arrival of Euro-Americans. (R. 1-3.) Additionally, by failing to ratify Anson Dart Treaty, the United States Government has failed to explicitly extinguish the Nation's aboriginal title. (R. 1-2.)

Consequently, the fee simple transfer of title to the Meeks in the 1850's was void ab initio, and any further transfer of title was also void and the land is still subject to aboriginal title. (R. 2, 4.) As a result, this Court should find that the Cush-Hook Nation has met all the required elements of aboriginal title and currently holds aboriginal title to the land encompassing Kelley Point Park.

Finding the necessary elements of aboriginal title "is a question of fact to be determined as any other question of fact," U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941), and therefore should be reviewed under a "clearly erroneous" standard. See Sac & Fox Tribe of Indians of Okl. v. U. S., 315 F.2d 896, 906 (Ct. Cl. 1963). "[R]eview under the "clearly erroneous" standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993). Consequently, the burden of proving that the lower court made a mistake rests with the petitioner.

A. The Cush-Hook Nation Established Aboriginal Title Through "A Showing Of Actual, Exclusive, And Continuous Use and Occupancy 'For A Long Time'"

A review of the record does not support a finding of definite and firm conviction that a mistake was made by the lower state courts as to the Cush-Hook Nation's establishment of aboriginal title. Aboriginal title is established when there is "a showing of actual, exclusive and continuous use and occupancy 'for a long time'." Conf'd. Tribes of Warm Springs Res. of Or. v. U. S., 177 Ct. Cl. 184, 194 (Ct. Cl. 1966). See also, Santa Fe Pac. R. Co., 314 U.S. at 345; United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975). "Each of these components must be shown by adequate proof." Sac & Fox Tribe of Indians of Okl., 315 F.2d at 903. An Indian group's actual, exclusive and continuous use and occupancy may be "considered with reference to their habits and modes of life." Mitchel v. United States, 34

U.S. 711, 746, (1835). Prior to the arrival of Euro-Americans, the Cush-Hook Nation established aboriginal title through "actual, exclusive and continuous use and occupancy" of the land encompassing Kelley Point Park. Conf'd. Tribes of Warm Springs Res. of Or., 177 Ct. Cl. at 194.

a. Actual Use

The Cush-Hook Nation actually used the land at the confluence of the Willamette and Columbia Rivers. In 1806, William Clark of the Lewis & Clark Expedition recorded in his journal his encounter with the Cush-Hook Nation. (R. 1.) Clark's journal recordings included ethnographic information and indicated that the Nation grew crops, harvested wild plants such as the wapato, and hunted and fished on the land. (R. 1.) Additionally, historical artifacts of cultural and religious significance can be found today carved into the trees hundreds of years ago by the Cush-Hook Nation indicating that not only did the nation use the land for substance and livelihood but for religious and cultural purposes as well. (R. 2.) In light of the historical recordings of William Clark and evidence of currently existing religious artifacts, it is clear that the Cush-Hook Nation had actual use of the land in question.

b. Exclusive Use

The Cush-Hook Nation occupied the land in question exclusive to any other Indian tribe. In Clark's journals, he indicated that he first encountered the Multnomah Indians on the Willamette River near the Cush-Hook Nation village and that they were harvesting wapato on the bank of the river. (R. 1.) It was this group of Multnomah Indians that first introduced him to the Cush-Hook Nation. (R. 1.) After making peace signs, the Multnomah Indians led Clark to the Cush-Hook village and introduced him to the chief of the Nation. (R. 1.) The

actions of the Multnomah Indians indicate that it was the Cush-Hook Nation who controlled the area of land and that the Multnomah Indians were on the land with the knowledge and permission of the Cush-Hook Nation. Instead of taking Clark to the chief of the Multnomah tribe, the Indians took him to the chief of the Cush-Hook signifying that it was the Cush-Hook who managed political control of the area and had the power to exclude others at will. Furthermore, it is clear that William Clark understood the position of the Cush-Hook Nation at the time by presenting them with a sovereign token[1] and indicating that the United States Government would recognize the Cush-Hook chief as the political and commercial head of the area. (R. 1.) The evidence thus shows that the Cush-Hook Nation had exclusive use of the land.

However, even if this Court finds that the presence of the Multnomah Indians was contrary to the Cush-Hook Nation's exclusive control of the area, it has been recognized that joint and amicable possession of property by two or more tribes will not defeat aboriginal title claims. See Sac & Fox Tribe of Indians of Okl., 315 F.2d at 903, n.11 (indicating that there is an exception to the exclusive use rule "where two or more tribes or groups inhabit a defined area in joint and amicable possession"); Conf'd. Tribes of Warm Springs Res. of Or., 177 Ct. Cl. At 194, n.6 (stating that "joint and amicable possession of the property by two or more tribes or groups will not defeat 'Indian title'"). "Political unity of the tribes is not required." Alabama-Coushatta Tribe of Tex. v. U.S., 28 Fed. Cl. 95, 107 (Fed. Cl. 1993) aff'g in part as modified, rev'd in part, 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000). Additionally, permission for other Indians to use the land does not defeat the exclusive requirement. Id. The peace signs made between William Clark and the Multnomah Indians

[1] Presentment and acceptance of the "sovereignty token" was an indication of a desire to engage in political and commercial relations and a recognition of the tribes leadership and government by the United States

followed by them subsequently taking Clark to the chief of the Cush-Hook Nation indicates that the two groups were joint and amicable in the possession of the land and that the Multnomah Indians had permission to be on the land so close to the Cush-Hook Nation's main village. (R. 1.) Additionally, the fact that the Multnomah Indians were harvesting the wild plant wapato so close to the main village of the Cush-Hook Nation shows that the two groups were at peace and possibly joint in efforts to harvest food and sustain life. (R. 1.) Consequently, even with the presence of the Multnomah Indians at the time that William Clark explored the area, the joint and amicable nature of the relations between the two groups acts as an exception to the complete exclusive rule.

c. Continuous Use

The Cush-Hook Nation maintained continual use of the land. Expert witnesses in history, sociology, and anthropology have established that the Cush-Hook Nation inhabited the land before the arrival of Euro-Americans and since time immemorial. (R. 1, 3.) The data recorded by Clark in 1806 and the actions of Anson Dart in 1850 have established that the Nation maintained continual use of the land in question. (R. 1.) It is clear that the Cush-Hook Nation continued using the land from 1806 to 1850, a span of forty-four years, since they were observed still using the land when Anson Dart induced the Nation to sign a treaty. (R. 1.) As a result, the Oregon Court of Appeals correctly affirmed that the Cush-Hook Nation had continuously used the land to establish aboriginal title. (R. 3-4.)

d. Occupation

The Cush-Hook Nation occupied the area of land situated on the confluence of what is called today the Columbia and Willamette Rivers since time immemorial. (R. 1.) William Clark's recorded journals contain his experience in entering a Cush-Hook village and

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government. (R. 1.)

communicating with the occupants. (R. 1.) Additionally, he recorded sketches of the Nation's permanent village, including drawings of longhouses, in his journals. (R. 1.) The Cush-Hook permanent village was located at the point between the Willamette and Columbia Rivers where Kelley Point Park sits today. (R. 1.) The presence of religious totems significant to the Cush-Hook culture carved into the trees of the area further show that the Cush-hook Nation in fact occupied the area. (R. 2.) As a result, the Cush-Hook Nation not only used the land in question but they occupied it as well.

e. "For A Long Time"

The Cush-Hook Tribe maintained actual, exclusive and continuous use and occupancy of the land for a period of time sufficient to qualify for aboriginal title. Aboriginal title does not attach at the moment an Indian group acquires complete dominion over an area of land, but instead requires a period of time. See Sac & Fox Tribe of Indians of Okl., 315 F.2d at 903 (finding that the acquisition of land had come too recently). While as a general rule there is no fixed time to satisfy "a long time," but "must be long enough to have allowed the Indians to transform the area into domestic territory so as not to make the Claims Commission Act 'an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before.'" Conf'd. Tribes of Warm Springs Res. of Or., 177 Ct. Cl. at 194 (citing Sac & Fox Tribe of Indians of Okl., 315 F.2d at 204). In contrast, the United States Court of Federal Claims has found that thirty years is sufficient to establish a long time. Alabama-Coushatta Tribe of Tex. 28 Fed. Cl. at 115, rev'd on other grounds (finding that the tribe had controlled the land for thirty years before the interference of white people and time was sufficient to establish aboriginal title). Part of their reasoning was based on the English common law where "periods of far less than [thirty] years of open, notorious

and uninterrupted occupancy are sufficient to establish title by adverse possession." Id. at 115, n. 29. While experts have determined that the Cush-Hook Nation occupied the land from time immemorial, the data collected by William Clark in 1806 and the treaty signed with Anson Dart in 1850 show that the Nation occupied the land for at least 44 years. (R. 1, 2.) Historical data also shows that the Cush-Hook Nation domesticated during their occupation of the land with agricultural activities and harvesting as well as by building permanent structures and establishing a permanent village. (R. 1.) See also Alabama-Coushatta Tribe of Tex., 28 Fed. Cl. at 115 (finding that the tribes agricultural activities and permanent buildings satisfied the requirement of domesticating the land). Consequently, it is clear that the Cush-Hook Nation satisfied the required elements of aboriginal title and a reasonable review of the record shows that the lower Oregon state courts did not make a mistake in determining that the Cush-Hook Nation held aboriginal title. The Cush-Hook Nation asks this Court to affirm that holding.

B. Extinguishment Of Aboriginal Title Is The Exclusive Right Of The U.S. Government And The Cush-Hook Nation's Aboriginal Title Has Never Been Explicitly Or Affirmatively Extinguished By The U.S. Government And Therefore Is Still Held By The Cush-Hook Nation

Matters concerning the extinguishment of aboriginal title are justiciable in general under the Indian Claims Commission Act of 1946. 25 U.S.C.A. §§ 70 et seq. It is well established that aboriginal title is a permissive right of occupancy and is not recognized as ownership, U.S. v. Gemmill, 535 F.2d 1145, 1147 (9th Cir. 1976), although it is afforded the protection of complete ownership against any but the sovereign see, e.g., U.S. v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). The federal government has the exclusive right to extinguish aboriginal title. Id; Santa Fe Pac. R. Co., 314 U.S. at 354. However, an intent of Congress to extinguish aboriginal title is not to be lightly inferred and requires a clear

expression in (1) the act of Congress alleged to constitute such extinguishment, or (2) the manner in which Congress has authorized and ratified the act of the President or other government official. See Santa Fe Pac. R. Co., 314 U.S. at 354; Gila River Pima-Maricopa Indian Cmty. v. U.S., 494 F.2d 1386, 1394 (Ct. Cl. 1974); 41 A.L.R. Fed. 425, *2a. Consequently, "the rule of construction recognized without exception… has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'" Santa Fe Pac. R. Co., 314 U.S. at 354 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)). A review of the record shows that the lower state courts did not make a mistake in finding that the Cush-Hook Nation's aboriginal title has not been extinguished.

a. The Oregon Donation Land Act of 1850 Did Not Extinguish Aboriginal Title Nor Did The Treaty With Anson Dart

A clear expression of extinguishment is necessary for any act of Congress that allegedly extinguishes aboriginal title. See Santa Fe Pac. R. Co., 314 U.S. at 354; Michael J. Kaplan, Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425, *2a. The Oregon Donation Land Act of 1850 lacked a clear expression of extinguishment by Congress. See Oregon Donation Land Act, 31 Cong. Ch. 76, September 27, 1850, 9 Stat. 496. The Act prescribed the rules for distributing federal lands to white settlors. Id. However, a review of the Act shows that there is no clear expression to extinguish the aboriginal title of the Cush-Hook Nation in present day Kelley Point Park. In fact, looking at the text of the Oregon Territory Act of 1848 demonstrates that the intent of Congress was to preserve aboriginal title of all tribes absent the ratification of treaty by the U.S. government. See Oregon Territorial Act, 30 Cong. Ch. 177, August 14, 1848, 9 Stat. 323. The Territorial Act

states, "nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished [sic] by treaty between the United States and such Indians." 9 Stat. 323. Consequently, any title transfer of land held under aboriginal title was void absent a treaty specifying such. See Alcea Band of Tillamooks, 329 U.S. at 46 (stating that land under aboriginal title is entitled to the rights of ownerships except against the sovereign). By failing to ratify the Cush-Hook Treaty, the Cush-Hook Nation's aboriginal title remained unextinguished and unaffected by the Act.

A clear expression is required in the manner which Congress has authorized and ratified the act of a government official. See Gila River Pima-Maricopa Indian Cmty., 494 F.2d at 1394; 41 A.L.R. Fed. 425, *2a. In 1850, Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, signed a treaty with the Cush-Hook Nation that compensated them for the land of their aboriginal title in exchange for them leaving. (R. 1, 2.) However, in 1853, the United States Senate refused to ratify the treaty. (R. 2.) The result is a clear absent of any expression ratifying Anson Dart's act. In fact, it may be construed as an express intent for the Cush-Hook Nation to maintain their aboriginal title. Reviewing the historical facts, it is evident that Congress lacked a clear expression of extinguishment in either a Congressional act or in the act of another government official and therefore, aboriginal title was not extinguished.

b. The Transfer Of Title To The Meeks And Any Subsequent Transfers Were Void Ab Initio And Failed To Extinguish Aboriginal Title

The absence of a treaty clearly extinguishing aboriginal title barred the transfer of title to the Meeks as outlined under the Oregon Territorial Act of 1848. 9 Stat. 323. However, even if the Court finds that transfers of aboriginal land were allowed under the Oregon

Donation Land Act without the presence of an extinguishing treaty, the transfer of title to the Meeks was void under failure to comply with the requirements of the Act. The Act stated that every white settlor claiming land must "[reside] and cultivate the [land] for four consecutive years." 9 Stat. 496. The Meeks failed to cultivate and live on the land for the required four years. (R. 1.) A review of the case law indicates that intent to extinguish aboriginal title may be shown through the lawful conveyance of lands by Congress. See Marsh v. Brooks, 55 U.S. 513, 519 (1852) (finding that the language "if Indian rights extinguished" was not needed on a patent application and indicating that aboriginal title was extinguished by conveyance). However, it has also been held that governmental acts that are merely in preparation or anticipation of non-Indian settlement on Indian lands do not extinguish aboriginal title. See Santa Fe Pac. R. Co., 314 U.S. at 350. The proposed conveyance to the Meeks was in anticipation of their living on the land for four years. Since the Meeks failed to comply with the requirements of the Oregon Donation Land Act, the distribution of the land in question was merely a governmental act in anticipation of non-Indian settlement and not a lawful conveyance and therefore not effective in extinguishing aboriginal title.

Nevertheless, while the conveyance to the Meeks failed to comply with the law and was therefore void, even if this Court finds such a conveyance was lawful, it still would have failed to extinguish aboriginal title. "Until Indian title is extinguished by sovereign act, any holder of the fee title or right of preemption, either through discovery or a grant from or succession to the discovering sovereign, remains "subject ... to the Indian right of occupancy," Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070, 1075 (2d Cir. 1982) (citing Johnson v. McIntosh, 21 U.S. 543, 574 (1823)). Thus, while title in fee simple may be transferred, it does not release the preemption of aboriginal title.

Consequently, although the subsequent transfers of title ultimately led to the State of Oregon gaining the land at Kelley Point Park in fee simple, the State's title is still subject to the Cush-Hook Nation's aboriginal title of their ancestral land.

C. The Cush-Hook Nation's Reliance On The Anson Dart Treaty Did Not Extinguish Aboriginal Title Through Abandonment

Once aboriginal title has been established, it is the exclusive right of the federal government to extinguish it. Alcea Band of Tillamooks, 329 U.S. at 46; Santa Fe Pac. R. Co., 314 U.S. at 354. There are no cases on point that hold a tribe loses their aboriginal title by leaving the land once it has been gained. See Quapaw Tribe of Indians v. U. S., 120 F. Supp. 283, 285 (Ct. Cl. 1954) rev'd by U S v. Kiowa, Comanche & Apache Tribes of Indians, 166 F. Supp. 939 (Ct. Cl. 1958) (stating in the context of establishing aboriginal title but not in the context of extinguishment that when an Indian tribe ceases for any reason to occupy an area of land, such land becomes the exclusive property of the United States). It is well established without exception that cases of ambiguity "are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith" rather than in favor of the United States. Santa Fe Pac. R. Co., 314 U.S. at 354 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)). Similarly, relying on the strong policy of the United States, this Court has held that it would "from the beginning to respect the Indian right of occupancy," and it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy." Santa Fe Pac. R. Co., 314 U.S. at 345-46. Consequently, the principles of equity necessitate that this Court uphold the findings of the Oregon state courts that the Cush-Hook Nation holds aboriginal title to the land located at Kelley Point Park.

The reason the Cush-Hook Nation left the land of their ancestors and traditional way of life was because they relied on the promises of compensation outlined in the treaty signed with the government's representative, Anson Dart, in 1850. (R. 1.) However, even though the Cush-Hook Nation moved their homes sixty miles to the west as agreed upon, the United States Senate failed to ratify the treaty approximately three years later and no compensation was ever given. (R. 2.) But for that agreement, the Cush-Hook Nation would still be on their ancestral land since there is no clear expression by Congress extinguishing their right of occupation. Although no treaty was officially formed, through Anson Dart the Cush-Hook detrimentally relied on the belief that a contract had been made. It is interesting to note that of the nineteen treaties agreed to by Anson Dart, not a single one was ever ratified by Congress. David Lewis, Anson Dart (1797-1879), THE OREGON ENCYCLOPEDIA, http://www.oregonencyclopedia.org/entry/view/anson_dart/ (last visited Jan. 14, 2013). While the wrongs occurred in 1850, it can begin to be corrected through the affirmation that the Cush-Hook Nation in fact holds aboriginal title today and have a possessory interest in protecting the religious and cultural artifacts of their tribe's great ancestors. Based on the arguments above and the principles of equity as well as the well-established policy of the United States, this Court should find that the Oregon Court of Appeals were not erroneous and therefore deference is afforded to the finding that the Cush-Hook Nation holds aboriginal title to the land located in the Kelley Point Park.

II. THE OREGON COURT OF APPEALS ERRED IN AFFIRMING THAT OREGON HAS CRIMINAL JURISDICTION OVER THE LAND IN QUESTION BECAUSE UNDER PUBLIC LAW 280 A STATE MAY EXERCISE CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY ONLY IF THE STATE CRIMINAL LAW APPLIED IS PROHIBITORY

The State of Oregon does not have criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the lands in question. "In order for a state to exercise criminal jurisdiction within Indian Country there must be a clear and unequivocal grant of authority." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978). While it is true that through Public Law 280 the State of Oregon's criminal laws "shall have the same force and effect within such Indian country as they have elsewhere within the State," 18 U.S.C.A. § 1162(a) (2013), such force and effect is only applicable to Indian country when such state criminal laws are prohibitory rather than regulatory in nature. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209-10 (1987). See also, Bryan v. Itasca County, 426 U.S. 373, 379–387 (1976). Therefore, this Court should hold that the State of Oregon lacks criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the lands in question.

A. The Land In Question Is Indian Country

Despite the Cush-Hook tribe's current lack of federal recognition, the land in question is Indian country for purposes of applying Public Law 280. Indian country has included land held under aboriginal title and that land could remain Indian country so long as that title was not extinguished. Bates v. Clark, 95 U.S. 204, 208 (1877). See also, Ex parte Kan-gi-shun-ca, 109 U.S. 556, 561 (1883) ("In our opinion [the *Bates*] definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians"). Though this definition of Indian country is antiquated, it has been said by this

Court that the *Bates* definition of Indian country is "more technical and limited" than the now codified definition of Indian country located at 18 U.S.C. § 1151. United States v. John, 437 U.S. 634, 649 n.18 (1978). The codified definition of Indian country provides that:

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

This Court has determined that tribal trust lands are themselves Indian country. See John, 437 U.S. 634. Federal courts have interpreted the codified definition of Indian country to include trust land whether or not the property is located on a formally established reservation. United States v. Roberts, 185 F.3d 1125, 1130 (10th Cir. 1999). "Over many decades, the federal government's interest in tribal land was gradually reconceived as a trustee's fee title, and the tribal interest as beneficial ownership under trust." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 15.04 at 5 [hereinafter "COHEN'S HANDBOOK"]. The United States owes a trust responsibility to Indian tribes despite Indian title being secondary to the federal government's superior title. See Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). See also Worcester v. Georgia, 31 U.S. 515 (1832); 25 U.S.C. § 3701 ("[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children"). Because of the Doctrine of Discovery and as held in *Johnson v. McIntosh*, Indian title includes "title of occupancy," "right of occupancy," and "right of possession,"

subject to the United States's superior "fee," "absolute title," or "absolute ultimate title," and such Indian title can not be extinguished absent action from the United States. Johnson v. McIntosh, 21 U.S. 543 (1823).

In the case at hand, by incorporation and reaffirmation of the foregoing argument that the Cush-Hook tribe holds aboriginal title to the land in question, the land in question is Indian country. Prior to the Cush-Hooks departure from the land in question, it is clear that the land in question met the *Bates* definition of Indian country, which simply equates aboriginal title with Indian country. Because of the failure of Congress to ratify the Dart treaty, aboriginal title has never been extinguished and consequently, under the *Bates* definition, the land in question would continue to be Indian country. It is reasonable to assume that, because this Court has said the *Bates* definition is narrower than the current definition, the codified definition was intended by Congress to be inclusive of the *Bates* definition and applied more broadly and therefore because the Cush-Hook retain aboriginal title to the lands in question such lands retain their status as Indian country. In addition, it could be said that the land in question is currently held in trust by the United States and therefore the trust land is Indian Country as determined under *John* and *Roberts*. Under the doctrine of discovery the Oregon Territory and lands therein became subject to superior federal title. That being said, it is reasonable for this Court to conclude that, similar to the Cherokee cases, Indian tribes within the Oregon Territory retained Indian title following the establishment of the Oregon Territory in 1848 subject to the United States' superior title. While the Anson Dart treaty of 1850 put in motion an action by the United States that might have extinguished aboriginal title, the treaty was not ratified, the aboriginal title was not extinguished, and the trust relationship between the Cush-Hook tribe and the United States

remains. Subsequently, the land in question is Indian country and Public Law 280 is applicable thereon.

B. Public Law 280 And The Regulatory-Prohibitory Distinction

Through Public Law 280, the State of Oregon has limited criminal jurisdiction over Indian country inclusive of the land in question. The relevant portion of Public Law 280 is as follows:

> [The State of Oregon] shall have jurisdiction over offenses committed by or against Indians in [all Indian country within the State, except the Warm Springs Reservation] to the same extent that [the State of Oregon] has jurisdiction over offenses committed elsewhere within the State [of Oregon], and the criminal laws of [the State of Oregon] shall have the same force and effect within such Indian country as they have elsewhere within the State [of Oregon]. 18 U.S.C. § 1162.

This Court has concluded that for a criminal law to apply within Indian country such criminal law must be prohibitory in nature. See Itasca County, 426 U.S. at 379–387. See also Cabazon Band of Mission Indians, 480 U.S. 202. When a state law is fundamentally regulatory, such law is not applicable under Public law 280 even when a violation of the regulatory law results in criminal punishment. Cabazon, 480 U.S. at 211. This Court explained that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and therefore the regulatory law is not applicable to Indian country under Public Law 280. Cabazon, 480 U.S. at 209. See also Itasca County, 426 U.S. 373. The types of state laws that have been found to be prohibitory and applicable to Indian country through Public law 280 include "conduct proscribed by most penal codes…including assault, sexual assault, disorderly conduct, drug offenses, arson, writing a bad check, welfare fraud, [] trespass…[m]ost firearm offenses [not] related to hunting…underage drinking…[and] traffic offenses that resulted from driving while

intoxicated in any way." Claudia G. Catalano, Annotation, Construction and Application of § 2 of Federal Public Law 280, Codified At 18 U.S.C.A. § 1162, Under Which Congress Expressly Granted Several States Criminal Jurisdiction Over Matters Involving Indians, 55 A.L.R. Fed. 2d 35 (2011). The types of state laws that have been found to be regulatory and not applicable to Indian country through Public law 280 include vehicle forfeiture laws, "a fireworks regulation, gaming regulations, a fire code, a workers' compensation statute, and a law imposing an income tax." Id. If a state law cannot be determined to be regulatory or prohibitory, "courts should follow the canons of construction and deny state jurisdiction under Public Law 280." COHEN'S HANDBOOK, §6.04 at 12. In the case at hand, OR. Rev. Stat. 358.920 and Or. Rev. Stat. 390.235 are both regulatory in nature and as such do not apply to the land in question.

a. Or. Rev. Stat. 358.905-358.96 and Or. Rev. Stat. 390.235-390.249 Application Under Public Law 280

Oregon Revised Statutes §§ 358.905-358.96 and §§ 390.235-390.249 are regulatory in nature and therefore not applicable to Indian Country under Public Law 280. From a purely textual standpoint the language of the determinative statutes is clearly an attempt to regulate, rather than prohibit, the behavior Mr. Captain was charged with: "A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon *unless that activity is authorized by a permit*," Or. Rev. Stat. §358.920 (1)(a) (emphasis added); "A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature *without first obtaining a permit*." Or. Rev. Stat. § 390.235 (1)(a) (emphasis added). The statutes themselves invite

application to perform the very actions that Mr. Captain performed and therefore simply regulates the actions performed. One could argue that the invitation to apply for a permit is only applicable to the excavation and removal portion of §358.920 but in that same vein one could argue that, strictly speaking, Mr. Captain did just that: excavated and removed an archaeological object, albeit without a permit, in an attempt to protect said object from the injury, destruction, and alteration of an archaeological object personally sacred to him that had already been vandalized. From 1966 through February 8, 2011 the State of Oregon granted 1,489 archaeological permits. Oregon Archaeological Permits, From Present Back to 1966, THE STATE OF OREGON, http://www.oregon.gov/oprd/HCD/ARCH/docs/oregon_archaeol ogical_permits-revised.pdf (last revised Feb. 8, 2011). This point is made to illustrate that the purpose of the Oregon statutes in question is to regulate behavior that is generally permitted under certain conditions. This is in stark contrast to the types of behavior considered prohibitory as applied to Public Law 280; one would certainly be unable to gain a permit to participate in the conduct that has been determined to be prohibitory law as listed above including sexual assault, arson, and driving under the influence of alcohol. Lending further credence to the claim that the Oregon statutes in question are regulatory is the fact that despite the persistent violation of the statutes the State failed to do anything to actually enforce the statutes; had the conduct been so egregious as other prohibitory criminal laws the State would surely have taking preventative measure to enforce such laws that violate so tragically the public policy of the State. If there is any question that the statutes in question are regulatory or prohibitory then this Court "should follow the canons of construction and deny state jurisdiction under Public Law 280." COHEN'S HANDBOOK, §6.04 at 12.

Additionally, § 390.235 only applies to public lands that are not inclusive of the land in question as it is held under aboriginal title and therefore is of private ownership or, to the alternative, federal public lands not within the definition of public lands applicable to § 390.235. By incorporation and reaffirmation of the foregoing argument that the Cush-Hook tribe holds aboriginal title to the land in question, the land in question is not public lands for purposes of imposing. Or. Rev. Stat. § 390.235.

CONCLUSION

For the aforementioned reasons, Mr. Captain respectfully requests that the United States Supreme Court affirm the decision of the Oregon Court of Appeals holding that the Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States and reverse the decision of the Oregon Court of Appeals holding that Oregon Revised Statute §§ 358.905-358.96 and §§ 390.235-390.249 apply to the land in question under Public Law 280.