No. 11-0274

In the

Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

THOMAS CAPTAIN,
Respondent.

On Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR PETITIONER

TEAM 60

Attorneys for Petitioner

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

Statement of the Facts

In 2011, the State of Oregon brought criminal charges against Respondent, Thomas Captain, arising from his cutting of timber and unlawful trespass of Kelley Point Park, a state park located in Portland, Oregon. Carved images, known as totems created by indigenous people, are located within this state park. These images have grown with the tree and now stand at a height of 25-30 feet. Respondent cut down one of the trees and removed the image. He then fled the park, but Oregon state troopers arrested him before he reached his home in the Oregon coastal mountain region. The State charged, and ultimately convicted, Respondent of trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological site under the statutory schemes of Or. Rev. Stat. § 358.905-358.961 (2012) (protecting archeological objects) and Or. Rev. Stat. § 390.235-390.340 (2012) (protecting historical objects).

Respondent claims membership in the Cush-Hook Nation. Neither the United States Government nor the State of Oregon recognizes the Cush-Hooks as a sovereign political entity. However, the Cush-Hooks claim to have been given a "sovereignty token" from explorers Meriwether Lewis and William Clark in 1806. These tokens were actually peace medals, which were ordinarily given as gifts by the explorers to chiefs of tribes they encountered. Acceptance of these medals was viewed as a demonstration of a desire to engage in relations with the United States. The Cush-Hooks remained on the land until 1850 after entering into treaty negotiations with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. During negotiations, the Cush-Hooks agreed to settle 60 miles west to the Oregon coast range of mountains to avoid the encroaching settlors. They have resided

in this area ever since. The treaty was signed by the parties, but the United States Senate refused to ratify the treaty.

Two American settlers, Joe and Elsie Meek, moved to the land in question. Under the Oregon Donation Land Act of 1850, the Meeks occupied and received title to 640 acres of the land from the United States. Their compliance with the Act is uncertain. Ultimately, the Meeks' descendants sold the land to the State of Oregon, which then established Kelley Point Park.

Statement of the Proceedings

The defendant elected to have a bench trial before the Oregon Circuit Court for the County of Multnomah. The trial court concluded that the Cush-Hooks aboriginal title has never been extinguished. It further determined that the Meeks' title to the land was void *ab initio*, which voided the subsequent sale to the State of Oregon. Therefore, the Cush-Hooks had aboriginal title to the land and Respondent was not guilty of trespass and cutting timber without a permit. However, the trial court determined that the State had criminal jurisdiction under Public Law 280 to charge desecration of archaeological and historical objects, and the court convicted Respondent. The State appealed the decisions to the Oregon Court of Appeals, which summarily affirmed. Further review was denied by the Oregon Supreme Court. The State petitioned, and was granted, certiorari to the United States Supreme Court, appealing the trial court's decision to award aboriginal title to the land occupied by Respondent. Respondent cross-petitioned, and was granted, certiorari, appealing the conclusion that the State had criminal jurisdiction to enforce statutes that protect archaeological, historical, and cultural objects within land upon which Respondent had trespassed.

SUMMARY OF ARGUMENT

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

The Oregon Court of Appeals erred in concluding that the Cush-Hooks hold aboriginal title to the land in Kelley Point Park because the Cush-Hooks are not a federally recognized tribe and cannot assert aboriginal title. The Cush-Hooks have not proved tribal aboriginal title by actual, exclusive, and continuous use and occupancy of the land. Respondent has not proved individual aboriginal title by his ancestor's actual, exclusive, and continuous use and occupancy of the land.

The Oregon Court of Appeals erred in concluding that the United States did not extinguish any possible aboriginal title to the land in Kelley Point Park because Congress intended to extinguish aboriginal title.

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

The State of Oregon has criminal jurisdiction to enforce its statutory scheme to protect archaeological, culture, and historical objects on any land within its territorial boundaries. First, its scheme has not been preempted by federal law. Second, the scheme is prohibitory by nature, allowing the State's jurisdiction extends into Indian Country through Public Law 280.

ARGUMENT

I. WHETHER THE CUSH-HOOK NATION OWNS THE ABORIGINAL TITLE TO THE LAND IN KELLEY POINT PARK?

a. The Oregon Court of Appeals erred in concluding that the Cush-Hooks hold aboriginal title.

A reversal of Respondent's convictions for trespass and cutting timber in a state park without a permit require Respondent to establish aboriginal title. The doctrine of discovery holds that the discovering sovereign takes fee title to the land, subject to the aboriginal right of occupancy and use. *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823); *County of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226, 234 (1985). "Aboriginal title is a term of art used to describe an Indian possessory interest in land which Indians have inhabited since time immemorial." *County of Oneida,* 470 U.S. at 234.

> Indian tribes are wards of the nation, communities dependent on the United States. 'From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' This duty of protection and power extend to individual Indians, even though they may have become citizens.

Cramer v. United States, 261 U.S. 219, 232 (1923) (quoting *United States v. Kagama,* 118 U.S. 375, 383 (1886)). To recognize an Indian right of occupancy requires a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians,* 348 U.S. 272, 278-79 (1955) (citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949). Non-federally recognized tribes have no legal relationship with the federal government. Cohen, *Handbook on Federal Indian Law,* § 3.02[3], at 139 (2005); *see, e.g.*, *Greene v. Rhode Island*, 398 F.3d 45, 50 (1st Cir. 2005) (declining to recognize rights in a non-federally recognized tribe). Congress has conferred

recognized tribal status on a number of tribes through the Office of Federal Acknowledgment of the Department of Interior. *See* Cohen, *supra*, § 3.02[6][a], at 144 & n. 57.[1] The Cush-Hooks are not a federally recognized tribe. Neither the United States nor the State of Oregon recognizes the Cush-Hooks as sovereign, and nothing sufficiently acknowledges the Cush-Hooks as a sovereign tribe for purposes of aboriginal title.

However, Congress specifically acknowledged that tribes may be recognized by a decision of the federal court. 25 U.S.C. §§ 479a, 479a-1 (2006). Recognition requires factual finding by a federal court, not this Court on appellate review. Therefore, this court is limited to a determination of aboriginal title, and any determination of sovereignty of the tribe is outside to scope of this appeal.

The issue becomes whether the Federal Government has acknowledged the Cush-Hooks as a sovereign tribe and whether that confers a right to occupy the land. The peace medal awarded by Lewis and Clark was "a pledge of the sincerity with which [Jefferson] now offers you the hand of friendship." Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* 105 (2006). It was "respected as the bond of union . . . ." Miller, Robert J., *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 97 (2005).[2] It was merely a representation of willingness of the United States to negotiate and trade with the Cush-Hooks peacefully. The Cush-Hooks are not wards of the United States, and the United States does not have a duty to

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[1] See e.g. 25 U.S.C. 1041(b) (2000) (Loyal Shawnee Tribe); 1300k-2 (1994) (Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians); 1300j-1 (1994) (Pokagon Band of Potawatomi Indians); 1300h-2 (1988) (Lac Veux Desert Band of Lake Superior Chippewa Indians); 1758 (1983) (Mashantucket Pequot Tribe); 712(a) (1982) (Cow Creek Band of Umpqua Indians); 1300f (1978) (Pasqua Yaqui Tribe).

[2] Lewis and Clark took these peace medals on the expedition before they knew that the United States had purchased the Louisiana Territory because the medals were an accepted part of trade. Miller, Robert J., *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 97 (2005).

recognize a possessory interest of the Cush-Hooks in Kelley Point Park. Therefore, Respondent is not able to assert aboriginal title.

Should Respondent be able to assert aboriginal title, the inquiry becomes whether Respondent has met the requirements for establishing aboriginal title. To establish tribal aboriginal title, the Cush-Hooks must prove actual, exclusive, and continuous use and occupancy of a definable portion of the land. *Native Village of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012); *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986), *cert. denied*, 107 S. Ct 3228.

The requisite conditions necessary to establish aboriginal title is a question of fact. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941), *reh'g denied*, 314 U.S. 716. The finding of the requisite conditions necessary to establish aboriginal title will be upheld if supported by substantial evidence. *See United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (reviewing findings of Indian Claims Commission); *Six Nations v. United States*, 173 Ct. Cl. 899, 910 (Ct. Cl. 1965) (reviewing findings of Indian Claims Commission); *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 906 (Ct. Cl. 1963) (reviewing under Indian Claims Commission Act).

i. The Cush-Hooks do not hold tribal aboriginal title

The Cush-Hooks must first establish actual use and occupancy of a definable portion of the land. Actual use is determined with reference to the Indians' "habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites . . . ." *Mitchel v. United States*, 34 U.S. 711, 746 (1835). The Cush-Hooks have not used the land since 1850 when they relocated to the Oregon coast range of mountains and abandoned what is now Kelley Point Park.

Secondly, the Cush-Hooks must establish exclusive use and occupancy of a definable portion of the land. "The Indians' rights to its exclusive enjoyment in their own way and for their own purposes were . . . respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." *Id.* Since 1850, Kelley Point Park has been subsequently possessed by the Oregon Territory, the United States, the Meeks and their descendants, and the State of Oregon. In 1850, the Cush-Hooks agreed to relocate to the foothills of the Oregon coast range of mountains. The Cush-Hooks relocated to avoid the encroaching settlers, and a majority of the Cush-Hooks has resided there ever since. The Cush-Hooks exchanged the land at Kelley Point Park for the Oregon coast range of mountains. When the Cush-Hooks relocated, they abandoned the land that is currently Kelley Point Park. After the Cush-Hooks relocated, two settlers moved onto what is now Kelley Point Park and ultimately received fee simple title to the land from the United States. The subsequent possession of Kelley Point Park by multiple parties effectively foreclosed exclusive possession by the Cush-Hooks. The Cush-Hooks did not maintain exclusive possession and cannot establish aboriginal title.

Lastly, the Cush-Hooks must establish continuous use and occupancy of a definable portion of the land for an extended period of time prior to the loss of the property. This court is able to "protect such ties in the form of legal title only for those Indians who have *maintained* a presence on that land." *Cramer*, 261 U.S. at 227. This court cannot "find such title in all Indians who attempt to *return* to their ancestral lands. *United States v. Kent*, 945 F.2d 1441, 1444 (9th Cir. 1991) (citing *Cramer*, 261 U.S. 219; *United States v. Dann (Dann II)*, 873 F.2d 1189, 1196-99 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989)). The Cush-Hooks signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon

Territory. Dart wanted to move the tribe so that American settlers could occupy the valuable farming lands on the river. The Cush-Hooks agreed to relocate to the Oregon coast range of mountains. When the Cush-Hooks agreed to relocate, they willingly exchanged any interest in the Kelley Point Park area for an equivalent interest in the Oregon coast range of mountains that they now occupy. The Cush-Hooks willingly ceased use and occupancy of the Kelley Point Park area, failed to maintain a presence on that land, and their use and occupancy was no longer continuous. A finding of aboriginal title is not supported by substantial evidence.

ii. Respondent does not hold individual aboriginal title.

Respondent's alterative right of occupancy could be established by individual aboriginal title. "Tribal property . . . must be distinguished . . . from property of individual Indians." Cohen, *supra*, § 15.02, at 966 (2005). Individual aboriginal title may survive even when tribal title has been extinguished. *United States v. Dann (Dann I)*, 470 U.S. 39, 50 (1985). The Ninth Circuit, on direction from this Court, set forth the requirements to establish individual aboriginal title. *See Dann II*, 873 F.2d at 1196-99. The Ninth Circuit responded, "There is no theoretical reason why individuals could not establish aboriginal title in much the same manner that a tribe does." *Id.* at 1196. Individual aboriginal title can only be established when an Indian can show that (1) he or his lineal ancestors continuously occupied the site, as individuals, and (2) commencing before the land was withdrawn from entry. *Kent*, 945 F.2d at 1444 (citing *Dann II*, 873 F.2d at 1198-99). An individual Indian must show actual possession by occupancy, enclosure, or other actions, to the exclusion of all others. *Dann II*, 873 F.2d at 1199. Respondent has not shown that his lineal ancestors

occupied the site before Kelley Point Park was withdrawn from entry. Respondent cannot establish individual aboriginal title.

This court must construe 'occupancy' under individual aboriginal title. Unlike the doctrine of tribal title, "[i]ndividual aboriginal title is by no means a well-defined concept." *Id.* at 1195. Few cases provide guidance as to what constitutes "occupancy" in the context of individual aboriginal title. The United States' protection of the right of occupancy "had in view the original nomadic tribal occupancy" but applies equally to individual Indian occupancy; "occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life." *Cramer,* 261 U.S. at 227. In *Cramer,* this Court explained:

> The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon, was in harmony with the well-understood desire of the government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

Id. at 228-29.

The right to the lands "is based on occupancy alone, and the extent of it is clearly fixed by the inclosure [sic], cultivation and improvements." *Id.* at 234. This Court, in *Cramer*, relied on the individual Indian's open and notorious possession in definite and substantial character at the time the grant was made to find a reservation of the individual Indian's right of occupancy. *Id.* at 230. *Cramer* "carefully restricted" individual rights to land that was "actually enclosed and occupied by the individual Indians." *Dann,* 873 F.2d at 1199 ("to establish such an individual right of occupancy, the Danns must show actual possession by occupancy, inclosure [sic], or other actions establishing a right to the lands to

the exclusion of adverse claimants") (citing *Cramer,* 261 U.S. at 234-36). *Dann II* does not clearly define what type of association with land is sufficient to constitute occupancy. *Id.*

This Court must also consider whether Respondent established continuous use to prove individual aboriginal title. The Ninth Circuit Court of Appeals in *Kent* illustrated the requirement that use and occupancy be continuous to establish individual aboriginal title. 945 F.2d 1441. The individual Indian defendant moved onto a site in the Klamath National Forest. *Id.* at 1443. "From approximately 1870 to 1984, no blood relative of Kent lived at this site[,]" but every year since time immemorial, the Karuk Indians have traveled along a road immediately adjacent to where Kent resided to participate in the ceremony of Pikiyowish (World Renewal). *Id.* at 1443. The Ninth Circuit did not find continuous use and possession because Kent "began her occupancy of th[e] parcel of land in 1984, long after her tribe's title to the land had been extinguished, and long after the land had been established as a National Forest, closed to public entry and settlement."[3] *Id.* No lineal ancestors immediately preceded her in occupancy. S*ee Cramer v. United States*, 261 U.S. 219, 226 (1923) (finding individual aboriginal title from continuous possession since living with parents). The Ninth Circuit was "acutely aware of, and respect[ed], the strong attachment that [the defendant] ha[d] by virtue of family, culture and tradition to th[e] parcel of land . . . ." *Id.* at 1144. Respondent, like the individual Indian in *Kent*, was not preceded by a lineal ancestor. Thus, Respondent's use and occupancy was not continuous, and a finding of aboriginal title is not supported by substantial evidence.

[3] Klamath National Forest was closed long before 1984 when Kent first occupied this parcel of land. *Kent*, 945 F.2d at 1444 n.3 (9th Cir. 1991). Tribal aboriginal title had been extinguished, and Congress set aside compensation for the tribe for the taking. *Id.* at 1443.

b. If aboriginal title was established, the United States extinguished aboriginal title because Congress intended to extinguish aboriginal title.

If aboriginal title was held at some point, this Court must consider whether aboriginal title was extinguished. The sovereign has the absolute and exclusive right to extinguish the aboriginal right of occupancy and use. *Johnson*, 21 U.S. at 586-88; *County of Oneida*, 470 U.S. at 234; *Cramer*, 261 U.S. at 227 ("[I]t has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer*, 261 U.S. at 227 (citing *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877); *Minnesota v. Hitchcock*, 185 U.S. 373, 385 (1906)). "Indian title is a permissive right of occupancy granted by the Federal Government to the aboriginal possessors of the land[;] . . . it is mere possession not specifically recognized as ownership, and may be extinguished by the Federal Government at any time. *United States v Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976) *cert. denied*, 429 U.S. 982 (citations omitted); *Tee-Hit-Ton Indians*, 348 U.S. at 279. The Federal Government awarded fee simple title to the Meeks. The grant of fee simple title to another extinguished any possible aboriginal title.

The next issue is whether Congress authorized the extinguishment any possible aboriginal title by granting fee simple title to the Meeks. "Congress' power to extinguish aboriginal title is supreme . . . whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . ." *Santa Fe Pac. R.R. Co.*, 314 U.S. 347. Congress can indicate extinguishment of aboriginal title by legislation or authorization of an executive action. *Id.* at 354. Congress had the power to extinguish any possible aboriginal title of the Cush-Hooks or Respondent by the

manner or method it saw fit. Congress authorized the grant of title to the Meeks. The United States granted title as a means of extinguishing any possible aboriginal title.

The final issue as to extinguishment is whether Congress extinguished any possible aboriginal title when it enacted the Oregon Donation Land Act. Congress may extinguish Indian title by a "clear and plain indication" that the sovereign "intended to extinguish all of the rights" in the property. *Sante Fe Pac. R.R. Co.*, 314 U.S. at 354. An intent on the part of Congress to extinguish aboriginal title is not to be lightly implied. *Id.*

To find that the Oregon Donation Land Act extinguished any possible aboriginal title, this Court must consider whether Congress indicated extinguishment. Congress enacted the Oregon Donation Land Act of 1850, granting "to every white settler or occupant of the public lands . . . " who had "resided upon and cultivated the [land] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500. The Oregon Donation Land Act gave settlers "[a] present right to occupy and maintain possession, so as to acquire a complete title to the soil . . . ." *Hall v. Russell*, 101 U.S. 503, 510 (1879). This Court found that many provisions of the Act manifested the clear intent of Congress that the occupant was granted the mere right of possession. *Id.* Further, this Court ruled, as to the Oregon Donation Land Act, "Congress had the right, on assuming undisputed dominion over the Territory . . . ." *Id.* at 508. Joe and Elsie Meek claimed the 640 acres of land that today comprises Kelley Point Park under the Oregon Donation Land Act, and they received fee title from the United States. Congress exercised dominion over the land that today comprises Kelley Point Park. In the exercise of its dominion, Congress authorized settlement or entry of non-Indians and granted a right of possession to the Meeks. Under the Oregon Donation Land Act, white settlers were awarded present possessory rights with a future grant of title upon satisfying the conditions. Whether

title vested is irrelevant. Vesting title to the Meeks was not necessary to extinguish aboriginal title. Congress expressed a willingness to extinguish any possible aboriginal title when it authorized entry and granted a right of possession to someone other than the Cush-Hooks. The grant of a possessory right to the Meeks was sufficient to extinguish any possible aboriginal title.

II. WHETHER OREGON HAS CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION NOTWITHSTANDING ITS PURPORTED OWNERSHIP BY A NON-FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE?

The State's concern is not title to the totem removed by Respondent. Rather, the State's interest is in the protection of Indian artifacts not yet excavated and attached to land within its territorial boundaries. For these reasons, the State enacted Or. Rev. Stat. §§ 358.905 – 358.961 (2011) and Or. Rev. Stat. §§ 390.235 – 390.240 (2011), creating criminal sanctions for failure to comply with permitting provisions for archaeological and historical artifacts. The trial court determined that Public Law 280 extends Or. Rev. Stat. §§ 358.905 – 358.961 and Or. Rev. Stat. §§ 390.235 – 390.240 to all lands within the State of Oregon, regardless of title, as a conclusion of law. First, if title to the land is resolved in favor of the State, then the court need not decide the application of Public Law 280. However, the artifact desecrated by Respondent is of Indian heritage. Therefore, there are two issues: (a) Whether the state of Oregon can enact a statute that protects archaeological and historical objects of Indian heritage, and (b) whether the State's criminal jurisdiction extends to the land in question if it aboriginal title is established. Questions of law are reviewed *de novo*,

Pierce v. Underwood, 487 U.S. 552, 558 (1988); as are jurisdictional questions, *United States v. Cruz*, 554 F.3d 840, 843 (9th Cir. 2009).

a. Whether the State of Oregon can enact a statute that protects archaeological and historical objects of Indian heritage?

Article VI, cl. 2, of the Constitution, known as the Supremacy Clause, states that the laws of the United States "shall be the supreme Law of the Land; . . . and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. In this case, the Native American Graves Repatriation Act (NAGPRA) is the federal law that regulates the disposition of archaeological discovery of Indian artifacts found on federal and Indian land. 25 U.S.C. §§ 3001, et.seq. (2006). First, the State asserts that the title to Kelley Point Park remains with the State, and NAGPRA does not apply to state public lands. *Id.* However, if this Court decides that the Cush-Hooks have aboriginal title to Kelley Point Park, an inquiry into federal preemption is necessary.

This Court has long recognized the principle that state laws in conflict with federal laws are without effect. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Questions of express or implied pre-emption begin with an analysis under an assumption that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 77. "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* Any ambiguity is ordinarily resolved in a "reading that disfavors pre-emption." *Id.*

The Court summarized pre-emption in *Altria Group, Inc. v. Good*:

> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-

> emption case." Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.

Id. The state statutory scheme in question creates criminal penalties for an individual who excavates or removes archeological and cultural objects without a permit. *See* Or. Rev. Stat. § 358.920(8) (creates a Class B misdemeanor for violation of Or. Rev. Stat. §§ 358.905 – 358.961); Or. Rev. Stat. § 390.235(7) (creates a Class B misdemeanor for violation of Or. Rev. Stat. 390.235 – 390.240). NAGPRA only creates a "civil penalty" for non-compliance by museums and does not create any criminal offense against an individual. 25 U.S.C. § 3007. NAGPRA further expressly states that "[n]othing in this chapter shall be construed to . . . limit the application of any State or Federal law pertaining to theft or stolen property." 25 U.S.C. 3009(5); *see also State v. Taylor*, 269 P.3d 205 (Haw. 2011) (prosecution of theft under Hawaii state law after federal conspiracy prosecution, based on NAGPRA provisions, is not double jeopardy, even though the objects at issue were the same). The express reservation of criminal prosecution removes any preemptive power of NAGPRA with regard to criminal prosecution under State law. Coupled with NAGPRA's expression of only civil penalties against museums, it remains a regulatory statute with no prohibitive characteristics. NAGPRA is essentially a civil law, regulating civil conduct, and is without any sort of criminal jurisdiction. Further, NAGPRA's jurisdiction is limited to federal and tribal land, giving states power to enact statutes protecting cultural objects of Indian heritage on state public land. This demonstrates Congress' intent not to occupy the field of criminal

prosecution of crimes relating to the excavation, removal, and desecration of Indian artifacts. The State's power to enact such statutes is not preempted.

This power is not to say that the State does not have to comply with NAGPRA provisions requiring return of Indian artifacts within the State's museums which receive federal funds. 25 U.S.C. §3005(a)(1). NAGPRA presumes that an "Indian Tribe" owns and controls cultural objects of Indian heritage discovered on federal and tribal lands. 25 U.S.C. § 3002. But an "Indian Tribe" is defined as "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States because of their status as Indians." 25 U.S.C. §3001(7). The Cush-Hooks do not fall within the definition of "Indian Tribe" for the purposes of NAGPRA. They do not receive special programs or services, and the record does not indicate that they have any organized status. Therefore, under NAGPRA, they are not qualified recipients of cultural property. Should the Cush-Hooks be federally recognized or fall within NAGPRA's definition of an "Indian Tribe," they are free to request the return of the cultural objects. 25 U.S.C. §3005(a)(1).

b. Whether the State's criminal jurisdiction extends to the land in question is aboriginal title is established.

The State has criminal jurisdiction outside of Indian country, regardless of tribal status. 18 U.S.C. § 1152 (2006). Sections 1152 and 1153 of Title 18 give the United States and tribes exclusive criminal jurisdiction over Indians and non-Indians within Indian Country, absent congressional action. *Nevada v. Hicks*, 533 U.S. 353, 365 (2001). But the State may extend its statutory scheme protecting archeological, historical, and cultural objects into Indian Country through Public Law 280. Congress created an exception to

exclusive tribal and federal jurisdiction through Public Law 280, which permits concurrent state criminal jurisdiction within Indian Country. 18 U.S.C. §1162 (2006); *Hicks*, 533 U.S. at 365. The primary concern of the enactment of Public Law 280 was combating lawlessness on reservations. *Id.* (citing *Bryan v. Itasca County*, 426 U.S. 373, 379-80 (1976)). The State of Oregon is a Public Law 280 state. 18 U.S.C. § 1162(a). However, Public Law 280 requires an additional inquiry into the language of a state statute in order to be enforceable in Indian Country.

When determining whether a state statute may be fully applicable into Indian Country under Public Law 280, in particular to section 2 of Public Law 280, an inquiry into whether the statute is criminal or civil is required. *California v. Cabazon*, 480 U.S. 202, 208 (1987). This Court established that state criminal statutes, which are prohibitory by nature, are applicable under Public Law 280 and civil statutes, which are regulatory, are not. *Id.* at 209-211. This is not a bright-line rule and requires a detailed examination before such a characterization can be made. *Id.*

Generally, interpretation of statutes involving Indian law apply canons of construction that liberally construe statutes in favor of the tribe. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 789, 765 (1985) (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)). The statute involving Indian law is Public Law 280, not the Oregon state statutes. Further, "the canons of construction are rooted in the unique trust relationship between the United States and the Indians." *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). The Cush-Hooks have no trust relationship with the United States, as they are not federally recognized. Further, this court in *Cabazon* did not apply the canons of construction to its inquiry into the California gaming scheme at issue in

that case. *Cabazon*, 480 U.S. at 210-11. Therefore, the canons of construction of Indian law do not apply to Respondent nor do they apply to the inquiry into the Oregon statutes protecting cultural objects of Indian heritage.

The shorthand test in *Cabazon* is "whether the conduct at issue violates the State's public policy." *Id.* at 210. The State's public policy is the protection of archeological and historical objects. Through both series of statutes, the State created protections by requiring permits to excavate and remove these objects. The totem removed by Respondent falls within this category and is protected. Respondent removed the objects without a permit, violating this public policy. Both statutory schemes criminalize this conduct through specific prohibitory statutes. The relevant provision prohibiting the removal of archaeological objects without a permit states:

> **Prohibited conduct; exception; penalty.** (1)(a) A person may not excavate, injure, or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235. . .
>
> (c) It is prima facie evidence of a violation of this section if:
>
> (A) A person possesses the objects described in paragraph (a) of this subsection . . .
>
> (8) Violation of the provisions of this section is a Class B misdemeanor.

Or. Rev. Stat. § 358.920. The relevant statute prohibiting removal of historical materials without a permit states:

> **Permits and conditions for excavation or removal of archeological or historical material; rules; criminal penalty.** (1)(a) A person may not excavate or alter an archaeological site on public lands . . . .or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks or Recreation Department.
>
> (7) Violation of the provisions of subsection (1)(a) of this section is a Class B misdemeanor.

Or. Rev. Stat. § 390.235. First, both statutes carry the criminal penalty of a Class B misdemeanor. Under Oregon law, a Class B misdemeanor carries up to a six month sentence, Or. Rev. Stat. § 161.615(2) (2011); or a fine of up to $2500, Or. Rev. Stat. § 161.635(1)(b) (2011). Further, § 358.920 uses the word "Prohibited," a clear expression of a criminal statute under *Cabazon*. The other statute, § 390.325, uses the word, "criminal penalty." These terms are unambiguous, demonstrating an intent to make a criminal statute for the purposes of protecting archeological and historical objects. Therefore, the State has criminal jurisdiction through Public Law 280 to prohibit removing cultural objects without a permit.

Conclusion

For the foregoing reasons, the State of Oregon, as petitioner, respectfully requests this Court to reverse the Oregon Court of Appeals decision affirming that the Cush-Hooks still owned the land with in the Park and the finding that Respondent is not guilty for trespass or for cutting timber without a state permit. The State of Oregon further respectfully requests this Court to affirm the finding of guilt for damaging an archeological site and a cultural and historical artifact.