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STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDINGS

In 2011, the State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecration of archaeological and historical site under Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240.

Oregon Circuit Court for the County of Multnomah held a bench trial in which they found Captain not guilty of trespass, not guilty of cutting timber without a state permit, and guilty of violation of Or. Rev. Stat. 358.905-358.961 *et seq.* and Or. Rev. Stat. 390.235-390.240 for damaging a cultural and historical artifact and an archaeological site. The court imposed a fine of $250.

The State and Captain both appealed the decision. The Oregon Court of Appeals affirmed, but did not write an opinion. The Oregon Supreme Court denied review.

The state then filed a petition and cross petition for certiorari and Captain filed a cross petition for certiorari to the United States Supreme Court. The Supreme Court granted certiorari.

The Oregon Circuit Court for the County of Multnomah made the following findings of fact and conclusions of law:

Findings of Fact:

1. Expert witnesses in history, sociology, and anthropology establish that the CushHook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans.

2. Anson Dart, the superintendent of Indian Affairs for the Oregon Territory, signed a treaty with the Cush-Hook Nation in 1850 in which the Nation agreed to sell its land and relocate to a reservation in the Oregon coast range of mountains.

3. The U.S. Senate refused to ratify the Cush-Hook Treaty in 1853, and thus the United States never paid the Cush-Hook Nation for its lands, nor did it provide the Nation with any of the other promised benefits for leaving their aboriginal territory.

4. In 1850, Congress enacted the Oregon Donation Land Act and thereafter both Joe and Elsie Meek applied for and received fee title to the land that encompassed the Cush-Hook village.

5. The Meeks did not live on this land for more than two years and they never cultivated the land at this site.

6. In 2011, Thomas Captain of the Cush-Hook Nation erected temporary housing in Kelley Point Park at the site of the ancient Cush-Hook village.

7. Thomas Captain cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol.

8. The Cush-Hook Nation is not on the list of federally recognized Indian tribes, compiled pursuant to the 1994 tribal list act.

Conclusions of Law:

1. Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States.

2. The Cush-Hook Nation's aboriginal title to its homelands has never been extinguished by the United States as required by Johnson v. M'Intosh because the U.S. Senate refused to ratify the treaty and to compensate the Cush-Hook Nation for its land.

3. The United States' grant of fee simple title to the land at issue to Joe and Elsie Meek under the Oregon Donation Land Act was void ab initio and, therefore, the subsequent sale of the land by the Meek's descendants to Oregon was also void.

4. The 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 et seq. apply to all lands in the state of Oregon under Public Law 280 whether they are tribally owned or not. Thus, Oregon properly brought this criminal action against Thomas Captain for damaging an archaeological, cultural, and historical object.

B. STATEMENT OF THE FACTS

The Cush-Hook Nation of Indians is a tribe of Indians whose original homelands encompass a large area near the confluence of the Columbia and Willamette Rivers within the limits of present day Portland, Oregon. Kelley Point park, an Oregon state park, is included within the boundaries of the original Cush-Hook homelands. The Cush-Hook Indians occupied the area since time immemorial, with their permanent village located in the area presently enclosed by Kelley Point Park's boundaries.

The Multnomah Indians, neighbors of the Cush-Hook, led William Clark, of the Lewis and Clark expedition, to the Cush-Hook Indian village in April of 1806. He recorded these interactions in the expedition journals, sketched the village and longhouses, and

recorded ethnographic information about Cush-Hook governance, religion, cultural, and tradition. Among those notes, Clark described tribal shamans/medicine men who carved sacred totem and religious symbols into the trees. Clark gave the headman/chief of the Cush-Hook a peace medal, also known as a "sovereignty token," which the expedition leaders gave to tribal leaders who showed they desired to engage in political and commercial relations with the United States.

The Cush-Hook tribe continued to live in their village for nearly fifty years after Clark made contact with the tribe. In 1850, the Cush-Hook signed a treaty with superintendent of Indian Affairs for the Oregon Territory, Anson Dart. The treaty provided for the relocation of the Cush-Hook Nation to a designated area 60 miles west in the coast range. After signing the treaty, Cush-Hook relocated per their treaty agreement to escape encroaching white settlers. A majority of the Nation's citizens remain there, living meagerly.

Despite the cooperation of the Cush-Hook, the U.S. Senate refused to ratify the Cush-Hook treaty in 1853. The Cush-Hook Nation and its citizens never received the compensation for their original homelands nor any other of the promised benefits of the treaty. The Cush-Hook never received recognized ownership of the lands that they moved to in the coastal range, either. The United States has not taken any other action to recognize the Cush-Hook Nation and the tribe remains politically unrecognized by the both the U.S. and Oregon.

The original Cush-Hook homeland was claimed by two white settlers, Joe and Elsie Meek, under the Oregon Donation Land Claim Act of 1850. The Act granted fee simple title to 640 acres of land to any white settler who resided upon and cultivated the land for four consecutive years. Though the Meeks claimed the land under the act, the Meeks never cultivated or lived upon the land for the required for years. Still, the Meeks received fee title

from the United States for the land that is now Kelley Point Park. Their descendants sold the land to the State of Oregon in 1880 and the state created Kelley Point Park.

By 2011, vandals had begun climbing tree to deface or steal the sacred carvings that remained in the trees after over 300 years. The State did nothing to stop these acts of vandalism. In 2011, a Cush-Hook citizen named Thomas Captain moved from the Cush-Hook tribal area in the coast range to Kelley Point Park, where he occupied the land to reassert Cush-Hook ownership and to protect the remaining sacred carvings in the trees, which are important to Cush-Hook religion and culture. Captain cut down a tree and removed a carving in an attempt to restore and protect the image, which had been carved by one of his ancestors and later vandalized. State troopers arrested him and seized the carved image as he attempted to return it to the Nation's location in the coastal range.

ARGUMENT

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

A. ABORIGINAL TITLE IS THEORY OF RETAINED LAND RIGHTS OF NATIVE INHABITANTS UNDER THE DOCTRINE OF DISCOVERY.

"Aboriginal title," often referred to as "Indian title," "original title," or the "Indian right of occupancy," is the theory of land ownership or retained land rights of the native inhabitants of what is the modern day United States. *See, e.g.*, *Sac & Fox Tribe v. United States*, 383 F.2d 991, 997 (Ct. Cl. 1967). As asserted in *State v. Elliot*, 616 A.2d 210 (S. Ct. Vt. 1992), "[a]lthough the doctrine of aboriginal rights is long standing, the nature of the various interests in aboriginal lands has not been easily defined or applied." *Elliott*, 616 A.2d at 212. As further stated in *Elliott*,

> "Aboriginal title" gives members of a viable Native American tribe a right of occupancy to lands that is protected against claims by anyone else unless the tribe abandons the lands or the sovereign extinguishes the right. The right arises from a tribe's occupation of a definable, ancestral homeland. . . . The occupation must have been exclusive of the occupation by other tribes. *Id.* (internal citations omitted).

The concept of aboriginal title arose out of the "Doctrine of Discovery," infamously promulgated in *Johnson v. M'Intosh*, 21 U.S. 543 (1823). Describing the origination of the Doctrine of Discovery, Chief Justice Marshall asserted,

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequently war with each other, to establish a principle, which all should acknowledge as the law, by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. *Johnson*, 21 U.S. 543 at 572-73.

In *Johnson*, Chief Justice Marshall further asserted that the Doctrine of Discovery necessarily required a curtailment of the rights of natives:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they please, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. *Id.* at 574.

Under the theory of aboriginal title, native inhabitants of the United States (or, American Indians) retain the right to occupy their ancestral lands – by virtue of having been the rightful owners of such land prior to Euro-colonization – even after such lands were

"discovered" by Euro-colonizers. However, this Indian right of occupancy is a diminished form of land ownership: Indians in the present-day United States no longer retain the right to alienate their land. *Id.* Subsequent to discovery, the "absolute title to lands" resides with the discoverer, including the right to alienate the territory discovered. *Id.* The aboriginal title retained by the Indians following discovery is necessarily a subsidiary of the absolute title owned by the discoverer. *Id.* In subsequent grants of land from the original Euro-colonizer to other sovereigns (e.g., from Great Britain to the United States), the Doctrine of Discovery inheres: The new sovereign assumes the absolute title to the land, subject only to the Indian right of occupancy, or aboriginal title.

Pursuant to the Doctrine of Discovery, the rights of natives were respected, but only "as occupants." *Id.* The Euro-colonizers "asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives." *Id.* Such grants "have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy." *Id.*

In *Beecher v. Wetherby*, 95 U.S. 517 (1877), the Supreme Court further elucidated the concept of aboriginal title, asserting that,

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. *Beecher*, 95 U.S. 517 at 525.

Thus, the United States, under the Doctrine of Discovery, obtained all land within the territorial limits of the United States in fee, subject only to the Indian right of occupancy (i.e., aboriginal title). The United States had the sole right to convey or transfer title of this land to third parties. However, such conveyance transferred only "naked fee" to the recipient. *Id.*

The Indians still retained aboriginal title – and hence the right to occupy their aboriginal lands – unless the United States expressly acted to extinguish such title, or occupation of the land was voluntarily abandoned by the Indians. *Id.* at 526. Therefore, conveyance of fee to a third party was not an effective means of extinguishing aboriginal title – it was simply a transferring of fee ownership subject to the Indian right of occupancy.

Moreover, the Supreme Court has repeated referred to aboriginal title as an "encumbrance" on fee ownership of land. *See, e.g.*, *Buttz v. Northern Pacific R.R. Co.*, 119 U.S. 55 (1886). In *Buttz*, the Court asserted,

> The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government. . . . *Id.* at 66.

The Cush-Hook Nation owns the aboriginal title to the land encompassing present-day Kelley Point Park.

B. TO PROVE ABORIGINAL TITLE A TRIBE MUST ESTABLISH EXCLUSIVE TRIBAL USE AND OCCUPANCY OF THE LAND IN QUESTION FOR A LONG PERIOD OF TIME.

In order to prove the existence of aboriginal title, a tribe must establish exclusive use and occupancy of the land in question "to the exclusion of other peoples for many years." *Lipan Apache Tribe v. United States*, 180 Cl. Ct. 487, 491 (1967). As asserted in *Lipan*, "[s]uch continuous and exclusive use of property is sufficient, unless duly extinguished, to establish Indian or aboriginal title." *Id.* Further, "[t]o be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *Sac & Fox Tribe of Indians of Oklahoma v. United States*, 315 F.2d 896, 902-03 (Ct. Cl. 1963) (alteration to original).

Additionally, "courts have . . . construed the . . . 'use and occupancy' requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Sac & Fox Tribe v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967). In other words, a tribe can establish ownership of aboriginal title by proving that it has inhabited the land in question from time immemorial. *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005). Further, though "[t]he validity of aboriginal title is not dependent on treaty, statute, or other formal governmental recognition . . . a group making a claim under the doctrine must present sufficient proof that they have constituted a tribe throughout relevant history and have never voluntarily abandoned their tribal status." *Elliott*, 616 A.2d at 212 (internal citations omitted).

As asserted in *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941),

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the [tribe] in the sense that they constituted definable territory occupied exclusively by the [tribe] (as distinguished from lands wandered over by many tribes), then the [tribe] had 'Indian title' which unless extinguished survived the . . . grant of [fee title to a third party]. *Santa Fe Pacific*, 314 U.S. 339 at 345 (citing *Buttz*, 119 U.S. at 66) (alteration to original).

Thus, in order to establish aboriginal title, an Indian tribe or nation must prove (1) exclusive use and occupancy (2) to the exclusion of all others (3) as a tribe (4) consistent with tribal custom (5) for a long period of time. The Cush-Hook Nation has met this burden and has proven that it owns aboriginal title to the land encompassed by modern-day Kelley Point Park. Several facts evidence the Cush-Hook Nation's exclusive use and occupancy of the land in question sufficient to establish aboriginal title. First, the Cush-Hook established a permanent village on the land in question. The location of this permanent village was known to other Indian tribes such as the Multnomah who resided in the area as well. In fact, the

Multnomah pointed out the Cush-Hook Nation's village to William Clark of the Lewis & Clark expedition. Moreover, upon showing Clark where the permanent Cush-Hook village was located, the Multnomah made peace signs to the Cush-Hook prior to approaching the village. The fact that the Multnomah felt it necessary to indicate their peaceful intentions prior to approaching the Cush-Hook Nation's village not only indicates the Cush-Hook's exclusive use and occupancy of the land, but also indicates the Cush-Hook's exclusion of all others from the land.

Further, that the Cush-Hook used the land in question as a tribe and consistent with tribal custom is supported by numerous facts. The Cush-Hook had a leader: a headman or chief. Likewise, the Cush-Hook peoples lived together in a permanent establishment, as a tribe. Moreover, after encountering the Cush-Hook, Clark recorded various ethnographic or cultural observations regarding the Cush-Hook Nation, including information about Cush-Hook governance, religion, burial traditions, housing, agriculture, and hunting and fishing practices. This ethnographic evidence establishes the functionality of the Cush-Hook peoples as a tribe or nation with a common culture perpetuated over time. Likewise, Clark's reference to the Cush-Hook as the Cush-Hook Nation supports the fact that the Cush-Hook did indeed operate as a tribe. Additionally, Anson Dart's attempt to treat with the Cush-Hook – as a tribe – indicates the objective belief that the Cush-Hook peoples constitute a tribe.

Likewise, the Cush-Hook have met the final requirement for establishment of aboriginal title – the use and occupancy of the land in question for a long period of time. The Cush-Hook have lived off of the land in question since time immemorial. Though it is unclear when the Cush-Hook first inhabited the land that constitutes present-day Kelley Point Park, they were living there in a permanent village when Clark encountered them in 1806.

Further, the Cush-Hook continued to live there as a tribe – engaging in their traditional ways of life – until 1850. Moreover, the culturally and religiously significant trees in Kelley Point Park that Cush-Hook shaman carved images into have existed for over three hundred years. This is evidenced by the current height of the carved images at 25 to 30 feet above the ground. The fact that the Cush-Hook carved these images into trees located on their original or ancestral land, owned under aboriginal title, more than 300 years ago provides strong evidence of the Cush-Hook Nation's extended use and occupation of such land as a tribe.

One may counter that the Cush-Hook Nation did not use or occupy the land in question exclusively because the Multnomah Indians fished and gathered near the Cush-Hook village. However, the fact that another tribe used or occupied the land in question does not negate the Cush-Hook Nation's exclusive use and occupancy of such land. As asserted in *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Cl. Ct. 1975),

> True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such 'exclusive' use and occupancy as is necessary to establish ownership by Indian title. However, his court has acknowledged, on several occasions, that [*sic*] two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the 'exclusive' nature of their use and occupancy, and without defeating Indian title. *San Ildefonso*, 513 F.2d at 1394 (internal citations omitted).

C. THE CUSH-HOOK NATION'S ABORIGINAL TITLE TO THE LAND CONSTITUTING PRESENT-DAY KELLEY POINT PARK HAS NOT BEEN EXTINGUISHED.

The concept of aboriginal title "and its extinguishment lacks precision in delineating between competing interests." *Elliott*, 616 A.2d at 213. Nonetheless, despite the fact that the doctrine of aboriginal title "has not been applied in a cohesive manner, 'every court considering the doctrine of discovery reaffirmed its basic tenets.'" *Id.* "The essential test

requiring sovereign consent to extinguish aboriginal rights has remained intact since its adoption in *Johnson*." *Id.* As further asserted in *Elliott*, under the doctrine of aboriginal rights,

> A sovereign's transfer of such land is subject to continuing Indian rights of occupancy and use, until those underlying rights are extinguished. The interest transferred is termed the "naked fee." Absolute ownership does not vest until Indian title is extinguished, a phenomenon that cannot occur without the act or consent of the sovereign. Therefore, where the terms of a land grant do not rise to the level of extinguishment, or where there has been no action by the sovereign demonstrating an intent to extinguish, the grant of land conveys only an inchoate interest in the land. *Id.* at 106 (internal citations omitted).

As stated by the Court in *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974), "a tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.'" *Oneida*, 414 U.S. 661 at 669 (citing *Santa Fe Pacific*, 314 U.S. 339 at 347). Likewise, as asserted in *Lipan*, "Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned." *Lipan*, 180 Ct. Cl. 487 at 492 (citing *Santa Fe Pacific*, 314 U.S. at 345, 347). Moreover, aboriginal title is "'entitled to the respect of all courts until it should be legitimately extinguished.'" *Id.* (citing *Johnson v. M'Intosh*, 21 U.S. at 592).

The right to extinguish aboriginal title lies exclusively with Congress. As asserted in *Santa Fe Pacific*, "'[u]nquestionably it 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.'" *Santa Fe Pacific*, 314 U.S. at 345 (citing *Cramer v. United States*, 261 U.S. 219, 227 (1923)) (alteration to original). As asserted by the Court in *Santa Fe Pacific*,

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. . . . '[T]he exclusive right of the United States to extinguish' Indian title has never been doubted . . . 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 Pacific*, 314 U.S. 339 at 347 (quoting Chief Justice Marshall in *Johnson*, 21 U.S. 543 at 586).

Moreover, for extinguishment of aboriginal title to be effectuated, intent to extinguish such title must be clear. *Elliott*, 616 A.2d at 213 (asserting that while "[s]overeign intent to extinguish need not be express," it must nonetheless "demonstrate[] a 'plain and unambiguous' intent to extinguish exclusive aboriginal rights) (alteration to original). As asserted in *Lipan*,

> While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues. *Id.* (citing *Santa Fe Pacific*, 314 U.S. at 353).

Moreover, extinguishment of aboriginal title will not be lightly inferred. *Elliott*, 616 A.2d at 213 (asserting that "[b]ecause the federal policy to respect Indian rights of occupancy, the intent to extinguish Indian title will not be 'lightly implied.'"). As asserted in *Santa Fe Pacific*, "[t]hat Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe Pacific*, 314 U.S. at 353. Further, as asserted in *United States v. Gemmill*, 535 U.S. F.2d 1145 (9th Cir. 1976), "[t]he relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights [aboriginal title], not whether the revocation was effected by permissible means." *Id.* at 1148 (alteration to original).

Additionally, in numerous cases, courts have held that "a series of federal actions" or "a century-long course of conduct" may effectively extinguish aboriginal title. *See e.g.,*

Elliott, 616 A.2d at 213; *Gemmill*, 535 U.S. F.2d at 1149; *Santa Fe Pacific*, 314 U.S. at 356. In *Gemmill*, for example, the Court asserted that,

> The exact date on which Indian title has been extinguished is often difficult to determine. The four events we have recounted amply illustrate that problem. Any one of these actions, examined in isolation, may not provide an unequivocal answer to the question of extinguishment. However, the activity of the federal government, beginning with the ambiguous Act of 1851 and culminating in the payment of the compromise settlement, has included expulsion by force, inconsistent use, and voluntary payment of a compensation agreement. This century-long course of conduct amply demonstrates that the Pit River Indian title has been extinguished. *Id.* at 1149 (internal citations omitted).

Contrary to *Gemmill*, with respect to Cush-Hook aboriginal title the federal government did not undertake a series of federal actions or a "century-long course of conduct" sufficient to effectuate extinguishment of the Cush-Hook Nation's aboriginal title in the lands constituting present-day Kelley Point Park. *Id.* If each of the four events discussed in *Gemmill* was not independently sufficient to extinguish the aboriginal title there at issue, aboriginal title was not clearly and unambiguously extinguished by the federal government in the case of the Cush-Hook Nation. In fact, the federal government did not undertake any action – let alone a continuous course of action – sufficient to effectuate extinguishment of Cush-Hook aboriginal title. True, the federal government did employ Anson Dart as Superintendent of Indian Affairs for the region in order to negotiate treaties for extinguishment of Indian land claims. However, despite the fact that Dart negotiated a treaty with the Cush-Hook, the treaty was never ratified by Congress.

Similarly, the Oregon Donation Land Act of 1850 failed even to mention Indians, let alone aboriginal title. Significantly, Congress overtly expressed its intention to extinguish aboriginal title in numerous instances. For example, in the act of congress of July 2, 1864 – addressed in *Buttz* – Congress asserted that "the United States should extinguish, as rapidly

as might be consistent with public policy and the welfare of the Indians, their title to all lands 'falling under the operation of this act, and acquired in the donation to the road.'" *Buttz*, 119 U.S. 55 at 58. Likewise, as asserted by the Court in *Santa Fe Pacific*, Congress, in the Act of July 27, 1866, overtly expressed its intention to extinguish aboriginal title:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. *Santa Fe Pacific*, 314 U.S. 339 at 344 (internal citations omitted).

Thus, if Congress had intended to extinguish aboriginal title to the land encompassed by modern day Kelley Point Park, Congress would have expressly asserted its intention to do so. Instead, in the Donation Land Claim Act – the Act by which the United States invalidly conveyed fee title to the Meeks – Congress failed even to mention extinguishment.

It could be argued that such congressional reticence reflects Congress's belief that there was no aboriginal title to be extinguished in Kelley Point Park. However, such an argument is implausible. Congress was well aware of the general Indian character of the entirety of the Oregon Territory. As asserted by the Court in *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946), "[a]fter creating a government for [the Territory of Oregon] by the Act of 1848, Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. *Alcea*, 329 U.S. 40 at 43 (internal citations omitted) (alteration to original). Further, Congress appointed Anson Dart as Superintendent of Indian Affairs for the express purpose of negotiating treaties "for the extinguishment of Indian claims to lands in that district." *Id.* Moreover, in 1850, after his appointment as Superintendent, Anson Dart did in fact negotiate a treaty with the Cush-Hook nation. It is true that the exact date of Dart's negotiation of the treaty with the Cush-Hook in relation to the passage of the Donation Land

Claim Act (which was approved on September 27 of 1850) is unclear. However, even conceding this point – that it is unclear whether Dart negotiated the treaty before or after the Act went into effect – the notion that Dart, the congressionally appointed Superintendent of Indian Affairs – who was given the express task of negotiating treaties with the Indians of the Territory of Oregon in order to extinguish Indian claims to land in that district – was not in contact with Congress regarding such negotiations is unsound. Thus, the claim the Congress was simply unaware of potential Indian claims to land in the Territory of Oregon, or in what constitutes modern day Kelley Point Park is untenable.

Analogous to *Santa Fe Pacific*, the treaty signed by the Cush-Hook in 1850 was "nothing more than an abortive attempt to solve a perplexing problem." *Id.* at 355. The Cush-Hook's relocation in 1850, induced by the Anson Dart treaty, "was not pursuant to any mandate of Congress." *Id.* Anson Dart's treaty was an illegitimate and ineffectual attempt to strip the Cush-Hook of ownership their aboriginal title. As stated in *Santa Fe Pacific*,

> It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly a forced abandonment of their ancestral home was not a 'voluntary cession'. . . . *Id.* at 355-56.

One may contend that the Cush-Hook did in fact voluntarily cede their aboriginal title to the land that constitutes present day Kelley Point Park and that such abandonment was not forced. However, the Cush-Hook only relocated after signing a treaty in which their relocation was to be in exchange for promised benefits. Among such promised benefits were compensation for the lands in present day Kelley Point Park and recognized ownership of the lands to which they relocated. The Cush-Hook never received any of these benefits as Congress refused to ratify the 1850 treaty. Absent inducement to sign a treaty which was

never ratified – and was likely never intended to be ratified – the Cush-Hook probably would not have relocated. This is supported by the fact that the Cush-Hook relocated in order to avoid encroaching Americans.

Moreover, the likelihood of the Cush-Hook voluntarily abandoning the land to which they hold aboriginal title is slim in light of their physical occupation of such land – prior to their relocation in 1850 – since time immemorial. Prior to relocating, the Cush-Hook enjoyed a long period of self-sustainability in what is now Kelley Point Park. They grew crops, harvested wild plants native to the area, hunted, and fished on their ancestral lands. This way of life – long practiced by the Cush-Hook in their ancestral homeland – was recorded by William Clark of the Lewis & Clark expedition in 1806. Clark noted numerous ethnographic observances of the Cush-Hook including, *inter alia*, information regarding Cush-Hook governance, religion, culture, burial traditions, housing, agriculture, and hunting and fishing practices. And, after Clark recorded this information, the Cush-Hook maintained their traditional way of life in their permanent village and across their ancestral territory (both in and surrounding present day Kelley Point Park) for nearly half a century more. However, after relocating in 1850, most citizens of the Cush-Hook Nation have struggled just to survive. This is drastically different than the Cush-Hook way of life on the land to which they hold aboriginal title, prior to their induced relocation.

II. OREGON DOES NOT HAVE CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION.

A. OREGON DOES NOT HAVE CRIMINAL JURISDICTOIN TO CONTROL THE USES OF, AND TO PROTTECT ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION BECAUSE THE LAND IS INDIAN COUNTRY.

As stated by the Court in *Oneida*, "a tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.'" *Oneida*, 414 U.S. 661 at 669 (citing *Santa Fe Pacific*, 314 U.S. 339 at 347). Instead, aboriginal title is inherent and must be explicitly extinguished by Congress. The Court in *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339 (1941), found that Congress, in the Act of July 27, 1866, overtly expressed its intention to extinguish aboriginal title:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. *Santa Fe Pacific*, 314 U.S. 339 at 344 (internal citations omitted).

Thus, if Congress had intended to extinguish aboriginal title to the land encompassed by modern day Kelley Point Park, Congress would have expressly asserted its intention to do so. Instead, in the Donation Land Claim Act of 1850, Congress granted white settlers fee title to the land, but failed even to mention extinguishment. Since Cush-Hook aboriginal title was never explicitly extinguished by Congress, the tribe maintains aboriginal title to the lands encompassing Kelley Point Park.

Pub.L. 280, codified under 18 U.S.C. § 1151, grants states criminal jurisdiction over crimes occurring in Indian Country. The statute broadly defines "Indian Country" to include "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." 18 U.S.C. § 1151. *See also Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 115 (defining "Indian Country" under 18 U.S.C. § 1151 as including both formal and informal reservations).

Pub.L. 280 provides for state criminal jurisdiction in Indian Country, but does not extend state regulatory jurisdiction in the same way. *Bryan v. Itasca Cnty., Minn*., 426 U.S.

373 (1976). When determining whether a state has jurisdiction to enforce a particular crime in Indian country, the court must draw a distinction between "criminal/prohibitory" statutes and "civil/regulatory" statutes. *Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987).*

The Supreme Court in *Cabazon* created a test to determine whether a law is prohibitory or regulatory in nature. A law is prohibitory and falls within Pub.L. 280's grant of criminal jurisdiction if the intent of the law is generally to prohibit certain conduct. But if the law generally permits the conduct at issue, subject to regulation, the law is regulatory and cannot be enforced on an Indian reservation under Public Law 280. *Id.* at 209. The court also notes that, "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.*

The Court's test for determining whether a law is prohibitory or regulatory does not include an assessment of the means of enforcement. On that topic, the Court specifically held, "That an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." *Id.* at 211 (holding that a California statute that prohibits high stakes Bingo on Indian reservations as a misdemeanor is regulatory, rather than criminal, because California permits gambling generally and Bingo in particular).

In the current case, Oregon passed two statutes relating to the preservation of archaeological and historical sites. The historical materials statute, Or. Rev. Stat. §§ 390.235 – 390.240, requires a permit to excavate or remove archaeological and historical objects from public lands. Or. Rev. Stat. § 390.235 (1993). Under the statute, the State Parks and Recreation Department can provide a permit to a "qualified archaeologist" or a person

working "for the benefit of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology." *Id*. § 390.235(2). The statute requires storage of objects collected under the statute in the Oregon State Museum of Anthropology unless the museum receives the approval of the appropriate Indian tribe to select alternative facilities. *Id.* § 390.235(3). For items obtained without a permit, the State Museum must receive the tribe's permission to retain the item at all. *Id.* § 390.237.

The archaeological site statute, Or. Rev. Stat. §§ 358.905 – 358.961, enacts a series of restrictions on the excavation, alteration, or removal of an archaeological object from private or public Oregon lands, and on the sale and purchase of such objects. The statute does not bar these actions outright, but instead requires written permission from the property owner for excavation on private lands, a permit on public lands per § 390.235, and a valid certificate of origin for purchase or sale. Or. Rev. Stat. § 358.920.

The statute's intent is not generally to prohibit the collection, purchase, and sale of archaeological goods. Instead, the intent of the statute is to regulate how those excavations, collections, and sales are conducted so as to preserve archaeological sites and objects. The statute provides evidence of this intent in § 358.923, which allows for collected objects to be held by entities other than the state if curated under museum conditions in the state of Oregon and made available for study by Oregon museums and educational institutions.

This statute also provides for consultation with Indian tribes from the Oregon State Museum of Anthropology:

> The museum shall work with the appropriate Indian tribe and other interested parties to develop appropriate curatorial facilities for artifacts and other material records, photographs and documents relating to the cultural or historic properties in this state. Generally, artifacts shall be curated as close to the community of their origin as their proper care allows.

Id. § 358.920(4)(a). The provisions in this storage for the lawful collection, storage, study, and display of archaeological and historical objects in these statutes suggest that the intent of the law is only to regulate, not to prohibit the collection and curation of these objects completely.

Because state laws intend to regulate, rather than prohibit the collection of archaeological objects, the State cannot enforce the statutes in Indian Country, including on the land at issue in this case. Had the Oregon Legislature chosen, they could have completely prohibited the collection of archaeological objects, including those on Indian land. *See Cabazon*, 480 U.S. at 210. However, by regulating instead of prohibiting, the legislature has assured that the regulations will not extend to Indian Country within the boundaries of the state.

We can confirm that this is the proper outcome by applying what the Court refers to as "the shorthand test" for determining where a law fits under the prohibitory/regulatory distinction model. If the law is criminal, rather than regulatory, we expect that excavation and collection of archaeological or historical objects would go against public policy. However, the state mandates in § 359.923 that objects be stored under museum conditions and be made available for study evidence, and in § 390.235 that objects be stored in a state museum. Those provisions suggest that public policy in Oregon is aimed at preserving cultural objects for education and study, rather than at preventing the collection of cultural objects completely.

Further, given the requirements in both statutes that the state consult with appropriate Indian tribes regarding the storage of historical objects, it is even less likely that the State Legislature intended to give the state jurisdiction over the use and protection of

archaeological, cultural, and historical objects in Indian country. If Indian tribes are considered an authority on the collection and storage of archaeological, cultural, and historic objects, and are to be consulted regarding these matters, there exists no need for the State to regulate the collection and storage of such objects by Indians in Indian country.

B. OREGON DOES NOT HAVE CRIMINAL JURISDICTION TO CONTROL THE USES OF, AND TO PROTECT, ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL OBJECTS ON THE LAND IN QUESTION BECAUSE OF FEDERAL PREEMPTION.

If the court finds that the land at issue is not "Indian Country," the State of Oregon still does not have criminal jurisdiction to control the uses of, and to protect archaeological, cultural, and historical objects on the land because the land is federally owned. Because the conditions of the Oregon Donation Land Act of 1850 through which the land was transferred from the federal government to a private party were not satisfied, the land was never validly transferred and the federal government maintains title. Since the federal government has established its own statutory scheme for regulating the same actions and objects as the state laws on tribal or federal lands, federal law overrides state law.

The Oregon Donation Land Act of 1850 required that settlers "resided upon and cultivated the [land] for four consecutive years" in order to receive fee title to the land. 9 Stat. 497. If an individual submitted a claim for land under the Donation Land Act but failed to reside upon and cultivate the land per the Act's requirements, title to the land does not pass and the land continues to be the property of the United States. *Or. & Cal. R.R. Co. v. U.S.*, 190 U.S. 186, 195 (1903); *Hall v. Russell*, 101 U.S. 503, 510 (1897).

Joe and Elsie Meek claimed the land in question under the Donation Land Act in 1850, but never cultivated or lived on the land as required to claim fee simple title from the

federal government. Their descendants sold the land to the State of Oregon in 1880. Applying the holding in *Or. & Cal. R.R. Co. v. U.S.*, since the Meeks did not meet the conditions of the Donation Land Act, title to the land did not pass to them. Instead, the land in question continued to be the property of the United States. Since the Meeks and their descendants never obtained valid title to the land under the Act, their sale to Oregon is invalid. The land is federal, not state land, and cannot be regulated by the state.

The Property Clause of the United States Constitution provides that, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. The Supreme Court has interpreted this power broadly: "The power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *U.S. v. San Francisco*, 310 U.S. 16, 29-30 (1940). *See also Light v. U.S.*, 220 U.S. 523, 537 (1911); *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (holding that "while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.") While states retain jurisdiction over federal lands within their territory, Congress retains power to enact legislation respecting those lands pursuant to the Property Clause. *Kleppe v. New Mexico*, 426 U.S. at 542-43. When that is the case, federal legislation overrides any conflicting state law under the Supremacy Clause of the Constitution. U.S. Const. Art. VI, cl. 2. *See Id.* at 543; *Hunt v. U.S.*, 278 U.S. 96, 100 (1928); *lvey v. U.S.*, 260 U.S. 353, 359 (1922).

Congress has enacted legislation that controls and protects archaeological, cultural, and historical objects found on federal or tribal land. The Archaeological Resources

Protection Act of 1979 (ARPA) forbids the excavation, collection, and sale of archaeological resources except pursuant to a permit granted by the Federal land manager. 16 U.S.C. §§ 470aa-470mm. ARPA regulates archaeological excavation on all lands to which the United States holds fee title. *Id.* § 470bb(3)(B). It provides for the protection of "archaeological resources" including but not limited to rock paintings and rock carvings. *Id.* § 470bb(1)

The Native American Graves Protection and Repatriation Act (NAGPRA) regulates the ownership of Native American cultural items that are discovered or excavated on federal or tribal land. 25 U.S.C. §§ 3001-3013 (1990). NAGPRA grants ownership and repatriation of sacred objects and cultural patrimony to the Indian tribe on whose lands the item was discovered, or to the tribe with the closest cultural affiliation in the case of federal lands. *Id.* § 3002(a)(2). The statute also establishes a system through which those sacred objects can be repatriated to their tribal owners. *Id.* § 3005.

In the present case, ARPA and NAGPRA would regulate the 300-year-old tree carvings that the state has attempted to be regulated under Or. Rev. Stat. §§ 358.905-358.961 and §§ 390.235-390.240. The state statutes create their own system for permitting archaeological excavations and for authorizing the possession and curation of archaeological objects. Since federal and state laws both purport to regulate the same activities and objects found on federal land, the Supremacy Clause mandates that federal law override conflicting state law. Therefore, the federal scheme for regulating archaeological sites and objects on federal land as established by Congress in ARPA and NAGPRA override Oregon's state statutes regulating the same.

CONCLUSION

In conclusion, the court should find that the Cush-Hook retained aboriginal title and that the state does not have criminal jurisdiction on the lands in question.