

No. 12-345

In the
Supreme Court of the United States

STATE OF OREGON, ET AL.,
Petitioners,

V.

THOMAS CAPTAIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
OREGON STATE COURT OF APPEALS

BRIEF FOR RESPONDENT

TEAM IDENTIFICATION NUMBER 65

Counsel for Respondent

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QUESTIONS PRESENTED

1. Under common law does the Cush-Hook Nation maintain aboriginal title to the land in Kelley Point Park when settlers invalidly transfer lands obtained under the Oregon Donation Land Act?
2. Under Public Law 280, does the State of Oregon have jurisdiction to prosecute Mr. Captain under Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 when the statutes are regulatory and not criminal in nature.

STATEMENT OF THE CASE

STATEMENT OF PROCEEDINGS

In 2011, Thomas Captain (“Mr. Captain”), a Cush-Hook citizen was arrested by state a trooper for cutting down trees and removing images that are sacred and hold cultural and religious significance to the Cush-Hook people. The State of Oregon (“The State”) brought a criminal action against Mr. Captain alleging trespass on the lands at Kelley Point Park, cutting of timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961 (archaeological sites) and Or. Rev. Stat. 390.235-390.240 (historical materials). Mr. Captain consented to a bench trial.

The Oregon Circuit Court for the County of Multnomah found that the Cush-Hook holds aboriginal title to the lands at Kelley Point Park and that the Oregon Donation Land Act did not extinguish that title. The Court also found Mr. Captain not guilty for trespass for cutting timber without a permit, however the Court found him guilty of violating Or. Rev. Stat. 358.905-358.961 *et seq.* (archaeological sites) and Or. Rev. Stat. 390.235-390.240 *et seq.* (historical materials) and fined him \$250.

The State and Mr. Captain both appealed the decisions of the Oregon Circuit Court. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. The State and Mr. Captain filed petitions and cross petitions for certiorari to this Court.

STATEMENT OF FACTS

This appeal is from a state court decision finding that the Cush-Hook Indians hold aboriginal title to the land at Kelley Point Park. The state court also found that Mr. Captain, a Cush-Hook citizen, violated Or. Rev. Stat. 358.905-358.961 (archaeological sites) and Or. Rev. Stat. 390.235-390.240 (historical materials) when he removed and attempted to protect a vandalized totem which is sacred to his people.

This case is about the recognition of aboriginal rights in lands belonging to unrecognized tribes when those rights were never extinguished by Congress. In 2011, Thomas Captain, a Cush-Hook citizen, asserted his Nation's ownership in the land at Kelley Point Park when he moved to the presently held state land to protect sacred totems holding immense cultural and religious significance for his people. Hundred year old trees in Kelley Point Park have carved totems with religious and cultural symbols now hovering about 25-30 feet from the ground. These totems have been recorded in ethnographic materials dating back to 1806. Recently, vandals have been climbing the trees and defacing the images and even stealing and selling some of the totems. Although the state asserts jurisdiction to these lands, it has in no way attempted to stop the vandalism or reach or to the Cush-Hook to resolve the problem. In order to restore and protect the vandalized sacred images carved by his ancestors, Mr. Captain cut down a tree and removed the images in hopes of returning them to his Nation's people. On his way back to his

Nation, state troopers arrested Mr. Captain and seized the sacred images. Although the land is Kelley Point Park is owned by the Cush-Hook under aboriginal title, the State subsequently charged him with trespass, cutting timber without a state park permit and for desecrating an archaeological and historical site.

The Cush-Hook Nation lived on the lands at Kelley Point Park from time immemorial. The Cush-Hook grew crops and harvested the numerous wild plants that grew in the area. The Nation also relied on hunting the territory and fishing the nearby Multnomah, modern day Willamette, River. The Cush-Hooks permanent village was located in the area that is now enclosed by Kelley Point Park. The Cush-Hook Indians lived in longhouses making up a village of men, women and children living together as a community. The community had an established government and practiced various religious and cultural practices such as performing burial traditions.

In April of 1806, William Clark of the Lewis and Clark Expedition first encountered Multnomah Indian fishing along the river. Rather than taking Clark to their Multnomah village to meet with their Chief, the Multnomah Indians made peace signs to the nearby Cush-Hooks and then brought Clark to the Cush-Hook village for a formal introduction to the Cush-Hooks Chief. After recording these events in ethnographic materials, Clark gave the Cush-Hook Chief a peace medal from President Thomas Jefferson. Lewis and Clark understood that the Chief's acceptance of the medal demonstrated a desire to engage in political and commercial relations with the United States. Acceptance of the peace metal meant that the United States would later recognize the tribal leaders and government as a sovereign. In fact, historians called the peace metals "sovereignty tokens" because of the political and diplomatic significance of the items.

Recognizing the Cush-Hook as a sovereign nation, in 1850 Anson Dart, superintendent of Indian Affairs for the Oregon Territory, negotiated a treaty in which the Cush-Hook would relocate only 60 miles westward to a specific location in the foothills of the Oregon Coastal range. After the superintendent and the Cush-Hook nation signed the treaty, the nation relocated to the new location where a majority of the Cush-Hook citizens continue to live ever since. Unfortunately, like many other treaties negotiated and signed by Anson Dart, in 1853, the United States Senate refused to ratify the Cush-Hook treaty. Consequently, the Cush-Hook never received compensation for their land, recognized ownership of the lands in the Coastal range, and they never receive any of the other promised benefits agreed to in the treaty. While the Cush-Hook remained in the foothills barely surviving, settlers began to relocate to Oregon through the Oregon Donation Land Act of 1850.

Under the Oregon Donation Land Act, Joe and Elsie Meek claimed 640 acres of land that comprised Kelley Point Park and the Cush-Hooks aboriginal territory. Although they received title to the land, this title was conditioned with specific requirements under the act. The Act required that the settler must reside upon and cultivate the land for at least four consecutive years. The Meeks *never* cultivate or lived upon the land as required under the Act. Descendants of the Meeks later transferred the land to the State of Oregon and in 1880 Oregon created Kelley Point Park. Title to the land in question at Kelley Point Park, where Mr. Captain presently has asserted his Nation's aboriginal title in the land, is currently at issue before this Court. We respectfully request that this Court uphold the determination that the Cush-Hook own the lands in question under right of aboriginal title and reverse the decision giving Oregon criminal jurisdiction over the land.

SUMMARY OF ARGUMENTS

This case presents the following issues: (1) the question of title in the lands at Kelley Point Park; (2) if established that it exists, whether the Cush-Hooks aboriginal title has been extinguished by an express act of Congress; and (3) the State of Oregon's jurisdiction over the lands in a Public Law 280 state on Indian land. In an era of recognition of past wrongs and the federal government's attempt to correct these inequities, the federal government should recognize the potential for unrecognized tribes to potentially have remaining aboriginal title in certain lands, as the Cush-Hook do. First, the Cush-Hook have demonstrate their exclusive use and occupancy from time immemorial of the lands at Kelley Point Park establishing that they still hold aboriginal title in the lands. Second, Congress has the exclusive right to extinguish aboriginal title and has not done so through an unambiguous intentional act therefore the Cush-Hooks aboriginal rights remain intact. Third, because the Cush-Hook still maintain aboriginal title to the land in Kelley Point Park, the State of Oregon does not have jurisdiction over the tribe because the Oregon statutes are regulatory and not criminal in nature. For these reasons, this Court should find that the Cush-Hook still maintains aboriginal title and that the State does not have jurisdiction to prosecute Mr. Captain.

First, the Cush-Hook has established their aboriginal title in the land at Kelly Point Park. Establishing aboriginal title requires a showing of (1) use and occupation of territory that is (2) exclusive and (3) for a period of time. William Clark first encountered the Cush-Hook in 1806 and made ethnographic records of the presence of the Cush-Hook Village at the confluence of the Multnomah and Columbia River. The other nearby Multnomah Indians, recognized the Cush-Hook as the owner of the lands when they led Clark to the Cush-Hook Chief and based on

the carved totems in hundred year old trees and testimony, the Cush-Hook lived in that location from time immemorial.

Second, the Cush-Hooks continue to have aboriginal title because Congress has not extinguished it. Congress has plenary authority in dealing with Indians and therefore has the exclusive right to extinguish aboriginal title. Congress can extinguish aboriginal title by treaty, by conquest, through compensation, by complete dominion adverse to the right of occupancy or otherwise. In 1850 when Anson Dart negotiated a treaty with the Cush-Hook that treaty would have extinguished the Indians aboriginal title. However, the treaty was never ratified by the Senate and cannot therefore be understood as an exchange of rights when the United States, in addition to not ratifying the treaty, did not compensate, give title to the new lands, or follow through with any of the other promises made under the Anson Dart treaty. When the Oregon Donation Land Act opened Oregon for settlement, this did not effectuate and extinguishment of the aboriginal title because the Meeks who occupied the land at Kelley Point Park did not live on and cultivate the land for at least four years as the Act required and thus never received fee title absolute from the government—they only held a conditional title. Because they only held a conditional title that is the only title they could pass to their heirs who then sold the land to Oregon. Therefore Oregon received invalid title to the land. Additionally, the Oregon Donation Land Act did not effectuate an extinguishment of all Indian title in Oregon territory because the act only gave title on a parcel-by-parcel basis.

Third, because the Cush-Hook still maintains the aboriginal title to the land at Kelly Point Park, Oregon does not have jurisdiction on Indian lands because the Oregon statues used to prosecute Mr. Captain is regulatory not criminal in nature. Oregon is a Public Law 280 state and while the law transfers criminal jurisdiction to the State, it does not transfer jurisdiction to the

state regarding civil and regulatory matters. Oregon prosecuted Mr. Captain under O.R.S. 358.905-358.961 which does not create an all-out prohibition against what Mr. Captain did, but rather regulates his actions by requiring him to receive a permit from the State. Although the land at issue is not reservation land, the criminal/ prohibitory and civil/ regulatory dichotomy should still apply because the artifacts in the trees are impossible to separate from the Cush-Hooks right of use and occupancy of those lands. Furthermore, a plain reading of the Oregon Statute reveals that the statute does not apply to tribally owned lands. Because the lands are owned under aboriginal title, Oregon cannot prosecute under its chosen statute. Despite this, Courts have considered the States interest in asserting jurisdictional balanced against the tribal interest. The states interest is to protect a historical and archeological artifacts and the tribal interest is cultural and religious importance of the totem to the Cush-Hook. Because the tribal interest outweighs the federal interest, the State cannot assert its jurisdiction over the tribal totems and religious symbols.

Therefore, as the Cush-Hooks have established their exclusive use and occupancy from time immemorial in the land at Kelley Point Park, and because this title has not been expressly extinguished by Congress, the Cush-Hook still maintain aboriginal title. Because of this title, the State of Oregon does not have jurisdiction under PL 280 to prosecute Mr. Captain because the Oregon statute is civil/ regulatory and not criminal/ prohibitory. For these reasons, this Court should uphold the lower courts determination that the Cush-Hook still own aboriginal title and have rights in the lands at Kelley Point Park and reverse the lower court on the determination that the State of Oregon has jurisdiction to enforce a statute against Mr. Captain that only applies to public lands and not tribal lands.

I. The Cush-Hooks own the aboriginal title in the land at Kelley Point Park because they used and occupied the land exclusively for a period of time and that title has not been extinguished by Congress.

In one of the paramount cases regarding dealing with Indian people, *Johnson v. M'Intosh* 21 U.S. 543 (1823) this Court discussed the significance of aboriginal title and its associated rights. Aboriginal title, also referred to as Indian title or original occupancy title, refers to the rights of aboriginals in the use and possession of the lands they inhabit. In *Johnson v. M'Intosh*, Chief Justice Marshall recognized Indians “to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it.” *Id.* at 574. The discussion of aboriginal title came about when the court was faced with the question of transferability of Indian lands. Ultimately the court held that the Indians were “the rightful occupants” of the land at issue however their rights were limited because the court also held that the Indians could not transfer the title of the land to anyone besides the Federal government.¹ *Id.* at 574. Establishing aboriginal title is a question of fact regarding the historical use and occupation of the lands at issue.

A. The Cush-Hooks have established exclusive use and occupancy since time immemorial of the lands at Kelley Point Park.

Establishing aboriginal title requires a showing of (1) use and occupation of territory that is (2) exclusive and (3) for a period of time. See *Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941). The Cush-Hooks have sufficient evidence showing their use and occupation on the land in question to establish a right in aboriginal title. The lower court found that the Cush-Hook nation occupied, used, and owned the land at Kelley Point Park. “Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact” *Santa Fe Pac. R.*

¹ Indian lands could only be sold to the federal government who owned the fee simple and the Indians had a title that gave them the right of use and occupancy.

Co., 314 U.S. 339, 345 (1941). Questions of fact are reviewed for clear error. *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 341 (9th Cir. 1996).

The lower courts did not error in finding that that the Cush-Hook meet the three requirement of (1) use and occupancy, (2) exclusivity and (3) for a period of time, to establish aboriginal title in the land at Kelly Point park. First, the Cush-Hook ‘used and occupied’ the land at Kelley Point Park. In 1806 William Clark first encountered the Cush-Hook at the village where he observed the Indians fishing and gathering wapato near the village. In his ethnographic materials, Clark discussed the Cush-Hook’s governance, religion, culture, burial traditions, housing, agriculture, hunting and fishing practices. This various items show the well-developed community that Clark first visited. Expert witnesses in history, sociology, and anthropology also verify that the Cush-Hooks used and occupied the lands in question. In *Otoe and Missouri Tribe of Indians v. United States*, the court state that expert testimony of historians can be used to establish the use and occupancy factor. 131 F.Supp.265 (Ct. Cl. 1955).

Although the village was only a small portion of land within Kelly Point Park, the entire Park and larger surrounding area is all considered aboriginal territory because the Cush-Hooks hunted and gathered throughout the entire territory. In *Mitchel v. United States*, the Supreme Court held that “Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites.” 34 U.S. 711, 746 (1835). In our case it is necessary to recognize that the hunting and gathering territory is part of the Cush-Hooks aboriginal territory as much as the permanent village lands are. In *Sac & Fox Tribes of Indians v. United States*, the Court of Claims stated that “the courts have construed the terms ‘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.” F.2d 991 (Ct. Cl. 1967). The Cush-Hook lived a hunter and gatherer lifestyle which certainly encompassed the land at Kelley Point Park and more as the lands to include are not just the village but the lands that were customarily hunted and gathered for as a part of the Cush-Hooks way of life.

Second, the Cush-Hook’s use and occupation was exclusive to all others. In *Sac & Fox Tribe of Indians of Oklahoma*, the court stated that a tribe must have “an exclusive and unchallenged claim to the disputed areas” to be entitled to aboriginal rights. 315 F. 2d 896, 906 (Ct. Cl. 1963). “Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion* of other Indian groups.” *Native Village of Eyak v. Blank*, 688 F.3d 619, 623 (9th Cir. 2012). Expert witnesses found the Cush-Hook *owned* the land in question before the arrival of Euro-Americans. This kind of recognition in an owner of the property demonstrates exclusivity. *Otoe and Missouri Tribe of Indians v. United States*, 131 F.Supp.265 (Ct. Cl. 1955). Cert. Den 350 U.S. 848. When Clark entered the Multnomah (or modern day Willamette) River, he came across Multnomah Indians. While it is unclear whether these Indians were part of the Cush-Hook or not is irrelevant. Traditionally “areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive.” *Native Village of Eyak v. Blank*, 688 F.3d 619, 623 (9th Cir. 2012). However, in *United States v. Seminole Indians*, the court clarified that exclusivity turned on “whether they [the tribe] avail themselves of their exclusive position.” 180 Ct. Cl. 375 (1967). Even if the Multnomah Indians that Clark first encountered were of a nation separate from the Cush-Hook, they still recognized the Cush-Hook as the exclusive leader in the area when they lead Clark to the Cush-Hook headman or chief.

Third, the Cush-Hooks have maintained their use and occupancy from time immemorial satisfying the longevity requirement. Although a specific number of years is not established, the court in *Sac & Fox Tribe of Indians v. United States*, stated about establishing use and occupancy for a period of time that, "especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land." 383 F3d 991 (Ct. Cl. 1967). Lewis and Clark first encountered the Cush-Hooks in 1806. This is just three years after the 1803 date set in the *Sac and Fox* case. It is reasonable to believe that the Cush-Hook lived in the territory well prior to the 1803 date because of the establishment of a village and community and the location. Expert historians found that the Cush-Hooks occupied, used, and owned the land before the arrival of Euro-Americans suggesting that the Cush-Hooks used the territory prior to 1803. Also in 1806, Clark noted that the Cush-Hook medicine men carved sacred totems and religious symbols into living trees hundreds of years ago evidenced by the fact that the carving are now 25-30 feet from the ground in old growth. In light of these numerous factors, it is evident that the Cush-Hooks have used the lands for a substantial period of time.

The Cush-Hook used and occupied the land at issue exclusively until 1850 when they signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. Persuaded by the promise of compensation and benefits, the Cush-Hook relocated only 60 miles westward to the Oregon coastal range where they continued to live in their traditional manner despite never receiving compensation from the Federal government. Although the treaty was never ratified by the Senate, the Cush-Hook are still entitle to rights of use and occupancy under aboriginal title. Because the Cush-Hooks have showed their use and occupancy of the land at Kelley Point Park exclusively since time immemorial, they have sufficiently established a right

of aboriginal title to the lands. Their rights in aboriginal title continue to exist to this day, unless they were unambiguously terminated by Congress.

B. Congress has not unambiguously extinguished the Cush-Hook aboriginal title to the land at Kelley Point Park.

Congress has the exclusive power to extinguish aboriginal title. *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941).² In 1974, the Supreme Court, addressing aboriginal title in *Oneida Indian Nation of New York v. County of Oneida*, stated that:

[Aboriginal title] could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. 414 U.S. 661, 670 (1974).

The United States may extinguish aboriginal title “by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise” *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). Typically, aboriginal title is extinguished by treaty or through compensation. Conquest typically has not been utilized to extinguish aboriginal title and in some cases complete dominion will be used but it is more difficult to clearly determine the intent of Congress in complete dominion cases.

1. *Congress has plenary power to deal with Indian and its action in not ratifying the Anson Dart treaties did not extinguish the Cush-Hook title at Kelley Point Park.*

² See *Lone Wolf*, 187 U.S. 553, 555 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (“Congress has plenary authority to legislate for Indian tribes in all matters, including their form of government.”); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (“It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.”).

In 1850, Anson Dart negotiated a treaty with the Cush-Hook nation promising them upon relocation, compensation for their aboriginal territory, benefits, and recognized ownership in their new lands located in the Oregon coastal range. Dart intended on relocating the tribe so that the American settlers could occupy the valuable farming lands along the river. Treaties during this time were views as a tool to accomplish the relocation and were also a way in which the United States extinguished aboriginal title through compensation. Most treaties negotiated call for tribes to relocate to different lands or reservations away from settlers. This extinguished all rights in their previous lands through compensation because the tribes typically would receive minimal payment for their lands and other benefits. All rights were extinguished in a tribes aboriginal territory unless of course specific rights were retained such as fishing at usual and accustomed locations. The Anson Dart treaty would have served as extinguishment of the Cush-Hooks aboriginal territory however the treaty was never ratified and although the Cush-Hook relocated and dealt in good faith under the treaty, they never received any compensation or what they bargained for from the United States.

In *Buttz v. Northern P. Railroad*, the Supreme Court found that aboriginal title is extinguished through a treaty ceding title to the land. 119 U.S. 55. Similarly, in *Sac & Fox*, the court stated, “it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise.” 383 F.2d 991, 999 (Ct. Cl. 1967). Had the treaty between the United States and the Cush-Hook been ratified it would have extinguished the aboriginal title in the land at Kelley Point Park. However, because the treaty was never ratified, and Cush-Hook never received any of the benefits promised, it does not extinguish title. Congress had the opportunity to ratify the Cush-Hook treaty and clearly extinguish aboriginal title. In *United States v. Santa Fe Pacific Railroad*, the court stated that

“extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.” 314 U.S. 339, 347 (1941). There must be a “clear and plain indication” that Congress intended to extinguish aboriginal title. *Id.* Since the treaty was not ratified, it cannot possibly be concluded that Congress intended to extinguish the Cush-Hooks aboriginal title. Congress had an opportunity to clearly and intentionally extinguish the Cush-Hooks aboriginal title yet choose not to ratifying the treaty. Even after Anson Dart attempted to create a treaty, there were other opportunities for Congress to clearly extinguish the Cush-Hooks aboriginal title through the 1855 Stevens negotiations. This also did not occur.

2. *The Oregon Donation Land Act did not extinguish the Cush-Hooks aboriginal title in the land at Kelly Point Park because the Meeks interest in the land never fully vested and they could not transfer anything more than their right of occupancy to the State of Oregon.*

The Oregon Donation Land Act did not extinguish the Cush-Hooks aboriginal title in the land at Kelley Point Park because the land transfer to the Meeks never fully vested. Because the Meeks interest in the land never fully vested, they could not have transferred fee simple absolute to the State of Oregon thus making the States claim to the land invalid. Section Four of the Oregon Donation Land Act specifies that:

there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years.

9 Stat. 496. Importantly, the act requires that each citizen “reside upon and cultivate” the land for “four consecutive years.” The Meeks never cultivated or lived on the land for the required four years thus they never acquired fee simple from the United States. The only rights the Meeks had was a mere right of occupancy. Because they never received fee simple they could not pass it to the State.

The Meeks only had limited rights in the land at Kelley Point Park and could only transfer the rights that they held. In *Hall v. Russell*, this court held that only the rights held by the grantee could be passed or transferred to the grantee's heirs. Under the Donation Land Act, “[a] present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land.” 101 U.S. 503, 510 (1879). You could only become fully entitled to the land by meeting the requirements of the act.

The grant was not to a settler only, but to a settler who had completed the four years of residence and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil.

Hall v. Russell, 101 U.S. 503, 510 (1879). Based on the statutory language, the court concluded that upon the death of the grantee after only one year of living on land acquired through the Oregon Donation Land Act, the passage of the land to the grantee's heirs only passed the conditional right the grantee held. The court did note, however, that the heirs could finish the requisite conditions and then they would receive title from the United States. 101 U.S. 503, 513 (1879).

Following the Courts reasoning, the Meeks interest in the land at Kelley Point Park never vested because they never cultivated or lived upon the land for the required four years. Because their interest never vested to anything more than a mere right of occupancy, the sale of the land was invalid and should not be recognized.

3. *The Oregon Donation Land Act did not extinguish the Cush-Hook's aboriginal title in the land at Kelley Point Park because the act extinguished title on a parcel-by-parcel basis as after settlers fulfilled the acts requirements.*

Government acts preparing land for settlement such as opening land or surveying land, does not necessarily extinguish aboriginal title. “Indian title based on aboriginal possession is a permissive right of occupancy; it may be extinguished by the federal government at any time without any legally enforceable Obligation to compensate the Indians.” *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 (9th Cir. 1981). However, “extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards” *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 354 (1941). In *United States v. Santa Fe Pacific Rail Road*, the court stated that required surveying does not constitute an extinguishment of aboriginal title. 314 U.S. 339, 339 (1941). In another case, *Plamondon ex rel. Cowlitz Band of Indians v. United States*, the court of claims found that since the surveying did not have to wait until aboriginal title to lands in Oregon was extinguished, it was apparent that Congress did not intend the mere act of surveying to extinguish existing title. 467 F2d 935 (Ct. Cl. 1972). In *Gila River Pima—Maricopa Indian Community v. United States*, the court stated that preparing for white settlement, such as opening lands, does not extinguish aboriginal title. 494 F 2d. 1386, 1391 (Ct. Cl. 1974). Additionally, the court stated, “[t]he expectation of future *parcel-by-parcel* ownership would not, alone, extinguish Indian ownership.” *Id.* (emphasis added). The Oregon Donation Land Act gives

precisely the type of parcel-by-parcel ownership that would not be considered an extinguishment of aboriginal title throughout the entire territory. The Oregon Donation Land Act only provides lands to settlers that satisfy all the requirements. As discussed above, only after you cultivate and live on the land for four years can you become fully vested in the property. Because of these conditions, the Act only gave lands on a parcel-by-parcel basis as settlers met the requirements. Only when the parcel became fully vested in the settler, was aboriginal title extinguished through “exercise of complete dominion adverse to the right of occupancy” *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941).

In one Circuit Court of Washington decision, the court found the Oregon Donation Land Act extinguished all aboriginal title in Oregon Territory. In *United States v. Ashton*, the court reasoned;

[t]he exclusive feature of the rights of Indians as occupiers of the country within the boundaries of Oregon Territory, which as originally organized included this State, was terminated by the act of Congress creating Oregon Territory, and the act of September 27, 1850, c. 76, 9 Stat. 496, familiarly known as the ‘Oregon Donation Law,’ because those acts were designed to encourage families to emigrate from the states and become permanent inhabitants of Oregon.

170 F. 509, 513 (W.D. Wash. 1909). This case should have no bearing on the issue at hand. First is it only a Circuit Decision from Washington and does not hold strong precedential value. Second, United States Indian policy requires extinguishment of aboriginal title prior to opening land to settlement. Samuel Thurston, territorial delegate, informed Congress that the “first prerequisite step” to settling the land issue involved the removal of Indians. To meet constitutional requirements, he advised, it was necessary to extinguish Indian title to before land

could become part of the public domain. Third, the court ignores the Oregon Territorial Act which specifically preserves aboriginal title. 9 Stat. 323 (1848). The Oregon Territorial Act established Oregon Territory and guaranteed Indians rights to their homelands providing that “so long as such rights shall remain unextinguished by treaty between the United States and such Indians.” The Territorial Act preserves aboriginal title so long as they are not extinguished through treaty. In 1850, Congress indicated its intent to extinguish aboriginal title through treaty making. The statute stated; “An Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains” 9 Stat. 437 (1850). When Oregon became a territory, aboriginal rights were in tack until treaty Congress authorized treaty making in 1850 to systematically extinguish the Indians rights. As discussed above, the Cush-Hooks negotiated and signed a treaty with Anson Dart which would have extinguished their aboriginal rights, but the treaty was never ratified and thus under the Oregon Territorial Act, they still maintain the rights to their homeland through aboriginal title.

In determining whether or not Congress extinguished aboriginal title, the Court must consider the Oregon Donation Land Act in light of the Indian canons of construction. The canons of statutory construction are well established in Federal Indian law and apply to both statutes and treaties enacted by Congress. As applied to statutes, the canons ensure that Congress, although it has plenary power to abrogate or limit tribal rights, it must do so clearly and unambiguously. The canons provide that statutes are to be construed as the Indians understood them, statutes are to be liberally construed in favor of the Indians, and that all ambiguities are to be resolve in favor of the Indians. *Choate v. Trapp*, 224 U.S. 655, 675 (1912); Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law²²² (1982 ed.). The Oregon Donation Land

Act is an Act to open the Oregon territory for settlement on a parcel by parcel basis and when read in light of the Oregon Territorial Act, the Cush-Hooks Congress has not clearly and unambiguously extinguished the Cush-Hooks aboriginal title.

The Oregon Donation Land Act does not have the necessary clear intent of Congress to extinguish the aboriginal title. An example of an Act that clearly extinguishes aboriginal title in the Alaskan Native Claims Settlement Act of 1971. 43 U.S.C 1601-1624 (1971) Public Law 92-203. The Act authorized Alaskan Natives to receive title to selected lands and to also receive compensation for settlement of land claims and extinguishment of all other aboriginal rights. Regarding extinguishment of aboriginal title, the Act stated; “[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.” 43 U.S.C. § 1603 (b). This language makes Congresses intent to extinguish aboriginal title expressly clear. In the case at hand, we do not have evidence of Congresses clear intent to extinguish the Cush-Hooks title.

II. The State of Oregon does not have jurisdiction over tribal members on tribal lands and thus Oregon does not have jurisdiction to prosecute Mr. Captain.

While Oregon was one of the original six states that acquired criminal jurisdiction from the Federal Government after the passage of Public Law 83-280 (“Public Law 280”), this Court has found that such jurisdiction does not extend to statutes which are more properly considered regulatory in nature, rather than criminal. While the State might have a valid interest in retaining such jurisdiction in situations where the accused is a non-tribal member, those interests do not supersede the interests and rights of tribal members on tribal land. Because of this, the State of Oregon does not have jurisdiction to prosecute Mr. Captain for damaging the artifacts and historical sites existing on the land of the Cush-Hook nation.

A. Oregon State Regulations O.R.S. 358.920 and O.R.S 390.235 are regulatory in Nature, not criminal, and therefore cannot be applied to non-public lands.

In 1953 criminal jurisdiction over on-reservation activity was transferred to the State of Oregon. *See Pub. L. No. 83-280, 67 Stat. 588.* However, this Court has found that while Public Law 280 does grant the State of Oregon jurisdiction over criminal or prohibitory actions, it does not grant jurisdiction over civil or regulatory laws. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S. Ct. 1083, 1088, 94 L. Ed. 2d 244 (1987). The reason for such a finding is that, “The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society.” *Id.*

The Shorthand test that has been used by this Court is whether the conduct in question is regulatory/civil or criminal/prohibitory and whether the conduct violates the State’s “public policy.” *Id.* In *Seminole Tribe of Florida v. Butterworth* the court looked not at the way the state had classified the law, but rather what the actual law provided for. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 314 (5th Cir. 1981). Specifically, the Fifth Circuit found that the Bingo prohibition in that case was regulatory in nature rather than criminal because it did not create an total prohibition, but rather provided for exemptions for certain non-profit and charitable events. Furthermore, they stated that while the inclusion in the law of penal sanctions might suggest it is prohibitory, doing so would result in the conversion of all regulatory laws into prohibitory ones. *Id.* Similarly in the present case O.R.S. 358.905-358.961 does not create an all-out prohibition against what Mr. Captain did, but rather regulates it, requiring that the person receive a permit from the State. O.R.S. 358.920 and O.R.S 390.235.

It is true that there can be no bright-line rule about when a statute is criminal or prohibitory in nature as opposed to regulatory. For example even though a Washington State firework statute allowed the activity to occur in certain circumstances, the Ninth Circuit found

that it was prohibitory nevertheless, because of the overriding state interest in protecting public health and well-being. *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). However, that case is distinguishable from the present one because of the state's interest in public health and welfare as it relates to fireworks, an understandably dangerous object. The *Marcy* court even explicitly stated the situation there was, "not the same situation encountered in other regulatory schemes such as hunting or fishing, where a person who wants to hunt or fish merely has to pay a fee and obtain a license. The purpose of such statutes is to *regulate the described conduct and to generate revenues.*" *Id.* at 1364 (emphasis added). Since the fireworks statute in that case was not about generating revenue or regulating conduct, as is the case here, but rather preventing general widespread use of fireworks it was prohibitory. Indeed in the present case the activity in question is much more analogous to fishing or hunting permits than it is to permits to set off fireworks.

While the tribal land of the Cush-Hook is not reservation land, because the Cush-Hooks are not federally recognized, the same distinction discussed above with regards to civil/regulatory as opposed to criminal/prohibitory should apply in deciding whether the statutes at question here are indeed applicable to all of Oregon, and by extension, whether Oregon has jurisdiction on them to protect archaeological, cultural, and historical objects.

This Court has held that protection of a tribe's right to occupy does not need to be based on treaty, statute, or other formal government action. *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347, 62 S. Ct. 248, 252, 86 L. Ed. 260 (1941). This Court has further held that such a right includes the right to have full command and use of the land, including of the trees, game, and waters. *See Winters v. U. S.*, 207 U.S. 564, 576, 28 S. Ct. 207, 211, 52 L. Ed. 340 (1908). Since the artifacts at question in this case are a part of those trees, it is impossible to separate the Cush-

Hook tribe's right to have command of those trees from their right to have full command and use of the artifacts carved into them. Accordingly, the State should only be able to assert jurisdiction over Cush-Hook citizens if, as discussed above, the law being asserted is criminal or prohibitory, rather than civil or regulatory. For example the State would of course still be able to regulate things like fireworks on Cush-Hook land, the way they would be able to on any private property. They would of course also be able to have jurisdiction over the so-called 10 major crimes³. However, what they cannot do is assert jurisdiction over the use of the trees on the Cush-Hook land, as doing so would contravene the right of occupancy possessed by the Cush-Hook people.

Assuming *arguendo* this Court finds that the command and use of the artifacts are severable from the command of the use of the land, the State still does not have jurisdiction in the present case. In *Ferguson v. Ray* the Oregon Supreme Court awarded ownership of gold-bearing quartz to the defendant-landowner as opposed to the plaintiff-tenant who had discovered it. *Ferguson v. Ray*, 44 Or. 557, 77 P. 600 (1904). In determining ownership rested with the owner of the land, the Oregon Supreme Court cited principles of common law dating all the way back to English common law and an opinion in which Lord Russell noted that “[t]he possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also.” *Id.* at 567-568⁴. The only one who could have a better title would be the true-owner, who in this case would be the descendants of those who actually carved the artifacts in question, not the State of Oregon.

³ The 10 Major crimes refers to murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.

⁴ Lord Russell quoted this language from Pollock and Wright on Possession in the Common Law, pp. 40- 41.

To put it another way, in determining that United States' grant of fee simple title to the land to the Meeks was void *ab initio*, and so too was the subsequent sale to Oregon, the lower court found that the title to the land, and everything on it had always belonged to the Cush-Hook people, and at no time belonged to the State of Oregon. Nevertheless the State now tries to argue that they have jurisdiction over objects that belong entirely to the Cush-Hook tribal nation without and support for such jurisdiction.

A plain text reading of the statute further supports such a determination. Or. Rev. Stat. 358.910(1) specifically states, "archaeological site and their contents located *on public land* are under the stewardship of the people of Oregon and to be protected and managed in perpetuity by the state as a public trust. As the lower courts determined, the land at Kelly Point is not, nor has it ever been, public land, but rather land owned by the tribe under aboriginal title. O.R.S 358.905(1)(j) defines "public lands" to mean "any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon." The lower court's finding that the statute in fact applies to *all* lands within the State of Oregon offends the canon of construction *expressio unius est exclusio alterius*. Since the Oregon Legislature specifically identified what public lands referred to, they meant to exclude all land not included in that list, including tribally owned land.

It is true that O.R.S. 358.920 prohibits excavation, injury, destruction, or alteration of an artifact or site on private land as well as public. However, the statute fails to define 'private land' and therefore it is impossible to know whether land held by an Indian tribe under aboriginal title is included, or whether it was intended to prohibit private land owners from acquiring excavating artifacts found on their property. However, the fact that O.R.S 390.235 only

discusses excavation or alteration of archaeological sites or artifacts on public land, suggesting that again that the statute was not intended to extend to tribally owned land.

These trees, as well as the artifacts carved into them, were created by Cush-Hook people, on land that is and always has been, the property of the Cush-Hook nation, and has now been cut down by a citizen of the Cush-Hook Nation. At no time did the State of Oregon possess these lands or the trees and artifacts upon them, nor does the plain text of the statute suggest that they have a right to assert jurisdiction. To find otherwise would be an error of law that would effectively cripple the right of the Cush-Hook people to take steps to preserve their own land as well as the artifacts on them.

B. The State's interest does not supersede the interest of the Tribes.

Another aspect that courts have looked at in determining a State's right to assert jurisdiction is the interest of the state in doing so. For example the *Cabazon* Court weighed the government's interest against the tribal interests. *Cabazon* at 219-222. In the present case the State's interest is stated in O.R.S. 358.910, as being the preservation and protection of the history and cultural heritage of the State of Oregon. While it is true that that the history and cultural heritage of the land at Kelly Point is a part of the history and cultural heritage of the State, it is first and foremost a part of the cultural heritage of the Cush-Hook people, and has been since long before the existence of the State of Oregon. To consider only the interests of the State, as opposed to those of the Cush-Hook people would be to completely miss the source of the cultural heritage provided by these trees and the sacred carvings they contained.

The trees on this land represent significant cultural and religious significance for the people of the Cush-Hook nation because of the sacred totem and religious symbols carved by the tribal shamans. These carvings were made hundreds of years ago, before the State of Oregon or

even the United States for that matter came into existence. Because of this the Cush-Hook people have a vested interest in protection of these artifacts.

At first glance the interests of the Cush-Hook people might seem to be the same as that of the state's interest, which is that both are interested in preservation of these artifacts. However, the difference lies in the action. Despite the fact that these artifacts are 25-30 feet off the ground, vandals have recently damaged them. Despite the fact this violates Oregon law, the State has not taken a single step to enforce the law and stop the damage caused by vandals. There has been no increased presence by law-enforcement, no criminal or civil prosecutions of vandals, nothing. If the State was truly interested in preserving these sites, they would have done more to protect them. Instead, the State has selectively decided to prosecute Mr. Captain for taking action to protect these artifacts, after the State failed to do so. Based on the State's actions one might be inclined to believe that they place more in emphases on their interest in protecting their ability control these artifacts and when they should be protected, as opposed to actually protecting them.

While the Cush-Hook nation is not recognized the fact of the matter is that Indian tribes are not so neatly divided into either recognized or not recognized, but rather non-recognized tribes may still be considered a legal entity with the same interests and rights as other legal entities. *See Allen v. United States*, 871 F. Supp. 2d 982, 991 (N.D. Cal. 2012), motion for relief from judgment denied (July 9, 2012)(Quoting Cohen's Handbook of Federal Indian Law, 3.02(6)(a) (2005 ed.)). As such, any balancing of interest must take into account the Cush-Hook nations interest, not just the personal interests of Mr. Captain.

While it is true that a state's regulatory interest may be used to extend jurisdiction into tribally owned land, it does not mean they automatically outweigh the tribes interests. For example in *Rice v. Rehner* this Court found that the State's interest in requiring a state liquor

license allowed the state to extend jurisdiction onto a Indian reservation because there has never been a recognized tribal interest in regulation of liquor traffic. *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). Such cases are distinguishable because there is a very strong tribal interest in preservation of their cultural, preservation of their sacred religious objects, and maintenance of their tribal homelands, an interest that would be destroyed should the State of Oregon be allowed to assert jurisdiction over the artifacts at Kelly Point.

This Court has long recognized the legal complexities created by Indian tribes. They have recognized that Indian tribes have, ““a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”” *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 173, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129 (1973), quoting *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886). Despite this complexity, and the fact the Cush-Hook are not a recognized tribe, this Court has held tribes are distinct independent communities retaining their original natural rights, and that despite no longer possessing the full attributes of sovereignty they nevertheless remain a separate people who possess the power of to regulate their internal and social relations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675, 56 L. Ed. 2d 106 (1978). Among those rights to regulate their social relations must be included the right to protect those artifacts that tie them to their ancestors.

O.R.S. 358.955 allows that any person may on behalf of the state bring an action against any person who violates the provisions of the statute. The purpose of doing this is to supplement the State’s ability to protect culturally significant artifacts. However, here Mr. Captain did not

know the identity of the vandals desecrating his tribe's sacred artifacts, and thus was unable to bring his own action against them. Instead he took physical possession of them from trees located on his tribe's tribally owned land. The intent of his action was the same as bringing a civil enforcement action and the same as the intent of the statute. As the State has done nothing to protect the artifacts at Kelly Point, allowing the State to assert jurisdiction in this case would cripple the right of the Cush-Hook people to protect the tress that have belonged to them since time immemorial and the sacred carving at that site that connect them to their ancestors.

CONCLUSION

As discussed above, and decided by the lower courts, the land at Kelly Point Park belongs to the Cush-Hook tribal nation under aboriginal title. This title has not been extinguished by Congress and exists to this day. While there are situations that may warrant the state asserting jurisdiction in tribally owned land, those situation rely upon the statute being criminal in nature not regulatory. In the present case the fact that excavation and alteration is allowed pursuant to a State issued permit demonstrates the regulatory nature of the law, and as such precludes the state from asserting jurisdiction on tribal lands. At no time did the State possess these artifacts or the trees into which they were carved. Furthermore, the plain text meaning of the statute suggests that the law was not intended to apply to tribally owned land.

Despite not being federally recognized, the Cush-Hook tribe nevertheless is still a legal entity with legal rights, including the right to occupy and have full command and use of the resources upon that land that they hold under aboriginal title. The State of Oregon's interest in the resources and artifacts on Cush-Hook land may allow the state to assert jurisdiction in situations where there is no conflicting tribal interest, which is not the case here. The Cush-

Hook interest in preservation and protection of their sacred tribal objects predates and outweighs any state interest in those same objects.

Therefore for the reasons listed above, respondents respectfully request this Court find that the Cush-Hook still own the aboriginal title in the land at Kelly Point Park and that the State lacks jurisdiction to prosecute Mr. Captain for actions committed on Cush-Hook land.