No. 11-0274

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS CAPTAIN,

Respondent and Cross-Petitioner.

On Writ of Certiorari to the
Oregon Court of Appeals

BRIEF FOR PETITIONER

Team # 66

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Books and Treatises

Essays, Articles, and Journals

QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

I. Proceedings and Disposition in the Court Below

This appeal stems from a criminal action against Defendant Thomas Captain for violation of trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Oregon law. The Oregon Circuit Court for the County of Multnomah held that the Cush-Hook Nation holds aboriginal title over the land on which the alleged crimes occurred, based on error by Congress in its declaration that all lands of Oregon were public, lack of extinguishment of aboriginal title by Congress, and a void patent granted by the United States government to Joe and Elsie Meek, the state's predecessor in interest in the land in question. The lower court further held that the Oregon statutes relating to archaeological and historical artifacts were applicable and enforceable upon all lands by the State of Oregon, regardless of aboriginal title. Thus, the lower court found Defendant not guilty of trespass and cutting timber, but guilty of crimes related to the protection of historical and archaeological artifacts. The Oregon Court of Appeals affirmed without a decision and the Supreme Court of Oregon denied review.

II. Statement of the Facts:

In 2011, Cush-Hook citizen Thomas Captain occupied what is now generally known as Kelley Point Park. The purpose of his occupation was to reassert his Nation's ownership over the lands within the Park and protect culturally and religiously significant trees growing in the park. Cush-Hook shaman had once carved sacred totem and religious symbols in living trees within what is now the Park's boundaries, and some of these carvings still existed, although now 25-30 feet off the ground.

In order to protect one of the carvings from vandals who had climbed other trees and damaged or removed other carvings, Defendant cut down a carved tree, removed sections that included the carvings. He then attempted to transport the images to his Nation's location some 60 miles to the west of Kelley Point Park. State highway troopers seized him en route and seized the image.

The land that is now included in Kelley Point Park at one time was the site of a Cush-Hook village. Lewis and Clark made note of the village, its people, and their practices when the Lewis and Clark expedition passed through the area in 1806 and were guided to the site by local Multnomah Indians. The Cush-Hook people continued to live in the area until 1850, at which time the Cush-Hook signed a treaty with Anson Dart, the Superintendent of Indian Affairs. The treaty was never ratified, but the Cush-Hook people relocated to a location 60 miles to the west where they remained until modern day. The United States has never undertaken any act since to recognize the Cush-Hook tribe.

Pursuant to the Oregon Donation Land Act of 1850, the United States Government issued fee simple title to Joe and Elsie Meek, to the land once encompassing the Cush-Hook village. The Meeks failed to fulfill all the statutory requirements of the land grant, but were nonetheless issued fee simple title, which they later sold to the State of Oregon in 1880. The state created Kelley Point Park.

Defendant challenged his arrest on the grounds that aboriginal title to Kelley Point Park was held by the Cush-Hook people at all times and that the Oregon statutes he was arrested under had no effect over members of the Cush-Hook Nation exercising their aboriginal right of use and occupancy.

ARGUMENT

I. Standard of Review

The first issue requires the Court to resolve an issue of aboriginal title, which is a "question of fact to be determined as any other questions of fact." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). Questions of fact are reviewed under a clearly erroneous standard. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). However, the elements of aboriginal title must be proven by "substantial evidence." *Santa Fe Pac. R. Co.*, 314 U.S. at 345.

The second issue requires the Court to resolve a legal question involving subject matter jurisdiction. A determination of subject matter jurisdiction is reviewed *de novo* by the Court. *Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir. 2009) (quoting *State of Alaska v. Babbitt*, 38 F.3d 1068, 1072 (9th Cir. 1994)).

II. The Oregon Court of Appeals Erred When It Determined that the Cush-Hook Nation Owns Aboriginal Title to the Kelley Point Park

The first issues that this court must examine is the existence of aboriginal title held by the Cush-Hook Nation. The Oregon appellate court erred in determining that the Cush-Hook Nation still holds valid aboriginal title to the land in question. Aboriginal title to land is a "mere right of usufruct and habitation," which is held without the power of alienation. *Johnson v. McIntosh*, 21 U.S. 543, 569 (1823). The power of Congress to extinguish any aboriginal title is supreme. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955).

A. The Lower Court's Finding Are Insufficient to Establish the Creation of Aboriginal Title in the Cush-Hook Nation

Before examining whether the aboriginal title was later extinguished, it is first necessary to determine whether any aboriginal title *ever* existed in the land in question.

Indian individuals and tribes making a claim of aboriginal title must bring forth proof of "actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (quoting *Confederated Tribes of the Warm Springs Reservation v. U.S.*, 177 Ct.Cl. 184, 194 (1966). This Court has also noted that claims to aboriginal title encompass a "definable territory". *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). The "occupancy necessary to establish aboriginal title is a question of fact," and must be supported by substantial evidence . *Id.*; *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Although there is perhaps not enough in the record to overturn the lower court's findings as to the actual use and occupancy, the findings of fact are lacking in the other elements necessary to establish aboriginal title.

First, there is no assertion or findings as to the exclusivity of use. "Generally, mixed and non-exclusive use and occupancy of an area precludes the establishment of any aboriginal title by any of the users of the subject property." *Strong v. United States*, 518 F.2d 556, 561 (Ct. Cl. 1975) (citing *Quapaw Tribe v. United States*, 120 F. Supp. 283 (Ct. Cl. 1954). Requiring substantial proof not only of control, use and ownership, but also of continuous and exclusive use over a "long period of time" prevents a court from becoming "an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before." *Confederated Tribes of Warm Springs*, 177 Ct. Cl. at 194.

The lower court's findings first fail to establish the exclusivity necessary for aboriginal title. The court's findings that the "Cush-Hook Nation occupied, used, and owned the lands in question" does not describe any Cush-Hook claim to exclusivity of occupation of the territory now encompassed in the Park. There exists in the record evidence of at least one

other tribe, the Multnomah, in the same area, but there is no conclusion as to the exclusivity of the occupation in relation even to the Multnomah. Even if the village itself may be evidence of exclusive use, the record does not reflect the size of the village in relation to the modern Park. It simply cannot be determined whether the Cush-Hook were the exclusive users of the area.

Similarly, the record lacks any determination of the length of time, nor continuousness the Cush-Hooks "occupied, used, and owned" the land in question. It has been acknowledged that aboriginal title does not attach to an Indian Nation or individual the moment they acquire dominion over the land, but rather must have been at least enough time to "have allowed the Indians to transform the area into a domestic territory." *Id.* This requires continuous use "'for a long time' prior to the loss of the land." *Id.* (citing *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 315 F.2d 896 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 921 (1963)). The findings of fact only determine that "the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans." This finding of fact neglects a determination of length of use. The findings of fact and the record of the case only reveal evidence of use and occupation, although not necessarily exclusive or continuously between 1806 and 1850, with an additional time added for the acquisition or creation of the village mentioned. This Court is left without the facts necessary to address whether the land in question had belonged to the Cush-Hooks since "time immemorial," or whether it was the product of a bloody Cush-Hook Nation conquest in 1804.

Lastly, the lower court's findings give no ascertainable and defined territory of which to apply aboriginal title. Although under specific claims before the Indian Claims Commission, it was established that" absolute accuracy of location and extent of occupancy

is not essential," the determination of aboriginal title does require at least a "reasonable" ascertainment of boundary lines. *See Upper Chehalis Tribe v. United States*, 155 F. Supp. 226, 228 (Ct. Cl. 1957). Under even the "reasonable accuracy" standard, Mr. Captain should be required to bring evidence to prove a boundary more specific than "land in and around Kelley Point Park." The conclusion of aboriginal title over "the lands in question" is too vague to even be considered measured with "reasonable accuracy."

The findings of fact by the lower court simply do not demonstrate that the Cush-Hook Nation had actual, continuous and exclusive dominion over the territory for a long period of time as is necessary to establish aboriginal title. As will be discussed further in later arguments, having the true parties of interest involved in the determination of aboriginal title would provide for an adequate adjudication of the extent of the territory over which the Cush-Hook have a legitimate claim of aboriginal title. Without this, the lower court has established an unascertainable territorial limit that begs for re-litigation of the same facts and complicates future jurisdictional disputes.

B. Aboriginal Title Was Extinguished Through Abandonment

If this Court were to determine that the lower court was correct in determining that the Cush-Hook Nation had satisfied the elements necessary to establish aboriginal title, the lower court was still erroneous when it determined that the aboriginal title was still in existence today. Aboriginal title can be extinguished in two ways, either through Congressional act or through abandonment. *See Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 669 (1974); *Cayuga Indian Nation v. Cuomo*, 758 F. Supp. 107, 110 (N.D.N.Y. 1991).

The right of the United States to terminate aboriginal title is exclusive and supreme. *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. at 669 (1974); *Pueblo of San Ildefonso*, 513 F.2d at 1387. "The manner, method and time of such extinguishment raise political not justiciable issues." *Santa Fe Pac. R. Co*., 314 U.S. at 347 (citations omitted). The facts and history associated with the area and this case indicated that the Cush-Hook abandoned the property, or alternatively that Congress was manifesting an intention to terminate the aboriginal rights of the Cush-Hook Nation.

First, the Cush-Hook gave up their aboriginal rights when they abandoned the land in question. "Since aboriginal title is dependent upon actual, continuous and exclusive possession of the land, proof of a tribe's voluntary abandonment of such property constitutes a defense to a subsequent claim concerning the land." *Cayuga Indian Nation*, 758 F. Supp. at 110. If an Indian tribe holds recognized title to the land, abandonment is not enough, but rather its aboriginal title must be extinguished by an act of Congress divesting the tribe of that land. *Id.* (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

In the record before the Court, the Cush-Hook Nation abandoned the property in question when they moved to the land 60 miles away. Although the treaty associated with this move was never ratified, and therefore was never effective, the Cush-Hook Nation showed no attempt to move back onto the land in question until over 150 years later, and then only by one individual of the tribe. Generally, abandonment of a property right brings the right of continued occupancy to it conclusion. *See generally*, *Williams v Chicago*, 242 U.S. 434 (1917) (demonstrating relinquishment of property rights through abandonment). If this is an unrecognized title, then it should only last so long as it is continuous, and the abandonment should destroy the aboriginal title.

Alternatively, the record does not establish that the title held by the Cush-Hook was recognized title. "Treaty-recognized title is a term that refers to Congressional recognition of a tribe's right permanently to occupy land." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-52 (7th Cir. 1983). In the present case, there is no Congressional recognition. Although the Lewis and Clark expedition may have given out "peace medals" which the Lewis and Clark expedition believed were bestowing some sort of official recognition, it was not in fact recognition. Lewis and Clark were not given any sort of congressionally mandated power, nor does the record indicate that Congress in any way ratified the actions of Lewis and Clark as having bestowed formal recognition upon the Cush-Hook people. They were perhaps recognized as a Nation with which the United States could communicate, but the record falls short of indicating that Congress intended to grant them rights of use and occupation, and thus, the Cush-Hook people should not be given the exclusion of abandonment law application given to tribes that are formally recognized by Congress as having definite use and occupancy rights.

C. Aboriginal Title Was Extinguished Through Congressional Acts

Finally, the Donation Land Act of 1850, in its historical context, demonstrate that Congress had a clear intent, and did actually extinguish the aboriginal title of the Cush-Hook Nation on the portion of land in question. This Court has noted in the examination of policy surrounding mid-19th century interactions with Oregon Indians that, "Congressional and executive action consistent with the prevailing idea of non-coercive, compensated extinguishment of Indian title is clear . . . . The Act of 1848 declared a policy of extinguishing Indian claims in Oregon only by treaty. The statute of 1850 put in motion the treaty-making machinery." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 49 (1946). "[A]boriginal title, as opposed to Indian title recognized by treaty or reservation, is

legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. *United States v. Atl. Richfield Co.,* 435 F. Supp. 1009, 1020 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

The Donation Land Act opened all land, except that land reserved "for governmental purposes" and within one mile of military outposts, for survey and eventual grant to white and "half-breed" settlers in the Oregon. Oregon Donation Act of September 27, 1850, 9 Stat. 496. There is no mention, as in other land grant statutes, excepting Indian lands from these grants. *Id., but see* Act of March 2, 1861, 12 Stat 239 (creating the Dakota Territory and specifically preserving Indian rights in land as against white settlers). Unsuccessful treaty negotiations have been seen as a marker of termination of aboriginal title, because the moving off of the territory would end exclusive control. *See Plamondon ex rel. Cowlitz Tribe of Indians v United States*, 199 Ct. Cl. 523 (1972). Although the United States never successfully ratified a treaty with the Cush-Hook Nation, its steps in authorizing a negotiation, coupled with the Donation Land Act, which opened *all* lands and the conveyance of the actual land in question, tend to show that the United States intended on terminating the Cush-Hook aboriginal title.

With the intent to extinguish and the vehicle for extinguishment setup through the conveyance of land, the actual conveyance of the land in question comes into issue. Although the court below ruled against the validity of the conveyance to the Meeks', this assertion was incorrect for several reasons. First, Oregon law prohibits actions involving the validity of patents issued by the United States that are not brought within 10 years of the issuance of that patent. Or. Rev. Stat. § 12.040 (2011). Thus, it was inappropriate for the Oregon courts to pass judgment on the validity of the patent under their own law.

Second, the challenge to this patent raise significant standing issues. First, this Court has recognized that "it may be well doubted whether the patent can be set aside without the United States being a party to the suit." *Silver v. Ladd*, 74 U.S. 219, 228 (1868). Challenges to a patent issued by the United States are properly set aside in the exclusive realm of equity. *See generally Steel v. St. Louis Smelting & Ref. Co.,* 106 U.S. 447 (1882). The lower court declared that "Congress erred" when it declared lands public, but if that is the case, and land has passed out of the hands of the United States government, which it did not actually intend to give away, the United States is the real party of interest, as title would pass back to the United States. By allowing Defendant to bring the challenge to the patent of the land, and adjudicating the issues in a case only incidentally related to the case in controversy, the court deprives the United States of the opportunity to fully argue this case on behalf of itself or of the full Cush-Hook Nation. By allowing the determination to stand, this Court would sanction an action which moves forward without a clearly focused adversarial proceeding.

Considering all the above arguments, the State of Oregon respectfully requests the Court to REVERSE the lower court's finding that the Cush-Hook Nation holds aboriginal title to the Kelley Point Park.

III. The Oregon Court of Appeals correctly affirmed that the State of Oregon has jurisdiction over Kelley Point Park

The State of Oregon has criminal jurisdiction over Kelley Point Park under 1) Oregon's grant of criminal jurisdiction over Indian Country within its borders under Pub. L. 280, and 2) "Exceptional circumstances" exist that require the State of Oregon to exert criminal jurisdiction even if Pub. L. 280 is not applicable.[1]

[1] This issue is resolved under the assumption that Kelley Point Park is held by the Cush-Hook Nation under aboriginal title; otherwise, the State would have jurisdiction. *See e.g., State v. Childers,*

A. The Oregon Court of Appeals correctly affirmed that Oregon has criminal jurisdiction over Kelley Point Park under Pub. L. 280

The language, purpose, and precedent of Pub. L. 280 all require a finding that Oregon has criminal jurisdiction over Kelley Point Park.

1. Development of Pub. L. 280 and the *Cabazon* Test

State cannot normally assert jurisdiction over Indians on Indian territory. *See Worcester v. Georgia*, 31 U.S. 515 (1832) (ruling that Georgia's laws were not applicable on Cherokee Nation territory); *Ex parte Crow Dog*, 109 US 556 (1883) (ruling that in the absence of a special federal statute, a federal district court in the Dakota Territory lacked jurisdiction to prosecute an Indian for a crime committed on Indian Country); 18 U.S.C. §§ 1152, 1153 (2006) (extending general and major criminal federal jurisdiction to Indian Country).

In 1953, Congress enacted Public Law 280, allowing several states to exert criminal and civil jurisdiction over specified Indian lands. Act of Aug. 15, 1953, Pub. L. 83-280, § 2, 4, 67 Stat. 588, 588-90 (codified as amended at 18 USC § 1162, 25 USC §§ 1321-26, 28 USC § 1360). Oregon was one of the first states to accept Pub. L. 280 jurisdiction. *See* Pub. L. 83-280, §§ 2, 4, 67 Stat. at 588, 588-89 (1953).[2]

The purpose of Pub. L. 280 was *not* to assimilate tribes within the territorial borders of states accepting jurisdiction. *See Bryan v. Itasca Cnty.*, 426 U.S. 373, 387 (1976). Rather, the primary purpose of Pub. L. 280 was to combat lawlessness on reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (citing *Bryan v. Itasca Cnty*, 426 U.S. 373, 379-80 (1976)).

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511 P.2d 447 (Or. App. Ct. 1973) (criminal prosecution of crime originating in state park); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (showing that state laws ordinarily apply to Indians outside of Indian Country).

[2] Specifically, Oregon assumed criminal jurisdiction over all Indian Country within the state except for the Warms Springs Reservation. 18 U.S.C. § 1162 (a) (2006).

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

Bryan, 426 U.S. at 379-80 (quoting H.R. Rep. No.83-848, at 5-6 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411-12). Jurisdiction given to the several states, including Oregon, was not without limits. The statute sets out specific provisions where state law has no application. *See* 18 U.S.C. § 1162(b) (2006); 25 U.S.C. §§ 1321(b), 1332(b) (2006); 28 U.S.C § 1360(b) (2006); *see also Cohen's Handbook of Federal Indian Law* § 6.04[2][b] (Newton et al. eds., 2005). The Court has interpreted Pub. L. 280's grant of civil jurisdiction to be "more limited" than the grant of criminal jurisdiction. *Cabazon*, 480 U.S. at 207. As a more limited grant, states may only hear private civil litigation claims "involving reservation Indians in state court," but are precluded from exerting civil regulatory authority over Indian Country. *Id.* at 208 (citing *Bryan*, 426 U.S. at 385, 388-90). Therefore, before enforcing a state law on Indian Country under Pub. L. 280, "it must be determined whether the [state] law is criminal in nature, and thus fully applicable to the reservation . . ., or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Id.*

The controlling test whether a state statute applies to Indian Country under Pub. L. 280 was presented in *California v. Cabazon Band of Mission Indians*. 480 U.S. 202 (1987). The Court in *Cabazon* determined whether California's state laws and county ordinances regarding bingo were applicable in Indian Country. *Id.* at 205-06. According to the *Cabazon* Court,

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be

> classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Id. at 209. Some courts have interpreted the *Cabazon* test to equate to a two-step analysis. first determining the "focus" of the case by looking either at the broad activity or the narrow activity depending on heightened public policy concerns, and second, "[a]fter identifying the focus of the *Cabazon* test, the second step is to apply it. If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory." *State v. Stone*, 572 N.W.2d 725, 730 (Minn. 1997).

The Court also provided a "shorthand test" for Pub. L. 280 application, requiring courts to determine if the "conduct at issue violates the State's public policy." *Id.* at 209. Lower courts have interpreted this shorthand test to require examining four nonexclusive factors, including

> (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; (4) the nature and severity of the potential penalties for a violation of the law.

Stone, 572 N.W.2d at 730.

For further aid, courts have also examined the prohibitory/regulatory distinction under the Assimilative Crimes Act. *See e.g.*, *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) (interpreting 18 U.S.C. §§ 13, 1152 and applying a prohibitory/regulatory analysis to Washington's fireworks statutes); *see also Barona Group of Captain Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1188 (9th Cir. 1982) (using *Marcyes* in a Pub. L. 280 context). Additionally, the Court should consider how a state's statutes have evolved over time to determine whether they are prohibitory or regulatory. *See e.g.*, *Twenty-Nine*

Palms Band of Mission Indians v. Wilson, 925 F. Supp. 1470, 1475 (C.D. Cal. 1996) (ruling that California's boxing laws had evolved from prohibitory in the late 1800s to regulatory under the state's current boxing statute as a recognized sport), *vacated*, No. 96-55893, 1998 WL 476111 (9th Cir. July, 30, 1998) (implying the case was moot because Congress enacted the Professional Boxing Safety Act of 1996).

2. **Synthesis of Case Law Establishes Themes for Prohibitory/Regulatory Distinctions Indicating Oregon's Laws Are Prohibitory**

Before delving into Oregon's statutes, it is important to examine *how* lower courts have applied the *Cabazon* test. Several themes regarding the two categories are apparent. First, for regulatory laws, courts have found that laws which serve the purpose of generating revenue for the state are generally regulatory. *See generally Bryan*, 426 U.S. 373 (1976) (ruling Minnesota's property tax scheme was not applicable to Indian Country under Pub. L. 280); *see also Twenty-Nine Palms*, 925 F. Supp. at 1477 (quoting *Marcyes*, 557 F.2d at 1364) (discussing that the Court in *Marcyes* ruled Washington's fireworks laws were prohibitory "because the purpose of the statute was not to generate income by requiring licenses . . ."). Second, prohibitory laws are generally reactionary in nature, allowing a certain conduct but then subjecting that conduct to regulation. *See e.g.*, *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981) (ruling Wisconsin's bingo statutes were regulatory in nature because the statute only assessed a penalty when a bingo operation was non-compliant with the statute).

Prohibitory statutes take a different approach. First, the conduct at issue in prohibited outright or prohibited but the conduct is allowed under very controlled circumstances. *See e.g.*, *State v. Lasley*, 705 N.W.2d 481, 490-91 (Iowa 2005) (ruling that Iowa's statute regarding sale of tobacco to minors was prohibitory because the statute "absolutely prohibits"

tobacco sales to minors); *see also State v. LaRose*, 673 N.W.2d 157, 163-64 (Minn. Ct. App. 2003) (ruling that Minnesota's laws regarding possession of marijuana were criminal/prohibitory because of general prohibition). Second, lower courts have found that statutes seeking to protect the public at large from injury and to preserve public safety are prohibitory. *See e.g., State v. Jones*, 729 N.W.2d 1 (Minn. 2007) (ruling Minnesota's predatory-offender registration statutes was a prohibitory law). Lastly, state laws may still be prohibitory even though the conduct has an accepted counterpart, and courts may narrow its focus on the impact of the specific activity. *See e.g., Jones v. State*, 936 P.2d 1263, 1266-67 (Alaska Ct. App. 1997). For example, the court in *Jones v. State* ruled that even though Alaska allowed hunting in a regulated fashion, unregulated hunting was prohibited in the state because unregulated hunting would decimate the state's game population and severely undermine the practice of hunting altogether in the state. *Id.*

3. Oregon's Archaeological Sites and Historical Artifacts Statutes are Criminal/Prohibitory under the *Cabazon* Tests and the progeny of *Cabazon*

Under the *Cabazon* test, Oregon's statutes are prohibitory. Oregon has a comprehensive set of statutes governing archaeological sites and historical artifacts. *See* Or. Rev. Stat §§ 358.905-358.961, 390.235-390.240 (2011). Under Oregon law, "[a] person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon *unless that activity is authorized by a permit* . . ." Or. Rev. Stat. § 358.920 (1)(a) (emphasis added).[3] Oregon's prohibition against destroying archaeological objects applies equally against private and public lands. Or. Rev. Stat. § 358.920 (1)(a). Also, the permitting process in no way contemplates allowing the destruction of archaeological artifacts, implying that destruction of

[3] *See* Appendix for definition of "Archaeological object" under Oregon Law.

archaeological artifacts is "absolutely prohibited." *See* Or. Rev. Stat § 390.235 (1)(a)(allowing only excavation, exploration, and removal of archaeological sites and artifacts *after* obtaining a permit from the State Parks and Recreation Department). Further, the only time the State Parks and Recreation Department will issue a permit that involves destruction is "to a qualified archaeologist to salvage such material from unavoidable destruction[.]" Or. Rev. Stat. § 390.235 (2)(b).

Moreover, Oregon's shows its condemnation of destroying archaeological artifacts by punishing violators with a Class B misdemeanor. Or. Rev. Stat. § 358.920 (8). Oregon acknowledges that even though a statute imposes a criminal sanction, this does not automatically indicate that the statute is criminal/prohibitory. *Twenty-Nine Palms*, 925 F. Supp. at 1474 (quoting *Cabazon*, 480 U.S. at 211). However, analyzing the punishment adds to the "legal context" of violating Or. Rev. Stat. § 358.920, which carries a maximum fine of $2,500 and a prison sentence of no more than 6 months. *See* Or. Rev. Stat. §§ 161.615, 161.635 (2011); *see also Twenty-Nine Palms*, 925 F. Supp. at 1474 (examining the "overall legal context governing the activity" for a Pub. L. 280 determination) (citations omitted).

Applying the two-step *Cabazon* test, first, the Court should narrow its focus on the conduct in question to "destruction" of archaeological sites and artifacts instead of considering the broad activity of archaeological exploration. The Court should narrow its focus because of the heightened public policy concerns that destruction of archaeological uniquely brings to light and because destruction presents substantially different concerns than other permitted activity. *See Stone*, 572 N.W.2d at 730. As opposed to exploration, excavation, and removal, which are preservative measures, destruction of a culturally significant object irrevocably destroys the valuable artifact. *See* Or. Rev. Stat. § 390.235

(1)(a). Applied to Defendant's facts, Defendant irrevocably destroyed an archaeological object under Oregon statutes when he cut down a tree that was generally known to have religious and cultural value to the Cush-Hook Nation and citizens of Oregon. Being that Defendant's act of destruction was set apart from the other allowed conduct, the Court should focus on this destruction when applying step two of *Cabazon*.

Applying the second step of the *Cabazon* analysis, the Court should find that Oregon wholly prohibits any destruction of archaeological sites and objects, and does not permit the conduct subject to any exceptions. *See Stone*, 572 N.W.2d at 730. The Oregon statutes only allow a permit in three limited situations, none of which allow an applicant to irrevocably destroy the archaeological site or artifact. *See* Or. Rev. Stat. § 390.235.[4] Of these three, the closest situation to Defendant's facts is providing a permit granted to a qualified archaeologist to "salvage" a site or artifact from unavoidable destruction. *See* Or. Rev. Stat. § 390.235 (2)(b). However, there exists an inherent difference between salvaging an artifact from unavoidable destruction and the act of complete destruction as performed by the Defendant. Oregon allows salvaging an artifact, but Oregon flatly prohibits the destruction of an artifact. Therefore, applying *Cabazon*'s two-part analysis, Oregon's archaeological sites and artifacts, as applied to destroying a culturally significant artifact, are prohibitory.

Under *Cabazon's* "shorthand" test, the public policy behind Oregon's statutes shows the statutes are prohibitory. First, the act of destroying a culturally significant artifact, one that is especially important to the Cush-Hook Nation and other citizens of Oregon, directly

[4] The three permitted situations include:

> (a) To a person conducting an excavation, examination or gathering of such material for the benefit of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology;
> (b) To a qualified archaeologist to salvage such material from unavoidable destruction; or
> (c) To a qualified archaeologist sponsored by a recognized institution of higher learning, private firm or an Indian tribe as defined in [Or. Rev. Stat. § 97.740].

Or. Rev. Stat. § 390.235(2)(a-c) (Permitting statute).

threatens property and invades the rights of others. By cutting down a 300-year-old tree with sacred carvings, Defendant irrevocably threatened the sacred property with Kelley Point Park, and invaded the rights of fellow Cush-Hood Nation members to practice their native religions in this sacred area by committing this cultural injury. Second, Oregon's laws do not allow any exceptions for destroying an archaeological site or artifact. *See* Or. Rev. Stat. § 390.235 (2)(a).

Third, Defendant was clearly "blameworthy" because, as evidenced by his actions of staying in the Park "to protect culturally and religiously significant trees," the Defendant understood that his actions were not permitted under Oregon's comprehensive statutory scheme and even if Defendant was unaware of these laws, he is charged with constructive knowledge. *See Lambert v. California*, 355 U.S. 225, 228 (1957) (stating ignorance of the law is not excuse) (citations omitted). Lastly, Oregon's statutes prescribe that a violation can result in six months of jail and a fine up to $2,500, the same punishment allotted for possession of a schedule IV controlled substance in Oregon. *See* Or. Rev. Stat. § 475.752 (1)(d). The policy statement of the Oregon Legislature sheds light on why the state imposed such a harsh punishment, stating that artifacts and sites, like the tree the Defendant cut down, are "finite," "irreplaceable," and "intrinsic" to heritage of all Oregon residents. *See* Or. Rev. Stat. § 358.910. As opposed to merely fining violators, the fact that the legislature allowed for a prison sentence should be a factoring supporting a conclusion that Oregon's law "seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property." *State v. Jones*, 729 N.W. at 9 (quoting *Stone*, 572 N.W.2d at 730). Therefore, under the shorthand test of *Cabazon*, destroying a culturally significant artifact is

prohibited in Oregon based on the state's public policy to "preserve" rather than "destroy" these items and locations that hold intrinsic value.

Lastly, when applying the themes derived from the lower courts' interpretations of *Cabazon*, the Oregon statutes are prohibitory. The permit process used by the State Parks and Recreation Department is not intended to generate revenue for the State of Oregon. *See* Or. Rev. Stat. §§ 358.910, 390.235 (stating the policy of the statutes which does not include revenue generation, and the permit process which does not mention revenue generation). While certain conduct that is meant to "preserve" sites and artifacts is allowed after seeking a permit, the specific activity of "destroying" an artifact is never allowed under the permitting system and violates the stated policy the Oregon Legislature intentionally added to the comprehensive scheme. *See id.* Oregon, unlike California's bingo laws in *Cabazon*, does not allow the conduct of destroying artifacts, and then regulates the activity. *See Cabazon*, 480 U.S. at 211. Accordingly, under the *Cabazon* themes created by lower court, Oregon's statutes concerning archaeological sites and historical objects, as pertaining to the specific activity of destroying artifacts, are prohibitory and thus, Pub. L. 280 applies to the Kelley Point Park.

By combining *Cabazon*'s two-part test, *Cabazon's* shorthand test, and the themes within *Cabazon's* progeny, Oregon's laws regarding archaeological sites and historical artifacts are criminal in nature as applied to the act of destroying a culturally significant artifact. For these reasons, the State of Oregon respectfully requests the Court of find the statutes in question to be criminal in nature and therefore applicable to Kelley Point Park under Pub. L. 280.

4. Public Law 280 Is Applicable to Kelley Point Park Regardless of Whether the Cush-Hook Nation Holds Aboriginal Title to the Park

Pub. L. 280 uses term "Indian Country" to describe which lands the several states acquired criminal and civil jurisdiction over. *See* 18 U.S.C. § 1162; 25 U.S.C. § 1360. Indian Country is defined as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006). If the Cush-Hook Nation is deemed to have aboriginal title over Kelley Point Park, Pub. L. 280 is still applicable to the park, as a "dependent Indian community" as defined in 18 U.S.C. § 1151. *See State v. Dana*, 404 A.2d 551 (Me. 1979). The court in *State v. Dana* addressed whether Maine could exert criminal jurisdiction over lands inhabited by the Passamaquoddy Tribe or whether the federal government held exclusive jurisdiction under the Major Crimes Act. *Id.* at 552. The land in question was not a formal Indian reservation, but the court reasoned that "when an Indian tribal community has 'Indian title' [aka aboriginal title], a right to occupy lands, which the federal government has undertaken to protect by assuming fiduciary responsibilities, the dependency status of the Indian community thus acknowledged and protected would be sufficient to establish 'dependency' within the meaning of Section 1151(b)." *Id.* at 562. If the Court determines that the Cush-Hook Nation retained aboriginal title, satisfying all the necessary elements, then *State v. Dana* is directly applicable to this case. *Dana* shows that aboriginal title, for the purposes of "Indian Country" under 18 U.S.C. § 1151, equates to being a "dependent Indian community," which is considered Indian Country under § 1151. Therefore, if the Cush-Hook

Nation holds Kelley Point Park under aboriginal title, the Park should still be considered "Indian Country" for purposes of Pub. L. 280.

For these reasons, Oregon has criminal jurisdiction over Kelley Point Park under the grant of criminal jurisdiction under Pub. L. 280, Oregon's archaeological sites and historical objects statutes, as applied to destroying historical sites and artifacts, are prohibitory in nature, and regardless of whether the Cush-Hook Nation holds the Park under aboriginal title, Pub. L. 280 is still applicable to the Park.

B. Oregon Has Criminal Jurisdiction Over Kelley Park Under "Exceptional Circumstances" Even if Pub. L. 280 Is Not Applicable

"[A] state may assert jurisdiction over the on-reservation activities of tribal members," without authorization from Pub. L. 280 or otherwise, under "exceptional circumstances." *State v. Jones*, 729 N.W.2d at 12 (Minn. 2007) (Anderson, J., concurring) (quoting *Cabazon*, 480 U.S. at 215 (1987) (citations omitted)). "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Oneida Tribe*, 518 F. Supp.at 715 (quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (citations omitted)). If Pub. L. 280 is not applicable to Kelley Point Park, there are no laws to govern the Park and there will exist a vacuum of power that only the State is prepared to fill.

According to 18 U.S.C. § 1162, the statute providing Oregon with its Pub. L. 280 criminal jurisdiction, "[t]he provisions of sections 1152 [General Crimes] and 1153 [Major Crimes] of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction." 18 U.S.C. § 1162(c). This section was added in 1970. Act of Nov. 25, 1970, Pub. L. 91-523, §§ 1, 2, 84 Stat. 1358. The amendment to the criminal jurisdiction statute

has been understood to be a transfer of the federal government's jurisdiction under the General Crimes Act and Major Crimes Act to those States that assumed Pub. L. 280 jurisdiction, resulting in *concurrent jurisdiction* between the State and Tribal governments, with the States taking the place of the Federal Government. *See* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1673-76 (1998) (emphasis added). Even in the absence of federal criminal jurisdiction, Oregon recognizes that other federal laws would still be applicable to Indian Country. *See Cohen's Handbook on Federal Indian Law* Sect 6.04[3][d[i] n.464 (citing *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998) (stating federal laws of general applicability were not affected by Pub. L. 280)).

For example, the Native American Grave Protection and Repatriation Act (NAGPRA) would normally apply to tribal burial sites and other cultural items. *See* 25 U.S.C. § 3002(c) (2006) (precluding intentional excavation and removal of Native American human remains and objects unless an applicant obtains a permit and consults with the appropriate tribe). However, because the Cush-Hook Nation is not a federally recognized tribe, NAGPRA is not applicable. *See* 25 U.S.C. § 3001 (7) (2006) (providing the definition of "Indian Tribe"). This means that the federal government has not exerted any criminal jurisdiction over Oregonian Indian Country[5] since 1970 and the most applicable federal statute for these facts cannot be applied to Kelley Point Park because the Cush-Hook Nation is not a federally recognized tribe. *See* 25 U.S.C. § 3001 (7). Further, because the Cush-Hook Nation is not a federally recognized tribe, continuing to enforce Oregon's criminal and civil statutes against non-Cush Hook Nation members would be a near impossibility,

[5] With the notable exception, Oregon's Pub. L. 280 jurisdiction does not extend to the Warm Spring Reservation. *See* 18 U.S.C. § 1162 (a); 25 U.S.C. § 1360 (a).

requiring Oregon courts to expend valuable time determining if a defendant is in fact a Cush-Hook member. As the great novelist Tolkien said, "The world changes, and all that once was strong now proves unsure." 2 J.R.R. Tolkien, *The Two Towers: The Lord of the Rings*, 155 (1986). The State of Oregon requests the Court to consider this vacuum of jurisdiction that would be opened if the State were not allowed to exert criminal jurisdiction, and to bring certainty back to Kelley Park Point.

Additionally, this would not be the first time the Court has extended state jurisdiction over lands held in aboriginal title. *See e.g., Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). The Court in *Kake* held that Alaska's fishing regulations applied to lands over which two tribes held aboriginal hunting and fishing rights on the basis that the laws were generally applicable to all residents of Alaska, and because no specific treaty existed between the two tribes and federal government. *Id.*at 76. Similar to *Egan*, the Cush-Hook Nation does not have a ratified treaty with the federal government and Oregon's archaeological site and historical artifacts statutes are generally applicable to all resident of Oregon. Therefore, the Court would not be setting precedent if it allowed Oregon to exercise jurisdiction over Kelley Point Park.

As an important conclusory note, the State of Oregon recognizes and respects the inherent sovereignty of the Cush-Hook Nation to make its own law and be governed by them even though the Nation is not a federally-recognized tribe. However, because the Nation is not federally recognized, the Nation is at an inherent disadvantage that other recognized tribes are overcome with the support of federal aid and guidance. *See e.g.*, 25 U.S.C. § 450 *et seq.* (providing education and governmental assistance for recognized tribes). Recognizing that the State of Oregon is in the best position to assume jurisdiction over

Kelley Point Park, and preserving the intent of Pub. L. 280 which was meant to prevent lawlessness, the State of Oregon respectfully requests the Court to find there exists "exceptional circumstances" for Oregon to exert jurisdiction over the Park.

CONCLUSION

For the above reasons, the Oregon Court of Appeals should be REVERSED on the issue of aboriginal title for the Cush-Hook Nation, and AFFIRMED on the issue of criminal jurisdiction for the State of Oregon.

Respectfully submitted,

Team #66
Counsel for Petitioner
January 15, 2013

APPENDIX

Or. Rev. Stat. § 358.905 (1)(a)(A-C)(2011)

> Archaeological object" is defined as an object that
> (A) Is at least 75 years old;
> (B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and
> (C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.