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Winner, Best Appellate Brief in the 2013 Native American Law Student Association Moot Court Competition

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WINNER, BEST APPELLATE BRIEF IN THE 2013 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

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Questions Presented

I. Does the Cush-Hook Nation, a tribe in existence since time immemorial, maintain aboriginal title to their ancestral lands situated in modern-day Kelley Point Park when that title has never been extinguished?

II. Does Oregon have criminal jurisdiction to regulate the use of, and to protect, the culturally and religiously significant tribal objects belonging to the Cush-Hook Nation when those objects are located within federal lands and subject to federal law?

Statement of the Case

I. Statement of Facts

The Cush-Hook Nation ("Cush-Hooks" or "Nation") is a tribe of Indians whose original homelands are located at the confluence of the Columbia and Willamette Rivers. ROA at 1. The Cush-Hook Nation's permanent village was located inside the present-day boundaries of Oregon's Kelley Point State Park. *Id.* The Nation occupied this area since time immemorial and lived by hunting, fishing, growing crops, and harvesting wild plants, such as wapato. *Id.*

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On April 5, 1806, the Multnomah Indians, a neighboring tribe to the Cush-Hook Nation, introduced William Clark of the Lewis & Clark expedition to the chief of the Cush-Hook Nation. *Id.* While visiting the Cush-Hook Nation's village, Clark drew sketches in his journals of the village and longhouses and recorded some ethnographic information about Cush-Hook governance, religion, culture, housing, agriculture, burial traditions, and hunting and fishing practices. *Id.* Clark also noted the tribal shamans' practice of carving sacred totems and religious symbols into living trees. *Id.* Clark presented the Cush-Hook chief with one of the President Thomas Jefferson peace medals that Clark and Lewis customarily handed out to chiefs during their expedition. *Id.* These peace medals, also referred to as "sovereignty tokens" by historians, were distributed to Indian chiefs because of the political and diplomatic significance of the items. *Id.* Lewis and Clark believed that an offering of these medals by the United States to tribal leaders demonstrated a United States' desire to engage in political and commercial relations with tribes. *Id.* Essentially, the offering of these medals represented recognition of tribal leaders and their respective governments by the United States. *Id.* After Clark's visit to the Cush-Hook Nation's village, the tribe continued to live in their village in this particular area and engaged in their traditional ways of life across their territory for next forty-four years. *Id.*

In 1850, the Cush-Hook Nation signed a treaty with Anson Dart ("Dart"), the superintendent of Indian Affairs for the Oregon Territory. *Id.* Dart's focus was to displace the tribe from their land so that American settlers could move in and occupy the valuable farming lands along the river. Id. On behalf of the United States, Dart offered the Cush-Hook Nation a treaty promising compensation and benefits for their lands in and around modern-day Kelley Point Park. *ROA at 2.* In return, the Cush-Hook Nation agreed to move sixty miles westward to a specific location in the foothills of the Oregon coast range of mountains. *Id.*

Following the treaty signing, the entire Cush-Hook Nation relocated to the coast range, as promised, to avoid the encroaching American settlers. Id. In 1853, however, the U.S. Senate refused to ratify the Cush-Hook treaty. *Id.* As a result, the United States never gave the Nation any of the promised compensation for their lands, nor did the United States deliver any of the other promised benefits of the treaty. *Id.* The United States did not recognize the Cush-Hook Nation's ownership of the lands they moved to in the Oregon coast range of mountains. *Id.* Furthermore, since the treaty was not ratified, and the United States has not since undertaken any other act to "recognize" the Cush-Hooks, the Nation has remained a non-

federally recognized tribe of Indians displaced from their original homelands. *Id.*

In the same year that the Cush-Hook Nation relocated following the treaty signing, the United States passed the Oregon Donation Land Act of 1850, which encouraged and validated white settler claims to lands in the Oregon Territory conditioned on certain requirements. Oregon Donation Land Act, ch. 76, 9 Stat. 496 (1850); ROA at 2. The Act granted fee simple title to "every white settler" who had "resided upon and cultivated the [land] for four consecutive years." § 4, 9 Stat. at 497; ROA at 2.

Joe and Elsie Meek, two American settlers, claimed the 640 acres of land that comprised the Cush-Hook Nation's ancestral lands. ROA at 2. The Meeks did not cultivate or live upon the land for the required four years, and thus failed to meet the conditions set forth in the Act. *Id.* Yet, the Meeks received fee simple title to the land from the United States. *Id.* In 1880, the Meek's descendants sold the land to the State of Oregon, which proceeded to created Kelley Point Park ("Park"). *Id.*

In 2011, Thomas Captain ("Captain"), a citizen of the Cush-Hook Nation, moved from the tribal area in the coast range of mountains to his tribe's ancestral homelands in Kelley Point Park. *Id.* Captain returned to his tribe's homeland to reassert his Nation's ownership of the land, and to protect culturally and religiously significant trees that had grown in the Park for over three hundred years. *Id.* The trees are of great importance to the Cush-Hook religion and culture because tribal shamans/medicine men carved totem and religious symbols into living trees hundreds of years ago when the Nation inhabited the lands prior to their displacement by the United States. *Id.* This practice was noted in the journals of William Clark during his visit in 1806. *Id.* Despite the fact that the carved images are at a height of twenty-five to thirty feet from the ground, vandals have recently begun climbing the trees to deface the images. *Id.* In some instances, these thieves have cut the images off the trees to sell. *Id.* The state has done absolutely nothing to stop these illegal acts. *Id.* To prevent further damage to his tribe's sacred totems and symbols, Captain occupied the Park to protect and preserve these crucial tribal objects. In order to restore and protect a vandalized image that had been carved by one of his ancestors, Captain cut down the tree and removed the section of the tree that contained the image. *Id.* As Captain was returning to his Nation's location in the Oregon coastal mountain range, state troopers arrested him and seized the image. *Id.*

II. Statement of Proceedings

The State of Oregon brought a criminal action against Thomas Captain for violating state law by allegedly trespassing on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historic site. ROA at 2. The Oregon Circuit Court for the County of Multnomah ("circuit court") held a bench trial. ROA at 3. In its opinion, the circuit court made the following findings of facts and conclusions of law. *Id.*

The circuit court found that the Cush-Hook Nation was not a tribe included on the 1994 list of federally recognized Indian tribes. Findings of Fact ("FOF" hereinafter) 8. However, the court concluded that the Nation continues to own the land in question under aboriginal title. Conclusions of Law ("COL" hereinafter) 4. The court's conclusion is strengthened by its finding that expert witnesses in history, sociology, and anthropology have established that the Cush-Hook Nation occupied, used, and owned the lands in question before the arrival of Euro-Americans. FOF 1.

The court further found that in 1850, the Cush-Hook Nation, having aboriginal title to the land, signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory in which the Nation agreed to sell its land and relocate to a reservation in the Oregon coast range of mountains. FOF 2. The court found that the U.S. Senate refused to ratify this treaty, and subsequently never paid the Cush-Hook Nation for its lands, nor did it provide the Nation with any of the promised benefits for leaving its aboriginal territory. FOF 3. Accordingly, the court held that because of the Senate's failure to ratify the treaty and compensate the Cush-Hook Nation, the Nation's aboriginal title was never extinguished by the United States, as required by *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). COL 2.

Because the Cush-Hook Nation's aboriginal title to the land in question was never extinguished, the circuit court concluded that Congress erred in passing the Oregon Donation Land Act (Act) in 1850 because the Act described the lands of the Cush-Hook Nation as being "public lands" of the United States. COL 4. The court found that Joe and Elsie Meek applied for and received fee title to the land that encompassed the Cush-Hook village. FOF 4. However, the court found that the Meeks did not fulfill the requirements of the Act because they did not live on the land for more than two years nor did they cultivate it. FOF 5. Thus, the court held that the Meek's failure to meet the requirements voided *ab initio* the grant of fee simple title to the Meeks and the subsequent sale of lands to the Meeks' descendants. COL at 3.

In 2011, vandals defaced the sacred totems in Kelley Point Park. ROA at 2. Thomas Captain returned to the Cush-Hook Nation's aboriginal lands in the Park to protect the sacred totems. *Id.* Captain erected temporary housing in Kelley Point Park at the site of his Nation's ancient village. FOF 6. He cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol. FOF 7. Subsequently, Captain was charged under Oregon state law. The circuit court held that Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 applied to all lands in the State of Oregon under 18 U.S.C. § 1162 (2012) ("Public Law 280" hereinafter), whether they were tribally owned or not, and thus Oregon properly brought this criminal action against Captain for damaging an archaeological, cultural, and historical object. COL 5. The court found Captain guilty for violating Or. Rev. Stat. 358.905-358.961 (2011) and Or. Rev. Stat. 390.235-390.240 (2011) for damaging an archaeological site and a cultural and historical artifact and fined him $250. ROA at 4. However, the court held that the Cush-Hook Nation still owned the land within the Park and found Captain not guilty for trespass or for cutting timber without a state permit. *Id.*

Both the State and Thomas Captain appealed the circuit court's decision. *Id.* The Oregon Court of Appeals affirmed the circuit court's decision without writing an opinion, and the Oregon Supreme Court denied review. *Id.* The State then filed a petition and cross petition for certiorari and Captain filed a cross petition for certiorari to the United States Supreme Court. *Id.*

Jurisdictional Statement

The judgment of the Oregon Court of Appeals, the highest court in which a decision was made, was entered when the court affirmed the decision of the Oregon Circuit Court for the County of Multnomah without writing an opinion. Following the denial of writ of certiorari by the Oregon Supreme Court, the petition for writ of certiorari with this Court was timely filed and granted. This Court has jurisdiction under 28 U.S.C. § 1257 (2006).

Summary of the Argument

The Cush-Hook Nation has maintained its aboriginal title to the lands in Kelley Point Park since their establishment of that title by occupancy since "time immemorial." The Cush-Hook Nation is a tribe that was recognized by Lewis from the Lewis and Clark Expedition by the sovereignty tokens

that he offered to the head chief of the Nation. *See* ROA at 1. At the time of Lewis's encounter with the Cush-Hook Nation in 1805, there was no formal federal recognition process. Rather, United States officials used sovereignty tokens as a means to demonstrate the United States' interest in establishing political and diplomatic relations with tribes. Lewis extended sovereignty tokens, documented the Nation's activities and established government, which further substantiates the validity of the Cush-Hook Nation's aboriginal title to the land. See id. Not only did the Cush-Hook Nation clearly establish their aboriginal title, the Cush-Hook Nation has also retained that title to the present.

Congress has made it clear that aboriginal title can be extinguished through conquest and purchase. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823). However, with respect to the Cush-Hook Nation, Congress did not take any steps to extinguish that title through either method. The United States has and maintains a peaceable relationship with the Nation and thus no evidence of conquest exists. As for purchase, although the Cush-Hook Nation did enter into treaty negotiations with the superintendent for Indian Affairs in the Oregon Territory, these negotiations were never ratified by the United States Congress and therefore were never valid. *See* ROA at 1. Further, because the United States never fulfilled the requirements of the treaty, there was no purchase by the United States of the Cush-Hook Nation's aboriginal lands. Finally, though Congress may extinguish title by an explicit act, this was never done. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941). In passing the Oregon Donation Land Act, Congress did not explicitly extinguish aboriginal title and therefore the title continues to remain with the Cush-Hook Nation.

The final way to extinguish a tribe's aboriginal title to land is voluntary abandonment by the tribe. *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917). In this case, however, the Cush-Hook Nation did not voluntarily abandon the lands in modern-day Kelley Point Park. Although the departure of the Cush-Hook Nation from the lands at issue in accordance with the treaty provisions could have constituted abandonment, the treaty was never ratified and therefore the Nation's displacement was unlawful. Thus, not only has the Cush-Hook Nation established aboriginal title, the Nation has also maintained that title because its title to the lands has never been extinguished or abandoned. For the foregoing reasons, the Oregon Court of Appeals was correct in finding that the Cush-Hook Nation established and maintained aboriginal title.

Following the Cush-Hook Nation's displacement from its original homelands in1850, the United States passed the Oregon Donation Land Act to encourage settlers to move to the newly "discovered" western frontier as part of the United States' domestic policy of "Manifest Destiny." In order to receive fee simple title to land, "every white settler" needed to reside upon and cultivate the land for four consecutive years. Oregon Donation Land Act, ch. 76, § 4, 9 Stat. 496, 497 (1850). Congress erred, however, in passing the Act when it described all the lands in the Oregon Territory as being public lands of the United States because the Cush-Hook Nation never relinquished their claim to the land, nor did the United States extinguish the Nation's aboriginal title.

Nonetheless, Joe and Elsie Meek, two American settlers, applied for and received fee title to 640 acres of land that today encompasses the Cush-Hook village despite failing to meet the explicit conditions to properly obtain the land title in accordance with the Act. The Meeks' descendants sold the land to Oregon in 1880 and Oregon proceeded to create the Kelley Point Park. The Meeks should have never received title to the land because they failed to live on the land for more than two years, and never cultivated the land, hence, failing to meet the conditions of the Act. *See Hall v. Russell*, 101 U.S. 503, 504 (1880). Therefore, the lower court was correct in holding that the United States' grant of fee simple title to the land at issue to the Meeks under the Oregon Donation Land Act was void *ab initio* and that the subsequent sale of the land by the Meek's descendants to the State of Oregon was also void. Thus, the land therefore still resides within the jurisdiction of the federal government and Oregon is precluded from asserting its criminal jurisdiction over Captain's activities on federal land.

The State of Oregon is a Public Law 280 state, which allows the State to extend its criminal and civil jurisdiction over Indian country. If the land in question is not found to be federal land outright, then it fits the qualifications for "Indian country." While Public Law 280 clearly provides that the General Crimes Act and the Major Crimes Act no longer applied in those regions, federal power to enforce federal laws of general applicability remains. *See* 18 U.S.C. § 1162(c) (2012). Crimes of general applicability remained within the subject matter of the federal courts despite the passage of Public Law 280 and its delegation of criminal jurisdiction to certain states. *See, e.g.*, *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998).

Further, a fundamental principle of the Constitution is that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing U.S. Const., art. VI, cl. 2). Oregon has no authority to assert jurisdiction over Thomas Captain in Indian country because its laws are preempted by two federal statutes, the Archaeological Resources Protection Act ("ARPA" hereinafter) and Native American

Grave and Protection Repatriation Act ("NAGPRA" hereinafter). Congress passed ARPA in 1979, in part, to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b) (2012). In 1990, Congress enacted NAGPRA, in part, with the principal objective of establishing a legal regime for the protection of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony presently on federal and tribal lands from unauthorized excavation or removal.

NAGPRA is "[f]ederal law, and, as such, under the Supremacy Clause of the Constitution preempts any state law on the same subject matter. . . . This is especially true in the field of Federal Indian law, where the United States has plenary and exclusive power." Native American Graves Protection and Repatriation Act Regulation, 75 Fed. Reg. 12,380 (Mar. 15, 2010) (codified at 43 C.F.R. pt. 10) (citing U.S. Const., art. I, § 8, cl. 3; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). Additionally, a preemption of state law need not be explicit—a state's regulation of a particular field that is so thoroughly occupied by Congress to exclusion of the states warrants preemption. *See Malone v. White Motor Corp.*, 435 U.S. 497 (1978). The State of Oregon seeks to tread into an area of law that has clearly been occupied by the federal government through two congressional acts which provide a comprehensive legal regime for archaeological and cultural preservation of sites and resources relating to Native American people. The Oregon statutes are virtually a recitation of the federal laws, but are limited in application to the lands that under Oregon's jurisdiction. Because the land in question falls under "Indian country," both ARPA and NAGPRA preempt Oregon's laws. A finding that Oregon's jurisdiction is not preempted by the operation of federal law would severely interfere with federal and tribal interests reflected in federal law, and Oregon's interests at stake do not rise to the sufficient level to assert its authority. Therefore, this Court should also dismiss Oregon's claim against Thomas Captain on the basis that federal law preempts Oregon's laws on archaeological and cultural preservation.

Argument

I. The Cush-Hook Nation Maintains Aboriginal Title to Their Ancestral Lands Enclosed by Modern-Day Kelley Point Park Because the Federal Government's Acquisition of the Land Was Invalid According to Clear Federal Indian Law Precedent.

A. The Cush-Hook Nation Has Established Aboriginal Title to the Lands in Question by Its Actual and Exclusive Use and Occupancy of the Land Prior to the Loss of the Property.

Indian aboriginal title, commonly referred to as the "right of occupancy" or the "right of possession," was first recognized in United States jurisprudence in 1823 in the decision of *Johnson v. M'Intosh*. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Johnson*, the Supreme Court of the United States asserted that "[i]t has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." *Id.* at 603. "An Indian tribe establishes aboriginal title by showing that it has inhabited the land 'from time immemorial.'" *Greene v. Rhode Island*, 398 F.3d 45, 49-50 (1st Cir. 2005) (citing *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 481-82 (1st Cir. 1987) (quoting *Cnty. of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985))). The tribe must show "historical evidence of the tribe's long-standing physical possession" of the land. *Greene*, 398 F.3d at 49-50 (quoting *Zuni Indian Tribe v. United States*, 16 Cl. Ct. 670, 671 (1989)). This Court has stated that the "[o]ccupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). The standard of review for questions of fact is the clearly erroneous standard. *Maine v. Taylor*, 477 U.S. 131, 145 (1986).

In this case, the Oregon Court of Appeals properly concluded that the Cush-Hook Nation owns the land in the modern-day Kelley Point Park under aboriginal title. COL 4. The Cush-Hook Nation maintains aboriginal title to the lands in question because it has met the factors set forth by the Indian Claims Commission Act to establish aboriginal title. From 1946 to 1978, the Indian Claims Commission Act was tasked with hearing claims of Indian tribes against the United States. An Act of August 13, 1946, ch. 959, 60 Stat. 1049 (1946). These claims included land disputes where the court often determined whether a tribe had aboriginal title. *See id.* At the termination of this Commission, Indian claims were transferred to the Court

of Claims where they are presently adjudicated. 28 U.S.C. §1505 (2012). During the period of the Indian Claims Commission, the Commission established ways of determining aboriginal title. These factors were laid out in *Otoe & Missouria Tribe v. United States*, 131 Ct. Cl. 593 (1955). The court found that:

> [C]laimant Indians had established their Indian title by means of, inter alia, (1) evidence that no other tribes claimed or used the areas involved and that neighboring tribes recognized these lands as being the exclusive property of the claimant Indians, (2) earlier official recognition of the claimants' exclusive Indian title to the lands, and (3) expert testimony of historians in the field of American history and statements of government Indian officials, and the court upheld this decision, noting that the record contained substantial support for the finding of Indian title.

Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425 (1979) (citing *Otoe & Missouria Tribe v. United States*, 131 Ct. Cl. 593 (1955)). These factors have much in common with the definition of aboriginal title as existing for tribes from "time immemorial." *Greene*, 398 F.3d at 49-50. The Indian Claims Commission factors are directly in line with the requirements as set forth by *Johnson v. McIntosh* to demonstrate right of occupancy. In *Johnson v. M'Intosh*, the Court determined that Indian tribes maintained a "right of occupancy" interest when they occupied and used land to the exclusion of others. *See generally* Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425 (1979) (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 573 (1823)).

In this case, the Cush-Hook Nation has established its aboriginal title by its occupation, use, and ownership of the land prior to the arrival of the Euro-Americans. FOF 1. The Cush-Hook Nation first engaged with William Clark in 1806. During his encounter, Clark documented the occupation and use of the land by the Nation. He sketched the established villages and longhouses that occupied the land, and noted the Nation's cultural, religious, and traditional practices of the Cush-Hook Nation. This documentation, coupled with the recognition of the Nation's homelands by the neighboring Multnomah Indians, indisputably determines the establishment of the Cush-Hook Nation's aboriginal title to the land. Thus, the Cush-Hook Nation fulfills the requirements to establish aboriginal title and there is no evidence that federal government extinguished that title.

B. The Cush-Hook Nation's Aboriginal Title to the Land in Question Still Exists Today Because It Was Never Extinguished

The court was correct in concluding that the Cush-Hook Nation's aboriginal title to its homelands in Kelley Point Park was never extinguished as required by law. "Aboriginal title is title to land that the Indians inhabited from time immemorial, which cannot be extinguished without explicit action by Congress." *Greene v. Rhode Island*, 289 F. Supp. 2d 5, 9 (D.R.I. 2003) *aff'd*, 398 F.3d 45 (1st Cir. 2005) (citing *Oneida Indian Nation*, 470 U.S. at 234–35). Congress's failure to extinguish the Nation's aboriginal title through any valid method, and the wrongful displacement of the Nation by the United States without the ratified treaty, vests aboriginal title to the land in the Nation.

i. The Court Was Correct in Finding That the Cush-Hook Nation's Aboriginal Title to the Land Has Never Been Extinguished by Congress Because There Has Been No Conquest or Purchase.

Indian aboriginal title, though a right that has never been questioned, may be extinguished by an explicit act of Congress. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347. Federal intent to extinguish aboriginal title, must be clear, but may take various forms. *Greene v. Rhode Island*, 39 F.3d 45 (1st. Cir. 2005). This right gives the United States "exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest." *Johnson*, 21 U.S. (8 Wheat.) at 587. However, the Indian right of occupancy shall not be disturbed without the tribe's "free consent." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 55 (1831).

The United States could have extinguished the Cush-Hook Nation's title by conquest. This Court has stated that "[c]onquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." *Johnson*, 21 U.S. (8 Wheat.) at 588. Though an extinguishment of the Nation's title by the United States through conquest is a proper method of extinguishment, the United States never took this course of action. To the contrary, Lewis gifted "sovereignty tokens" to the Cush-Hook Nation's chief, an act that has been historically noted to have political and diplomatic significance. Because there was no method of federal recognition at the time of Clark's discovery of the Nation, the process of sovereignty tokens was such that established a relationship between the existing tribes in the lands which were encountered by the Americans and the sovereign United States. Accordingly, the Cush-Hook Nation's title was never extinguished by

conquest and the Cush-Hook Nation continues to possess its aboriginal title to the land.

Just as it is clear that the Cush-Hook Nation's title was never extinguished by conquest, the aboriginal title was also never extinguished by purchase. In *Johnson v. M'Intosh*, the court stated that Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." *Id.* at 574. This title, however, was purchasable by the sovereign with the consent of the tribe, at the price the tribe was willing to take, without coercion. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 517 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353 (2001). Thus, Congress could approve the United States' purchase of the Cush-Hook Nation's aboriginal title so long as the tribe consented to the sale at an agreeable price and without coercion. In order for a treaty to be valid, the Senate must ratify the treaty. However, the executive branch, which includes executive officers such as Anson Dart, was responsible for the initiation of the process of creating and negotiating these treaties with tribes. *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1371 (Fed. Cir. 2000). At the time that the Cush-Hook Nation was negotiating its treaty with the United States, many executive officials were doing the same in various parts of the western United States. *Id.* In many of these cases, the executives acted upon these treaties despite the Senate's failure to ratify them, "render[ing] them legal nullities." *Id.*

The same circumstances exist in the present case. Anson Dart negotiated a treaty with the Nation where the Nation agreed to sell its aboriginal title to the United States with the expectation that they would receive compensation for the lands in and around modern-day Kelley Point Park, recognized ownership of the lands to which they moved, and other promised treaty benefits. ROA at 2. Under this agreement, the Cush-Hook Nation's title would have been extinguished by purchase because there was consent by the Nation to sell at a willing price and without coercion. However, that is not the actual case. Rather, the Nation was misled to believe that the treaty benefits would flow from the extinguishment of the aboriginal title, but Congress' failure to ratify the treaty voided the treaty altogether. Thus, the Cush-Hook Nation's right of occupancy and aboriginal title could not have been and was not extinguished by purchase.

ii. Even Though Congress Has Extended Extinguishment to Include Explicit Extinguishment, the United States Never Explicitly Extinguished the Cush-Hook Nation's Aboriginal Title and Therefore the Tribe Has Retained Aboriginal Title.

The final way that this Court recognizes that Congress has terminated a tribe's aboriginal title is through an explicit extinguishment. This Court has held that "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354. Congress is the branch of government that has the absolute authority to extinguish aboriginal title. Thus, Congress' failure to ratify the treaty with the Nation is a clear indication that Congress never meant to extinguish the aboriginal title and therefore the Cush Hook Nation still retains Indian title to the land. In the treaty between the United States and the Cush-Hook Nation, the United States promised benefits such as federal recognition and a reservation for their continued living in a new location in exchange for their claims to the land at issue. However, Congress refused to ratify this treaty, thereby preserving the Cush-Hook Nation's aboriginal title to the land.

This Court has held that agreements between the United States and Indians "are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). The treaty included provisions such as "promised compensation for [the Nation's] lands in and around modern-day Kelley Point Park . . . and other promised benefits of the treaty, and the recognized ownership of the lands in return for the Nation agreeing to move to the lands in the coast range of mountains." ROA at 2. In order to comply with *Carpenter*, these provisions must be interpreted in favor of the Cush-Hook Nation. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Because it is clear that the Cush-Hook Nation wanted to establish a political and diplomatic relationship with the United States by accepting the sovereignty tokens and entering into a treaty, the only just way to interpret these ambiguities is to have the treaty "construed as [it was] understood by the tribal representatives who participated in their negotiation." *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

In this case, the Cush-Hook Nation expected that this treaty would establish rights and benefits for them as a tribe in exchange for the extinguishment of their aboriginal title. The Nation's land was in a prime

location at the confluence of two major rivers. ROA at 1. The Cush-Hook Nation was willing to extinguish its aboriginal title only because it expected to receive ownership rights to another piece of land, other promised benefits including federal recognition, and monetary compensation in return. ROA at 2. By interpreting the treaty as it should be, in favor of Indians, the subsequent refusal of ratification is the opposite of an explicit congressional act of extinguishment. In fact, by refusing to ratify a treaty that would explicitly extinguish aboriginal title, Congress did not extinguish the Cush-Hook Nation's aboriginal title. Thus, the tribe maintains their title to the lands in Kelley Point Park.

Even if this Court finds that Congress's failure to ratify the treaty is not a clear indication of the Nation's continued claim to aboriginal title, the Cush-Hook Nation retains aboriginal title because Congress has never explicitly extinguished Indian title as required by its "avowed solicitude. . . for the welfare of its Indian wards." *See United States v. Santa Fe Pac. R.R. Co*., 314 U.S. at 354. The circuit court correctly concluded that "Congress erred in the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being public lands of the United States." COL 1. In the Oregon Donation Land Act of 1850, Congress declared that "every white settler" living on "public lands" that had "resided upon and cultivated the [land] for four consecutive years" was to be granted fee simple title to the land. Oregon Donation Land Act, ch. 76, § 4, 9 Stat. 496, 497 (1850). However, by deeming the lands in Kelley Point Park as eligible under the Act, not only did Congress err because the Cush-Hook Nation had aboriginal title to the lands, but Congress did not expressly extinguish the Cush-Hook Nation's aboriginal title.

Historically, Congress has expressly extinguished aboriginal title, as evidenced in the Alaska Native Settlement Act ("ANSA" hereinafter). ANSA explicitly stated that "[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) (2012). The Ninth Circuit upheld this extinguishment and stated, "We hold that the [aforementioned] Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." *United States v. Atl. Richfield Co.,* 612 F.2d 1132, 1134 (9th Cir. 1980). This is an example of Congress's explicit extinguishment of a claim of aboriginal title, which is not evident in the present case. At best, the Oregon Donation Land Act was

an act to define the uses of *public lands*, not those lands which retained unextinguished aboriginal title. This Act did not make any mention of Indian title nor did it make any reference to the extinguishment of Indian aboriginal title. Congress is apprised of the standard for extinguishment of Indian title, as expressed in the Alaska Native Settlement Act, and yet it took none of those measures when creating the Oregon Donation Land Act. Thus, the Cush-Hook Nation maintains aboriginal title because its title has not been extinguished by Congress in any way.

iii. The Cush-Hook Nation Never Relinquished Its Title by Abandonment Because Anson Dart Wrongfully Displaced the Cush-Hook Nation from Its Aboriginal Lands.

"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; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected *until they abandoned them*, made a cession to the government, or an authorized sale to individuals. . . . In either case their rights became extinct. . . ." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835) (emphasis added).

Abandonment has long been regarded as the way in which an Indian tribe may voluntarily extinguish its aboriginal title to its lands. *See id.* Abandonment is not an involuntary act but one that requires volition and consent to constitute an extinguishment of aboriginal title. The act of moving off tribal lands is only seen as an abandonment when there are "specific circumstances to warrant that conclusion." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974). Further, "the unilateral action of an officer of the executive branch cannot eliminate Indian title." *Id.*

Though the Cush-Hook Nation moved from its aboriginal lands, their alleged "abandonment" was not voluntary, but rather a wrongful displacement under false pretenses. After the treaty failed to be ratified, the United States took no documented measures to show that it informed the Cush-Hook Nation of their wrongful displacement, and there is no evidence that the Nation's failure to return to the land was voluntary.

In *Buttz v. Northern Pacific Railroad*, 119 U.S. 55 (1886), this Court recognized Indian land abandonment when a treaty signed by a tribe to cede its aboriginal lands did not take effect until the tribe moved to a reservation set aside for them by the United States. *Id.* at 70. This Court found that "[t]he relinquishment thus made was as effectual as a formal act of cession.

Their right of occupancy was, in effect, abandoned; and, full consideration for it being afterwards paid, it could not be resumed." *Id.* at 69-70. This Court held that the tribe's relinquishment of its aboriginal title, accompanied by the treaty recognizing its cession, "may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned." *Id.* at 70.

Further, Congress never ratified a treaty recognizing cession or a formal relinquishment of the Nation's land for which consideration was paid. The Cush-Hook Nation signed the treaty and abided by its terms because it believed the agreement to be valid. Thus, it is clear that the mere actions of Anson Dart, an officer of the executive, did not constitute extinguishment. *See Turtle Mountain Band of Chippewa Indians*, 490 F.2d at 945.

Additionally, the relocation of the Cush-Hook Nation pursuant to the treaty with Anson Dart was not an extinguishment of the Nation's title to the lands in Kelley Point Park because a relinquishment alone does not constitute abandonment for the purposes of extinguishment of Indian title. The members of the Cush-Hook Nation moved to the new land because they were operating under the contract that they had made with Anson Dart. Though Anson Dart had the authority to negotiate treaties with Indian tribes pursuant to the Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, he did not have the authority to carry out the removal of the Cush-Hook Nation without congressional approval. Thus, the abandonment was not voluntary and did not constitute an extinguishment of the Cush-Hook Nation's aboriginal title. An Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, ch. 16, 9 Stat. 437, 437 (1850). Therefore, the Cush-Hook Nation retained Indian title, which was never extinguished because the Nation established it, Congress never extinguished it, and the Nation never abandoned it.

II. Oregon Is Precluded From Asserting Criminal Jurisdiction Over Thomas Captain for Excavating and Removing Sacred Objects Because the Objects Are Located Within Federal Lands and Are Subject to Federal Laws.

A. The Cush-Hook Nation's Homelands Situated in Kelley Point Park Are Under Federal Jurisdiction and Not Owned by the State of Oregon Because Congress Erred in the Oregon Donation Land Act When It Deemed All Lands as Being "Public," Voiding Any Subsequent Conveyance of the Land.

The Oregon Court of Appeals erred in concluding that Or. Rev. Stat. 358.905-358.961 and Or. Rev. Stat. 390.235-390.240 applied to all lands in the State of Oregon under Public Law 280, whether the lands were tribally owned or not. Public Law 280 only applies the laws of Oregon to those lands defined as "Indian Country," not all federal lands. In this case, the land in modern-day Kelley Point Park is federal land and not subject to the jurisdiction of the State of Oregon, notwithstanding the extension of Oregon's jurisdiction through Public Law 280.

i. The Oregon Court of Appeals Was Correct in Determining that the Cush-Hook Nation's Homelands Cannot Be Considered "Public Lands" Subject to Alienation to the Meeks, or Subsequently the State of Oregon, Under the Oregon Donation Land Act.

The lower court properly held that Congress erred in promulgating the Oregon Donation Land Act when it described all the lands in the Oregon Territory as being "public lands" of the United States. COL 1. As discussed earlier, the Cush-Hook Nation owns the land in question under aboriginal title because its aboriginal title has never been extinguished. COL 2, 5.

In 1850, Congress passed the Oregon Donation Land Act to stimulate white settler movements into the fledgling territory that was occupied by Indian tribes. *See generally* Oregon Donation Land Act, ch. 76, 9 Stat. 496 (1850). Earlier legislation, however, necessitated that Indian title to land be extinguished before land could become part of the public domain. When Congress passed the Oregon Territorial Act of 1848 establishing, inter alia, the Territory of Oregon, the Act guaranteed Indians rights to their homelands "so long as such rights shall remain unextinguished by treaty between the United States and such Indians." Act to Establish the Territorial Government of Oregon, ch. 177, § 1, 9 Stat. 323, 323 (1848). Prior to passing the Oregon Donation Land Act, Congress enacted a law

that authorized the appointment of commissioners to negotiate treaties with Oregon tribes "for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains." An Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, 9 Stat. at 437. Additionally, the Act gave the commissioners the discretion to remove all these small tribes and leave the whole of the most desirable portion open to white settlers. *Id.* Consequently, the majority of the Territory of Oregon was entered into the public domain as a result of the confiscation of Indian land through the treaty process.

In this case, the Cush-Hook Nation's retention of aboriginal title prevents the declaration of those lands as public. Although Anson Dart negotiated with the Cush-Hook Nation to relocate sixty miles westward, this was in exchange of land, promised benefits, and compensation. *Id.* If the Senate had indeed ratified this treaty, its declaration of the lands as public would have been in accordance with the extinguishment of aboriginal title by a ratified treaty. However, the U.S. Senate refused to ratify the treaty and the Cush-Hook Nation's aboriginal title to the land was not extinguished. Therefore, the lands in Kelley Point Park could not have been deemed public and conveyed to the Meeks, or subsequently to the State of Oregon, through the Oregon Donation Land Act.

ii. Because the Meeks' Sale of Land to Oregon Was Void Ab Initio, the Meeks Never Gained Lawful Title to the Land Through the Oregon Donation Land Act, and the Land Still Remains Under Federal Jurisdiction.

The Oregon Donation Land Act allowed an adult white male to claim up to 320 acres of land for himself, and, if he were married, another 320 acres in his wife's name, so long as he resided on and cultivated the land for four consecutive years. *See* Oregon Donation Land Act, ch. 76, 9 Stat. 496 (1850).

The Oregon Supreme Court has recognized that although a fee simple title vests in the donors for lands of a "donation claim" from the date of their settlement, this title is subject to be defeated by non-compliance with the conditions expressed in the Oregon Donation Land Act. *McKay v. Freeman*, 6 Or. 449, 452-53 (1877). Thus, a failure to meet the conditions of the Oregon Donation Land Act rendered the fee simple title invalid and reverted title back to the United States. *See generally id.*

This Court has recognized a settler's failure to comply with Section 4 of the Oregon Donation Land Act barred him from passing title to the land to his heirs. In *Hall v. Russell*, the question before the court was whether the

heirs of a settler could receive lands passed by will from a settler who died before the expiration of the four-year residence and cultivation requirement. *Hall v. Russell*, 101 U.S. 503, 504 (1880). In 1852, devisor settled on the land in dispute with a view to becoming its owner under the operation of the Oregon Donation Land Act. *Id.* at 503-04. Devisor met the qualifications necessary to enable him to initially take and hold land under the Act. *Id.* However, he died without fulfilling the qualifications necessary to perfect title, but nonetheless left a will devising his estate to his heirs. *Id.* If the Court found that the land patent descended from the devisor, despite his failure to fulfill the requirements, then the devisor would have had a devisable estate. *Hall*, 101 U.S. at 504. However, the Court concluded that when devisor died, he had nothing in the land which he could transmit to his heirs, so that anything the heirs received came from the United States. *Id.* at 513-14. Therefore, the heirs could not obtain the legal tract of land because it reverted back to the federal government, which subsequently vested ownership in another settler who fulfilled the requirement. *Id.*

In the present case, the Meeks failed to fulfill the terms of the Oregon Donation Land Act and did not obtain legal title to the land. *See id.* at 504. The Meeks failed to meet the Act's requirements and thus the title reverted back to the federal government, which retained the title just as it did in *Hall*. *See id.* Therefore, the Meeks could not transfer any title to their descendants because they had no title to transfer as a result of having had their title defeated by failure to comply with the requirements. *McKay*, 6 Or. at 452-53.

The State of Oregon does not own the land where Captain acquired the sacred totem. Rather, the federal government still retains ownership over the land because, as the lower court concluded, the United States' grant of fee simple title to the land at issue to the Meeks was void *ab initio* because the Meeks did not fulfill the explicit conditions of the Oregon Donation Land Act. ROA at 2. Hence, the grant of the land to the Meeks' descendants and subsequent sale of land to State of Oregon was also void because the Meeks did not have proper title. COL 3; ROA at 2. Because the land reverted back to the federal government's jurisdiction when the Meeks failed to satisfy the conditions of the Oregon Donation Land Act, the lands remain under federal jurisdiction and Oregon's laws relating to archaeological sites do not govern Captain's actions on federal lands.

B. Even if the Land in Question Is Considered "Indian Country," Oregon's Laws Are Preempted by Federal Law, Notwithstanding Public Law 280, and the State Does Not Have Criminal Jurisdiction over Captain's Use and Removal of the Cush-Hook Nation's Sacred Objects.

i. Under Montoya, *the Cush-Hook Nation Is an "Indian Tribe" of Which Thomas Captain Is a Member, and the Nation's Existing Aboriginal Title to the Land in Question Qualifies the Land as "Indian Country."*

In *Montoya v. United States*, this Court has held that an Indian tribe is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901). The Cush-Hook Nation qualifies as an "Indian tribe" because its members are of a similar race, united in a community under one chief, and once inhabited a defined territory. Further, the Cush-Hook Nation is the only Native tribe to the defined territory of modern-day Kelley Point Park. ROA at 2. According to Clark's journal records, Clark was escorted by the Multnomah Indians to the established Cush-Hook Nation village and longhouses, which provides evidence that the Nation inhabited a particular, defined area. ROA at 1. Clark gave the Cush-Hook chief "sovereignty tokens," which demonstrated the United States' desire to engage in political and diplomatic relations with the Nation and symbolized that tribal leaders and governments would be recognized by the United States. It is clear through the facts that the Cush-Hook Nation existed in the territory since time immemorial and its members were all of the same race, governed by a chief, and living within a clearly demarcated territory as drawn by Clark and recognized by the Multnomah tribe. Therefore, the Cush-Hook Nation constitutes a tribe pursuant to the definition set forth by Montoya, though admittedly not federally recognized according to the 1994 tribal list act. FOF 3.

As a citizen of the Cush-Hook Nation, Captain is therefore considered an "Indian." *See* ROA at 2. The Ninth Circuit established that the test for determining whether one is an Indian, for purposes of Public Law 280, is to determine the "degree of Indian blood" and the "tribal or governmental recognition as an Indian." *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979), *cert. denied* 444 U.S. 849; *see also United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). "A person may still be an Indian though not enrolled with a recognized tribe." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988) (citing *Broncheau*, 597 F.2d at 1263; *United States v. Ives*, 504 F.2d 935, 953 (9th Cir.1974). Given

Captain's status as a citizen of the Cush-Hook Nation and descendent of the Cush-Hook's ancestors, he may be considered an "Indian" for the purposes of determining whether the State of Oregon can assert jurisdiction over him.

Regarding the status of the land in question, Congress has broadly defined "Indian country" to include, inter alia, formal and informal reservations (notwithstanding the issuance of any patent). *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993); *United States v. John*, 437 U.S. 634, 648 (1978) (citing 18 U.S.C. § 1151). This Court has held that the term "Indian Country" also embraces all land within the United States to which the aboriginal title has never been extinguished. *See Ex parte Crow Dog*, 109 U.S. 556, 559-61 (1883)). The term "Indian country" is used generally to describe land in the occupation of the Indians, to which their title or right of occupancy has not been extinguished. *See id.* As established earlier, the Cush-Hook Nation owns the land in question under aboriginal title. Even if this Court finds that lands situated in modern-day Kelley Point Park do not fall exclusively under the ownership of the federal government, the lands are certainly considered part of "Indian country" for jurisdictional purposes.

Accordingly, the State of Oregon does not have criminal jurisdiction over Captain for the acts committed because notwithstanding Oregon's incorrect expansion of authority under Public Law 280, Oregon's statutes relating to the protection of archaeological sites and cultural objects are preempted by federal law.

ii. Under the Principles of Federal Preemption, Congress Intended the ARPA and NAGPRA to "Occupy the Field" of Law with Respect to Archaeological Preservation of Native American Sites and Artifacts on Federal and Indian Land, Thereby Preempting Oregon's Statutes.

As stated earlier, Public Law 280 gave six states, including Oregon, extensive criminal and civil jurisdiction over offenses committed by or against Indians in Indian country. 18 U.S.C. § 1162 (2006). Additionally, Public Law 280 clearly provides that the General Crimes Act (25 U.S.C. § 1152) and the Major Crimes Act (18 U.S.C. § 1153) no longer applied in those regions. *Id.* § 1162(c). Federal power to enforce those two statutes was fully supplanted by the power of the mandatory Public 280 states in the areas over which they were granted jurisdiction. Nonetheless, federal power to enforce federal laws of general applicability—actions that Congress has declared illegal regardless of where they occur—remains even though the amendment to Public Law 280 refers to the "exclusive" authority of the States over conduct that falls within the scope of the Major

Crimes or General Crimes Acts. *See United States v. Anderson*, 391 F.3d 1083, 1085-86 (9th Cir. 2004); *see* 18 U.S.C. § 1162(c). For example, the court in *United States v. Wadena*, held that crimes of general applicability remained within the subject matter of the federal courts despite the passage of Public Law 280 and its delegation of criminal jurisdiction to certain states. 152 F.3d 831, 842 (8th Cir. 1998). In that case, the chairman, treasurer, and councilman of the White Earth Reservation Tribal Council were convicted in federal court of many crimes related to the misapplication of tribal funds. *Id.* at 837. On review, the Eighth Circuit summarily rejected the assertion that under Public Law 280, the federal government had surrendered to Minnesota its criminal jurisdiction over all federal offenses committed on Indian lands. The court reiterated that crimes of general applicability were not affected by the enactment of Public Law 280 and remained within the subject-matter jurisdiction of the federal courts. *Id.* at 842.

Since Public Law 280, Congress has passed two significant and extensive laws of general applicability that govern the archaeological preservation of culturally significant sites and resources. The purpose and intent behind these pieces of legislation indicates that Congress sought to have exclusive authority over this area of law, particularly with respect to remains, sites, and objects of Native American tribes.

In 1979, Congress passed Archaeological Resources Protection Act, in part, to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b) (2012). The primary motivation behind ARPA was the need to provide more effective law enforcement to protect archaeological sites. ARPA defines an "archaeological resource" as "any material remains of past human life or activities which are at least 100 years of age, and which are of archaeological interest." 43 C.F.R. § 7.1(a) (2006); 16 U.S.C. § 470bb(1) (2012). ARPA defines "public lands," inter alia, as the "lands the fee title to which is held by the United States." *Id.* § 470bb(3)(B). "Indian lands" are defined as "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States. *Id.* § 470bb(4).

ARPA states that an Indian tribe or member thereof is not required to obtain a permit for the excavation or removal of any archaeological resources located on Indian lands of such Indian tribe. 16 U.S.C. § 470cc(g)(1). The exception to this general rule states that an individual is required to obtain a permit in the absence of tribal law regulating the

excavation or removal of archaeological resources on Indian lands. *Id.* Section 6 of ARPA details the range of prohibited activities, including removal, damage, or defacement in addition to unpermitted excavation or removal. 16 U.S.C. § 470ee(a).

Shortly after the passage of the ARPA, Congress enacted the Native American Grave and Protection Repatriation Act with the principle objective of establishing a legal regime for the protection of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony presently on federal and tribal lands from unauthorized excavation or removal. *United States v. Corrow*, 119 F.3d 796, 799-800 (10th Cir. 1997) (citing H. R. Rep. No. 101-877, 101st Cong., 2d Sess. 1990, *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368) (emphasis added). In addition to repatriation and graves protection, NAGPRA also establishes a criminal prohibition on trafficking in Native American human remains and cultural items in violation of the statute. *See generally* 18 U.S.C. § 1170 (2012) (emphasis added). The law provides that Indian tribes or descendants of the deceased have the ownership and control over human remains and cultural items which are excavated on federal lands when 1) lineal descendancy or cultural affiliation can be shown; 2) tribal land is involved; or 3) where an Indian tribe has successfully obtained a land claims judgment establishing that a given piece of federal land was within its aboriginal territory. 25 U.S.C. 3002(a) (2012).

NAGPRA defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3)(C). A literal reading of this definition reveals that any artifact deemed a "sacred object" must be connected to the practice of an American Indian religion by present-day peoples. *Bonnichsen v. United States*, 367 F.3d 864, 879 (9th Cir. 2004).

According to NAGPRA, the intentional excavation of sacred objects and objects of cultural patrimony from federal land is allowed only if 1) the objects are excavated or removed following the requirements of ARPA, 2) the objects are excavated after consultation with or, in the case of tribal lands, consent of, the appropriate Indian tribe, 3) disposition of the objects is consistent with their custody, and 4) proof of the consultation or consent is shown to the Federal agency official responsible for issuing the required permit. 43 C.F.R. § 10.3 (2006).

Passed in 1993, three years after the enactment of NAGPRA, Or. Rev. Stat. 358.905-358.961 were in enacted and provide, in part, definitions of terms, types of prohibited conduct along with exceptions, and criminal

enforcement procedures relating to archaeological objects and sites. Or. Rev. Stat. 390.235-390.240 explains that an individual is required to first obtain a permit in order to excavate or remove archaeological and historical material on public lands or otherwise is subject to criminal penalty. The Oregon statute defines an "archaeological object" and a "sacred object" in the same manner as the definitions in ARPA and NAGPRA, respectively. Or. Rev. Stat. 358.905-358.961 (2011); Or. Rev. Stat. 390.235-390.240 (2011). A person must first obtain a permit to either excavate or alter an archaeological site on public lands or remove from public lands any material of an archaeological, historical, prehistoric, or anthropological nature, and failure to obtain a permit results in a Class B misdemeanor. Or. Rev. Stat § 390.325(7). If an individual excavates or removes from the land any materials of archaeological, historical, prehistoric, or anthropological nature without obtaining the required permit, any native Indian human remains, funerary goods, sacred objects, and objects of cultural patrimony must be returned to the appropriate Indian tribe. Or. Rev. Stat. § 390.237.

A fundamental principle of the Constitution is that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing U.S. Const., art. VI, cl. 2). Consideration of issues arising under the Supremacy Clause "starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). However, Congress often does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that federal law so thoroughly occupies a legislative field as to make it reasonable that Congress sought to occupy the field to the exclusion of the States. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Rice*, 331 U.S. at 239. This Court has found that even when a State law is not in direct conflict with a Federal law, the State law could still be found unconstitutional under the Supremacy Clause if the "state law is an obstacle to the accomplishment and execution of Congress' full purposes and objectives." *Crosby*, 530 U.S. at 373. When Congress intends federal law to "occupy the field," state law in that area is preempted. *Id.* at 372.

In *New Mexico v. Mescalero Apache Tribe*, this Court has stated that although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, preemption of state

laws affecting Indian tribes should not be limited only to those circumstances given the "unique historical origins of tribal sovereignty" and the "federal commitment to tribal self-sufficiency and self-determination." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Additionally, this Court has "rejected a narrow focus on congressional intent to preempt state law as the sole touchstone" and that "preemption requires an express congressional statement to that effect." *Id.* Rather, this Court has stated that the preemption analysis should rest principally on a consideration of the nature of the competing interests at stake, offering the following rule: state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *See id.*

The Oregon Court of Appeals erred in affirming that Oregon statutes regarding the excavation or removal of archaeological or historical material are applicable to the Cush- Hook Nation's sacred totems located within Kelley Point Park because application of the statutes was preempted by federal law. Captain moved back into the Cush-Hook Nation's ancestral homelands in modern-day Kelley Point Park, in part, to protect trees aging over 300 years old that are culturally and religiously significant to the Cush-Hook Nation. ROA at 2. The trees are considered critical to the Cush-Hook religion and culture because tribal shamans carved totem and religious symbols into living trees hundreds of years ago, which was verified in Clark's journal descriptions from 1806. ROA at 2. As the lower court correctly found, the tree that Thomas Captain cut down was of archaeological, cultural, and historical significance because it represented a tribal cultural and religious symbol. FOF 7. Despite the inherent value of these sacred totems, the State did nothing to stop vandals from defacing the images and cutting them off the trees to sell. ROA at 2. In response to the State's failure to protect the images, Captain sought to restore and protect a vandalized image that had been carved by one of his ancestors by cutting the tree down and removing the section of the tree which contained the image. ROA at 2.

There is clear evidence that Congress intended NAGPRA to be the "supreme law of the land." The 2010 Federal Register states that "NAGPRA is Federal law, and, as such, under the Supremacy Clause of the Constitution preempts any state law on the same subject matter . . . This is especially true in the field of Federal Indian law, where the United States has plenary and exclusive power." 43 C.F.R. § 10.3 (2006) (citing U.S. Const., art. I, § 8, cl. 3; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

The Oregon statutes seek to tread into an area of law that has clearly been occupied by the federal government through two congressional acts that provide a comprehensive legal regime for archaeological and cultural preservation of sites and resources relating to Native American people. Oregon law states that "a person may not excavate, injure, destroy, or alter an archaeological site or object or remove an archaeological object on public or private lands in Oregon unless that activity is authorized by a permit." Or. Rev. Stat. § 358.920(1)(a) (2011). "Public lands" means "any lands owned by the State of Oregon, a city, county, district, or municipal or public corporation in Oregon." Or. Rev. Stat. § 358.905(1)(j) (2011). However, because Kelley Point Park is actually considered "Indian country" and not under the State's ownership, Oregon seeks to exert its authority over land which is outside the confines of its statutory limits. Or. Rev. Stat. § 358.905 provides definitions for "archaeological object" and "sacred object" that are nearly identical to the definitions of those words in ARPA and NAGPRA, respectively. Additionally, the State of Oregon's attempt to require the acquisition of permits through the State Parks and Recreation Department directly conflicts with ARPA's requirement to obtain a permit for the use, removal, or excavation of essentially the same archaeological artifacts and objects. Or. Rev. Stat. § 390.235(1)(a).

This Court should reaffirm its holding in *Mescalero Apache Tribe* and declare that the State of Oregon is without jurisdiction to exercise its authority in this area of law because the Oregon statutes are preempted by federal law and the federal government has a "commitment to tribal self-sufficiency and self-determination" that would be comprised by an interjection of state authority. *See Mescalero Apache Tribe*, 462 U.S. at 334. Following the analysis set forth by this Court in *Mescalero Apache Tribe*, Oregon's jurisdiction is preempted by the operation of federal law because it interferes with federal and tribal interests reflected in federal law, and there is no sufficient state interest at stake to justify the assertion of Oregon's authority. This is clearly demonstrated by Oregon's failure to stop the recent acts of vandalism that have resulted in the defacing, theft, and trafficking of the Cush-Hook Nation's sacred totems, which the State now claims it will protect. ROA at 2. Even if Congress has not clearly stated an intention to preempt state laws, the evidence above makes clear that from the totality of the circumstances, federal law so thoroughly occupies this legislative field as to make it reasonable that Congress sought to occupy the field, and the existence of conflicting state laws would frustrate the federal body of law regarding the preservation of archaeological, cultural, and historical objects relating to Native American

tribes. *See Malone*, 435 U.S. at 504; *Rice*, 331 U.S. at 239. Therefore, we ask this Court overturn the lower court's ruling that Thomas Captain is guilty for violating Or. Rev. Stat. § 358.905-358.961 and Or. Rev. Stat § 390.235-390.240 on the grounds that Oregon does not have criminal jurisdiction to control the uses of, and to protect, the archaeological, cultural, and historical objects on the Cush-Hook Nation's ancestral homelands situated in modern-day Kelley Point Park because Oregon's laws are preempted by federal law.

Conclusion

For all the foregoing reasons, Thomas Captain respectfully requests this Court to uphold the decision in part and reverse in part.

The Oregon Court of Appeals' decision to uphold the Cush-Hook Nation's establishment and current exercise of aboriginal title to the lands in Kelley Point Park was correct and should be upheld. The Cush-Hook Nation has established aboriginal title to the lands and Congress has not extinguished this title through purchase, conquest or explicit action. Additionally, the relocation of the Cush-Hook Nation did not constitute abandonment of the Nation's aboriginal title. Thus, the land remains under the aboriginal title of the Cush-Hook Nation and should be affirmed.

Further, Thomas Captain respectfully requests this Court to reverse the Oregon Court of Appeals with respect to state government's alleged criminal jurisdiction to control the uses of, and to protect, archaeological, cultural, and historical objects on the land in Kelley Point Park. The land at issue is not under the jurisdiction of the State of Oregon because it is federal land. Accordingly, Oregon Court of Appeals erred in its application of the state regulatory laws through Public Law 280 and its decision should be overturned.