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
COURT OF APPEALS FOR THE STATE OF OREGON

BRIEF FOR THE PETITIONER

Counsel for Petitioner

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STATEMENT OF THE PROCEEDINGS

This action was originally brought by the State of Oregon against defendant/respondent, Thomas Captain, for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.904-358.961 and Or. Rev. Stat. 390.235-390.240. 1 Respondent contends that he committed no such violations and that the State of Oregon lacks the jurisdiction to bring these charges claiming that the land he allegedly trespassed on belongs to the Cush-Hook Nation. The Oregon Circuit Court for the County of Multonmah ruled in favor of respondent/defendant, finding that the land belonged to the Cush-Hook Nation under aboriginal title and that the only charge Oregon properly brought against respondent/defendant was the criminal action for damaging an archaeological, cultural, and historical object. 2

STATEMENT OF THE FACTS

The Cush-Hook Nation Willingly Leaves Their Land And Relocates

The Lewis & Clark expedition first encountered the Cush-Hook Nation, a non-federally recognized tribe of Indians, [3] in April of 1806 when they visited their village near the Willamette River. [4] During that visit William Clark recorded ethnographic materials about the tribe, and met with the headman/chief where William Clark gave the headman/chief a peace medal signifying a desire to engage in political and commercial relations. [5]

[1] Record, at 2-3,.
[2] Record, at 4.
[3] Record, at 2.
[4] Record, at 1.
[5] *Id.*

After meeting with William Clark the Cush-Hook Nation continued to live on that land that would become Kelly Point Park. [6] In 1850, the Cush-Hook Nation signed a treaty with the superintendent of Indian Affairs for the Oregon Territory, thereby agreeing to relocate their tribe sixty miles to the west to a specific location in the foothills of the Oregon coast range of mountains. [7] However, in 1853 Congress refused to ratify the 1850 treaty. [8] After the Cush-Hook Nation willingly relocated to new lands a majority of the Nation's citizens have continued to live on these new lands instead of attempting to return to their former lands or seeking to have the terms of the treaty enforced. [9]

Title to the former Cush-Hook land passed to Joe and Elsie Meek, white settlers, under the Oregon Donation Land Act of 1850 even though they did not cultivate the land for four years. [10] In 1880 the Meek's descendents sold the land to the State of Oregon which then created Kelly Point Park. [11]

Respondent Violates Oregon Law

In 2011, in a failed attempt to reassert Cush-Hook control over the Nation's former land, respondent, Thomas Captain, occupied Kelley Point Park. [12] While living in Kelly Point Park respondent, in an act of vigilantism to protect trees and carvings of the cultural and religious significance to the Cush-Hook Nation from vandals, cut down a tree and removed a section of the tree bearing an image carved by Cush-Hook shaman/medicine men three hundred years ago. [13] Respondent then fled the park and was attempting to return to the Cush-Hook Nation's land in

[6] *Id.*.
[7] Record, at 1-2.
[8] Record, at 2.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Record, at 2.
[13] *Id.*

the coastal mountain range when state law enforcement arrested him and took control of the carved image.

The State of Oregon then brought criminal actions against respondent for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.904-358.961 and Or. Rev. Stat. 390.235-390.240.

QUESTIONS PRESENTED

Does the State of Oregon's title to the land in Kelly Point Park survive an aboriginal land claim from respondent, a member of a non-federally recognized American Indian tribe?

Does the State of Oregon have 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?

ARGUMENT

I. The Oregon Circuit Court Erred In Finding That The Cush-Hook Nation Owns The Lands Of Kelly Point Park Under Aboriginal Title

This issue falls under the Nonintercourse Act, a federal statute, which provides that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." [14]

[14] 25 U.S.C.A. § 177. See also James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983).

In the case at bar, the Cush-Hook Nation, which is not a federally recognized Indian tribe,[15] owned the Kelly Point Park lands in question before the arrival of Euro-Americans. [16] This same Cush-Hook Nation later agreed to relocate to a reservation in the Oregon coast range of mountains. [17] The title to the land eventually passed to two settlers, Joe and Elsie Meek, through the Oregon Donation Land Act [18] whose descendants sold the land to the State of Oregon. [19]However, the Oregon Circuit Court erred in its conclusion of law that the Cush-Hook Nation still holds aboriginal title to land [20] regardless of whether or not the Meeks' title to the land was valid. Therefore, this Court should overturn the lower court's ruling that the Cush-Hook nation owns the land in question under aboriginal title and rule that such aboriginal title was extinguished for the following reasons.

First, the respondent has failed to present a prima facie case for a Nonintercourse Act violation. Second, the Cush-Hook Nation's aboriginal title was extinguished when the Nation willingly relocated. Third, respondent's efforts to occupy the park did not reestablish the extinguished aboriginal title of the Cush-Hook Nation. Finally, even if the Cush-Hook Nation did retain aboriginal title after relocating, the aboriginal title has since then been extinguished by the equitable doctrine of laches.

The Nonintercourse Act provides that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C.A. § 177 (West). See also James v. Watt, 716 F.2d 71, 72 (1st Cir.

[15] Record, at 3.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Record, at 4.
[20] Record, at 3-4.

1983). This Act echoes the holding of Johnson v. McIntosh in which this Court held that Indian tribes retained a right of occupancy [21] which could be only extinguished by the sovereign "by purchase or by conquest." [22] Thus, both the Nonintercourse Act and Johnson v. McIntosh protect the aboriginal title of tribes. However, there are limits to this protection.

1. Respondent Has Failed To Establish All Of The Elements Required For A Prima Facie Case For A Nonintercourse Act Violation

To establish a prima facie case based on a violation of the Nonintercourse Act "a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned." [23] [24]

A. The Cush-Hook Nation Is Not Not An Indian Tribe Under Federal Law

If the Cush-Hook Nation does not exist as an Indian tribe under federal law, as required by the first element of this test, there cannot be a prima facie case of a violation of the Nonintercourse Act. [25] Many Indian groups apply for Federal acknowledgment through the Bureau of Indian Affairs and the Department of the Interior under 25 C.F.R. § 83 [26] by meeting

[21] "This right of occupancy is frequently referred to as 'aboriginal title,' or simply 'Indian title.'" *American Indian Law in a Nutshell*, 16 (5th ed. 2009).
[22] Johnson v. McIntosh, 21 U.S. 543, 587 (1823).
[23] Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994) (citing Catawba Indian Tribe of S. Carolina v. State of S.C., 718 F.2d 1291, 1295 (4th Cir. 1983)); United States v. 43.47 Acres of Land, More or Less, Situated in The County of Litchfield, Town of Kent, No. 2:85-CV-01078 AWT, 2012 WL 4753411 (D. Conn. Sept. 30, 2012); *American Indian Law in a Nutshell* 417-18 (5th ed. 2009).
[24] The State of Oregon may be immune to such claims. See *American Indian Law in a Nutshell*, 418 (5th ed. 2009).
[25] United States v. 43.47 Acres of Land, More or Less, Situated in The County of Litchfield, Town of Kent, 2:85-CV-01078 AWT, 2012 WL 4753411 (D. Conn. Sept. 30, 2012).
[26] 25 C.F.R. § 83

the mandatory criteria listed in 25 C.F.R. § 83.7. [27] Alternatively, courts themselves may determine whether to recognize a group as an Indian tribe by utilizing the federal common law test laid out in Montoya v. United States. In Montoya the Supreme Court defined an Indian tribe as, "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." [28]

Here, respondent is an individual person and "[i]ndividual Indians do not fall within the zone of interests to be protected by the Nonintercourse Act." [29] While the Nonintercourse Act does protect aboriginal title, the protections afforded by the Nonintercourse Act cannot be invoked by individual Indians. [30] The Act was "designed to protect the land rights only of *tribes* . . . and that individual Indians could not assert [Nonintercouse Act] rights on their own behalf." [31] As the courts have repeatedly stated, claims made by individual Indians Under the Nonintercourse Act are not cognizable. [32]"Only Indian tribes may bring § 177 actions." [33]

Even if the Court were to overlook respondent's debilitating status as an individual person the Cush-Hook Nation itself is not a federally recognized Indian tribe. Generally, a tribe must first receive federal recognition before they may be entitled to the protections and benefits available to Indian tribes from the Federal government. [34] In fact, the Cush-Hook Nation is not

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[27] The mandatory requirements under 25 C.F.R. § 83.7 include: (a) the group has been identified from historical times to the present, on a substantially continuous basis, as Indian; (b) "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; (c) the group "has maintained political influence or other authority over its members as an autonomous entity from historical times until the present"; (d) the group has a governing document; (e) the group has lists of members demonstrating their descent from a tribe that existed historically; (f) most of the members are not members of any other acknowledged Indian tribe; (g) the group's status as a tribe is not precluded by congressional legislation.

[28] Montoya v. United States, 180 U.S. 261, 266 (1901).

[29] Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 55 (2d Cir. 1994).

[30] *American Indian Law in a Nutshell*, 414 (5th ed. 2009); James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983).

[31] James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983).

[32] Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979).

[33] San Xavier Dev. Auth. v. Charles, 237 F.3d 1149, 1152 (9th Cir. 2001).

[34] Robinson v. Salazar, 838 F. Supp. 2d 1006, 1029 (E.D. Cal. 2012).

even politically recognized by the State of Oregon which further harms respondent's argument. [35] [36] While federal recognition through 25 C.F.R. Part 83 is not necessarily the only way to determine whether a group qualifies as an Indian tribe or not, it is persuasive and a determination on Indian status from the Bureau of Indian Affairs deserves deference where it exists. [37] [38] Unfortunately, it does not appear that the Bureau of Indian Affairs has made any determination regarding the Cush-Hook Nation. The fact that Congress itself chose not to ratify the Cush-Hook Treaty in 1853, which would have established a guardian-ward relationship between the Nation and the United State, does lend some support to the argument that Congress, which has plenary power over all Indian affairs [39], did not intend to grant federal recognition to the Cush-Hook Nation. However, it is more appropriate to apply the Montoya test in this situation to determine whether the Cush-Hook Nation is an Indian tribe as required to establish the prima facie case because "Federal courts have held that to prove tribal status under the Nonintercourse Act, an Indian group must show [the elements of the Montoya test]." [40]

The Montoya test requires three criteria: that the Indian group is "a body of Indians of the same or a similar race," that the Indian group be "united in a community under one leadership or government," and that the Indian group "[inhabits] a particular though sometimes ill-defined

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[35] Record, at 1.

[36] If the Cush-Hook Nation were recognized by the State of Oregon such recognition status would somewhat support plaintiff's position in regard to the first element of a Nonintercourse Act violation. A district court has found state recognition of an Indian tribe was sufficient to support a finding that the tribe was an Indian tribe even though they were not recognized as an Indian tribe by the Bureau of Indian Affairs.

[37] United States v. 43.47 Acres of Land, More or Less, Situated in The County of Litchfield, Town of Kent, 2:85-CV-01078 AWT, 2012 WL 4753411 (D. Conn. Sept. 30, 2012)

[38] Here, the Cush-Hook Nation is not a federally recognized Indian tribe and it is unknown whether the Nation has applied for acknowledgment through the Bureau of Indian Affairs under 25 C.F.R. § 83 at this time. If the Bureau of Indian Affairs has already decided that the Cush-Hook Nation does not meet the requirements for federal recognition and is not an Indian tribe, then the Court should defer to that determination.

[39] Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 501 (1979).

[40] New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 492 (E.D.N.Y. 2005).

territory." [41] From the facts of the record is it unclear whether the Cush-Hook Nation is and has been united under one leadership or government. When William Clark, of Lewis and Clark fame, encountered the Cush-Hook Nation in 1806 he gave a peace medal to the Cush-Hook headman or chief. [42] There was clearly a unified Cush-Hook government in 1806, but the respondent has failed to show that the Cush-Hook Nation continued to be unified under this same government from then until today, or even for a substantial period of time. Robinson v. Salazar found that the facts there were "insufficient" to allege that the tribe was "the present day embodiment of an ancient tribe." [43] Similarly, here the respondent has not shown that the Cush-Hook Nation that exists today is racially the same Nation William Clark encountered in 1806. If the Cush-Hook Nation has failed to maintain a united community under one leadership or government, which is a requirement of the Montoya test, then the Nation cannot be considered to be an Indian tribe. Thus, the Cush-Hook Nation is not an Indian tribe as required to establish a prima facie case for a violation of the Nonintercourse Act, nor does the respondent as an individual Indian have the power to invoke the Nonintercourse Act even if the Cush-Hook Nation were an Indian tribe.

B. Kelley Point Park Is Not Tribal Land

The second element to establish a Nonintercourse Act violation requires that the plaintiff show that the land in question was in fact tribal land at the time of the conveyance. [44] The Ninth Circuit Court of Appeals has defined tribal land as land that is "held in common for the benefit of all members of a tribe." [45]

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[41] Montoya v. United States, 180 U.S. 261, 266 (1901).
[42] Record, at 1.
[43] Robinson v. Salazar, 838 F. Supp. 2d 1006, 1028-29 (E.D. Cal. 2012) (District Court used Montoya test to determine that the tribe was not an Indian tribe for purposes of a Nonintercourse Act land claim).
[44] Seneca Nation of Indians v. New York, 382 F.3d 245, 258 (2d Cir. 2004).
[45] San Xavier Dev. Auth. v. Charles, 237 F.3d 1149, 1151 (9th Cir. 2001) (holding that subleased allotted land is not tribal land regarding the Nonintercourse Act).

Regarding the case at bar, Petitioner does not dispute that the land in question was tribal land at the time of the 1850 treaty between the Nation and superintendent Anson Dart, and further acknowledges that Congress refused to ratify this treaty. However, the test is focused on the status of the land at the time of the disputed conveyance. [46] Here, the disputed conveyance originated after enactment of the Oregon Donation Land Act of 1850 when the Meeks obtained title to the lands without living on or cultivating the land for the required four years. [47] While the Meeks' title to the land may not have valid, this does not necessarily mean that the land in question was still tribal land at that time. Following the treaty signing the Cush-Hook Nation relocated to another area of Oregon [48] and it was not until after the Nation relocated that the Meeks arrived on the land in question. [49] When the Cush-Hook Nation relocated it left behind the land in question and established itself anew on other lands, thus the land in question was not "being held in common for the benefit of all member of a tribe," [50] in fact it was being held at all and should not be considered to be tribal land after that time.

C. The Cush-Hook Nation Gave Up Their Claim To The Land

The third element to establish a Nonintercourse Act violation requires that the plaintiff show that the United States never consented to the conveyance of the tribal land in question. [51] It is true that Congress refused to ratify the 1850 treaty with the Cush-Hook Nation, which would have shown consent to the alienation of the land. However, intent to allow alienation of tribal

[46] Seneca Nation of Indians v. New York, 382 F.3d 245, 258 (2d Cir. 2004).
[47] Record, at 3.
[48] *Id.*
[49] Record, at 2.
[50] San Xavier Dev. Auth. v. Charles, 237 F.3d 1149, 1151 (9th Cir. 2001).
[51] Seneca Nation of Indians v. New York, 382 F.3d 245, 258 (2d Cir. 2004).

land must be "plain and unambiguous," either "expressed on the face of the [instrument] or ... clear from the surrounding circumstances." [52]

Here, it would admittedly be difficult to find a clear intent to alienate the land within the Oregon Donation Land Act. Fortunately, the fact that the Cush-Hook Nation willingly relocated to other lands and apparently never sought judicial or legislative aide in reasserting their ownership of the lands they left behind. The actions, and inactions, of the Cush-Hook Nation toward the land in question is very clear that they intended to give up their claims to the land. However, a similar line of argument will discussed later in this brief, and in greater detail.

D. The Cush-Hook Nation Has Never Had A Trust Relationship With The United States

The fourth element to establish a Nonintercourse Act violation requires that the plaintiff show that the trust relationship between the United States and the tribe has not been terminated or abandoned. [53]

Here, respondent faces an unenviable uphill battle to establish this fourth elelement. Respondent appears to have the burden of showing that there is in fact a trust relationship between the United States and the Cush-Hook Nation, and that this trust relationship remains intact today. If this interpretation is correct respondent must fail in his burden as it has already been demonstrated that the Cush-Hook Nation is not an Indian tribe with a guardian-ward relationship under 25 C.F.R. § 83 or under the Montoya criteria. Even if respondent manages to satisfy this or any other element, all four elements must be established for respondent to have a valid case for a violation of the Nonintercourse Act.

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[52] Seneca Nation of Indians v. New York, 382 F.3d 245, 260 (2d Cir. 2004) (citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 276 (1985)).

[53] 25 C.F.R. § 83; Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994).

Respondent has failed to establish a prima facie case for a Nonintercourse Act violation and it is questionable whether respondent even has the proper standing to pursue the case at bar.

2. The Aboriginal Title To The Land of Kelly Point Park Was Extinguished

As Chief Justice Marshall wrote in Johnson v. McIntosh, the sovereign holds, "an exclusive right to extinguish the Indian title of occupancy," also known as aboriginal title. [54] Where the sovereign intends to extinguish aboriginal title such intention must be "'plain and unambiguous,' either 'expressed on the face of the [instrument] or ... clear from the surrounding circumstances.'" [55] "Treatment of the land in a manner wholly inconsistent with continued tribal occupancy suffices to extinguish aboriginal title." [56] Thus, while intent to extinguish aboriginal title must be clear, this requirement is also flexible, taking multiple shapes including situations where the Indian tribe itself has relinquished all tribal claims to certain lands. [57] Doubtful or ambiguous expressions "are to be resolved in favor [of the tribe]." [58]

Here, the 1850 treaty signed by the Cush-Hook Nation was not ratified by Congress, [59] but this alone is not proof positive that the Cush-Hook Nation still owns the land through its aboriginal title. In fact, after signing the treaty the Cush-Hook Nation willingly relocated from their permanent village on the land in question; they were not forcibly removed by United States

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[54] Johnson v. McIntosh, 21 U.S. 543, 587 (1823).

[55] Seneca Nation of Indians v. New York, 382 F.3d 245, 260 (2d Cir. 2004) (citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 276 (1985)).

[56] *American Indian Law in a Nutshell*, 413 (5th ed. 2009).

[57] See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 458 (7th Cir. 1998) (where off reservation aboriginal title was extinguished when tribe signed new treaty which created new reservation); U. S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 357 (1941) (where tribe requested and received new reservation lands which amounted to a relinquishment of any tribal claims to the previous lands).

[58] Choate v. Trapp, 224 U.S. 665, 675 (1912); Bryan v. Itasca County, 426 U.S. 73, 392 (1976) (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918)).

[59] Record, at 3.

military nor was the land ever actually purchased as originally intended. [60] The record is bare of any evidence that the Cush-Hook ever sought to return to their former land, or that they sought payment for those lands after they surely realized that Congress was not going to pay the Nation for the land, as originally believed. The Cush-Hook Nation's actions surrounding their relocation and lack of effort to reclaim their lands signify that the Nation had relinquished all tribal claims to their former lands by 'voluntary cession' similar to that found in U. S. v. Santa Fe Pac. R. Co. [61] Regardless of whether the Meeks' title was valid or not, it is clear that the Nation no longer holds aboriginal title to the land.

3. Respondent's Effort To Occupy Kelly Point Park Did Not Reestablish Aboriginal Title

This Court has clearly rejected the "unification" theory, which sought to combine aboriginal title with the newly obtained fee title to those same lands as a way to assert sovereign dominion over the parcels of land, [62] holding that the standards of federal Indian law and equity "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." [63]

Here, respondent's actions in erecting temporary housing to live in Kelly Point Park were insufficient to reestablish the Cush-Hook's ownership of the land. [64] If the Oneida Indian Nation, which is a federally recognized Indian tribe and also held both the aboriginal title and fee title to parcels of land, was unable to 'unite' the two titles and asset sovereign dominance then it is impossible that respondent succeeded. Not only does the Cush-Hook Nation not own the fee title to these lands, the Nation does not even hold the aboriginal title. The fact that respondent lived in the park for a short period of time in 2011 does not even do much to support an argument that the

[60] Record, at 3.
[61] U. S. v. Santa Fe Pac. R. Co., 314 U.S. 339, 357-58 (1941).
[62] City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 213 (2005).
[63] *Id.*, at 214.
[64] Record, at 3.

land has been occupied by Cush-Hook Indians since time immemorial because there has been a large gap in time, more than one hundred and fifty years, between the Cush-Hook Nation's willing relocation in 1850 and respondents park antics in 2011. [65]

4. Equitable Doctrine Of Laches Is An Appropriate Defense Against Aboriginal Title

There is lingering doubt regarding the applicability of equitable doctrines, such as laches, to aboriginal title claims. In 1922, in Ewert v. Bluejacket, this Court concluded that a land transfer was void under the Nonintercourse Act and that neither the state statute of limitations nor the doctrine of laches constituted valid defenses. [66] Later, in 1976, the United States District Court held that, "neither the defense of laches, nor statute of limitations/adverse possession, nor estoppel by sale can overrule the operation of federal law if plaintiff establishes a violation of the Act." [67] Federal courts have held that "claims brought by Indian tribes in general ... should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if [it] had been brought by the United States," as recently as 2001. [68]

However, in 2005 this Court found laches to be an appropriate defense regarding a two hundred year gap in sovereign authority over territory. [69] City of Sherrill holds that laches can bar a tribe from obtaining the disruptive remedy of re-assertion of tribal sovereignty. [70] Later that same year the Second Circuit followed suit and held that "equitable doctrines-such as laches, acquiescence, and impossibility-can be applied to Indian land claims in appropriate circumstances." [71] One especially appropriate circumstance is when "disruptive" Indian land

[65] Record, at 3.
[66] Ewert v. Bluejacket, 259 U.S. 129, 129 (1922).
[67] Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp., 418 F. Supp. 798, 804 (D.R.I. 1976).
[68] Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170, 186 (N.D.N.Y. 2001).
[69] City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 220-21 (2005).
[70] New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 496 (E.D.N.Y. 2005).
[71] Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 268 (2d Cir. 2005).

claims are involved such as where the Indian tribe demands "immediate possession of the land in question and ejectment of the current residents." [72]

Here, a successful aboriginal land to this land would in fact be disruptive and thus barred by the laches doctrine. While this may be parkland today, this land is still located within the present day limits of Portland, Oregon, [73] the most populated city in the State of Oregon. Kelly Point Park is ideal parkland due to the fact that it touches both the Columbia and Willamette Rivers. [74] It is difficult to ascertain the negative impact that Portland would suffer if this land, in particular this park, was turned over to the Cush-Hook Nation. It certainly wouldn't be as disruptive as the pathwork tax scheme sought in City of Sherrill, [75] but it might still be disruptive enough to warrant laches as a defense especially considering the amount of time, more than one hundred and fifty years, between the time that the Cush-Hook Nation relocated and the time respondent began living in Kelly Point Park.

II. The State of Oregon is Vested with Criminal Jurisdiction over the Case at Bar

The State of Oregon is vested with criminal jurisdiction over the case at bar under Public Law 280, of which Oregon is a mandatory state. In other words, any criminal act committed by Mr. Captain, on or off an Indian reservation in Oregon, is properly brought and tried in state court under state law. Furthermore—even momentarily setting aside Oregon's status as a mandatory Public Law 280 state—the case at bar is subject to state law through the Assimilative Crimes Act, if the land in question is deemed Indian Country. Therefore, whether or not the land

[72] New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 495 (E.D.N.Y. 2005).
[73] Record, at 1.
[74] Record, at 1.
[75] City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 219-20, (2005).

in question is Indian country, Mr. Captain has, by his own actions, placed himself under the auspices of state law.

1. Criminal Jurisdiction is Vested in the State of Oregon Regardless of Whether the Locus of the Crime is Tribal Lands or Not under Public Law 280

The second issue presented here is brought under Or. Rev. Stat. 358.905-961 (archaeological) and Or. Rev. Stat. 390.235-390.240 (historical). These statutes apply to all lands within the state, including tribal lands, under Public Law 280.[76]

In the case at bar, Mr. Captain cut down an archaeologically, culturally, and historically significant tree containing a tribal cultural and religious symbol.[77] This tree is culturally and religiously significant to the Cush-Hook Nation of Indians.[78] Mr. Captain is a member of the Cush-Hook Nation.[79] However, that does not excuse his action and the state of Oregon does have criminal jurisdiction to censure his act for the following reasons, whether or not the site in question is owned by a non-federally recognized American Indian tribe. Therefore, this Court should affirm the lower court's ruling and uphold Mr. Captain's conviction under Or. Rev. Stat. 358.905-961 and Or. Rev. Stat. 390.235-390.240.

First, Oregon has criminal jurisdiction under Public Law 280 and the state has deemed this to be a criminal offense. Second, even if the Court decides this is a civil offense, the state's involvement is adjudicatory and not regulatory; therefore, Public Law 280 vests jurisdiction in the state court. Finally, given the facts of this case, conviction under the aforementioned state statutes was appropriate.

[76] Record, at 3.
[77] Record, at 3.
[78] *Id.*
[79] Record, at 3.

Congress has plenary power over Indian tribes.[80] This Court held in 1980 that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the [s]tates."[81] Public Law 280 (PL 280) is an exercise of that power, held by Congress, to transfer jurisdiction among federal, state, and tribal government. In mandatory Public Law 280 states such as Oregon, criminal jurisdiction and jurisdiction for civil causes of action shifts to the state.[82] This jurisdiction includes "offenses committed by or against Indians . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."[83]

A. Criminal Jurisdiction is Vested in Oregon under PL 280

Oregon took criminal jurisdiction to enforce state criminal laws inside the reservation, against tribal members. Therefore, regardless of whether or not Kelly Point Park is tribal land, criminal jurisdiction rests with the state for crimes committed therein. Mr. Captain's offense has been classified as criminal by the state of Oregon. Ergo, Oregon has criminal jurisdiction over Mr. Captain's offense.

But is the case at bar truly a criminal one? This is the first question which must be asked in order to determine if a Public Law 280 state has jurisdiction within Indian country.[84] After all, if the law or statute in question is deemed merely regulatory, it cannot be applied to Indians in Indian country under PL 280.[85]

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[80] See generally Worcester v. Georgia, 31 U.S. 515 (1832).
[81] Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).
[82] 18 U.S.C. 1162(a); 28 U.S.C. 1360(a).
[83] 18 U.S.C. 1162(a).
[84] California v. Cabazon Band of Mission Indians, 480 U.S 202, 202 (1987).
[85] Bryan v. Itasca County, 426 U.S. 373, 388-90 (1976).

In Cabazon, the issue at bar was whether a state statute permitting bingo games only in certain circumstances, and making them illegal in others, was criminal in nature, and therefore within PL 280's grant of criminal jurisdiction to the state.[86] The 9th Circuit first drew, and the 5th Circuit later followed, the criminal/prohibitory versus civil/regulatory distinction in order to determine when a law such as this is criminal and when it is not.[87] This Court found the distinction to be proper and consistent with Congress' intent in implementing PL 280.[88] The distinction, broken down, basically asks whether the act is prohibited entirely, or if the state is simply trying to regulate it.[89] In Cabazon, the bingo games were not prohibited, but were subject to regulation.[90] Therefore, this Court ruled that California had no jurisdiction within Indian country because the state law was not criminal/prohibitory.[91]

Here, Oregon is attempting to enforce a statute which makes criminal an act, regardless of who commits it. While there are some regulatory provisions, such as permitting provisions for the excavation of artifacts, because the tree is an artifact of cultural patrimony, it cannot be harmed or altered in any way, by anybody, and the only regulatory provisions concern what to do if the statute is violated and the artifact of cultural patrimony has already been disturbed. Furthermore, Mr. Captain's actions are punishable by criminal sanctions. Therefore, following the Court's reasoning in Bryan and Cabazon, the statutes in the present case are best classified as criminal/prohibitory.[92] As such, PL 280 grants Oregon criminal jurisdiction over the case at bar.

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[86] Cabazon, at 208-09.
[87] Barona Group of Capitan Grande Band of Mission Indians, San Diego Co. v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983); see also Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).
[88] Cabazon, at 210.
[89] *Id.*, at 210-11.
[90] *Id.*
[91] *Id.*, at 210-12.
[92] *Id.*; see also generally Cabazon.

B. Civil Adjudicatory Jurisdiction is Vested in Oregon under PL 280

As a matter of course, this Court has found that, without Congressional intent or Federal authority stating otherwise, the states do not have civil regulatory jurisdiction over Indian country.[93] This excludes the power of taxation and other such regulatory authority the state might inappropriately wish to exercise. Therefore, if this Court were to find that the statutes in question are regulatory, the state would have no jurisdiction. However, the statutes at issue are not regulatory but are in fact criminal, as discussed in the immediately preceding section, but even if this Court finds them to be civil in nature, the statutes should be deemed adjudicatory, and not regulatory. This distinction, and its effect on the grant of state jurisdiction, is explained immediately below.

The civil jurisdiction granted by PL 280 only applies to civil causes of action, and does not grant Oregon regulatory authority within Indian country.[94] This was fleshed out in Bryan v. Itasca County where this Court found that a PL 280 state did not have the regulatory authority to tax an Indian's personal property in Indian country.[95] Instead, this Court held that the purpose of the civil jurisdiction granted by Congress was to give a forum for the adjudication of civil disputes, i.e. state courts.[96]

The Court in Bryan expressly held that PL 280 does not confer the authority to tax and thus made the distinction in civil jurisdiction between "adjudicatory" and "regulatory." Consequently, this Court held that PL 280 states have civil adjudicatory jurisdiction, but not civil

[93] See generally McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); see also Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).
[94] See generally Bryan; see generally Cabazon; see generally Barona; see generally Butterworth.
[95] Bryan, at 373; see also Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976).
[96] 28 U.S.C. § 1360(a), § 4(a).

regulatory jurisdiction, meaning that PL 280 was implemented to grant a state forum within which to bring civil cases.[97]

Here, Oregon is not trying to regulate the Cush-Hook Nation's government, assess a tax, or interfere with their decision making process. Nothing in the facts suggests that the Cush-Hook Nation granted Mr. Captain a permit to cut down the sacred tree in question. Nor do the facts suggest that the tribe condones such an action in any way, shape, or form. This is a criminal cause of action. However, even if the Court decides this is a civil action, it is an adjudicatory one with jurisdiction still vested in state court. While it is not a private cause of action, as was considered by this Court in Bryan, the case at bar still mostly resembles a criminal case, and if not that, an adjudicatory one.[98] Therefore, this Court should in either case affirm the lower court and find jurisdiction vested in the state.

2. With Jurisdiction Vested in the State, Conviction was Proper under the Statutes at Bar.

Under Public Law 280, jurisdiction over the case at bar properly rests with the State of Oregon. The statutes in question are criminal in nature, and if not criminal are adjudicatory. As such, Mr. Captain is subject to state jurisdiction even if Kelly Point Park is found by this Court to be Indian country. Of course, if this Court correctly finds that Kelly Point Park is not Indian country, jurisdiction obviously rests with the state. Therefore, the question remaining is whether or not conviction is proper under Oregon statute for the crimes committed by Mr. Captain. For the following reasons, this Court should affirm the lower court and convict Mr. Captain for his destruction of deeply cultural, spiritual, and religious artifacts.

[97] Bryan, at 383-84.
[98] Bryan, at 374.

A. The Tree was an Object of Cultural Patrimony under O.R.S. § 358.905

The tree cut down by Mr. Captain is an object of cultural patrimony, which is defined by the State of Oregon as "an object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian."[99] This is not in dispute. In fact, Mr. Captain's supposed justification for his action is the very fact that the trees in question are significant to the Cush-Hook Indians. Mr. Captain makes no claim that the trees are individually owned. Therefore, according to the statute, the trees "cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe."[100] In other words, the fact that Mr. Captain is a member of the Cush-Hook Nation is irrelevant for purposes of this statute. The statute also seems to offer protection to Native artifacts for tribes whether or not they are federally recognized. Therefore, the status of the Cush-Hook Nation is irrelevant as well, for purposes of this statute.

B. The Site is Part of the Public Trust of the State of Oregon

Mr. Captain claims he cut down the tree in order to protect it from further vandalism. However, "archaeological sites and their contents located on public land are under the stewardship of the people of Oregon to be protected and managed in perpetuity by the state as a public trust."[101] Therefore, if Mr. Captain, concerned for the preservation of the trees, wanted to take decisive action, he should have made the matter known to the proper state authorities rather than take matters into his own hands. Oregon readily recognizes that "[a]rchaeological sites are . . . a finite, irreplaceable and nonrenewable cultural resource, and are an intrinsic part of the

[99] O.R.S. § 358.905(h)(A).
[100] *Id.*
[101] O.R.S. § 358.910(1).

cultural heritage of the people of Oregon" and, therefore, has a duty to protect the trees in question. If Mr. Captain is dissatisfied by Oregon's handling of the situation, the proper course of action is to bring suit, not cut down the trees. As part of the public trust, those trees belonged to everyone, and even as a member of the Cush-Hook tribe, Mr. Captain had no authority to cut them down. In fact, his action was in direct violation of O.R.S. § 358.920.

C. Mr. Captain Cannot Legally Alter the Site by Cutting the Trees

According to the statute, 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."[102] Here, Mr. Captain injured and altered the site, possibly even destroyed it, and then removed the object. He did not have a permit to do so. Furthermore, nothing in the facts suggest that he was denied a permit. He simply never bothered to obtain one.

If an object is removed from such a site, as was the case here, it must be turned over to the Oregon State Museum of Anthropology for curation, so that it may be preserved.[103] Mr. Captain also failed to do this. While there is an exception to this requirement for objects which will be kept within the state, curated to museum standards, and made available for study, there is nothing in the facts to suggest that respondent had the intention, much less the ability, to do so.[104]

However, Mr. Captain should be comforted by the fact that objects of cultural patrimony seized in this manner are "reported to the appropriate Indian tribe and the Commission on Indian Services. The appropriate Indian tribe, with the assistance of the State Historical Preservation

[102] O.R.S. § 358.920(1)(a) (emphasis added).
[103] O.R.S. § 358.920(4)(a).
[104] O.R.S. § 358.923(1)-(3).

Officer, shall arrange for the return of any objects to the appropriate Indian tribe."[105] Therefore, the Cush-Hook Nation, if they wish to claim the tree, may retrieve it.

3. In the Alternative, Mr. Captain is Subject to State Law under the Assimilative Crimes Act

The procedural history of the case at bar makes no mention of any corresponding federal statute which might prohibit Mr. Captain's behavior. Only the Oregon statute discussed at length in the previous section is referenced. As such, if for some reason this Court were to rule that Public Law 280 does not grant the state criminal jurisdiction in the case at bar, due to the nature of the crime or for any other reason, the Assimilative Crimes Act (ACA) would assimilate the state law of Oregon, i.e. the statutes previously discussed, into federal law.[106] This would, of course, have the effect of making the case a federal one, but the Oregon statutes discussed would be the applicable law.[107] In such an instance, conviction of Mr. Captain would remain proper and this Court should still affirm the lower court's ruling as to this issue.

CONCLUSION

For the foregoing reasons, the holding of the Oregon Circuit Court should be overruled as to the first issue at bar, and affirmed as to the second for the following reasons.

First, the State of Oregon's title to the land in Kelly Point Park survives an aboriginal land claim from respondent, a member of a non-federally recognized American Indian tribe. Respondent has failed to establish the required elements of a prima facie case for a Nonintercourse Act violation. Respondent is an individual which precludes him from the

[105] O.R.S. § 358.940(2).
[106] 18 U.S.C.A. § 13.
[107] 41 Am. Jur. 2d Indians § 182; see also U.S. v. Billadeau, 275 F.3d 692, 694 (8th Cir. 2001); see also U.S. v. Ashley, 255 F.3d 907, 909 n. 3 (8th Cir. 2001).

protections afforded by the Nonintercourse Act. The aboriginal title of the Cush-Hook Nation was extinguished. Respondent cannot reestablish Cush-Hook sovereign authority over the land of Kelly Point Park. Respondent's claim is barred by the equitable doctrine of laches. Therefore, we respectfully ask that this Court overrule the lower court's ruling as to this issue.

Second, the State of 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. Criminal Jurisdiction and Civil Adjudicatory Jurisdiction are vested in the State of Oregon under PL 280. The tree respondent cut down was an 'Object of Cultural Patrimony' under O.R.S. § 358.905. The site is part of the Public Trust of the State of Oregon and respondent cannot legally alter the site by cutting the trees. Therefore, conviction under the statute is proper. Finally, even if the crime is deemed to fall outside of PL 280 jurisdiction, the Assimilative Crimes Act would make proper the imposition of state law in a federal forum. Therefore, Mr. Captain could properly be convicted of the same crime, under the same Oregon statute. Therefore, we respectfully ask that this Court affirm the lower court's ruling as to the issue of criminal jurisdiction.