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 CERTOIRARI TO THE OREGON CIRCUIT COURT FOR THE COUNTY OF MULTNOMAH

BRIEF FOR THE PETITIONER

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Counsel of Record

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

This action was initiated when the State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 385.905-358.961 and Or. Rev. Stat. 390.235-390.240. The bench trial to which Captain consented was held in the Oregon Circuit Court for the County of Multnomah. There, the Court recognized the Cush-Hook Nation's aboriginal title to the land in Kelley Point Park, and therefore found Captain not guilty of trespass or cutting timber without a state permit. However, it found that he was guilty of damaging an archaeological site and a cultural and historical artifact. Both the State and Captain appealed the decision. With respect to the parties' appeals, the Oregon Court of Appeals affirmed the lower court's decision without writing an opinion, and the Oregon Supreme Court declined to grant certiorari. Given this denial of review, the State filed a petition and cross petition for certiorari to the United States Supreme Court. Captain filed a cross petition.

STATEMENT OF THE FACTS

Kelley Point Park is an Oregon State Park within the city limits of Portland. Approximately 160 years ago, the land that now composes the Park was a part of the original homelands of the Cush-Hook Nation of Indians (CHN). It was documented as such by the Western Hemisphere explorers, William Clark and Meriwether Lewis. CHN is not and has never been a federally recognized tribe, nor is it recognized by the State of Oregon. In 1850, CHN signed a treaty with Anson Dart, then the Superintendent of the Oregon Territory,

under which CHN agreed to, and did, relocate to land in Oregon's coastal foothills. This treaty was never ratified by the U.S. Senate, and thus the tribe never received compensation for the land that they vacated, any of the other promised benefits of the treaty, or title to the land to which they relocated.

Subsequent to CHN's relocation, white settlers moved onto the land that the tribe had formally occupied, and the settlers Joe and Elsie Meeks (the Meeks) settled the land that is now known as Kelley Point Park. Under the Oregon Donation Land Act of 1850 (the Act), the Meeks received fee simple title to the land from the United States. They were granted this title even though they had not resided on or cultivated the land in question for the four consecutive years required by the Act. The Meeks' retained their fee simple title to the land until 1880 when the descendants of Joe and Elsie sold the land to the State of Oregon. Oregon has thus held fee simple title to the land that is Kelley Point Park for the last 132 years.

In 2011, Thomas Captain (Captain), who identifies himself as a Cush-Hook "citizen," moved from his home in the Coastal foothills to Kelley Point Park. He claims that he did so in order to protect the culturally and religiously significant trees that grow there from the various vandals who were allegedly entering the park to deface the trees and/or cut off the tree faces to sell. Captain believed that such action was necessary because the State had failed to apprehend the vandals. Some time into his occupation of the park, Captain became a vandal himself when he cut down one of the trees, removed its face, and attempted to return to the Coastal foothills. He did so allegedly in order to restore and protect a tree face that had been previously vandalized. He was stopped by state troopers during this return and arrested; the image was seized. The State of Oregon subsequently brought a criminal action against

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. 385.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historic materials).

ARGUMENT

This court should find that the District Court erred in finding that the Cush-Hook Indian Nation has aboriginal title to the lands in Kelly Point Park because the District Court misunderstood the meaning of *Johnson v. M'intosh.* Moreover, an unratified treaty does not return aboriginal title to a tribe. Rather, it confers only the right to be compensated for an illegal taking of the lands identified in the treaty. Congress did not err when it defined all lands in the Territory of Oregon as public lands because Congress had the authority to reserve Indian lands if it chose to do so, but did not.

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 because the statutes in question are criminal and not regulatory, and because Oregon has criminal jurisdiction over all lands in Oregon whether public or Indian Country except for the Warm Springs Reservation, which is not implicated here.

I. THE DISTRICT COURT'S RECOGNITION OF THE CUSH-HOOK NATION OF INDIANS SHOULD NOT BE CONSTRUED AS FEDERAL RECOGNITION OF THE TRIBE BECAUSE SUCH RECOGNITION WOULD BE ERRONEOUS AND PREMATURE.

In order for an Indian tribe to be identified as an American Indian tribe, proper evidence showing that such an identification is appropriate must exist. Such evidence is required because Congress did not manifest intent to recognize all tribes. It is clear that Congress did not intend to do so given the fact that the Secretary of Interior has statutory authority to promulgate regulations that differentiate from past practices. 25 U.S.C.A. §§2,9; 25 C.F.R. § 83.1 et seq. *Miami Nations of Indians of Indians, Inc. v. Babbi*t, N.D. Ind. 1995. See *James v. U.S. Dept. of Health & Human Services*, 824 F.2d 1132, 1133-34 (D.C. Cir. 1987). The Department of the Interior's Branch of Acknowledgment and Research was established for the purposes of determining whether groups seeking tribal recognition actually deserve that recognition, and determining which tribes have previously obtained federal recognition, see 25 C.F.R. § 83.6(b). While a tribe can receive its recognition from the judicial branch, this can only occur if a political branches of the government has previously recognized that tribe. *Id.* Additionally, if the Executive Branch determines that a tribe of Indians is recognized, that decision must be respected by the Judicial Branch. *United States v. Holliday*, 70 U.S. 407, 18 L. Ed. 182 (1865).

The judicial branch can accept certain historical material as fact when determining the establishment of an Indian Tribe. However, the determination of whether documents adequately support the conclusion that an Indian tribe should be federally recognized, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9. The District Court mistakenly assumes that the recorded journals, ethnographic materials, governance, religion, cultural aspects recorded by the explorers Lewis and Clark to be

political influence for the establishment of the Cush-Hook Tribe. However this is not the case, In *James*, the court stated “we are not prepared to hold that scholarly compilations of lists of Indian tribes existing in the United States are sufficient to constitute tribal recognition by the Executive Branch, even though the scholarly work was commissioned by the government. *Holliday,* 70 U.S. at 419 (*treaty* with United States government specifically required tribal relations to continue). Surely scholarly articles gathered by explorers that were not a representative of the United States would be deemed as less significant. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch was allowed to make the initial determination as to whether or not a group has been previously recognized or whether conditions for that group’s recognition currently exist. *James*, at 1137 (D.C. Cir. 1987).

Furthermore, where Congress has delegated certain initial decisions to the Executive Branch, the exhaustion of the Executive’s available administrative remedies is required before judicial relief for an actual or threatened injury can be obtained - provided that the purposes of the exhaustion doctrine are furthered. *E.g. Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938).

Exhaustion has four primary purposes:

> First, it carries out the congressional purpose in granting authority to the agency by discouraging the frequent and deliberate flouting of administrative processes [that] could ... encourag[e] people to ignore its procedures.

> Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors.
>
> Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding.
>
> Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial fact finding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency. *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), at 1484.

In accord with the first purpose of administrative remedies, requiring exhaustion of the Department of the Interior's procedures for tribal recognition, before permitting judicial involvement, serves this purpose.

As noted, Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations, and regulations establishing procedures for federal recognition of Indian tribes certainly come within this area of concern. Further, requiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the area of tribal recognition. In *New York v. Salazar*, 6:08-CV-00644 LEK, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012), the court stated that “there is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous peoples of the United States. This institution is not the court. It is the Bureau of Indian Affairs. and therefore a tribe that is recognized only by the court is not a federally recognized tribe. Accordingly, the Cush-Hook Nation, as a tribe recognized only by the Court, is not a federally recognized tribe. Indeed, it is clear that

The Interior expressly recognizes its jurisdiction over the issue of federal recognition, especially when it promulgates the regulations that specifically provide for decisions on issues of tribal recognition. Therefore, exhaustion of the Interiors administrative remedies is essential, and here the agency should have been called upon to apply its expertise before any judicial involvement occurred.

A. THE DISTRICT COURT'S FINDING THAT MR. CAPTAIN IS A REPRESENTATIVE OF THE CUSH-HOOK NATIONS OF INDIANS IS ERRONEOUS AND PREMATURE.

The fact that Mr. Captain can prove that he is a member of the CHN, does not prove that he deserves the discretion of federal or state protection. For purposes of acknowledgment and dealings with the federal government, a tribe is a political institution, so racial or ancestral commonality is not enough, without a continuously existing political entity, to constitute a tribe for those purposes. 25 C.F.R. § 83.3 (a, c). *Miami Nation*, at 742, Affirmed 255 F.3d 342, rehearing and rehearsing en banc denied, certiorari denied 122 S.Ct. 1067. Even if Mr. Captain can demonstrate that he is a descendant of the historical entity of the CHN nation, which had dealings with the Lewis and Clark explorers, this is not enough evidence to affirm his tribal representation.[1] Therefore, the court should not give Mr. Captain the discretion of being a representative member of a historical CHN until his ancestral background can be affirmed by the Secretary's administrative process.

[1] (Scholarly compilations of lists of Indian tribes existing in United States are not sufficient to constitute tribal recognition by executive branch, even if scholarly work was commissioned by government, See, *James v. U.S. Dept. of Health and Human Services*, C.A.D.C 1987, 263 U.S. App. D.C. 152.).

B. THE DISTRICT COURT WAS MISTAKEN WHEN IT FOUND THAT CONGRESS ERRED BY DESCRIBING ALL THE LANDS IN THE TERRITORY OF OREGON PUBLIC LANDS OF THE UNITED STATES FOR THE PURPOSES OF THE OREGON DONATION LAND ACT.

Congress did not err when it described all the land within the Territory of Oregon as public land. Congressional history, treaties with Indian tribes and executive orders establish that Congress purposely described the lands in Oregon as public lands. Had Congress intended to preserve the land in question for Indigenous Peoples, it would have then reserved rights specifically for Indian tribes.

It is clear from the record that Congress did not err when it described all the land in the Oregon Territory as public since the record shows that it took specific measures to make sure that the land would be lawfully defined as such. Samuel Thurston, territorial delegate from Oregon, informed Congress that constitutional requirements made it necessary to extinguish Indian title to land before it could become part of the public domain. Moreover, the Oregon Territorial Act guaranteed that "nothing contained in this Act shall be construed to impair the rights of persons or property pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians , or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which would have been competent to the government to make if this act had never passed." 9 Stat. 323, Sec. 1. This saving clause recognizing the status of Indian lands within the first paragraph of the act establishing the Territorial Government of Oregon is proof that Congress did not err in describing "all land the lands in the Oregon Territory as being public lands of the United States.

Furthermore, before debating the donation law, Congress passed legislation authorizing the President to appointment commissioners to negotiate treaties with Indian tribes in the Oregon Territory "for the Extinguishment of their claims to lands lying west of the Cascade Mountains." The commissioners were empowered to negotiate treaties, "and if found expedient and practicable, for their removal, they shall remove tribes west."9 Stat. 437, Sec. 1. The Act noted the previous 1848 Act, authorizing the authority of the superintendant of Indian affairs, for the territory of Oregon, additional proof of legislative intent referencing the authority of Congress to reserve lands for Indian tribes. *Id*. at Sec. 3. Additionally, the Act granted the "law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes on the Oregon Territory." *Id*. Sec. 5. These specific and deliberate acts of Congress are concrete examples that Congress did not err in defining all lands within the Territory of Oregon as public lands when it deliberately established the terms by which Indian Lands were to be quantified. Later documents surrounding the passage of the Oregon Donation Land Act of 1850 (ODLA) further prove this point: in particular, the ODLA was passed after the 1848 and 1850 acts in which Congress authorized the appointment of Indian Commissioners to negotiate treaties with Indian tribes.

Additionally, the ODLA expired after five years evidence that this legislation was only intended to have a small impact to perpetuate the settlement of the North West. Additionally, in OLDA there was a provision that "certain reserved lands not be liable to any claims under and by virtue of the provisions of this act; and that such portions of the public lands as may be designated under the authority of the President of the United States,… shall be excepted from the operation of this act." 9 Stat. 500, Sec. 14.

Thus Congress did not err in the designation of all lands within the Oregon Territory as public lands since it did so purposefully and only after taking the legal steps necessary to formally take the lands into the public domain; and when if it had wanted to reserve the lands for the Indian tribes of the Oregon territory it would have done so explicitly as it did in other contexts during this time. [See; Treaty with the Rogue River Tribe of Oregon, 1854. 10 Stat. 307.; See; Executive Order establishing the Alsea and Siletz Indian Reservation, dated November 9, 1855. *Congressional Record*, 20 February 1875, 1528-29. See; An Act to authorize the President to negotiate a Treaty with the Klamath, Modoc, and other Indian tribes in southeastern Oregon. March 25, 1864. 13. Stat. 37. See; Treaty with Indians in Middle Oregon, June 25, 1855. 12 Stat. 963.]

C. THE DISTRICT COURT ERRED IN FINDING THAT THE CUSH-HOOK NATION'S ABORIGINAL TITLE SURVIVED BECAUSE THE DISTRICT COURT MISTAKES THE OUTCOME OF *JOHNSON V. M'INTOSH*, ERRONEOUSLY CONCLUDING THAT THE LACK OF COMPENSATION SAVES ABORIGINAL TITLE.

In order to understand how the District Court erred in its reading of *Johnson v. McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823), we must first evaluate the case. In *Johnson v. M'intosh* this court made a landmark decision with respect to Federal Indian Law, and in doing so it laid the foundation of common law for the next two centuries. In Chief Justice Marshall concluded that United States has the exclusive right to aboriginal land either through purchase or conquest, and that no other powers can own land rights to the lands to which the United States has laid claim. *Id.* at 588. According to the "Discovery Doctrine" there were to two stipulations with regard to aboriginal land claims: 1)The discovering nation had the sole right of acquiring land from the natives, and establishing settlement upon the

discovered land, although the Indians still retained right of occupancy to the land. And 2) The doctrine established a restriction on the tribe's occupancy, which was meant to limit the tribe's authority to sell land; they in turn could only sell their lands to the discovering nation, the United States. *Id.* at 562.Following discovery, Indians no longer have fee simple title, but do have a "right of occupancy." This recognized the legal right of Indians in their lands, good against all third parties, (including states) but existing at the sufferance of the federal government. *Johnson* does not stand for the proposition that if a recognized Indian tribe's lands are illegally taken without compensation, they have the right to their aboriginal lands to be returned.

Until the early twentieth century it was not understood whether the United States could unanimously modify a tribe Indian title. In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-67, 23 S. Ct. 216, 221-22, 47 L. Ed. 299 (1903), this court held that the power exists to abrogate provisions of an Indian treaty; stating that "[i]n the interest of the country and the Indians themselves, that it should do so." *Id*. at 566. When an Indian tribe has made a treaty with the government, and when the government chooses, it may abrogate that treaty. This is not to say that Indians are not to be compensated when abrogation occurs, But may be compensated for a taking of such lands. Here, the CHN has never had a ratified treaty with the United States government[2], nor have they ever been recognized by any political branch or any government. In short they have been recognized neither by the United States nor by the State of Oregon.[3]

However, we will not go so far as to say they do not have a claim, as they do. But, the District Court erred in finding that *Johnson v. M'Intosh* stood for the proposition that when

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[2] See statement of facts.
[3] *Id*.

an Indian tribe had its land taken without justification or compensation, it would receive its aboriginal title back. *Johnson*, does not stand for such a proposition. Instead, *Johnson* states that the discovering nation; here, the United States, has “the exclusive right to lands either through purchase or conquers; no other powers can own land rights simultaneously to the lands that the United States lays claim to.” *Johnson*, at 588. Thus, Indian nations have the “right of occupancy," but a right to receive aboriginal title if those lands have been taken without compensation. *Id*.

Still, the United States cannot just take land without compensation, even through an unratified treaty. In *U.S. Aleca Band of Tillamooks*, 329 U.S. 40 (1946), eleven tribes in the then Territory of Oregon sued the United States in the Court of Claims. There, the tribe’s challenge was similar to the CHN’s, in that both signed treaties with designated superintendent of the Federal government, and neither tribe’s treaty was ratified by the Senate. This resulted in the federal government’s uncompensated taking of aboriginal lands, lands which the Aleca band had successfully demonstrated were theirs. *Id*. at 42. There, this court held that “[a]dmitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation not be paid.” *Id*. at 47. That is, the Court held that although Congress has plenary power to take Indian lands, it cannot do so without just compensation. However, this court has never held that a taking of original Indian title or aboriginal title, merits a remedy of return of land. Rather, only that it requires just compensation.

In speaking of the original claims of the Indians to their lands, Justice Marshall had this to say: “It is difficult to comprehend the proposition * * * that the discovery * * * should give the discoverer rights in the country discovered which annulled the pre-existing rights of

its ancient possessors. * * * It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. * * * The king purchased their lands, * * * but never coerced a surrender of them." *Worcester v. Georgia*, 1832, 6 Pet. 515, 543, 544, 547, 8 L.Ed. 483. In this court's opinion, "taking original Indian title without compensation and without consent does not satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs." *United States v. Santa Fe R. Co.*, 1941, 314 U.S. 339, 356, 62 S.Ct. 248, 256, 86 L.Ed. 260. Therefore, Indians who have suffered such a situation unfourtanately have no more than a merely moral claim for compensation. However, since this court has never held that a taking of Indian land without compensation is grounds for the Indian nation to receive their original title back.

Since a tribe which had a claim to their lands that cannot be rivaled by the claim that the CHN has to their former lands (i.e. the Aleca Band of Tillamooks), had its claim rejected by the Court such that their aboriginal title was not returned, it would be illogical to return aboriginal title to the CHN when their right to the land in question is even less developed.

D. THE CUSH-HOOK NATION HAS NOT ESTABLISH THEY HAVE ABORIGINAL TITLE AND THEY CANNOT EJECT THE STATE OF OREGON.

The CHN has not established that they have an aboriginal title to the Kelly Point lands. Furthermore, even if they could assert such a title, CHN could not eject the state of Oregon from the lands. This court held in the *Oneida Indian Nation of New York State v. County of Oneida, N.Y.*, 199 F.R.D.6 9 (N.D.N.Y. 2000) "Oneidas" proposed claims against the private landowners may well be justiciable does not necessarily mean, *a fortiori,* that they are entitled to seek monetary damages from or *to evict current landowners.* (emphasis

added). In other words, this court does not equate justiciability of land claims with the availability of relief against private landowners. *Id*. at 90.

Even if CHN could establish that it has original title, which it has not (procedure discussed above), this court in *Yankton Sioux Tribe of Indians v. United States*, 47 S. Ct. 142, (1926), held that a tribe cannot retroactively receive the title to their land. That is,

> ["[i]t is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers, and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians."] *Id.*

In the present case, the State of Oregon has rightfully purchased the lands in the open market, and has occupied the lands for over a century and a half. This court has consistently held that compensation for an illegal taking is sufficient and within the equitable parameters of justice. In speaking about the decision of the Court of Claims remedy for an illegal taking in *Yankton*, this court held it is significant the court would order monetary compensation "as for" a taking because of non-Indian settlement of the lands, even though it may have recognized the Indians' fee title. Thus such a decision entitles a tribe *only* to monetary damages. *Id*. (emphasis added).

Furthermore, even if the Tribe, "had timely filed its claim under the Indian Court of Claims, it could not have quieted title in these lands or maintained an action in ejectment. However, its assertion of present title *could* have been heard before the Commission, just as the Yankton Sioux Tribe's claim was heard under the Court of Claims. The Tribe simply would have had to accept just monetary compensation *if* the Commission found their claim to

title valid. This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although *any* and *all* accrued claims could be heard before the Commission, land title could not be disturbed because of the sorry injustices suffered by Native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards. *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1466-68 (10th Cir. 1987).

E. THE DOCTRINE OF LATCHES AND REASONABLE EXPECTATIONS PRECLUDES THE CUSH-HOOK NATION FROM REASSERTING SOVEREIGN AUTHORITY OF LAND THAT HAS NOT BEEN HELD IN ITS POSSESSION FOR OVER A CENTURY AND A HALF.

If this court found that the CHN was an established Indian nation it would have to defer to the administrative procedure to be recognized by the Secretary because Congress and the Executive explicitly designated that branch of government the duty to federally recognize Indian tribes, as argued above. Furthermore, sitting on a claim that could be recognized may preclude the claim because of the Doctrine of Latches and reasonable expectations by the current owner of the land. In the *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), this court held that a federally recognized tribe, of which CHN is not, could not unilaterally revive its ancient sovereignty in whole or in part over the parcels of land there at issue. There the Oneida Indian Nation purchased in the open market lands that were illegally purchased by the State of New York, because there was no federal supervision as required by the Nonintercourse Act of 1790, which requires the Federal Government a fiduciary duty to insure Indian nations “conscionable considerations” for purchasing original Indian title. *Id*. at 208. There after, the Oneida Indian Nation “purchased” their aboriginal

lands back from non Indians that were taken from the nation through illegal transaction, this court rejected the tribes assertion of original Indian title.

This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude Oneida asserting claims of original Indian title.

Similarly, for one hundred and sixty years the CHN has done nothing to pursue a claim of original Indian title. This court has established the principle that the passage of time can preclude relief has deep roots in our law, and "this Court has recognized this prescription in various guises." It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief. See, *e.g., Badger v. Badger,* 2 Wall. 87, 94, 17 L.Ed. 836 (1865) ("[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." (internal quotation marks omitted)); *Wagner v. Baird,* 7 How. 234, 258, 12 L.Ed. 681 (1849) ("[The] doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland, ... should now be regarded as settled law in this court.").

This Court applied the doctrine of laches in *Felix v. Patrick,* 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719 (1892), to bar the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction. In the nearly three decades between the conveyance and the lawsuit, "[a] large part of the tract ha[d] been platted and recorded as an addition to the city of Omaha, and ... sold to purchasers." *Id.,* at 326, 12 S.Ct. 862. "[A]s the case stands at present," the Court observed,

"justice requires only what the law ... would demand—the repayment of the value of the [illegally conveyed] scrip." *Id.,* at 334, 12 S.Ct. 862.

This Court has observed in the different, but related, in the context of tribal jurisdiction. In an area of Indian title "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use," may create "justifiable expectations." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604–605, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); accord *Hagen v. Utah,* 510 U.S. 399, 421, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) ("jurisdictional history" and "the current population situation ... demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" (internal quotation marks omitted)). This court held in *City of Sherrill* that "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by Oneida, merit heavy weight here." *City of Sherill,* at 216.

Similar to New York there, here, the State of Oregon has exercised jurisdictional authority over Kelly Point Park for over one hundred and sixty years. The justifiable expectations of jurisdiction over the land in question have existed under the sole authority of the state, without question. The wrongs of which CHN complains in this action occurred during the early years of the development of Oregon. For the past two centuries, Oregon and the city of Portland have continuously governed the territory. The CHN did not seek to regain possession of their aboriginal lands by court decree until this case, and the tribe has never acquired the property after its loss. In considering the length of time this court in *City of Sherrill* held that "This long lapse of time, during which the tribe did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the

character of the properties, preclude the tribe from gaining the disruptive remedy it now seeks. *Id*. at 217.

As between States or jurisdiction of an Indian tribe, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory. *Ohio v. Kentucky,* 410 U.S. 641, 651, 93 S.Ct. 1178, 35 L.Ed.2d 560 (1973) ("The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." (quoting *Michigan v. Wisconsin,* 270 U.S. 295, 308, 46 S.Ct. 290, 70 L.Ed. 595 (1926))); *Massachusetts v. New York,* 271 U.S. 65, 95, 46 S.Ct. 357, 70 L.Ed. 838 (1926) ("Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary."). The acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary.

When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. There is no dispute that it has been one hundred and sixty years since CHN last exercised regulatory control over the properties here. In the context of a tribe attempting to require original Indian title and assert jurisdiction this court states that "given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose." *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) (STEVENS, J., dissenting in part). Thus, too much time has passed for the this action to now be legitimate.

Finally, this Court has recognized the impracticability of returning to Indian control, land that generations earlier had passed into private hands. Recognizing the need for acquisition of tribal lands, Congress has provided a mechanism for the acquiring lands for tribal communities. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians. See *Cass County v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 114–115, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; “[t]he purposes for which the land will be used”; “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls”; and “[j]urisdictional problems and potential conflicts of land use which may arise.” 25 CFR § 151.10(f) (2004). Section 465 provides the proper avenue for CHN to reestablish sovereign authority over territory last held by CHN over a century and a half ago.

II. 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 BECAUSE OREGON HAS SUCH JURISDICTION OVER ALL LANDS IN THE STATE WHETHER PUBLIC OR PRIVATE.

A. KELLEY POINT PARK IS OREGON PUBLIC LAND AND IS THEREFORE INHERENTLY UNDER OREGON’S CRIMINAL JURISDICTION.

As established in the preceding sections, the land in question is public land that belongs to the State of Oregon. Accordingly, Oregon has the authority to control the uses of,

and to protect, archaeological, cultural, and historical objects on that land per Or. Rev. Stat. § 358.905-961 (1993), which established, in part, that "a person may not excavate, injure, destroy, or alter an archaeological site or object; or remove an archaeological object located on public or private land in Oregon unless that activity is authorized by a permit." Or. Rev. Stat. § 358.920(1)(a). To do so, places that person in violation of Oregon law and subject to the jurisdiction of the Oregon circuit courts. Or. Rev. Stat. § 358.9. Here, Captain violated Or. Rev. Stat. § 358.920(1)(a) when, without a permit, he injured an archaeological site by cutting down one of the sacred trees in Kelley Point Park, and by removing an archaeological object (i.e. the tree face that he cut off) from the park. Because he committed these offences in Kelley Point Park, he committed them on public land. Accordingly, all elements of the crime are satisfied, and Oregon has jurisdiction to adjudicate the action.[4]

B. OREGON HAS JURISDICTION OVER ALL LANDS WITHIN ITS BOUNDARIES WITH THE EXCEPTION OF THE WARM SPRINGS RESERVATION.

Even if it is found that CHN owns the aboriginal title to Kelley Point Park and that that land is Indian Country, [5] Oregon still has criminal jurisdiction to control and protect the archaeological, cultural, and historic objects located on it per the grant of jurisdiction embodied in Public Law 280. Public Law 280, codified at 18 U.S.C. § 1162(a) (1953), granted Oregon, and six other States, jurisdiction over offences committed by Indians or

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[4] Although the issue was not explicitly raised by the question to which this Court granted certiorari, the fact that Thomas Captain is not an "Indian" for criminal jurisdiction purposes is significant. First, Captain is not an "Indian" for under these circumstances because his only claim of affiliation with an Indian group is with the unrecognized CHN group, and when it has been clearly established that such an affiliation cannot qualify a defendant as an "Indian." *Lapier v. McCormick*, 986 F.2d 303 (1993). Because he is not an "Indian " in this context he cannot claim the benefits that he might stand to receive if he were a properly classified "Indian" and could seek removal to federal or tribal criminal court.

[5] Under this, alternative, and likely erroneous theory of the case, Kelley Point Park would be classified as Indian Country under the third prong of the definition of Indian Country that is contained within the Ten Major Crimes Act. 18 U.S.C. § 1151 (1948).

against them within Indian Country. Given this grant, Oregon has criminal jurisdiction over all the Indian Country within its boundaries, except the Warm Springs Reservation, and is consequently able to apply its criminal laws in Indian Country "with the same force and effect" as it is able to do so anywhere else within the State. *Id*.

Whether a particular swath of Indian Country was so designated before or after Public Law 280 was formally codified is irrelevant since Public Law 280 applies equally in either case. That is, Indian Country that was designated as such after 1953 is as subject to Oregon's jurisdiction as is land that was so designated before that date. In *U.S. v. Hoodie*, two enrolled members of the Burns Paiute Indian tribe, Robert Louis Hoodie and Aaron Daniel Kennedy, were charged in federal court with burglarizing the Burns Paiute Tribal Office Building. *U.S. v. Hoodie*, 588 F.2d 292, 293 (9th Cir. 1978). Pointing to Public Law 280, Hoodie and Kennedy moved for dismissal of the case on the grounds that it was the State of Oregon, and not the federal government, that had jurisdiction. *Id*. The District Court did not grant their motion, finding that 25 U.S.C. § 1321(a)(1) (1968) limited the scope of Public Law 280 such that it did not grant Oregon jurisdiction over Indian Country that came to be designated as such after 1953.[6] *Id*. at 294. Since the Burns Paiute Reservation was not established until 1972, the District Court held that it was not a part of the Indian Country over which Oregon had assumed jurisdiction in 1953. *Id*. However, the Ninth Circuit did not agree with the reasoning of the District Court and vacated its decision. *Id*. at 295.

Instead of agreeing with the District Court, the Ninth Circuit held that § 1321(a)(1) does not apply to the six States enumerated in Public Law 280. *Id*. at 294. Thus, it is only to

[6] 25 U.S.C. § 1321(a)(1) is the modified version of the uncodified § 7 of Public Law 280. It grants "any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian Country within such State to assume with the consent of the Indian tribe occupying the particular Indian Country or part thereof which could be affected by such assumption." The original § 7 did not require tribal consent.

States not having criminal jurisdiction over offenses committed by or against Indians in Indian Country that § 1321(a)(1) applies, and it is only these states that must obtain tribal consent before assumption of jurisdiction. *Id*. States which received their grant of jurisdiction under Public Law 280 have "automatic" jurisdiction over Indian Country and do not need tribal consent to maintain or establish it.[7] *Id*. Indeed, the legislative history of § 1321(a)(1) echoes the Ninth Circuit's findings and clearly indicates that Congress never intended the statute to limit Oregon's Public Law 280 jurisdiction. *Id*. Therefore since Oregon is a Public Law 280 State, it has automatic jurisdiction over all land classified as Indian Country regardless of whether that land was classified as Indian Country at the time that it received its grant of jurisdiction.

If it is found that Kelley Point Park is now Indian country, then it too is under the automatic criminal jurisdiction of the state of Oregon. Like the land at issue in *Hoodie*, the land here was not recognized as Indian Country in 1953 when Public Law 280 was codified. However, as was established in *Hoodie*, the lack of CHN's pre-1953 recognition will not in any way curtail Oregon's criminal jurisdiction over it since, as established above, it matters not whether the Indian Country in question was established as such pre- or post-1953.

C. THE STATE STATUTES UNDER WHICH OREGON BROUGHT A CRIMINAL ACTION AGAINST THOMAS CAPTAIN ARE CRIMINAL AND NOT REGULATORY IN NATURE.

This Court established, in *California v. Cabazon Band of Mission Indians*, that in order for a law to be enforceable under Public Law 280, it must be criminal and not

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[7] In terms of assuming jurisdiction, Oregon's grant of automatic jurisdiction means not only that it need not seek tribal acceptance in order to obtain jurisdiction, it also need no take affirmative legislative action. *Anderson v. Gladden*, 293 F.2d 463, 467 (9th Cir. 1961).

regulatory in nature. 480 U.S. 202, 209 (1987). That is, it must prohibit, not regulate. The shorthand for this test requires asking whether the conduct at issue violates the State's public policy. *Id*. at 209. Neither the complete rule nor the shorthand rule create a bright-line distinction between what type of provisions are criminal and what type are regulatory. *Id*. at 210.

Recognizing that there is no bright-line rule to aid Courts in their decision as to whether a law is criminal or regulatory, this Court requires a careful examination of any statute in question. In *Cabazon*, the statute there in question was one that limited the operation of bingo games within the State of California. *Id*. at 202. After performing a thorough analysis, the Court held that while a bingo statute might well be a prohibitory statute in some contexts, it was not in this case because the State sponsored gambling in other forms (e.g. the State-run lottery), it allowed exceptions to the bingo statue, and it knew that the game was widely played in California. *Id*. at 211. Given these factors it was clear that the State was merely regulating something that was generally permitted, and that it was not prohibiting any conduct outright as it would have if this were a true criminal provision. *Id*. Additionally, and although the State of California tried to argue otherwise, the playing of bingo and gambling generally were not against the State's public policy when both were such widespread activities. *Id*. at 213.

The facts of this case do not show similarity to those in *Cabazon* such that this Court could find that the provisions at issue are regulatory and not criminal as it did there. Here, the provisions in question are clearly criminal. The injury and destruction of archaeological sites and objects are not permitted within any context. Thus, while the state of California permitted the playing of bingo in a variety of settings, Oregon does not permit destruction or

injury to archaeological sites/objects under any circumstances whatsoever, [8] nor does it endorse or sponsor such conduct in any way. What is more, Oregon has a strong case for the fact that injuring and destroying archaeological sites and objects, as Captain did here, is against the State's public policy. While the average person is likely to gamble at some point in their lifetime (especially given the popularity of the Power Ball in the present economic climate), it is unlikely that the average person will ever injure or destroy an archaeological site or object. That is, there is nowhere near the same air of acceptance for such desecration as there is for casual gambling. Indeed, this lack of acceptance is codified at Or. Stat. Rev.§ 358.910 where the people of Oregon, through their State's legislative bodies, placed the stewardship of their cultural resources in the hands of the State, and gave it the power to punish those who would seek to damage them.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that the Court find that CHN does not have aboriginal title to the lands in Kelley Point Park, and that 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.

[8] While it may be argued that the State's allowance for the collection of arrowheads in Or. Rev. Stat. § 358.920(1)(b) is akin to injury or destruction, it is not. It is merely a separate allowance for the collection of certain lesser valued objects.