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Honoring Treaty Rights and Conserving Endangered Species after United States v. Dion

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HONORING TREATY RIGHTS AND CONSERVING ENDANGERED SPECIES AFTER *UNITED STATES v. DION*

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Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. [2]

I. INTRODUCTION

In *United States v Dion*[3] the Supreme Court expressly sidestepped the issue of whether the Endangered Species Act[4] abrogates Indian treaty rights to hunt and fish on reservation lands.[5] Six years later, the question raised in *Dion* remains unanswered by the Supreme Court. As framed, the issue forces a conflict between honoring treaty rights and conserving endangered and threatened species. The purpose of this note is to predict the Supreme Court's eventual resolution of the dispute as framed, and propose an alternative solution which honors treaty rights and conserves endangered species.

II. BACKGROUND

A. *Indian Treaty Rights to Hunt and Fish*

Although all Indian treaties were executed over 100 years ago[6], unless otherwise modified, these treaties remain in effect.[7] Indian treaties often fix geographic boundaries, define tribal rights on and off reservation lands, and detail issues of tribal sovereignty [8]

A treaty is "not a grant of rights to the Indians, but a grant of rights

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2. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at v, (1982 ed.).

3. 476 U.S. 734 (1986).

4. 16 U.S.C. §§ 1531-1544 (1988).

5. *Dion*, 476 U.S. at 745.

6. In 1871, Congress enacted legislation halting treaty making with Indian tribes. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544 (codified as carried forward at 25 U.S.C. § 71 (1988)). The statute called for a continuation of existing treaties. F Cohen, *supra* note 2, at 62.

7. Tsosie v. United States, 825 F.2d 393 (Fed. Cir. 1987).

8. F COHEN, *supra* note 2, at 62-70.

from them - a reservation of those not granted."[9] As a general rule, tribes hold treaty rights to hunt and fish on the lands reserved to them[10] and individual tribal members may assert those tribal treaty rights.[11] Even where a treaty is silent on hunting and fishing rights, tribes reserve the right to maintain their way of life which includes hunting and fishing.[12] Tribal hunting and fishing rights are property rights protected by treaty [13]

Courts have traditionally construed treaties from the perspective of the Indians at the time they entered the treaties[14] and resolved ambiguities in treaty language in favor of the tribes.[15] Several implicit policy reasons support these canons of construction. Courts acknowledge the communication difficulties[16] and unequal bargaining power[17] between Indians and non-Indians during most treaty negotiations and use these principles of treaty interpretation to redress the inequities.[18] Treaty interpretation also rests on the "unique trust relationship" between the United States and the tribes.[19]

In the context of this trust relationship between the federal government and Indian tribes, Congress maintains the power to unilaterally abrogate Indian treaties.[20] To pass constitutional muster, however, Congress must compensate the tribe if treaty abrogation takes a recognized property right.[21] The Supreme Court recognizes Indian treaty rights to

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9. United States v. Winans, 198 U.S. 371, 381 (1905).

10. *Dion*, 476 U.S. at 738. Cases have distinguished treaty rights on and off the reservation (Puyallup Tribe v. Dep't of Game of Washington, 391 U.S. 392 (1968) (Puyallup I)) and those lands held in fee from those lands on the reservation which the tribe no longer holds (Puyallup Tribe v. Dep't of Game of Washington, 433 U.S. 165 (1977) (Puyallup III)). The right to hunt a species does not necessarily entail a right to sell the catch. United States v. Top Sky, 547 F.2d 486, 487-88 (9th Cir. 1976). Courts have tied commercial hunting and fishing rights to traditional practice by the affected tribe. United States v. Dion, 752 F.2d 1261, 1265, n.11 (8th Cir. 1985) (en banc) *rev d in part*, 476 U.S. 734 (1986).

11. *Dion*, 476 U.S. at 738, n.4.

12. Menominee Tribe v. United States, 391 U.S. 404, 406 (1968). Additionally, "Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty." *Dion*, 476 U.S. at 745 n.8.

13. *Menominee Tribe*, 391 U.S. at 406.

14. *Winans*, 198 U.S. at 381; Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

15. *Choctaw Nation*, 397 U.S. at 631; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979). Additionally, some treaties expressly provide that interpretation of ambiguities should favor the Indians. *See, e.g., Choctaw Nation*, 397 U.S. at 631.

16. *Winans*, 198 U.S. at 380.

17. *Id.*, Choctaw Nation, 397 U.S. at 630-31.

18. *Cf. Washington State Commercial Passenger Fishing Vessel Ass n*, 443 U.S. at 675-76 (assuming equal bargaining position, the Court followed these canons of construction given the United States' "presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded.")

19. *Winans*, 198 U.S. at 380-81.

20. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

21. Sioux Nation v. United States, 448 U.S. 371 (1980). *But cf*, Tee-Hit-Ton Indians v. United

hunt and fish as compensable property rights.[22]

"The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[23] The Court requires "plain and clear congressional intent to abrogate Indian treaty rights,"[24] and has stated various standards for determining if the requisite intent is present.[25] The Court prefers, but does not require, an express declaration of congressional intent to abrogate a treaty [26] Legislative history, "surrounding circumstances," and "the face of the Act" can be sufficiently compelling to demonstrate congressional intent to abrogate.[27] In *Dion*, the Court reviewed and clarified the standard: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty "[28] One commentator refers to the test articulated in *Dion* as "the actual consideration and choice test."[29] The actual consideration and choice test is the Court's most recent articulation of the standard for treaty abrogation.

One area of congressional action that poses significant potential conflict with tribal treaty rights to hunt and fish is the Endangered Species Act of 1973 (ESA).[30] Following *Dion*, the Court would apply the actual consideration and choice test to determine if the ESA abrogates Indian treaty rights to hunt and fish species protected by the ESA. In doing so, the Court would assess whether the legislative history, surrounding circumstances, or the face of the ESA demonstrate sufficiently compelling evidence to demonstrate that Congress intended for the ESA to abrogate those Indian treaty rights.

B. *The Endangered Species Act of 1973*[31]

"[T]he Endangered Species Act of 1973 represents the most compre-

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States, 348 U.S. 272 (1955) in which the Court held that rights based solely on aboriginal title are not compensable. However, in that decision the Court explicitly distinguished property rights based solely on aboriginal title (which are not compensable) from those rights (including treaty rights) based on some congressional action which are compensable. *Id.* at 277-78, 288-89.

22. *Menominee Tribe*, 391 U.S. at 413.

23. Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934).

24. *Dion*, 476 U.S. at 738.

25. *Id.*

26. *Id.* at 739.

27. *Id.*

28. *Id.* at 740.

29. Robert Laurence, *The Bald Eagle, the Florida Panther and the Nation s Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of United States v. Dion*, 4 J. LAND USE & ENVTL. L. 1, 12 (1988).

30. 16 U.S.C. §§ 1531-1544 (1988).

31. 16 U.S.C. §§ 1531-1544 (1988).

hensive legislation for the preservation of endangered species ever enacted by any nation."[32] The ESA establishes procedures for listing endangered[33] and threatened[34] species and makes it illegal for "any person" to "take" a listed species.[35] Hearing an early case on the ESA, the Supreme Court declared, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[36]

Pursuant to the ESA, the United States Fish and Wildlife Service had listed 633 species as threatened or endangered in the United States as of October, 1991 [37] This list included 362 wildlife species and 271 plant species with habitat dispersed throughout all 50 states.[38]

The ESA provides a few, narrow exceptions to its sweeping prohibition on the taking of endangered and threatened species. The ESA excepts the taking of an endangered or threatened species by "(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or (B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes."[39] Legislative history indicates the Senate included an Alaskan native subsistence exception in the ESA as a hardship provision, "as a means of preserving social unity," and because the native "take" did not pose the principal threat to the protected species.[40] The House bill did not provide a similar exception.[41] The conference committee wrote the final version of the subsistence provision to include Alaskan non-natives similarly situated to the excepted natives.[42]

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32. Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

33. Defined as "any species (except some insect species) which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

34. Defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

35. 16 U.S.C. § 1538(a)(1)(B). The ESA defines the term "take" to mean, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Courts have interpreted this broad definition of "taking" to include United States Forest Service management practices when clearcutting caused a dramatic decline in endangered red-cockaded woodpeckers (Sierra Club v. Lyng, 694 F Supp. 1260 (E.D. Texas 1988)) and habitat destruction when a state maintained population of feral goats and sheep destroyed vegetation upon which an endangered bird, the Palila, depends (Palila v. Haw. Dep't of Land and Nat. Resources (Palila II), 649 F Supp. 1070 (D. Haw. 1986), *aff'd* 842 F.2d 1106 (9th Cir. 1988)).

36. *Tennessee Valley Authority*, 437 U.S. at 184. Ironically, the ESA's strength is provoking serious political attacks by ranching and pro-development interest groups as the ESA faces reauthorization in 1993. Michael J. Bean, *Taking Stock: The Endangered Species Act in the Eye of a Growing Storm*, 13 PUB. LAND LAW REV *supra* (1992) (in press).

37 50 C.F.R. §§ 17.11-.12 (1991).

38. *Id.*

39. 16 U.S.C. § 1539(e).

40. S. Rep. No. 307, 93rd Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2993. The ESA also contains a hardship exemption. 16 U.S.C. § 1539(b).

41. H.R. Conf. Rep. No. 740, 93rd Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code, Cong. & Admin. News 2989, 3006.

42. *Id.*

The House agreed to this compromise language because other language in the ESA allowed states to further restrict takings if necessary [43]

III. *UNITED STATES v DION*[44]

Dion arose when the United States Fish and Wildlife Service caught Dwight Dion, Sr. and three other Indian men in a "sting" operation.[45] Dion, an enrolled member of the Yankton Sioux, killed four bald eagles and a golden eagle on the Yankton Sioux Reservation and sold them to undercover agents.[46]

Among other things, the Government prosecuted Dion under the Eagle Protection Act (EPA)[47], which protects both bald and golden eagles, and the Endangered Species Act (ESA), which protects bald eagles. As one defense, Dion asserted that the Yankton Sioux reserved treaty rights to hunt and fish on their lands.[48] The trial court convicted Dion on several counts including killing bald eagles in violation of the ESA and selling eagle carcasses and parts in violation of the EPA.[49] The Eighth Circuit, sitting *en banc*, found that Congress did not abrogate treaty rights to hunt eagles by enacting the EPA or the ESA and remanded Dion's case for additional consideration.[50] *Dion* placed the Eighth Circuit in conflict with a Ninth Circuit opinion that the EPA abrogated Indian treaty rights to hunt protected eagles.[51]

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43. *Id.*

44. 476 U.S. 734 (1986).

45. United States v. Dion, 762 F.2d 674, 679 (8th Cir. 1985).

46. The Fish and Wildlife Service undercover operation began in response to information that "an excessive number" of protected birds "were being picked up" around the Yankton Sioux Reservation. *Id.* at 678. During the sting operation, which lasted more than two years, undercover agents paid "thousands of dollars in cash for protected bird artifacts, feathers, parts and whole birds." *Id.* at 678-79. The Yankton Sioux Reservation is "one of the most impoverished areas in the nation. The 1980 census reports that the 1979 per capita income on the Yankton Sioux Reservation was less than $2,500, and more than half of all families on the Reservation were below the poverty level." *Id.* at 679. The Eighth Circuit found that two of the defendants originally tried with Dion were entrapped. *Id.* at 690, 692.

47. 16 U.S.C. §§ 668-668(d) (1988).

48. United States v. Dion, 752 F.2d 1261, 1263 (8th Cir. 1985) (en banc), *rev'd in part*, 476 U.S. 734 (1986).

49. *Id.* at 1262.

50. *Id.* at 1270. The Eighth Circuit noted that convictions could be supported on retrial if a properly-instructed jury found the takings were for commercial purposes. *Id.* at 1270. The court cited historical and cultural authority that the Yankton Sioux "deplored" the selling of eagle parts and would not have considered it a part of tribal treaty rights. So the treaty rights, viewed from the perspective of the tribe, would not have included commercial sale of eagle parts. Thus, Dion had no treaty right to take an eagle for a commercial purpose. *Id.* at 1264.

51. United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) *cert. denied*, 449 U.S. 1004 (1980). The court in *Fryberg* reasoned that reasonable, non-discriminatory conservation statutes of general application abrogate Indian treaty rights when the statute must be applied to limit treaty rights in order to realize its conservation purpose. *Id.* at 1015.

In hearing *Dion*, the Supreme Court faced the issue of whether the EPA or the ESA abrogated Indian treaty rights to hunt protected eagles.[52] However, the Court resolved the controversy in *Dion* by addressing only the EPA issue.[53] While the Court in *Dion* didn't reach the question of whether the ESA abrogated Indian treaty rights to hunt and fish protected species, the Court's EPA analysis should foreshadow the Court's analysis when it eventually addresses this ESA question.

Using the actual consideration and choice test, the Court found "unmistakable and explicit" indications of congressional intent for the EPA to abrogate Indian treaty rights to hunt protected eagles.[54] The Court pointed to an exception on the face of the EPA which allows Indians to obtain a permit to take a protected eagle for religious purposes.[55] This exception is "difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians."[56] Additionally, the legislative history of the 1962 amendments to the EPA included Department of the Interior testimony that Indian religious ceremonies contributed to the threatened extinction of eagles. This testimony, which was attached to both the House and Senate reports, proposed the religious exception and permit system that Congress adopted.[57] Given evidence of congressional intent to abrogate Indian treaty rights on the face of the EPA and in its legislative history, the Court held the EPA completely abrogated Indian treaty rights to hunt protected eagles.[58]

Because the EPA was held to have abrogated Dion's treaty right to kill

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52. *Dion*, 476 U.S. at 737, n.3. All parties agreed the Yankton Sioux reserved treaty rights to hunt and fish on their lands. *Id.* at 737-38.

53. *Id.* at 745.

54. *Id.* at 745.

55. 16 U.S.C. § 668(a). The Eighth Circuit described the application procedure for the permits as "labyrinthine," noting it is "unnecessarily intrusive and hostile to religious privacy." To apply for a permit, an Applicant must complete extensive paperwork to certify that he or she is Indian and will use the eagle parts for religious purposes. The Applicant must detail the religious ceremonies in which the eagle parts will be used and name the religious leaders involved. The federal depository for eagle parts for Indian religious use takes 18 months to two years to fill Indian requests for eagle parts and has never granted approval to kill a golden eagle, although the statute provides that option. In contrast, the U.S. Fish and Wildlife Service had issued permits allowing non-Indian ranchers to kill depredating eagles. Golden eagles are not endangered or threatened. United States v. Abeyta, 632 F. Supp. 1301, 1303-04 (D.N.M. 1986).

56. *Dion*, 476 U.S. at 740.

57 *Id.* at 741-44.

58. *Id.* at 745. Given the Court's holding that the EPA completely abrogates tribal hunting rights with respect to protected eagles, one text raises the question of whether the defendant has a claim for compensation for the taking of a recognized property right. 3 R. CLINTON, N. NEWTON, & M. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 227 (1991). Because such a takings claim would arise from a treaty, tribes would file the claim through the Court of Claims. 28 U.S.C. § 1505 (1988).

eagles, he had no such right to assert as a defense to the ESA charge against him.[59] As such, the Court determined it did not need to reach the question of whether the ESA abrogated Indian treaty rights to hunt and fish protected species.[60] In dicta, the Court commented that the decision did not address Dion's contentions that the ESA and its legislative history "are to a great extent silent regarding Indian hunting rights" and that congressional intent to abrogate Indian hunting and fishing rights is "considerably more slim" for the ESA than for the EPA.[61] Nor did the Court address the Solicitor General's argument that hunting and fishing to extinction exceeds the scope of treaty rights to hunt and fish.[62]

IV DOES THE ESA ABROGATE INDIAN TREATY RIGHTS TO HUNT AND FISH?

To hold that a statute abrogates Indian treaty rights, the Court must find that Congress demonstrated plain and clear intent to abrogate those treaty rights.[63] In *Dion*, the Court adopted the actual consideration and choice test as the standard for assessing congressional intent to abrogate treaty rights.[64] To determine whether the ESA abrogated Indian treaty rights to hunt and fish applying the actual consideration and choice test, a court must ask the following question: In passing the ESA, did Congress give actual consideration to the conflict between conserving species and Indian treaty rights, and choose to resolve that conflict by abrogating the treaty rights? The answer must be "yes" for a court to conclude the ESA abrogates Indian treaty rights to hunt and fish protected species.

Only one federal district court has addressed this question since *Dion*. *United States v Billie* arose when a Seminole Indian killed an endangered Florida panther on the Seminole Indian reservation.[65] The *Billie* court found that the ESA abrogated Indian treaty rights to hunt and fish protected species, citing evidence of congressional intent to abrogate on the face of the ESA and in its legislative history [66]

On the face of the ESA, the *Billie* court saw the general comprehensiveness of the Act and the Alaska subsistence exception as evidence of

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59. *Dion*, 476 U.S. at 745.
60. *Id.*
61. *Id.*
62. *Id.* at 738, n.5. The Court also notes that Dion did not pursue a religious freedom claim at this level of the proceedings. *Id.* at 736, n.3. As such, this note does not include the analysis necessary to pursue a religious freedom claim, although such claims will often be connected. *See, e.g., Abeyta*, 632 F. Supp. 1301.
63. United States v. Dion, 476 U.S. 734, 738 (1986).
64. *Id.* at 739-40. *See* text accompanying notes 23-29 *supra.*
65. United States v. Billie, 667 F Supp. 1485 (S.D.Fla. 1987).
66. *Id.* at 1490.

congressional intent to abrogate Indian treaties. The court concluded that when the ESA refers to "all persons," and fails to exclude Indians, the ESA includes Indians.[67] Additionally, the *Billie* court analogized the ESA's subsistence provision for Alaska natives and similarly situated non-natives[68] to the EPA exception for Indian religious use.[69] Like the EPA exception, the subsistence provision indicates that "Congress considered Indian interests, balanced them against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife."[70]

This analogy fails. The EPA exception specifically addresses Indians who are primarily protected by treaty [71] In contrast, the ESA subsistence provision only addresses Alaska natives who are primarily protected by statute, the Alaska Native Claims Settlement Act of 1971 (ANCSA),[72] rather than by treaty [73] In passing ANCSA, Congress specifically rejected the traditional federal model for Indian relations and adopted a framework involving native corporations organized under state law [74] Congress was clearly aware of ANCSA, having passed the law only two years before passing the ESA.[75] Additionally, the Conference Committee considered the definition of Alaska natives in the ESA subsistence provision to be that definition contained in the ANCSA.[76] An exception for Alaska natives governed by a statutory scheme discussed in the ESA debates gives no indication that Congress considered treaty rights and chose to abrogate them. Absent congressional consideration of treaty rights in the subsistence exception, the general comprehensiveness of the ESA fails to demonstrate actual consideration of treaty rights. Therefore, the face of the ESA fails to demonstrate the specific congressional intent necessary to abrogate treaty rights.

While congressional intent to abrogate Indian treaties is lacking on

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67. *Id.*

68. 16 U.S.C. § 1539(e) (1988). *See* text accompanying notes 38-42 *supra.*

69. 16 U.S.C. § 668(a) (1988). *See* text accompanying notes 54-56 *supra.*

70. *Billie*, 667 F Supp. at 1490.

71. 16 U.S.C. § 668(a) and *Dion*, 476 U.S. at 740.

72. 43 U.S.C. §§ 1601-1628 (1988).

73. As of 1985, the United States had not entered into any treaties with Alaskan Natives. Respondent's Brief at *19 (LEXIS) United States v. Dion, 476 U.S. at 734 (1986) (No. 85-246) *citing* COHEN, *supra* note 2, at 739-58.

74. Arthur Lazarus, Jr. & W Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP PROBS. 132, 133-34 (1976).

75. Congress was obviously considering the subsistence needs of rural Alaskans in this time period. The Alaska National Interest Lands Conservation Act (ANILCA) (codified at 43 U.S.C. §§ 3101-3233 (1988) and other scattered sections of 16 and 43 U.S.C.) also included a subsistence provision for rural Alaskans (16 U.S.C. § 3101(c)).

76. H.R. Conf. Rep. No. 740, 93rd Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Admin News 2989, 3006.

the face of the ESA, sufficiently compelling legislative history and surrounding circumstances can demonstrate the congressional intent necessary to abrogate treaty rights.[77] In *Dion*, the Eighth Circuit, sitting *en banc*, could not "find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in the statutory language or legislative history" of the ESA.[78] In contrast, the *Billie* court concluded that Congress considered Indian treaty rights in passing the ESA.[79]

To support this conclusion, the *Billie* court relied on the legislative history of two unenacted predecessors of the ESA and an unexplained change between those bills and the final Act.[80] Both bills initially provided exceptions for Indian taking of protected species; however, Congress deleted the exception on one bill.[81] At a hearing on one bill, H.R. 13081, a Department of the Interior official testified that Committee members wanted to abrogate Indian treaty rights to hunt and fish protected species. The official advised the Committee that to abrogate treaty rights Congress must do so expressly Congress did not act on this advice.[82] In the context of this legislative history, the *Billie* court saw the subsistence exception as a limited version of the Indian exceptions in the unenacted bills. The court reasoned that Congress' choice of a more limited exception implicitly rejected the earlier, broader exceptions and evidenced congressional intent to abrogate Indian treaty rights to hunt and fish protected species.[83]

The *Billie* court's reliance on the unexplained disappearance of an Indian exception in the ESA is misplaced. In *Mead Corp. v Tilley*,[84] the Court did not "attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent."[85] Similarly, the silent legislative maneuvers which resulted in the absence of an Indian exception in the ESA should not be dispositive of whether the ESA abrogates Indian treaty rights to hunt and fish protected species.

Even if the legislative history of the ESA's unenacted predecessors provides insight to the ESA, that legislative history does not necessarily

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77. *Dion*, 476 U.S. at 739.

78. United States v. Dion, 752 F.2d 1261, 1269 (8th Cir. 1985) (en banc) *rev'd in part*, 476 U.S. 734 (1986).

79. *Billie*, 667 F Supp. at 1490-91.

80. *Id. citing* H.R. 13081, 92d Cong., 2d Sess. and S. 3199, 92d Cong., 2d Sess.

81. *Id.*

82. *Id.* at 1491.

83. *Id.*

84. 490 U.S. 714 (1989).

85. *Id.* at 723 *citing* Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947).

lead to the conclusion that Congress considered Indian treaty rights and chose to abrogate them. In the legislative history of H.R. 13081, officials warned a congressional committee that to abrogate treaty rights, Congress must do so expressly [86] If this legislative history applies, it is difficult to explain ESA's silence on Indian treaty rights except as an indication that Congress did not intend to abrogate those treaty rights. Moreover, Congress later considered amending the ESA to address Indian treaty rights and chose not to do so.[87] Congress' failure to act on this amendment leads to the conclusion that Congress did not intend the ESA to abrogate Indian treaty rights.

With no clear indication of congressional intent to abrogate treaty rights on the face of the ESA or in its legislative history, the ESA fails to satisfy the actual consideration and choice test. As such, the ESA cannot abrogate Indian treaty rights to hunt and fish.

V ARE TREATY RIGHTS TO HUNT AND FISH LIMITED IN SCOPE?

Even if the ESA did not abrogate Indian treaty rights to hunt and fish, the ESA may still affect those treaty rights. If treaty rights are limited in scope, then the ESA, as a statute of general application applies beyond the scope of the treaty right. Statutes of general application apply in Indian Country[88] unless treaty rights are implicated.[89] In *Dion*, the Solicitor General argued that hunting "to extinction" exceeds the scope of Indian treaty rights.[90] The Court expressly noted it was not addressing this argument.[91]

The argument that Indian treaty rights may be limited in scope for conservation purposes stems from a line of cases regarding state regulatory jurisdiction over tribal activities. The controversies involved the salmon and steelhead trout fisheries in Washington State where Indian tribes reserved treaty rights to fish "in common" with other citizens.[92] The *Puyallup* decisions held that in extraordinary circumstances states can regulate "in common" treaty fishing rights for conservation purposes so

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86. *Billie*, 667 F Supp. at 1491.

87. Respondent's Brief at *20 (LEXIS), United States v. Dion, 476 U.S. 734 (1986) (No. 85-246) *citing Hearings on Endangered Species Act Reauthorization Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 311 (1985).

88. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 91 (1960).

89. *See, e.g.*, EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

90. United States v. Dion, 476 U.S. 734, 738, n.5 (1986).

91. *Id.*

92. Puyallup Tribe v. Dep't of Game of Washington, 391 U.S. 392 (1968) (*Puyallup I*); Dep't of Game of Washington v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*); Puyallup Tribe v. Dep't of Game of Washington, 433 U.S. 165 (1977) (*Puyallup III*); Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979).

long as state regulations do not discriminate against Indians fishing under reserved treaty rights.[93] The cases are not on point because they involve state regulatory jurisdiction rather than federal pre-emption of treaty rights. However, because of the factual similarities of government conservation regulations conflicting with Indian treaty rights to hunt and fish, the Court may consider the state regulation cases.

Addressing the "in common", off-reservation treaty rights in *Puyallup II*, Justice Douglas stated in dicta that treaty "rights can be controlled by the need to conserve a species. .[T]he Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."[94] In *Puyallup III*, the Court held that "in common" treaty rights to take anadromous fish on reservation lands no longer held by the tribe can be limited by state regulations enforcing valid conservation purposes.[95] In *Dion*, the Eighth Circuit characterized the *Puyallup* decisions as interpreting "the scope of 'in common' treaty rights" rather than creating "an alternative method of abrogating treaty rights."[96]

The Supreme Court has been reluctant to apply the holding that treaty rights are subject to state regulation beyond the "in common" treaty rights and the factual situation in *Puyallap III*.[97] In *New Mexico v Mescalero Apache Tribe*, the Court refused to apply state fish and game laws to nonmembers hunting and fishing on the reservation.[98] The Court distinguished *Puyallap III* because it rested on qualified, "in common" treaty rights exercised on reservation lands no longer belonging to the tribe and a circumstance in which the state has an interest in conserving a "scarce, common resource."[99] In *Mescalero* the Court applied a balancing test, stating:

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93. *Id.*

94. *Puyallup II*, 414 U.S. at 49. One independent study showed the Indian take accounted for a constant 6.5% of the total catch for the years in controversy. AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 127 (1970). While Justice Douglas spoke from a conservation perspective, the group conducting the study adopted the following perspective, "Salmon, important in their own right, are important here because people are important. In this uncommon controversy the fish are tied to the questions of how a minority, a minority view, a minority style of life and thinking are to be treated." *Id.* at XXV-XXVI.

95. *Puyallup III*, 433 U.S. 165. During *Puyallup I and II* parties assumed they were addressing off-reservation fishing rights. After these cases, however, the Ninth Circuit Court of Appeals determined the Puyallup Reservation had not been extinguished. United States v. Washington, 496 U.S. 620 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974). The reservation encompassed most of the land where the disputed fishing had occurred. Thus, the focus in *Puyallup III* shifted to on-reservation fishing rights.

96. United States v. Dion, 752 F.2d 1261, 1269 (1985).

97. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 342 (1983).

98. *Id.* at 329-30.

99. *Id.* at 332 n.15.

> State jurisdiction is preempted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority [100]

Citing Congress' overriding goal of encouraging tribal self-government and economic sufficiency, the Court held that tribal interests outweighed state interests in this case.[101]

While *Mescalero* signals the Court's reluctance to extend the *Puyallup* rationale to implicate unqualified treaty rights, the case also demonstrates the Court's willingness to balance state and tribal interests when determining if state jurisdiction is preempted on reservation lands.[102] The Court developed this balancing test from previous statements weighing state, federal, and tribal interests.[103] However, the Court's discussions about weighing state, federal, and tribal interests have been restricted to the issue of state regulatory jurisdiction.[104] None of the Court's statements provide a precedent for using a balancing test to determine if a federal statute abrogates Indian treaty rights.[105]

Currently, the Court requires clear congressional intent for federal statutes to abrogate treaty rights.[106] This requirement is firmly grounded in the Indian Commerce Clause of the Constitution[107] which gives Congress sweeping power to regulate Indian affairs.[108] Extending the *Puyallap* rationale from state regulatory jurisdiction to federal statutes would provide an alternative, judicial method of treaty abrogation at the federal level. Such an extension would leave two, irreconcilable lines of cases on the standard for federal statutes to abrogate treaties. The resulting uncertainty would lead to additional litigation seeking to limit the scope of other Indian treaty rights and balance such rights against other federal interests.[109] Extending the rationale of the *Puyallup* decisions to apply to federal statutes and previously unqualified treaty rights would

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100. *Id.* at 334 *citing* White Mountain Apache v. Bracker, 448 U.S. 136 (1980).

101. *Mescalero Apache Tribe*, 462 U.S. at 344.

102. William C. Canby, Jr., *The Status of Indian Tribes in America Today*, 62 WASH. L. REV 1, 11-13 (1987).

103. *Mescalero Apache Tribe*, 462 U.S. at 334 *citing Bracker*, 448 U.S. 136.

104. *Id.*

105. Bracker, 448 U.S. at 141-145.

106. *Dion*, 476 U.S. at 738 and text accompanying notes 21-26, *supra.*

107. U.S. CONST. art. I, § 8, cl. 3.

108. *Bracker*, 448 U.S. at 142.

109. The Supreme Court has recently decided a plethora of Indian law cases. One source counted 63 United States Supreme Court cases between a casebook's first edition in 1973 and the third edition in 1991. 3 R. CLINTON, N. NEWTON, & M. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS P V (1991).

undermine the firm federal policy of promoting tribal self-government.[110] It is the proper role of Congress, not the Court, to regulate Indian affairs.

To maintain a cohesive body of law, the Court should not limit the scope of unqualified treaty rights or create a judicial balancing test for federal preemption. Rather, the Court should hold that the ESA does not abrogate Indian treaty rights to hunt and fish protected species.

VI. RECOMMENDATIONS

Honoring Indian treaty rights to hunt and fish need not compromise the public interest in conserving endangered and threatened species. Alternatives exist which allow for protecting threatened and endangered species through tribal systems. Tribes currently protect endangered species and their habitat.[111] Moreover, precedent exists for environmental statutes and regulations to delegate responsibilities to tribes.[112] With the federal government's assistance and funding, the Mescalero Apache Tribe established a comprehensive plan for fish and wildlife management.[113] In a similar vein, the federal government can work with tribes to develop similar plans to protect threatened and endangered species at a tribal level.

The framework currently exists for this plan to be implemented. If a statute is silent on a particular issue, the administrative agency charged with implementing the statute may promulgate rules "to fill any gap left, implicitly or explicitly, by Congress."[114] The agency is given wide discretion; the promulgated rules must only be a "permissible construction of the statute."[115] Tribes can work unilaterally or in conjunction with the

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110. *Bracker*, 448 U.S. at 143-44.

111. *See, e.g.*, Confederated Salish and Kootenai Tribes (CS&KT), Ordinance 44D, which, among other things, prohibits hunting of bald eagles, wolves, and grizzly bears unless the tribal cultural committee so allows. Montana has allowed grizzly bear hunting, although the state is currently under a temporary restraining order prohibiting the hunt. [Fund for Animals v. Turner, No. 91-2201 (MB), 1991 WL 206323 * 1 (D.D.C. Sept. 27, 1991)]. Thus, the tribe arguably offers stronger protection for listed species than the state in which the reservation is located. The CS&KT also protects wildlife habitat. *See, e.g.*, Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) (regarding protection of riparian areas for water quality and fisheries) *and* Joint Board of Control v. U.S., 832 F.2d 1127 (9th Cir.), *cert. denied*, 486 U.S. 1007 (1988) (regarding protection of tribal fisheries.) The CS&KT recently received authorization to perform ESA section 7 (the jeopardy provision) review on reservation lands. (Personal communication with John Carter, Attorney for CS&KT, March 25, 1992.) The Yakima Indian Nation zoned a heavily forested area of their reservation as a closed area. The tribe restricted public access to that area, protecting water quality and wildlife habitat. Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989).

112. Richard A. Du Bey, Mervyn T. Tano, & Grant D. Parker, *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 466-469 (1988).

113. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983).

114. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) *citing* Morton v. Ruiz, 415 U.S. 199, 231 (1974).

115. *Chevron U.S.A.*, 467 U.S. at 843.

United States Fish and Wildlife Service, the administrative agency charged with implementing the ESA, to develop tribal plans to protect threatened and endangered species.

Alternatively, Congress could amend the ESA to abrogate Indian treaty rights to hunt and fish protected species but provide for tribal participation in implementing the ESA on reservation lands. However, amending the ESA is less desirable than encouraging tribal protection of endangered species for three reasons. First, because the ESA will be subjected to numerous other amendments, it may not be politically wise to place another hurdle in the path of the ESA's reauthorization. Secondly, amending the ESA to include tribal participation entails abrogating treaty rights and thus infringes upon tribal sovereignty And finally, as discussed above, abrogating Indian treaty rights to hunt and fish protected species would subject the United States to takings claims.

VII. Conclusion

The issue of whether the ESA abrogates Indian treaty rights to hunt and fish protected species remains unresolved. The Court requires a showing of clear congressional intent for legislation to abrogate treaty rights. The requisite intent is absent in the ESA. Some have argued that treaty rights to hunt and fish are limited in scope and do not encompass the right to hunt and fish protected species. This argument creates an alternate judicial means of federal treaty abrogation and is a departure from current constitutional and common law Application of legal precedent leads to the conclusion that the ESA does not abrogate Indian treaty rights to hunt and fish protected species.

Honoring treaty rights to hunt and fish need not compromise federal efforts to conserve endangered and threatened species. This issue is best resolved by developing federally-assisted, tribal-based plans for conserving threatened and endangered species on reservation lands.