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THE EFFECT OF THE ENDANGERED SPECIES ACT ON TRIBAL ECONOMIC DEVELOPMENT IN INDIAN COUNTRY

I. INTRODUCTION

Long before the European expansion across the North American continent, Native Americans evolved complex relationships between tribes and the lands they occupied.¹ The tribes depended upon hunting, fishing, and gathering to feed, clothe, and shelter their numbers.² The ability to perform these activities has been characterized by the United States Supreme Court as “not much less necessary to the existence of the Indians than the atmosphere they breathed.”³

As the white settlers steadily advanced westward across the continent in the mid-1800s, the young American nation began to initiate policies designed to suffocate the tribes.⁴ The settlers forced the

1. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time Is That?*, 63 CAL. L. REV. 601, 605-06 (1975). Note in particular the significance of land in the religious life of various tribes. *Id.* at 605 n.17.

2. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 441 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

3. *Id.* at 442 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

4. See Wilkinson & Volkman, *supra* note 1, at 608-12 (describing the alteration in the balance of power between the United States and the tribes, and its subsequent impact on treaty negotiations). See also FRANCIS P. PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 41 (1994) (noting that because Indians had sided with

Indians⁵ on to reservations much smaller than the vast territories they had occupied prior to the arrival of the Europeans.⁶ During this time, the United States government and the various tribes entered into a series of treaties and agreements, allocating “rights to valuable resources . . . [in] land, minerals, wildlife and water.”⁷ The Indians, whose traditional customs and practices were essential to their way of life, strongly sought to preserve their hunting, fishing, and gathering rights formally on paper.⁸

These treaties and agreements, however, were often marred by incidents of bribery, threats, and outright fraud by the United States “negotiators.”⁹ Indians were often coerced into signing treaties, replete with ambiguous language, that left their rights to hunt and fish in a state of flux.¹⁰ This resulted in a federal-Indian struggle for control over the

the British during the American Revolution, the United States viewed the tribes as conquered peoples). Wilkinson and Volkman present the Indian perspective on American westward expansion, noting:

From the Indians’ point of view, it was a Hobson’s choice. Theoretically, they could keep their land and be overrun by white settlers. Or, they could sell their land, their ancestral heritage, and remove to a new site. Certainly no happy solution to such a dilemma could be found under the best of circumstances.

Wilkinson & Volkman, *supra* note 1, at 609-10 (footnotes omitted).

5. Although I realize that the more correct term to use is “Native Americans,” to be consistent with the scholarship and case law in this area I have used the terms “Indians” and “Native Americans” interchangeably. In fear of having my Note labeled “politically incorrect” by today’s standards, I telephoned Robert Anderson, the Associate Solicitor in the Division of Indian Affairs at the United States Department of the Interior. Anderson assured me that the term “Indian” can properly be used to refer historically to the tribes in the 48 contiguous states. The term “Native American” is broader and can be used to include Native Alaskans and Native Hawaiians. Telephone Interview with Robert T. Anderson, Associate Solicitor, United States Department of the Interior, Division of Indian Affairs (June 19, 1996).

6. Wilkinson & Volkman, *supra* note 1, at 609. See COHEN, *supra* note 2, at 28-29 (noting a “policy of separating Indians from non-Indians”). See, e.g., PRUCHA, *supra* note 4, at 188 (“As a result of the treaties, the Potawatomis were concentrated on . . . small reservations.”).

7. COHEN, *supra* note 2, at vii.

8. See *id.* at 442. See *infra* text accompanying note 65 (discussing the importance of hunting and fishing for Indian tribes).

9. Wilkinson & Volkman, *supra* note 1, at 610. Also cited as barriers to the conclusion of fair and solemn treaties are language and interpretation discrepancies, and unequal bargaining positions. *Id.* at 610-11.

10. See COHEN, *supra* note 2, at 442 (noting “frequent clashes” between tribes and states regarding fishing and hunting rights). In addition to problems with the language of

natural and wildlife resources contained on Indian reservations which continues to this day.¹¹ At first, the Indians clashed with the states in which their reservations were located over issues of tribal sovereignty and the reach of state regulatory authority.¹² More recently, Indians have strenuously resisted the impact of federal legislation upon their lives.¹³ Specifically, Indian tribes believe that their historic rights to hunt and fish are being infringed upon, either directly¹⁴ or indirectly,¹⁵ by federal conservation statutes such as the Endangered Species Act (ESA)¹⁶ and the Eagle Protection Act.¹⁷

While much of the beauty of Indian culture and tradition has been

the treaties, other difficulties impinged upon Indian rights:

The legal force of Indian treaties has not assured their enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only small parts of the signatory tribes [T]he courts will not inquire into whether an Indian tribe was properly represented during negotiation of a ratified treaty or whether such a treaty was procured by fraud or duress.

Id. at 63 (citations omitted). Courts have, however, recognized the effect of unequal bargaining power on the content of treaties and have held that the language must be construed in favor of the tribes. *Id.* at 444.

11. Wilkinson & Volkman, *supra* note 1, at 607 (discussing condemnation of tribal lands by federal agencies).

12. COHEN, *supra* note 2, at 442.

13. See Wilkinson & Volkman, *supra* note 1, at 607 nn.23-27 (listing cases claiming rights violations).

14. Congress may abrogate treaty rights directly. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 251 (Nicholas J. Spaeth et al. eds., 1993) [hereinafter AIL DESKBOOK]. Courts require clear evidence, either express or implied, of congressional intent to abrogate reserved rights. *Id.*

15. See *id.* at 253-56 (describing administrative regulations effecting hunting and fishing rights).

16. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)). Subsequent cites to sections within the ESA will use the precodification section numbers, followed by the U.S.C. citation.

17. Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d (1994)). See generally *United States v. Dion*, 476 U.S. 734, 745 (1986) (holding that Indian defendant could not assert a defense based on treaty rights in charges arising from shooting four bald eagles on his reservation because the Eagle Protection Act abrogated any such right); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (holding that where conservation measures are necessary to protect endangered wildlife, Government can intervene to limit Indian hunting and fishing rights).

stripped away over time, largely as a result of their forced relocation to reservations, the Indians have clung tightly to their treaty hunting and fishing rights.¹⁸ Indeed, these rights have remained enormously vital to them, both for subsistence needs and for their livelihood.¹⁹ Today, Indians in many areas of the country, the Pacific Northwest in particular, depend almost exclusively upon these treaty rights as their only means to earn a living.²⁰ Against this backdrop, a multitude of complex "Indian law" cases have arisen.²¹ These cases have struggled to clarify the scope of Indian treaty hunting and fishing rights, and to balance the tribes' interests against competing federal interests in wildlife conservation.²² At present, however, no coherent analytic framework can readily be gleaned.²³

This Note proposes an analytic framework with which to evaluate

18. See Wilkinson & Volkman, *supra* note 1, at 602-06 (describing Indian land as a sanctuary "where Indian customs and traditions are supreme").

19. "Fish, particularly salmon, still are an integral part of Indian life. As some other aspects of that life have disappeared, the role of fish and fishing has assumed even more importance—both economic and symbolic, and the symbolic may well be more significant than the economic." AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 71 (1970).

20. See *id.* at 66-71 (describing the lifestyle of Indians living in the Pacific Northwest). For an in-depth discussion of the adverse impact the ESA listing of certain species of the Columbia River anadromous fish will have on Indian fishing rights, see Robert J. Miller, Comment, *Speaking With Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991).

21. Sally J. Johnson, Note, *Honoring Treaty Rights and Conserving Endangered Species After United States v. Dion*, 13 PUB. LAND L. REV. 179, 190 n.109 (1992) ("One source counted 63 United States Supreme Court cases between a casebook's first edition in 1973 and the third edition in 1991.").

22. See *infra* part II.A-C.

23. Felix S. Cohen, one of the greatest scholars ever to enter the domain of Indian Law, described it as an "extraordinarily rich and diverse field." COHEN, *supra* note 2, at 1. Cohen elaborated, saying:

[T]he cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity, and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from those other fields.

Id.

the ESA's effect on tribal economic development in Indian country.²⁴ The impact of the ESA on the exercise of Native American treaty rights to hunt and fish has been considered in numerous law review articles²⁵ and a pair of published court decisions.²⁶ Far less attention has been paid to a related issue: the extent to which the ESA's takings prohibition²⁷ limits economic development that results in the incidental taking of a listed species.²⁸ In other words, tribes hold full rights of

24. Felix Cohen explains that "[w]hile the public is probably most familiar with the term Indian Reservation, for most jurisdictional purposes the governing legal term is 'Indian country.'" *Id.* at 27.

25. See generally Johnson, *supra* note 21, at 185-88 (concluding that the ESA does not abrogate treaty hunting and fishing rights and proposing an alternative to honor traditional treaty rights while conserving endangered species); Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 860 (1991) [hereinafter Laurence, *The Abrogation of Indian Treaties*] ("examin[ing] whether treaty rights should be set aside in the face of a federal statute of general applicability which does not mention Indian treaties."); 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 (1988) [hereinafter Laurence, *The Bald Eagle*] (discussing Congress' different methods of treaty abrogation and referring to abrogations as "quiet" when there is no renegotiation with the tribes, no compensation, and no definite evidence that Congress was thinking of treaties when it passed the legislation); Miller, *supra* note 18 (exploring the adverse effects ESA listing has upon traditional Indian fishing rights).

26. See *United States v. Dion*, 476 U.S. 734, 738 (1986) (determining that the Eagle Protection Act abrogated treaty hunting rights); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (holding that the ESA abrogated Seminole hunting rights).

27. The ESA has three provisions relevant to "takings": (1) ESA § 3(19) defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19); (2) ESA § 9 defines prohibited acts, including "tak[ing] any [listed species] within the United States." ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B); (3) ESA § 10 allows the government to permit prohibited takings if they are "incidental to, and not the purpose of" a lawful activity. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). Thus, the general definition in ESA § 3 does not distinguish between direct and incidental takings; however, § 10 carves out a limited exception for "incidental takings." In order for the exception in § 10 to apply, a person committing a taking must first receive a permit from the government. ESA § 10, 16 U.S.C. § 1539. For the purposes of this Note, the hypothetical proposed in part III.C assumes that the taking occurs incidental to development on the reservation, and that the Indians have purposely not applied for a § 10 permit.

28. This issue surfaced in September 1994 in Oregon. Tribal fishing of non-listed salmon stocks resulted in the incidental takings of listed salmon. Telephone Interview with Steven Hoffman, Attorney in the Solicitor's Office of the United States Department of the Interior, Division of Conservation and Wildlife (Feb. 2, 1995). The tribes argued that the federal government could only limit such incidental takings attributable to the exercise of their treaty fishing rights if the government fully regulated or eliminated all non-Indian

possession to their lands,²⁹ and often pursue economic opportunities to improve the conditions of individual tribe members.³⁰ As the tribes develop their lands³¹ they face probable conflict with the Department of the Interior if the tribal lands provide habitat to ESA-listed species.³²

There are several interests involved in this scenario. First, the tribes have attributes of sovereignty within the United States territorial borders³³ even though treaties govern much of the relations between tribes and the federal government.³⁴ Second, the United States has recognized the rights of tribes to economic self-sufficiency.³⁵ Third, the United States has the power, through the ESA, to preserve dwindling species and their habitats.³⁶

This Note analyzes the difficult question of whether the federal government should permit tribes to pursue economic development without considering the impact on endangered species and their habitats.³⁷ Part II provides an historical analysis of Indian treaty law.

activities which result in incidental takings. Because the parties settled the case by agreeing to continue discussing the issue, the courts have not addressed the issue. *Id.*

29. COHEN, *supra* note 2, at 472 (noting six means by which tribes acquired real property interests). *See also* *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835) (“[Indians’] right of occupancy is considered as sacred as the fee simple of the whites.”).

30. *See* Fox Butterfield, *Tribal Investment Bank Helps Indians and Maine*, N.Y. TIMES, Aug. 4, 1985, § 1, at 20 (describing Penobscott tribe’s investments after winning \$81.5 million as “compensation for lands taken by the United States government”); Bill Day, *The Great Emancipator*, BUS. REC. (Des Moines), June 19, 1995, § 1, at 14 (describing benefits of casino to Mesquakis tribe).

31. Butterfield, *supra* note 30 (noting the Penobscotts have built an ice hockey rink on a river island, and plan to build an audio cassette factory); Day, *supra* note 30 (noting that the Mesquakis tribe has built a medical clinic and apartments on their land, and plan to install a sewer system and build a school).

32. *See infra* part III.C (posing a hypothetical based upon this issue).

33. *See* COHEN, *supra* note 2, at 244 n.25.

34. *Id.* at 242-44 (describing limitations on tribal sovereignty as a result of treaties). *But see* David Lamb, *A Tribe that Means Business*, L.A. TIMES, Dec. 2, 1992, at A1 (discussing Maine tribes multi-million dollar settlements with the United States for land taken in violation of 1790 treaty).

35. *See, e.g.*, Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4)-(5) (1994) (recognizing tribes’ interests in economic development and self sufficiency and finding that tribes have exclusive rights to regulate gaming on Indian lands).

36. ESA § 2(a)(4); 16 U.S.C. § 1531(a)(4) (“[T]he United States has pledged itself as a sovereign state . . . to conserve . . . the various species . . . facing extinction . . .”).

37. In answering this question it is necessary to consider the following additional issues: What did the United States mean when it granted the Indians, expressly or

Part III presents an overview of the ESA and its impact on tribal economic development. Additionally, Part III poses a hypothetical that presents the tensions between tribal interests in economic development and the federal government's interest in preserving endangered species. Part IV examines the previous treatment of the conflict between tribal interests and the ESA in direct takings situations. Part V applies the direct takings analysis to the incidental taking situation presented in the hypothetical and proposes a means by which the federal government and the tribes can cooperate to better protect both the tribes' acknowledged treaty rights and wildlife resources.

II. THE ORIGINS AND SCOPE OF INDIAN HUNTING AND FISHING RIGHTS

Part II outlines the historical development of present day tribal rights. Section A discusses the sources of these rights with emphasis on the treaties wherein the federal government made pledges in exchange for the tribes relinquishing territory. Section A also discusses the principles the courts developed in interpreting treaties, and the judicial recognition of the trust relationship between the federal government and Indian tribes. Section B examines congressional power to abrogate treaties and the Supreme Court's rule to determine whether a federal law abrogates treaty rights. Finally, Section C briefly examines whether the ESA abrogates tribal hunting and fishing rights.

A. *The Sources of Tribal Hunting and Fishing Rights*

The federal government guaranteed tribes' hunting and fishing rights on numerous occasions³⁸ and through a variety of devices, including treaties,³⁹ agreements,⁴⁰ statutes,⁴¹ and executive orders.⁴² These

impliedly, treaty rights to hunt and fish? What did the Indians understand their rights to be? See *infra* part II.A.

38. See, e.g., PRUCHA, *supra* note 4, 448-500 (listing 366 treaties ratified between 1778 and 1868).

39. COHEN, *supra* note 2, at 444-45. See, e.g., *United States v. Dion*, 476 U.S. 734, 737 (1986) (describing an 1858 treaty between the United States and the Yankton Tribe); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 662 n.2 (1979) (noting six treaties with 20 tribes in 1854 and 1855); *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (construing the 1854 Treaty of Medicine Creek); *United States v. Winans*, 198 U.S. 371 (1905) (discussing an 1859 treaty with Yakima Nation).

guarantees⁴³ preserved Indians' rights⁴⁴ to hunt and fish on their reservations and at traditional off-reservation locations.⁴⁵ The tribes and individual Indians, however, have struggled to enforce these guarantees,⁴⁶ asserting that the passage of time has not diminished the force of the treaties.⁴⁷

40. COHEN, *supra* note 2, at 445. See also PRUCHA, *supra* note 4, at 508-16 (listing 73 ratified agreements). See, e.g., *Antoine v. Washington*, 420 U.S. 194 (1975) (deciding the effect of an 1891 agreement on the hunting rights of defendant Indians); *Winters v. United States*, 207 U.S. 564 (1908) (construing the water rights to the Fort Belknap Reservation under an 1888 agreement).

41. COHEN, *supra* note 2, at 445-46. See also *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (discussing fishing rights under federal statutes); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (construing a federal statute granting reservation lands to the Metlakatla Indians).

42. COHEN, *supra* note 2, at 445.

Congress passed legislation ending the era of formal treaty-making with the Indian tribes in 1871. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)) ("[H]ereafter no Indian nation or tribe . . . shall be . . . recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . ."). See generally PRUCHA, *supra* note 4, at 305-10 (discussing the legislative debate). Because the federal government could no longer use formal treaties, it turned to executive orders, statutes, and agreements. *Id.* at 311-33 (describing treaty substitutes). As a result, courts have applied the same liberal rules of construction used with treaties, see *supra* note 10, to the construction of these less familiar agreements to confirm the existence of hunting and fishing rights. See, e.g., *Antoine v. Washington*, 420 U.S. 194, 203 (1975) ("The change [from a treaty to an agreement] in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes . . .").

43. In addition to the express guarantees contained in treaties, agreements, statutes, and executive orders, courts have recognized "aboriginal claims" based on "immemorial custom and practice." COHEN, *supra* note 2, at 442. See also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-52 (7th Cir.) (distinguishing treaty-recognized rights from aboriginal rights), *cert. denied*, 464 U.S. 805 (1983); *State v. Coffee*, 556 P.2d 1185, 1189-94 (Idaho 1976) (finding that the aboriginal rights of the Kootenai Tribe were extinguished by the ratification of a treaty to which the tribe was not a party).

44. Although Indian hunting and fishing rights have emerged from various sources, see *supra* notes 39-42 and accompanying text, for the purposes of this Note the terms "treaty" and "treaty rights" will be used to refer to such rights, regardless of their source.

45. Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, 87 Interior Dec. 525, 526 (1980) [hereinafter *Martz Opinion*].

46. See *infra* notes 50-55 and accompanying text.

47. Treaties guarantee rights forever. *Wilkinson & Volkman*, *supra* note 1, at 602. For example, in frequently cited prose, Senator Sam Houston said that treaty rights were guaranteed "[a]s long as water flows, or grass grows upon the earth, or the sun rises." *Id.*

Each judicial interpretation of the reach of the Indians' treaty rights is meaningful to the on-going federal-Indian dispute. As a general rule, courts construe these treaties, not as grants of rights to Indians, but as instruments preserving rights not expressly granted to the federal government.⁴⁸ In *United States v Winans*,⁴⁹ the Supreme Court established the standard for examining treaty hunting and fishing rights.⁵⁰ The Court examined a provision, common to many Indian treaties, granting the Yakima Indians the off-reservation privilege of taking fish at all their "usual and accustomed places."⁵¹ The Court emphasized the immense cultural significance of fishing to the Yakima way of life.⁵² This right to fish in the controverted locations, reserved to the Yakima Indians in the 1859 treaty,⁵³ "was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."⁵⁴ In other words, the treaty placed a limitation on the rights already possessed by the Indians, but it did not divest the Indians of these rights.⁵⁵

Unless an Indian treaty is subsequently modified or terminated, its original terms remain in effect.⁵⁶ Federal courts have acknowledged, however, that the treaty-making process was often fraught with problems,

(citing CONG. GLOBE, 33d Cong., 1st Sess., app. 202 (1854)). See also COHEN, *supra* note 2, at 68.

48. COHEN, *supra* note 2, at 444.

49. 198 U.S. 371 (1905).

50. See *id.* at 380-81.

51. *Id.* at 378.

52. *Id.* at 381-82. "The right to resort to the fishing places . . . was a part of larger rights . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* at 381.

53. *Id.* at 377-78.

54. *Id.* at 381.

55. *Id.* These rights were to continue regardless of future ownership on nonreservation lands. *Id.*

56. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)). While Congress' primary purpose for this Act was to terminate treaty-making with the Indian tribes, this statute additionally clarified that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." 25 U.S.C. § 71 (1994). See also COHEN, *supra* note 2, at 62-63.

such as exploitation,⁵⁷ large disparities in negotiation skills,⁵⁸ and knowledge of the language.⁵⁹ For these reasons, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,⁶⁰ the Supreme Court held that an Indian treaty must be construed, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."⁶¹ Thus, for example, in *Menominee Tribe v. United States*,⁶²

57. In *Jones v. Meehan*, 175 U.S. 1, 11 (1899), Justice Gray cautioned that, in construing an Indian treaty, one must bear in mind that:

[T]he negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . .

Id.

58. The white negotiators often invited the Indians to rely on the good faith of the United States to protect their hunting, fishing, and gathering rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 667 (1979). While negotiating the Treaty of Point-No-Point, Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, *id.* at 666, stated:

Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?

Id. at 667 n.11 (citation omitted).

59. *E.g.*, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). A series of treaties in the Puget Sound region were conducted as follows:

Since . . . the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted . . . to the Indians in the Chinook jargon and then translated into native languages by Indian interpreters. Chinook jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained.

Id. at 356.

60. 443 U.S. 658 (1979).

61. *Id.* at 676 (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). *See also* *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Seufert Bros. v. United States*, 249 U.S. 194, 198-99 (1919); *United States*

the Supreme Court stated that, although the 1854 treaty did not mention hunting and fishing rights, the language, "to be held as Indian lands are held,"⁶³ impliedly includes the right of Indians to engage in these activities.⁶⁴

Hunting and fishing rights span a spectrum ranging from takings for religious or recreational purposes, to commercial fisheries operated solely for economic gain.⁶⁵ Therefore, courts interpret the scope of the Indians' treaty hunting and fishing rights broadly to enable the Indians to remain self-sufficient.⁶⁶ Consistent with this purpose, courts interpret the parties' intent by examining the activities the Indians engaged in prior to and at the time the treaty was made.⁶⁷ If courts make the determination that the parties intended to grant hunting or fishing rights, the tribes are then allowed to continue to modernize their methods of hunting and fishing as long as they can demonstrate a history of updating

v. *Winans*, 198 U.S. 371, 380-81 (1905).

62. 391 U.S. 404 (1968). In *Menominee*, the Tribe brought an action to recover damages arising from the loss of hunting and fishing rights on their Wisconsin reservation. *Id.* at 407. The Menominee were granted their reservation by the Treaty of Wolf River in 1854. *Id.* at 405. The Court was required to determine the effect of a congressional act terminating federal supervision over the tribe. *Id.* at 408. Wisconsin argued that the Indians were subject to the state hunting and fishing regulations. *Id.* at 407.

63. *Id.* at 406 (quoting *Menominee Tribe of Indians v. United States*, 388 F.2d 988, 1002 (Ct. Cl. 1967)). "[T]he words 'to be held as Indian lands are held' sum up in a single phrase the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life." *Id.* at 406 n.2. (quoting the Solicitor General's brief and citing Treaty with the Choctaw Indians, Jan. 3, 1786, U.S.-Choctaw Nation, art. 3, 7 Stat. 21, 21; Treaty with the Shawnee Indians, Jan. 31, 1786, U.S.-Shawnee Nation, art. 6, 7 Stat. 26, 27; Treaty with the Wyandot Indians, Jan. 9, 1789, U.S.-Wyandot Tribe, art. 4, 7 Stat. 28, 29; Treaty with the Wyandot Indians, Aug. 3, 1795, U.S.-Wyandot Tribe, art. 5, 7 Stat. 49, 52; Treaty with the Osage Indians, Nov. 10, 1808, U.S.-Osage Tribe, art. 8, 7 Stat. 107, 109; Treaty with the Comanche Indians, Aug. 24, 1835, U.S.-Comanche Nation, art. 4, 7 Stat. 474, 474-75).

64. *Menominee Tribe*, 391 U.S. at 406 ("The essence of the Treaty . . . was that the Indians were authorized to maintain on the new lands ceded to them . . . their way of life which included hunting and fishing.") (footnote omitted). The Supreme Court noted that in terminating federal supervision of the tribe, Congress declined to expressly preserve treaty hunting and fishing rights. *Id.* at 408. The Court held, nonetheless, that the tribe reserved these rights, absent an express declaration by Congress of its intent to abrogate them. *Id.* at 412-13.

65. Martz Opinion, *supra* note 45, at 526.

66. COHEN, *supra* note 2, at 446.

67. *Id.* at 446-47.

them.⁶⁸

The courts, however, must determine whether a specific individual or tribe has the right to exercise tribal treaty hunting and fishing rights on a case by case basis.⁶⁹ A court's interpretation of an Indian treaty rests largely upon its evaluation of several important factors: the nature of the treaty right at issue; whether the right is held exclusively by the tribe in common with all citizens of the territory; the status of the individual; the nature of the taking; whether the taking occurred on or off the reservation; and any applicable conservation statutes or regulations.⁷⁰

Treaty interpretation further requires recognition of the "unique trust relationship" between the tribes and the federal government through its

68. *Id.* at 447 (noting tribes can utilize fishing nets, modern boats, and any other modern technique).

69. *Id.* In developing this section I have relied on information received from Associate Solicitor, Robert L. Baum, United States Dep't of the Interior, Division of Conservation and Wildlife, Address at the 19th Annual Federal Bar Assoc. Indian Law Conference 4 (April 7, 1994) (speech outline on file with author).

In his address, Baum compares *United States v. Dion*, 752 F.2d 1261 (8th Cir.) (en banc), *cert. granted*, 474 U.S. 900 (1985), and *rev'd in part*, 476 U.S. 734 (1986) [hereinafter *Dion I*] (holding that while the Yankton Sioux tribe has the right to hunt on the reservation for eagles for non-commercial purposes, this right does not extend to hunting for commercial purposes) and *United States v. Top Sky*, 547 F.2d 486, 488 (9th Cir. 1976) (holding that treaty hunting rights did not include the right to sell eagles commercially) with *United States v. Bresette*, 761 F. Supp. 658, 662 (D. Minn. 1991) (distinguishing *Dion I* and *Top Sky* by citing "ample evidence" that the Chippewa believed that their treaty rights included the right to take and sell migratory birds and their feathers). Baum, *supra*, at 4 n.4.

70. See Martz Opinion, *supra* note 45, at 526 (listing the important factors). See also COHEN, *supra* note 2, at 450-55 (discussing off-reservation rights and rights held in common with all citizens of the territory).

agency, the Department of the Interior.⁷¹ The concept of a trust relationship between the federal government and Indian tribes first emerged in 1831⁷² with the Supreme Court's decision in *Cherokee Nation v. Georgia*.⁷³ The Cherokee Nation brought an original action before the Supreme Court to enjoin the enforcement of state laws on lands guaranteed to the tribe by a treaty.⁷⁴ Chief Justice Marshall,⁷⁵ wrote that the court lacked original jurisdiction.⁷⁶ He reasoned that, although the tribe was a "distinct political society" and thus a "state,"⁷⁷ the tribe was neither a state of the United States nor a foreign state.⁷⁸ Rather, Marshall defined the tribes as existing "in a state of pupilage. Their relation to the United States resembles that of a ward to his

71. Baum, *supra* note 69, at 13. The Department of the Interior's responsibilities for trust resources were recently clarified by a Secretarial Order. *Id.* Order No. 3175 requires the component bureaus and offices of the Department:

inter alia, (1) to "operate within a government to government relationship with federally recognized Indian tribes"; (2) to be "aware of the impact of their plans, projects, programs or activities on Indian trust resources"; (3) to "explicitly" address any anticipated effects on trust resources when engaged in the planning of any proposed project or action; and (4) "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may effect"

Id. (citing Order of the Secretary of the Interior No. 3175 (Nov. 8, 1993)). For a discussion of the development of the trust relationship and the ways it limits congressional power, see COHEN, *supra* note 2, at 220-28.

72. COHEN, *supra* note 2, at 220.

73. 30 U.S. (5 Pet.) 1 (1831).

74. *Id.* at 19-20.

75. Although frequently cited, this opinion did not capture the votes of a majority or even a plurality of the Court; there was a 2-2-2 split among the six participating justices. DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW, CASES AND MATERIALS* 137 (3d ed. 1993). Justices Marshall and McLean viewed the tribes as "domestic dependent nations." *Cherokee Nation*, 30 U.S. (5 Pet.) at 16; Justices Johnson and Baldwin recognized the tribes as possessing no sovereignty at all; GETCHES ET AL., *supra*, at 137; Justices Thompson and Story, equated the Cherokee Nation with a foreign nation and thus, possessing sovereignty. *Id.*

76. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19 ("[T]he framers of our Constitution had not the Indian tribes in view, when they opened the Courts of the Union to controversies between a state or the citizens thereof, and foreign states.").

77. *Id.* at 15. Counsel for the Tribe argued that the Cherokees were a foreign nation and thus able to bring suit under the Supreme Court's Article 3 original jurisdiction. *Id.*

78. *Id.* at 16, 19.

guardian.”⁷⁹

B. Congressional Power to Abrogate Indian Treaties

Notwithstanding this federal trust responsibility to the Indian tribes, Congress may unilaterally abrogate Indian treaties.⁸⁰ Congress’ power over the tribes and their property further encompasses Congress’ ability to terminate its trust obligation.⁸¹ In order to survive constitutional scrutiny, however, Congress must compensate a tribe if, in abrogating a treaty, it takes a recognized property right.⁸²

“[T]he intention to abrogate or modify a treaty is not to be lightly

79. *Id.* at 16. The trust principles established by this case have been applied in many subsequent decisions to define and protect the rights of Indian tribes and individuals. COHEN, *supra* note 2, at 220. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (noting that as long as special treatment for the tribes “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832) (noting that the Cherokees “placed themselves under the protection of the United States”).

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

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulation of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.

Id. at 566. See generally Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227-29 (1975) (criticizing the *Lone Wolf* approach in favor of a broad trustee rule).

81. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (discussing the Ute Partition Act terminating federal supervision of tribal property); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (discussing the impact of termination on treaty hunting and fishing rights); *United States v. Seminole Nation*, 299 U.S. 417, 428-29 (1937) (discussing liquidation and distribution of tribal property); *United States v. Nice*, 241 U.S. 591, 598 (1916) (discussing the effect of termination on federal regulation of alcohol on reservation).

82. E.g., *United States v. Sioux Nation*, 448 U.S. 371, 421 (1980) (upholding Court of Claims application of the “good faith effort” test to require compensation to the Sioux Nation for appropriation of the Black Hills). *But cf.* *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The *Tee-Hit-Ton* Court held that property rights based exclusively on aboriginal title were not compensable. *Id.* at 288-89. By contrast, rights created through congressional action, such as treaty rights, must be compensated. *Id.* at 277-78.

imputed to the Congress.”⁸³ Thus, the mere fact that Congress holds the power to abrogate Indian treaty rights does not mean that every potentially inconsistent statute constitutes an abrogation.⁸⁴ Instead, the Court requires that Congress’ intention to abrogate Indian treaty rights be “clear and plain.”⁸⁵ In *United States v. Dion (Dion III)*,⁸⁶ the Supreme Court acknowledged the differing standards it has used to determine how Congress may demonstrate such a clear and plain intent.⁸⁷ Although the Court prefers an “explicit statement by Congress” to abrogate a treaty, it does not require one.⁸⁸ The Court will find congressional intent sufficient to abrogate a treaty as long as compelling evidence can be readily gleaned from “the statute’s ‘legislative history,’ . . . ‘surrounding circumstances,’ . . . [or] ‘the face of the Act.’”⁸⁹ *Dion III* establishes an important three-part test for finding treaty abrogation in the absence of express congressional intent: “What is essential is [1] clear evidence that [2] Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and [3] chose to resolve that conflict by abrogating the treaty.”⁹⁰ This contemporary test, also referred to as the “actual consideration and choice test,”⁹¹ remains the standard for determining

83. *Menominee Tribe*, 391 U.S. at 413 (quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934)). The Court also stated: “We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation” *Id.* (citation omitted).

84. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 84 (1981). See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979) (“Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights”).

85. *United States v. Dion*, 476 U.S. 734, 738 (1986) (*Dion III*). See also COHEN, *supra* note 2, at 223 (explaining that although courts have not firmly articulated how a clear and plain intent must be demonstrated, “the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute”).

86. 476 U.S. 734 (1986).

87. *Id.* at 739.

88. *Id.* (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

89. *Id.* (citations omitted). See also COHEN, *supra* note 2, at 223.

90. *Dion III*, 476 U.S. at 739-40. See also Miller, *supra* note 20, at 566-67 (breaking down the *Dion III* test and discussing the probable abrogation of treaty rights under the ESA).

91. Laurence, *The Bald Eagle*, *supra* note 25, at 12. See also Johnson, *supra* note 21, at 183-85.

when an Indian treaty has been effectively abrogated by congressional action.

C. *The ESA and Treaty Rights*

One area brimming with controversy is the extent to which the ESA conflicts with Indian treaty rights for economic development through, *inter alia*, hunting and fishing.⁹² One commentator has suggested that, in the aftermath of *Dion III*, the Court would have to apply the actual consideration and choice test to determine if the ESA abrogates treaty rights to hunt and fish particular species protected by the statute.⁹³

It is possible, however, that the question of abrogation need not arise.⁹⁴ An important rule of construction requires that a statute and an Indian treaty be construed in harmony to the extent possible.⁹⁵ Therefore, as long as no irreconcilable conflict exists between a treaty and the statute,⁹⁶ both can be given their full effect.⁹⁷ The Solicitor's Office of the Department of the Interior has applied this rule to the ESA-tribal dispute, arguing that no conflict between the ESA and treaty hunting and fishing rights exists because, as a matter of law, Indian treaty rights simply do not extend to the takings of species which are threatened with

92. See *supra* notes 33-36 and accompanying text.

93. Johnson, *supra* note 21, at 181. Johnson noted that a court would have to ask: "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?" *Id.* at 185.

94. Martz Opinion, *supra* note 45, at 527.

95. *Id.* (citing *United States v. Payne*, 264 U.S. 446, 448 (1924)).

96. For example, in the case of a direct taking, a strong argument can be made that there is a conflict between the treaty right to take a species and the ESA's provisions protecting such a species. See *United States v. Dion*, 476 U.S. 734, 738 (1986) (concluding that Congress, by enacting the Eagle Protection Act, abrogated the tribe's hunting and fishing rights). By contrast, in the indirect taking situation, Indians may or may not have a treaty right to engage in the conduct that is resulting in the indirect taking of a listed species. If a court determines that the Indians retain a right to engage in the conduct, then it should apply the direct takings analysis. If, however, the Indian's conduct is not protected, the Indian must cease his activities immediately to avoid further jeopardizing the status of the listed species. See also Martz Opinion, *supra* note 45, at 527 (arguing that the ESA is in harmony with treaty hunting and fishing rights and thus does not abrogate those rights).

97. Martz Opinion, *supra* note 45, at 527. See also George C. Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 406 (1979) ("[T]he initial search should be for an interpretation that resolves the contradiction by reconciling both policies if possible.").

extinction.⁹⁸

III. THE ENDANGERED SPECIES ACT OF 1973⁹⁹ AND TRIBAL ECONOMIC DEVELOPMENT

A. *Overview of the Statute*

"[T]he Endangered Species Act of 1973 represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."¹⁰⁰ To achieve its goals,¹⁰¹ the ESA empowers the Secretary of the Interior¹⁰² to declare a species of wildlife "endangered"¹⁰³ or "threatened"¹⁰⁴ and to identify the "critical habitat"¹⁰⁵ in which these species live.¹⁰⁶

Because Congress believes that endangered or threatened species should be afforded the "highest of priorities,"¹⁰⁷ it requires all federal

98. Martz Opinion, *supra* note 45, at 526-27.

99. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

100. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

101. The ESA's stated goals are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species." ESA § 2(b), 16 U.S.C. § 1531(b).

102. Pursuant to ESA § 3(15), 16 U.S.C. § 1532(15), the term "Secretary" may also mean the Secretary of Commerce, depending on the species and program responsibilities as described in the Reorganization Plan Numbered 4 of 1970. *See also* ESA § 4(a)(2), 16 U.S.C. § 1533(a)(2) (requiring the Secretary of Commerce to inform the Secretary of Interior of endangered species).

103. The term "endangered species" is defined as: "any species which is in danger of extinction throughout all or a significant portion of its range." ESA § 3(6), 16 U.S.C. § 1532(6).

104. Congress defined "threatened species" as: "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ESA § 3(20), 16 U.S.C. § 1532(20).

105. Congress defined "critical habitat" as: "the specific areas within the geographical area occupied by the species, at the time it is listed, . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." ESA § 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i).

106. ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1) (determination of endangered and threatened species); ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2) (designation of critical habitat).

107. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Congress found that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical,

agencies to use their authorities to promote the purposes of the statute.¹⁰⁸ The ESA further requires each federal agency to ensure that any action it authorizes, funds, or carries out will not jeopardize the continued existence of any listed species.¹⁰⁹ This ESA provision also applies to the tribes when they act through the tribe's federal liaison, the Bureau of Indian Affairs (BIA).¹¹⁰

Once the Secretary of the Interior lists a species as endangered, ESA's section 9 makes it unlawful for any "person subject to the jurisdiction of the United States"¹¹¹ to import, export, *take*, possess, sell, offer for sale, carry, transport, or ship any such species.¹¹² The statute broadly defines "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or . . . attempt to engage in any such conduct."¹¹³ The definition does not distinguish between direct and indirect takings.¹¹⁴ The Department of the Interior has extended the prohibition against taking endangered species to include threatened species.¹¹⁵ Several species are covered by special rules which permit

recreational, and scientific value to the Nation and its people." ESA § 2(a)(3), 16 U.S.C. § 1531(a)(3).

108. ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1). Under section 7, each agency is required to carry out programs for the conservation of endangered and threatened species. *Id.*

109. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 7(a)(2) also requires assurance that no agency action shall "result in the destruction or adverse modification" of a designated critical habitat. *Id.* A federal agency must consult with the Secretary of the Interior (or the Secretary of Commerce) to prevent the likelihood of jeopardizing the existence of these species. *Id.*

110. Telephone Interview with Steven Hoffman, *supra* note 28. The BIA provides the tribes with a federal source of assistance and enables the tribes to avail themselves of ESA's section 7 consultation provisions. These consultation provisions impose an obligation to consult, but also provide an easier route towards project approval, rather than the more cumbersome section 10 incidental taking permit process. The average Native American, however, is probably more interested in potential criminal prosecution for a violation of section 9 of the Act. *Id.*

111. For a discussion of whether Indians are "persons" subject to the jurisdiction of the United States for ESA purposes, see *infra* notes 137-39 and accompanying text.

112. ESA § 9(a)(1)(A)-(F), 16 U.S.C. § 1538(a)(1)(A)-(F) (emphasis added). See also ESA § 9(a)(2), 16 U.S.C. § 1538(a)(2) (applying § 9 prohibitions to listed plant species).

113. ESA § 3(19), 16 U.S.C. § 1532(19).

114. *Id.* See *supra* note 27.

115. United States Fish and Wildlife Service, Dep't of the Interior, 50 C.F.R. § 17.31(a) (1995).

takings under carefully defined circumstances.¹¹⁶

Congress, however, did provide a few, narrow exceptions to section 9's prohibitions, which are set out in section 10.¹¹⁷ First, the Secretary of the Interior may issue a permit for taking a listed species if the taking is incidental to an otherwise lawful activity.¹¹⁸ Second, the "Alaska natives" provision¹¹⁹ exempts Indians, Aleuts, or Eskimos who are Alaskan natives residing in Alaska, and non-native permanent residents of Alaskan native villages from the ESA's prohibition against taking a listed species.¹²⁰ This narrow exemption is further limited by the requirement that the taking occur primarily for subsistence purposes.¹²¹ At least one court has rejected an equal protection challenge alleging that similarly-situated natives were unfairly excluded from the Alaskan native exception.¹²²

Further exceptions to section 9's broad direct-takings prohibition include permits for scientific purposes, and to enhance the propagation or survival of the affected species.¹²³ In addition, the ESA permits "hardship exemptions" for persons who enter into contracts with regards to a species before it is published on the endangered list.¹²⁴ Several tribes have attempted to escape the ESA's section 9 proscriptions by arguing that because of their "aboriginal existence" and "long continuous

116. See, e.g., 50 C.F.R. § 17.40(d)(2)(i) (1995) (describing circumstances under which gray wolves in Minnesota may be taken).

117. Johnson, *supra* note 21, at 182.

118. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). This exception additionally requires that the permittee submit a conservation plan specifying mitigation measures and funding mechanisms. ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A).

119. ESA § 10(e), 16 U.S.C. § 1539(e).

120. *Id.*

121. *Id.* The right to subsistence-purpose takings of listed species is not absolute; it may be exercised only subject to such regulations as the Secretary may promulgate upon a determination that "such taking[s] materially and negatively affect[] the [listed] species." ESA § 10(e)(4), 16 U.S.C. § 1539(e)(4).

122. *United States v. Nuesca*, 773 F. Supp. 1388, 1391 (D. Haw. 1990) (*Nuesca I*). The court did not see native Hawaiians and Alaskan natives as similarly situated because the defendant failed to show that hunting green sea turtles was for subsistence purposes. *Id.*

123. ESA § 10(a)(1)(A), 16 U.S.C. § 1539(a)(1)(A).

124. ESA § 10(b)(1), 16 U.S.C. § 1539(b)(1). See *United States v. Species of Wildlife*, 404 F. Supp. 1298, 1299 (E.D.N.Y. 1975) (rejecting the hardship exemption with regard to a mounted leopard because the parties entered into the contract after the species was listed as endangered).

use of the area” they hold aboriginal rights to hunt and fish the species present in that location.¹²⁵ This argument, however, has failed in light of the federal government’s ability to unilaterally extinguish any Indian title based upon aboriginal possession.¹²⁶

B. *The Impact of the Endangered Species Act on Tribal Economic Development*¹²⁷

The ESA prohibitions apply to tribal economic development in direct-taking situations,¹²⁸ incidental-taking situations,¹²⁹ and in federal agency actions.¹³⁰ The first type of section 9 violation may occur when an Indian directly takes a listed species while hunting and fishing.¹³¹ Although a court is likely to address the motivation for the

125. See, e.g., *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 (9th Cir. 1981). A party may invoke this aboriginal rights defense if the party cannot point to specific language in the treaty protecting a clear right to engage in the activity. E.g., *Nuesca I*, 773 F. Supp. at 1390-91 (rejecting the aboriginal rights defense). But see Kristen Chapin, *Indian Fishing Rights Activists in an Age of Controversy: The Case for an Individual Aboriginal Rights Defense*, 23 ENVTL. L. REV. 971, 976-81 (1993) (discussing cases in which Indians have successfully asserted individual, as opposed to tribal, aboriginal rights in the absence of treaties).

126. AIL DESKBOOK, *supra* note 14, at 211; *Bateman*, 655 F.2d at 180 (“Indian title based on aboriginal possession . . . may be extinguished by the federal government at any time without any legally enforceable obligation to compensate the Indians.”). See also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (“[Indian title] means mere possession not specifically recognized as ownership by Congress.”); *United States v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir.) (noting that when Congress “clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action”), *cert. denied*, 429 U.S. 982 (1976).

127. I have relied on Baum, *supra* note 69, for much of the information in this section.

128. Baum, *supra* note 69, at 2-3. See also *infra* part IV (discussing direct takings situations).

129. Baum, *supra* note 69, at 3. See also *infra* part III.C (discussing incidental taking situations).

130. Baum, *supra* note 69, at 3. If a contemplated tribal action requires federal approval, the approving agency may be required under ESA § 7(a)(2) to consult with the Department of the Interior. *Id.* See also *supra* note 109 and accompanying text (discussing the ESA’s consultation requirement).

131. See, e.g., *United States v. Dion*, 752 F.2d 1261 (8th Cir.) (*Dion I*) (considering Indian defendants’ right to hunt birds and sell their feathers under the Eagle Protection Act and the Endangered Species Act), *cert. granted*, 474 U.S. 900 (1985), *rev’d*, 476 U.S. 734 (1986). See generally AIL DESKBOOK, *supra* note 14, at 251-53 (discussing the application of the ESA to Indian treaty hunting and fishing rights).

taking,¹³² the motivation is not determinative because an ESA section 9 violation may occur notwithstanding the purpose for the taking.¹³³ The second type of section 9 violation may occur incidentally: a tribe developing its reservation lands may cause, through its construction activities, the death of a listed species or alter its habitat to the detriment of the species.¹³⁴ The third type of section 9 violation may result when a federal agency authorizes, funds, or grants its approval to a tribe on a lease or other action.¹³⁵ In this scenario, the agency is required to ensure that the tribal action will not affect the continued existence of the species.¹³⁶

The ESA is applicable to actions of the tribal government and individual tribal members. The ESA section 9 prohibitions apply to any person or entity "subject to the jurisdiction of the United States."¹³⁷ Indians are persons subject to the jurisdiction of the United States.¹³⁸

132. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 63 (1979) (holding that the Migratory Bird Treaty Act (MBTA) authorized the Secretary of the Interior to regulate trade and commercial sale of Indian artifacts made with feathers and other bird parts taken before the Act was passed); *Dion I*, 752 F.2d at 1270 (holding that Dion could only be convicted upon a jury determination that the takings were for commercial purposes). But cf. *United States v. Bresette*, 761 F. Supp. 658, 664-65 (D. Minn. 1991) (holding that Chippewa sale of items made of feathers from MBTA-protected birds does not violate the MBTA).

133. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1) (prohibiting takings without permission of the secretary); ESA § 3(19), 16 U.S.C. § 1532(19) (defining "take" without reference to motivation for the taking).

134. See *City of Las Vegas v. Lujan*, 891 F.2d 927, 929 (D.C. Cir. 1989) ("The relocation of a listed species or the alteration of its habitat during construction activities constitutes an 'incidental taking' that is prohibited by the [ESA] unless the Secretary grants a special permit.") (citing ESA § 10(a), 16 U.S.C. § 1539(a)). The parties in *City of Las Vegas* included the City, the State of Nevada, the Nevada Development Authority, and private real estate developers. *Id.* at 929. No court to date has addressed the incidental taking issue in the context of tribal activities.

135. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184-86 (1978) (holding that under ESA § 7, federal agencies are required to safeguard endangered species and their habitats, whether the federal project is in the planning or execution stages).

136. See *id.*

137. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1). See also ESA § 3(13), 16 U.S.C. § 1532(13) (defining "person").

138. Martz Opinion, *supra* note 45, at 527 (stating that "American Indians are clearly subject to the jurisdiction of the United States"). See *United States v. Billie*, 667 F. Supp. 1485, 1491 (S.D. Fla. 1987) (finding congressional intent to extend ESA's prohibitions to Indians). See also *United States v. Nuesca*, 773 F. Supp. 1388, 1391 (D. Haw. 1990) (*Nuesca I*), *aff'd*, 945 F.2d 254 (9th Cir. 1991) (*Nuesca II*). Nuesca, a native Hawaiian charged with violating the ESA, argued that judicial principles governing the determination

Because the ESA's section 9 applies to Indians, the "status" of Indian is not a defense for a section 9 violation.¹³⁹

However, the presence or absence of a treaty right provides a potential defense for violations of section 9. In *United States v. Billie*,¹⁴⁰ after holding that Congress intended the ESA to apply to Indians,¹⁴¹ the district court considered whether the treaty with the Seminole Tribe provided the defendant with a defense.¹⁴² In *United States v. Nuesca (Nuesca I)*,¹⁴³ the district court held that because there was no treaty between the United States and native Hawaiians, the defendant had no defense to a section 9 prosecution.¹⁴⁴ The court decided this issue despite the defendant's contention that his ethnic status bore comparison to that of Native Americans¹⁴⁵ or Native Alaskans.¹⁴⁶

of Indian rights should extend to Native Hawaiians. *Nuesca II*, 945 F.2d at 256-57. The Ninth Circuit rejected this argument, noting *inter alia* that no treaty governed the relationship between Native Hawaiians and the federal government. *Id.*

139. Baum, *supra* note 69, at 3 (explaining further that "[b]ecause tribal governments and tribal corporations are entities subject to the jurisdiction of the United States, they should . . . be considered 'persons' subject to ESA § 9").

140. 667 F. Supp. 1485 (S.D. Fla. 1987).

141. *Id.* at 1488 (noting that under ESA § 10(e), 16 U.S.C. § 1539(e), Congress exempted Alaskan natives from the ESA's prohibitions but it did not similarly exempt non-Alaskan natives).

142. *Id.* at 1489-92. In *Billie*, a Seminole Indian was prosecuted for violating the ESA. Billie shot and killed a Florida panther, an endangered species, on the Seminole reservation. *Id.* at 1487. See also *infra* notes 227-42 and accompanying text (discussing the *Billie* case).

143. 773 F. Supp. 1388 (D. Haw. 1990).

144. *Id.* at 1390. In *Nuesca I*, a native Hawaiian appealed his conviction under the ESA for taking two green sea turtles off the northern shore of Maui. *United States v. Nuesca*, 945 F.2d 254, 256 (9th Cir. 1991) (*Nuesca II*). The green sea turtle is a "threatened" species. 50 C.F.R. § 227.4(a) (1995).

145. *Nuesca I*, 773 F. Supp. at 1391. Nuesca argued that, like Native Americans, Native Hawaiians had aboriginal rights. *Id.* at 1390. Such rights could be abrogated solely by the "clear and plain intent of Congress." *Id.* (internal quotations omitted). The court, however, found the absence of a treaty addressing aboriginal right to be determinative. *Id.*

146. *Id.* at 1391. Nuesca argued that Congress' failure to include native Hawaiians in the ESA's exemption for native Alaskans was an equal protection violation. *Id.* The court rejected this argument, noting that the native Alaskan exception applied to takings for subsistence purposes, a circumstance which did not apply to native Hawaiians hunting green sea turtles. *Id.*

The direct conflict between Indian treaty rights, the ESA, and other federal statutes protecting the environment presents a problem of practical significance. Indians have cognizable interests in protecting the economic security of their tribes¹⁴⁷ and in promoting economic development and self-sufficiency.¹⁴⁸ As tribes seek to emerge from their general state of underdevelopment,¹⁴⁹ they are frequently faced with a problem: the wildlife on their reservations¹⁵⁰ or the fish in their streams have become endangered, often through no fault of their own.¹⁵¹ Attempts by tribes and tribal members to improve their

147. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (noting that under an 1852 treaty, the Mescalero Apache Tribe had rights to regulate “the use of resources by members as well as nonmembers”). *See also* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (stating that the “power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty”). *See also supra* note 35 and accompanying text.

148. *See* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *Mescalero Apache Tribe*, 462 U.S. at 334-35. *See also* 25 U.S.C. § 2701(4) (1994) (“Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government . . .”).

149. *See generally* Frank Pommersheim, *Economic Development in Indian Country: What are the Questions?*, 12 AM. INDIAN L. REV. 195, 196 (1984) (discussing the difficulties of overcoming vast poverty on many Indian reservations and “examining the context, goals, and strategies of development and the deeper concerns of culture and meaning”).

150. This problem can also occur off-reservation. For example, many of the Northwestern treaties include a provision granting the Indians “the right of taking fish, at all usual and accustomed grounds and stations . . .” This language has been interpreted to allow Indian fishing outside the boundaries of the tribe’s ceded territory. COHEN, *supra* note 2, at 455. *See also* *United States ex rel. Williams v. Seufert Bros. Co.*, 233 F. 579, 583-84 (D. Or. 1916), *aff’d sub nom. Seufert Bros. Co. v. United States ex rel. Confederated Tribes and Bands of the Yakima Indian Nations*, 249 U.S. 194 (1919). These treaties, however, do not confer off-reservation fishing rights outside of these “usual and accustomed grounds.” COHEN, *supra* note 2, at 456. *See also* *Seufert v. Olney*, 193 F. 200, 203-04 (E.D. Wash. 1911).

151. For example, in an ongoing controversy regarding listed salmon in Oregon’s Columbia River, the Warm Springs, Umatilla, and Nez Perce Tribes argued against the federal government’s efforts to conserve the species by restricting tribal fishing. Plaintiff-Intervenor Confederated Tribes’ Joint Memorandum in Support of Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunctives Should Not Enter at 1, *United States v. Oregon*, Civil No. 68-513 MA (brief on file with author). The tribes argued that the government’s goal of rescuing the listed fish from their “seemingly inexorable decline toward extinction,” *id.* at 17, demands action related to the federal hydroxsystem management rather than the Indian fisheries. *Id.* The tribes asserted:

Overall, tribal harvest is an insignificant factor in the decline of the listed Snake

financial situation through commercial hunting or fishing, making crafts and jewelry, or developing land can be greatly hindered by discovery of listed species or a subsequent listing of a species known to live on their land by the Secretary of the Interior.¹⁵²

C. The Impact of the Endangered Species Act on Tribal Economic Development that Results in the Incidental Taking of a Listed Species: A Hypothetical

The resulting query becomes: "Because the United States intended through treaties that Native Americans become a 'civilized people,' do tribes enjoy treaty rights to economically develop their reservations and, in the process, incidentally take protected species thereon?"¹⁵³ Judicial opinions on this issue may vary in much the same way as do prior opinions dealing with the direct taking situation.¹⁵⁴ A court may choose to focus on what the Indians understood their treaty rights to mean,¹⁵⁵ the concentration of species in that area,¹⁵⁶ or the actual

River fall chinook. A pie chart display of human induced mortality for the 1994 Snake River fall chinook run shows the tribal fishery provided in the 1994 [Ocean and In-River Agreement] is responsible for only 2.5% of total mortality. . . . [Computer] model runs show that if meaningful actions are taken in the areas with the greatest mortality on the listed species, primarily hydrosystem operations, Snake River fall chinook will stop their decline, stabilize and begin to rebuild. This desirable outcome occurs *with or without* the tribal fishery.

Id. at 12 (citations omitted).

152. See *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989). See also *infra* part III.C (explaining the problems Indians could encounter when they try to develop their land).

153. Baum, *supra* note 69, at 5 (quoting *Winters v. United States*, 207 U.S. 564, 576 (1908)).

154. See *infra* part IV.

155. *E.g.*, *United States v. Bresette*, 761 F. Supp. 658, 662 (D. Minn. 1991) (examining Chippewa beliefs that treaty rights to hunt migratory birds included the right to sell their catch).

156. See, *e.g.*, *United States v. Nuesca*, 945 F.2d 254, 258 (9th Cir. 1991) (*Nuesca II*). The concentration of an endangered or threatened species in a given area and the demand upon that particular species may be relevant to the level of protection the species receives from the federal government. For example, in 1983, the National Marine Fisheries Service (NMFS) granted a subsistence authorization for the "handful of native Pacific Islanders thousands of miles West of Hawaii," *id.*, relying on the threatened green sea turtle for subsistence purposes. In 1991, a native Hawaiian attempted to argue that a similar subsistence exemption should be granted for indigenous Hawaiians. *Id.* The court rejected his equal protection argument, noting that it was "reasonable" for NMFS to determine that

number of the listed species remaining in the United States and its territories.¹⁵⁷

The following hypothetical clarifies the narrow issue this Note addresses and the contexts in which it may arise.¹⁵⁸ The Hoffinka tribe lives on a reservation in the northeastern part of Arizona. The Hoffinka reservation was established pursuant to the Treaty at Critter Point in 1849. Seeking to attract tourists and to make money on a growing trend around the country, the Hoffinka tribe has decided to create the next "Mirage" hotel complex on their reservation located on the outskirts of a desert gambling metropolis. The Hoffinka tribe soon learns, however, that the proposed development will be located in the prime habitat of a listed species, the Desert-Bob-Snake.¹⁵⁹ The tribe further discovers that its entire reservation is habitat for the reptile and, therefore, they cannot relocate the development.

It is clear that the development will not only result in the incidental taking of the Desert-Bob-Snakes, but will, due to its magnitude, actually jeopardize the continued existence of the reptile. The Hoffinka tribe asserts that the decline of the Desert-Bob-Snake is the result of previous non-Indian development and that any limitation on their reservation's economic development is an affront to their alleged treaty right—the exclusive use and occupation of reservation lands. This Note addresses the issue of whether the Hoffinka tribe violates ESA section 9¹⁶⁰ if, under the direction of Chief Hoffinka, it begins bulldozing the prospective development site and, in the process, it incidentally takes a protected

the Pacific Islanders subsisted off green sea turtles, while native Hawaiians did not. *Id.* See *supra* notes 143-46 and accompanying text (discussing *Nuesca I*).

157. See *United States v. Billie*, 667 F. Supp. 1485, 1489-90 (S.D. Fla. 1987) (citing *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973)); *infra* note 192. See also Tina L. Morin, Note, *Indians, Non-Indians, and the Endangered Panther; Will the Indian/Non-Indian Conflict Be Resolved Before the Panther Disappears?*, 13 PUB. LAND L. REV. 167, 167 (1992) (noting that "[t]oday, only twenty to fifty panthers remain in the wild in southern Florida").

158. I would like to express my great appreciation to Steven Hoffman, an attorney in the Solicitor's Office in the Department of the Interior, Division of Conservation and Wildlife, for his help in creating this hypothetical.

159. For purposes of this hypothetical, assume that the Desert-Bob-Snake has been officially classified as "endangered."

160. 16 U.S.C. § 1538.

species.¹⁶¹

In considering whether Chief Hoffinka should be imprisoned and heavily fined, this Note will consider the case law that has developed in situations involving the direct taking of listed species; that is, the hunting or fishing of species pursuant to reserved treaty rights. With this background, this Note will apply the direct-taking analysis to the hypothetical situation in which incidental taking of a listed species occurs on tribal lands during the course of economic development.

IV. PREVIOUS TREATMENT OF ESA-INDIAN TREATY CONFLICT IN DIRECT TAKING SITUATIONS

The conflict between Indian treaty rights and the ESA commonly involves the hunting and fishing of a listed species,¹⁶² which may occur both on and off the tribal reservation.¹⁶³ Absent a valid treaty or statutory right reserving the Indians' right to hunt or fish a protected species, the ESA's section 9 applies.¹⁶⁴ As detailed in Part III.A, the

161. This hypothetical deliberately avoids any reference to federal agency involvement to bypass the confusion that results when the provisions of ESA § 7 are triggered. *See supra* notes 130 & 135 (discussing § 7). The § 7 argument is rather disingenuous because, in the "real world," the "Mirage" hotel complex would probably be built with a non-Indian developer's money in exchange for a ground lease. Under 25 U.S.C. § 415(a), such leases require approval from the BIA, a division of the Department of the Interior. *See generally* Reid P. Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974) (discussing the history of and policies for leasing approval under § 415). Section 7(a)(2) requires the BIA, because it is a federal agency, to "insure that any action authorized . . . by [the] agency . . . is not likely to jeopardize the continued existence of [a listed species] or result in the destruction or adverse modification of habitat of [a listed species]." ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Therefore, even if building a hotel complex is protected by a treaty right that trumps the ESA, the BIA could not approve the project.

162. This is true regardless of whether the species is hunted or fished for commercial or non-commercial purposes. *See supra* notes 132-33 and accompanying text.

163. *See supra* note 150 (discussing federal treaties reserving the right for Indians to hunt and fish off-reservation "at all usual and accustomed places").

164. *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980) (holding that, in the absence of an express exemption for Indians, federal laws of general application apply to Indians on reservations, subject to three exceptions: "(1) the law touches upon 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations'"), *cert. denied*, 449 U.S. 1111 (1981); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citing *Farris*, 624 F.2d at 893-94). If there is no treaty right to hunt or fish the protected species at issue, no conflict

statutorily-granted exceptions to the ESA's section 9 prohibitions are rare¹⁶⁵ and narrowly drawn.¹⁶⁶ The only other means by which Native Americans can avoid section 9's proscriptions is by demonstrating that their treaty rights have not been limited, modified, or abrogated.

In establishing reservations¹⁶⁷ the federal government may create a treaty right to take an endangered or threatened species.¹⁶⁸ Such taking rights may be expressly stated or created "by implication in the setting aside of the lands as an Indian reservation."¹⁶⁹ In analyzing direct-taking situations, courts conduct very fact-specific judicial inquiries into the existence of the treaty right alleged to permit the taking.¹⁷⁰ The extent to which these treaty rights have been limited, modified, or abrogated by the ESA and similar legislation¹⁷¹ has evolved slowly over the last twenty-three years.¹⁷²

with the ESA exists, and the statutes and treaty can be construed in harmony. Martz Opinion, *supra* note 45, at 527-28. See also *supra* notes 94-98 and accompanying text.

165. The ESA's exemptions are laid out in § 10, 16 U.S.C. § 1539. See also *supra* notes 117-26 and accompanying text for a more thorough examination of the ESA's exemptions.

166. See *United States v. Billie*, 667 F. Supp. 1485, 1488 (S.D. Fla. 1987) ("Congress has drawn several extraordinarily narrow exceptions to the [ESA's] prohibitions.").

167. Reservations were established either by treaty or executive order. See *supra* note 42.

168. Baum, *supra* note 69, at 4 (citing *United States v. Billie*, 667 F. Supp. 1485, 1488-89 (S.D. Fla. 1987)).

169. *Billie*, 667 F. Supp. at 1488.

170. See *United States v. Dion*, 476 U.S. 734, 745 (1986) (*Dion III*) (concluding that Congress abrogated the treaty right to take bald eagles for commercial and non-commercial purposes); *United States v. Top Sky*, 547 F.2d 486, 488 (9th Cir. 1976) (finding that treaty hunting rights did not include the right to sell eagles commercially). *But cf.* *United States v. Bresette*, 761 F. Supp. 658, 660-62 (D. Minn. 1991) (finding a treaty right to sell items containing feathers from birds protected under the Migratory Bird Treaty Act).

171. Courts have also addressed the conflict of tribal rights with federal conservation efforts under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994), and the Eagle Protection Act, 16 U.S.C. §§ 668-668d (1994).

172. The conflict between Indian treaty rights and federal or state conservation statutes dates back to 1905 when the Supreme Court first suggested, in dicta, that Indian treaty fishing rights could be subjected to state regulation when necessary for the conservation of fish. COHEN, *supra* note 2, at 459 (citing *Tulee v. Washington*, 315 U.S. 681, 684 (1942) and *United States v. Winans*, 198 U.S. 371, 384 (1905)). An analysis of several non-ESA direct-taking cases (*i.e.*, hunting and fishing) is necessary to more fully develop the incidental taking hypothetical presented in part III.C, *supra*.

While just two cases¹⁷³ have considered the relationship of the ESA to the exercise of Native American treaty rights to hunt and fish,¹⁷⁴ it is important to comprehend the courts' analyses. In examining the ESA-treaty rights conflict, courts look to past decisions dealing with similar conflicts involving state and federal conservation statutes. A future court's analysis of an incidental taking claim may borrow from the principles developed in these lines of cases.

A. *Limitation and Modification of Indian Treaty Rights*

The question of when and under what circumstances a treaty right to directly take a species may be limited or modified has been addressed by several courts in the past. In a case involving the Lake Superior Chippewa Indians, the Seventh Circuit twice addressed the question of whether the Chippewas retained their usufructuary rights to hunt and fish reserved to them by treaties in 1837 and 1842.¹⁷⁵ In *Lac Courte Oreilles Band v. Voigt (Lac Courte I)*,¹⁷⁶ the court held that although these usufructuary rights survived a subsequent treaty in 1854,¹⁷⁷ the rights "might be subject to some conservation regulations."¹⁷⁸ In *Lac Courte Oreilles Band v. Wisconsin (Lac Courte II)*, the court noted that it had grave doubts that "extinction of a species or even wholesale slaughter . . . is a reasonable adjunct to the [treaty] rights reserved by the Indians."¹⁷⁹

173. *United States v. Dion*, 476 U.S. 734 (1986) (*Dion III*); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987). See *supra* note 25 for a sampling of relevant law review articles on this issue.

174. The ESA views Indian hunting and fishing as direct takings because the wildlife at issue is killed as the direct result of the Indian activity. By contrast, incidental takings, as demonstrated in the hypothetical, occur when wildlife is threatened or killed as a result of building something like the "Mirage" hotel complex or other such lawful activities. For example, an incidental taking could occur if a listed species such as the Desert-Bob-Snake, or its critical habitat, got in the way of a bulldozer.

175. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 351-58 (7th Cir.), *cert. denied sub nom. Besadny v. Lac Courte Oreilles Band*, 464 U.S. 805 (1983) (*Lac Courte I*); *Lac Courte Oreilles Band v. Wisconsin*, 760 F.2d 177, 183 (7th Cir. 1985) (*Lac Courte II*).

176. 700 F.2d 341 (7th Cir. 1983). Also at issue were the tribe's usufructuary rights to trap, and to gather wild rice and maple sap on non-reservation lands. *Id.* at 351.

177. *Id.* at 365.

178. *Lac Courte II*, 760 F.2d at 183 (making clear "that to which [the Court] adverted only by implication" in *Lac Courte I*).

179. *Id.*

The Department of the Interior concurs with this reasoning.¹⁸⁰ In an opinion discussing the application of the ESA to Native Americans with treaty hunting and fishing rights, the Solicitor of the Interior Department, Clyde Martz, declared that, "as a matter of law, Indian treaty rights do not include the right to take species which are endangered or threatened with extinction."¹⁸¹ Thus, even if a treaty right to take a protected species exists,¹⁸² that right may be limited or modified by the need to conserve the species.¹⁸³

The Supreme Court further refined the government's ability to limit and modify existing Indian treaty rights in the *Puyallup* trilogy.¹⁸⁴ At issue in the *Puyallup* cases was a dispute over rights to the run of steelhead trout on the Puyallup River in the state of Washington.¹⁸⁵ The Indians alleged that Washington's fishing regulations infringed upon their treaty right to fish.¹⁸⁶ The regulations, while permitting hook and line fishing, banned net fishing as a conservation measure.¹⁸⁷ In securing the rights of the Puyallup to take a portion of the steelhead trout

180. See generally Martz Opinion, *supra* note 45, at 529.

181. *Id.*

182. See *infra* notes 258-64 and accompanying text for a discussion of what it means to have a treaty right to take a listed species and whether that right is qualified in the incidental taking context.

183. Baum, *supra* note 69, at 6.

184. See *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (*Puyallup I*); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); and *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) (*Puyallup III*).

185. *Puyallup I*, 391 U.S. at 395.

186. *Id.* at 396. The Puyallup pointed to the Treaty of Medicine Creek, which protects their right to engage in commercial net fishing. See *id.* at 398. The tribe alleged that the ban on net fishing prevented Indians from fishing while permitting sport fishing. *Puyallup II*, 414 U.S. at 46-47.

187. *Puyallup II*, 414 U.S. at 45 (citing *Puyallup I*, 391 U.S. at 400). Because the tribe relied on net fishing, while sport fishermen used hook-and-line fishing, the tribe alleged the regulation was discriminatory. *Id.* at 46-47. The State of Washington prohibited "all Indian net fishing of steelhead trout because those who engaged in sport fishing, with hook and line, caught all the steelhead that could be taken under conservation measures." PRUCHA, *supra* note 4, at 403-04 (discussing *Puyallup II*). The Puyallup, however, argued that it was unfair for the state to force them to bear the entire burden of steelhead trout conservation because they were only responsible for about half of the steelhead trout take. *Puyallup II*, 414 U.S. at 46-47.

run,¹⁸⁸ the Court held that valid treaty rights to take wildlife may be limited "in the interest of conservation, provided the regulation meets appropriate standards¹⁸⁹ and does not discriminate against the Indians."¹⁹⁰ While the *Puyallup* cases focused on the state's power to regulate treaty hunting and fishing rights in the interest of conservation, these decisions have been extended to permit federal regulation of similar treaty rights.¹⁹¹

Although federal regulations may limit or modify Indian treaty rights, the standard the federal government has to meet for a court to uphold the regulation is not yet settled.¹⁹² Some courts apply a

188. The Supreme Court, in *Puyallup III*, vacated the Supreme Court of Washington's decision that permitted the state to regulate the tribe's on-reservation fishing activities. *Puyallup III*, 433 U.S. at 167 n.1, 178. The Court upheld the state's regulatory authority, when such regulations were reasonable and necessary for the conservation of fish. PRUCHA, *supra* note 4, at 404.

Judge George Boldt, however, expanded the Indians' right in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), when he defined the precise meaning of the treaty phrases "the right of taking fish" and "in common with all citizens of the Territory." PRUCHA, *supra* note 4, at 404. His controversial decision allotted the Puyallup not only access to the fishing sites, but a maximum 50% share of the fish, exclusive of religious and subsistence take. *Id.* at 405. This victory for the tribe was met by widespread dismay amongst non-Indians. *Id.*

189. Under the "appropriate standards" rule, the state's regulation must be "a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation." *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (citations omitted).

190. *Puyallup I*, 391 U.S. at 398. The Department of Game of Washington was required to achieve an accommodation between the Puyallups' net fishing rights and conservation needs. *Puyallup II*, 414 U.S. at 48. At the conclusion of his majority opinion in *Puyallup II*, Justice Douglas stated:

We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Id. at 49.

191. Baum, *supra* note 69, at 6-7 (citing, as cases which have extended the holdings of the *Puyallup* trilogy to federal regulation, *United States v. Eberhardt*, 789 F.2d 1354, 1362 (9th Cir. 1986) and *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980)).

192. *Id.* at 7 n.6.

conservation standard¹⁹³ while others examine the process by which the government promulgated the regulations.¹⁹⁴ The ESA should survive either the conservation or the rule-making test. The ESA strives to prevent the extinction of a species and “to avoid further diminution of national and worldwide wildlife resources” through all necessary resources and efforts.¹⁹⁵ It is possible to argue that under the *Puyallup* decisions, tribal hunting and fishing treaty rights are limited by the substantive provisions of the ESA.¹⁹⁶ The ESA’s measures are non-discriminatory and reasonable and necessary for the preservation of threatened and endangered species.¹⁹⁷

193. *Id.* Courts apply conservation standards of varying degrees of rigor. In *United States v. Bresette*, 761 F. Supp. 658, 664 (D. Minn. 1991), the court found that, as a result of the *Puyallup* trilogy, federal regulations of treaty rights must be non-discriminatory measures intended to prevent extinction of a species. *Id.* By contrast, in *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987), the court held that the government had authority to regulate tribal behavior when exercise of a treaty right “endangers the resource and threatens to divest [another tribe] of their right.” *Id.*

194. *United States v. Eberhardt*, 789 F.2d 1354, 1362 (9th Cir. 1986) (examining the standards of the Administrative Procedures Act). The *Eberhardt* court rejected the “endangered species approach to conservation” and held that federal regulatory limitations may be properly imposed so long as the Interior Department properly exercised its rule making authority. *Id.* The court may set aside the Indian regulation only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* The Ninth Circuit had previously rejected the endangered species approach in favor of permitting state regulation to preserve a “reasonable margin of safety.” *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983).

195. George C. Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1974).

196. This argument has been made by the Department of the Interior. See Martz Opinion, *supra* note 45, at 529; Baum, *supra* note 69, at 7.

197. Martz Opinion, *supra* note 45, at 529; Baum, *supra* note 69, at 7. Baum continues, quoting *United States v. Billie*:

Indian rights to hunt and fish are not absolute. Where conservation measures are necessary to protect endangered wildlife, the Government can intervene on behalf of other federal interests. . . . [I]ndians, the states, and the federal Government [have] a common interest in the preservation of the species. Where the actions of one group can frustrate the others’ efforts at conservation, reasonable, nondiscriminatory measure [sic] may be required to ensure the species’ continued existence.

The Endangered Species Act is such a measure.

667 F. Supp. 1485, 1490 (S.D. Fla. 1987) (quoted in Baum, *supra* note 69, at 7-8) (citation omitted).

B. *Abrogation of Indian Treaty Rights*

Another controversial question concerning Indian treaty rights and federal conservation statutes is when a treaty right to take a protected species is completely abrogated.¹⁹⁸ The general rule, which has been endorsed by case law,¹⁹⁹ the Department of the Interior,²⁰⁰ and the leading authority on Indian Law, Felix Cohen,²⁰¹ is that a federal law of general application applies with equal force to Indians on reservations.²⁰² Courts must determine whether congressional intent to abrogate the Indians' treaty rights is clear from the face of the statute, its legislative history, or the surrounding circumstances.²⁰³

It was not until 1986, in *United States v. Dion (Dion III)*,²⁰⁴ that the Supreme Court squarely addressed the issue of treaty abrogation in the context of the ESA.²⁰⁵ A jury convicted Dwight Dion, Sr., a member of the Yankton Sioux Tribe, of, *inter alia*, the shootings of four bald eagles, in violation of the ESA.²⁰⁶ Dion was caught as a result of a "sting" operation run by undercover United States Fish and Wildlife agents posing as collectors and traders of Indian crafts and artifacts.²⁰⁷

198. See generally Laurence, *The Abrogation of Indian Treaties*, *supra* note 25, at 860 (examining whether Indian treaty rights to hunt and fish should be cast aside when the federal government promulgates a new conservation statute without expressly mentioning the Indians or their treaties).

199. See, e.g., *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

200. See *Applicability of the Wholesome Meat Act of 1967 on Indian Reservations*, 78 Interior Dec. 18 (1971).

201. COHEN, *supra* note 2, at 297.

202. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960); *Farris*, 624 F.2d at 893.

203. See *supra* text accompanying note 89.

204. 476 U.S. 734 (1986).

205. Miller, *supra* note 20, at 565.

206. *Dion III*, 476 U.S. at 735. Dion was additionally charged and convicted of selling the carcasses and parts of the eagles and other protected birds in violation of the Eagle Protection Act and the Migratory Bird Treaty Act. *Id.* Before the trial, the district court dismissed a charge of shooting a golden eagle in violation of the Eagle Protection Act. *Id.*

207. *United States v. Dion*, 762 F.2d 674, 678 (8th Cir. 1985) (*Dion II*). The undercover operation, code-named "Operation Eagle," was inspired by reports that "an excess number of birds were being picked up around the Yankton Sioux Reservation." *Id.* (internal quotations omitted). While investigating the possible violations of federal wildlife

The agents visited the Yankton Sioux Reservation on several occasions over a two-year period and paid Dion and others for birds' carcasses and other body parts.²⁰⁸ The Eighth Circuit, sitting *en banc*, reversed in part and affirmed in part.²⁰⁹ The court reversed the convictions on several charges brought under the ESA and the Eagle Protection Act, holding that neither statute abrogated Dion's treaty right to hunt *non-commercially* on his reservation.²¹⁰ However, the court affirmed the convictions based on Dion's *commercial* dealings in protected birds because the court found that Dion had no treaty right to sell the birds' carcasses or body parts.²¹¹

In *Dion III*,²¹² the Supreme Court faced a formidable issue:

laws, the agent learned "that Indian crafts made with protected bird parts were arriving from South Dakota for sale in New Mexico." *Id.*

208. *Dion III*, 476 U.S. at 735. The Court noted that during this period, the reservation experienced depressed economic conditions and the agents offered large amounts of money to induce the defendants to kill the eagles. *Dion II*, 762 F.2d at 686. Two of the original four defendants escaped convictions under the defense of entrapment. *See id.* at 682-92.

209. *United States v. Dion*, 752 F.2d 1261, 1270 (8th Cir. 1985) (*Dion I*).

210. *Id.* The Eighth Circuit examined the legislative history and surrounding circumstances of the ESA and the Eagle Protection Act and concluded that neither statute contained the requisite clear and plain intent necessary to abrogate a treaty. *Id.* at 1269-70. The court held that the tribes' treaty rights to take bald and golden eagles for non-commercial purposes remained intact. *Id.*

The Eighth Circuit cited its prior ruling in *United States v. White*, 508 F.2d 453 (8th Cir. 1974). In *White*, the court held that in order to affect treaty hunting rights, Congress must expressly abrogate or modify the spirit of the relationship between the United States and the Indians. *Id.* at 457-58. The Eighth Circuit decided that this had not been done to its satisfaction in either *White*, or *Dion I*. *Dion I*, 752 F.2d at 1263.

211. *Dion I*, 752 F.2d at 1264-65, 1270. The court relied upon *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976). In *Top Sky*, the Ninth Circuit determined that the commercial sale of eagles and eagle parts violated the ESA. *Id.* at 487-88. The Ninth Circuit examined historical evidence, tribal custom, and religious practice and held that no treaty right to engage in these commercial activities existed. *Id.* at 487-89.

In *Dion I*, the Eighth Circuit agreed with the reasoning in *Top Sky*, noting that Dion had presented no historical evidence of a Yankton Sioux practice that involved the commercial sale of eagle or scissor-tailed flycatcher carcasses. *Dion I*, 752 F.2d at 1264-65. Similarly, the record in *Dion I* clearly acknowledged that the Yankton Sioux Tribe condemned the selling of eagle parts as a matter of tribal custom and religion. *Id.* For these reasons, the Eighth Circuit found that, because the Yankton Sioux could not reasonably have understood their treaty as reserving in them the right to engage in the commercial sale of eagles or other protected birds, no treaty right to do so existed. *Id.*

212. 476 U.S. 734 (1986). The Government appealed the Eighth Circuit's ruling, arguing that Dion's convictions should have been affirmed, regardless of whether the

whether the ESA²¹³ and the Eagle Protection Act abrogated the rights of members of the Yankton Sioux Tribe under an 1858 treaty to hunt the bald or golden eagle on the Yankton Sioux Reservation.²¹⁴ The Court reversed the Eighth Circuit and held that the Eagle Protection Act abrogated Indians' treaty rights to hunt bald and golden eagles.²¹⁵ As a result, Dion had no treaty rights on which he could rely as a defense.²¹⁶ The Court, however, refused to consider whether Congress abrogated the tribes' treaty rights to hunt eagles under the ESA.²¹⁷

In *Dion III*, the Court reviewed the varying standards for determining whether Congress has abrogated treaty rights.²¹⁸ First, the Court reiterated its preference that Congress expressly indicate its intention to abrogate treaty rights²¹⁹ through "explicit statutory language."²²⁰ Second, in promulgating the actual consideration and choice test,²²¹ the Court sought to guide Congress by explaining how "such a clear and

killings were done for commercial or non-commercial purposes. *Id.* at 736 n.3.

213. See Miller, *supra* note 20, at 567 ("[T]he Court did not dispute Dion's assertion that [the ESA] and its legislative history . . . are to a great extent silent regarding Indian hunting rights.") (internal quotations omitted).

214. *Dion III*, 476 U.S. at 736-37. The 1858 treaty did not limit the tribe's right to hunt on their reservation. *Id.*

215. *Id.* at 745 (finding that the 1962 amendments to the Eagle Protection Act "reflected an unmistakable and explicit legislative policy choice that Indian hunting [of eagles] . . . is inconsistent with the need to preserve [them]").

216. *Id.*

217. *Id.* at 746. See also Baum, *supra* note 69, at 9. The Court reasoned that Congress had divested Dion of his treaty right to hunt eagles when it passed and amended the Eagle Protection Act. *Dion III*, 476 U.S. at 745. Thus, the Court denied Dion the opportunity to allege the treaty defense for the ESA charges. *Id.*

218. See *supra* notes 86-91 and accompanying text for a full discussion of the Supreme Court's treaty abrogation analysis in *Dion III* and the promulgation of the actual consideration and choice test. See also Baum, *supra* note 69, at 8-9; Miller, *supra* note 20, at 566.

219. *Dion III*, 476 U.S. at 739. The Court does not "rigidly interpret[] that preference, however, as a *per se* rule." *Id.*

220. See *id.* (explaining that "[a]bsent explicit statutory language, [the Supreme Court has] been extremely reluctant to find congressional abrogation of treaty rights") (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979)).

221. For further discussion of the actual consideration and choice test see Laurence, *The Abrogation of Indian Treaties*, *supra* note 25, at 862-85; Johnson, *supra* note 21, at 181. See *supra* text accompanying notes 90-91 for the precise wording of the actual consideration and choice test.

plain intent must be demonstrated."²²² Third, in applying this test the Court found "unmistakable and explicit"²²³ evidence in the Eagle Protection Act's legislative history that Congress had actually considered the conflict between the Acts' intended purpose and tribal treaty rights²²⁴ and chose to resolve the conflict in favor of the conservation measure.²²⁵ The Supreme Court concluded that Congress' actions reflected its policy judgment that "Indian hunting of the bald or golden eagle, except pursuant to a permit, is inconsistent with the need to preserve those species."²²⁶

The only post-*Dion* case to consider the conflict between the ESA and Indian treaty rights is *United States v. Billie*.²²⁷ In *Billie*, the district court tackled the issue left undecided by the Supreme Court in *Dion*: whether the ESA abrogates Indian treaty hunting rights.²²⁸ The *Billie* court noted that, despite the Eighth Circuit's *en banc* opinion in *Dion I* which held that the ESA was inapplicable "to Indians exercising non-commercial hunting rights on Indian land,"²²⁹ this question was one of first impression in the Eleventh Circuit.²³⁰

The State of Florida charged James E. Billie, a member and

222. *Dion III*, 476 U.S. at 738-40. It is necessary that the evidence establishes that Congress "actually considered the conflict between its intended action . . . and Indian treaty rights." *Id.* at 739-40.

223. *Id.* at 745.

224. *Id.* at 740-45.

225. Miller, *supra* note 20, at 566. Miller states:

Government officials had asked Congress to consider an exemption for the taking of eagles for Indian cultural and religious purposes. In response, Congress enacted a provision that allowed the Secretary of the Interior to issue permits for tribal members to take eagles for those purposes. The Court held that this legislative history clearly evidenced that Congress considered and chose to abrogate treaty hunting rights.

Id. at 566-67 (footnotes omitted).

226. *Dion III*, 476 U.S. at 745.

227. 667 F. Supp. 1485 (S.D. Fla. 1987). Chief Billie was also prosecuted in a Florida state proceeding. See *Florida v. Billie*, 497 So. 2d 889 (Fla. Dist. Ct. App. 1986) (reversing tribal court's dismissal of criminal charge). See also Miller, *supra* note 20, at 586.

228. *Billie*, 667 F. Supp. at 1487. See *supra* note 217 and accompanying text.

229. *Id.* at 1487-88 (citing *United States v. Dion*, 752 F.2d 1261, 1270 (8th Cir. 1985) (*Dion I*)).

230. *Billie*, 667 F. Supp. at 1488.

Chairman of the Seminole Indian Tribe, for killing a Florida panther in violation of the ESA.²³¹ Billie argued that he was properly exercising his treaty rights because the kill was made for religious and medicinal purposes, and moreover, it occurred on his reservation, the Big Cypress Seminole Indian Reservation.²³² The district court held that the rights of Indians to hunt and fish are not absolute.²³³ The court elaborated, stating that “[w]here conservation measures are necessary to protect endangered wildlife, the Government can intervene . . . [with] reasonable, nondiscriminatory measure[s].”²³⁴

The *Billie* court found the ESA to be such a reasonable and nondiscriminatory measure.²³⁵ To support its conclusion, the court applied the actual consideration and choice test.²³⁶ It concluded that Congress considered the Indians’ interest from the Act’s general comprehensiveness and the Act’s legislative history.²³⁷ The court discussed the significance of the Alaskan Native exemption²³⁸ to taking prohibitions.²³⁹ The court further noted that the House and Senate

231. *Id.* at 1487. The Florida panther, or *felis concolor coryi*, is a subspecies of the panther which has been listed as “endangered” since 1967. *Id.* at 1487-88. *See also* 50 C.F.R. § 17.11 (1995). The panther’s historic range is listed as extending from Louisiana and Arizona east to South Carolina and Florida. *Billie*, 667 F. Supp. at 1488. The species now, however, appears to be confined to South Florida. *Id.* at 1496.

232. *Billie*, 667 F. Supp. at 1487, 1494-97. *See also* Morin, *supra* note 157, at 169.

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

234. *Id.*

235. *Id.*

236. *Id.* The *Billie* court summarized its findings:

The legislative history must be considered along with the plain language of the Act. The narrow Alaskan exception, the inclusion of Indians within the Act’s definition of “person,” the Act’s general comprehensiveness, and the evidence that the House committee desired to prohibit Indians from hunting and fishing protected species all provide “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 Indian rights.

Id. at 1491-92 (quoting *United States v. Dion*, 476 U.S. 734 (1986) (*Dion III*)).

237. *Billie*, 667 F. Supp. at 1490. “[The Act’s] general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives,” is evidence that Congress examined and considered Indian interests. *Id.*

238. ESA § 10(e), 16 U.S.C. § 1539(e). *See supra* text accompanying note 117.

239. *Billie*, 667 F. Supp. at 1490-92.

committees debated and rejected broader versions of the exemption.²⁴⁰ Thus, the *Billie* court concluded that Congress had considered the Indian rights but chose not to accommodate them.²⁴¹ In holding that the ESA abrogated the Seminoles' treaty hunting rights, the court concluded that Congress "could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers."²⁴²

Although litigants and legal scholars have addressed the highly controversial relationship between the ESA and Indian treaty rights to hunt and fish, it remains to be seen how these cases will apply to the incidental taking situation.

V. THE EFFECT OF THE ENDANGERED SPECIES ACT ON TRIBAL ECONOMIC DEVELOPMENT THAT RESULTS IN THE "INCIDENTAL TAKING" OF A LISTED SPECIES: AN ANALYSIS AND PROPOSAL

In the hunting and fishing cases, there was a direct conflict between a specific treaty right and federal and state conservation statutes such as the ESA.²⁴³ For example, Chief Billie's historic right to kill Florida panthers for Seminole religious and cultural practices²⁴⁴ was established

240. *Id.* at 1490-91. One rejected version exempted "consumption and ritual use by American Indians, Aleuts or Eskimos." *Id.* at 1490 (internal quotations omitted). The court concluded that "[C]ongress must have known that the limited Alaskan exemption would be interpreted to show congressional intent not to exempt other Indians." *Id.* at 1491.

241. *Id.* at 1490-91. For a critical analysis of the *Billie* courts' findings on congressional intent to abrogate Indian treaty hunting and fishing rights, see Miller, *supra* note 20, at 568-71.

242. *Billie*, 667 F. Supp. at 1492.

243. Because this section of the Note considers the relationship between the ESA and incidental takings of a species listed pursuant to the ESA's provisions, other federal or state conservation statutes will not be similarly analyzed.

244. The *Billie* court explained the religious and cultural significance of the Florida panther for the Seminole Indians:

According to Seminole tradition, the panther was the first choice of the creator to enter the earth Buffalo Jim, a Seminole medicine man, testified that panther claws are good for cramps and different ailments. Jim Shore, general counsel to the Seminole tribal council, testified that panther parts are an important part of a medicine man's bundle. It is commonly known that panther claws and tails are used for different ailments, and a medicine man should have them on hand in case they are needed to minister to a particular illness . . . [such as] muscle cramps, which cannot be treated as well without the panther part.

Billie, 667 F. Supp. at 1496-97.

implicitly in Executive Order No. 1379 in 1911.²⁴⁵ Fifty-five years later, however, the Florida panther became one of the first species of wildlife protected under the 1966 Endangered Species Preservation Act,²⁴⁶ the predecessor to the ESA.²⁴⁷ This created a direct conflict between the two interests, ultimately resulting in the prosecution of Chief Billie.²⁴⁸

In an incidental taking situation,²⁴⁹ however, there may not be such a conflict. For example, in the hypothetical²⁵⁰ Chief Hoffinka wants to help his tribe rise above the near poverty level at which they, like many other tribes, presently exist.²⁵¹ To do so, Chief Hoffinka plans to develop the Hoffinka reservation and build the "Mirage" hotel complex. He believes he has the right to do so, because under the Treaty at Critter Point the reservation lands were devoted to the Tribes' "exclusive use and benefit."²⁵² When confronted with information indicating that the "Mirage" project will lead to the imminent demise of the endangered Desert-Bob-Snake, Chief Hoffinka contends that this is not an Indian problem. He cites valid scientific studies proving that the decline of the Desert-Bob-Snake is largely the result of previous non-Indian development. In a heated moment between the Chief and a United States Fish and Wildlife Service agent, Chief Hoffinka states that, as far as the Hoffinka and their reservation are concerned, the ESA does not apply, and they will begin bulldozing in a few weeks.

However, the Hoffinka Tribe seems to have forgotten the lesson taught by the Ninth Circuit in *United States v. Farris*.²⁵³ In *Farris*, members of the Puyallup Indian Tribe in Washington appealed their

245. *Id.* at 1488.

246. *Id.* at 1495 (citing the 1966 Endangered Species Protection Act, Pub. L. No. 89-669, 80 Stat. 926). The Florida panther was listed as "threatened with extinction." *Id.*

247. *Id.*

248. See *supra* notes 227-42 and accompanying text for a thorough discussion of the *Billie* case.

249. See *supra* note 174 (examining the difference between direct and incidental takings).

250. See *supra* part III.C.

251. See Pommersheim, *supra* note 149, at 195 (discussing the severe levels of poverty that exist in Indian country across the nation).

252. This language is common in Indian treaties. See, e.g., *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 414-15 (1989).

253. 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

convictions under a federal statute prohibiting illegal gambling.²⁵⁴ The appellants argued that the statute did not apply to them or their large-scale gambling activities.²⁵⁵ The circuit court rejected this argument, stating that “federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.”²⁵⁶ The Ninth Circuit, however, analyzed the appellants’ possible claims under the several exceptions to this blanket rule.²⁵⁷

The court examined the presumption that, in passing general legislation, Congress does not intend an abrogation of treaty rights unless it specifically names Indians.²⁵⁸ The *Farris* court noted this exception “applies only to subjects specifically covered in treaties, such as hunting rights; usually, general federal laws apply to Indians.”²⁵⁹ Therefore, the court maintained that the treaty must contain specific language permitting on-reservation gambling to avoid the federal prohibition on gambling.²⁶⁰ Because the court did not find such language in the treaty, it held that there was not a conflict between the federal statute prohibiting gambling and the United States-Puyallup Treaty. Thus, the federal statute automatically applied to the tribe.²⁶¹

Generic development of reservation land is not a treaty-protected activity which would preclude the application of a federal law of general

254. *Id.* at 892. The statute at issue in *Farris* was 18 U.S.C. § 1955. *Id.* Congress enacted § 1955 as part of the Organized Crime Control Act in an effort to “curtail[] syndicated gambling, the lifeline of organized crime, which provides billions of dollars each year to oil its diversified machinery.” *Id.* (citing *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974)).

255. *Farris*, 624 F.2d at 893.

256. *Id.*

257. *Id.* at 893-94.

258. *Id.* at 893 (citing *Antoine v. Washington*, 420 U.S. 194 (1975)); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. White*, 508 F.2d 453 (8th Cir. 1974)).

259. *Farris*, 624 F.2d at 893.

260. *Id.*

261. *See id.* The treaty in question is the 1854 Treaty of Medicine Creek. *Id.* *See also United States v. Dion*, 476 U.S. 734, 736 n.2 (1986) (*Dion III*) (noting that Dion chose not to challenge his convictions for hunting and selling bald eagles for commercial purposes because the rights to do so were not included in the Yankton Sioux treaty with the federal Government); *United States v. Nuesca*, 773 F. Supp. 1388, 1390 (D. Haw. 1990) (*Nuesca I*) (holding that “[a]bsent an explicit treaty or statutory right to take green sea turtles, [the defendant] can point to no legally recognized ‘aboriginal right’ to take green sea turtles”).

applicability such as the ESA. The treaty language granting tribal lands to the Hoffinka's exclusive use is insufficient to affect the operation of a law of general applicability: the treaty must contain specific language allowing on-reservation construction of a hotel complex or something similar.²⁶² Without this specific language, the Chief and his fellow Hoffinka will be unable to avoid the strictures of the ESA.²⁶³ The tribe will be compelled to apply for an ESA section 10 permit to proceed with construction.²⁶⁴

Suppose, however, that the Treaty at Critter Point contains a provision guaranteeing the Hoffinka the right to the economic returns from their land. In this case, a court's analysis of the ESA-treaty conflict would shift away from the straight forward *Farris* approach. A court would have to resolve whether the treaty right to economic returns equates with a treaty right to engage in economic activity on lands inhabited by a listed species.

The central question would become whether the Hoffinkas' rights under the Treaty at Critter Point bar the application of the ESA. The Indians have a strong interest in pursuing their tribal economic development plans. The Hoffinka may perceive any concurrent federal jurisdiction as an impairment of their independent tribal control.²⁶⁵

When a tribe has a treaty right to the economic return from land inhabited by a protected species, the federal government can invoke its trust responsibilities.²⁶⁶ The Department of the Interior has determined

262. See *Farris*, 624 F.2d at 893.

263. *Id.*

264. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B) ("The Secretary may permit . . . any taking otherwise prohibited . . . if such taking is incidental . . ."). If the ESA is applicable to the Hoffinka, its provisions will govern any activity conducted upon their reservation. See *id.* Because the Desert-Bob-Snake has been declared endangered, and because the Hoffinka Reservation is the species' critical habitat, the Hoffinka will have to fully comply with ESA's § 10 permit requirements or risk a § 9 violation.

265. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). In *Mescalero*, the Supreme Court stated that "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation," *id.* at 338, and would "threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 341. However, *Mescalero* does not control the situation at hand because it addressed only concurrent state, not federal, jurisdiction.

266. "An agency's trust responsibilities are established and defined by treaties, statutes, regulations and executive orders." Baum, *supra* note 69, at 13 (citing *United States v. Mitchell*, 463 U.S. 206, 224 (1983); *North Slope Borough v. Andrus*, 642 F.2d 589, 611-12 (D.C. Cir. 1980)). See *supra* notes 71-79 and accompanying text (discussing the trust

that its trust responsibility "to preserve Indian wildlife resources for future generations of Indians,"²⁶⁷ both authorizes and requires the conservation of listed species.²⁶⁸ Thus, the government can limit or prevent the Indians from taking a species in the interest of protecting a trust resource.²⁶⁹

In our hypothetical, the Department of the Interior might reasonably conclude that the Hoffinka are risking extinction of the Desert-Bob-Snake. By refusing to cooperate with the United States Fish and Wildlife Service and clinging to a treaty right to economic return on land, the Hoffinkas' desire to profit from the gambling resort may warrant governmental interference in order to protect the Desert-Bob-Snake for future generations of Hoffinka.²⁷⁰

Abrogation analysis would also apply to the hypothetical. The ESA is not expressly applicable to the Hoffinka tribe, or any Indian tribe for that matter. Thus, the ESA may not be invoked against the Hoffinka if the facts given in the hypothetical fall within the treaty rights exception.²⁷¹ In contrast to express treaty hunting and fishing rights, there may not be a treaty right to build the hotel complex and, thus, there is no conflict between the treaty and the ESA.²⁷² Because the ESA is a law of general applicability, it applies automatically to the Hoffinka

relationship).

267. Martz Opinion, *supra* note 45, at 530.

268. The Martz Opinion states:

The special responsibility of the Secretary to Indians compels regulation of Indian hunting and fishing pursuant to a treaty. This responsibility obligates the United States to take all reasonable and necessary steps to protect the hunting and fishing rights of *future* tribal members from being squandered by the "untrammelled" pursuit of endangered species by *present* tribal members. Failure to act could be deemed a dereliction of the Secretary's special responsibilities since a treaty hunting or fishing right loses all realistic value if the game species upon which it is focused is allowed to suffer the fate of the passenger pigeon.

Id. (citations omitted).

269. *See id.*

270. Baum, *supra* note 69, at 14 n.9.

271. *See United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) (noting that the rule that Congress is not presumed to abrogate Indian treaty rights when passing general legislation applies only to specifically granted rights). *See supra* notes 253-61 and accompanying text (discussing *Farris*).

272. *See Farris*, 624 F.2d at 893.

tribe.²⁷³

If, however, there is a specific treaty right to build the hotel or to receive economic return from the land, and this results in an incidental taking of a listed species, courts will have to apply the *Dion-Billie* direct takings analysis. The courts, however, must remember that the ESA's section 10 may permit an incidental taking of listed species by non-Indians.²⁷⁴ It hardly seems rational that the United States Fish and Wildlife Service must first deny all non-Indians the permission to incidentally take the listed species before a Chief Hoffinka can be stopped from eliminating all of them because of the tribes' treaty right.²⁷⁵

Therefore, the ESA should not only abrogate the treaty right to hunt and fish listed species, but it should also abrogate any treaty right that results in an incidental taking.²⁷⁶ Thus, under the ESA, an incidental taking of a protected species would be prohibited by section 9 to the same extent that a direct taking is.²⁷⁷ Although this prohibition on incidental takings may limit the treaty rights of Indians to develop their land, it is a reasonable and necessary conservation measure.²⁷⁸

VI. CONCLUSION

The extent to which the Endangered Species Act takings prohibition limits economic development in Indian country is a new and relatively uncharted area of law. Although the conflict between treaty rights and federal conservation statutes has arisen in the past in the direct takings context, only recently has the issue of the indirect taking of an endan-

273. See *supra* text accompanying note 256.

274. See *supra* note 27 (discussing ESA § 10's permit process for incidental takings).

275. See, e.g., *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987). In *Billie*, the court had to wrestle with two competing factors: (1) The Seminoles of South Florida believe in the magical healing powers of the Florida panther; and (2) the last 20 to 50 Florida panthers are located in South Florida. *Id.* at 1494-96. Given this situation, if the Seminoles had untrammelled rights to take an otherwise protected species, the Florida panther might be extinct by now. However, the district court found that the ESA abrogated the Indians' rights to engage in this conduct. *Id.* at 1492. Similarly, this Note proposes that the courts should uphold the ESA even in the incidental taking situation presented in the hypothetical.

276. Note that ESA § 9 does not distinguish between direct and incidental takings. See *supra* note 27.

277. See *supra* note 27.

278. See *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

gered species on Indian reservations come to light. This Note argues that because of the nature of the ESA as a federal conservation statute of general applicability, section 9 should prohibit both incidental and direct takings.

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RECENT DEVELOPMENTS

