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The Endangered Species Act: Should It Affect Indian Hunting and Fishing Rights?

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THE ENDANGERED SPECIES ACT: SHOULD IT AFFECT INDIAN HUNTING AND FISHING RIGHTS?

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I. INTRODUCTION

Problems with the regulation of wildlife, as in other areas of public land management, have often been ignored until they became a crisis.¹ Only in the past two decades has there been any significant attempt on the federal level to protect and manage wildlife.² One of the most significant and, perhaps, broadest wildlife laws of recent origin is the Endangered Species Act of 1973 (ESA).³

The ESA is the result of a growing national concern for wildlife whose very existence is threatened with extinction.⁴ The wolf, Bald Ea-

1. See Coggins and Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375 (1979) [hereinafter referred to as Coggins and Modrcin], for a discussion of federal wildlife law and Indians. The general national policy was to leave wildlife management to the states. The states, in turn, generally managed game species and neglected non-game species.

2. Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, 1978 DUKE L. J. 753; see, also, M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977)*; COGGINS & WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW*, 599-671 (1981).

3. 16 U.S.C. §§ 1531-1543 (1976). Early attempts to deal with species threatened or endangered with extinction began with passage of the Endangered Species Preservation Act in 1966, 80 Stat. 926, codified at 16 U.S.C. §§ 668aa, *et seq.*, repealed by 87 Stat. 903 (1973). The Endangered Species Conservation Act, 83 Stat. 275, codified at 16 U.S.C. §§ 668aa *et seq.*, repealed by 87 Stat. 903, was passed in 1969 to remedy problems in the 1966 Act. In 1973, the ESA was transformed again to fill an active congressional commitment to protect certain species. After *TVA v. Hill*, 437 U.S. 153 (1978), the ESA was modified considerably to apparently address public outcries over the outcome of that case where the Court enjoined continued construction of the Tellico Dam in Tennessee to save the snail darter.

4. The ESA (1973) specifies that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the act]." 16 U.S.C. § 1531(c) 1976. See Goplerud, *The Endan-*

gle, Peregrine Falcon and grizzly bear⁵ are but a few of the more well-known wildlife species receiving attention under the Act.

Because some Indians claim the Endangered Species Act does not apply to them, the effectiveness of the Act could be seriously hampered unless this legal question is resolved.⁶

This comment will deal with that question as it relates to Indians in the lower 48 states because Alaskan Indians are excluded from coverage under the Act. Some believe the ESA should and does apply to all persons not specifically excluded by the wording in the statute. To develop that conviction, it is necessary to review the history of public land legislation, the unique status of American Indians, the development of wildlife law with respect to the federal government, the states, and the Indians, and, finally, conclusions on why the ESA must apply to Indians.

II. HISTORY OF PUBLIC LAND LEGISLATION

The development of modern federal wildlife law has great significance when measured against historical concepts of public land management. Although the federal government has been sporadically motivated to pass laws dealing with allocation or preservation of natural resources and public lands, only within the last twenty years has the public interest begun to develop into a logical pattern taking the form of legislative action.⁷

Major legislation, such as the Forest Service Organic Act of 1897⁸ and the Taylor Grazing Act of 1934,⁹ symbolize early attempts to deal with public concern over use of and impacts on federal lands. Recently, it has become evident that the broad managerial guidelines in such acts do not provide adequate managerial direction nor adequate

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5. The grizzly is listed as a "threatened" species by 50 C.F.R. § 17.11 (1980). It is significant to note that states are also concerned with regulation of endangered species. For example, Montana has the Non-game and Endangered Species Conservation Act of Montana, MONTANA CODE ANNOTATED § 87-501-1 (1979). See generally J. TREFETHAN, AN AMERICAN CRUSADE FOR WILDLIFE. (1975).

6. *Supra* note 1, at 403. Coggins and Modrcin believe the Act should cover Indians. See Footnote 63.

7. See generally C. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1 (1980) for an overview of public land law and related issues. The Public Land Law Review Commission, created by the Act of Sept. 9, 1964, P.L. 88-606, 78 Stat. 932, published its findings in a 1970 report titled UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND (1970). The Commission addressed the environmental concerns being expressed by a growing segment of society with the environmental awakening of the 1960's.

8. 16 U.S.C. §§ 473-478, 479-482, 511 (1976).

9. 43 U.S.C. §§ 315-315r (1976).

protection for dwindling resources.¹⁰

Early federal wildlife laws, such as the Migratory Bird Treaty Act of 1918¹¹ and the Bald Eagle Act of 1940,¹² dealt with specific species or groups of species. Eventually, wildlife advocates pushed for broader legislative protection for wildlife.

Public involvement led to massive changes in attitudes resulting in legislation, such as the Multiple-Use Sustained Yield Act of 1960¹³ in which Congress officially recognized resources traditionally considered to be non-economic,¹⁴ such as fish, wildlife, recreation, and preservation, as being equally important to economic resources. The Wilderness Act of 1964¹⁵ reflected an emerging national desire to preserve the rapidly dwindling wildlands heritage. The National Environmental Policy Act of 1969,¹⁶ the Federal Land Policy and Management Act of 1976,¹⁷ and the National Forest Management Act of 1976,¹⁸ involved a more precise management direction and reflected added concern for environmental impacts.

Recent federal wildlife laws, such as the Wild Free-Roaming Horses and Burros Act of 1971,¹⁹ the Marine Mammal Protection Act of

10. *Supra*, notes 1, 2, and 7.

11. 16 U.S.C. §§ 703-711 (1976). For a discussion of the provisions and genesis of this Act, see Coggins and Modrcin, *supra* note 1, at 398-99. See also J. Trefethan, *supra* note 5.

12. 16 U.S.C. §§ 668-668d (1976). The Bald Eagle was adopted by the Continental Congress as the nation's symbol in 1782.

13. 16 U.S.C. §§ 528-531 (1976).

14. *Id.* at § 528 states, "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes . . ." Section 531 defines "multiple use" and "sustained yield."

15. 16 U.S.C. §§ 1131-1136 (1976).

16. 42 U.S.C. §§ 4331-4361 (1976). See Wilkinson, *supra* note 7, at 2. See W. RODGERS, ENVIRONMENTAL LAW 697 (1977). See Tobias and McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of the Environmental Policy Acts on Pre-existing Agency Authority*, 41 MONT. L. REV. 177 (1980) for a comprehensive coverage of The National Environmental Policy Act of 1969 [hereinafter cited as NEPA].

17. 43 U.S.C. §§ 1701-1782. Congress recognized the need for administrators to address all resources including recreation, wildlife, fish, and other scenic, scientific, and historical values. *Id.* at § 1712(c) (1976). See generally, Muys, *The Public Land Law Review Commission's Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301 (1979).

18. Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C.). This act resulted in more specific criteria for management of timber and other National Forest resources; see Wilkinson, *supra* note 7, at 5; see generally, Hines, *Monongahela and the NFMA of 1976*, 7 ENV. L. 356 (1977); Izaak Walton League of America v. Butz, 522 F.2d 945 (4th Cir. 1975) which points to some of the administrative activities in timber management which have serious environmental impacts.

19. 16 U.S.C. §§ 1331-1340 (1976). See, Coggins and Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 IOWA L. REV. 1099 (1976) for an in-depth discussion of the implications of this act. *Kleppe v. New Mexico*, 426 U.S. 529 (1976) provides insights into how the Court views federal power to manage wildlife on public lands.

1972,²⁰ and the ESA, have resulted in the placement of wildlife into a position of national interest.

III. STATUS OF INDIANS

Indians hold a special status in our society due to their heritage as original inhabitants of the United States.²¹ The fundamental argument supporting Indian claims to undisturbed hunting rights stems primarily from two sources: (1) aboriginal title and (2) treaty rights.²²

A. *Aboriginal Title*

In 1823, Chief Justice Marshall, in *Johnson v. McIntosh*,²³ stated that upon "discovery" of this country by a European, the foreigner gained sovereignty over the land. However, Indians were said to be the rightful occupants of the land and could claim legal rights to occupy and use the land. By claim to aboriginal title, the Indians reserved all rights they traditionally enjoyed on the lands.²⁴ This concept would include the unfettered right to hunt and fish wherever they choose.

Marshall stressed that aboriginal title may pass only to the United States and not to state governments or to private individuals.²⁵ Only the government of the discovering nation could extinguish the Indian title, either by purchase or conquest.²⁶ Part of the right to occupy and use the land is being asserted today as the right to hunt and fish on unoccupied federal lands unless Congress has specifically extinguished the right or unless the Indians have relinquished that right by express language in a treaty or other agreement.²⁷

By virtue of succession to title from the "discoverer," Congress has

20. 16 U.S.C. §§ 1361-1407 (1976).

21. GETCHES, ROSENFELT, WILKINSON, FEDERAL INDIAN LAW, 30-32, and various other chapters contain an overview of the source of Indian rights.

22. *Id.* A myriad of texts and articles exist dealing either directly or collaterally with aboriginal title and treaty rights. The field of Indian Law is closely related to a doctrine established by "discovering" nations and subsequent case law. *See, e.g.*, Comment, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975); Cohen, *Original Indian Title*, 32 MINN. L. REV. 38 (1947).

23. 21 U.S. (8 Wheat.) 543 (1823) laid the legal foundation for these theories in the federal government's dealings with Indian rights.

24. *Id.* at 574.

25. *Id.* at 543.

26. *Id.* at 585, 587.

27. *United States v. Santa Fe Pac. R. R.*, 314 U.S. 339 (1941). The concept that Congressional intent must be shown to extinguish an Indian right has gone through a series of modifications. For a thorough discussion of court-related rules on treaty abrogation, *see*, Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long is That?* 63 CALIF. L. REV. 601 (1975).

plenary power over Indians and Indian lands.²⁸ Indians, however, are generally not subject to federal regulation unless specific criteria are met.²⁹

B. Treaty Rights

As settlers pushed westward (and, in some cases, eastward from the west coast), the federal government, to protect the settlers, entered into treaties with various Indian tribes to guarantee initial safe passage and later settling space. Often the same treaty form was used by a United States negotiator in dealing with different tribes. Questions exist with respect to the extent of the arm's length negotiating that went on during the treaty talks. For these and other reasons, courts have been careful to protect Indian rights in this century by developing rules and canons of construction for interpreting treaty provisions in relation to federal statutes.³⁰ Courts have stated that Congress may unilaterally abrogate treaty provisions.³¹ Whenever there is a conflict as to whether a federal statute applies to Indians, the court will look to whether Congress intended to modify or abrogate the treaty right. Generally, the court requires a "clear showing" of legislative intent³² and abrogation "is not to be lightly imputed to the Congress."³³ All statute or treaty provisions will be liberally construed in favor of the Indians.³⁴ Treaty provisions must be interpreted as the Indians themselves would have understood them at the time of signing,³⁵ and ambiguous expressions must be resolved in favor of Indians.³⁶ Treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of

28. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870).

29. *Infra* notes 32-34.

30. See, *GETCHES, et al.*, *supra* note 22, at 200-204, for a discussion of canons of construction for treaty rights interpretation.

31. The leading case establishing the concept of unilateral abrogation by Congress is *Lone Wolf v. Hitchcock*, *supra* note 30. However, the case does import a duty to Congress to act in good faith in doing so. *Id.* at 566.

32. *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. 339 (1941); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974).

33. *Menominee Tribes v. United States*, 391 U.S. 404, 413 (1968); *Pigeon River Improvement, Slide and Boom Co. v. Cox*, 291 U.S. 138, 160 (1924).

34. *GETCHES, et al.*, *supra* note 22, at 35; *Wilkinson and Volkman, supra* note 28; *Choate v. Trapp*, 224 U.S. 665 (1912) and *United States v. Cutler*, 37 F. Supp. 724 (D. Idaho 1941). See also *Winters v. United States*, 207 U.S. 576-77 (1908); *Worcester v. Georgia*, 31 U.S. cite (6 Pet. 515, 582 (1832)).

35. This rule is especially critical in cases dealing with hunting and fishing rights. See, *Burnett, Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49 (1970) for a comprehensive discussion of treaty litigation. See also, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

36. *United States v. Cutler*, *supra* note 35, at 725, *McClanahan v. State Tax Commission*, 411 U.S. 164, 174 (1973).

those not granted."³⁷

These court-made rules have prevented states and the federal government from abrogating or derogating Indian hunting and fishing rights. Only recently have courts allowed intrusion by states to regulate Indian fishing rights, and then only in the interest of conservation.³⁸ Indian treaty hunting and fishing rights have generally been held beyond the jurisdiction of the states. The majority of opinions uphold the view that primacy of Indian treaty rights over state regulation is established by the "Supremacy Clause" of the Constitution.³⁹ That trend, however, is changing in the area of state regulation of fishing and portends of things to come.⁴⁰

IV. FEDERAL WILDLIFE REGULATION

Indians and the Federal government have a special relationship due to the status of the government as trustee for the tribes. In addition, the states and the Federal government have developed a unique relationship with regard to wildlife regulation. Federal attempts to regulate wildlife raise the hackles of both states and Indians. In *Geer v. Connecticut*,⁴¹ the Supreme Court established the concept that wildlife was owned by the states and, as such, was not proper subject for federal regulation. That view remained relatively undisturbed until recent wildlife laws created tension over wildlife management on lands administered by the federal government.

In *Kleppe v. New Mexico*,⁴² the court departed from the state own-

37. *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also*, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

38. Cases developing the concept of state regulation of Indian treaty rights are spread over a considerable period of time and represent a growing field of legal technicalities in Indian law. Some light may be shed on the complexity by reference to the following. GETCHES, *et al.*, *supra* note 22, at 617-54; Comment, *Indian Hunting and Fishing Rights*, 10 ARIZ. L. REV. 725 (1968); Comment, *Regulation of Treaty Indian Fishing*, 43 WASH. L. REV. 670 (1968); Burnett, *supra* note 36; Comment, *State Power and the Indian Treaty Right to Fish*, 59 CAL. L. REV. 485 (1971); Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 46 WASH. L. REV. 207 (1972).

39. Because congress has plenary power over Indians via the U. S. Constitution, art. I, § 8, cl. 3 whereby Congress is granted power "to regulate commerce with foreign Nations, and among the several states and with the Indian Tribes" and because the President has power to make treaties, treaty Indians hold a higher position in relation to the federal government than do the states.

40. This trend also forms the basis of much of this Comment.

41. 161 U.S. 519 (1896). The *Geer* holding was based on the theory that wildlife was a state-owned property and as such the Commerce Clause of the Constitution did not prevent a state from prohibiting transportation of wildlife outside its boundaries. Coggins and Wilkinson, *supra* note 1, at 396, argue that the *Geer* holding is too broad and has been substantially changed by more recent holdings.

42. 426 U.S. 529 (1976).

ership concept when it held that wild burros inhabiting public lands fell under the complete power of Congress to regulate the public domain and, thus, Congress could preempt state authority to regulate such animals.⁴³

A 1978 case upheld the State of Montana's right to charge a higher fee to non-resident hunters than to residents by holding that efforts of Montana to allocate access to recreational hunting were rationally related to the preservation of a finite resource. However, the court did say that "the State's interest in regulating and controlling those things they claim to 'own', including wildlife, is by no means absolute."⁴⁴

In *Hughes v. Oklahoma*,⁴⁵ a 1979 case, the Supreme Court overruled *Geer* by stating that "Time has revealed the error of the result reached in *Geer* through its application of the 19th Century legal fiction of state ownership of wild animals." Federal power to regulate wildlife on public lands stems from authority granted by the Property and Commerce Clauses of the Constitution.⁴⁶ As such, Congress is given extensive power over an area previously considered under the exclusive jurisdiction of states. The extent of federal power to regulate wildlife is uncertain at present, but *Kleppe* supports the growing trend of recognition of conservation as a vital national concern by the courts. This trend may result in an overturning of established rules in determining the scope of federal power over states and Indians when dealing with wildlife regulation.

V. THE ENDANGERED SPECIES ACT V. INDIAN HUNTING AND FISHING RIGHTS

The judiciary faces a quagmire of conflicting, overlapping, and often ambiguous rules when determining the scope of federal power over public lands and resources. Congress has plenary power over federal land and, therefore, can preempt state regulations which conflict with federal law.⁴⁷ In addition, Congress has plenary power over Indians and Indian tribes.⁴⁸ Problems develop when Congress has not

43. See, Coggins and Hensley, *supra* note 19, for discussion of federal versus state claims on the right to regulate wildlife.

44. *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978).

45. 441 U.S. 322 (1979).

46. See, Coggins and Hensley, *supra* note 19, at 1135-39, for an overview of arguments for and against the federal power to regulate wildlife under the treaty-making power and the Commerce Clause of the Constitution.

47. Article IV, § 3, cl. 2 of the Constitution gives Congress power to regulate the public lands and resources. That power has been held superior to state authority even when prior state regulation exists. See, *Hunt v. United States*, 278 U.S. 96 (1928); *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968); *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied*, 396 U.S. 961 (1970). See also *Wilkinson*, *supra* note 7, at 19.

48. *Supra* note 30.

clearly shown, on the face of the statute or through dependable legislative history, that the statute was intended to apply to Indians. Problems also exist where pre-existing rules and case law restrict the means which Congress can use to preempt state authority or abrogate Indian treaty rights.⁴⁹

A leading theory for upholding strict scrutiny on how public lands and resources are managed is based on the concept that public lands are held in "trust" for the common good of all citizens.⁵⁰ The trust theory provides a solid basis for the argument that Federal wildlife laws are not only within the plenary power of Congress, but are an extension of the government's duty to protect the public resources for "all" citizens. It is beyond the scope of this article to discuss the approaches courts have taken to review administrative decisions affecting public lands; however, the trust theory lends support to the argument that any legislation substantially impacting public land resources, be it land, water, minerals, or wildlife, rises to a position of being in the "national interest."⁵¹

When a law is of significant scope to address a national concern, then that law, necessarily, applies to all persons covered by the law unless specifically excluded. The national interest is superior to any claim to derogate the law's effect. For example, in passing the Wild Free-Roaming Horses and Burros Act of 1971, Congress declared that

49. *Supra* note 31.

50. *See*, Wilkinson, *supra* note 7, for a concise summary of the Trust Review Theory. The concept that public lands are to be held and managed in the public's best interest is the foundation of the public trust doctrine. When courts use the approach known as trust review, they invoke a stricter scrutiny to decisions of administrative officials which narrows administrative discretion. Wilkinson suggests that the viability of the public trust doctrine is still uncertain; however, the trend in case law suggests that courts may be expanding it to include public land management. *Id.* at 26-28. *See also*, *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 376 F. Supp. 90 (N.D. Cal. 1974). *Davis v. Morton*, 469 F.2d 593 at 597 (10th Cir. 1972) is an Indian law case where dictum suggested that all lands of the United States are held in trust for the people of the United States. But, the 10th Circuit made an important distinction between Indian lands and public lands. Indian lands are not public trust lands. Thus, any statement expressing trust relationships in Indian lands does not squarely apply to non-Indian or "public" lands. The stronger argument seems to suggest that recent legislation, together with several state court decisions, dictum in lower federal court decisions, and the growing impact of public interest in public land management, justifies the courts invoking stricter scrutiny of administrative decisions by applying the public trust doctrine. *See also*, Rogers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699, 706 (1979). *Light v. United States*, 220 U.S. 523 (1911); *United States v. Trinidad Cool Col.*, 137 U.S. 1960 (1890); COGGINS & WILKINSON, *supra* note 2 at 258.

51. *See e.g.*, *Kleppe v. New Mexico*, 426 U.S. at 535-36; *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942). In *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973), Justice Douglas sets the mood of the conservation concept by warning "the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets," 414 U.S. at 49.

“these animals contribute to the diversity of life forms within the Nation and enrich the lives of the American people.”⁵² The Bald Eagle, as a symbol of our nation’s heritage, has to be regarded as a species of national interest. It is in the best interest of the nation to resist any efforts to limit legislation protecting this magnificent creature. Court holdings which recognize the necessity of ensuring the survival of wild-life populations embrace this concept.

A. *Endangered Species Legislation*

The federal government has a duty to protect species in danger of extinction for the benefit of all citizens. The purposes of ESA are to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth” in the Congressional findings.⁵³ The Secretary of Interior is to determine whether any species is endangered or threatened, and if so, he is directed to publish a list of all such endangered or threatened species. The Secretary of Commerce may also identify such species.⁵⁴

IVA v. Hill,⁵⁵ a highly publicized case, demonstrated the scope of the ESA when the Supreme Court held that the ESA prohibits impoundment of the Little Tennessee River by the Tellico Dam in order to protect the critical habitat of an endangered species. The Court relied on the legislative history of the ESA and on the Purpose Statement to find that Congress intended even a three-inch fish warranted complete protection.

The history of the ESA and the circumstances surrounding the development of other federal wildlife legislation logically lead to the conclusion that Indians in the lower 48 states were intended to be subject to the Act. Various prior federal wildlife laws are either devoid of mention of Indians, or only brief references are made, either in the legislative history or in exemptions within the Acts.⁵⁶ For example, the Bald Eagle Act of 1940,⁵⁷ when passed, did not specifically state that it applied to Indians, and thus the argument was made that it did not apply.⁵⁸ Even after the Bald Eagle Act was amended in 1972 to allow

52. 16 U.S.C. § 1331 (1976).

53. 16 U.S.C. § 1531(b) (1976).

54. 16 U.S.C. § 1533 (1976).

55. 437 U.S. 153, 172-193 (1978).

56. See *Coggins and Modrcin*, *supra* note 1, for a summary of the legislative history of major federal wildlife laws.

57. 16 U.S.C. §§ 668-668d (1976).

58. *Supra* note 1, at 400. See also *United States v. L. Top Sky*, 546 F.2d 482 (9th Cir.

taking of eagles by permit if compatible with the preservation of eagles and for the religious purposes of Indian tribes,⁵⁹ some claimed the Act did not meet the requirement that before a treaty right can be extinguished, there must be a positive expression of congressional intent to do so. Such an argument defies logic. Congress intended the Act to apply to Indians since it added an exclusion allowing Indians to take eagles for religious purposes. Other acts create similar problems.⁶⁰

The ESA prohibits taking or commerce in any listed species⁶¹ "by any person subject to the jurisdiction of the United States."⁶² The Act, however, exempts "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" and non-native permanent residents of Alaskan native villages.⁶³

American Indians were also exempted under earlier versions of the ESA which allowed Indian taking of listed species only for subsistence or ceremonial purposes.⁶⁴ When Congress expressed concern for survival of the Bald Eagle, those exemptions were removed. By 1973, no exemptions remained for Indians in the lower 48 states.⁶⁵ The Congressional deliberations support the argument that Congress did not intend to exclude Indians in the lower 48 states from application of the ESA.

It can be legitimately presumed that Congress, as the supreme legislative body of the land, acts under the assumption that federal wildlife laws apply to anyone and everyone unless specifically excluded.⁶⁶

1976); *United States v. C. Top Sky*, 547 F.2d 486 (9th Cir. 1976); *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980), which all hold that the Bald Eagle Act applies to Indians. For earlier holdings *contra*, see, *United States v. Cutler*, 37 F. Supp. 721 (1941) and *United States v. White*, 598 F.2d 453 (8th Cir. 1974). The dissenting opinion by Judge Lay in *White* established the 9th Circuit rule that the Act does apply to Indians.

59. 16 U.S.C. § 668a (1976).

60. *Coggins and Modrcin*, *supra* note 1, address this issue by showing problems in finding congressional intent sufficient to satisfy rules regarding Indian rights.

61. 16 U.S.C. § 1533a (1976). The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. *Id.* at § 1532(19).

62. *Id.* at § 1538(a).

63. *Id.* at § 1539(e)(1).

64. H.R. 13081 § 5(a)(2) 92d Cong., 2d Sess. (1972); *Predatory Mammals and Endangered Species: Hearing Before the Subcomm. on Fisheries & Wildlife Conservation and the Environment of the House on Merchant Marine & Fisheries*, 92d Cong., 2d Sess. 143-44; *Endangered Species: Hearings Before the Subcomm. on Fisheries & Wildlife Conservation & the Environment of the House Comm. on Merchant Marine & Fisheries*, 93d Cong., 1st Sess. 121 (1973). See also, *Coggins and Modrcin*, *supra* note 1, 403-405.

65. *Id.*; *supra* note 69. The 1978 Amendments to the ESA primarily dealt with modifications in defining habitat and thus had no effect on the issue of Indian exemptions.

66. See *Head v. Hunter*, 141 F.2d 449 (10th Cir. 1944); *Stone v. United States*, 506 F.2d 561, 563 (8th Cir. 1974); *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1976); see *Coggins and Modrcin*, *supra* note 1, at 403.

B. *Need for Conservation*

Species listed under the Endangered Species Act require special attention.⁶⁷ To argue that the ESA does not apply to Indians is to suggest that a law of national significance is to be made less effective by application of a series of sometimes conflicting court-created rules which are not equally acceptable by all courts or by all legal scholars.

The argument seems even less supportable when one considers case law which allows state regulation of Indian treaty fishing activities in the interest of conservation.⁶⁸ As early as 1942, the Supreme Court, although it reversed Washington's attempt to require tribal fishermen to be licensed, suggested states could regulate Indians fishing outside the reservation "as necessary for the conservation of fish."⁶⁹ The rationale used by the courts in determining fishing rights could equally be applied to hunting rights. In *State v. Satiacum*,⁷⁰ the Washington court dismissed charges against Puyallup Indians net fishing off reservation during the closed season, but adopted this "necessary" rule holding that the state had not proven its regulations were "necessary."⁷¹

The case law conflict seems to center on whether there should be "no regulation" of treaty rights as was found in *State v. Arthur*,⁷² where a Nez Perce Treaty Indian killed a deer on National Forest lands off the reservation, or whether, as in *Tulee*, there should be regulation "as necessary."⁷³

In *State v. McCoy*,⁷⁴ the Washington court adopted the view that state regulation would be upheld if "reasonable and necessary,"⁷⁵ and found a Swinomish Indian guilty of net-fishing off the reservation. The Supreme Court confirmed the "reasonable and necessary" rule.⁷⁶ In that case, the State of Washington sought declaratory and injunctive

67. The endangered and threatened species list is published at 50 C.F.R. §§ 17.11-13 (1980).

68. See, *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977). See also *United States v. State of Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979), cert. denied, 100 S. Ct. 1645 (1980). Of course, this new rule is hotly contested. See *Johnson, supra* note 39.

69. *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

70. 50 Wash.2d 513, 314 P.2d 400 (1957).

71. 50 Wash.2d at 530, 314 P.2d at 410.

72. 74 Idaho 251, 261 P.2d 135 (1953). A treaty Indian who killed a deer outside the reservation but within an area ceded to the federal government was said to be acting within his legal rights as reserved by the treaty with his tribe and the state had no right to enforce the state hunting laws upon the Indian defendant.

73. 315 U.S. 681, 685 (1942).

74. 63 Wash.2d 521, 387 P.2d 942 (1963).

75. 387 P.2d at 942 (1963).

76. 391 U.S. 392, 394 (1968).

relief to stop the netting of salmon and steelhead by treaty Indians. The Court upheld the use of the reasonable and necessary rule under these circumstances. Certainly if state law, which is generally inferior to tribal treaty rights, can regulate those activities, it seems well within logic and sound legal policy to find that federal wildlife laws such as the ESA should apply to Indians. Conservation of salmon fisheries in Washington is certainly not of any more importance than the survival of an endangered or threatened species.

Holding Indians subject to the ESA would not destroy their hunting rights, but holding them free of the operation of the Act could destroy a species.⁷⁷ Coggins and Modrcin suggest that courts should look into the "subtler question of whether Congress merely intended to modify or regulate the treaty rights without destroying them."⁷⁸ Under this concept, the application of federal wildlife law to Indians could be upheld without express Congressional intent if such law only modified or regulated certain aspects of Indian treaty rights.⁷⁹

Further, times have changed. Laws cannot be written on granite scrolls.⁸⁰ To so hold would suggest that Congress is without the power to change laws as it deems necessary. At the time many of the Indian

77. While this may be an overstatement, there are situations in which it is justified. In Montana and Idaho, treaty Indians from the Kootenai-Salish Tribes and Nez Perce Tribes can hunt free of state regulation while on open and unoccupied federal lands. *State v. Stasso*, 172 Mont. 242 (1977), 563 P.2d 562 (1977); *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953). Much of the remaining grizzly bear habitat is in federal forests, and some even lies within reservation boundaries. The Flathead Indian Reservation and the Blackfeet Indian Reservation in northwestern Montana support grizzly populations. The grizzly bear is a "threatened" species in the lower 48 states (50 C.F.R. § 17.11) and have an extremely low reproductive rate. C. Jonkel and I. Cowan, *The Black Bear in the Spruce-Fir Forest*. Wild, Mono. No. 27, 57 pp. (1971). See also, J. Craighead, J. Varney, and F. Craighead, *A POPULATION ANALYSIS OF THE YELLOWSTONE GRIZZLY BEARS*. MONTANA FOR. AND CONS. EXP. STAT. BULL. 40, Univ. Mont. (1974). If two or three tribal members decide to kill grizzlies in order to sell the hides and claws as a profit-making business, it is entirely possible that the grizzly population in a given area could be reduced to a point where it is no longer viable. A strong argument should be made, however, that if any grizzlies are to be taken in a state, as in Montana where Federal Regulations allow an annual taking of 25 (50 C.F.R. § 17.40), then treaty Indian hunters should get preference over non-treaty hunters. Grizzly bears are highly sought-after trophies. Unscrupulous hunters, regardless of status, can seriously damage remaining populations unless they can be regulated. See Coggins and Modrcin, *supra* note 1, at 378.

78. Coggins and Modrcin, *supra* note 1, at 378. This concept allows Indians to retain the substantive right to hunt all but the specifically protected species. In today's complex world, that may be the best Indians can hope for without raising a clamor from sensitive wildlife advocates.

79. Such modification or regulation of part of the treaty activity could accommodate both Indian and wildlife interests without destroying the treaty right to hunt and without leaving the endangered species unprotected.

80. To argue that a law once declared or a rule once made cannot be changed is not acceptable from a logical or historical point of view. One Supreme Court reversal is enough to establish the fallacy of such arguments.

treaties were entered into, the concept of a species being in danger of extinction was unknown. Today, it is clear that the rate of species extinction has increased drastically due to man's activities. The ESA was enacted to halt, or at least slow down, this rate. Indians must share responsibility for insuring survival of endangered or threatened species if they wish to assure continued existence of those species.

Due to the wide variations in status and location of Indian tribes through the United States,⁸¹ it is unlikely that each tribe could reach cooperative agreements with the government on how to manage taking of endangered species. "[T]here are 481 federally recognized Indian tribes. Over 100 tribes were 'terminated' by Congress during the 1950's. East of the Mississippi River there are more than 100,000 Indians whose identity has been denied or ignored by federal agencies."⁸²

It would be a practical impossibility to reach such agreements, especially since many tribes have been disbanded and may have no governing tribal council. Better reasoning mandates the conclusion that Congress fully intended the ESA to apply to all but those specifically excluded.

Wildlife is of important cultural and economic value to Indians.⁸³ However, the national interest cannot be ignored in trying to satisfy all needs. Neither the ESA nor any other federal wildlife law substantially interferes with Indian hunting or fishing needs. The Bald Eagle Act allows taking by permit for religious purposes.⁸⁴ No tribe relies on grizzlies, wolves, falcons, eagles, or any other threatened or endangered species as a major food source. Certainly, Indians are opposed to the possible destruction of a species to promote commercial sale of feathers, claws, or other body parts.⁸⁵ Treaty Indians should be given special consideration and preference when exercising a treaty right in competition with non-Indian users. Also, where the diminished right can be defined sufficiently to compensate the Indians for their loss, they should be so compensated. In the case of the ESA, it would be difficult, if not impossible, to reward all Indians to the degree they feel their

81. See generally, GETCHES, *et al.*, note 22, at 1-20 for an excellent overview of how widely dispersed American Indians are today. One can readily see how difficult it would be to negotiate with all segments of the Indian community regarding their individual assertions that the ESA does not apply.

82. *Id.* at 5.

83. DeVleming, *The Aboriginal Hunting Right: Is the Only Good One an Extinguished One?* 13 IDAHO L. REV. 403 (1977) for a discussion of hunting and fishing activities upon which Indians depend for subsistence.

84. 16 U.S.C. § 668(a).

85. There have been cases where Indians were selling eagle parts. *United States v. Allard*, 397 F. Supp. 429 (D. Mont. 1975) (eagle feathers); *United States v. L. Top Sky*, 547 F.2d 483 (9th Cir. 1976); *United States v. C. Top Sky*, 547 F.2d 486 (9th Cir. 1976) (feathers and other parts of 16 eagles).

rights may be diminished. An ecosystem cannot benefit from a species which is eliminated. All people must share responsibility for ensuring a species' survival. Part of the Indian's share is the loss of the right to hunt that animal.

C. *Need for a New Approach*

The time has come for a new approach when dealing with federal wildlife legislation and Indian hunting and fishing rights. Rather than requiring Congress to specifically deal with Indian hunting and fishing rights in each piece of legislation, it seems more practical and logical to start with the presumption that those federal wildlife laws apply to all persons covered by the language in the law unless specifically excluded.⁸⁶

The basis for this presumption is the need for conservation in the national interest. It is doubtful Congress is even aware of the special rules dealing with abrogation of Indian rights. Indian rights must be treated with very special care. Only where Congress has shown sufficient intent to include Indians in the coverage of a statute, or when it is in the national interest to protect a national resource, should the Indian right be altered. Legal rules carried to extremes can destroy or seriously alter that which the rules intended to protect. Absent such presumption, this nation will continually be faced with arguments and legal technicalities while wildlife bears the brunt of human inconsistency.⁸⁷

86. This concept is allied to the maxim *expressio unicus est exclusio alterius*, which states that if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. See Sutherland, *Statutory Construction*, § 47.23. Going one step further, *expressio unicus personae est exclusio alterius* says mention of one person is the exclusion of another. The ESA specifically excludes a group which does not include Native American Indians in the lower 48 states, and as such, fits these maxims perfectly. Under the latter maxim, federal wildlife statutes which apply to "any person," as in the Wild Free-Roaming Horses and Burros Act and the Migratory Bird Treaty Act, 16 U.S.C. § 707(a), or "by any person subject to the jurisdiction of the United States," 16 U.S.C. § 1538(a) (1976), as in the ESA, meet the necessary criteria to uphold the statutes' application to everyone meeting those basic descriptions unless specifically excluded. See *Ex Parte Green*, 123 F.2d 862 (2d Cir. 1941); *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (D. Neb. & S.D. 1975); *supra* note 1 at 403.

87. After the bulk of research for this Comment was completed, the Solicitor General of the Department of Interior issued a memorandum to the Assistant Secretaries of Fish and Wildlife and Parks and Indian Affairs wherein he concluded the ESA applied to Native American treaty hunting and fishing rights. Memorandum. *Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights*, Nov. 4, 1980.

While the result is compatible with this Comment, the reasoning for the Solicitor's conclusions does not appear to be solidly based. For example, the Memorandum cites the history of state regulation of Indian treaty fishing in the Puyallup cases [Puyallup I, 391 U.S. 392, 398 (1968); Puyallup II, 414 U.S. 44, 48 (1973); Puyallup III, 433 U.S. 165, 171 (1977)] as the basis for saying "that as a matter of law Indian treaty rights do not extend to the taking

VI. CONCLUSION

The plenary power of Congress over Indians gives adequate authority to subject Indians to ESA provisions. The exclusionary language and legislative history of the ESA support its application to Indians. Recent developments in federal land management emphasize a national desire to preserve the nation's diminishing resources. That, along with court recognition that even tribal treaty fishing can be regulated by states in the interest of conservation, suggests that Congress and the courts believe conservation of certain species is superior to Indian treaty rights. The ESA could be made ineffective if it were held to not apply to Indians. Such a holding would be illogical. Application of the ESA would only slightly modify Indian hunting rights, but certainly would not abrogate them, and Indians will benefit equally by assuring uniform regulation and control of these endangered species.

It is vital that a resource as valuable as endangered or threatened species not be lost due to esoteric arguments over ambiguous and conflicting legal theories. The national will is that these species survive. Legislative intent is adequately manifested in the circumstances surrounding the ESA that the Act does apply to Indians in the lower 48 states.

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of threatened or endangered species . . ." *Id.* at 5-6. (Emphasis added). Those cases dealt entirely with state regulation and, more specifically, with treaty rights established by a treaty with the particular tribes. Therefore, it seems an overbroad interpretation to conclude that, as a matter of law, all Indians automatically become subject to a federal wildlife statute.

The Solicitor further argues that since the Supreme Court in *TVA v. Hill*, 437 U.S. 153 (1978), recognized the mandate of Congress in applying the provisions of the ESA, the ESA, therefore, covers Indians as well. Such reasoning is only valid if joined with the special considerations that must be met before Congressional acts can be found to apply to Indians. It appears that the ESA does apply to Indians in the lower 48 states, but one must reach that conclusion only through means consistent with procedures established for interpreting Congressional intent to include Indians.

In summary, while some of the Solicitor's arguments present sound policy reasons for the application of the ESA to Indians, too little emphasis was placed on the legal methodology required to reach such conclusions. Just because a statute says it covers "any person subject to the jurisdiction of the United States," does not automatically make it applicable to Indians without some legislative history or exception language to show that Congress intended Indians to be included. Indian treaty rights deserve and require special attention. The Solicitor's Memorandum does not adequately address the problems of treaty abrogation in dealing with those rights.