United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 15, 2021

M-37063

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Assistant Secretary – Fish and Wildlife and Parks

From: Solicitor

Subject: Withdrawal of Solicitor Opinion M-36936, "Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights;" Solicitor Opinion M-36926, "Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights;" and Solicitor Opinion M-27690, "Migratory Bird Treaty Act"

On January 14, 2021, the Deputy Solicitor for Indian Affairs transmitted the attached memorandum ("Deputy Solicitor's Memorandum") recommending that I withdraw the below Solicitor Opinions ("Opinions") that analyze the impact of certain federal conservation statutes on the reserved hunting and fishing rights of individual members of recognized Indian tribes ("tribal members").[1]

- Solicitor Opinion M-36936, "Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights" (Sol. Op. M-36936)[2]
- Solicitor Opinion M-36926, "Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights" (Sol. Op. M-36926)[3]
- Solicitor Opinion M-27690, "Migratory Bird Treaty Act" (Sol. Op. M-27690)[4]

These Opinions undertake to determine whether Congress intended to abrogate the rights of tribal members guaranteed by treaty, statute, or executive order through enactment of the Bald and Golden

[1] Memorandum from Kyle E. Scherer, Deputy Solicitor for Indian Affairs, to Daniel H. Jorjani, Solicitor, "Applicability of the Endangered Species Act and Migratory Bird Treaty Act to Reserved Tribal Hunting and Fishing Rights" (Jan. 14, 2021).
[2] William H. Coldiron, Solicitor Opinion M-36936, "Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights" (June 15, 1981).
[3] Clyde O. Martz, Solicitor Opinion M-36926, "Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights" (Nov. 4, 1980).
[4] Charles Fahy, Solicitor Opinion M-27690, "Migratory Bird Treaty Act" (June 15, 1934) (overruled to the extent of conflict with Sol. Op. M-36936).

Eagle Protection Act ("BGEPA"),[5] the Endangered Species Act ("ESA"),[6] and the Migratory Bird Treaty Act ("MBTA").[7] The Opinions all predate the Supreme Court's decision in *United States v. Dion*,[8] and thus rely on abrogation analyses that are inconsistent with intervening case law. Understandably, this is most apparent in Sol. Op. M-27690, where the Solicitor's finding of abrogation relies on an interpretation of the MBTA that is in conflict with the principles of federal Indian law and statutory construction that have guided federal courts and the Department for over fifty years.[9] Further demonstrating the analytical challenges of the Solicitor's reasoning, Sol. Op. M-27690 favorably cites to an 19th-century case regarding abrogation that has since been "repudiated" by the Supreme Court.[10]

That a Solicitor Opinion from 1934 no longer reflects the current state of the law is unsurprising, particularly where it seeks to address an issue of federal-tribal relations. The same can be said for Sol. Op. M-36926 and Sol. Op. M-36936. Though they are each relatively more recent, the Supreme Court's foundational opinion in 1986 regarding abrogation of treaty rights rendered their conclusions open to criticism shortly after their publication.

This Opinion does not represent a fulsome review of the issues raised in the Deputy Solicitor's Memorandum. That said, I agree that the abrogation analyses contained in the Opinions are inconsistent with the standard articulated by the Supreme Court in *Dion*.[11] Further, and for the reasons discussed in the Deputy Solicitor's Memorandum, I am of the opinion that neither the ESA nor the MBTA possess the requisite plain language or legislative history demonstrating congressional intent to abrogate reserved hunting and fishing rights. This result is consistent with those reached by the most recent federal circuit court and district court to have considered the issue.[12]

Despite this, however, it is also my view that the Solicitor's conclusion in Sol. Op. M-36926 regarding the ESA was correct, even though his abrogation analysis was ultimately flawed. It remains the position of the United States that the federal government has the authority to enforce the ESA against tribal members.[13] Further, it is settled law that each of the States has the ability to

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[5] Act of June 8, 1940, ch. 278, 54 Stat. 250, *codified as amended at* 16 U.S.C. § 668.
[6] Pub. L. No. 93-205, 87 Stat. 884, *codified as amended at* 16 U.S.C. § 1531 *et seq.*
[7] Act of July 3, 1918, ch. 128, 40 Stat. 755, *codified as amended at* 16 U.S.C. §§ 703-712.
[8] 476 U.S. 734 (1986).
[9] Specifically, Sol. Op. M-27690 finds that Congress intended the MBTA to abrogate the treaty-protected hunting rights of the Swinomish Tribe based, in part, on the fact that "[t]he [underlying treaty between the United States and Great Britain] and statute contain no provision excluding the Indians or Indian reservations from their operation." This analysis inverts the direction provided by the Supreme Court in multiple cases subsequent to 1934, which require the inclusion of statutory language or other similar clear and convincing evidence of congressional intent. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (collecting cases).
[10] *Compare* Sol. Op. M-27690 (favorably citing *Ward v. Race Horse*, 163 U.S. 504 (1896)) *with Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) ("*Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood").
[11] *Id.* at 739-740 ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty").
[12] *United States v. Dion*, 752 F.2d 1261, 1270 (8th Cir. 1985) (en banc), *overruled on other grounds*, 476 U.S. 734; *United States v. Turtle*, 365 F. Supp. 3d 1242 (M.D. Fla. 2019).
[13] The rationale for continued federal enforcement of the ESA in the absence of abrogation of reserved hunting or fishing rights can be found in the federal district court opinion in *Turtle*. It relies on the Supreme Court's reasoning in *Puyallup* (defined below) and permits federal regulation of reserved hunting and fishing on the basis of "conservation necessity."