



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”).<sup>1</sup>

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

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

<sup>1</sup> 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).

<sup>2</sup> William H. Coldiron, Solicitor Opinion M-36936, “Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights” (June 15, 1981).

<sup>3</sup> 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).

<sup>4</sup> 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”),<sup>5</sup> the Endangered Species Act (“ESA”),<sup>6</sup> and the Migratory Bird Treaty Act (“MBTA”).<sup>7</sup> The Opinions all predate the Supreme Court’s decision in *United States v. Dion*,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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*.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> Further, it is settled law that each of the States has the ability to

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<sup>5</sup> Act of June 8, 1940, ch. 278, 54 Stat. 250, *codified as amended at* 16 U.S.C. § 668.

<sup>6</sup> Pub. L. No. 93-205, 87 Stat. 884, *codified as amended at* 16 U.S.C. § 1531 *et seq.*

<sup>7</sup> Act of July 3, 1918, ch. 128, 40 Stat. 755, *codified as amended at* 16 U.S.C. §§ 703-712.

<sup>8</sup> 476 U.S. 734 (1986).

<sup>9</sup> 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).

<sup>10</sup> 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”).

<sup>11</sup> *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”).

<sup>12</sup> *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).

<sup>13</sup> 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.”

regulate reserved hunting and fishing, consistent with the Supreme Court's "conservation necessity" test.<sup>14</sup>

It is not typically the practice of the Office of the Solicitor to revisit decades-old Solicitor Opinions, particularly where their conclusions may not be wholly incorrect. In this case, however, federal prosecutors have relied on these published opinions to support arguments that are inconsistent with case law, as well as the Department's long-standing approach to advising whether Congress intended through a particular statute to abrogate a treaty or treaty rights. Accordingly, I hereby withdraw Sol. Op. M-27690, Sol. Op. M-36926, and Sol. Op. M-36936, to the extent they conflict with *Dion* and related case law.<sup>15</sup>



Daniel H. Corjani

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<sup>14</sup> *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165 (1977) (*Puyallup III*); *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*) (collectively "*Puyallup*").

<sup>15</sup> This Opinion is binding on the Department but is not intended to limit or constrain how any other federal agency interprets or applies the ESA or the MBTA.




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

January 14, 2021

Memorandum

To: Daniel H. Jorjani, Solicitor

From: Kyle E. Scherer, Deputy Solicitor for Indian Affairs   
Eric N. Shepard, Associate Solicitor, Division of Indian Affairs ERIC SHEPARD Digitally signed by ERIC SHEPARD  
Date: 2021.01.14 15:16:08 -05'00'  
Samuel E. Ennis, Assistant Solicitor, Division of Indian Affairs SAMUEL ENNIS Digitally signed by SAMUEL ENNIS  
Date: 2021.01.14 14:33:53 -05'00'

Subject: Applicability of the Endangered Species Act and Migratory Bird Treaty Act to Reserved Tribal Hunting and Fishing Rights

**I. Introduction.**

On November 4, 1980, the Solicitor issued M-36926, “Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights” (“Sol. Op. M-36926”).<sup>1</sup> Sol. Op. M-36926 concluded that

Indian treaty rights do not extend to the taking of threatened or endangered species and that even if treaty rights allow the taking of endangered and threatened species, then those rights may have been abrogated or modified by Congress through the [Endangered Species Act].<sup>2</sup>

On June 18, 2018,<sup>3</sup> federal prosecutors charged a member of the Seminole Tribe of Florida (“Tribe”) and resident of the Brighton Seminole Indian Reservation with violating the Endangered Species Act (“ESA”)<sup>4</sup> and Lacey Act.<sup>5</sup> In response to the defendant’s motion to dismiss on the grounds that his hunting activities were protected by treaty, the United States argued that Congress had abrogated any applicable reserved hunting right<sup>6</sup> through enactment of the ESA.<sup>7</sup> In support of this proposition, the United States cited to Sol. Op. M-36926 and

<sup>1</sup> 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) [hereinafter “Sol. Op. M-36926”].

<sup>2</sup> Sol. Op. M-36926 at 1.

<sup>3</sup> Complaint, *United States v. Turtle*, 365 F. Supp. 3d 1242 (M.D. Fla. 2019) (Case No: 2:18-cr-88-FtM-38MRM).

<sup>4</sup> Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. § 1531 *et seq.*).

<sup>5</sup> Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. § 3371 *et seq.*). Among other things, the Lacey Act prohibits the “import, export, transport, s[ale], recei[pt], acqui[sition], or purchase [of] any fish or wildlife or plant taken, possessed, transported, or sold in violation of any” federal or tribal law, or state or foreign law when the activity is in interstate or foreign commerce. 16 U.S.C. § 3372(a). In the case at issue, the Lacey Act violation was predicated on the ESA. The State of Florida similarly criminalizes the activity for which the defendant was charged. FLA. STAT. § 379.409(1) (2012).

<sup>6</sup> The analysis contained in Sol. Op. M-36926 applies equally to “any hunting or fishing rights pursuant to a treaty with the United States or pursuant to a statutory or aboriginal right, or an executive order.” Sol. Op. M-36926 at 2. As such, unless the context otherwise requires, this memorandum will refer to these rights generally as “reserved.”

<sup>7</sup> Government Response to Motion Dismiss at 7-17, *United States v. Turtle*, 365 F. Supp. 3d 1242 (M.D. Fla. 2019) (Case No: 2:18-cr-88-FtM-38MRM).

Solicitor Opinion M-36936 (“Sol. Op. M-36936”),<sup>8</sup> an opinion from the same period that reached a similar result with respect to the Migratory Bird Treaty Act (“MBTA”).<sup>9</sup> The U.S. District Court for the Middle District of Florida rejected the government’s position relating to abrogation,<sup>10</sup> but nonetheless found the ESA to be enforceable against members of federally-recognized Indian tribes (“Indians” or “tribal members”). In dismissing the defendant’s affirmative defense of reserved hunting rights, the federal district court judge relied, in part, on the reasoning contained in Sol. Op. M-36926.<sup>11</sup>

It is the considered view of the signatories to this memorandum that Sol. Op. M-36926 and Sol. Op. M-36936 (“Opinions”) are inconsistent with subsequent case law. Shortly after their publication, the U.S. Supreme Court (“Supreme Court”) heard arguments in *United States v. Dion*.<sup>12</sup> There, in a unanimous opinion, Associate Justice Thurgood Marshall recounted the varying standards that the Supreme Court historically applied when considering whether Congress had intended to abrogate a treaty or treaty right.<sup>13</sup> He then concluded that “[w]hat 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.”<sup>14</sup>

As discussed in greater detail below, neither the statutory text nor legislative history of the ESA or MBTA demonstrate congressional intent to abrogate reserved hunting or fishing rights. Accordingly, we recommend that both Sol. Op. M-36926 and Sol. Op. M-36936 be withdrawn to the extent they conflict with *Dion* and related case law. We similarly recommend the withdrawal of Solicitor Opinion M-27690 (“Sol. Op. M-27690”),<sup>15</sup> an earlier analysis of the MBTA that reaches a conclusion similar to that of Sol. Op. M-36936. These withdrawals do not necessarily make the ESA or MBTA inapplicable in Indian Country.<sup>16</sup> Rescinding such opinions will, however, prevent federal prosecutors and judges from citing to legal opinions that the Department of the Interior (“Department”) no longer considers to be accurately reflective of the law.

## II. Legal Background.

### A. Abrogation of reserved hunting and fishing rights.

“As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by

<sup>8</sup> William H. Coldiron, Solicitor Opinion M-36936, “Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights” (June 15, 1981) [hereinafter “Sol. Op. M-36936”].

<sup>9</sup> Act of July 3, 1918, ch. 128, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712).

<sup>10</sup> *United States v. Turtle*, 365 F. Supp. 3d 1242, 1248 (M.D. Fla. 2019) (“All in all, interpreting the ESA liberally in favor of the Seminoles, the Court does not find clear and convincing evidence that Congress chose to abrogate the Tribe’s usufructuary rights.”).

<sup>11</sup> *Id.* at 1248-49.

<sup>12</sup> 476 U.S. 734 (1986).

<sup>13</sup> *Id.* at 738-39.

<sup>14</sup> *Id.* at 739-40.

<sup>15</sup> Charles Fahy, Solicitor Opinion M-27690, “Migratory Bird Treaty Act” (Jun. 15, 1934) [hereinafter “Sol. Op. M-27690”].

<sup>16</sup> “Indian country” is a term of art defined at 18 U.S.C. § 1151. It includes reservations, trust lands, Indian allotments, and dependent Indian communities.

Congress.”<sup>17</sup> And where Congress so chooses to abrogate Indian treaty rights, “it must clearly express its intent to do so.”<sup>18</sup> For example, even where Congress has terminated a tribe or disestablished an Indian reservation, treaty rights survive absent clear congressional intent to the contrary.<sup>19</sup> As the Supreme Court recently held in *Herrera v. Wyoming*, a statute cannot be interpreted as abrogating a treaty right when “[t]here simply is no evidence that Congress intended to abrogate the ... Treaty right ... much less the ‘clear evidence’ this Court’s precedent requires.”<sup>20</sup>

*United States v. Dion* is a foundational case concerning the application of these principles.<sup>21</sup> In *Dion*, the Supreme Court considered whether Congress had abrogated any reserved right to hunt bald and golden eagles when it passed the Bald and Golden Eagle Protection Act (“BGEPA”).<sup>22</sup> The Supreme Court began its inquiry by stating that “Congress’ intention to abrogate Indian treaty rights [must] be clear and plain” and by invoking the canon discussed *supra* that “[a]bsent explicit statutory language, [courts] have been extremely reluctant to find congressional abrogation of treaty rights.”<sup>23</sup> Considering this framework as settled law,<sup>24</sup> the Supreme Court sought to reconcile the various approaches that had previously been applied for “determining how [Congress’] clear and plain intent must be demonstrated.”<sup>25</sup>

The Supreme Court found that while an explicit statement by Congress is “preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights ... such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.”<sup>26</sup> As summarized above, such an inquiry requires “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.”<sup>27</sup> The Supreme Court ultimately applied these principles to find clear congressional intent in BGEPA’s text and legislative history to abrogate tribal treaty rights.<sup>28</sup> Subsequent Supreme Court and lower court cases examining congressional abrogation of reserved hunting and fishing rights

<sup>17</sup> *Dion*, 476 U.S. at 738.

<sup>18</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (collecting cases).

<sup>19</sup> See, e.g., *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (tribal treaty hunting right survived termination of tribe); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983) (general statutory language referring to taking “entire interest” in certain lands falls short of abrogating specific treaty right); *Kimball v. Callahan*, 493 F.2d 564, 567 (9th Cir. 1974) (tribal termination statute did not extinguish tribal hunting and fishing rights).

<sup>20</sup> 139 S. Ct. 1686, 1698–99 (2019) (quoting *Mille Lacs*, 526 U.S. at 203).

<sup>21</sup> While there are cases concerning abrogation that predate *Dion* (e.g., *Menominee*), most courts today refer to *Dion* when citing to the Supreme Court’s congressional abrogation analysis. For ease of reference, this memorandum will refer to such analysis as the “*Dion*” analysis.

<sup>22</sup> Act of June 8, 1940, ch. 278, 54 Stat. 250 (codified as amended at 16 U.S.C. § 668).

<sup>23</sup> *Dion*, 476 U.S. at 738–39 (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979)).

<sup>24</sup> *Id.* (citing, e.g., *Menominee*, 391 U.S. at 412; *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353 (1941); *Pigeon River Co. v. Cox Ltd.*, 291 U.S. 138, 160 (1934)).

<sup>25</sup> *Id.* at 739.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 740.

<sup>28</sup> *Id.* at 745; see also generally *id.* at 740–45. The Supreme Court declined to decide whether the ESA or the MBTA similarly abrogated tribal treaty rights, or whether hunting a species “to extinction” fell outside the scope of the treaty right. It did, however, hold that BGEPA’s abrogation of treaty rights to hunt eagles precluded defendants from citing those treaty rights as a defense to a separate ESA prosecution for the same activities. *Id.* at 738 n.5, 745–46.

follow *Dion*'s "clear congressional intent" analysis.<sup>29</sup> These cases considered federal conservation statutes such as the ESA,<sup>30</sup> the Lacey Act,<sup>31</sup> the MBTA,<sup>32</sup> and others.<sup>33</sup>

### B. The *Puyallup* "conservation necessity" test.

In both Opinions, the Solicitor found the ESA and the MBTA to be broadly applicable by concluding, in part, that reserved hunting and fishing rights inherently do not extend to the taking of threatened or endangered species.<sup>34</sup> The Solicitor in each case based his conclusions on his interpretation of a series of Supreme Court opinions holding that the State of Washington could regulate certain Indian tribes' treaty fishing activities so long as such regulations were both (1) reasonable and necessary for conservation and (2) non-discriminatory towards Indians.<sup>35</sup> Finding that the "conservation necessity" test articulated in *Puyallup* applies equally to federal statutes, the Solicitor concluded that the ESA and the MBTA apply to Indian tribes as reasonable, non-discriminatory conservation statutes, irrespective of whether their texts or legislative histories demonstrate the requisite congressional intent.<sup>36</sup>

Several courts have considered whether *Puyallup* applies to federal conservation regulations, such that a federal statute satisfying *Puyallup* may equally restrict tribal hunting and fishing, even if it would otherwise fail *Dion*. Courts have split on this question, with certain cases applying variations of the test articulated in *Puyallup* at the federal level<sup>37</sup> and others explicitly holding that *Puyallup* is limited to state regulation.<sup>38</sup> In briefs submitted in *Dion*, the

<sup>29</sup> See, e.g., *Mille Lacs*, *supra*; *South Dakota v. Bourland*, 508 U.S. 679 (1993).

<sup>30</sup> See, e.g., *United States v. Dion*, 752 F.2d 1261, 1269 (8th Cir. 1985) (en banc), *overruled on other grounds*, 476 U.S. 734; *Turtle*, 365 F. Supp. 3d at 1242; *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>31</sup> *United States v. Brown*, No. CRIM. 13-68 JRT/LIB, 2013 WL 6175202, at \*4 (D. Minn. Nov. 25, 2013), *aff'd*, 777 F.3d 1025 (8th Cir. 2015).

<sup>32</sup> See, e.g., *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1126 n.11 (D. Ariz. 2006) (collecting cases applying *Dion* to treaty rights); *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991); *United States v. Cutler*, 37 F. Supp. 724, 725 (D. Idaho 1941); *United States v. Vance Crooked Arm*, No. CR-13-18-BLG-RFC, 2013 WL 1869113, at \*2 (D. Mont. May 3, 2013); *United States v. Fiddler*, No. 2:10-CR-00052-RLH, 2011 WL 2149510, at \*1 (D. Nev. Mar. 11, 2011), *report and recommendation adopted*, No. 2:10-CR-00052-RLH, 2011 WL 2148853 (D. Nev. June 1, 2011); *United States v. Wahchumwah*, No. CR-09-2035-EFS-1, 2009 WL 2604779, at \*1 (E.D. Wash. Aug. 24, 2009); Amended Order Ruling on Pretrial Motions, *United States v. Hawk*, No. CR-09-2034-EFS-1, at 7-13 (E.D. Wash. Aug. 13, 2009) (unpublished order on file with the Department) [hereinafter "*Hawk*"].

<sup>33</sup> See, e.g., *United States v. White*, 508 F.2d 453, 458-59 (8th Cir. 1974) (pre-*Dion* Eagle Act case); *United States v. Allard*, 397 F. Supp. 429, 431 (D. Mont. 1975) (same); *Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at \*9 (D. Or. Oct. 2, 1996) (Emergency Supplemental Appropriations for Disaster Relief and Recessions Act).

<sup>34</sup> See Sol. Op. M-36926 at 528-29; Sol. Op. M-36936 at 588-90.

<sup>35</sup> *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165 (1977) (*Puyallup III*); *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*) (collectively "*Puyallup*").

<sup>36</sup> Sol. Op. M-36926 at 528-29; Sol. Op. M-36936 at 588-90.

<sup>37</sup> See, e.g., *Anderson v. Evans*, 371 F.3d 475, 497, 497 nn.21-22 (9th Cir. 2004); *United States v. Fryberg*, 622 F.2d 1010, 1013-16 (9th Cir. 1980), *cert. denied*, 449 U.S. 1004 (1980); *Turtle*, 365 F. Supp. 3d at 1247-48; *United States v. Gotchnik*, 57 F. Supp. 2d 798, 802-04 (D. Minn. 1999).

<sup>38</sup> See, e.g., *Fiddler*, 2011 WL 2149510, at \*2-3 ("Accordingly, inasmuch as *Dion* is directly on point, and absent any explanation in [*Fryberg* and *Anderson*] for not applying precedential Congressional treaty abrogation analysis, this court will heed the admonition that treaties are not to be easily cast aside, and apply the Supreme Court's precedential abrogation analysis in this case.") (citation and internal quotations omitted); *Hawk* at 12 (rejecting *Fryberg* and *Anderson* on the grounds that they "ignor[ed] post-*Dion* Supreme Court precedent directly on point which utilized the Congressional treaty abrogation analysis").

United States took the position that *Puyallup* can be applied to federal statutes, though the Supreme Court ultimately did not address the issue.<sup>39</sup>

As the purpose of this memorandum is to consider whether the ESA and the MBTA abrogate reserved rights within the meaning of *Dion*, we do not address *Puyallup* and its application to federal statutes. Thus, it remains the position of the United States that the ESA is enforceable against tribes and tribal members. Nevertheless, we have raised this issue to emphasize that it is settled law that the States have the ability to regulate reserved hunting and fishing, consistent with the conservation necessity test articulated in *Puyallup*.

### III. Analysis.

#### A. The ESA did not abrogate reserved hunting and fishing rights.

In Sol. Op. M-36926, the Solicitor declined to explicitly address whether the ESA abrogated reserved hunting and fishing rights.<sup>40</sup> And while the Supreme Court in *Dion* held that BGEPA's abrogation of treaty rights precluded the respondent from asserting such rights as a defense to alleged violations of the ESA, it expressly did not decide whether the ESA independently abrogated those rights.<sup>41</sup> Indeed, that portion of the en banc opinion of the federal circuit court from which certiorari was granted was not disrupted, leaving intact its analysis that Congress did not intend the ESA to abrogate tribal treaty rights.<sup>42</sup>

Ultimately, when enacting a federal statute, Congress must demonstrate a "clear and plain intent" to abrogate tribal treaty rights.<sup>43</sup> "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."<sup>44</sup> Particularly where treaty rights are implicated, courts must further construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."<sup>45</sup> The ESA's plain language or legislative history must therefore demonstrate clear congressional intent to abrogate reserved hunting and fishing rights, as read most favorably for tribal interests.

#### 1. The plain language of the ESA does not demonstrate clear congressional intent to abrogate reserved hunting and fishing rights.

As the *Dion* Court noted, "[t]he Endangered Species Act and its legislative history ... are to a great extent silent regarding Indian hunting rights."<sup>46</sup> However, there are two statutory provisions in the ESA that are potentially relevant to this inquiry. The ESA's prohibited acts

<sup>39</sup> See Brief for the United States at 18-33, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246) [hereinafter "Brief for the United States"]; Reply Brief for the United States at 6 n.4, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246); see also Government's Response to Motion to Dismiss at 17-20, *United States v. Turtle*, 365 F. Supp. 3d 1242 (M.D. Fla. 2019) (No. 2:18-cr-88-FtM-38MRM) (arguing the same).

<sup>40</sup> Sol. Op. M-36926 at 534-35.

<sup>41</sup> 476 U.S. at 745-46.

<sup>42</sup> 752 F.2d 1261, 1270 (8th Cir. 1985) (en banc); 476 U.S. at 736, 745.

<sup>43</sup> 476 U.S. at 739.

<sup>44</sup> *Id.* at 739-40.

<sup>45</sup> *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

<sup>46</sup> 476 U.S. at 745.

cover “any person subject to the jurisdiction of the United States.”<sup>47</sup> The term “person” is separately defined as:

[A]n individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.<sup>48</sup>

This definition makes no specific mention of Indians or Indian tribes. However, under a plain language statutory interpretation, the term “individual” is read to include Indians, and “other entit[ies] subject to the jurisdiction of the United States” is read to include recognized Indian tribes. One could argue, therefore, that in applying the ESA’s prohibitions in a broad, nondiscriminatory manner to any person subject to the jurisdiction of the United States, including Indians and Indian tribes, the plain language of the ESA thereby also demonstrated congressional intent to abrogate treaty hunting and fishing rights where such activities are otherwise prohibited by the ESA subject to narrow exclusions.

While we find this definition is not the clear expression of congressional intent contemplated in *Dion* or other abrogation analyses in relation to reserved tribal hunting and fishing rights, this plain language interpretation is not without support. The ESA includes a narrow exclusion for the taking of threatened and endangered species by “any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or any non-native permanent resident of an Alaskan native village” if such taking is primarily for subsistence purposes.<sup>49</sup> In conjunction with the broad definition of a covered “person,” this language could be read to suggest that Congress intended the ESA to apply to any otherwise prohibited activity undertaken by an individual Indian other than those specifically mentioned in the Alaska exception, including treaty hunting and fishing activities. Further support for this interpretation can be gleaned from the Supreme Court’s decision in *Tennessee Valley Authority v. Hill*.<sup>50</sup> There, the Supreme Court noted that when passing the ESA, “Congress was also aware of certain instances in which exceptions to the statute’s broad sweep would be necessary.”<sup>51</sup> The Supreme Court accordingly refused to read any exceptions into the ESA other than those specifically enumerated in the statute.<sup>52</sup>

Similarly, in *United States v. Billie*, a case concerning whether the ESA applied to noncommercial hunting of the Florida panther by a member of the Seminole Tribe of Florida on the Big Cypress Indian Reservation, the U.S. District Court for the Southern District of Florida (“District Court”) read these exceptions in concert as sufficient under *Dion* to demonstrate congressional intent to abrogate treaty hunting rights. The District Court held that (1) the ESA is a statute of general applicability that does not otherwise exclude Indians; and (2) the narrow exclusion for Alaska Native subsistence demonstrates that Congress considered Indians in the

<sup>47</sup> 16 U.S.C. § 1538(a)(1).

<sup>48</sup> 16 U.S.C. § 1532(13).

<sup>49</sup> 16 U.S.C. § 1539(e)(1).

<sup>50</sup> 437 U.S. 153 (1978).

<sup>51</sup> *Id.* at 188.

<sup>52</sup> *Ibid.*

conterminous United States when passing the ESA, and intended the ESA to apply to tribal hunting and fishing activities so located.<sup>53</sup>

Other courts have disagreed with regard to whether the ESA abrogates treaty hunting and fishing rights. For example, before *Dion* reached the Supreme Court, the Eighth Circuit noted that “[w]e cannot find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in either the statutory language or legislative history of this Act. Nor has the government directed our attention to any such reference.”<sup>54</sup> And in *Turtle*, the federal district court noted that Congress may have “limited this exception to Alaskan natives in recognition of their unique reliance on endangered species for cultural and subsistence purposes ... [or] believed Alaskan natives had a unique need for an exception because they lacked the treaty rights enjoyed by Indians in other states.”<sup>55</sup>

Confronted with competing federal court decisions, we conclude, on balance, that the plain language of the ESA does not meet the high threshold necessary to demonstrate congressional intent to abrogate reserved hunting and fishing rights. First, that the ESA defines “person” without specifically identifying or exempting Indians does not require its application to Indians exercising reserved hunting and fishing rights. We are mindful of the interpretive canon that statutes of general applicability apply to Indians absent evidence to the contrary.<sup>56</sup> But as *Dion* and its progeny demand, the relevant interpretive canon and analysis required is different in the specific context of determining congressional abrogation of reserved rights.<sup>57</sup> Here, the issue is whether Congress considered the effect of the ESA on reserved hunting and fishing rights, then demonstrated a clear intent to abrogate those rights. We do not glean such intent from the fact that the ESA’s general definition of “person” makes no specific mention of Indians or Indian tribes.

Nor does the Alaska subsistence exemption provide the prerequisite congressional intent. It is certainly possible to interpret this provision as suggesting the ESA is otherwise applicable to Indians, as the District Court did in *Billie*. But it is equally plausible, as was observed in *Turtle*, that the provision was meant to extend to Alaska Natives similar hunting and fishing rights to what legislators understood were available to those Indians residing in Indian Country in the conterminous United States. For example, during congressional hearings prior to the passage of the ESA, the Department provided testimony in support of the Alaska exception:

Although American Indians enjoy treaty-secured hunting and fishing rights over areas in which endangered species are found, no such rights are recognized for Aleuts and Eskimos. Moreover, section 3 of the Alaska

<sup>53</sup> 667 F. Supp. at 1490; *accord id.* at 1491 (finding plain-language abrogation from “[t]he narrow Alaskan exception, the inclusion of Indians within the Act’s definition of ‘person,’ [and] the Act’s general comprehensiveness”).

<sup>54</sup> 752 F.2d at 1269.

<sup>55</sup> 365 F. Supp. 3d at 1248.

<sup>56</sup> *See, e.g., Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 115-24 (1960).

<sup>57</sup> *See, e.g., United States v. Fox*, 573 F.3d 1050, 1052 (10th Cir. 2009) (otherwise applicable laws of general application do not apply to Indians if they “abrogate rights guaranteed by Indian treaties” pursuant to *Dion*).

Native Claims Act extinguished any claims they may have asserted to immunity from Federal hunting and fishing laws.<sup>58</sup>

When viewed in this manner, the Alaska exception represents a decision by Congress to exempt Alaska Natives who lack treaty hunting and fishing rights from the ESA. It does not reflect, *sub silentio*, a specific consideration and extinguishment of the rights of treaty Indians in the conterminous United States.<sup>59</sup>

BGEPA provides an instructive comparison. While it generally prohibited the taking, possession, or transportation of bald and golden eagles, Congress authorized the Secretary of the Interior (“Secretary”) to permit such actions “for the religious purposes of Indian tribes” in certain limited contexts.<sup>60</sup> As the Supreme Court found in *Dion*, that authorization “is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians.”<sup>61</sup> Unlike the BGEPA permit clause, however, the ESA’s Alaska exception applies only to Alaska Natives and residents of Alaska Native villages in Alaska. It says nothing of the rights of Indians residing in the conterminous United States. As several courts have found, and as the United States has argued, clauses in federal conservation statutes specific to the rights of Alaska Natives are generally not probative in a *Dion* analysis.<sup>62</sup>

Similarly, the Supreme Court in *Tennessee Valley Authority* considered the general question of how to apply the ESA outside of its enumerated exemptions. But there is a significant distinction between an otherwise-covered entity (i.e., a federal agency) that cannot avail itself of the ESA’s limited statutory exemptions and an Indian tribe that is exempt from federal conservation statutes absent clear congressional intent to abrogate its treaty-protected rights. It may therefore be simultaneously true that the ESA is to be broadly applied, but that it does not contain the textual hallmarks to extend to reserved hunting and fishing activities.

Whatever views the Department had prior to passage of the ESA in 1973, at a 1985 congressional hearing on the interplay between endangered species and American Indian religious practices, the Acting Solicitor testified that while the ESA did not amount to a

<sup>58</sup> *Predatory Mammals and Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 144 (1972) [hereinafter “*Predatory Mammals*”].

<sup>59</sup> See *United States v. Nuesca*, 945 F.2d 254, 257–58 (9th Cir. 1991) (noting that the Alaska exception “is based upon food supply and culture. Some native Alaskans depend upon hunting certain species for their livelihood; hunting is engrained in their culture” and rejecting notion that in Alaska exception, Congress was “called upon to decide whether any surviving native Hawaiians subsist on the hunting of endangered animals”).

<sup>60</sup> 16 U.S.C. § 668a.

<sup>61</sup> 476 U.S. at 740.

<sup>62</sup> See, e.g., *Bresette*, 761 F. Supp. at 663 (characterizing the MBTA exemption for Alaska Natives as “irrelevant for purposes of *treaty* rights analysis because Native Alaskans do *not* have treaty rights. . . . To treat the consideration of indigenous Alaskans’ rights as the consideration of Native American *treaty* rights nationwide, for the simple reason that both groups are regarded as Indians, is disingenuous”) (emphasis in original); *Fiddler*, 2011 WL 2149510 at \*5 (“While the MBTA does make reference to Native Alaskans, specifically allowing indigenous inhabitants of the State of Alaska to take and collect migratory birds for food and clothing, this is irrelevant for the purposes of treaty rights because Native Alaskans do not *have* treaty rights.”) (emphasis in original; citations and internal quotations omitted); Supplemental Answering Brief for the Federal Defendants, *Anderson v. Evans* at 19, 371 F.3d 475 (9th Cir. 2004) (No. 02-35761)) (Marine Mammal Protection Act provision authorizing Alaska Native subsistence taking “is irrelevant to the question of Indian *treaty* rights because Alaskan natives have no such treaty rights and thus required an express statutory exception to continue their subsistence taking”) (emphasis in original).