

The Endangered Species Act and Indian Treaty Rights: A Fresh Look

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I. INTRODUCTION

In 1987, the United States District Court for the Southern District of Florida, in *United States v. Billie*,¹ considered the relationship between the Endangered Species Act (ESA or the Act)² and Indian³ treaty rights and concluded that the Seminole Indians' rights to hunt an endangered species were abrogated by the ESA.⁴ The holding in *Billie* was based on the 1986 abrogation standard defined by the Supreme Court in *United States v. Dion*,⁵ which specified 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

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1. 667 F. Supp. 1485 (S.D. Fla. 1987).

2. 16 U.S.C. §§ 1531-1544 (1994).

3. As used throughout this Article, the term “Indian” does not refer to Alaskan natives.

4. See *Billie*, 667 F. Supp. at 1492.

5. 476 U.S. 734 (1986).

the treaty.”⁶ The *Billie* decision touched off extensive criticism by commentators⁷ and has also been questioned in the courts.⁸ However, in spite of these concerns, no federal case has since been reported that directly analyzes the ESA in relation to Indian treaty rights. In addition, a recent survey, completed by the author in the spring of 1999, did not find any issues concerning conflicts between the ESA and Indian treaty rights scheduled for judicial resolution.⁹

The purpose of this Article is to reevaluate the relationship between the ESA and Indian treaty rights. This “fresh look” will consider two issues. First, whether protection of endangered species necessarily creates a conflict with Indian treaty rights to the extent that those rights must be abrogated in order to fulfill the purposes of the ESA. Does the ESA provide some flexibility whereby most issues can be resolved without resorting to abrogation? Can Indian hunting and fishing rights be regulated to resolve most conservation issues? Is protection of endangered species consistent, in principle, with our nation’s trust responsibility to Indians? Part II of this Article will review the provisions of the ESA that provide the flexibility to address potential conflicts. In addition, regulation of Indian hunting and fishing rights will be examined. Part II will also consider Indian trust responsibilities and policy considerations as they relate to the protection of endangered species.

6. *Id.* at 739-740.

7. *See, e.g.*, Tracy A. Diekemper, *Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions that Indian Treaties Are the Supreme Law of the Land*, 10 J. ENVTL. L. & LITIG. 473, 482 (1995); Sally J. Johnson, *Honoring Treaty Rights and Conserving Endangered Species After United States v. Dion*, 13 PUB. LAND L. REV. 179, 186-88 (1992); Tina L. Morin, *Indians, Non-Indians, and the Endangered Panther; Will the Indian/Non-Indian Conflict be Resolved Before the Panther Disappears?*, 13 PUB. LAND L. REV. 167, 177-78 (1992); Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 883-85 (1991); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 568-71 (1991).

8. *See, e.g.*, *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991). Chippewa Indians were prosecuted for the sale of migratory bird feathers in violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994). *See Bresette*, 761 F. Supp. at 659. An affirmative defense based on treaty rights was asserted. *See id.* at 660. In contending that the Migratory Bird Treaty Act abrogated any treaty rights the defendants possessed, the government relied in part on *Billie*. *See id.* at 663-64 n.2. The court commented that “*Billie* should not stand for the proposition that the inclusion of Alaskan natives’ concerns in a statute is evidence that Congress has considered Indian treaty rights in the rest of the country.” *Id.* at 664.

9. The author sent letters to the seven regional directors of the United States Fish and Wildlife Service (FWS) and five regional directors of the National Marine Fisheries Service (NMFS) asking whether there were any disputes between Indian treaty rights and the ESA that were unresolved and bound for judicial resolution. Of the eight responses received, five from the FWS and three from the NMFS, none indicated any issues headed for the courts. (on file with author).

The second issue considered in this Article is whether, in those situations where Indian treaty rights must be set aside for the protection of an endangered species, the legislative history of the ESA supports a conclusion that Congress considered the issue and chose to resolve the conflict by abrogating treaty rights. Was the *Billie* court correct, or were the critics of the court's decision justified in their criticism? What does abrogation of Indian treaty rights mean when considered in relation to the ESA? Part III will examine in detail the legislative history of the ESA, how the *Billie* court applied that legislative history, and the criticism of that application. Finally, assuming that abrogation can be supported, the implication of that finding will be applied to the specific situations that arise under the ESA.

II. AVOIDANCE OF CONFLICTS BETWEEN THE ESA AND INDIAN TREATY RIGHTS

A. *Flexibility Within the ESA*

There are two categories of species listed under the ESA: "endangered" and "threatened."¹⁰ A species listed as "endangered" is "in danger of extinction throughout all or a significant portion of its range."¹¹ A species listed as "threatened" is "likely to become an endangered species within the foreseeable future."¹² All species listed as "endangered" or "threatened" are to be reviewed every five years and de-listed if the protections of the ESA are no longer necessary.¹³ Further, where justified, the status of any species can be changed from "endangered" to "threatened" or from "threatened" to "endangered."¹⁴ Thus, any listed species is protected under the ESA only so long as its status justifies its listing, and a species retains the status of "endangered" only so long as it is in present danger of extinction.

The taking of species listed as "endangered" is generally prohibited by the ESA.¹⁵ To "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."¹⁶ Exceptions to the takings prohibition are generally limited to permits for scientific purposes, actions that will enhance the propagation or survival of the species, hardship

10. 16 U.S.C. § 1533(a)(1) (1994).

11. *Id.* § 1532(6).

12. *Id.* § 1532(20).

13. *See id.* § 1533(c)(2).

14. *See id.*

15. *See id.* § 1538.

16. *Id.* § 1532(19).

exemptions, incidental take, and subsistence purposes for Alaskan natives.¹⁷ Detailed procedures for obtaining a permit to take an endangered species are contained in the Code of Federal Regulations.¹⁸ Given the precarious status of the species involved, these procedures set a high standard for permit issuance.¹⁹ A survey of the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), revealed that no permits have been issued authorizing the taking of an endangered species for Indian religious or ceremonial purposes.²⁰ It seems unlikely that a request for such a taking could be justified within the exceptions to the takings prohibition.

The prohibition against takings does not directly apply to species listed as “threatened.”²¹ Instead, the ESA requires the issuance of regulations as “necessary and advisable to provide for the conservation of [threatened] species.”²² The federal government has, by regulation, applied the prohibition against the taking of endangered species to threatened species,²³ provided exceptions from the rigid requirements necessary to protect endangered species by allowing for the issuance of permits for special purposes consistent with the ESA,²⁴ and provided for the development of “special rules” for the management of specific threatened species.²⁵ These special rules can allow for more liberal regulations, including possible harvest, as long as the harvest is conducted within the framework of a reasonable conservation plan.²⁶

The Apache trout is an excellent example of how the special rules for threatened species can be applied to include species harvest in a management plan. Native to the White Mountains of Arizona, the Apache trout is primarily found on the White Mountain Apache Indian Reservation.²⁷ The Apache trout was placed on the endangered

17. See *id.* § 1539. An “incidental take” is a taking “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B).

18. See 50 C.F.R. §§ 17.22-.23 (1999).

19. See *id.*

20. See *supra* note 9.

21. See 16 U.S.C. § 1538 (1994).

22. *Id.* § 1533(d).

23. See 50 C.F.R. § 17.31(a) (1999).

24. See *id.* § 17.32. Such “special purposes” include scientific purposes, hardship, and incidental takes. See *id.*

25. See *id.* § 17.31(c).

26. See *Sierra Club v. Clark*, 755 F.2d 608, 612-13 (8th Cir. 1985).

27. See Conrad A. Fjetland, *Native Trout in a Native Land* 3 (1994) (unpublished manuscript, on file with author).

species list when the ESA was passed in 1973.²⁸ In 1975, the Apache trout was reclassified from “endangered” to “threatened.”²⁹ The justification for the reclassification was the development of a hatchery program by the state of Arizona and the resultant stocking of hatchery fish in waters that the Apache trout formerly inhabited.³⁰ The state program, unfortunately, had poor success and was soon discontinued.³¹ However, by the late 1970s, the population of Apache trout on the reservation had improved enough to allow a limited fishing program.³² Federal hatcheries on the reservation developed a successful propagation program beginning in 1983.³³ By the late 1980s, management of the species included the stocking hundreds of thousands of fish annually, and fishing for the species expanded to many streams on the reservation.³⁴

The White Mountain Apaches have promoted the recreational fishing for Apache trout on the reservation as a fishing experience found nowhere else in the world.³⁵ In turn, the economic benefits realized by the tribe have resulted in an accelerated program to fully restore the Apache trout to its former range.³⁶ Thus, proper use of the flexible provisions of the ESA for a threatened species not only allowed for the harvest of the Apache trout, it also contributed to the trout’s recovery. The Apache trout is now near full recovery and stands as an outstanding example of the management of a species under the ESA in a manner consistent with the nation’s trust responsibility to Native Americans.³⁷

B. Regulation of Treaty Rights for Conservation Purposes

The Supreme Court addressed the limits of treaty rights in a series of decisions regarding the harvest of steelhead trout by the

28. See *Endangered Native Wildlife*, 39 Fed. Reg. 1157, 1175 (1974). The Apache trout (then known as the Arizona trout) was originally listed under the Endangered Species Conservation Act of 1969, 16 U.S.C. §§ 668aa to cc-6, *repealed by* Pub. L. No. 93-205, § 14, 87 Stat. 903, 903 (1973). A provision in the ESA of 1973, which would have transferred all species previously listed into the initial list under the new statute, was later repealed. See 16 U.S.C. § 1533(c)(3), *repealed by* Pub. L. No. 97-304 §2(a)(3)(B), 96 Stat. 1411, 1411-16 (1982).

29. See “Threatened” Status for Three Species of Trout, 40 Fed. Reg. 29,863, 29,863 (1975).

30. See *id.*

31. See Fjetland, *supra* note 27, at 5.

32. See *id.*

33. See *id.* at 5-7.

34. See *id.*

35. See *id.* at 10.

36. See *id.* at 7.

37. See *id.*

Puyallup Indian tribe.³⁸ The treaty right at issue was established in the Treaty of Medicine Creek, which provided that “[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory”³⁹ The Supreme Court held that, although the Treaty of Medicine Creek gave the Indians a right to fish off their reservation, treaty fishing rights can be regulated in the interest of conservation as long as the regulations do not discriminate against Indians.⁴⁰ Further, Indian treaty rights can be restricted by the need for conservation.⁴¹ In deciding these cases, the Court observed that the existence of a treaty did not allow the Indians the right to pursue a species to extinction.⁴² Concerning the extent of Puyallup rights on their reservation, the Court noted that any attempt to protect the rights of Indians and non-Indians alike would be completely frustrated if the Puyallup Tribe was allowed to exercise exclusive jurisdiction over a resource that travels between the lands of the two parties.⁴³ Thus, the Puyallup Tribe did not have an exclusive right to take steelhead trout that passed through the reservation.⁴⁴

Limitations on treaty rights to hunt and fish have been recognized in other contexts as well.⁴⁵ For instance, in *United States v. Eberhardt*, the Department of the Interior (the DOI or the Department) decided to regulate commercial fishing by Indians on the Hoopa Valley Reservation in order to protect anadromous fish runs on the Klamath River.⁴⁶ The DOI agreed that the Indians had “federally reserved commercial fishing rights based on the statutes authorizing creation of the reservation.”⁴⁷ Nevertheless, the DOI, in response to

38. See *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398-99 (1968) [hereinafter *Puyallup I*]; *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) [hereinafter *Puyallup II*]; *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 173-74 (1977) [hereinafter *Puyallup III*].

39. *Puyallup I*, 391 U.S. at 395 (quoting 1854 Treaty of Medicine Creek).

40. See *id.* at 398.

41. See *Puyallup II*, 414 U.S. at 49 (White, J., concurring).

42. See *id.*

43. See *Puyallup III*, 433 U.S. at 176-77.

44. See *id.* at 177.

45. See *United States v. Oregon*, 913 F.2d 576, 584 (9th Cir. 1990) (noting that limitations on harvest for conservation purposes can have a reasonable margin of safety built in); *United States v. Sohapp*, 770 F.2d 816, 819 (9th Cir. 1985) (“[I]ndian sovereignty is ‘necessarily limited’ and must not conflict with the overriding sovereignty of the United States.”); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749-50 (10th Cir. 1987) (finding that the Secretary of Interior has the right to promulgate hunting regulations on the Wind River Indian Reservation in order to fulfill his trust responsibility).

46. See *United States v. Eberhardt*, 789 F.2d 1354, 1357 (9th Cir. 1986).

47. *Eberhardt*, 789 F.2d at 1357.

declining anadromous fish runs on the river, promulgated regulations that banned commercial fishing and sales of fish by Indians on the reservation, while still allowing fishing for ceremonial and consumptive purposes.⁴⁸ The *Eberhardt* court held that the DOI had the authority to make regulations within its “responsibilities as trustee to preserve and protect Indian resources.”⁴⁹

C. National Trust Responsibility to Maintain Treaty Rights

The trust relationship between the United States and Indians must be considered when evaluating whether a statute and Indian treaty rights necessarily conflict. It is undisputed that a general trust relationship exists between the United States and Indians.⁵⁰ Treaties are to be construed as Indians would have understood them at the time they were made, but it can hardly be supposed that Indians (or the government, for that matter) could have foreseen the future complexities of wildlife management and preservation.⁵¹ Indeed, circumstances can arise that demand that the government disregard the obligations of a treaty in favor of the interests of the country or the Indians themselves.⁵² Thus, conservation statutes apply to Indians where such application is necessary to meet trust responsibilities.⁵³

A fundamental objective of the ESA is to safeguard the nation’s heritage in fish, wildlife, and plants for the benefit of all citizens.⁵⁴ The prohibitions, as well as the benefits of the ESA apply to all persons subject to the jurisdiction of the United States.⁵⁵ The loss of a species of value to an Indian tribe would be a failure of the United States to meet its trust responsibility. Congress recognized this trust

48. *See id.*

49. *See id.* at 1359.

50. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) (discussing the fiduciary relationship between the United States and Indians).

51. *See, e.g., Kennedy v. Becker*, 241 U.S. 556, 563 (1916). In *Kennedy*, the Court reasoned that, while separate state and Indian regulatory schemes regarding the harvesting of fish may have once been contemplated, such an approach would no longer work. *See id.* at 563. Unless authority to preserve resources was exercised under a common framework, the ability to achieve conservation objectives would be denied, thereby resulting in a failure to carry out the trust responsibility. *See id.*

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

53. *See, e.g., Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987) (noting that the Secretary of Interior had authority to promulgate hunting regulations pursuant to the DOI’s trust responsibility); *Eberhardt*, 789 F.2d at 1359 (determining that fishing regulations were promulgated pursuant to trust responsibility); *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980) (noting that the purpose of conservation laws as applied to Indians is “to accommodate the rights of Indians . . . and other people”).

54. *See* 16 U.S.C. § 1531(a)(5) (1994).

55. *See id.* § 1538(a)(1).

responsibility in 1972 when it considered an exemption for Indians by observing that Indians would suffer irreparable harm unless the ESA was applied to them.⁵⁶ For example, treaty rights would become moot if a species was to become extinct.⁵⁷ On the other hand, the preservation or recovery of a species would protect the subject of the treaty right for future generations.⁵⁸ Thus, protection of endangered wildlife resources, including regulation of hunting and fishing treaty rights, is consistent with the broader goal of maintaining the trust responsibility to all Indians.

The federal government addressed the trust relationship in relation to the ESA in a 1997 Secretarial Order issued by the FWS (the 1997 order).⁵⁹ The 1997 order acknowledges the trust responsibility and treaty obligations and requires the FWS and NMFS to carry out their responsibilities under the ESA in a manner that will minimize the potential for conflict and confrontation with Indian tribes.⁶⁰ Furthermore, the 1997 order requires the FWS and NMFS to use the flexibility of the ESA to the extent practicable to accommodate Indian cultural and religious uses of listed species.⁶¹ Additionally, the FWS and NMFS must encourage tribal governments to develop their own plans for conservation and management of natural resources on tribal lands.⁶² In the event that conservation restrictions are deemed necessary to protect a listed species, the FWS and NMFS are instructed to work with the affected tribe on a government-to-government basis in an effort to harmonize the federal trust responsibility, tribal sovereignty, and the statutory requirements of the ESA.⁶³ A recent survey of the FWS and the NMFS indicated that the 1997 order is being followed in addressing tribal/ESA issues,

56. See *Predatory Mammals and Endangered Species: Hearings on H.R. 13081 Before the Subcomm. on Fish and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 92nd Cong. 144 (1972) [hereinafter *Hearings on H.R. 13081*] (statement of Frank Potter, Jr., Counsel to Committee on Merchant Marine and Fisheries).

57. See *Endangered Species Act, 1985: Hearings on H.R. 1027 Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the House Comm. on Merchant Marine and Fisheries*, 99th Cong. 313 (1985) [hereinafter *Hearings on H.R. 1027*] (statement of Marian Horn, Acting Soliciter, DOI).

58. See *id.*

59. See U.S. FISH & WILDLIFE SERVICE, SECRETARIAL ORDER NO. 3206, AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT (June 5, 1997).

60. See *id.* at 1.

61. See *id.* at 6.

62. See *id.* at 5.

63. See *id.* at 6.

thereby likely contributing to the lack of controversies reaching the courts.⁶⁴

While use of the regulatory flexibility of the ESA, implementation of reasonable conservation regulations, and sensitivity to the trust responsibility will usually result in avoidance of conflicts between Indian treaty rights and the ESA, the facts of *Billie* demonstrate that conflict avoidance is not always the case.⁶⁵ James Billie, a member and chairman of the Seminole Indian Tribe, killed a Florida panther on the Big Cypress Seminole Indian Reservation in December 1983.⁶⁶ The Florida panther is listed as an endangered species under the ESA.⁶⁷ The killing of the panther was clearly a “take” under the ESA, and the court found no applicable exceptions to the takings prohibition.⁶⁸ Billie was therefore charged with the taking and subsequent possession of the Florida panther in violation of the ESA.⁶⁹ In response, Billie moved to dismiss on the ground that the ESA does not abrogate traditional rights to hunt and fish on the reservation.⁷⁰ Thereupon, the district court was faced squarely with the question of whether the ESA abrogates Indian treaty rights on the reservation when those rights conflict with the purposes of the ESA.⁷¹

III. DOES THE ENDANGERED SPECIES ACT ABROGATE INDIAN TREATY RIGHTS?

A. *The Legislative History*

In *United States v. Dion*, the Supreme Court indicated a preference for an explicit statement of congressional intent to abrogate treaty rights, but recognized that abrogation can be established where evidence of congressional intent is sufficiently

64. See *supra* note 9.

65. See *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

66. See *id.* at 1487.

67. See *id.* at 1488. The Florida panther has been listed as an endangered species since 1967. See *id.*

68. See *id.* at 1497; see also *supra* notes 16-17 and accompanying text.

69. See *Billie*, 667 F. Supp. at 1487.

70. See *id.* The Seminole Indian Reservations were established by executive order in 1911. See *id.* at 1488. Although the executive order does not mention hunting and fishing rights, the court concluded that, when the land was set aside for the Seminole Indians, these rights were established by implication regardless of whether the reservation was established by treaty or executive order. See *id.* at 1488-89.

71. See *id.* at 1487-88. The *Billie* court recognized that the Supreme Court in *United States v. Dion*, 476 U.S. 734 (1986), reversed the Eighth Circuit’s decision on other grounds and thereby left unresolved the question of whether the ESA abrogates Indian treaty rights. See *Billie*, 667 F. Supp. at 1487-88. Therefore, the *Billie* court considered the issue as one of first impression. See *id.*

compelling.⁷² In applying its “actual consideration and choice” test to the Bald Eagle Protection Act,⁷³ the *Dion* Court looked at two factors: the plain language of the statute and its legislative history.⁷⁴ In *Billie*, the United States District Court for the Southern District of Florida used these same two factors in reaching its conclusion that “the [ESA] applies to hunting by Indians on the Seminole reservations.”⁷⁵ As previously noted, this decision has received widespread criticism by commentators.⁷⁶ This criticism has generally focused on what is viewed as a failure of the *Billie* court to provide sufficient evidence that the legislative history of the ESA satisfies the “actual consideration and choice” test established in *Dion*. Unfortunately, this criticism has relied almost exclusively on the legislative history as presented superficially in *Billie*, with little or no attempt to examine the history itself.⁷⁷ The result has been a conclusion that the decision in *Billie* is at best flawed and at worst wrong.⁷⁸ Assuming the legislative record as recounted in *Billie* is insufficient to support the court’s holding, the necessary conclusion is not that *Billie* was wrongly decided, or that the ESA fails to abrogate Indian treaty rights, as some have suggested.⁷⁹

This Part of the Article will take a “fresh look” at the legislative history of the ESA. This examination will include not only those

72. See *Dion*, 476 U.S. at 739.

73. 16 U.S.C. §§ 668-668d (1994 & Supp. III 1997)

74. See *Dion*, 476 U.S. at 740-45. In *Dion*, a member of the Yankton Sioux Tribe shot an endangered species, the bald eagle. See *id.* at 735. The bald eagle is protected by the ESA and also by the Bald Eagle Protection Act. See 16 U.S.C. § 668 (1994); 50 C.F.R. § 17.11 (1992). The Court first considered the Bald Eagle Protection Act and concluded that it abrogated any Indian treaty right to hunt bald eagles, except as allowed by permit. See *Dion*, 476 U.S. at 745. Having concluded that the treaty right was already barred by the Bald Eagle Protection Act, the Court did not specifically address the question of whether the ESA abrogated Indian treaty rights. See *id.* at 746. Thus, while *Dion* established the standard for determining whether a statute lacking clear abrogation language, such as the ESA, abrogates Indian treaty rights, the Court did not apply this standard to the ESA.

75. *Billie*, 667 F. Supp. at 1491-92.

76. See *supra* note 7 and accompanying text.

77. See, e.g., Laurence, *supra* note 7, n.96 (citing to the legislative record once); Miller, *supra* note 7, at 568-71 (lacking direct references to the legislative history); Johnson, *supra* note 7, at 186-88 (containing three references to the legislative history); Morin, *supra* note 7, at 177 (referring once to the limited legislative history cited in *Billie*); Diekemper, *supra* note 7, at 482-83 (lacking direct references to the legislative history).

78. See, e.g., Laurence, *supra* note 7, at 884 (contending the opinion is “unsatisfactory”); Miller, *supra* note 7, at 571 (contending the holding is “mistaken”); Johnson, *supra* note 7, at 188 (contending that the ESA “fails to satisfy” the test); Morin, *supra* note 7, at 177 (contending that the reasoning in the decision is “flawed”); Diekemper, *supra* note 7, at 482 (contending the *Dion* test was “misapplied”).

79. See, e.g., Johnson, *supra* note 7, at 188 (“[T]he ESA cannot abrogate Indian treaty rights to hunt and fish.”).

portions of the record discussed in *Billie*, and thereafter criticized by commentators as insufficient, but also will include additional material from the legislative record that provides ample support for the *Billie* decision. This record will be analyzed with regard to prevailing standards of statutory interpretation to show that *Billie* was correctly decided and that criticism of the decision is unjustified.

Among the many endangered species bills considered by the House of Representatives in 1972 was House Bill 13081, the Administration's proposal for endangered species legislation.⁸⁰ The proposal contained the following provision: "The [takings] prohibitions contained in this section shall not apply to American Indians, Aleuts, or Eskimos who take endangered species for their own consumption or ritual purposes in accordance with a treaty or pursuant to Executive order or Federal statute."⁸¹ In hearings on House Bill 13081, the Subcommittee on Fisheries and Wildlife Conservation (the Subcommittee) questioned the DOI about the extent of treaty rights that might be covered by this provision.⁸² The DOI provided the following written response: "Statements made by the Committee indicate its desire to prohibit American Indians from continuing such hunting or fishing, exemplifying a concern for the peril of our endangered species and the presumed inconsistency therewith in permitting American Indians to perhaps extinguish a species in the name of treaty rights."⁸³

The DOI then acknowledged Congress' authority to extinguish treaty rights, but expressed no opinion as to whether Congress should do so.⁸⁴ The DOI urged, however, that if Congress chose to extinguish treaty rights, "Congress must extinguish these rights expressly."⁸⁵

In further discussions during hearings on House Bill 13081, the Subcommittee noted that marine mammal legislation prohibits the taking of any endangered marine mammal and that similar protection is "imperative" if the objectives of the ESA are to be effective.⁸⁶ In response, the DOI testified that the Alaskan natives exemption was drafted into the proposed legislation "only to raise the issue with the

80. See *Hearings on H.R. 13081*, *supra* note 56, at 22, 103.

81. *Id.* at 24.

82. See *id.* at 142-44.

83. *Id.* at 144.

84. See *id.* It should be noted that the DOI is responsible for both the Indian trust responsibility and the protection of the nation's fish and wildlife resources. Therefore, the DOI was in a difficult position and chose not to advocate strongly one way or the other. See *id.*

85. *Id.*

86. *Id.* at 145.

full understanding that the committee would want to look at it very closely.”⁸⁷

The Senate Subcommittee on the Environment held hearings on two bills on endangered species in August 1972: Senate Bill 3199 and Senate Bill 3818.⁸⁸ Language that would have exempted American Indians from the takings prohibition of the ESA for consumption and ritual use was contained in Senate Bill 3199, but not in Senate Bill 3818.⁸⁹ The DOI testified that it would support the exemption “when the Secretary determines, in each case, that such taking will not lead to extinction or otherwise irreparably damage population stocks.”⁹⁰ The DOI urged this position because it “has responsibility for the welfare of Indians and Native people.”⁹¹ The exemption drew considerable criticism from numerous environmental interest groups, which argued that no one should be allowed to kill endangered species.⁹² Ultimately, Senate Bill 3818, which lacked an exemption for Indians, was adopted by the Subcommittee and reported favorably by the Senate Committee on Commerce in Senate Report 1136.⁹³

The *Billie* court summarized these 1972 bills as “contain[ing] broader exemptions encompassing the taking of protected species for Indian religious purposes.”⁹⁴ The court did not mention the Senate Committee on Commerce report. As the court acknowledged, Congress had not yet passed endangered species legislation in 1972.⁹⁵ Thus, critics have dismissed this entire examination of the 1972 legislative history as being of little, if any, value in meeting the *Dion* requirement of “clear evidence” of congressional consideration and choice.⁹⁶

87. *Id.*

88. *See Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92nd Cong. (1972).*

89. *See id.* at 71 (statement of Nathaniel P. Reed, Assistant Secretary for Fish and Wildlife and Parks).

90. *Id.*

91. *Id.*

92. *See id.* at 203, 222, 240, 251.

93. *See S. REP. NO. 92-1136 (1972).*

94. *United States v. Billie*, 667 F. Supp. 1485, 1490 (S.D. Fla. 1987).

95. *See id.*

96. *See, e.g., Laurence, supra* note 7, at 881 (contending that “when compared with the *Dion* case, the evidence of Congressional consideration and choice . . . falls well short of the mark”); *Miller, supra* note 7, at 570 (reasoning that “[b]ecause the acts were not passed, such legislative history should have had no bearing on a determination of Congress’ intent”); *Diekemper, supra* note 7, at 486 (contending that the “legislative history of unpassed bills reveals very little about the congressional intent”).

Historical information about circumstances that led to the enactment of a statute is an important source of insight into legislative intent.⁹⁷ Legislative history, however, can be problematic because it often does not reflect the work of the entire legislature.⁹⁸ The proper approach is not to avoid the legislative history entirely, but to ensure that it is used carefully.⁹⁹

A thorough analysis of the legislative history of the ESA shows that the 1972 bills contribute much more than the critics contend. The ESA was a complicated piece of legislation, considered late in 1972, an election year. When the Senate Committee on Commerce ordered Senate Report 1136 to be printed in September 1972, Senator Stevens noted:

Answers to many . . . questions have not yet been received Many [comments] were not incorporated into the bill which was ordered reported. Additional comments have been received since the bill was ordered reported. In short, there has been too little time to develop this important legislation to the point where it is in a form sufficiently finalized to be considered on the Senate floor.¹⁰⁰

The House Committee on Merchant Marine and Fisheries also reported that ESA legislation was not given full consideration in 1972 because of a lack of time.¹⁰¹ Thus, the 1972 bills were not rejected and did not fail; they were simply part of the development of the ESA that carried forward from the ninety-second Congress to the ninety-third Congress.¹⁰² As such, they provide valuable insight into the issues that Congress considered during the development of the ESA.

The administration re-offered its proposed bill, House Bill 13081, early in the 1973 legislative year, introducing it as House Bill 4758.¹⁰³ Earlier in the 1973 legislative session, Representative Dingell introduced House Bill 37, which was “based on the 1972 hearings.”¹⁰⁴ In addition, there was little change in the composition of the committees considering the ESA from 1972 to 1973.¹⁰⁵ Thus, the

97. See 2 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.02, at 308 (5th ed. 1992).

98. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 23 (1997).

99. See *id.* at 33.

100. S. REP. NO. 92-1136, at 17 (1972).

101. See H.R. REP. NO. 93-412, at 3 (1973).

102. See *id.*

103. See *id.*

104. See *id.* None of the commentators critical of the use of the 1972 bills by the *Billie* court noted this fact. See sources cited *supra* note 77.

105. Representative Dingell remained as Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment from 1972 to 1973, and 13 of the 22

1973 bills were closely linked to the discussions that took place in the 1972 hearings.

Additional House committee hearings were held in March 1973¹⁰⁶ and House Bill 37 was reported out of committee in July.¹⁰⁷ Several points in the House report are relevant. Concern was expressed about the pace of species extinction.¹⁰⁸ The Committee viewed its decision as a choice between exercising or ignoring its responsibilities to the nation.¹⁰⁹ The prohibitions of the bill were spelled out "in the broadest possible terms" by extending House Bill 37 to "any person or entity" subject to the jurisdiction of the United States.¹¹⁰ Exemptions were limited under the theory that species in danger of extinction must be given the maximum possible protection.¹¹¹ There was no exemption for Indian tribes included in the House bill.¹¹² Therefore, when the history of House Bill 37 is analyzed correctly, including its links to the 1972 hearings, the evidence overwhelmingly indicates that the Subcommittee started with a bill that contained a specific exemption for Indian tribes, considered the implications of that exemption in relation to the need to provide the maximum protection possible to endangered species, and chose to withhold the exemption.

The Senate version of endangered species legislation considered in 1973 was Senate Bill 1983.¹¹³ The bill noted that certain exemptions may be made for scientific purposes, species propagation, and alleviation of undue economic hardship.¹¹⁴ The Senate bill contained a more extensive exemption for Alaskan natives, subject to the discretion of the Secretary, for subsistence purposes and handicrafts than House Bill 37.¹¹⁵ Like House Bill 37, Senate Bill 1983 did not mention an exemption for Indian tribes.¹¹⁶ Thus, when analyzed against the entire record, including the linkages to the 1972

members of the Subcommittee in 1973 were on the Subcommittee in 1972. In the Senate, Senator Hart remained as the Chairman of the Subcommittee on the Environment from 1972 to 1973, and seven of the nine members of the Subcommittee in 1973 were on the subcommittee in 1972.

106. See H.R. REP. NO. 93-412, at 3 (1973).

107. See *id.* at 1.

108. See *id.* at 4.

109. See *id.*

110. *Id.* at 10, 15.

111. See *id.* at 17.

112. See *id.* at 16-17.

113. See S. REP. NO. 93-307, at 1 (1973).

114. See *id.* at 10.

115. See *id.* at 10; see also H.R. CONF. REP. NO. 93-740, at 14-16 (1973).

116. See S. REP. NO. 93-307, at 10.

legislative history, Senate Bill 1983 clearly indicates the Senate, much like the House, started with a provision to exempt Indians from the process, considered that exemption, and chose to withhold it from the final bill in favor of a more limited exemption for Alaskan natives.

In the fall of 1973, a conference committee considered the two bills, specifically the extent of the prohibitions proposed by the House and Senate.¹¹⁷ The conferees adopted the Senate's limited Alaskan native exemption, as well as the exceptions for scientific, species propagation, or hardship purposes without making reference to a broader exemption for Indian tribes.¹¹⁸ In fact, there is no indication in the conference report that the conferees considered whether Indians should be excluded from the prohibitions of the ESA.¹¹⁹ The conference bill passed both houses and was signed into law as the Endangered Species Act of 1973.¹²⁰

The *Billie* court considered the Alaskan native exemption and concluded "that Congress must have known that the limited Alaskan native exemption would be interpreted to show congressional intent not to exempt other Indians."¹²¹ The court referenced the evidence from the 1972 bills in its analysis, but did not identify any of the specific links between the 1972 bills and the legislation that passed in 1973.¹²² The *Billie* court also referred to the ESA's broad definition of "person" as including Indians and as evidence of Congress' intent to abrogate Indian treaty rights.¹²³ Thus, the *Billie* court concluded that the *Dion* test had been met and that the ESA applied to Indians hunting on Seminole reservations.¹²⁴

The DOI correctly recommended that Congress explicitly abrogate Indian treaty rights if it chose to abrogate them at all.¹²⁵ However, in view of the legislative history and the plain language of the ESA, it can hardly be said that Congress failed to consider the conflict between endangered species and Indian treaty rights. Both Houses started with proposed legislation that specifically exempted Indian tribes and treaty rights from the prohibitions of the ESA. Both Houses considered the effects of such exemptions on the protection of endangered species. Both Houses ultimately adopted provisions that

117. See H.R. CONF. REP. NO. 93-740, at 1.

118. See *id.* at 1, 14-16.

119. See *id.* at 14-16.

120. Pub. L. No. 93-205, 87 Stat. 884.

121. *United States v. Billie*, 667 F. Supp. 1485, 1491 (S.D. Fla. 1987).

122. See *id.* at 1490-91.

123. See *id.* at 1491-92.

124. See *id.*

125. See *supra* note 85 and accompanying text.

eliminated all such exemptions, except those for subsistence purposes in Alaska. The evidence is conclusive that Congress considered Indian treaty rights and chose to abrogate those rights in passing the ESA. Thus, while the *Billie* court did not consider the entirety of the legislative record, the court correctly held that the ESA abrogates Indian rights.¹²⁶

There is additional evidence of Congress' intent regarding Indian treaty rights and the ESA following passage of the ESA in 1973. On June 11, 1985, the House Subcommittee on Fisheries and Wildlife Conservation and the Environment (the Subcommittee) held hearings on endangered species and Native American religious practices.¹²⁷ These hearings were held in response to the Eighth Circuit's decision in *Dion*, wherein the court held that if the Native American defendants possessed treaty rights to hunt endangered species on their reservation, their rights were not abrogated by the ESA.¹²⁸ Whereas the Supreme Court would later apply the "actual consideration and choice" test on review, the Eighth Circuit applied an "express reference test" to the question of whether the ESA abrogated Indian treaty rights.¹²⁹ Using this standard, the circuit court concluded that Congress did not abrogate treaty rights in the ESA.¹³⁰ In his opening statement at the Subcommittee hearing, Representative Breaux, Chairman of the Subcommittee, expressed his concern about the Eighth Circuit's opinion and the conflicting decisions of other circuits.¹³¹ He stated that the goal of the hearings was to find a "fair solution" balancing the "conservation needs of . . . endangered species with the requirements of the American Indians for the practice of their religion."¹³²

Additionally, the DOI, in testimony before the Subcommittee, noted its disagreement with the Eight Circuit's decision in *Dion* and discussed the Department's attempt to balance, albeit delicately, its trust responsibility with the protection of endangered species:

126. Interestingly, only two commentators have previously reached the same conclusion, and they presented it in a jointly authored article written several years before the Supreme Court's holding in *Dion*. See George Cameron Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 404-05 (1979) ("[T]he combination of the specific Alaska exemption and the considered failure to enact an exemption for other Indians virtually requires the conclusion that Congress intended the Act to cover Indian activities.").

127. See *Hearings on H.R. 1027*, *supra* note 57, at 311.

128. *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985); *Hearings on H.R. 1027*, *supra* note 57, at 311-12.

129. See *Dion*, 752 F.2d at 1265-66.

130. See *id.* at 1269-70.

131. See *Hearings on H.R. 1027*, *supra* note 57, at 312.

132. *Id.*

The Department disagrees with the holding and rationale of the *Dion* decision. It is the position of this Department that while Congress did apply the prohibitions of the ESA to reserved hunting rights, it never intended that application to be an abrogation of those treaty hunting rights.

Instead, the ESA represents an effort to regulate . . . the exercise of those rights

. . . .

[T]he Department takes the position that the ESA is a reasonable and necessary nondiscriminatory conservation measure that applies to the exercise of reserved hunting rights by all Native Americans.

. . . .

. . . Our general preference is that the [ESA] be reauthorized without amendment

Nevertheless, should Congress choose to do so, the Department would have no objection to an amendment to the definition of “person” . . . to provide expressly that [Native Americans] are covered by . . . the ESA.

Such amendment would clarify and reaffirm the application of the provisions of the ESA to Native Americans without abrogating valid treaty rights.¹³³

From this rather long and convoluted testimony it appears that the DOI wanted it both ways. The Department wanted Indian tribes to be subject to the ESA, including its prohibitions, yet it did not want Congress to state expressly that the ESA abrogated valid treaty rights. The DOI went on to state that if the ESA were amended, provisions should be included for a limited “take” for “bona fide religious purposes.”¹³⁴

Representative Breaux had a more definitive view of the status of Indian treaty rights where a conflict with endangered species occurred:

The law of this country is that it is illegal to take an endangered species, period. That is a declaration of the Congress of the United States, that if a species is found, by biological evidence, that it is in such a delicate situation that it is threatened with the danger of becoming extinct, any taking of that species is illegal. That has already been determined.¹³⁵

Breaux stated, however, that he would be willing to consider amending the ESA to allow a “take” for religious purposes, as long as the “take” was restricted through a permitting system.¹³⁶

At the time of the Subcommittee hearings, the Supreme Court was deciding whether it would review the Eighth Circuit’s decision in

133. *Id.* at 313-14.

134. *Id.* at 315.

135. *Id.* at 413.

136. *See id.* at 431.

Dion.¹³⁷ Breaux adjourned the Subcommittee until after the Court reached its decision to grant *certiorari*.¹³⁸ Ultimately, of course, the Supreme Court reversed the Eighth Circuit, albeit on other grounds.¹³⁹ There is no record that Congress considered the subject of the ESA and Indian religious practices further in 1985.

Only one of the commentators critical of the *Billie* decision discussed the events of 1985, citing the fact that no amendment was passed as evidence that Congress did not intend to abrogate Indian treaty rights.¹⁴⁰ This view completely ignores the circumstances surrounding the Subcommittee 1985 hearings and the statements of Representative Breaux during those hearings.¹⁴¹ A proper analysis shows that Breaux was of the opinion that the ESA had abrogated all treaty rights that conflicted with the prescribed protection of endangered species. Breaux was concerned about the Eighth Circuit's *Dion* opinion to the contrary and was prepared to amend the ESA if necessary to correct a misinterpretation by the courts.¹⁴² However, he postponed further consideration of any needed changes to the ESA to see what action the Supreme Court would take.¹⁴³ It is logical to conclude that Representative Breaux was satisfied that the position on the ESA and Indian treaty rights was clear following the Supreme Court's reversal of the Eighth Circuit's decision in *Dion*. Although the Court's application of the "actual consideration and choice" test was limited to the Bald Eagle Protection Act, and not extended to the ESA,¹⁴⁴ the Court did reject the "express reference test" used by the Eighth Circuit.¹⁴⁵ Congress had already considered the implications of the ESA in relation to Indian treaty rights and chose to abrogate those rights.¹⁴⁶ The Court established that this "consideration and choice" process was sufficient to establish that treaty rights had, in fact, been abrogated. Hence, the logical inference is that Congress considered further action to be unnecessary.

137. *See id.* at 432.

138. *See id.*

139. *See* United States v. *Dion*, 476 U.S. 734 (1986).

140. *See* Johnson, *supra* note 7, at 188 ("Congress' failure to act on [the 1985] amendment leads to the conclusion that Congress did not intend the ESA to abrogate Indian treaty rights."). The *Billie* decision did not refer to these hearings either. *See* United States v. *Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

141. *See supra* note 135 and accompanying text.

142. *See supra* note 136 and accompanying text.

143. *See supra* notes 137-138 and accompanying text.

144. *See Dion*, 476 U.S. at 745.

145. *See id.* at 739-40.

146. *Cf.* text accompanying *supra* note 133.

Statements by legislation managers, as recorded in committee reports, are considered authoritative sources of legislative intent.¹⁴⁷ The basis of this authority is that these congressmen are the best informed about the legislation and most likely to reflect congressional expectations.¹⁴⁸ Furthermore, legislation that was never passed into law should nonetheless be considered as part of the legislative history, as an indication that the issue addressed by the proposed legislation did not warrant further consideration by Congress.¹⁴⁹ Thus, the hearings in 1985, when properly understood in relation to the legislative history of the ESA, support the conclusion that the ESA abrogates Indian treaty rights and that the decision in *Billie* was correct.

In 1987, Congress considered reauthorization of the ESA.¹⁵⁰ The primary issues considered in the hearings on House Bill 1467 on March 17, 1987, were the use of turtle excluder devices in shrimp nets to protect sea turtles in the Gulf of Mexico and the protection of large predators in the northern Rocky Mountain region.¹⁵¹ However, the International Association of Fish and Wildlife Agencies (IAFWA) expressed its concern that the Supreme Court's decision in *Dion* did not reverse the Eighth Circuit's prior decision with regard to the ESA.¹⁵² The IAFWA was concerned that if a small population of endangered species, other than eagles, occurred on Indian land, survival of the species would be in jeopardy because the Eighth Circuit's holding favored Indian rights over the ESA.¹⁵³ When House Bill 1467 was discussed on November 4, 1987, Representative Bosco, questioned whether reserved Native American hunting rights superseded the ESA.¹⁵⁴ Later, when the full Committee on Merchant Marine and Fisheries met on November 19, 1987, to consider House Bill 1467, Representative Bosco "had conducted a further review of recent case law . . . and was persuaded that the courts were accurately interpreting the intent of Congress that the Endangered Species Act

147. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 220 (1994). Representative Breaux, as chairman of the subcommittee responsible for reauthorization of and amendments to the ESA, was such a manager.

148. See *id.*

149. See 2 SINGER, *supra* note 97, § 48.04, at 325.

150. See *Endangered Species Act Reauthorization, 1987: Hearings on H.R. 1467 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong. (1987).

151. See *id.*

152. See *id.* at 60 (statement of Gordon Robertson, Legislative Council, International Association of Fish and Wildlife Agencies).

153. See *id.*

154. See H.R. REP. NO. 100-467, at 12 (1987).

apply [to reserved Indian hunting rights]. He therefore saw no need for further clarification of this matter."¹⁵⁵ *Billie* was decided on August 24, 1987,¹⁵⁶ between the hearings and the committee action, leading to Representative Bosco's assessment that no further clarification was necessary.¹⁵⁷

During floor debate in the Committee of the Whole House on reauthorization of and amendment to the ESA, Representative Bosco addressed the abrogation issue as follows:

There are a small number of Native Americans in the country who have claimed, under right of treaty or other rights, that the Endangered Species Act does not apply to them. This has resulted in the taking of bald eagles, black panthers and other species that are strictly prohibited from taking under the act.

I want to make it clear that Congress has always intended that there are not two classes of Americans, one entitled to take endangered species and another obligated to protect them. The court system, fortunately, has gone along with this.

... I believe without exception, that the Endangered Species Act clearly applies to all Americans.¹⁵⁸

The ESA was reauthorized and amended by the Endangered Species Act Amendments of 1988, which became law on October 7, 1988.¹⁵⁹ None of the commentators critical of the *Billie* decision made any reference to congressional consideration of the abrogation issue in 1987.¹⁶⁰

Statements by congressmen during floor discussions and at hearings are less authoritative but still useful in determining legislative intent.¹⁶¹ Federal courts consider statements of committee members as aids in determining legislative intent.¹⁶² Representative Bosco's statements, although standing alone would be insufficient to establish legislative intent, when added to the hearings and report history, indicate that Congress considered the impact of the ESA on Indian treaty rights and chose to abrogate those rights in favor of protecting endangered species.

155. *Id.*

156. *See* United States v. Billie, 667 F. Supp. 1485, 1485 (S.D. Fla. 1987).

157. *See* H.R. REP. NO. 100-467, at 13 (1987).

158. 133 CONG. REC. 35033 (1987).

159. *See* Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat. 2306 (1988).

160. *See supra* sources cited note 7.

161. *See* ESKRIDGE, *supra* note 147, at 220.

162. *See* 2 SINGER, *supra* note 97, § 48.10, at 343.

In summary, the record reflects that Congress considered Indian treaty rights before passage of the ESA and passed a bill that did not exempt those rights, but did allow a limited exemption for Alaskan natives. Additionally, the record indicates that Congress reaffirmed its decision to abrogate Indian treaty rights after the initial passage of the ESA, during hearings on the reauthorization of and amendments to the ESA. An analysis of the hierarchy of legislative history reveals that the most persuasive authorities are committee reports, followed closely by statements of sponsors and floor managers.¹⁶³ Rejected proposals, floor and hearing colloquy, nonlegislator statements, legislative inaction, and subsequent history are less authoritative but still useful.¹⁶⁴ Perhaps a piecemeal analysis of the ESA's legislative history does not satisfy the "actual consideration and choice" test established by the Supreme Court in *Dion*. However, when considering the entirety of the ESA's legislative history, there can be no doubt that Congress considered the conflict between Indian treaty rights and endangered species and chose to resolve that conflict in favor of endangered species protection. Thus, one must conclude that *Billie* was correctly decided and that criticism of the *Billie* decision is based on nothing more than a cursory review of the ESA's legislative history.

B. Other Relevant Factors

The Supreme Court in *Dion* indicated that the plain meaning of the legislation is yet another factor to consider when determining whether Congress intended to abrogate Indian treaty rights.¹⁶⁵ As previously noted, the ESA's objective is to safeguard the nation's natural heritage.¹⁶⁶ The Supreme Court previously considered the breadth of the ESA in *Tennessee Valley Authority (TVA) v. Hill*.¹⁶⁷ "[T]he language, history, and structure of the [ESA] indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities."¹⁶⁸ The Court noted that the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."¹⁶⁹ The intent of Congress was clear that

163. See ESKRIDGE, *supra* note 147, at 220-22.

164. See *id.*

165. See *United States v. Dion*, 476 U.S. 734, 740 (1986).

166. See *supra* note 54 and accompanying text.

167. 437 U.S. 153 (1978).

168. *Id.* at 174. In *TVA*, the Court held the preservation of the snail darter, a small fish, was intended by Congress to be higher in priority than the completion of a large dam where over \$100 million had been invested. See *id.* at 172-73.

169. See *id.* at 180.

the trend toward species extinction was to be halted and reversed at whatever cost.¹⁷⁰ Thus, in *TVA*, the Supreme Court stated that the limited exemptions for hardships expressly identified in the ESA are the only exemptions Congress intended.¹⁷¹

After conducting its evaluation of the legislative history of the ESA, the court in *Billie* considered other relevant factors in determining that the *Dion* standard of “actual consideration and choice” had been met.¹⁷² The court noted that “hunting rights [on a reservation] are not absolute when a species . . . is in danger of extinction.”¹⁷³ Congress “could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers.”¹⁷⁴ The *Billie* court also considered the narrow Alaskan native exemption, the ESA’s definition of “person” as including Indian tribes, and the comprehensive scope of the statute in concluding that Indian treaty rights are abrogated by the ESA.¹⁷⁵

Two commentators have concluded that the *Billie* court actually “discarded the *Dion* test in favor of a more liberal test built on a series of inferences.”¹⁷⁶ This conclusion misinterprets the function of the *Dion* test and the manner in which the *Billie* court applied that test. The Supreme Court in *Dion* clearly held 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.”¹⁷⁷

Additional insight into the meaning of the ESA can be found by examining interpretations of the Act in other courts. In Hawaii, Daniel Kaneholani, a native Hawaiian, argued that he had an aboriginal right to hunt monk seals, an endangered species, for subsistence purposes.¹⁷⁸ He further argued that the trust relationship between American Indians and the federal government extends to native Hawaiians, and the federal government could not abrogate his “aboriginal rights” absent clear and plain congressional intent to the

170. *See id.* at 184.

171. *See id.* at 188.

172. *United States v. Billie*, 667 F. Supp. 1485, 1491-92 (S.D. Fla. 1987).

173. *Id.* at 1492.

174. *Id.*

175. *See id.* at 1491.

176. Miller, *supra* note 7, at 569; *see also* Morin, *supra* note 7, at 177 (adopting the position of Miller). Three other commentators have generally concluded that the *Dion* test was used, but that it was not properly applied. *See* Laurence, *supra* note 7, at 884-85; *see also* Johnson, *supra* note 7, at 185-88; Diekemper, *supra* note 7, at 485-86.

177. *United States v. Dion*, 476 U.S. 734, 739-40 (1986).

178. *See United States v. Kaneholani*, 773 F. Supp. 1393, 1395 (D. Haw. 1990).

contrary expressed in the ESA.¹⁷⁹ The district court dismissed the abrogation argument for lack of merit, reasoning that the abrogation issue concerns treaty rights and there were no applicable treaties or statutory rights that would give the defendant a right to take monk seals.¹⁸⁰ The court also held that the exemption granted to native Alaskans was for subsistence purposes and did not extend to Hawaiians.¹⁸¹

The Ninth Circuit reviewed the *Kaneholani* case together with the appeal of Daryl Nuesca, who had been convicted of taking two endangered green sea turtles.¹⁸² The court dismissed any reliance on Indian hunting rights as misplaced and irrelevant because of a lack of treaty rights.¹⁸³ The defendants further argued that exempting one aboriginal group (Alaskan natives) while withholding immunity from another (Hawaiians) was a violation of the equal protection clause.¹⁸⁴ The court determined that the ESA exemption is based on subsistence needs and culture, not on race, and rejected the argument.¹⁸⁵ Also, in *United States v. Nguyen*, the Fifth Circuit concluded that the ESA imposes penalties even if the defendant, a Vietnamese fisherman, did not know the sea turtle he had in his possession was a protected species.¹⁸⁶ While such cases do not involve Indian treaty rights, they do indicate the understanding of the courts that Congress considered a wide variety of exemptions and chose a narrow exemption based on need and culture, not race. Unless a compelling need could be established, Congress intended the ESA to apply to all Americans.

Public policy considerations should also be considered in determining the intent of Congress. When a statute is interpreted it must be done "in light of the purposes Congress sought to serve."¹⁸⁷ In passing the ESA, Congress was concerned about the accelerating rate of extinctions and the incalculable genetic heritage that would be lost forever.¹⁸⁸ Protective measures were considered essential to

179. *See id.*

180. *See id.*

181. *See id.* at 1395-97.

182. *See United States v. Nuesca*, 945 F.2d 254, 255-56 (9th Cir. 1991).

183. *See id.* at 257.

184. *See id.*

185. *See id.*

186. *See United States v. Nguyen*, 916 F.2d 1016, 1020 (5th Cir. 1990). Nguyen was found in possession of a threatened loggerhead sea turtle off the Texas coast. *See id.* at 1017. The court held that Congress intended to make a violation of the ESA a general intent crime and it was therefore unnecessary for the government to prove that Nguyen knew his conduct was illegal. *See id.* at 1018.

187. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

188. *See H.R. REP. NO. 93-412*, at 4 (1973).

prevent further extinction of animal species.¹⁸⁹ The ESA recognizes that endangered species are of “esthetic, ecological, educational, historical, recreational, and scientific value to the nation,” and many species are or soon will be extinct.¹⁹⁰ The ESA clearly recognizes that we all share a stewardship responsibility for our natural resources. Only by working together as one nation can we carry out that stewardship responsibility. If we fail and lose a species because of that failure, it does not matter that someone was right. It is not within our power to recreate that which we have allowed to become extinct. The plain language of the statute and the clear intent of Congress establish the critical nature of the resources protected by the ESA. Judicial interpretation of the statute affirms that the ESA has jurisdiction over all persons not specifically exempted. Furthermore, we have a moral obligation as a nation not to squander our national heritage. It would be inconsistent with clearly established public policy objectives to allow a major exception to the protections provided endangered species under the ESA.

Legislative history, clear meaning of the statute, and public policy issues behind the drafting of the statute are all factors to consider when determining whether the standard established in *Dion* has been met. For the foregoing reasons, the analysis and the opinion of the *Billie* court are correct. The ESA abrogates those Indian treaty rights that are in conflict with statutory purposes. The legislative history, biological conservation requirements, trust responsibilities, and public policy all demand this conclusion. Treaty rights must yield to the protection of species by the ESA in those cases where the ESA cannot accommodate the treaty right in question.

C. *The Meaning of Treaty Abrogation by the Endangered Species Act*

Having determined that the ESA abrogates Indian treaty rights where those rights are in conflict with endangered species, the next question is whether those treaty rights are permanently abrogated. Unfortunately, the word “abrogation” causes much of the confusion and misunderstanding about the relationship between Indian treaty rights and the ESA. “Abrogation” is defined as “[t]he destruction or annulling of a former law, by an act of the legislative power, by constitutional authority, or by usage.”¹⁹¹ As applied to Indian treaty

189. See S. REP. NO. 93-307, at 2989-90 (1973).

190. 16 U.S.C. § 1531(a) (1994).

191. BLACK'S LAW DICTIONARY 8 (6th ed. 1990).

rights, the definition of “abrogation” clearly means that a right is permanently lost when that right is abrogated. However, when considered in relation to the ESA, the result is different. The ESA abrogates only those rights that are in conflict with the statute. For any given species, the result may be only temporary. When a species recovers, it is taken off the endangered species list.¹⁹² Once that species is de-listed, the ESA no longer applies, and treaty rights to hunt the species are no longer affected. Therefore, while the listing of a species under the ESA may have some negative impacts on select treaty rights relating to individual species, it will not cancel a broader right to hunt and fish.¹⁹³ Furthermore, if the species recovers, those rights will be fully restored instead of permanently lost.¹⁹⁴ This appears to be the position that the DOI was trying to state in 1985 when it testified that while the ESA necessarily applied to Indian hunting rights, it was not intended to abrogate those rights.¹⁹⁵

In general, the ESA abrogates those rights in conflict with the statute. However, for any particular species, those rights are suspended or regulated only while the species is on the list. Further, when a species is listed as “threatened,” rather than “endangered,” some harvest may be permitted as long as it is consistent with a conservation plan for the species. When the long-term benefits of the ESA are realized through restoration of a species to a level that can sustain reasonable harvest under a treaty right, that right then exists in

192. See 16 U.S.C. § 1533(c)(2)(B)(i) (1994).

193. It is important to note that the listing of a species can also have significant impacts on activities that do not directly target the listed species. First, regulations implemented to protect the listed species can impact the otherwise legal harvest of other species. For example, it may be necessary to ban the use of gill nets to protect a run of a listed salmon, resulting in the curtailment of fishing rights for other salmon that are not listed. Second, the ESA has a provision for “similarity of appearance” cases allowing the listing of a species that does not otherwise qualify as “endangered” when necessary to protect a listed species. *Id.* § 1533(e). For instance, it may be determined that the only way to protect an endangered run of salmon is to list, under the “similarity of appearance” provision, another run that is not endangered but commingles with the endangered run. On the other hand, the ESA also has a provision that allows for an “incidental take” where the taking of an endangered species is “incidental to, and not the purpose of . . . an otherwise lawful activity.” *Id.* § 1539(a)(1)(B). A permit is required for an “incidental take,” but a permit may be issued only if it can be shown in a conservation plan that the incidental take “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” *Id.* § 1539. For example, if it could be shown that the use of gill nets to harvest a run of common salmon would not take so many listed salmon as to reduce the likelihood of survival and recovery of the listed run, an incidental take permit could be issued to protect the fisherman from liability for any listed fish they might incidentally take.

194. Whether the outcome is recovery or extinction, the result will be the same. If protections under the ESA are removed, any secondary impacts of those regulations will also be removed.

195. See *supra* text accompanying note 133.

fact instead of merely on paper. Therefore, one must conclude that the ESA does not conflict with Indian treaty rights, but furthers those rights by ensuring that they exist for future generations. Unfortunately, situations arise, such as that presented in *Billie*, where the long term goals of the ESA are in conflict with the application of treaty rights to a specific situation. In such a situation, treaty rights must yield to the ESA. Whether that yielding is called “abrogation,” “regulation,” or “suspension” depends on the perspective of the parties involved. The end result, however, is the same.

IV. CONCLUSION

The flexibility of the ESA, particularly for species listed as “threatened,” a recognized ability to regulate treaty rights for conservation purposes, and a strong national commitment to maintain treaty rights as part of our national trust responsibility, all provide for the resolution of most of the potential conflicts between the ESA and Indian treaty rights before the question of “abrogation” of those rights is reached. Situations do arise, however, where the question of whether the ESA sets aside treaty rights in conflict with the purposes of the Act must be addressed. Such a situation was presented in *Billie*. The legislative history of the ESA, congressional intent, and the public policy considerations behind passage of the ESA all lead to the conclusion that the ESA abrogates Indian treaty rights where those rights are in conflict with endangered species protection. Therefore, the holding in *Billie* is correct and criticism of that holding is not supported when the full record is examined.

Further, the net effect of the ESA is merely to suspend treaty rights only to the extent they apply to species listed under the ESA. General rights to hunt and fish are not abrogated by the Act. Once a species is recovered and removed from the endangered species list, treaty rights are fully restored in a manner that allows the exercise of those rights. Thus, when properly examined, the ESA works to preserve Indian treaty rights rather than to abrogate them.