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On-Reservation Treaty Hunting Rights: Abrogation v. Regulation by Federal Conservation Statutes - What Standard

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ON-RESERVATION TREATY HUNTING RIGHTS: ABROGATION V. REGULATION BY FEDERAL CONSERVATION STATUTES—WHAT STANDARD?

United States v. Dion, 752 F.2d 1261 (8th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985) (No. 85-246).

The status of Indian on-reservation treaty rights will be examined by the United States Supreme Court to resolve inconsistent interpretations of the Bald Eagle Protection Act (BEPA)[1] by the Eighth and Ninth Circuits. The basic issue questions the validity of a treaty defense[2] in a criminal prosecution for the taking of an eagle as prohibited by the BEPA.[3] Specifically, the Court must determine if the BEPA has abrogated or modified existing on-reservation treaty hunting rights.

These Eighth and Ninth Circuit Indian eagle taking cases have several facts in common.[4] First, the takings were by members of federally recognized tribes. Second, all takings occurred within the exterior boundaries of their reservations. Finally, the right to take eagles on the reservations was found, expressly or implicitly, within the original scope of a treaty. On essentially these facts, the Eighth and Ninth Circuits split on whether the treaty right still existed at the time of the taking in light of the BEPA.

The heart of the inquiry focuses on what standard the Court should apply, and what principles they should consider, when deciding the issue of whether the BEPA has either abrogated or regulated Indian on-reservation hunting rights. Unquestionably Congress has full plenary power to legislate with regard to Indians.[5] This power includes the right to

1. Bald Eagle Protection Act, 16 U.S.C. §§ 668-668(d) (1982).

2. The treaty defense requires three findings by the court. First, a treaty right to hunt on the reservation must be found. Second, the Indian defendant must have acted within the scope of a tribal treaty right. To fall within the scope of a treaty right, the defendant must be a member of the tribe and his actions occur on the reservation. Third, the court must determine the treaty right has not been abrogated. If abrogation is not found, the defendant may successfully use the treaty right as a shield against criminal prosecution. United States v. Dion, 752 F.2d 1261, 1263 (8th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985) (No. 85-246). *See* United States v. White, 508 F.2d 453 (8th Cir. 1974).

3. In *Dion*, 752 F.2d 1261 (8th Cir. 1985), the court expanded the treaty defense to shield against taking prohibitions charged under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982).

4. *See, e.g.*, United States v. Dion, 752 F.2d 1261 (8th Cir. 1985); United States v. White, 509 F.2d 453 (8th Cir. 1974); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980).

5. The exercise of Congress' plenary power over Indians was deemed a political issue, not subject to judicial review. Lone Wolf v. Hitchcock, 187 U.S. 533 (1903). However, nonreviewability was later rejected in United States v. Sioux Nation, 448 U.S. 371 (1980). The Court held congressional power to control Indian affairs is not absolute. The power is subject to guardianship and constitutional limits. *Id.* at 415.

unilaterally abrogate Indian treaties.[6] As a consequence, Congress could abrogate all treaty hunting rights, if it wished, by passing efficient legislation.

United States v. Dion[7] also raises the issue of whether a statute, such as the BEPA, may be viewed as a regulation rather than an abrogation of on-reservation Indian treaty rights. This relationship between treaty hunting rights and federal regulation has never been addressed in the context of an on-reservation right. The United States Supreme Court may determine that federal plenary power includes the power to regulate treaty rights. However, what standards will apply to Congress when federal regulations are capable of effecting complete abrogration of exclusive on-reservation rights?

The trust relationship between the United States and American Indians provides the historical foundation for federal Indian law and policies.[8] The federal government has a duty to establish and protect the rights of Indians. That duty has been described as a moral obligation "of the highest responsiblity and trust."[9] Additionally, when Congress acts to control or manage Indian interests, the exercise of this plenary power must be rationally related to fulfilling the trust responsibility.[10] Furthermore, Congress must discharge these trust duties with "good faith and fairness."[11]

The Supreme Court's decision in *Dion*[12] will emerge in the midst of a dramatic controversy where federally guaranteed interests of tribes will be juxtaposed against an overwhelming public interest in saving the eagle. This casenote will examine the level of accountability to which Congress should be held when federal legislation adversely affects on-reservation treaty rights. First, the note will review canons of construction used over the years to determine abrogation when federal statutes and Indian treaties conflict. Second, the nature of treaty rights will be examined. Third, the note will focus on the contrasting views of the Eighth and Ninth Circuits and the Department of the Interior. In conclusion, the note urges that the "express reference" test of abrogation should always be applied to determine whether Congress has effectively legislated with regard to on-reservation treaty rights.

6. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870), where the court noted that a congressional act may supersede a treaty.

7. *Dion*, 752 F.2d at 1269.

8. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall denominated tribes as domestic dependent nations. Indians were considered in a state of pupilage resembling that of a ward to a guardian. Tribes "look to our government for protection." *Id.* at 17.

9. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

10. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977).

11. United States v. Payne, 264 U.S. 446, 448 (1924).

12. *Dion*, 752 F.2d 1261.

BACKGROUND

Treaties between the United States and American Indian tribes preserve important reservation rights. These rights are not grants from the United States to the Indians, but instead may be regarded as negotiated contracts whereby a tribe has made "major concessions in return for such rights."[13] Thus, under the "reserved rights" doctrine, tribes retain all rights which were not granted away in a treaty or taken away by subsequent congressional enactments.[14]

The trust relationship between the United States and Indian tribes, as well as the unequal bargaining power of the parties at the time the treaties were made, resulted in the judicial recognition of special canons of construction to interpret Indian treaty rights. The trust relationship also requires the application of these canons to determine the scope of treaty rights not clearly expressed.[15] These canons facilitate the goal of treaty interpretation in determining the original intention of the parties.

The three primary rules of construction for treaties are: (1) ambiguous expressions must be resolved in favor of the Indians,[16] (2) the treaties should be interpreted as the Indians themselves would have understood them[17] and (3) the treaties must be liberally construed in favor of the Indians.[18]

Treaty rights may be abrogated unilaterally by Congress.[19] However, the major issue for the courts has been determining when congressional action has effectively abrogated treaty rights. Various judicial tests have

13. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 603 (1975).

14. *Id.* at 619. "[A] treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680 (1979); United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Washington, 520 F.2d 676, 684 (9th Cir. 1975).

15. The United States was presumed to have the superior negotiating skills and knowledge of language. Often there was no evidence that tribes had any understanding of the specific English terms used in the treaties. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 676.

16. *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908). *See* Wilkinson & Volkman, *supra* note 13, at 617.

17. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832). *See also* Wilkinson & Volkman, *supra* note 13, at 617.

18. *See, e.g.*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Tulce v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Walker River Irrig. Dist., 104 F.2d 334, 337 (9th Cir. 1939). *See also* Wilkinson & Volkman, *supra* note 13, at 617.

19. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). Treaties do not limit Congress' plenary power over Indian tribes. *But see supra* notes 10 and 11 which describe limits on the exercise of plenary power.

been applied to determine whether Congress intended to abrogate Indian treaties: (1) a claim of abrogation must be supported by a clear showing of legislative intent,[20] (2) abrogation will not be lightly imputed to Congress,[21] (3) abrogation will be found only after liberally construing the statute in favor of the Indian treaty[22] and (4) abrogation will be found only upon express legislative reference to Indian treaty rights.[23] The trend over the last twenty years suggests courts will not find intent to abrogate treaty rights unless there is some clear, express statement of such intent by Congress in the statute or in the legislative history.[24]

NATURE OF TREATY RIGHTS

Recently, the United States Supreme Court recognized the exclusive nature of on-reservation rights to hunt and fish as opposed to off-reservation rights.[25] Express on-reservation treaty rights to hunt and fish are often described in treaties as "exclusive" tribal rights.[26] Some treaties do not expressly list the right to hunt and fish on the reservation. However, using the canons for interpreting treaties, courts have held the right to hunt and fish is an implicit treaty right.[27]

Treaties may also guarantee Indian hunting and fishing on lands outside current reservation boundaries. Off-reservation treaty rights are generally considered to be shared in common with other citizens.[28] Off-reservation

20. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941). The Supreme Court treated the Walapai aboriginal right of occupancy similar to a treaty right holding Indian title survives absent a "clear and plain" congressional action. *Id.* at 353. *See also* Wilkinson & Volkman, *supra* note 13, at 623.

21. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). *See also* Wilkinson & Volkman, *supra* note 13, at 625.

22. Choate v. Trapp, 224 U.S. 665 (1912). Doubtful expressions will be resolved in favor of the Indians. *Id.* at 675-76. *See also* Wilkinson & Volkman, *supra* note 13, at 626.

23. Mattz v. Arnett, 412 U.S. 481 (1973). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 505. *See also* Wilkinson & Volkman, *supra* note 13, at 627.

24. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) ("We find it difficult to believe that Congress without explicit statement, would . . . [destroy] property rights conferred by treaty. . . ."); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971) ("if it was the intention of Congress to disestablish the Leech Lake Reservation, the Congress knew how to say so in clear language."); *White*, 508 F.2d at 457 (8th Cir. 1974) ("it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and Red Lake Chippewa Indians . . .").

25. Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 53 U.S.L.W. 5106 (U.S. July 2, 1985) (No. 83-2148). The Court recognized a significant geographical component in tribal sovereignty. The Court held the Klamath tribe's exclusive right to hunt and fish on lands reserved in an 1864 treaty did not survive as a special right to be free of state regulation on subsequently ceded lands under a 1901 Agreement. *Id.* at 5107.

26. *Id.* The treaty created a reservation for the tribe securing "the exclusive right of taking fish in the streams and lakes included in said reservation."

27. *Dion*, 752 F.2d at 1264 (8th Cir. 1985).

28. *See, e.g.*, Puyallap Tribe v. Washington Dep't of Game, 391 U.S. 392 (1968); Kennedy v. Becker, 241 U.S. 556 (1916); Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 53 U.S.L.W. 5106 (U.S. July 2, 1985) (No. 83-2148).

rights to hunt and fish have been found subject to some state conservation regulations because they are in-common rights rather than exclusive tribal rights.[29] The appropriate standard to determine whether such conservation measures impinge on off-reservation treaty rights is whether the statute is nondiscriminatory, reasonable and necessary.[30]

The United States Supreme Court refused to imply off-reservation treaty hunting rights in the recent decision of *Oregon Dep't of Fish and Wildlife v. Klamath*.[31] This refusal suggests that the status of the land plays a vital role in determining the nature and existence of treaty rights. Furthermore, these differences indicate that the reasoning applied to resolve issues involving regulation of off-reservation rights will not necessarily lead to similar conclusions regarding on-reservation treaty rights.

CIRCUIT CONFLICT

The Bald Eagle Protection Act is a broadly worded conservation statute enacted to protect the bald eagle.[32] Despite the broad wording which would suggest general application, several points must be considered. First, treaty Indians may be excepted from the rule that general laws apply to all persons.[33] Second, the BEPA is also a criminal law which requires a higher degree of specificity.[34] Third, no express intention to

29. The reasoning behind state regulation of off-reservation rights goes to a theory that two sovereigns may not effectively regulate the same activity. Furthermore, Indian hunting and fishing occurs on land within the exercise of state sovereignty. Puyallup Tribe v. Washington Dep't of Game, 391 U.S. at 400 (citing Kennedy v. Becker, 241 U.S. 556, 563-64 (1916)).

30. Puyallup Tribe v. Washington Dep't of Game, 391 U.S. at 399-401.

31. *Klamath Indian Tribe*, 53 U.S.L.W. at 5111. This distinction may fit into the scheme of other court decisions in which a tribe's power over non-Indians is limited, while the courts are generous to the exercise of tribal power over member Indians. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Wahington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

32. Bald Eagle Protection Act, 16 U.S.C. §§ 668-668(d) (1982). 16 U.S.C. § 668(a), provides in part: "Whoever . . . shall . . . take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead . . . shall be fined not more than $5000 or imprisoned not more than one year or both. . . . Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald or golden eagle to permit the taking, possession, and transportation of specimens thereof . . . for the religious purposes of Indian tribes . . . he may authorize the taking of such eagles pursuant to regulations . . . Provided . . . that bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior. . . ."

33. The exception applies to Indians and their property interests and may be triggered where the subject of the enactment involves treaty rights and areas traditionally left to tribal self-government. *White*, 508 F.2d at 455. General laws usually apply to Indians unless special Indian rights are involved. *See, e.g.*, Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1970); Bryan v. Itasca County, 426 U.S. 373 (1976).

34. The specificity requirement is based on two policies. First, a fair warning of what the law intends to do should be given in clear language to the common world. "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." United States v. Bass, 404 U.S. 336, 348 (1971).

abrogate reservation Indian hunting rights exists in the language of the Act or in the legislative history.[35] These ambiguities in the draftmanship of the Act have led to the current conflict between the Eighth and Ninth Circuits in interpreting the prohibitions of the Act as applied to a treaty right to take eagles on reservations.

The Eighth Circuit affirmed the validity of the treaty defense in *United States v. White*.[36] The court found the Red Lake Band of Chippewas had a right to hunt eagles which was implicit in the treaties between the tribe and the United States.[37] Reliance was placed on the *Menominee* doctrine to govern disposition of the case: "While the power to abrogate [recognized hunting] rights exists . . .'the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.'"[38] Applying the express abrogation test, the Eighth Circuit found the right to take eagles had not been abrogated by the BEPA. No express intention to abrogate was found in the language of the Act or in the legislative history.[39]

Six years later, the Ninth Circuit was confronted with the *White* treaty defense in *United States v. Fryberg*.[40] The Ninth Circuit held the BEPA modified Indian treaty rights such that treaty Indians could take eagles only for religious purposes pursuant to a permit. A less rigorous standard for abrogation, the surrounding circumstances test, was applied.[41] "In all cases, the 'face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye towards determining what congressional intent was."[42] The major circumstance considered

35. Both the Eighth and Ninth Circuits agreed that there was no expression of congressional intent to abrogate on-reservation treaty hunting rights in the BEPA. *Dion*, 752 F.2d at 1266. *See also Fryberg*, 622 F.2d at 1013. The only reference to Indians in the BEPA is contained in the 1962 revision: "or for the religious purposes of Indian tribes. . . ." Bald Eagle Protection Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668(a) (1982)). This phrase is capable of many meanings. For example, the Eighth Circuit found the language could be interpreted to allow a non-Indian to take eagles off the reservation so long as the taking was for the religious purposes of Indians. *See White*, 508 F.2d at 458; *Dion*, 752 F.2d at 1270.

36. 508 F.2d 453, 454 (8th Cir. 1974). Enrolled member of the Red Lake Band of Chippewas was charged with taking a bald eagle within the confines of his reservation.

37. *White*, 508 F.2d at 457. The court found no express reservation of hunting rights in the treaties. But the court found an express reservation was unneccessary. The right to hunt and fish was implicitly part of the Indians' right of use and occupancy of the land. "Such right, which was not much less necessary to the existence of the Indians than the atmosphere they breathed remained in them unless granted away." (citing United States v. Winans, 198 U.S. 371, 381 (1905)).

38. *White*, 508 F.2d at 456 (quoting Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968)).

39. The Eighth Circuit found the only express reference to Indians was contained in a 1962 amendment to the act extending protection to the golden eagle: "or for the religious purposes of Indian tribes." Bald Eagle Protection Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668(a) (1982)).

40. 622 F.2d 1010 (9th Cir. 1980). Enrolled member of the Tulalip tribe was convicted for taking a bald eagle on the Tulalip Reservation in violation of the BEPA.

41. Congressional intent to abrogate may be "clear from surrounding circumstances and legislative history." *Id.* at 1013.

42. *Id.* at 1013 (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973)).

was the fact the BEPA was a conservation statute. The court determined conservation statutes affect Indian treaty rights when:

> (1) the sovereign exercising its police power to conserve a resource has jurisdiction in the area where the activity occurs; (2) the statute applies in a nondiscriminatory manner to both treaty and non-treaty persons; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purpose.[43]

The court also found that, historically, Indians hunted eagles only for religious purposes. Since the BEPA contained provisions for such use, application of the Act involved a relatively insignificant modification of Indian treaty rights. The surrounding circumstances test was justified on the ground that there was less reason for Congress to expressly state treaty rights were being modified here than in cases where substantial infringements were involved.[44] This reasoning suggests a more rigorous test would be adopted by the Ninth Circuit if the regulation substantially modified a treaty right.

The United States Supreme Court denied certiorari on *Fryberg*.[45] On June 15, 1981 the Solicitor for the Department of the Interior expressly rejected any analysis of the BEPA that turned on whether or not Congress intended to abrogate reserved Indian hunting rights.[46] This rejection avoided the entire controversy over what was the proper test for abrogation. Instead, the Solicitor proposed applicability of a regulation turned on whether the restrictions were nondiscriminatory, reasonable and necessary. If these requirements were met, no impingement upon reserved hunting and fishing rights would occur. The Solicitor reasoned that reserved rights to hunt did not include the right to take wildlife contrary to conservation. Thus, treaty hunting rights could be completely banned by a regulation aimed at the survival of a species.[47]

In 1985, the Eighth Circuit in *United States v. Dion*[48], reaffirmed its

43. *Fryberg*, 622 F.2d at 1015. The court supports this view with several cases involving state regulation of off-reservation treaty rights. Kennedy v. Becker, 241 U.S. 556 (1916); United States v. Winans, 198 U.S. 371 (1905); Washington Dept. of Game v. Puyallap Tribe, 414 U.S. 44 (1973). *See supra* notes 28, 29.

44. *Fryberg*, 622 F.2d at 1014. Cases cited for substantial infringements include: Menominee Tribe v. United States, 391 U.S. 404 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

45. 449 U.S. 1004 (1980).

46. Opinion of the Solicitor, United States Department of the Interior, No. M-36936 (1981).

47. The Solicitor relied on the same cases used by the Ninth Circuit which dealt with state regulation of off-reservation treaty rights. *See* Kennedy v. Becker, 241 U.S. 556 (1916); Puyallap Tribe v. Washington Game Dep't, 391 U.S. 391 U.S. 392 (1968). *See supra* note 43.

48. 752 F.2d 1261 (8th Cir. 1985). Undercover agents for the United States Fish and Wildlife Service purchased eagle parts from Yankton Sioux tribal members over approximately two years. Dwight Dion, Sr. and Lyle Dion argued the treaty defense on appeal. The treaty defense was not applicable to Terry Fool Bull and Asa Primeaux because their allegedly criminal acts did not occur on the reservation. Convictions were reversed for Lyle Dion and Terry Fool Bull based on entrapment in United States v. Dion, 762 F.2d 674 (8th Cir. 1985).

previous ruling in *White*[49] and expanded the treaty defense to shield against liability for alleged violations of the Endangered Species Act of 1973 (ESA).[50] The court found a right to take eagles was implied in the treaty between the Yankton Sioux and the United States. However, the right to sell or engage in commercial taking of eagles on the reservation was excluded from the scope of the treaty hunting right.[51] Applying the express reference test, the Eighth Circuit determined the on-reservation treaty right to take eagles was neither abrogated nor modified under the BEPA or the ESA.[52] Congressional intent to abrogate treaty hunting, even under the surrounding circumstances test used by the Ninth Circuit, was deemed inconclusive.[53] Therefore, the court chose to adhere to the express reference test which provided greater consistency, clarity and reliability.[54]

Judge Ross, of the Eighth Circuit, rejected the government's argument that Congress may regulate exclusive, on-reservation treaty hunting rights without abrogation when the statute is reasonable, necessary and nondiscriminatory.[55] The government relied on precedent involving state regulation of off-reservation treaty rights.[56] The court distinguished those cases from *Dion*, noting that it read the cases "as establishing only that 'in common' treaty rights are subject to conservation regulation" and not as providing "an alternative method of abrogating treaty rights."[57]

THE PROPER STANDARD

When examining Indian treaty questions, one must consider that the United States retains what it bargained for—namely land. On the other hand, the treaty rights Indians bargained for are continuously eroded as federal policy shifts. When these rights are altered, what level of congressional accountability will be consistent with the moral obligations imposed by the treaty doctrine and the trust relationship?

49. 508 F.2d 453 (8th Cir. 1974).

50. 16 U.S.C. §§ 1531-1543 (1982).

51. The court reasoned the Indians could have no expectation of a treaty right to sell eagles. Historical evidence indicated no practice of selling existed at the time the treaty was made and such practices were deplored as a matter of tribal custom and religion. *Dion*, 752 F.2d at 1264. "Since the Yankton Sioux lacked any understanding that they had a treaty right to sell eagles commercially, it follows that they could not have had a reasonable expectation of a right to take eagles for this purpose." *Id.*

52. The court noted no changes had occurred in the Bald Eagle Protection Act, 16 U.S.C. §§ 668-668(d) (1982), which required altering their conclusion in *White*, that Congress had failed to abrogate treaty hunting rights. Furthermore, the court rejected the government's argument that express congressional intent was exhibited by Congress' rejection of a bill which would have exempted Indians from the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982). "We reject such a 'backhanded' way of abrogating treaty hunting rights of Indians." *Dion*, 752 F.2d at 1269.

53. *Dion*, 752 F.2d at 1269-70.

54. *Id.* at 1267.

55. *Id.* at 1269.

56. *See supra* notes 28, 29, 43, 47.

57. *Dion*, 752 F.2d at 1269.

The appropriate standard for resolving Indian treaty issues is one which encompasses the accepted canons of construction for determining abrogation. By requiring an express statement in either the Act itself or in the legislative history the Court would establish a standard providing the highest degree of certainty, consistency and institutional competency. In light of the federal plenary power over Indians, such a ruling will present no bar to subsequent legislation by Congress. Furthermore, if Congress acts in a clear and express manner, Indians and the judiciary will be convinced that Congress has indeed faced these issues and clearly intended to abrogate treaty hunting rights in an evenhanded, rather than in a backhanded manner. Perhaps Congress will think twice before legislating if it must unequivocally state an intention to abrogate an Indian treaty right.

The surrounding circumstances test should be rejected. The only plausible argument for application of this less rigorous test is judicial flexibility. Courts may use broad discretion in finding extrinsic indications of congressional intent to abrogate treaties. Retrospective conjecture provides no guarantee that Congress actually and fully considered the impact on Indian treaty rights at the time of the legislative enactment. Additionally, leaving resolution of the issue to the discretion of the judiciary will invite inconsistent interpretations and circuit conflicts. For example, in *Dion,* the Eighth Circuit found that, even under the surrounding circumstances test, the legislative history of the BEPA provided insufficient congressional intent to abrogate treaty hunting rights.[58] In sharp contrast, the Ninth Circuit in *Fryberg,* found the identical legislative history was sufficient.[59] These interpretive differences exemplify that the lack of specific guidelines does lead to unpredictable results under the surrounding circumstances test. Absent predictive value, the test does not otherwise offer sound proof that decisions are based on applicable legal principles rather than desired results. A result oriented approach is exactly what treaties were intended to protect against. In addition, that approach stands in direct opposition to the canons of construction which insure that the rights promised in treaties will be respected despite public sentiment to the contrary. The approval or disapproval of the general public is immaterial to the issue of whether treaty rights have been abrogated by Congress. In fact, "[t]he trust responsibility protects Indian tribes from the majoritarian political process just as the Constitution protects the national government's status from that same process."[60]

If the Court chooses the regulatory path suggested by the Ninth Circuit and the Department of the Interior, application of the nondiscriminatory, reasonable and necessary standard will not be appropriate.[61] First, federal

58. *Id.* at 1269, 1270.

59. *Fryberg,* 622 F.2d at 1014.

60. F.L. Ragsdale, Jr. and D.B.L. Endreson, Tribal Self-Government Under United States Law, 30, Paper from the Ninth Inter-American Indian Congress (Oct. 28, 1985).

61. *See supra* notes 43, 46.

regulations may, in effect, abrogate treaty rights. For example, under the express language of the BEPA, the Secretary of the Interior shall determine if a taking is compatible with preservation of the bald or golden eagle before issuing a permit to take.[62] Clearly within the right to issue a permit is the power to deny a permit. Thus, regulation may equal abrogation of a treaty protected right to hunt on a reservation. As noted in *Menominee,* "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."[63] Second, while the standard has been applied to state regulation of off-reservation "in common" treaty rights,[64] the rationale has not been successfully applied to federal regulation of "exclusive" on-reservation treaty rights. Finally, the trust relationship imposes upon the federal government special responsibilities, including a duty to protect Indian interests, which are not imposed on the states.

CONCLUSION

The United States Supreme Court should require an express statement of congressional intent to abrogate or modify Indian treaty rights before finding that treaty rights have been adversely affected by federal legislation. Such a requirement would not only encourage, but also allow tribal participation in the law making process and the implementation of federal policy. The federal trust responsiblity dictates that Congress should expressly state the impact of laws on Indian people out of deference to their special status and the solemn bargains which are represented by treaties.[65] When Congress is allowed to legislate under less rigorous standards, the federal-tribal relationship becomes merely an object of judicial conversation which is inconsistent with the United States Supreme Court's prior definitions of the trust responsibility.[66] If Congress wishes to act with regard to on-reservation treaty rights there is no question it may. However, let Congress act in a manner for which it may be held accountable—a manner in which Congress must stand up and be counted.

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62. 16 U.S.C. § 668(a) (1982). *See supra* note 32.

63. Menominee Tribe v. United States, 391 U.S. 404, 413 (1967).

64. *See e.g.,* Puyallup Tribe v. Washington Game Dep't, 391 U.S. 392 (1968); Kennedy v. Becker, 241 U.S. 556 (1916). *See supra* notes 28, 29, 43, 47, 56.

65. *See generally* Wilkinson & Volkman, *supra* note 13.

66. The duties owed by the United States to Indian tribes are to "be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). The relationship of Indians to the United States "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). "[T]he United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." United States v. Payne, 264 U.S. 446, 448 (1924).