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# Abrogation or Regulation? How *Anderson v. Evans* Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity

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# ABROGATION OR REGULATION? HOW *ANDERSON V. EVANS* DISCARDS THE MAKAH'S TREATY WHALING RIGHT IN THE NAME OF CONSERVATION NECESSITY

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*Abstract*: From 1787 to 1871, the federal government and various Indian tribes entered into hundreds of treaties. Under well-established U.S. Supreme Court precedent, the U.S. Congress has plenary authority to abrogate or modify any of these treaties. The U.S. Supreme Court is reluctant to find congressional intent to do so, however, and requires that this intent be clear and plain. States have no such power to qualify treaties, but the Court has allowed states to regulate treaty rights when doing so is necessary for species conservation. While the U.S. Supreme Court has kept these two lines of cases distinct, the U.S. Court of Appeals for the Ninth Circuit has merged the two doctrines in recent years. The Ninth Circuit's recent decision in *Anderson v. Evans*, in which the court held that the Marine Mammal Protection Act (MMPA) applied to the Makah Tribe's treaty whaling rights, dramatically illustrates this practice. This Note argues that the Ninth Circuit's conflation of federal treaty abrogation principles with state conservation necessity principles is analytically indefensible and in direct contravention to established U.S. Supreme Court precedent. Under correctly applied U.S. Supreme Court precedent, the Makah's treaty whaling right is not subject to the MMPA. The *Anderson* decision is a violation of the United States' treaty obligation to the Makah Tribe and should be overturned.

Long before gray whales were hunted to the brink of extinction in the early 1900s, the animals were central to the cultural, spiritual, and economic existence of the Makah Tribe.[1] Until the 1930s, the Makah hunted gray whales in the waters off the northwest coast of present-day Washington State.[2] Nowhere is the Makah's connection with the gray whale better illustrated than in the 1855 Treaty of Neah Bay,[3] in which the Tribe ceded most of its land in part for the right to take whales "at usual and accustomed grounds and stations . . . in common with all

1. *See* United States v. Washington, 384 F. Supp. 312, 363 (W.D. Wash. 1974) ("The Makah Indians, prior to treaty times, were primarily a seafaring people who spent their lives either on the water or close to the shore. Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal. The excess of what they needed for their own consumption was traded to other tribes for many of the raw materials and some of the finished articles used in the daily and ceremonial life of the village."), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

2. *See* Anderson v. Evans, 314 F.3d 1006, 1009 (9th Cir. 2002); Metcalf v. Daley, 214 F.3d 1135, 1137 (9th Cir. 2000).

3. Treaty of Neah Bay, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939. Neah Bay is located in the north-westernmost corner of present-day Washington State, on the Olympic Peninsula.

citizens of the United States."[4] In fact, the Makah is the only tribe in the United States with an explicit treaty right to hunt whales.[5] However, a recent ruling by the U.S. Court of Appeals for the Ninth Circuit has severely limited the ability of the Makah Tribe to exercise this right.[6] In *Anderson v. Evans*,[7] the court held that the Marine Mammal Protection Act (MMPA),[8] which generally prohibits the taking of marine mammals, applied to the Makah's whaling efforts.[9] Without ruling that Congress had abrogated the Makah's treaty whaling right, the court held that the application of the MMPA to the Tribe's whaling efforts was necessary to achieve the statute's "conservation purpose."[10]

The U.S. Supreme Court has consistently held that Congress has plenary power to abrogate or modify Indian treaties.[11] However, because the federal government and the tribes negotiated the treaties in conditions severely disadvantageous to the Indian tribes, the Court has created canons of Indian treaty construction that favor Indian tribes and protect treaty rights.[12] Foremost among these canons is the principle that congressional intent to abrogate a treaty right must be clear and plain, and will not be easily imputed.[13]

States, on the other hand, have no such power to abrogate or modify Indian treaties.[14] By virtue of the Supremacy Clause,[15] Indian treaties take precedence over any conflicting state laws.[16] Nonetheless, in deference to the police power of the states, the U.S. Supreme Court has held that states can regulate Indian treaty fishing rights when doing so is necessary for conservation.[17] However, courts are reluctant to find such "conservation necessity" in state regulations.[18]

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4. *Id.* art. 4, 12 Stat. at 940a.

5. *See Metcalf*, 214 F.3d at 1140.

6. Anderson v. Evans, 314 F.3d 1006, 1028–29 (9th Cir. 2002).

7. 314 F.3d 1006 (9th Cir. 2002).

8. 16 U.S.C. §§ 1361–1407 (2000).

9. *Anderson*, 314 F.3d at 1028–29.

10. *Id.*

11. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903).

12. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222–23 (1982).

13. *See* United States v. Dion, 476 U.S. 734, 738 (1986) (citing COHEN, *supra* note 12, at 223).

14. *See* COHEN, *supra* note 12, at 458–62.

15. U.S. CONST. art. VI, cl. 2.

16. *Id.*

17. *See* Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) [hereinafter *Puyallup I*].

18. *See, e.g.*, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981) (stating that treaty

This Note argues that in *Anderson v. Evans*, the Ninth Circuit erred in using the conservation necessity doctrine to hold that the Makah Tribe is subject to the MMPA, a federal statute. This error is a direct result of the court's previous conflation of two analytically distinct U.S. Supreme Court doctrines: treaty abrogation principles, properly applied only in cases involving *federal* abrogation or modification of treaty rights; and the conservation necessity principle, properly applied only in cases involving *state* regulation of treaty rights. Part I of this Note reviews the development and rationale behind each doctrine. Part II examines the Ninth Circuit's combination of these two doctrines and notes the rejection of this approach in other circuits. Part III discusses the Ninth Circuit's recent affirmation and extension of this approach in *Anderson*. Finally, Part IV argues that in *Anderson*, the Ninth Circuit improperly analyzed the impact of the MMPA on the Makah's treaty whaling right. Under a proper abrogation analysis, the Makah are not subject to the provisions of the MMPA because there is no indication that Congress, in passing the statute, intended to modify or abrogate the Makah's treaty right to hunt whales. Using the conservation necessity doctrine as a substitute for abrogation analysis in the context of federal legislation is doctrinally inexplicable and unprecedented in U.S. Supreme Court jurisprudence. The Ninth Circuit's *Anderson* decision is a violation of the United States' treaty obligation to the Makah, and should be overturned.

## I. THE SCOPE OF FEDERAL AND STATE POWER OVER INDIAN TREATY RIGHTS: TWO DIFFERENT RATIONALES, TWO DIFFERENT ANALYSES

The U.S. Supreme Court has held that both the U.S. Congress and the states have some ability to limit the exercise of Indian treaty rights.[19] The nature of the federal and state powers is fundamentally different, however, and developed in two distinct lines of cases.[20] Congress has plenary power to modify or abrogate treaty rights; the focus of a judicial inquiry is on whether Congress intended to do so in a specific instance.[21] In contrast, states have only a limited ability to affect Indian treaty

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rights may be regulated only upon showing that unregulated treaty fishing would cause "irreparable harm" to fisheries within state).

19. *See infra* Part I.A–B.

20. *See infra* Part I.A–B.

21. *See infra* Part I.A.

rights.[22] Among other restrictions, courts insist that state regulations be reasonable and necessary for conservation purposes.[23]

### A. *Although Congress Has Plenary Power To Modify or Abrogate Indian Treaties, Its Intent To Do So Must Be Clear and Plain*

As a result of its plenary authority over Indian affairs, Congress has the power to statutorily abrogate or modify Indian treaties.[24] Courts strongly presume, however, that federal statutes of general applicability do not automatically affect Indian treaty rights.[25] Instead, prior to concluding that a congressional act affects a treaty right, courts must find that Congress considered the Indian treaty right in question and subsequently chose to abrogate or modify the right by passing the statute.[26]

The U.S. Supreme Court offered one of its strongest expressions of the presumption against treaty abrogation in *Menominee Tribe of Indians v. United States*.[27] The Court held that a 1954 statute terminating the trust relationship with the Menominee Tribe[28] did not extinguish the Tribe's hunting and fishing treaty rights.[29] While the statute provided that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of

22. *See infra* Part I.B.

23. *See infra* notes 73–83 and accompanying text.

24. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903). However, as later cases have clarified, the exercise of such power would likely subject the United States to a takings claim under the Fifth Amendment. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

25. *See* COHEN, *supra* note 12, at 222–23. In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the U.S. Supreme Court stated that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *Id.* at 120. However, *Tuscarora* was not a treaty rights case, and, as the Ninth Circuit has noted, the *Tuscarora* rule "does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights." Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 711 (10th Cir. 1982).

26. United States v. Dion, 476 U.S. 734, 739–40 (1986).

27. 391 U.S. 404 (1968).

28. Menominee Termination Act of 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891–902 (1970)).

29. *Menominee*, 391 U.S. at 412–13. The Menominee Tribe's hunting and fishing rights were not explicitly granted by treaty. *See* Treaty of Wolf River, May 12, 1854, U.S.-Menominee Tribe, 10 Stat. 1064. However, the Court held that the treaty language reserving for the Tribe a home "to be held as Indian lands are held" included the right to hunt and fish. *See Menominee*, 391 U.S. at 405–06.

the tribe,"[30] the Court held that the use of the word "statutes" was "potent evidence" that *treaty* rights remained unaffected.[31] Reaffirming the principle that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress,"[32] the majority refused to construe the statute as a "backhanded"[33] way of abrogating the Menominee's hunting and fishing rights.[34]

While the *Menominee* decision was a strong statement about the importance of treaty rights, it did not establish whether Congress' intent to abrogate a treaty must be explicit in the language of the statute. The Court addressed this question in *United States v. Dion*,[35] holding that there must be "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."[36] Congressional intent to abrogate can be found in either the language of the statute or from "clear and reliable evidence in the legislative history of a statute."[37]

In *Dion*, the state convicted Dwight Dion, Sr., a member of the Yankton Sioux Tribe, of shooting four bald eagles on the Tribe's reservation in South Dakota in violation of both the Eagle Protection Act[38] and the Endangered Species Act (ESA).[39] In his defense, Dion asserted his treaty right to hunt eagles for noncommercial purposes.[40] Rejecting Dion's treaty defense, the Court first reasoned that the language of the Eagle Protection Act strongly suggested congressional intent to abrogate Indian treaty rights to take eagles.[41] Although the

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30. Menominee Termination Act of 1954, ch. 303, 68 Stat. 250, 252 (repealed 1973) (formerly codified at 25 U.S.C. § 899 (1970)) (emphasis added).

31. *Menominee*, 391 U.S. at 412.

32. *Id.* at 412–13 (citing Pigeon River, Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934)).

33. *Id.* at 413.

34. *Id.* The Court also felt it unlikely that Congress would have intentionally subjected the federal government to a claim for compensation under the Fifth Amendment. *Id.*

35. 476 U.S. 734 (1986).

36. *Id.* at 739–40.

37. *Id.* at 739 (quoting COHEN, *supra* note 12, at 223).

38. 16 U.S.C. §§ 668a–668d (2000). The Eagle Protection Act, as originally enacted, only applied to bald eagles. However, in 1962, the protections were extended to golden eagles as well. *See* Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (codified at 16 U.S.C. § 668a (2000)).

39. 16 U.S.C. §§ 1531–1544 (2000); *Dion*, 476 U.S. at 735–36.

40. *Dion*, 476 U.S. at 737–38.

41. *Id.* at 745. The Court found that it did not need to consider whether the ESA abrogated Dion's

Eagle Protection Act contained no language that explicitly mentioned abrogation of Indian treaty rights,[42] the Court noted that the Eagle Protection Act authorized the Secretary of the Interior to issue permits to Indian tribes for the taking of eagles for "religious purposes."[43] The Court noted that such language was powerful evidence that Congress considered the treaty rights and subsequently chose to abrogate them.[44]

In addition, the *Dion* Court looked to the legislative history of the Eagle Protection Act.[45] The original version of the statute, passed in 1940, only applied to bald eagles and contained no explicit references to Indians.[46] In 1962, however, Congress extended the statute's prohibitions to golden eagles and instituted the permitting process described above.[47] The amendment reflected an "unmistakable and explicit legislative policy choice" that unregulated Indian hunting of bald eagles was inconsistent with the need for species preservation.[48] As a whole, the legislative history provided additional evidence that Congress considered the treaty right of all tribes to take eagles and chose to abrogate those rights.[49]

The Court has applied the *Dion* framework in two subsequent cases. In *South Dakota v. Bourland*,[50] the Court cited the *Dion* test with approval in holding that Congress abrogated the Cheyenne River Sioux Tribe's treaty right to "absolute and undisturbed use and occupation" of former tribal trust lands when it acquired the lands from the Tribe for a dam and flood control project.[51] In acquiring the lands, Congress explicitly reserved the right of the Tribe to hunt and fish around the newly created reservoir "subject to the regulations governing the corresponding use by other citizens of the United States."[52] Following

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treaty rights because the Eagle Protection Act had already removed his "treaty shield." *Id.* at 745–46.

42. *Id.* at 740–41.

43. *Id.* at 740 (quoting Eagle Protection Act, 16 U.S.C. § 668a (2000)).

44. *Id.*

45. *Id.* at 740–44.

46. *See* Eagle Protection Act, § 1, 54 Stat. 250 (1940) (current version at 16 U.S.C. §§ 668a–668d (2000)).

47. *Dion*, 476 U.S. at 741.

48. *Id.* at 745.

49. *Id.* at 743.

50. 508 U.S. 679, 693–94 (1993).

51. *Id.* at 693.

52. *Id.* at 690 (citing Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191, 1193 (1954)).

*Dion*, the Court held that such a limited reservation of rights could not be explained without finding that Congress intended to abrogate the right of the Tribe to regulate hunting and fishing on the land by non-Indians.[53]

Most recently, in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[54] the Court again cited the *Dion* test with approval in holding that there was no "clear evidence" that Congress intended to abrogate Chippewa treaty rights in passing Minnesota's Enabling Act.[55] The Court noted that the Act made no mention of Indian treaty rights, and provided "no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act."[56] Both *Bourland* and *Mille Lacs* illustrate the continued vitality of the *Dion* framework.

Thus, U.S. Supreme Court precedent weighs heavily against the finding of congressional intent to abrogate treaty rights.[57] Under *Dion*, the Court requires evidence that Congress considered the treaty right in question and nonetheless chose to modify or abrogate that right.[58] While the intention to abrogate treaty rights need not be explicit on the face of a statute, evidence of abrogation must be "clear and plain" in light of the "fundamental importance" of Indian treaty rights.[59]

### *B. States Cannot Modify or Abrogate Indian Treaty Rights, but They Have a Limited Ability To Regulate Off-Reservation Treaty Rights When Necessary for Conservation*

By virtue of the Supremacy Clause,[60] Indian treaties are superior to conflicting state laws or constitutional provisions.[61] As a result, states do not have the ability to qualify the rights guaranteed in Indian treaties.[62]

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53. *Id.* at 693–94. While the Court analyzed the abrogation issue under the *Dion* framework, the Court's holding of abrogation provoked a strong dissent. *See id.* at 700 (Blackmun, J., dissenting) (stating that the "majority adopts precisely the sort of reasoning-by-implication that [*Dion* and other cases] reject").

54. 526 U.S. 172 (1999).

55. *Id.* at 203.

56. *Id.*

57. *See* COHEN, *supra* note 12, at 222–23.

58. United States v. Dion, 476 U.S. 734, 739–40 (1986).

59. *Id.*

60. U.S. CONST. art. VI, cl. 2.

61. *See* COHEN, *supra* note 12, at 62.

62. *See, e.g.*, *Puyallup I*, 391 U.S. 392, 398 (1968) (stating that a treaty right to fish at all usual and accustomed places "may, of course, not be qualified by the State").

However, in recognition of the potential effects of a treaty on a state's police powers, the U.S. Supreme Court has held that states do have the power to regulate off-reservation Indian fishing rights when necessary for conservation.[63]

The Court first recognized the ability of states to regulate Indian treaty fishing rights for purposes of conservation in 1968.[64] In *Puyallup Tribe v. Department of Game* (*Puyallup I*),[65] the Court held that off-reservation Indian treaty fishing rights were subject to limited state regulation.[66] At issue in the case was the ability of Washington State to enforce regulations banning net fishing of steelhead and salmon by the Puyallup Tribe.[67] The Court first reasoned that the Puyallup's treaty[68] guaranteed the Tribe the right to fish at its "usual and accustomed places," but not the right to fish in its "usual and accustomed manner."[69] Furthermore, the Court noted that the off-reservation fishing right was not an exclusive one, but rather one held in common with all citizens of Washington Territory.[70] The Court held that the terms of the treaty preserved "the overriding police power of the State" to enact

63. *See id.* The regulation of *on-reservation* Indian treaty rights is beyond the scope of this Note as the Makah's treaty whaling right is an off-reservation right held "in common with the citizens of the territory." In general, the justification for allowing the regulation of *off-reservation* treaty rights lies primarily in the non-exclusive nature of such rights, indicated by the "in common" language of many Indian treaties. However, in at least one case, the U.S. Supreme Court has applied this same rationale to state regulation of *on-reservation* treaty rights, which are otherwise exclusive rights according to the terms of the treaties. *See* Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 173–77 (1977).

64. *See Puyallup I*, 391 U.S. at 398. Prior to 1968, the Court had only indirectly addressed whether states could regulate Indian treaty rights. *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (holding that the state of Washington could not charge treaty fishermen a fee to exercise "the very right their ancestors intended to reserve," but noting in dicta that the state could impose "purely regulatory" restrictions on Indian treaty rights to the extent "necessary for the conservation of fish"); United States v. Winans, 198 U.S. 371, 384 (1905) (holding that treaty fishermen had an easement to cross and use private land in the exercise of their treaty fishing rights, but noting in dicta that treaty did not "restrain the state unreasonably, if at all, in the regulation of the right").

65. 391 U.S. 392 (1968).

66. *See id.* at 398. The case arose when the Washington Department of Game brought suit against two Indian tribes to prevent them from fishing in violation of a blanket ban on the use of net fishing in Washington territorial waters, applicable to both Indians and non-Indians. *Id.* at 395–96, 400.

67. *Id.* at 395–96.

68. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.

69. *Puyallup I*, 391 U.S. at 398 (quoting Treaty of Medicine Creek, *supra* note 68, art. 3, 10 Stat. at 1133).

70. *Id.*

nondiscriminatory measures to conserve fish resources.[71] The Court described this new conservation necessity standard, and its limitations, in the following terms:

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State . . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.[72]

The Court has developed these limitations on state regulation in subsequent cases. To show that regulation of treaty rights meets "appropriate standards," the state must demonstrate that the regulation is a "reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation."[73] Moreover, the principle of non-discrimination also guarantees treaty fishermen an actual share of the harvestable fish, and not just the mere opportunity to fish on the same terms as other citizens.[74] For example, the second Puyallup case to reach the Court, *Department of Game v. Puyallup Tribe* (*Puyallup II*),[75] directly addressed whether a state steelhead fishing regulation prohibiting net fishing met the *Puyallup I* standard.[76] Although the regulation was facially neutral, the Court found that it had the effect of banning all tribal steelhead fishing, and was thus

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71. *Id.* Commentators have suggested that the *Puyallup I* decision was grounded more on a fear that the salmon would be fished to extinction, rather than on any principled legal basis. *See* Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 208 (1972) ("No valid basis for the existence of such state power can be found . . . . The treaties with the Indians do not provide for state regulation and Congress has never authorized such regulation.").

72. *Puyallup I*, 391 U.S. at 398 (quoting Treaty of Medicine Creek, *supra* note 68, art. 3, 10 Stat. at 1133).

73. Antoine v. Washington, 420 U.S. 194, 207 (citing Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973) [hereinafter *Puyallup II*]; Tulee v. Washington, 315 U.S. 681, 684 (1942)).

74. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676–79 (1979).

75. 414 U.S. 44 (1973).

76. *Id.* at 48–49. Under Washington law at the time, the Department of Fisheries regulated salmon fishing, while the Department of Game regulated steelhead fishing. After the *Puyallup I* decision, the Department of Fisheries changed its blanket prohibition against salmon net fishing to allow Indian net fishing in certain areas of the Puyallup River. *Id.* at 46. The Department of Game, however, maintained its blanket prohibition of steelhead net fishing in the River, and it was this regulation that the Puyallup Tribe contested in *Puyallup II*. *Id.*

discriminatory.[77] The Court refined this line of reasoning in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[78] holding that Indians would have understood the treaty term "taking fish in common with all citizens of the Territory" to guarantee the tribes an actual share of the fish.[79]

Lower courts have interpreted the scope of a state's conservation necessity power quite narrowly. Some courts have required a showing of imminent species extinction,[80] and all have required proof of substantial species peril.[81] Further, some lower courts have also concluded that states cannot regulate for purposes of conservation when other, less restrictive means are available, such as existing tribal self-regulation. For example, in *United States v. Washington*,[82] a district court required the state to demonstrate that existing tribal regulation or enforcement was "inadequate to prevent demonstrable harm to the actual conservation of fish," and that other, less restrictive means or methods could not achieve the conservation goals.[83]

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77. *Id.* at 48. The Court found that while the regulations allowed line and hook fishing by all citizens, including Indians, such fishing was "entirely pre-empted by non-Indians," thus effectively granting the entire steelhead run to non-Indian sports fishermen. *Id.* Thus, while the treaty fishing rights did not give the Puyallup Tribe a right to "pursue the last living steelhead until it enters [its] nets," the state did not have the power to regulate so as to deny the Puyallup a fair apportionment of the steelhead in the river. *Id.*

78. 443 U.S. 658 (1979).

79. *Id.* at 675–85. The Court noted that the premise that "each individual Indian would share an 'equal opportunity' with thousands of newly arrived individual settlers is totally foreign to the spirit of the [treaty] negotiations." *Id.* The rights possessed by the Indians "are admittedly not 'equal,' but are to some extent greater than, those afforded other citizens." *Id.* at 677. In practice, this has meant a court-imposed allocation of fish between the interested treaty and non-treaty parties. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (holding that "in common" off-reservation treaty fishing right entitled the Puyallup Tribe up to fifty percent of harvestable run of fish after allowing for escapement), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

80. *See, e.g.*, Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969) (holding that "conservation necessity" required the state to show that the continued exercise of the unregulated treaty fishing right would imperil the existence of the species).

81. *See, e.g.*, United States v. Oregon, 718 F.2d 299, 304–05 (9th Cir. 1983) (stating that treaty rights may be regulated only where necessary to preserve a "reasonable margin of safety" against the imminence of extinction); United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981) (holding that treaty rights may be regulated only upon showing that unregulated treaty fishing would cause "irreparable harm" to fisheries within state); Purse Seine Vessel Owners Ass'n v. State, 92 Wash. App. 381, 392, 966 P.2d 928, 934 (1998) (noting that state regulation of treaty fishing rights must be "essential" to the conservation of fisheries).

82. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

83. *Id.* at 415; *see also* Mille Lacs Band v. Minnesota, 952 F. Supp. 1362, 1380 (D. Minn.) (noting that state cannot regulate Indian treaty fishing if tribe "can effectively self-regulate and such tribal regulations are sufficient to meet conservation needs"), *aff'd*, 124 F.3d 905 (8th Cir. 1997),

In sum, states have the ability to regulate tribal treaty rights to the extent necessary for conservation.[84] In practice, however, courts have required that states meet a formidable burden in showing the necessity of such regulation. The state may not regulate to the extent that it denies the treaty tribes an actual share of the harvestable resource—even where conservation regulations are facially neutral. Furthermore, while the state may not have to show that the species is subject to imminent extinction, it must prove substantial species peril. Finally, the state must also show that existing tribal self-regulation, or other, less restrictive means or methods, is inadequate to achieve conservation.

## II. THE NINTH CIRCUIT DEVELOPS A NEW TREATY ABROGATION STANDARD, BUT FINDS ITSELF ALONE

As the above cases illustrate, the U.S. Supreme Court has kept its method of analyzing treaty abrogation cases (governed by the *Dion* standard)[85] distinct from its review of state regulation of treaty rights (governed by the *Puyallup* line of cases).[86] However, the Ninth Circuit has combined the two methodologies, using state conservation necessity principles to determine the effect of federal statutes on Indian treaty rights.[87] Most other courts have not adopted the Ninth Circuit's methodology, instead requiring a "clear and plain" showing under *Dion* that Congress considered the Indian treaty right in question and subsequently chose to abrogate that right.[88]

### *A. The Ninth Circuit's Federal Conservation Necessity Standard*

The U.S. Supreme Court has never used state conservation necessity principles to analyze whether a federal statute has abrogated Indian treaty rights. The Ninth Circuit, however, has done so on several occasions, in a line of cases originating with *United States v. Fryberg*.[89]

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*aff'd*, 526 U.S. 172 (1999); Lac Courte Oreilles Band v. Wisconsin, 668 F. Supp. 1233, 1236 (W.D. Wis. 1987) (noting that state regulation of Indian treaty fishing must be the "least restrictive alternative available").

84. *See Puyallup I*, 391 U.S. 392, 398 (1968).

85. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986); *supra* notes 23–57 and accompanying text.

86. *See supra* notes 64–79 and accompanying text.

87. *See infra* notes 89–108 and accompanying text.

88. *See infra* notes 109–15 and accompanying text.

89. 622 F.2d 1010 (9th Cir. 1980).

In *Fryberg*, the court faced the same issue that was later addressed by the U.S. Supreme Court in *Dion*: whether the Eagle Protection Act modified or abrogated treaty rights to take and kill bald eagles.[90] Using reasoning different from that later adopted by the *Dion* Court, the Ninth Circuit held that the application of the Eagle Protection Act to the treaty rights was necessary to achieve the statute's "conservation purpose."[91]

The *Fryberg* court noted that the statute did not itself indicate an "unambiguous express intent" to abrogate or modify Indian treaty rights.[92] However, the court held that it was appropriate to look beyond the language of the statute to the Eagle Protection Act's legislative history and "surrounding circumstances" to help determine congressional intent.[93] In particular, the *Fryberg* court held that such "surrounding circumstances" could include the statute's inherent "conservation purpose."[94] The court observed that the U.S. Supreme Court, in the state regulatory context, had "long recognized that reasonable and non-discriminatory conservation statutes implicitly affect treaty rights to the extent necessary to achieve their conservation purpose."[95] Looking to the *Puyallup* line of cases, the court established the following test:

> [R]easonable 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 non-discriminatory 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.[96]

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90. *Id.* at 1014–16. Dean Fryberg, an enrolled member of the Tulalip Indian Tribe, had been charged with the unlawful taking, shooting, and killing of a bald eagle in violation of the Eagle Protection Act. *Id.* Fryberg contested the charges, asserting that he had a general on-reservation right to hunt eagles under the Treaty of Point Elliot. *Id.*

91. *Id.* at 1016.

92. *Id.*

93. *Id.*

94. *Id.* at 1013–14. The court noted that this was especially true in the case at hand, which did not "involve the termination or diminishment of a reservation, . . . or the total extinguishment of hunting and fishing rights, as in *Menominee*, or even a substantial infringement on fishing and hunting rights." *Id.* at 1014. Rather, the case involved a "relatively insignificant" restriction on Fryberg's treaty hunting rights. *Id.* The court noted that there was no evidence that the bald eagle had ever "provided the Indian with any commercial benefit or had any subsistence value." *Id.*

95. *Id.* at 1014.

96. *Id.* at 1015.

Applying this test to the Eagle Protection Act, the *Fryberg* court held that there was federal jurisdiction,[97] the statute was non-discriminatory,[98] and application of the Eagle Protection Act to treaty rights was necessary to effectuate the conservation purpose of the statute.[99] The court found that the purpose of the Eagle Protection Act was to prevent the extinction of the bald eagle, and not "merely to conserve a resource."[100] So precarious was the situation of the eagle that "all threats, including takings pursuant to Indian treaty, should be banned to assure the species' survival."[101]

Prior to the recent *Anderson v. Evans* decision, only one Ninth Circuit decision cited *Fryberg* for its use of the conservation necessity doctrine in the treaty abrogation context.[102] In *United States v. Eberhardt*,[103] decided prior to the U.S. Supreme Court's adoption of the "actual consideration and choice" test in *Dion*, the Ninth Circuit noted in dicta the validity of the *Fryberg* analysis for interpreting the effect of congressional statutes on Indian treaty rights.[104] However, the *Eberhardt* court overturned a district court decision[105] that applied the *Fryberg*

97. The Eagle Protection Act applied "within the United States or any place subject to the jurisdiction thereof," including Indian reservations. *Id.*

98. The "sweeping language" of the Eagle Protection Act banned all threats to the bald eagles' survival from both treaty and non-treaty persons. *Id.*

99. *Id.* at 1013.

100. *Id.* at 1015.

101. *Id.*

102. Shortly after the *Dion* decision, a federal district court in Nevada noted that *Fryberg* precluded a treaty defense to a civil fine under the ESA. *See United States v. Thirty Eight (38) Golden Eagles or Eagle Parts*, 649 F. Supp. 269, 280–81 (D. Nev. 1986). However, the court's mention of *Fryberg* was dicta as it found that the tribal member had no treaty right to take eagles, making the *Fryberg* analysis inapplicable. *Id.* at 281. Moreover, the district court was apparently unaware of the U.S. Supreme Court's recent *Dion* decision as it noted only that the Court had granted certiorari in the case. *Id.* at 280. In addition, the Ninth Circuit has invoked the conservation necessity doctrine at least twice in treaty cases involving prosecutions under the Lacey Act. *See* United States v. Williams, 898 F.2d 727, 729 (9th Cir. 1990); United States v. Sohappy, 770 F.2d 816, 823 (9th Cir. 1985). However, in both cases, the court analyzed the validity of the underlying state wildlife conservation laws, on which prosecutions under the Lacey Act are based. In both cases, the court did not cite to *Fryberg*, and instead relied solely on the *Puyallup* line of cases. *See Williams*, 898 F.2d at 729; *Sohappy*, 770 F.2d at 823.

103. 789 F.2d 1354 (9th Cir. 1986).

104. The *Eberhardt* court consolidated review of two lower court decisions, both of which found the *Puyallup* line of cases inapplicable when there was no risk of "imminent extinction." *Id.* at 1358.

105. *Id.* at 1358 (overturning United States v. Wilson, 611 F. Supp. 813 (N.D. Cal. 1985) (holding Department of Interior regulations invalid because the general trust statutes contained "no reflection of the congressional intent necessary to abrogate reserved rights as required by [*Fryberg*]")).

analysis to administrative regulations affecting treaty fishing rights on the Hoopa Valley Reservation in California.[106] The *Eberhardt* court held that *Fryberg* was inapplicable to regulations promulgated by the Department of the Interior in its capacity as trustee for the tribes occupying the reservation.[107] Even though there was no evidence that Congress considered treaty rights in authorizing the Department of the Interior to promulgate fishing regulations, the court reasoned that the regulations were designed to manage the reservation fisheries for the "benefit of the Indians," and not to abrogate or modify any treaty rights.[108]

### *B. Abrogation Analysis in Other Circuits*

In general, other courts have not followed the Ninth Circuit in incorporating the conservation necessity test into Indian treaty abrogation jurisprudence. Prior to the U.S. Supreme Court's decision in *Dion*, the Circuits disagreed about whether courts must find congressional intent to abrogate from the language of the statute, or instead, like in *Fryberg*, could infer this intent from the "surrounding circumstances" of the statute, such as the statute's "conservation purpose."[109] However, in the years since the *Dion* decision, no court outside of the Ninth Circuit has cited *Fryberg* for its methodology. Rather, these courts have generally relied on the *Dion* test and required "clear and plain" evidence that Congress intended to abrogate treaty rights.[110]

While courts outside the Ninth Circuit have not specifically cited *Fryberg* for its reasoning, one federal district court has used the "conservation necessity" doctrine in analyzing an Indian treaty

106. *Id.* at 1361–62.

107. *Id.* at 1362.

108. *Id.* at 1361–62.

109. *Compare, e.g.*, United States v. White, 508 F.2d 453, 456 (8th Cir. 1974) (holding that Indian treaty abrogation must be "clearly expressed") *with* United States v. Fryberg, 622 F.2d 1010, 1013 (9th Cir. 1980) (holding that treaty abrogation could be inferred from legislative history and surrounding circumstances, including effectuation of a general conservation purpose).

110. *See, e.g.*, United States v. Gotchnik, 222 F.3d 506, 509–11 (8th Cir. 2000) (acknowledging the *Dion* standard, but holding that the Bois Forte Band of Chippewa Indians' treaty right to hunt and fish did not include right to use modern transportation methods in a designated wilderness area while hunting and fishing); Oyler v. Allenbrand, 23 F.3d 292, 296 (10th Cir. 1994) (holding that there was "clear evidence" under the *Dion* standard that the Kansas Enabling Act abrogated the Shawnee's individual criminal immunity, even though the Shawnee were not one of the four tribes named in the Act).

abrogation case.[111] In *United States v. Billie*,[112] the court ruled that the Endangered Species Act abrogated the defendant's treaty right to hunt panthers.[113] Citing the *Puyallup* line of cases, the court held that Indian treaty rights "do not extend to the point of extinction," and that "reasonable, nondiscriminatory" conservation measures may affect Indian treaty rights to the extent necessary to ensure the continued existence of a species.[114] Subsequent courts have not followed *Billie*, and commentators have criticized the case for ignoring the *Dion* test.[115]

## III. THE NINTH CIRCUIT REAFFIRMS THE *FRYBERG* STANDARD IN *ANDERSON V. EVANS*

In *Anderson v. Evans*, the Ninth Circuit again used the conservation necessity doctrine to analyze whether a federal statute had abrogated an Indian treaty. In holding that the Makah's whaling efforts were subject to the Marine Mammal Protection Act,[116] the court relied on the conservation necessity standard it adopted more than twenty years earlier in *Fryberg*.[117] While it was unclear whether *Fryberg* was still valid following the U.S. Supreme Court's decision in *Dion*,[118] the *Anderson* court, without citing the *Dion* decision, reaffirmed and extended *Fryberg*'s methodology.[119]

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111. *See* United States v. Billie, 667 F. Supp. 1485, 1489–90 (S.D. Fla. 1995).

112. 667 F. Supp. 1485 (S.D. Fla. 1995).

113. *Id.* at 1489–90.

114. *Id.*

115. *See* Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 868–86 (1991); Sally J. Johnson, Note, *Honoring Treaty Rights and Conserving Endangered Species After* United States v. Dion, 13 PUB. LAND L. REV. 179, 185–88 (1992); Robert J. Miller, Comment, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 567–71 (1991). *But see* Conrad A. Fjetland, Comment, *The Endangered Species Act and Indian Treaty Rights: A Fresh Look*, 13 TUL. ENVTL. L.J. 45, 53–70 (1999) (arguing that the "legislative history, 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").

116. Anderson v. Evans, 314 F.3d 1006, 1029 (9th Cir. 2002).

117. *Id.* at 1026–29.

118. United States v. Dion, 476 U.S. 734, 739–40 (1986) (holding that it is "essential" that there be "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").

119. *Anderson*, 314 F.3d at 1006.

Under the Treaty of Neah Bay, the Makah Tribe has an explicit right to hunt whales.[120] In fact, while all treaties in present-day Washington and Oregon were negotiated by either Governor Stevens (Washington) or Colonel Palmer (Oregon), the Treaty of Neah Bay is the *only* one of these treaties that reserves the right to whale for the Tribe.[121] However, while they were once prolific whalers, the Makah stopped hunting gray whales entirely by the mid-1930s in the face of plummeting whale populations.[122] In the years that followed, the federal government and international regulatory bodies implemented strict regulations on the taking of whales.[123] These conservation efforts resulted in a dramatic comeback of the California gray whale and its removal from the endangered species list.[124] Following the delisting, the Makah began working in conjunction with the National Oceanic and Atmospheric Administration (NOAA) to obtain a subsistence-whaling quota under the International Convention for the Regulation of Whaling, to which the United States is a signatory.[125]

In response to these efforts, the plaintiffs in *Anderson*, most of which were whale advocacy groups, sued the federal government over its decision to support the Makah's resumed whaling efforts.[126] The plaintiffs contended, *inter alia*,[127] that the Makah were subject to the requirements of the federal MMPA.[128] Congress passed the MMPA in 1972 in an effort to provide greater protection to marine mammals,

120. Treaty of Neah Bay, *supra* note 3, art. 4, 12 Stat. at 940a; *see* Metcalf v. Daley, 214 F.3d 1135, 1140 (9th Cir. 2000).

121. *Metcalf*, 214 F.3d at 1140.

122. *See id.* at 1137.

123. *See id.* While it is beyond the scope of this Note, and was not raised in the *Anderson* proceedings, it could be argued that, in addition to the MMPA, the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, and its domestic implementing statute, the Whaling Convention Act of 1949 (WCA), 16 U.S.C. §§ 916–916l (2000), either modified or abrogated the Makah's treaty whaling right. However, as with the MMPA, there is no evidence, under the *Dion* standard, that Congress considered, and chose to abrogate, Indian treaty whaling rights by passing the WCA. *See infra* Part IV.C (addressing whether Congress intended to abrogate the Makah's treaty whaling right by passing the MMPA).

124. *See* Endangered Fish and Wildlife, 58 Fed. Reg. 3121, 3135 (Jan. 7, 1993).

125. *See Metcalf*, 214 F.3d at 1137.

126. Anderson v. Evans, 314 F.3d 1006, 1009 (9th Cir. 2002).

127. The plaintiffs also challenged the federal government's approval of the Makah's whaling plans under the National Environmental Policy Act of 1969 (NEPA). *See id.* The court held that the government violated NEPA by failing to prepare an Environmental Impact Statement before approving a whaling quota for the tribe. *See id.* at 1023.

128. *Id.* at 1009.

including the gray whale.[129] While the MMPA imposes a general moratorium on the taking of marine mammals,[130] it contains numerous exceptions to this moratorium, including an exemption for subsistence takings by certain Alaskan Natives.[131] In addition, the MMPA allows the NOAA to issue permits for the taking of marine mammals in accordance with applicable MMPA regulations.[132]

Neither the statute nor its legislative history mentioned Indian treaty rights until 1994, when Congress amended the MMPA.[133] Section 14 of the 1994 Amendments provides that "[n]othing in this Act including any amendments to the Marine Mammal Protection Act of 1972 made by this Act alters or is intended to alter any treaty between the United States and one or more Indian Tribes."[134] While, on its face, the language of this provision only applies to the 1994 Amendments, the Senate Commerce Committee Report for the amendments notes that "the MMPA does not in any way diminish or abrogate existing protected Indian treaty fishing or hunting rights."[135]

The Makah argued that the MMPA was inapplicable to the Tribe because the statute had not abrogated the Makah's explicit treaty right to hunt whales.[136] Without addressing this defense, the court ruled that the MMPA must apply to the Makah in order to "effectuate the conservation purpose of the statute."[137] Thus, the court concluded that the NOAA had

129. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (current version at 16 U.S.C. §§ 1361–1407 (2000)). Congress declared that many marine mammal population stocks were in danger of extreme depletion, even to the point of ceasing to be significant elements of the ecosystem. As a result, the stated goal of the MMPA was to "obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat." *Id.* § 1361(6).

130. *Id.* § 1371. The provisions of the MMPA only supplement any existing "international treaty, convention, or agreement, or any statute implementing the same" that otherwise applies to marine mammal taking. *Id.* § 1383.

131. *Id.* § 1374(b)(1).

132. *Id.*

133. Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532 (current version at 16 U.S.C. §§ 1386–1389 (2000)).

134. *Id.* § 14, 108 Stat. at 558–59 (16 U.S.C. § 1361 historical and statutory notes (2000)).

135. S. REP. NO. 103-220, at 17 (1994), *reprinted in* 1994 U.S.C.C.A.N. 514, 534.

136. *See* Anderson v. Evans, 314 F.3d 1006, 1023 (9th Cir. 2002). The court rejected the tribe's additional argument that they were exempt from the MMPA because the whaling had been "expressly provided for by an international treaty, convention, or agreement to which the United States is a party," finding that the quota agreement with the International Whaling Commission did not qualify under this provision. *Id.* at 1023–26.

137. *Id.* at 1029–30.

violated federal law by issuing a whaling permit without complying with the MMPA.[138]

In holding that the Makah were subject to the MMPA, the *Anderson* court applied *Fryberg*'s conservation necessity test rather than the U.S. Supreme Court's treaty abrogation test established in *Dion*.[139] Citing *Fryberg*, the court concluded that the conservation necessity test applied to federal conservation statutes, even though it had been developed in the state regulatory context.[140] Unlike the *Fryberg* court, however, the *Anderson* court did not apply the conservation necessity test in the context of a larger abrogation analysis.[141] Instead, it adopted the three-part *Fryberg* test to hold that the MMPA allows regulation of the Makah's treaty whaling rights, without considering whether the MMPA abrogated those rights.[142] Under the jurisdictional prong of the *Fryberg* test, the court reasoned that because the MMPA extends to "any person subject to the jurisdiction of the United States,"[143] the statute would apply to the Makah's whaling efforts off the coast of Washington State and in the Strait of Juan de Fuca.[144] The statute also satisfied *Fryberg*'s non-discrimination prong because tribal members and non-treaty people were both subject to identical provisions.[145] Finally, the court held that the application of the MMPA to the Tribe was necessary to achieve its conservation purpose.[146] Reasoning that Congress was not merely concerned with the "survival" of marine mammals, but also with maintaining "optimum sustainable population[s],"[147] the court concluded that the MMPA could not achieve such objectives without subjecting the Makah to its provisions.[148]

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138. *Id.*

139. *Id.* at 1026.

140. *Id.* at 1026 n.21.

141. *Id.* at 1026.

142. *See id.*

143. 16 U.S.C. § 1372(a)(1) (2000).

144. *Anderson*, 314 F.3d at 1026. The Strait of Juan de Fuca is the channel of water separating northwest Washington State from Vancouver Island, Canada.

145. *Id.*

146. *Id.* at 1026–28.

147. *Id.* at 1026–27.

148. *Id.* The court also rejected contentions by the government and Makah that even if the *Fryberg* test was the proper framework for analysis, the *Fryberg* court's rationale was limited to cases where species preservation was an issue (it was undisputed that the California gray whale population was near "carrying capacity"). The court disagreed, and found that the *Fryberg* test mandated consideration of the conservation purpose of the statute as a whole, and not a general

In support of this conclusion, the court offered two scenarios where the Makah Tribe's unrestricted exercise of its treaty right could jeopardize the gray whale population.[149] First, the court noted that the Treaty of Neah Bay contained no explicit limitation on the number of gray whales the Tribe could take.[150] While the Makah had shown "admirable restraint"[151] in limiting its take to a small number of whales, and in seeking the approval of the United States, the court expressed concern that future generations of Makah could decide to take a significantly larger share of gray whales.[152] Second, the court stated that the affirmation of the Makah's right to whale free of MMPA restraints could trigger other tribes to claim whaling treaty rights under "less specific treaty language."[153]

In addition to its analysis of the Makah's treaty right under the *Fryberg* framework, the court found that regulating the Tribe's treaty right under the federal conservation necessity doctrine was consistent with "the principles embedded in the Treaty of Neah Bay itself."[154] The court noted that the Makah's treaty right to hunt whales was "in common with all citizens of the United States."[155] According to the court, such language secures a right to take a "fair share" of the available resource for both the treaty and non-treaty parties.[156] Although this logic suggests that the Makah have a right to take a fair share of the available whales, the court noted that the non-Indian citizens of Washington State were unable to exercise their treaty right to take a fair share of the whales because of MMPA restrictions.[157] This apparent inequity rendered the right to take a "fair share" of the resource inapplicable to the Makah's treaty right.[158] Thus, the court concluded that the Makah's fair share

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inquiry into issues of species preservation. *Id.*

149. *Id.* at 1027–28.

150. *Id.* at 1027.

151. *Id.*

152. *Id.*

153. *Id.* at 1027–28.

154. *Id.* at 1028.

155. *Id.*

156. *Id.* at 1028–29 n.24. In other words, the treaty guarantees Indians not merely the "equal opportunity" to take fish, but instead "secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676–79 (1978).

157. *Anderson*, 314 F.3d at 1028–29 n.24.

158. *Id.*

under their treaty right to hunt whales in common with the citizens of the state was "no[t] unrestricted," supporting its conclusion that the Tribe must comply with the MMPA's permit process.[159]

## IV. THE *ANDERSON* COURT RELIED ON FLAWED NINTH CIRCUIT TREATY ABROGATION JURISPRUDENCE IN HOLDING THAT MAKAH WHALING IS SUBJECT TO THE MMPA

In *Anderson*, the Ninth Circuit reaffirmed and extended its confused line of Indian treaty jurisprudence by holding that the MMPA applied to the Makah's whaling efforts.[160] This error was a result of the court's previous conflation, in *Fryberg*, of two analytically distinct U.S. Supreme Court doctrines: the conservation necessity principle, properly applied only in cases involving state regulation of treaty rights; and treaty abrogation principles, properly applied only in cases involving federal statutes affecting treaty rights.[161] The logic of *Fryberg* is unsound, and was implicitly rejected by the U.S. Supreme Court in *Dion*, where the Court reached the same result as in *Fryberg*, but without relying upon the state conservation necessity doctrine.[162] In addition, the *Anderson* court compounded the error made in *Fryberg* by divorcing the conservation necessity test from the treaty abrogation framework entirely.[163]

When analyzed under the correct treaty abrogation analysis established in *Dion*, it becomes clear that the MMPA neither modifies nor abrogates the Makah's treaty right to whale.[164] There is no evidence that Congress considered Indian treaty rights and chose to abrogate those rights through the MMPA.[165] Given the fundamental importance of Indian treaty rights, the application of the MMPA to the Makah requires a greater showing than a finding that unrestricted treaty whaling would run counter to the MMPA's stated purpose.[166] The *Anderson* decision's logic ignored the U.S. Supreme Court's repeated admonition that the

159. *Id.*

160. *Id.* at 1028.

161. *See supra* notes 89–101 and accompanying text.

162. United States v. Dion, 476 U.S. 734, 738–45 (1986).

163. *See infra* notes 188–201 and accompanying text.

164. *See infra* Part IV.C.

165. *See infra* notes 218–24 and accompanying text.

166. *See infra* Part IV.C.

Court will not easily find congressional intent to modify or abrogate Indian treaty rights.[167] The Ninth Circuit's decision is contrary to the treaty abrogation standard established in *Dion* and should be overturned.

### *A. The* Anderson *Court Improperly Relied on* Fryberg, *Which Applied Conservation Necessity Principles to Its Indian Treaty Abrogation Analysis Contrary to U.S. Supreme Court Precedent*

The *Anderson* court should not have relied on *Fryberg* in holding that the MMPA applied to Makah whaling efforts. The *Fryberg* court created and relied upon an improper test for Indian treaty abrogation by importing and misapplying principles of the state conservation necessity doctrine. Such an extension of the conservation necessity doctrine serves only to confuse the traditional Indian treaty abrogation analysis[168] and is not supported by U.S. Supreme Court precedent.[169]

While the *Fryberg* court was properly concerned with determining whether Congress, in passing the Eagle Protection Act, intended to modify or abrogate Indian treaty hunting rights, it improperly applied the state conservation necessity analysis to determine whether such intent existed in a federal law.[170] Prior to *Fryberg*, courts correctly applied the conservation necessity doctrine exclusively to determine whether *states* could regulate certain aspects of treaty rights when necessary for conservation purposes.[171] Analysis of state regulation of treaty rights differs from that of congressional treaty abrogation because of the dramatically different powers possessed by each sovereign.[172] States have only a limited ability to regulate Indian treaty rights when "necessary for conservation," and no ability to abrogate or otherwise modify these rights.[173] In stark contrast to this limited state power, the ability of the U.S. Congress to abrogate or modify Indian treaties is unquestioned.[174] While the fundamental question when analyzing state regulation is whether the regulation is necessary for conservation,[175] the

167. *See infra* Part IV.B.

168. *See infra* notes 177–79 and accompanying text.

169. *See infra* notes 183–87 and accompanying text.

170. *See supra* Part II.A.

171. *See supra* Part I.B.

172. *See supra* Part I.A–B.

173. *See supra* Part I.B.

174. *See supra* Part I.A.

175. *See supra* Part I.B.

only question in federal abrogation issues is whether Congress *intended* to exercise its power.[176]

When a court applies the *Fryberg* test and finds congressional intent to abrogate Indian treaty rights implicit in the "general purpose" of a federal statute, the court eviscerates the logic of the abrogation doctrine. The general purpose of a federal statute, conservation or otherwise, does not address the fundamental abrogation question—whether Congress intended the statute to apply to Indian treaty rights. The *Fryberg* approach contradicts the U.S. Supreme Court's admonition that congressional intent to modify or abrogate an Indian treaty "is not to be lightly imputed."[177]

In citing to the line of cases establishing the conservation necessity doctrine, the *Fryberg* court focused on the dire conservation threat posed by unregulated treaty hunting.[178] Quoting *Puyallup II*, the court noted:

> Rights can be controlled by the need to conserve a species . . . . The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.[179]

However, the U.S. Supreme Court's logic in *Puyallup II*, developed exclusively in the context of state regulation, is wholly inapplicable to the abrogation context.[180] The question in abrogation cases, unlike state regulation cases, is not whether Congress has the power to affect the treaty rights—if Congress so chooses, it could completely abrogate all Indian treaty fishing rights.[181] Rather, the question is whether Congress has chosen to exercise that power. The U.S. Supreme Court has repeatedly stated that it will only find such intent when there is clear evidence that Congress considered the treaty right in question and then chose to abrogate that right.[182] The *Fryberg* court failed to recognize this fundamental distinction.

Most significantly, the U.S. Supreme Court's *Dion* decision illustrates the fallacy of the *Fryberg* court's analysis.[183] The *Dion* decision, like the

176. *See supra* Part I.A.

177. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968).

178. *See* United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980).

179. *Id.* (quoting *Puyallup II*, 414 U.S. 44, 49 (1973)).

180. *See supra* Part I.A.

181. *See supra* Part I.A.

182. *See* United States v. Dion, 476 U.S. 734, 738–40 (1986).

183. *See supra* Part I.A.

*Fryberg* decision, addressed whether Congress intended the Eagle Protection Act to modify Indian treaty eagle hunting rights.[184] In reaching its conclusion that Congress intended to modify these rights, the Court found that congressional intent to abrogate was both "strongly suggested" by the language of the Eagle Protection Act and evident from the legislative history of the statute.[185] No part of the *Dion* opinion discusses the Eagle Protection Act's general "conservation purpose." Nor does the opinion import the conservation necessity doctrine into its abrogation analysis.[186] On the contrary, the U.S. Supreme Court reaffirmed the importance of Indian treaty rights, holding that treaty abrogation requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[187] Courts can find such evidence in the statute's language or legislative history; they cannot find it in a generic examination of the statute's "conservation purpose."

### *B. The* Anderson *Court Ignored the Abrogation Issue, Compounding the* Fryberg *Court's Mistaken Analysis, and Offered Little Justification for a Finding of Conservation Necessity*

The *Anderson* court not only relied on the *Fryberg* court's flawed methodology, it also compounded the *Fryberg* court's error by ignoring the U.S. Supreme Court's treaty abrogation requirements.[188] In formulating its novel approach to the analysis of the impact of a federal conservation statute on Indian treaty rights, the *Anderson* court cited the three-part *Fryberg* test to determine when "reasonable conservation statutes" affect Indian treaty rights.[189] While the *Fryberg* court misapplied the conservation necessity test, it did so in an attempt to determine whether Congress intended to *modify* or *abrogate* Indian

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

185. *Id.* at 740.

186. *See supra* Part I.A. It is noteworthy that the court did not even cite to *Fryberg*, in spite of the fact that the case was featured prominently in the underlying Eighth Circuit's decision, as well as in the briefs submitted to the U.S. Supreme Court. *See* United States v. Dion, 752 F.2d 1261 1266–70 (8th Cir. 1985); Brief for the United States at 24, 29, United States v. Dion, 476 U.S. 734 (1986) (No. 85-246).

187. *Dion*, 476 U.S. at 740.

188. *See supra* Part II.B.

189. Anderson v. Evans, 314 F.3d 1006, 1026 (9th Cir. 2002).

treaty rights.[190] The *Anderson* court, by contrast, applied the test to determine whether the MMPA *regulates* Makah whaling.[191] Without explanation, the *Anderson* court held that it need not consider whether "the MMPA applies by virtue of treaty abrogation."[192] The practical result of the court's decision is that the Makah Tribe has been stripped of a treaty right without the court having found congressional intent to do so. Such an analysis is not only inconsistent with established U.S. Supreme Court Indian treaty abrogation precedent, but also with the methodology of *Fryberg*.[193]

The *Anderson* court's contention that the conservation necessity test is not limited to cases involving state regulations[194] is also erroneous. The two cases the court cited in support of this proposition, *Fryberg* and *Eberhardt*,[195] are simply inapposite. As noted above, the *Fryberg* court improperly used the conservation necessity test within the framework of its abrogation analysis.[196] Even under its own terms, however, the *Fryberg* decision merely stands for the premise that a court may look to the conservation necessity doctrine in determining whether Congress intended to modify or abrogate Indian treaty rights.[197] It does not stand for the proposition that a court may invoke the conservation necessity principle apart from the abrogation context.

The *Anderson* court's reliance on *Eberhardt* for the proposition that conservation necessity principles are not limited to cases involving state regulation is equally inappropriate. Although the *Eberhardt* court approved of the *Fryberg* methodology in dicta,[198] it ultimately determined the *Fryberg* test to be inapplicable to administrative regulations promulgated by the Department of the Interior in its trust capacity.[199] While it is doubtful that the court's distinction between

190. *See* United States v. Fryberg, 622 F.2d 1010, 1013–16 (9th Cir. 1980).

191. *See Anderson*, 314 F.3d at 1026–30.

192. *Id.* at 1029–30.

193. *See Fryberg*, 622 F.2d at 1013–16 (analyzing conservation necessity test in context of treaty abrogation analysis).

194. *Anderson*, 314 F.3d at 1026 n.21.

195. *Id.* at 1026–28.

196. *See supra* Part IV.A.

197. *See supra* notes 92–101 and accompanying text.

198. *See* United States v. Eberhardt, 789 F.2d 1354, 1361–62 (9th Cir. 1986).

199. *See id.* The *Eberhardt* court specifically found that "the district court erred in analogizing this case to the ban on taking bald eagles in *Fryberg*." *Id.* at 1361.

administrative regulations and congressional statutes is valid,[200] *Eberhardt* nonetheless was decided before *Dion*, and its dicta cannot be read as controlling in light of *Dion*'s methodology.[201]

To justify its holding that the Tribe was subject to the MMPA, the *Anderson* court emphasized two possible consequences of unrestricted Makah whaling. The court first noted that, if left unrestricted, the Makah would be free to expand whaling activities, perhaps to the point of "jeopardizing" the gray whale population.[202] The court ignored, however, the great likelihood that, were the Makah to hunt to the point of endangering the whale population, Congress would exercise its plenary authority to modify or abrogate the Makah's treaty right. As noted, Congress has plenary power to abrogate treaty rights; the only question is whether Congress has chosen to do so.[203] Furthermore, the empirical basis for this speculation is highly questionable. In five years of hunting, the Makah have taken one whale.[204] The assertion that the Makah would (or could) take enough whales to endanger a species that is presently "at or near [the ocean's] carrying capacity"[205] is unsupported.[206]

The *Anderson* court further asserted that less specific treaty language than that found in the Treaty of Neah Bay could support the unrestricted whaling rights by other tribes.[207] While the treaties of other Pacific Coast tribes do not contain specific treaty language reserving the right to hunt

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200. *See, e.g.*, Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) ("The Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so.") (citing United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981), *aff'd*, 520 F.2d 676 (9th Cir. 1975)); *see also* United States v. Dion, 476 U.S. 734, 739–40 (1986); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 670 (1979).

201. *See Dion*, 476 U.S. at 739–40.

202. Anderson v. Evans, 314 F.3d 1006, 1027 (9th Cir. 2002).

203. *See supra* Part I.A.

204. *Anderson*, 314 F.3d at 1014.

205. *Id.* at 1010.

206. While it is beyond the scope of this Note, it could be argued that even if the conservation necessity doctrine had been applied to the Makah's treaty right, the success of the tribal government in self-regulation would preclude regulation by the federal government. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 415 (W.D. Wash. 1974) (finding that to regulate for purposes of conservation necessity the state must show, among other things, that "existing tribal regulation or enforcement is inadequate to prevent demonstrable harm to the actual conservation of fish"), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

207. *Anderson*, 314 F.3d at 1027–28.

whales, many have reserved "hunting and fishing" rights.[208] The court implied that such "hunting and fishing" rights could, if broadly construed, include the right to take whales.[209] The court reasoned that granting other Pacific Coast tribes unrestricted whaling rights could present a serious threat to the survival of the gray whale.[210]

Such a scenario is unlikely for several reasons. First, as noted above, Congress is free to modify or abrogate any Indian treaty right,[211] and would likely do so should widespread tribal hunting—by the Makah or any other tribe—endanger the existence of the gray whale. Second, two government representatives negotiated virtually all of the treaties with Pacific Coast tribes: Governor Stevens in the Washington Territory, and Colonel Palmer in the Oregon Territory.[212] While many of these treaties reserved the non-exclusive right to "hunt and fish" at usual and accustomed places, only one—the Treaty of Neah Bay—reserved the explicit right to whale.[213] Arguably, if the general right to hunt and fish included the right to whale, there would have been no need for the inclusion of such language in the treaty. While treaty terms are to be construed "in the sense in which they would naturally be understood" by the tribes,[214] the uniqueness of the whaling language provides a strong argument that none of the other treaties should be interpreted to include the reserved right to whale.[215] The concern of the court seems unfounded.

The *Anderson* court provided no additional justification for the use of the conservation necessity test. That test is not the appropriate method for analyzing the fundamental Indian treaty abrogation issue presented to the court. Not only did the court fail to discuss the issue within the *Dion* framework, it improperly applied the *Fryberg* test by completely ignoring the larger abrogation issue. Given the importance of Indian treaty rights, such analysis is insufficient.

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208. *Id.*

209. *See id.*

210. *Id.*

211. *See supra* notes 24–26 and accompanying text.

212. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979).

213. Treaty of Neah Bay, *supra* note 3, art. 4, 12 Stat. at 940a.

214. *See Fishing Vessel*, 443 U.S. at 675–76 (citing Jones v. Meehan, 175 U.S. 1, 11 (1898)).

215. This flows from the legal maxim "*expressio unius est exclusio alterius*" which means that "to express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

### C. *Under Well-Established U.S. Supreme Court Abrogation Analysis, the Makah Tribe Is Not Subject to the MMPA*

Because the *Anderson* court's finding that the Makah Tribe was subject to the MMPA in effect abrogates the Tribe's treaty right to whale, the court should have determined whether, in passing the MMPA, Congress intended to abrogate the Makah's treaty whaling rights. The U.S. Supreme Court's *Dion* test requires a court to evaluate whether "clear evidence" exists that Congress 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.[216] Such evidence must be "clear and plain," and found either on the face of the statute or in the statute's legislative history.[217] Under the *Dion* test, the Ninth Circuit should have concluded that there was no clear evidence that Congress intended the MMPA to apply to the Makah.

There is no indication from either the language of the MMPA[218] or the statute's legislative history[219] that Congress considered and chose to abrogate the Makah's whaling treaty right.[220] In fact, until the 1994 Amendments, the MMPA made no mention of *any* Indian treaty right, including the Makah's whaling right under the Treaty of Neah Bay.[221] Far from abrogating Indian treaty rights, the 1994 Amendments expressly *preserved* them.[222] Section 14 of the 1994 Amendments provides that "nothing in this Act including any amendments to the Marine Mammal Protection Act of 1972 made by this Act alters or is intended to alter any treaty between the United States and one or more Indian Tribes."[223] Congress' stated intent in enacting this disclaimer was to "reaffirm that the MMPA does not in any way diminish or abrogate protected Indian treaty fishing or hunting rights."[224]

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216. United States v. Dion, 476 U.S. 734, 737–39 (1986).

217. *Id.*

218. *See* 16 U.S.C. §§ 1361–1407 (2000).

219. *Dion*, 476 U.S. at 739.

220. Treaty of Neah Bay, *supra* note 3, art. 4, 12 Stat. at 940a.

221. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (current version at 16 U.S.C. §§ 1361–1407 (2000)).

222. Marine Mammal Protection Act Amendments of 1994, Pub. L. 103-238, § 14, 108 Stat. 532, 558–59 (current version at 16 U.S.C. § 1361 (2000)).

223. *Id.*

224. S. REP. NO. 103-220, at 17 (1994), *reprinted in* 1994 U.S.C.C.A.N. 514, 534.

Arguably, the MMPA's exemption for Alaska Natives might indicate that Congress intended the MMPA to apply to all Indian groups *except* for Alaska Natives, evincing congressional intent to abrogate the Makah's treaty whaling right.[225] Such a reading, however, is tenuous. Alaska Natives possess no treaty rights, so it is logical for the MMPA to contain an explicit exemption for Alaska Natives.[226] Any statute of general applicability passed by Congress would naturally apply to Alaska Natives were there no exemption.[227] Moreover, such a reading of the statute would effect an abrogation of the Makah's treaty by negative implication. This falls far short of the "clear evidence" standard of *Dion*.[228]

In sum, there is no evidence in the language and legislative history of the MMPA that suggests that Congress was even aware of the Makah's whaling treaty right, much less that it considered the right and intended the MMPA to abrogate it. In fact, there is a strong indication that Congress did not wish to abrogate any Indian treaty rights by enacting the MMPA. In the absence of a finding of intention to abrogate, the *Dion* decision requires that the treaty right be preserved. As the U.S. Supreme Court has noted on many occasions,[229] such treaty rights are too fundamental for the courts to so easily discard.

## V. CONCLUSION

Contrary to the Ninth Circuit's decision in *Anderson*, the Makah's right to take whales under the Treaty of Neah Bay is unfettered by the MMPA. The *Anderson* court misapplied its own faulty precedent in

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225. *See, e.g.*, United States v. Billie, 667 F. Supp. 1485, 1490–92 (S.D. Fla. 1987) (concluding that certain exclusions for indigenous Alaskans in the Endangered Species Act indicated congressional intent not to exempt other Indians, thereby effecting an abrogation of Indian treaty rights).

226. *See, e.g.*, United States v. Bresette, 761 F. Supp. 658, 663 (D. Minn. 1991).

227. This seems particularly true given that just one year prior to passing the MMPA, Congress had extinguished all claims based on "aboriginal right, title, use, or occupancy of land or water areas in Alaska" by passing the Alaska Native Claims Settlement Act. Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601–1628). At least, it indicates that Congress was well aware of the non-treaty status of Alaska natives. *See also Bresette*, 761 F. Supp. at 663 (holding that a similar exception for Alaska natives in the Migratory Bird Treaty Act did not abrogate Indian treaty rights and stating that "[t]o treat the consideration of indigenous Alaskans' rights as the consideration of Native American *treaty* rights nationwide, for the simple reason that both groups are regarded as Indians, is disingenuous").

228. *See* United States v. Dion, 476 U.S. 734, 740–41 (1986).

229. *See, e.g.*, *id.* at 739 ("Indian treaty rights are too fundamental to be easily cast aside.").

*Fryberg* in erroneously concluding that Congress intended to regulate Makah whaling through the MMPA. The *Fryberg* court, implicitly overruled by the U.S. Supreme Court in *Dion*, mistakenly incorporated the conservation necessity doctrine into treaty abrogation analysis. The conservation necessity doctrine properly applies only to *state* regulation of Indian treaty fishing. It is not relevant to the question of whether *federal* statutes affect Indian fishing rights. Furthermore, the *Anderson* court compounded the *Fryberg* court's error by failing even to consider the abrogation issue. Instead, the Anderson court relied *solely* on the conservation necessity doctrine in holding that the MMPA must apply to the Makah's whaling efforts.

The correct treaty abrogation analysis is found in *Dion*: There must be clear and plain evidence that Congress considered the treaty right in question, and subsequently chose to modify or abrogate that right. There is no evidence that Congress, in passing the MMPA, considered and then chose to abrogate the Makah's treaty right to whale. Thus, under *Dion*, the Makah's treaty right remains unaffected by the MMPA. If Congress decides that the MMPA should regulate Makah whaling, it is free to do so through statutory enactment. Until Congress passes such legislation, however, the United States is bound by its treaty obligation to the Makah. The *Anderson* decision should be overturned.

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