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*Robert Laurence**

I. INTRODUCTION[1]

Victories for tribal concerns are rare enough that they ought not be squandered. When a case comes down from the United States Supreme Court that can be read to advance tribal interests, it behooves Indian advocates to urge that it be so read. The case should not be manipulated to mean that which it does not say; the words may not be distorted; the holding may not be ignored. Nevertheless, it is often possible to read a case for the *most* that it might mean, rather than the *least*. In this essay I will urge that *United States v. Dion*[2] be read for the most it might mean, and will lament the fact that commentators and judges have been so quick to read *Dion* as a defeat for tribal interests.

Dwight Dion, Sr. was arrested by agents of the U.S. Fish and Wildlife Service for offering to sell and selling the feathers and other parts of various protected birds, and for shooting protected birds.[3] Among other defenses, Dion claimed a treaty-pro-

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1. I have written twice before about *United States v. Dion* and this essay by its very nature overlaps, sometimes to the extent of complete thoughts, with those two earlier articles. *See* Laurence, *The Bald Eagle, the Florida Panther and the Nation's Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of* United States v. Dion, 4 J. LAND USE & ENVTL. L. 1 (1988); Hanna & Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797 (1987). It is with pleasure and gratitude that I acknowledge that Tassie Hanna of the New Mexico and District of Columbia bars had considerable input into the thoughts in those articles, and this one. Errors and infelicities, of course, are my responsibilities.

2. 476 U.S. 734 (1986).

3. Several other parties were caught as well in the federal "sting" operation, *see* United States v. Dion, 752 F.2d 1261, 1262 (8th Cir. 1985) (en banc), *rev'd in part*, 476 U.S. 734 (1986), but only the conviction of Dwight Dion, Sr. reached the Supreme Court.

tected right to hunt birds on his reservation, notwithstanding federal statutes of broad application that forbad the hunting and trading of those birds.[4] He was convicted at trial on most of the counts.

The Eighth Circuit reversed in part and affirmed in part.[5] First, it adhered to its view that the Bald Eagle Protection Act was not a treaty-abrogating act of Congress.[6] Second, it extended that view to the Endangered Species Act.[7] Hence, Dion could not be convicted for killing birds in violation of those statutes. Third, the court found that Dion had no treaty protection for commercial dealings in the parts of birds and so affirmed the convictions for those acts under the Bald Eagle Protection Act and the Migratory Bird Treaty Act.[8] The government appealed and the Supreme Court reversed, reinstating the conviction.[9]

Thus, the Indian lost. The Indians lost, too, to the extent that the Supreme Court's opinion could have been written to be much more protective of treaty rights than it was.[10] The gravamen of this essay, though, is that the Indians did not lose entirely. When one reads what the Supreme Court actually said in *Dion*, ponders the meaning of those words, and resists the temptation to divorce the holding of *Dion* from its facts, one arrives

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4. The treaty under which Dion claimed is the Treaty with the Yancton [sic, an earlier spelling] Sioux, 11 Stat. 743 (1858). The statutes alleged to abrogate that treaty are the Endangered Species Act, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1982 & Supp. II 1984)), the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)) and the Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d (1982)). *See Dion*, 476 U.S. at 735-36. The precise holding of the court was only that the Bald Eagle Protection Act abrogated the treaty, *id.* at 745, and, the treaty having been abrogated, that the prosecution under the Endangered Species Act was not barred by the treaty, *id.* at 746.

5. The circuit court's holding is summarized at *Dion*, 752 F.2d at 1270.

6. *Id.* at 1262-63, 1265-69.

7. *Id.* at 1270.

8. *Id.* at 1264-65.

9. United States v. Dion, 476 U.S. 734 (1986).

10. That Indians as self-governing groups may win on issues, even while the members of those groups are losing as individuals, is shown best by United States v. Wheeler, 435 U.S. 313 (1978). In *Wheeler*, the Court held that the double jeopardy clause of the U.S. Constitution did not prevent a second prosecution of Mr. Wheeler, he having been previously prosecuted and convicted for the same acts before a tribal court. *Id.* at 329-30. The fifth amendment does not prohibit coincidental prosecutions by independent sovereigns; the Navajo Tribe as a governmental entity separate from the United States was free to make its own determination of guilt. I have always been happy it was not I who had to explain to Mr. Wheeler how his case represented a major victory for Indian interests.

at a potential victory for the Indians. Whether such a potential victory becomes an actual one, and whether any actual treaty rights survive attack depends on the effectiveness of the advocacy of those representing and supporting tribal interests. My own modest attempts at such advocacy follow.

II. WHAT *Dion* SAYS

At issue in *Dion* was what I call a "quiet" Indian treaty abrogation. That is to say, the treaty was alleged and found to be abrogated not by an express congressional enactment that sought plainly to restructure the relationship that exists between the United States and the Yankton Sioux Tribe. Such express abrogations of early treaties are very common in the books,[11] and often, but not always, were the result of a renegotiation of the relationship with the Indians. Such renegotiations are theoretically unobjectionable, with the usual caveats that we will conclude only with some reluctance that such important things as treaty rights would ever be given up,[12] that the word "voluntary" in white-Indian negotiations can be put to a very strained meaning,[13] and that the voluntary surrender of treaty rights should only be found when the whites were acting in perfect good faith, as they rarely were.[14] Even with this undenied reluctance to find the surrender of treaty rights,[15] the Supreme Court

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11. *See generally* Hanna & Laurence, *supra* note 1.

12. This reluctance is reflected in the canons of Indian treaty construction, for example that treaties are to be construed to the advantage of the Indian parties and in light of what the Indians would have understood the terms to mean. *See generally* 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 (1975).

13. *See, e.g.*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 78-92 (1982) [hereinafter COHEN'S HANDBOOK] (discussing the removal of the Five Civilized Tribes from the Southeast to Oklahoma).

14. *See* United States v. Sioux Nation, 448 U.S. 371 (1980). *See generally* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258-65.

15. In Solem v. Bartlett, 465 U.S. 463 (1984), the Court was dealing with the question of whether Congress, pursuant to a renegotiation with the Indians, intended to diminish the size of their reservation, when it opened the reservation to white settlement. The Court, on its way to holding that Congress did not diminish the size of the reservation, began with a general reluctance to find important rights surrendered. Justice Marshall wrote for the unanimous court, "[O]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. Diminishment, moreover, will not be lightly inferred." *Id.* at 470. (citation omitted)(footnote omitted).

has occasionally found such a voluntary surrender, usually in exchange for a sum of money.[16]

At issue in *Dion*, however, was a "quiet" abrogation, where there had been no renegotiation with the Indians, no compensation for the breached treaty, no unambiguously definitive evidence that Congress was thinking much about Indian treaties when it passed the abrogating statutes. In 1940, Congress passed the Bald Eagle Protection Act, making it a crime to hunt bald or golden eagles,[17] to protect our vanishing national bird. The eagle is vanishing, it is admitted by all, almost entirely because of encroachments by *non-Indians*.[18]

There is no indication in the legislative history or on the face of the Bald Eagle Protection Act that Indian treaty hunting rights were abrogated. Moreover, the legislative history does not indicate that Congress necessarily knew that the right to hunt eagles was a right protected by treaty.[19] There was some discussion of Indians taking eagles for religious purposes, and Congress responded, not by exempting Indians from the application of the statute, but by creating a permitting scheme whereby Indians and others could seek permission to hunt eagles.[20]

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16. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

17. 16 U.S.C. §§ 668-668d (1982). Golden eagles are neither as symbolic nor as endangered as bald eagles, but immature birds of the two species look alike, so goldens were protected for the sake of the balds. The Bald Eagle Protection Act was amended, on this theory, to protect golden eagles by the amendments of 1962. *See* S. REP. No. 1986, 87th Cong. 2d, Sess. 1 (1962). *See also* United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986).

18. The Yankton Sioux reservation in South Dakota provides excellent eagle hunting because the reservation borders on the Karl Mundt National Wildlife Refuge, which had been specifically established as an eagle sanctuary. *See* Petition for Certiorari at 4, United States v. Dion, 476 U.S. 734 (1986)(No. 85-246). It is not disputed that the need for such sanctuaries is the result of white, not Indian, use and exploitation of natural eagle habitats.

19. It does not go without saying that the right to hunt eagles was, in fact, protected under the Yankton treaty. The Supreme Court assumed that such a right had existed before its unilateral abrogation by Congress. The Eighth Circuit discussed the matter at length in United States v. Dion, 752 F.2d 1261, 1262-65 (8th Cir. 1985). I addressed that discussion in Laurence, *supra* note 1, at 7-10, suggesting that the question was more complicated than the court recognized. The circuit court got itself tied in a bit of a knot on the question of whether Dion himself was hunting eagles for commercial purposes. The earlier en banc decision refused to pass on the question and left it for trial on remand. *Dion*, 752 F.2d at 1265, 1270. The later panel decision thought the killings were for commercial purposes. United States v. Dion, 762 F.2d 674, 680 (8th Cir. 1985). The Supreme Court finessed the point. *Dion*, 476 U.S. at 736 n.3.

20. No permit has ever been granted to an Indian to take an eagle for religious purposes, at least not at the time of *Dion*. *See* Brief for Appellee at 25 n.28, *Dion*, 476

Dion was also charged under the Endangered Species Act[21] which is similar to the Bald Eagle Protection Act. This statute is even "quieter" than the Bald Eagle Protection Act on the question of treaty abrogation. Neither the statute nor the legislative history mention treaties and there is no permitting scheme to exempt treaty Indians out on a case-by-case basis. Indeed, the statute barely mentions Indians at all. The Supreme Court seemed to agree with the defendant when Justice Marshall wrote, "[t]he Endangered Species Act and its legislative history, [Dion] points out, are to a great extent silent regarding Indian hunting rights."[22]

So, in *Dion*, the Court was called upon to determine whether these two statutes, both largely silent with respect to Indian treaty rights, worked to abrogate the Yankton treaty and made criminal those actions that had once been solemnly guaranteed to be protected in perpetuity by the United States. The Court determined that the Bald Eagle Protection Act, at least, did abrogate the treaty.

Compared to the lower court opinion, the Supreme Court's decision in *Dion* does appear to be a defeat for Indian interests. In Dion, The Eighth Circuit reaffirmed its test for "quiet" abrogations, a test that originally came from the case of *United States v. White*: "statutory abrogation of treaty rights can only be accomplished by an express reference to treaty rights in the statute or in the statute's legislative history."[23] Although there were no express references, the Supreme Court found the treaty abrogated. So, the bright line clarity of *White* has been left behind, and the Supreme Court's *Dion* test is more lenient in favor of abrogations.

Nevertheless, the Supreme Court in *Dion* established a very

U.S. 734 (1986)(No. 85-246). Instead, the Fish and Wildlife Service maintains an "eagle depository" in which birds found dead are kept on ice and dispensed upon request. To assume that a road-killed bald eagle will satisfy the religious needs of American Indians strikes me as somewhat insensitive. Some Indians insist upon taking the eagle as their religions demand. See *Abeyta*, 632 F. Supp. at 1303, where the testimony was that the golden eagle had to be taken from Pueblo lands in order to be usable in the defendant's sacrament.

21. 16 U.S.C. §§ 1531-1543 (1982 & Supp. II 1984).

22. *Dion*, 476 U.S. at 745.

23. *Dion*, 752 F.2d at 1265 (emphasis removed). The test originated in United States v. White, 508 F.2d 453 (8th Cir. 1974). The Ninth Circuit's test was friendlier to abrogation; it looked to surrounding circumstances, express legislative history, and the statute itself. *See* United States v. Fryberg, 622 F.2d 1010 (9th Cir.) *cert. denied*, 449 U.S. 1004 (1980).

strict test for "quiet" abrogations and that strictness must not be forgotten in a rush to mourn the passing of the more protective *White* test. That test, worthy of careful study, is this: "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty."[24]

III. Actual Consideration and Choice Test

The words "essential" and "clear" stand out as words of strictness, hard for a court or commentator to ignore in interpreting *Dion*. Even more important to me are the phrases "actually considered" and "chose to . . . abrogat[e]." The *Dion* test—which I will call for emphasis, "the actual consideration and choice test"—requires that a court wishing to find a treaty abrogated "quietly" must find that Congress *actually considered* whether or not to abrogate the treaty and *chose* to break, without renegotiation, the solemn promises of the government.

A. Actual Consideration

What does the word "actual" mean? A connection between Indian law and commercial law may not be apparent, but, I believe the use of the word "actual" in the Uniform Commercial Code is instructive on the meaning of the *Dion* test. Under the U.C.C., a person knows something "when he has actual knowledge of it;" things are not "constructively known."[25] Similarly, a person acts in good faith when she is "honest in fact"[26] and an agreement is a bargain "in fact."[27] When I read that the Supreme Court would henceforth require, for a "quiet" abrogation of an Indian treaty, that there be clear evidence that Congress *actually considered* whether to abrogate the treaty, I felt comfortable. "Actual consideration" means actual consideration. Not "constructive consideration." Not "would not have been adverse to the notion that a treaty was being abrogated, had it been brought to Congress's attention." Not "might well have chosen to abrogate had it known of the problem." It means *actual consideration*. As long as attorneys make courts toe the "actual con-

24. *Dion*, 476 U.S. at 739-40.
25. U.C.C. § 1-201(25) (1989).
26. U.C.C. § 1-201(19) (1989).
27. U.C.C. § 1-201(3) (1989).

sideration" line, Indian treaty rights will be found abrogated "quietly" only with a sensible reluctance.

How is one to know, after the fact, that Congress "actually considered" whether to abrogate? The clearest evidence is a reflection of that consideration in the legislative history, but the rejection of the *White* test demonstrates this is no longer necessary. "Clear evidence," apparently, need not be direct evidence. That does not bother me; the search for what a debtor "knows," *i.e.* that of which he has "actual knowledge," usually involves the inspection of circumstantial evidence. Mind readers are rare. And, while we hope that honest witnesses are not rare, commercial litigators know better than to trust a competing creditor to be especially forthcoming on the stand about what he or she actually knew. So, circumstantial evidence is often crucial and carries the day. Still, the requirement of actual knowledge directs the search, and a careful judge will not allow that search to be side-tracked into questions of what the creditor should have known.[28]

Similarly, the *Dion* "actual consideration and choice test," if properly used, will avoid inquiry into what Congress should have known. Congress, of course, does keep a public journal, and a very complete one, and it was not unreasonable for the Eighth Circuit to demand that such a complete journal reflect consideration of treaty abrogation before finding one. But, in rejecting a test of that strictness, the Supreme Court did not go all the way to a "should have known" test, nor anywhere near one.

B. Actual Choice

If Congress actually considers the treaty abrogation issue and then enacts a statue that conflicts with a treaty, it will often be the case that the choice was made. Nevertheless, the Court required clear evidence of both consideration and choice.[29] And well it should. It is not inconceivable that Congress would actually consider an abrogation, decide not to abrogate, then do so inadvertently. This will be more likely when the legislative rec-

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28. " 'Discover' or 'learn' or a word or phrase of similar import refers to knowledge *rather than reason to know.*" U.C.C. § 1-201(25) (emphasis added). *See, e.g.*, United States v. Ed Lusk Constr. Co., Inc., 504 F.2d 328 (10th Cir. 1974); Clark Oil & Ref. Co. v. Liddicoat, 65 Wis. 2d 612, 223 N.W.2d 530 (1974).

29. On choice generally, see T. ROBBINS, STILL LIFE WITH A WOODPECKER (1980)(noting that "CHOICE" is one of the rare words that is not reversed by a mirror, and for that reason attributing mystical relevance to the concept of choosing).

ord exhibits no direct evidence of actual consideration. The Court, in demanding evidence both of actual consideration and actual choice, seems to be seeking to avoid that possibility.

Have I made too much of the word "actual?" After all, the Supreme Court dabbles only occasionally in the field of U.C.C. law.[30] Might the Court be using the word "actual" less precisely than did Karl Llewellyn and the U.C.C. drafters? The answer, of course, comes in the analysis of the *Dion* test in the context of the facts of that case.

The evidence is strong, though circumstantial, that Congress, in enacting the Bald Eagle Protection Act, was actually considering the impact of the statute on Indian treaty rights. I might suggest, in fact, that the evidence could hardly be stronger, short of a direct reference in the legislative history.[31]

In the first place, it is directly evident that Congress had Indians on its mind: there is a permitting scheme on the face of the statute that potentially exempts Indians from the application of the statute when the taking of eagles is for religious purposes.[32] It is circumstantially evident that Congress knew that most of those Indians eligible for exemption were protected by treaties and that those treaties protected hunting rights. If that which we circumstantially suspect is true, then Congress was faced with this choice: exempt all Indian treaty-protected eagle hunting from the statute, or abrogate the treaties and protect the hunting of eagles for religious purposes. Congress, it appears, actually considered the problem and chose the former solution.[33] So the Court held, and that holding can not be divorced from the circumstance that Congress was dealing with the hunting

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30. *See* United States v. Kimball Foods, Inc., 440 U.S. 715 (1979).

31. Some might see this as a veiled attempt to limit *Dion* to its facts, thereby reinstating the *White* test, except for cases under the Bald Eagle Protection Act. I would not go quite that far.

32. 16 U.S.C. § 668a (1982). Regulations for the permitting scheme are found at 50 C.F.R. § 22.22 (1988). The Supreme Court's discussion of the importance of the permitting scheme is found in United States v. Dion, 476 U.S. 734, 740-44 (1986). Permits are also available to take eagles for scientific or exhibition purposes, 50 C.F.R. § 22.21 (1988), to take "depredating eagles," *id.* § 22.23, and for falconry purposes, *id.* § 22.24.

33. In the case of State v. Billie, 497 So. 2d 889 (Fla. Dist. Ct. App. 1986), the Florida Second District Court of Appeals found that "[t]he Supreme Court said that in enacting the [Bald] Eagle Protection Act, Congress had *explicitly* abrogated Dion's Indian treaty right to hunt the bald eagle." *Id.* at 893 (emphasis added). This statement is, of course, overly broad, at least under the standard meaning of the word "explicit," and is part of the sloppy reading of *Dion* by that court. *See infra* notes 67-85 and accompanying text.

rights mostly of treaty-protected Indians, and reacted with a statutory permitting scheme, rather than an exemption from application of the statute to Indians.

Compare the case of the Endangered Species Act. Once again, the legislative history is silent on the question of treaty abrogation. The only circumstantial evidence of congressional consideration is an exemption for Alaska natives. But, we must assume, Congress knew that Alaska Natives are without treaty protection.[34] The statutory mention, then, of Alaska Natives is without the circumstantial force of the permitting scheme—applicable to treaty Indians in the lower forty eight states—of the Bald Eagle Protection Act.

It is worth emphasizing here that, in analyzing the *Dion* test, we are not talking merely about an ethnic minority group; the aid to statutory construction at issue in the case is not one that merely reads statutes generously for the benefit of a group of disadvantaged people. There is such a rule used in the construction of Indian treaties.[35] The *Dion* rule is for the construction of the abrogating statute, not for the construction of the underlying treaty. In the Eighth Circuit's case, the court forced itself to construe the Treaty with the Yankton Sioux to determine whether the right to hunt eagles was protected.[36] The Supreme Court did not address this question, finding that any treaty rights that did exist were abrogated.[37] The issue before the Supreme Court was thus whether an Indian treaty, ratified by an earlier Congress following promulgation by the Executive branch, would be put aside in favor of a new national policy, and would further be put aside without Congress ever exactly saying that it should be.[38]

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34. *See generally* COHEN'S HANDBOOK, *supra* note 13, at 739-46.

35. *See generally* Wilkinson & Volkman, *supra* note 12.

36. United States v. Dion, 752 F.2d 1261, 1263-65 (8th Cir. 1985) (en banc), *rev'd in part*, 476 U.S. 734 (1986).

37. United States v. Dion, 476 U.S. 734, 738 & n.5 (1986).

38. See M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN (2d ed. 1983):

> One area in which the question of a clear and specific congressional intent frequently arises involves efforts to apply federal statutes of general, nationwide applicability in Indian country. The cases in this area tend to be confusing because of the failure to analyze whether the application of the federal statute infringes upon a specific right guaranteed to Indians by treaty or statute or, rather, whether the Indians are claiming exemption from the federal law merely because they are Indians or the law is sought to be applied in Indian country.

Id. at 163 n.2 [hereinafter PRICE & CLINTON]. *See also* Comment, *Toward Consent and*

When one considers the Endangered Species Act from this perspective, even with a generous exception for non-treaty Indians, there is no evidence, direct or circumstantial, that Congress set out to abrogate treaties. No evidence, that is, except that Congress enacted a sweeping statute addressing a laudable purpose with no mention of Indian treaties. As is commonly noted, the Supreme Court in a non-Indian case characterized the Endangered Species Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[39]

If nothing else, the *Dion* "actual consideration and choice test" makes it crystal clear that more is required to find a treaty abrogation. The sweeping purpose of the Bald Eagle Protection Act, though noted by the Court,[40] was not enough by itself to abrogate the Treaty with the Yankton Sioux. As Congress so often enacts sweeping statutes of laudable purpose without mentioning Indian treaties, there is no more important part of the *Dion* analysis than that these statutes do not abrogate the treaties merely on the strength of their general applicability or the worthiness of their non-Indian goals. Nor should it be enough that those non-Indian goals seem to be better served by nationwide application than by special rules for Indian reservations. That might be enough to make clear the application of the statute to non-treaty Indians, but *Dion* makes it plain that more is required to decide that Congress is "quietly" going back on old, bargained-for and relied-upon promises.

IV. *Dion*'s RECEPTION—THE COMMENTARY

Some, perhaps most, of the judges and commentators have, in my view, been careless in their reading of *Dion*. This is a harsh appraisal, but one for which I think a case may be made. I will begin with the commentators, in the optimistic belief that law review writers, having some impact on the way cases are eventually decided, are in part responsible for the treatment that *Dion* has received in those cases.

Four casenotes greeted the *Dion* opinion.[41] Of the four, the

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Cooperation: Reconsidering the Political Status of Indian Nations, 22 HARV. C.R.-C.L. L. REV. 507, 544-47 (1987).

39. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

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

41. Comment, *Federal Conservation Statutes and the Abrogation of Indian Hunting and Fishing Rights:* United States v. Dion, 58 U. COLO. L. REV. 699 (1988)[hereinafter

Suffolk piece, by Glenn M. Goffin, is the most enthusiastically environmentalist, beginning with the title. Mr. Goffin acknowledges and emphasizes the "actual consideration" part of the test[42] as well as a general reluctance of the Court to find abrogation,[43] but Mr. Goffin's heart seems to be with the eagles, not the Indians. For example, he writes:

> The *Dion* decision . . . furthered Congress' purpose in passing the [Bald Eagle Protection Act] and the [Endangered Species Act] by allowing for the better protection of eagles. Wildlife conservation statutes seeking to protect migratory animals must apply to all potential takers of the animals to be effective. Under the *White* decision, eagles passing through Indian reservations were temporarily deprived of the statute's protection. Indians on the reservation could, therefore, hunt them to extinction in direct contravention of the Acts' purpose. By annulling the treaty defense . . . the *Dion* Court extended the operation of these statutes onto Indian reservations, thus ensuring the eagles' protection, in accordance with Congress' intent.[44]

It is worth noting that there is no evidence that the Indians intended to "hunt them to extinction." Furthermore, the entire

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Riley Comment]; Comment, *Indian Cases in the 1985-86 Supreme Court Term*, 20 CLEARINGHOUSE REV. 1085, 1088-89 (1987)[hereinafter Locklear Comment]; Note, *Indian Law — "Great Nations, Like Great Men, Should Keep Their Word;" But Do They?*, 22 LAND & WATER L. REV. 443 (1987)[hereinafter Esmay Note]; Comment, *Environmental Law — Bald Eagle Protection Act Abrogates Yankton Sioux Indians' Treaty Rights to Hunt Eagles*, 21 SUFFOLK U.L. REV. 945 (1987)[hereinafter Goffin Comment]. A casenote on the Eighth Circuit's opinion in *Dion*, urging affirmance, is Note, *On-Reservation Treaty Hunting Rights: Abrogation v. Regulation by Federal Conservation Statutes — What Standard?*, 26 NAT. RESOURCES J. 187 (1986).

Lead articles dealing with *Dion* are rare; perhaps it is still too early. The clearest insight consistent with my view of the case comes in an article not about Indian law. See Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987):

> Long-standing precedent establishes a trust relationship between the federal government and the tribes. The federal government has vast legislative power over Native Americans, but the states have minimal legislative power absent an express delegation of authority from Congress, and the tribal governments retain a right of self-determination consistent with federal law. The means and ends of federal legislation relating to Indians are subjected to extraordinarily minimal scrutiny. The Supreme Court, however, has endorsed a variety of canons of interpretation that, absent *express* congressional intent to the contrary, promote statutory and treaty interpretation favorable to the tribes. [citing *Dion.*]

Id. at 916 n.246 (citations omitted)(emphasis added). The emphasized word, of course, is a sizeable overstatement.

42. Goffin Comment, *supra* note 41, at 951.

43. *Id.* at 948-49.

44. *Id.* at 952-53.

thrust of this passage suggests that the mere general application of a broadly written federal statute is enough to abrogate the prior inconsistent treaty. In the same vein, Mr. Goffin writes that "[t]he grizzly bear, gray wolf, peregrine falcon, black-footed ferret, California condor, and whooping crane are other endangered species that spend time on and near reservation land, and that would thus be subject to decimation by unlimited Indian hunting."[45] This may be an argument that will move Congress to abrogate a treaty but, as I argued above, *Dion* makes clear that more than a laudable statutory purpose is required before a court may determine that a treaty is "quietly" abrogated.

Thomas Riley, the Colorado comment writer, is less an environmentalist and more an Indian advocate than is Mr. Goffin. He, in fact, appears to urge the Court to protect, under appropriate treaties, just the activities of which Mr. Goffin is most afraid—the hunting of endangered animals to extinction:

> Because the government argued that federal conservation legislation dealing with species in danger of extinction regulates an area that is beyond the scope of Indian reserved hunting and fishing rights, it is unfortunate that the Court did not address this argument before considering the issue of congressional intent in the [Bald Eagle Protection Act]. Since Indian treaties should be construed liberally in favor of the Indians, the Court should have clearly rejected this line of argument.[46]

This treaty interpretation issue is beyond the scope of the present essay; I have explained elsewhere my reasons for not going as far as Mr. Riley's position just quoted.[47] In any case, it does not surprise one to read that Mr. Riley believes that this right to hunt animals so fervently should be protected from "quiet" abrogation by the *White* test. Mr. Riley is a strong advocate for the Indians.

Mr. Riley quotes the "actual consideration and choice test"[48] and says it "appears to set a strict standard for Congress and the courts,"[49] but, I think, his comment emphasizes not what *Dion* means, but what it does not mean. He tries to score some points by noting that the *White* test—and a Congress aware of the *White* test's requirements—allows for more effec-

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45. *Id.* at 951 n.35.
46. Riley Comment, *supra* note 41, at 711.
47. Laurence, *supra* note 1, at 7-9.
48. Riley Comment, *supra* note 41, at 705.
49. *Id.* at 712.

tive political input by the Indians and their advocates,[50] but one suspects that he is preaching a lost cause to the converted.[51] The *White* test is gone, but he spends less time urging that *Dion* as written is substantial protection for Indian treaty rights, even though he apparently believes that it is. I do not think that Mr. Riley is avoiding the role of an advocate for the role of the detached scholar. Rather, he is wasting an opportunity for effective advocacy.

For example, Mr. Riley spends a paragraph applying the *Dion* test to the Endangered Species Act. We know his sympathies lie with the Indians, but he is led in this paragraph to the conclusion that "because the Court did not settle upon a definite standard for applying its 'clear and plain' evidence test, the tribes, the courts and Congress have been left without a clear indication of how the Court may rule."[52] This is more lament than analysis; as I have noted above, there is a strong argument that, even under the *Dion* test, the Endangered Species Act does not "quietly" abrogate Indian treaties.

The title of Niki Esmay's casenote in the *Land and Water Law Review* asks this question: " 'Great Nations, Like Great Men, Should Keep Their Word;' But Do They?"[53] She is quoting Justice Black from the famous case of *Federal Power Commission v. Tuscarora Indian Nation*,[54] and we all know the answer to the question is "no." Justice Black knew the answer, for he was writing in dissent in that case.[55] Ms. Esmay's title prepares us to read the words of a tribal advocate.

Once again, as with the others, this note writer quotes the "actual consideration and choice test,"[56] but Ms. Esmay is so disappointed with it that a few pages later she misstates the test to make it weaker:

> Today, through its decision in *Dion*, the Supreme Court moves away from that fiduciary standard of protection without really

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50. *Id.* at 708-09.

51. *Id.* at 709-10.

52. *Id.* at 711.

53. Esmay Note, *supra* note 41, at 443.

54. 362 U.S. 99, 142 (1960)(Black, J., dissenting).

55. *Tuscarora* was not a treaty abrogation case, and my statement that it was in Laurence, *supra* note 1, at 3 n.10, was incorrect, thereby adding to exactly the confusion that Price and Clinton bemoan in the quotation cited in *supra* note 38. I should have known better; the Eighth Circuit did. *See* United States v. White, 508 F.2d 453, 455 n.2 (8th Cir. 1974).

56. Esmay Note, *supra* note 41, at 447-48.

> addressing the issue. The Court has opened the door to abrogation of Indian treaty rights a little wider and moves one step farther from the deference to Indian treaty rights it has shown in the past. The holding indicates that abrogation need not be triggered by the traditionally-required, clear and plain showing of congressional intent. *Rather, vague extrinsic evidence can be used to avoid the review requirements.*[57]

The Supreme Court could hardly have been more clear that "vague extrinsic evidence" will not do; the Court mentioned that "[w]hat is essential is clear evidence . . . ." Ms. Esmay must, then, be thinking that, while the Court said that "clear" evidence was essential, the Court decided the case based upon "vague" evidence. It may be that no circumstantial evidence could be anything but "vague," at least in comparison to direct evidence of intent to abrogate found in the Congressional Record, but she does not go that far. She instead carefully constructs an alternative explanation for the permit scheme added to the Bald Eagle Protection Act of 1962, an explanation that has a certain logical tidiness to it and does not result in treaty abrogations: the statute was intended to leave treaty rights intact and the exemptions by permit were for Indians without reservations or for off-reservation hunting.[58] A similar hypothetical has occurred to me;[59] it apparently even occurred to the Interior Department in 1962.[60] The *Dion* Court, however, was unpersuaded that it ever occurred to Congress.[61]

I am unwilling to allow the Court's words to be transformed from "clear evidence" to "vague evidence" solely because the Court will not spin hypotheticals with Ms. Esmay and me. Nor do I think that it is in the interest of anyone that they be so transformed. As I wrote above, I have a strong, circumstantial belief that Congress actually considered the abrogation of Indian treaties in passing the Bald Eagle Protection Act, at least as amended in 1962. I see no such evidence of that with respect to the Endangered Species Act. If Ms. Esmay is right and "clear" means "vague," then the Endangered Species Act fight is already lost, and I am unwilling, just yet, to be that gloomy. (As we shall see, a federal court and a Florida state court have

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57. *Id.* at 449 (emphasis added).
58. *Id.* at 449-50.
59. *See* Laurence, *supra* note 1, at 14 n.63.
60. Esmay Note, *supra* note 41, at 450.
61. United States v. Dion, 476 U.S. 734, 744 (1986).

adopted the Esmay " 'clear' means 'vague' " transformation, to the disadvantage of the Florida Seminole Tribe and its chief.[62])

Over the years, the Native American Rights Fund (N.A.R.F.), of Boulder, Colorado, has been one of the most effective litigators of the interest of Indian tribes. Arlinda Locklear, a Senior Staff Attorney in N.A.R.F.'s District of Columbia office, has become a virtual legend among Indian lawyers and their friends for her skills of advocacy, analysis and persuasion before the Supreme Court and various lower courts. It is not surprising then, that the short comment that Ms. Locklear wrote on *Dion* for the *Clearinghouse Review*[63] sees the strength of the case more clearly than the notes written by the law students:

> As stated by the Court, the treaty abrogation standard appears to provide reasonable protection against backhanded [what I call "quiet"] abrogation of treaty rights. By focusing on whether Congress actually considered the issue, the standard assures Indian people an opportunity to do political battle against proposed abrogation with legislative accountability for the result.[64]

Even Ms. Locklear disapproves of the way the *Dion* test was applied to the Bald Eagle Protection Act, however, finding "no indication" of actual consideration by Congress in the 1962 amendment.[65] But her note is so short that she has no room to expand on the thought, and so the reader may well be unpersuaded that *Dion* itself was decided wrongly under the new test. Unlike Ms. Esmay, Ms. Locklear does not suggest that the court meant something other than what is said in the test that she finds to be "reasonab[ly] protect[ive]."[66] And, unlike Mr. Riley, she finds political input available to the Indians under *Dion* as well as *White*. Overall, her piece has less reverse advocacy than the writings of Mr. Riley and Ms. Esmay. Still, it is fair to say that she did not heap praise on the reasoning of *Dion*, but I will forgive her fondness for *White* because she accepts *Dion*.

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62. See discussion below of the *Billie* cases, *infra* notes 67-85 and accompanying text.

63. Locklear Comment, *supra* note 41.

64. *Id.* at 1089.

65. *Id.*

66. *Id.*

V. *Dion*'s Reception—The Cases

A. Chief Billie and His Panther[67]

In December of 1983, James E. Billie, chief of the Seminole Tribe in Florida, killed a *felis concolor coryi*, or Florida panther, an endangered species protected under both state and federal law. Dual prosecutions ensued. The state trial court dismissed the information against Billie, but the Florida District Court of Appeal reversed and remanded for trial.[68] In the federal prosecution, the district court denied Billie's motion to dismiss.[69] Both reported cases purported to use the Supreme Court's test for "quiet" abrogations from *Dion*; both used it superficially and rather off-handedly found a treaty abrogation.[70]

Both courts noted that the Supreme Court in *Dion* left open the question of whether the Endangered Species Act is a treaty-abrogating act of Congress.[71] That is technically correct, but it is difficult not to read some approval into the *Dion* Court's language when it noted that "[t]he Endangered Species Act and its legislative history, [Dion] points out, are to a great extent silent regarding Indian hunting rights."[72] This sentence, though, was ignored by both *Billie* courts.

The federal district court in *Billie* inspected the legislative history of the Endangered Species Act, but in the end was able to find little indication of a congressional intent to abrogate Indian treaties: "[The Endangered Species Act's] general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives . . . demonstrate that Congress considered Indian interests, balanced them against conservation

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67. The cases discussed are United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) and State v. Billie, 497 So. 2d 889 (Fla. Dist. Ct. App. 1986).

68. *Billie*, 497 So. 2d 889. At trial, Billie was acquitted. N.Y. Times, Oct. 9, 1987, at 29, col. 1.

69. *Billie*, 667 F. Supp. 1485. Billie's trial in federal court ended in a mistrial, the jury deadlocked at 7-5 for acquittal. N.Y. Times, Aug. 28, 1987, at 32, col. 1. Following the verdict of acquittal in the state prosecution, *see supra* note 68, the Justice Department dropped the federal prosecution. N.Y. Times, Oct. 11, 1987, at 28, col. 1.

70. Both courts addressed the more fundamental question of whether the treaties with the Seminoles went so far as to protect the Indians' rights to hunt now-endangered species. I have earlier deemed this issue beyond the scope of the present essay.

71. United States v. Dion, 476 U.S. 734, 745 (1986). *See Billie*, 497 So. 2d at 893; *Billie*, 667 F. Supp. at 1487.

72. *Dion*, 476 U.S. at 745.

needs, and defined the extent to which Indians would be permitted to take protected wildlife."[73]

First, note that the court is concerned with "Indian interests." I warned above of the danger of confusing the interests of Indians *qua* Indians with Indian treaty protected rights.[74] It is not enough for a court to determine that Congress was thinking of Indians in passing the statute: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian *treaty rights* on the other, and chose to resolve the conflict by abrogating the treaty."[75]

Second,[76] the Alaskan natives the court referred to are not protected by any treaty and would need federal statutory protection to have any rights at all, other than their rights in common with other Alaska citizens.[77]

The federal district court did not really object to Dwight Dion's observation, with the apparent approval of the Supreme Court, that the legislative history of the Endangered Species Act is largely silent on the subject of Indian hunting rights. The court, instead, based much of its holding on some legislative history of a bill before the House of Representatives in a previous Congress, a bill that never passed, the relevance of which is not entirely clear.[78] It seems that ever since then-Justice Rehnquist's creative use of unpassed legislation in *Oliphant v. Suquamish Indian Tribe*,[79] the use of such non-statutes in Indian law cases has been on the rise.

The most telling piece of the federal court's statement, quoted above, is its reference to "the Act's general comprehensiveness," and its "nonexclusion of Indians."[80] The court seems undaunted by any commitment of the United States to keep its

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73. *Billie*, 667 F. Supp. at 1490.

74. *See supra* notes 35-38 and accompanying text.

75. *Dion*, 476 U.S. at 739-40 (emphasis added).

76. *See supra* note 34.

77. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); PRICE & CLINTON, *supra* note 38.

78. United States v. Billie, 667 F. Supp. 1485, 1490-91 (S.D. Fla. 1987). The House bill was H.R. 13081, 92d Cong., 2d Sess. (1972). A companion bill in the Senate was S. 3199, 92d Cong., 2d Sess. (1972), which also failed to pass.

79. 435 U.S. 191, 201-02 (1978) (construing the Western Territories Bill). *See* H.R. REP. No. 474, 23d Cong., 1st Sess. 36 (1834).

80. *Billie*, 667 F. Supp. at 1491. *See also id.* at 1488, 1492. The Florida state court was impressed, too, by the comprehensiveness of the federal statute. *See* State v. Billie, 497 So. 2d 889, 893, 895 (Fla. Dist. Ct. App. 1986).

word to the Indian parties to a treaty, and it is for exactly this reason that *Dion* requires more. In all cases of "quiet" treaty abrogations, all the difficult ones anyway, a generally comprehensive statute will be weighed against the terms of an Indian treaty. The fact that Congress has sought to regulate an area of national concern is not enough, and ought not be enough, to conclude that Congress at the same time means to go back on an old and important promise. More should be and is required under *Dion*.

The Florida state appellate court's opinion is even less encouraging than the federal trial court's. Instead of the "actual consideration and choice" test, the state court used a weaker "sufficiently compelling evidence" test. The court stated that, "[t]he Supreme Court concluded that while an express statement of Congress may be preferable, it would not rigidly interpret that preference as a per se rule where the evidence of congressional intent to abrogate was sufficiently compelling."[81]

The Florida state court then used an even weaker test: "[T]he Endangered Species Act abrogates any inherent rights the Seminole Indians may have for hunting the Florida panther, *since only Alaskan native Indians are specifically exempt from the Act*. In expressly exempting only Alaskan Indians, we must presume Congress did not intend to exempt any other Indian tribes."[82] A non-Indian case was cited.[83] Any "sufficiently compelling" test collapses upon itself and ultimately begs the question. And a presumption that treaty-protected Seminoles are covered merely because certain non-treaty Alaskan natives are not almost mocks the spirit of *Dion*.

My real complaint with the state court decision, however, is not that it substituted one black-letter statement of the law for another. The mistake is in black-letterizing the *Dion* case in the first place. Divorcing *Dion* from its facts and leaving the test quoted above floating in a vacuum does not do justice to the Supreme Court's opinion. First year law students learn early on

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81. *Billie*, 497 So. 2d at 893. In *Dion*, the "sufficiently compelling" language occurs just before the "what is essential . . ." passage, which I have characterized as the "actual consideration and choice" test. United States v. Dion, 476 U.S. 734, 739 (1986).

82. *Billie*, 497 So. 2d at 894 (citations omitted) (emphasis added). The Florida court has made a technical mistake here by equating Alaskan natives with Alaskan Indians, to the possible offense of Inuits and Aleuts. *See* COHEN'S HANDBOOK, *supra* note 13, at 739. The error is probably forgivable, though, for a court so far from Alaska.

83. *Billie*, 497 So. 2d at 894 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), a leading case on the Endangered Species Act).

that legal analysis requires more than this. The Florida District Court of Appeal might better have cited *Gilbert Law Summaries* than the *Dion* case.

The federal district court did little better in this regard. It paid lip service to *Dion*'s strict test,[84] but it too treated the test as if it were a black-letter statement, divorced from the facts of the case that gave rise to the test. In particular, the court failed to compare carefully the Bald Eagle Protection Act and the Endangered Species Act.

We have seen above the importance of the permitting scheme that Congress put into place under the earlier Bald Eagle Protection Act and left off the Endangered Species Act.[85] We have seen how the permitting scheme made the circumstantial evidence of congressional consideration and choice clear rather than vague or presumed, Ms. Esmay to the contrary notwithstanding. We have seen the emphasis that Justice Marshall's opinion placed on the permitting scheme. It was exactly the permitting scheme that made me feel that the Court was correct in its *Dion* holding; it is the absence of a similar provision directed toward treaty-protected Indians that makes me less sure that the *Billie* holdings are correct. Moreover, it is the Court's insistence on such evidence that will decrease markedly the chances that a court will guess wrong in finding that the nation's promise was being retracted.

B. Ms. Tsosie and Her Claim for Damages[86]

In October of 1978, Venita Tsosie, a Navajo, was a patient in the Public Health Service Hospital in Shiprock, New Mexico. She alleges that while admitted as an inpatient she was sexually assaulted by a laboratory technician and employee of the hospital, who was posing as a physician. Having first failed in attempts to recover under the Federal Tort Claims Act and to prosecute the technician for criminal violations,[87] Ms. Tsosie

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84. *Id.* at 1489, 1491-92.

85. Billie had argued in the federal prosecution that a permit scheme such as Congress placed in the Bald Eagle Protection Act was necessary to save the Endangered Species Act from an attack under the first amendment Free Exercise Clause for overbreadth on its face and as applied. *Billie*, 667 F. Supp. at 1494. The court rejected the argument, with little discussion of the permitting scheme. *Id.* at 1494-97.

86. The case discussed is Tsosie v. United States, 11 Cl. Ct. 62 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987).

87. *Id.* at 64. The Department of Health and Human Services held against her on the grounds that the Federal Tort Claims Act (FTCA) does not reach assaults, nor was

filed an administrative claim with the Department of the Interior under the so-called "bad men" provision of the treaty between her tribe and the United States.[88] The Assistant Secretary of the Interior denied her claim, and she then filed suit in the Claims Court for review of the administrative decision.

The Claims Court reversed the Department and remanded for further consideration on the merits. Before the Claims Court, the Department raised several arguments; of interest to us is the argument that the "bad men" provision of the treaty had become obsolete, both by original design and by non-use. That is to say, first, that the original parties to the treaty had envisioned the "bad men" provision to apply only while "the irritants that could cause warfare between the parties" remained in existence.[89] Second, the government argued, the "bad men" provision of the treaty with the Navajos, and identical provisions in several other contemporaneous treaties, had so rarely been invoked as to have become obsolete by abandonment.

The Claims Court judge was persuaded by the government's argument, but in a spasm of judicial restraint, found himself bound by *stare decisis* and several opinions of the old Court of Claims, forced to reverse.[90] Of interest to this article, the judge raised on his own behalf the theory that the "bad men" provision of the treaty had been abrogated by later statutes:

> [I]t is clear that Congress has passed enumerable laws affecting the peace, health, and welfare of the various Indian tribes since the treaties at issue were ratified. . . . In any event, it is unnecessary for the Court to have to find that there has been an abrogation consistent with the standards enunciated by the recent Supreme Court case of [*Dion*] for the Court to find that

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there any showing of negligence by the United States. Ms. Tsosie never brought suit on the FTCA claim. *Id.* It is unclear why the U.S. Attorney declined to prosecute. *Id.*

88. Treaty with the Navajo Indians, June 1, 1968, United States-Navajo Tribe of Indians, 15 Stat. 667. The "bad men" provision is:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Id. art. I.

89. *Tsosie*, 11 Cl. Ct. at 65.

90. *Id.* at 65-68.

> the Government's position on abandonment and obsolescence is strong.
>
> What is important, however, is to note that many of the later passed statutes provide far greater protection from wrongs to Indians (and all other citizens of the United States) than what was provided of them by the bad men treaty provisions. . . . [Citing, among other statutes, the Federal Tort Claims Act.] In addition to these examples of laws passed by Congress that supplanted the need for the Indians to retain their bad men reimbursement provisions, the civil and criminal courts of the United States and the various states of the union are open to all citizens (including Indians) to vindicate societal wrongs.
>
> In short, it is clear that Indian citizens, such as the plaintiff here, have many legal options open and available to them to vindicate "wrongs" that may have been committed against them. The need to have the bad men reimbursement provisions available to Indians covered by these 1867 and 1868 treaties simply no longer exists.[91]

First, it is disingenuous in the extreme to cite the protections of the Federal Tort Claims Act to a plaintiff who is ineligible for protection under that act because she alleges an assault and battery.[92] Second, the opinion is unpersuasive in saying that *Dion* is irrelevant to the inquiry. The strict test of *Dion* would go for practically nothing if some looser standard applied to cases of "obsolescence" rather than "abrogation." Third, the Claims Court made it plain that it wished it could decide the "obsolescence" issue by looking at broad statutes of general impact, hardly the kind of abrogating statute that *Dion* requires, as we have seen.

The government appealed the *Tsosie* case and the Federal Circuit affirmed with a more satisfactory opinion, albeit one that did not cite *Dion*.[93] The appellate court set the trial judge straight: "It is asking the wrong question to ask if Article I of the Navajo Treaty of 1868 is obsolete. The right question is whether it is preempted."[94]

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91. *Id.* at 70.

92. The Federal Circuit made this point on the appeal. Tsosie v. United States, 825 F.2d 393, 400 (Fed. Cir. 1987).

93. *Tsosie*, 825 F.2d 393.

94. *Id.* at 403. By "preempted" I take the court to mean what I have been calling "abrogated," a change in syntax of which I do not approve. "Preemption," when a treaty and statute are at issue, suggests over-deference to the "last-in-time" rule. "Abrogation" is a better word to emphasize the importance of the treaty right and the *quid pro quo*

The trial judge had not framed the issue of treaty abrogation very well, perhaps because he raised it without the lawyers' help, and as a result, the Federal Circuit's discussion was not all that it should be. *Dion* was not cited; evidence of actual consideration by Congress was not sought. The court noted:

> It is *unlikely* that Congress intended the Tort claims Act, or the statutes relating to military records, and Indian claims to preempt the Navajo treaty because these 1946 acts were court *opening*, intended to eliminate the private bill system by judicial procedures. It would be ironic to conclude that Congress both opened and closed the courts to Indians at the same time.[95]

The Court then quoted from two pre-*Dion* cases to show the reluctance that must be shown when finding treaty abrogations.[96] These cases, while protective of treaty rights and broadly consistent with *Dion*, do not have the specificity of the later case. The Federal Circuit was both strong and emphatic that the Claims Court, at least, should not be eager to find a treaty abrogation. Nevertheless it is puzzling that *Dion* was not cited, even though it had been decided more than a year earlier and had been mentioned, off-handedly, by the trial judge. Overall, while *Tsosie* allows me to end on a happier note than the *Billie* cases would have permitted, even it leaves much to be desired.

VI. Conclusion

There were times in our past when promises to Indians were broken with regularity and with impunity, as if there was something about being an Indian that made promises to them go for nothing. Perhaps those days are not far in the past at all; the maliciously misnamed "American Indian Equal Opportunity Act," which would have abrogated all treaties unilaterally, was introduced in Congress only ten years ago.[97] When lines are drawn as visibly as that cruel bill did, at least we all know where the challenge lies.

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negotiations that gave rise to it.

95. *Id.* at 400 (citations omitted)(emphasis added in the first instance, and emphasis in the original in the second instance).

96. *Id.* at 401 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, *modified*, 444 U.S. 816 (1979).

97. H.R. 13329, 95th Cong., 2d Sess. (1978).

More common though than such extremism is the situation discussed in this essay, where Congress, in exuberant pursuit of an otherwise worthy national goal, enacts a statute inconsistent with an old treaty. We all hope that when Congress does this, it will pause to consider the impact of its proposed enactment on Indian treaties. During such a pause, Indian people will have a chance to protect their hard-earned rights.[98] And when the evidence is slim that Congress did indeed pause, a court should not be quick to find the treaty abrogated. The "actual consideration and choice" test, if strongly argued by lawyers and rigorously used by courts, should give the old promises the protection they need.

98. Locklear Comment, *supra* note 41, at 1089.