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NOTES

INDIANS, NON-INDIANS, AND THE ENDANGERED PANTHER; WILL THE INDIAN/NON-INDIAN CONFLICT BE RESOLVED BEFORE THE PANTHER DISAPPEARS?

Tina L. Morin*

INTRODUCTION

The majestic Florida panther, *Jelis concolor coryi*, is a predatory mammal of the subtropics.[1] A male panther roams over a two hundred to three hundred square mile area, while a female panther's range is fifty to one hundred square miles.[2] The panther's historic range stretched from Louisiana and Arizona east to South Carolina and Florida.

The Florida panther has been listed as endangered since 1967[3] It was one of the first species protected under the Endangered Species Preservation Act of 1966, the predecessor of the present Endangered Species Act.[4] It is now protected under the Endangered Species Act and Florida Statute Section 372.671.[5]

The panther does not read treaties nor does it recognize reservation boundary lines or differentiate between Indians and non-Indians. Its only focus is survival. Despite this focus, the panther, like many endangered species, is losing its battle for survival.

Today, only twenty to fifty panthers remain in the wild in southern Florida, frequently inhabiting the Big Cypress Indian Reservation.[6] As this majestic creature is disappearing, its main predator, the human

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1. Robert 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).
2. *Id.* at 17.
3. United States v. Billie, 667 F Supp. 1485, 1496 (S.D. Fla. 1987).
4. 50 C.F.R. § 17.11 (1991).
5. Endangered Species Preservation Act, Pub. L. No. 89-669, 80 Stat. 926 (1966). Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1990)).
6. Fla. Stat. Ann. § 372.671 (West 1988).

population, continues to be divided into territorial jurisdictions—state, federal, and tribal. These divisions produce inevitable legal conflicts. While the court battles rage, the panthers continue to die.

Ironically, both Indians and non-Indians would probably list the preservation of the Florida panther as one of their goals. Instead of cooperating to protect the Florida panther, Indians and non-Indians continue to focus on determining their respective rights. The biggest loser in this human struggle is the panther, as well as other endangered species; they cannot speak for themselves.

This casenote addresses the significance of the recent Florida District Court of Appeals case, *State v Billie*,[7] and the subsequent Federal District Court case involving the same defendant, *United States v Billie*.[8]

These cases go far beyond the precedent setting case of *U.S. v Dion*[9] with respect to Indian treaty rights. This casenote reviews the case law leading up to the *Billie* cases and predicts how the *Billie* cases will potentially affect future case law Finally, this casenote evaluates whether the direction taken by the courts in the *Billie* decisions is necessary to protect and preserve the panther and other endangered species.

FACTS

President Taft created the Big Cypress Indian Reservation for the Seminole Indians in southern Florida by executive order in 1911 [10] Prior to the creation of the Big Cypress Indian Reservation, the United States had repeatedly attempted to end the Seminole Indian Wars.[11] Pursuant to the federal removal policy, and in an effort to resolve land disputes with other tribes, the United States tried to convince the Seminoles to settle west of the Mississippi.[12] The United States failed in its efforts to remove the Seminoles from Florida. Consequently much later, President Taft created the Big Cypress Indian Reservation by executive order [13]

Reservations created by executive order have the same implicit hunting rights as reservations created by treaty [14] Executive Order No. 1379 did not explicitly reserve hunting and fishing rights to the Seminole Indians. However, by setting aside land for the reservation, hunting and

7. 497 So. 2d 889 (Fla. App. 2 Dist. 1986).
8. 667 F Supp. 1485 (S.E. Fla. 1987).
9. 106 S. Ct. 2216 (1986).
10. State v. Billie, 497 So. 2d at 891.
11. *See, e.g.*, Treaty with the Seminole (May 9, 1832), 7 Stat. 368; Treaty with the Seminole (March 28, 1833), 7 Stat. 423; Treaty with the Creeks and Seminole (January 4, 1845), 9 Stat. 821; Treaty with the Creeks (August 7, 1856), 11 Stat. 699.
12. United States v. Billie, 667 F Supp. at 1488.
13. Executive Order No. 1379 (June 28, 1911).
14. State v. Billie, 497 So. 2d at 891.

fishing rights were impliedly reserved.[15] "As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress."[16] Therefore, the Big Cypress Indian Reservation carries with it traditional hunting rights.[17]

On December 1, 1983, James E. Billie, Chairperson of the Seminole tribe, killed a Florida panther.[18] The use of the Florida panther in Seminole religious and cultural practice varies.[19] Seminole medicine men use various animal parts, with chants and prayers, to help others.[20] According to Seminole beliefs the Creator chose the panther as the first animal to enter earth.[21] God, or the breathmaker, gives the animal parts their powers. Numerous medicine men from the Seminole tribe testified at Billie's trial that panther claws and tails are important parts of a medicine man's bundle and relieve muscle cramps.[22] Billie testified, however, that he had not thought about what he would do with the panther he shot until the morning it was seized.[23] After the panther was seized, Billie decided he might give it to an experienced medicine man because he himself was just a novice.[24] Because Billie did not present evidence that he killed the panther specifically for religious reasons, neither the Florida district court nor the federal district court determined whether the First Amendment protected Billie's killing of the panther.[25] Florida charged Billie with violating Florida Statute 372.671 which protects the Florida panther.[26]

The Florida Circuit Court, Hendry County, dismissed the information filed by the state against Billie.[27] The Florida Circuit Court, adopting a principle enunciated by the Eighth Circuit Court of Appeals in *United States v White*[28] and *United States v Dion*,[29] held that Congress needed to expressly abrogate treaty rights in order for states to regulate on-reservation treaty rights through federal conservation laws.[30] The Florida Circuit Court concluded that the state of Florida could not regulate

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15. United States v. Billie, 667 F Supp. at 1488.
16. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).
17. State v. Billie, 497 So. 2d at 891.
18. State v. Billie, 497 So. 2d at 890.
19. United States v. Billie, 667 F Supp. at 1497.
20. *Id.* at 1496.
21. *Id.*
22. *Id.*
23. *Id.* at 1497.
24. *Id.*
25. State v. Billie, 497 So. 2d at 895; United States v. Billie, 667 F Supp. at 1497.
26. State v. Billie, 497 So. 2d at 890.
27. *Id.*
28. 508 F.2d 453 (8th Cir. 1974).
29. 476 U.S. at 740.
30. State v. Billie, 497 So. 2d at 890.

endangered species on Indian reservations under the Endangered Species Act.[31] The Court determined that the state could not have greater authority over Indians on reservation lands than the authority given to the state by Congress.[32] The state appealed that decision.[33]

HOLDING

The District Court of Appeals of Florida vacated the order of the Florida Circuit Court.[34] The District Court of Appeals reinstated the information filed by the state against Billie, charging Billie with the killing of a Florida panther in violation of Florida Statute 372.671[35] The Florida District Court of Appeals held that Florida had jurisdiction to protect the panthers pursuant to state law which was more protective than the federal Endangered Species Act.[36] The Florida District Court of Appeals held that Billie's right to hunt on the reservation could be regulated by the state in order to conserve a species. Additionally, the Florida District Court of Appeals found that treaty rights did not insulate the defendant from the application of Florida criminal law under Public Law 280.[37] Therefore, Florida had the authority to charge Billie with the unlawful killing of the panther[38] The Supreme Court of Florida denied review of the case on March 24, 1987[39]

Subsequently, prosecution by the state of Florida commenced in federal district court against Billie for violation of the Endangered Species Act.[40] The federal district court held that the Endangered Species Act applied to hunting of Florida panthers on the Seminole Indian reservation.[41] The federal court also held that the Act did not unconstitutionally infringe on Billie's right to free exercise of religion where the use of the panther was not indispensable to Billie's religious practices.[42]

DISCUSSION OF PRIOR LAW

Since the Supreme Court ruled in 1903 that the federal government had the power to legally abrogate the Indian treaty rights,[43] many cases

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31. *Id.*
32. *Id.*
33. *Id.*
34. State v. Billie, 497 So. 2d at 895.
35. *Id.*
36. State v. Billie, 497 So. 2d at 894.
37. *Id.* at 895. See *infra*, text accompanying note 87 through 91.
38. *Id.*
39. Billie v. State, 506 So. 2d 1040 (1987).
40. United States v. Billie, 667 F Supp. 1485 (S.D. Fla. 1987).
41. *Id.*
42. *Id.*
43. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

have come before the Court to decide whether Congress intended to abrogate treaty rights when Congress enacted laws affecting tribes.[44] The courts have used several tests to determine whether Congress intended to abrogate Indian treaty rights.[45] The most common tests are:

1. Abrogation only upon a "clear showing" of legislative intent;[46]
2. Abrogation "not lightly implied";[47]
3. Abrogation only after "liberal construction" of the statute in favor of Indian treaty rights;[48] and
4. Abrogation only upon "express legislative reference" to Indian treaty rights.[49]

The first test, abrogation only upon a "clear showing" of legislative intent, was used in *United States v Santa Fe Pacific R.R.*.[50] There, the Supreme Court held that congressional establishment of a reservation for the Walapai Indians did not operate to extinguish Indian title to off-reservation land that the railroad wanted.[51] Creating the reservation was not a clear expression of congressional intent to extinguish Indian title to the off-reservation land.[52]

The "not lightly implied" test is a much weaker test.[53] This test permits an abrogation of treaty rights upon a "reasonable" showing of legislative intent to abrogate.[54] The test does not specify how strong the showing should be.[55] In *Menominee Tribe v United States*,[56] the court could find no specific reference to Indian hunting and fishing rights in the Menominee Termination Act of 1954.[57] The Termination Act ostensibly made all state statutes applicable on the reservation thereby abrogating the Indian hunting and fishing rights.[58] The court applied the "not lightly implied test" and held that the Termination Act did not abrogate the

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44. Charles Wilkinson & John M. 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 Cal. L. Rev. 601, 623 (1975).
45. *Id.*
46. United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941).
47. Menominee Tribe v. United States, 391 U.S. 404 (1968).
48. Choate v. Trapp, 224 U.S. 665 (1912).
49. Leavenworth, Lawrence, & Galveston R.R. v. United States, 92 U.S. 733 (1876).
50. Wilkinson & Volkman, *supra* note 44, at 623.
51. *Id.*
52. *Id.*
53. Wilkinson & Volkman, *supra* note 44, at 625.
54. *Id.*
55. *Id.*
56. 391 U.S. at 405.
57. Menominee Termination Act, 25 U.S.C. §§ 891-902 (1988).
58. Wilkinson & Volkman, *supra* note 44, at 636.

hunting and fishing rights.[59]

The third test, abrogation of treaty rights only after "liberal construction" of the statute in favor of the Indian treaty rights, was used in *Choate v Trapp*[60] Here the court relied on three primary rules of treaty construction:[61] treaties should be liberally construed in favor of the Indians; treaties should be interpreted as the Indians would have understood them at the time of their drafting, not how the government would have understood them; and any ambiguous expressions in the treaties should be resolved in favor of the tribes involved.[62] These rules of treaty construction were developed because of the unequal bargaining power between the tribes and the federal government at the time the treaties were signed.[63] The courts use these rules of construction to protect the reasonable expectations of the tribes.[64]

In *Choate*, the Supreme Court was faced with determining whether the State could tax land allotted to the Choctaw and Chickasaw tribes. The Court, relying on the rules of treaty construction, resolved the doubt in favor of the tribes. In *Menominee Tribe v United States*,[65] the Supreme Court similarly relied on the rules of treaty construction to hold that hunting and fishing rights were reserved by the treaty phrase "to be held as Indian lands are to be held."[66]

The fourth test, abrogation only upon express legislative reference, has been the predominant test.[67] Indeed, in 1975, Charles Wilkinson, a leading Indian law scholar, stated that the United States Supreme Court had not found abrogation of Indian treaty rights in the preceding century without an "express legislative reference" to Indian treaty rights.[68] A leading case for this test is *United States v White*[69] decided in 1974. In *White*, the Eighth Circuit held that a member of the Red Lake Band of Chippewa Indians could not be prosecuted for violation of 16 U.S.C. Section 668(a) (the Bald Eagle Protection Act) prohibiting the taking of eagles[70] because the legislation made no specific reference to Indian treaty rights.[71]

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59. *Id.*
60. 224 U.S. 665 (1912).
61. Wilkinson & Volkman, *supra* note 44, at 626.
62. *Id.*
63. *Id.*
64. *Id.*
65. 391 U.S. at 405.
66. Wilkinson & Volkman, *supra* note 44, at 618.
67. *Id.* at 630.
68. *Id.*
69. 508 F.2d 453, 454 (8th Cir., 1974).
70. Wilkinson & Volkman, *supra* note 44, at 630.
71. *Id.*

More recently, the Supreme Court has enunciated yet a fifth test to determine whether Congress intended to abrogate treaty rights. The latest case dealing with abrogation of Indian treaty rights is *United States v Dion*.[72] In *Dion*, the Supreme Court retreated from the *White* test of express legislative reference and formulated a test that has become known as the "actual consideration and choice test".[73]

> What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty [74]

In *Dion*, a member of the Yankton Sioux tribe was prosecuted under the Bald Eagle Protection Act[75] and the Endangered Species Act for shooting bald and golden eagles.[76] The Supreme Court found sufficient circumstantial evidence that Congress intended to abrogate Indian hunting rights when it passed the Bald Eagle Protection Act.[77] That intent was evidenced by the fact that Congress established a permit system under which Indians could take bald eagles for religious purposes.[78] Although the Court held that no treaty right prevented the defendant from being prosecuted under the Endangered Species Act, the Court expressly declined to decide whether the Endangered Species Act also abrogated treaty rights.[79]

Beginning with *Lone Wolf v Hitchcock* in 1903 and extending to *Dion v United States* in 1986, the Supreme Court has often found that Congress abrogated Indian treaty rights using one test or another. The Florida state court case of *State v Billie*[80] continues that long line of cases dealing with abrogation but with a substantial distinction. Not only did the court look for and find express Congressional intent to abrogate Indian treaty hunting rights in the Endangered Species Act,[81] it extended, to the states, the power to substantially infringe upon Indian reservation hunting rights in the interest of conservation.[82] The federal district court case of *United States v Billie* which involved the same defendant, also extended the line of abrogation cases. The federal district court disposed of the question that

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72. 476 U.S. 734.
73. Laurence, *supra* note 1, at 12.
74. 476 U.S. 740.
75. 16 U.S.C. §§ 668-668(d) (1988).
76. 476 U.S. at 735.
77. *Id.* at 743.
78. 16 U.S.C. §§ 668-668(d) (1988).
79. 476 U.S. at 745.
80. 497 So. 2d at 892.
81. 16 U.S.C. § 1531 (1982).
82. State v. Billie, 497 So. 2d at 894.

the Supreme Court in *Dion* had left unanswered: the Endangered Species Act does abrogate Indian reservation hunting rights.[83]

REASONING

The Florida district court conceded that the Big Cypress Indian Reservation carried with it traditional Indian hunting rights for the Seminole Indians.[84] Reservations created by executive order, like the Big Cypress Reservation, carry the same hunting rights as reservations created by treaties.[85] Once the Florida district court determined that Billie had a treaty right to hunt the Florida panther, the Florida district court turned to whether Florida's statute, which prohibited the killing of panthers, could supersede that hunting right.[86]

Florida obtained jurisdiction over criminal offenses committed by or against the Seminole Indians through Public Law 280.[87] Section Seven[88] of this act granted states the right to acquire criminal jurisdiction over Indians by legislative enactment.[89] State law affecting tribal members is generally inapplicable within Indian reservations. However, states may obtain jurisdiction over tribes when Congress expressly permits it.[90] Public Law 280 was enacted in 1953 to mandate that six states assume civil and criminal jurisdiction over Indian lands and to give all other states the option to assume similar jurisdiction.[91] Public Law 280 was passed during the Termination Era, a time when the national policy was to terminate the trust relationship between the tribes and the federal government.[92] That policy has since been replaced by the policy of self-determination.[93]

Public Law 280 exempts tribes from either state civil or criminal jurisdiction over hunting, trapping, or fishing rights protected by treaty or

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83. 667 F Supp. at 1492.
84. 497 So. 2d at 891.
85. *Id.*
86. *Id.* at 892.
87. Public Law 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988))
88. *See* Pub. L. No. 90-284, Title 4, § 403, 82 Stat. 79 (1968).
89. *Billie* at 891. Public Law 280 was amended in 1968 to require tribal consent to subsequent extension of state jurisdiction under Public Law 280 but the cession of jurisdiction to Florida was not affected. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981).
90. Richard Monette, *Indian Country Jurisdiction and the Assimilative Crimes Act*, 69 Or. L. Rev. 269, 270 (1990).
91. Public Law 280 extended state criminal and civil jurisdiction over all Indian lands in California and Nebraska, most Indian land in Minnesota, Oregon, Wisconsin, and eventually all Indian land in Alaska. Several states, including Montana, have since assumed a measure of Public Law 280 jurisdiction. *See* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing The Development of Contemporary Indian Law*, 52 Mont. L. Rev. 211, 232 (1991).
92. *Id.* at 276.
93. *Id.*

statute.[94] However, in situations that do not involve protected treaty rights, a state that has acquired jurisdiction under Public Law 280, can enforce state law against Indian hunting on the reservation if the state law is criminal prohibitory rather than regulatory.[95] The statute could be applied to Billie under Public Law 280 because the Florida court determined that the Endangered Species Act had abrogated Billie's right to hunt the panther and because the Florida statute prohibiting the killing of panthers was a criminal prohibitory, rather than civil regulatory statute.[96] Further, the Florida court drew from the Supreme Court decisions in the *Puyallup* cases to pronounce that states could regulate Indians' rights to hunt if there was a need to conserve a species without having to rely on either the Endangered Species Act or Public Law 280.[97]

Additionally, Billie contended that federal law pre-empted the field of endangered species through the Endangered Species Act.[98] The Florida district court flatly disagreed with that contention.[99] The Endangered Species Act was passed in 1973 and hailed as the "most comprehensive legislation ever enacted by any nation."[100] The purpose behind the Act was to stop and reverse the increasing trend toward species' extinction, no matter the cost.[101] The Florida court pointed to Section 1535(f) of the Endangered Species Act where Congress expressly said that the Act was not to be construed to void any state law which was intended to preserve fish or wildlife.[102] The Florida district court continued that only when state law directly conflicted with federal law, by allowing actions prohibited by the federal law or restricting actions allowed by the federal law, did the federal law pre-empt the state law in the field of endangered species protection.[103] Consequently, the Florida district court held that the state of Florida had the power to prohibit the killing of Florida panthers on tribal lands, and to prosecute Billie under that state statute.[104]

The extension, to the states, of the power to abrogate Indian treaty rights departs from *Dion*. In *Dion*, the Supreme Court allowed Congress to abrogate Indian treaty rights, something courts had done since *Lone Wolf*

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94. *Id.* at 285.

95. *Id.* at 277.

96. State v. Billie, 497 So. 2d at 892.

97. *Id.* at 892. *See* Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 49 (1973); *See also* Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 175 (1977).

98. State v. Billie, 497 So. 2d at 893.

99. *Id.*

100. TVA v. Hill, 437 U.S. 153, 180 (1978).

101. United States v. Billie, 667 F Supp. at 1492.

102. State v. Billie, 497 So. 2d at 894.

103. *Id.*

104. *Id.*

v Hitchcock.[105] With *State v Billie*, however, the Florida district court extended *Dion* by holding that because the Endangered Species Act abrogated Indian hunting rights, states with criminal prohibitory jurisdiction under Public Law 280 had the ability to supersede Indian reservation hunting rights and that states could abrogate Indian hunting rights if there was a need to conserve a species.[106]

In *Dion*, the Supreme Court held that the Bald Eagle Protection Act abrogated Indian treaty hunting rights. The Florida court, following the Supreme Court's lead in *Dion*, found that the Endangered Species Act abrogated Indian treaty hunting rights.[107] The Florida district court's reliance on *Dion* to support its holding that the Endangered Species Act abrogated Indian treaty rights is not well-reasoned. In *Dion* the court found express legislative intent in the Eagle Protection Act to abrogate treaty rights.[108] Legislators directly discussed the hunting of eagles by Indians, indicating actual consideration of the impact of the proposed legislation on Indians.[109] Congress then took measures to mitigate those effects by adopting a permit system which allowed Indians to take eagles for religious purposes.[110] Congress considered the conflict between the Act and Indian treaty rights and chose to resolve that conflict by abrogating the treaty [111]

Express legislative intent was not as clear in *State v Billie*. The Florida district court, in a sweeping statement with little analysis, found that the Endangered Species Act abrogated inherent hunting rights of the Seminole Indians because the Act exempted Alaskan natives.[112] The Florida court reasoned that because Congress only exempted Alaskan natives from the Act,[113] Congress did not intend to exempt anyone else, including the Seminole Indians.[114] The Florida court presumed that Congress' reference to Alaskan natives indicated that Congress had in fact taken into consideration all Indians and decided to only exempt Alaskan Natives.[115] This is an incorrect presumption. Alaskan natives divide into

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105. *Lone Wolf*, 187 U.S. at 554.
106. State v. Billie, 497 So. 2d at 892. *See also* Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973).
107. State v. Billie, 497 So. 2d at 894.
108. 476 U.S. at 743.
109. *Id.*
110. *Id.* at 744.
111. *Id.*
112. State v. Billie, 497 So. 2d at 894.
113. 16 U.S.C. § 1539(e) (1988); 50 C.F.R. § 17.5 (1991).
114. State v. Billie, 497 So. 2d at 894.
115. Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon and the Endangered Species Act*, 70 OR. L. REV 543, 568 (1991).

three ethnic groups—Eskimo, Aleuts, and Indians.[116] Congress has routinely passed special legislation directed at Alaskan natives. To presume that Congress considered all Indian hunting treaty rights when it exempted Alaskan natives does not meet the express legislative intent test required by *Dion*.[117]

The Florida district court also relied on the Act's general comprehensiveness to find that it abrogated Billie's hunting rights.[118] This also is an incorrect reading of *Dion*.[119] The actual consideration and choice test set out in *Dion* requires express legislative intent to abrogate treaty rights, not just the comprehensiveness of a statute.[120]

The reasoning in the federal *Billie* decision was similarly flawed. The federal court misapplied the *Dion* test requiring express legislative intent to abrogate Indian treaty rights. Instead of looking for express legislative intent to abrogate the treaty, the federal court focused, as the Florida court did, on the comprehensiveness of the Endangered Species Act, the Alaskan native exception, and the arguable inclusion of Indians within the definition of "person."[121] The federal court "discarded the *Dion* test in favor of a more liberal test built upon a series of inferences."[122] The federal court also relied on legislative history of other acts similar to the ESA that were not passed to find Congressional intent to abrogate.[123] In essence the federal court "spoke for Congress" and "judicially created legislative history for the ESA."[124]

The impact of the *Billie* decisions on future law could be enormous. Though *Dion* sets out a rather stringent test for determining when abrogation of a treaty right can occur, the *Billie* decisions indicate how state and federal courts may interpret that test. When dealing with broad legislative statutes such as the Bald Eagle Protection Act or the Endangered Species Act, *Dion* called for "clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating

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116. *Id.*

117. *Id.*

118. State v. Billie, 497 So. 2d at 894.

119. Laurence, *supra* note 1, at 18.

120. *Id.*

121. United States v. Billie, 667 F Supp. at 1491.

122. Miller, *supra* note 115, at 569.

123. An Interior Department official, at a House Subcommittee hearing on the Predatory Mammals and Endangered Species: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries, 92d Cong. 2d Sess. 144 (1972), testified that "to eliminate Indian treaty rights, it should do so 'expressly.' " This legislation was never passed and to use it as evidence of express legislative intent to abrogate Indian treaty rights is inaccurate. *See* Miller, *supra* note 115, at 570.

124. Miller, *supra* note 115, at 570.

the treaty ."[125] The courts in the *Billie* decisions sidestepped this test and relied instead on the general comprehensiveness of the Endangered Species Act and a "negative inference that the nonexclusion of Indians under the ESA clearly indicated an intention to abrogate Indian treaty rights."[126]

In addition, the Florida district court in *State v. Billie* also gave states with criminal prohibitory statutes under Public Law 280 the right to supersede treaty rights in the interest of conserving a species.[127] Also, the federal court in *United States v. Billie* created legislative history for the ESA in order to find express intent to abrogate.[128] The effect is to abrogate Indian treaty rights without meeting the stringent *Dion* test.

CONCLUSION

State v. Billie and *United States v. Billie* go far beyond the decision in *Dion*. Both misuse the "express intent" test to find treaty abrogation and effectively extend abrogation rights to states in the interest of conservation and to Congress when it enacts comprehensive legislation that does not contain express intent. This, however, is not the real significance of the *Billie* decisions. These decisions signify that the Florida Panther and other endangered species are still not receiving the protection they require. The luxury no longer exists to continue to divide this issue into an Indian/non-Indian issue. The Florida panther is disappearing and it no longer matters who is to blame. In order to save the panther, Indians and non-Indians need to cooperate to save this majestic creature from extinction.

125. 476 U.S. at 740.
126. Miller, *supra* note 115, at 570.
127. State v. Billie, 497 So. 2d at 891.
128. U.S. v. Billie, 667 F. Supp. at 1490.