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Indian Law - Great Nations, like Great Men, Should Keep Their Word; But Do They - United States v. Dion

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CASE NOTE

INDIAN LAW—"Great Nations, Like Great Men, Should Keep Their Word;" But Do They? *United States v. Dion,* 106 S. Ct. 2216 (1986).

Dwight Dion, Sr., is a member of the Yankton Sioux Tribe,[1] which resides on its reservation in South Dakota.[2] On May 18, 1983, Dion was indicted on several counts of taking eagles on the reservation[3] and selling bald and golden eagles[4] in violation of the Eagle Protection Act,[5] the Migratory Bird Treaty Act[6] and the Endangered Species Act.[7] The district court dismissed Count 12, which charged Dion with taking[8] an eagle in violation of the Eagle Protection Act.[9] A jury then convicted Dion of all other counts against him.[10]

In an en banc decision, the Eighth Circuit upheld the dismissal of Count 12,[11] relying on *United States v. White.*[12] That court also held that the district court erred in finding that the Endangered Species Act abrogated Dion's treaty rights and, accordingly, vacated the convictions on Counts 8 and 10 involving the taking of eagles.[13] The Eighth Circuit upheld all of the convictions involving sales, saying that Dion had no treaty right to sell eagle parts or carcasses.[14]

The Supreme Court granted the Government's petition for certiorari to review the court of appeals' affirmation of the dismissal of Count 12 and its reversal of the conviction on Counts 8 and 10.[15] The Supreme Court held that the court of appeals erred in recognizing Dion's treaty defense to Eagle Protection Act and Endangered Species Act violations.[16] The Court reversed the Eighth Circuit decision and held that the Eagle Protection Act abrogated Dion's treaty right to hunt bald or golden eagles.[17]

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1. United States v. Dion, 106 S. Ct. 2217 (1986). Dion's tribal membership was not conclusively established at trial. *See* United States v. Dion, 752 F.2d 1261, 1270 (1985). Both parties in the Supreme Court, however, stipulated to Dion's tribal membership. Brief for the United States at 10, *Dion* (No. 85-246); Brief of Respondent at 2, *Dion* (No. 85-246) [hereinafter Brief of Dion].
2. Brief of Dion at 2, 3.
3. *Dion,* 106 S. Ct. 2218. Dion testified at trial that the birds were all killed on the reservation. The Eighth Circuit assumed that fact, as did the Supreme Court.
4. Brief of Dion at 1.
5. 16 U.S.C. §§ 668-668d (1982).
6. *Id.* §§ 703-711 (1982).
7. *Id.* §§ 1531-1543 (1982).
8. "Taking" is defined in the Endangered Species Act as follows: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1982).
9. United States v. Dion, 752 F.2d 1261, 1262 (8th Cir. 1985). The September 8, 1983, order of the District Court dismissing Count 12 of the indictment is unreported.
10. *Id.* at 1262.
11. *Dion,* 752 F.2d at 1270 (en banc); 762 F.2d 674, 694 (1985) (panel opinion).
12. United States v. White, 508 F.2d 453 (8th Cir. 1974).
13. *Dion,* 752 F.2d at 1270.
14. *Id.*
15. United States v. Dion, 106 S. Ct. 270 (1985) (mem.).
16. *Dion,* 106 S. Ct. at 2218.
17. *Id.* at 2223.

This casenote analyzes the legal standards by which the Court determines congressional intent to abrogate Indian treaty rights. It specifically examines those standards in relation to the Eagle Protection Act and, further, explores possible distinguishing factors which may explain the Court's finding of congressional abrogational intent in this case.

BACKGROUND

When courts construe provisions in Indian treaties, several principles are well recognized: any ambiguities in the treaty will be construed in favor of the tribe;[18] treaty provisions are construed as the Indians would have understood them when the treaty was made;[19] and, if a treaty is silent on the reservation of hunting and fishing rights, those rights are deemed to have been retained unless subsequently granted away.[20] As an overall proviso, Indian treaties are always liberally construed in favor of the tribe.[21]

There is no question that Congress has the power to abrogate Indian treaties or treaty rights when circumstances demand changes for the country's good, as well as for the good of the Indians themselves.[22] Uncertainty arises, however, when it becomes necessary to determine how congressional abrogation should be effected.[23]

In *Menominee Tribe of Indians v. United States*,[24] the Federal Government terminated federal supervision of tribal members and property and provided that state laws applied to the Indians by way of the Menominee Termination Act of 1954.[25] The State of Wisconsin subsequently prosecuted some Menominees for violation of fishing and hunting regulations. The Wisconsin Supreme Court held that the state regulations were valid because the Menominee's hunting and fishing rights had been abrogated by the 1954 Termination Act.[26] The tribe then sued in the Court of Claims to recover just compensation for the loss of their rights. That court held that the tribe's hunting and fishing rights had not been abrogated.[27] After granting certiorari, the Supreme Court considered that only two months after passing the Termination Act, Congress had passed another statute

18. *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908).

19. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832); *see also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222 (1982 ed.); 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, 617 (1975).

20. *White*, 508 F.2d 453, 457 (8th Cir. 1975) (quoting United States v. Winans, 198 U.S. 371 (1905)).

21. *See, e.g.*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912).

22. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

23. Wilkinson & Volkman, *supra* note 19, at 608.

24. 391 U.S. 404 (1968).

25. 25 U.S.C. §§ 891-902 (1954).

26. *Menominee*, 391 U.S. at 407.

27. *Id.*

dealing with the same subject. That statute, Public Law 280,[28] granted certain states, including Wisconsin, jurisdiction over offenses committed by or against Indians in Indian country.[29] The statute also specifically instructed that nothing in the section shall deprive any Indian of hunting or fishing rights granted under federal treaty.[30] Harmonizing the two acts, the Supreme Court determined that, although federal supervision over tribal property had ceased, the Menominee hunting and fishing treaty rights remained intact. The Menominees were concerned that, because the Termination Act did not address hunting and fishing rights, it would, by implication, abolish those rights.[31] It was therefore argued that those rights were indeed abolished by the Termination Act. The Supreme Court responded to that argument by holding not only that the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress, but that abrogation would not be implied in a backhanded manner.[32] The Court also rejected the premise that Congress would subject the United States to compensation claims by destroying treaty rights without explicitly indicating its intention.[33]

Faced with facts similar to those in *Dion*, the Eighth Circuit had earlier held in *United States v. White* that congressional silence on the issue of Indian treaty rights in enacting the Eagle Protection Act and the 1962 amendment to that legislation evidenced the absence of congressional intent to abolish the Indian's right to hunt eagles.[34] The Court also considered the Department of the Interior's (Interior) position that Indians were not subject to the Migratory Bird Treaty Act.[35] The court held that congressional silence and the Department of the Interior's position, taken together, confirmed that Congress did not intend the Eagle Protection Act as a backhanded abrogation of the Indian's treaty right to hunt eagles.[36] The court also emphasized the criminal penalties for an Eagle Protection Act violation in holding that the necessary congressional intent for abrogation of an express treaty right was lacking. It stated that "the specificity which we require of our criminal statutes is wholly lacking here as applied to an Indian on an Indian reservation."[37] The court concluded that, because neither the Act nor its legislative history mentioned Indian treaty rights, Congress did not intend to abolish the Indian treaty right to hunt eagles.[38]

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28. 18 U.S.C. § 1162 (1982). This was the result of an amendment to the original Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953)).

29. Land within the boundaries of an Indian reservation is considered "Indian Country." F. COHEN, *supra* note 19, at 27.

30. *Menominee*, 391 U.S. at 411.

31. *Id.* at 408.

32. *Id.* at 412-13.

33. *Id.*

34. 508 F.2d 453, 458 (8th Cir. 1974).

35. *Id.*

36. *Id.*

37. *Id.* at 459.

38. *Id.*

A later case, *Rosebud Sioux Tribe v. Kneip*,[39] illustrated a situation where the Court found congressional intent to terminate an Indian treaty right. The Court considered the legislative history and circumstances surrounding the passage of a 1904 Act[40] and concluded that Congress intended to diminish the boundaries of the Rosebud Sioux reservation.[41] In 1901 the Indians entered into an agreement with the government, which provided for the cession of land within the Rosebud reservation to the United States for a specified price. The 1901 agreement was never ratified by Congress because of a dispute over the payment provision.[42] The Court noted that the significance of the 1901 agreement was that, had it been ratified, it undisputedly would have diminished the Rosebud reservation.[43] In 1904, Congress unilaterally[44] passed an act that incorporated, verbatim, the cession language of the 1901 agreement. The Court reasoned that, since the only difference between the 1901 agreement and the 1904 Act concerned land payment methods, the objective of the two was the same.[45] Since the undisputed intent of the 1901 agreement was to diminish the reservation boundaries, congressional intent of the 1904 Act was also found to diminish the reservation.[46]

Another case which dealt with termination of an Indian reservation was *Mattz v. Arnett*.[47] The Court looked to the language of the Act, its legislative history and surrounding circumstances,[48] but it was unable to find the necessary congressional intent to terminate the reservation. In support of its holding, the Court stated that many bills had been introduced which expressly provided for termination and, hence, that Congress was well aware of how termination of a reservation could be achieved.[49]

In the context of hunting eagles, federal district courts have been consistent with the Eighth Circuit holding in *Dion*.[50] For example, in *United States v. Abeyta*,[51] an Indian took an eagle without a permit in violation of the Eagle Protection Act under facts similar to those in *Dion*.[52] The *Abeyta* court cited several cases which involved Indians either taking eagles for non religious purposes or selling eagle parts.[53] The court,

39. 430 U.S. 584 (1977).
40. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254 (1904).
41. *Rosebud*, 430 U.S. at 586-87.
42. *Id.* at 590-91.
43. *Id.* at 591.
44. After Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), Congress possessed the authority to abrogate the provisions of an Indian treaty unilaterally, that is, without tribal consent. *Rosebud*, 430 U.S. at 588.
45. *Rosebud*, 430 U.S. at 597-98.
46. *Id.* at 592.
47. 412 U.S. 481 (1973).
48. It was argued that the presence of allotment provisions in the Act which opened the Klamath reservation lands for settlement meant that the reservation was terminated. The Court disagreed with that interpretation. *Id.* at 504.
49. *Id.*
50. *See, e.g.*, United States v. White, 508 F.2d 453 (8th Cir. 1974).
51. 632 F. Supp. 1301 (D.N.M. 1986).
52. *Id.* at 1303.
53. *Id.* at 1305-06. Two of the cases were United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) (confirming the conviction of an Indian for shooting an eagle after the District

however, specifically distinguished those cases because the defendant in *Abeyta* had undisputedly killed the eagle for religious purposes.[54] The court held that it could not infer an intent by Congress to abrogate the right to hunt eagles which was preserved by an Indian treaty. It reasoned that "the stakes are too high and the legislative evidence too slight to warrant such a flamboyant deduction."[55] The *Abeyta* court specifically recognized that the United States Congress owes a fiduciary duty to native Americans; requiring Congress to act explicitly and expressly to relinquish any prior agreement insures that Congress properly exercises those fiduciary standards.[56] Using this approach, the court held that Congress did not intend to abolish the Indian treaty right to hunt eagles for religious purposes when it amended the Eagle Protection Act.[57]

The Court, through the years, added to the factors with which to determine congressional intent to abrogate an Indian treaty right. The statutory language, surrounding circumstances, and the act's legislative history are all acceptable sources for determination of congressional intent. The trend had been to find intent to abrogate a treaty right only when faced with conclusive legislative history which left no room for alternative interpretation. With *Dion*, the Court was faced with the opportunity to follow that trend, or to deviate from the principle of deference to the Indians in the face of doubtful legislation.

THE PRINCIPAL CASE

In *Dion*, the Court recognized first that Congress has the power to abrogate Indian treaty rights when circumstances demand changes in the interest of the country or of the Indians.[58] The Court also acknowledged that congressional intent to abrogate must be plain and clear, that abrogation will not be found absent explicit statutory language, and that backhanded abrogation will not be recognized because abrogational intent will not be lightly imputed to Congress.[59] It based this standard of review on the premise that "Indian treaty rights are too fundamental to be easily cast aside."[60]

The Court then reviewed various standards which courts have used to determine whether a clear and plain intent to abrogate treaty rights exists. After this review, it ruled that "what is essential is clear evidence that Congress actually considered the conflict between its intended

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Court had found that the Indian did not kill the eagle for religious purposes) and United States v. Allard, 397 F. Supp. 429, 431 (D. Mont. 1975) (faced with a prosecution for the *sale* of eagle parts, the court stated that Congress did not have Indians in mind when it enacted the eagle protection laws).

54. *Abeyta*, 632 F. Supp. at 1306.
55. *Id.*
56. *Id.* at 1306-07.
57. *Id.*
58. *Dion*, 106 S. Ct. at 2220.
59. *Id.*
60. *Id.*

action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[61]

Applying these principles to the case before it, the Court found the requisite congressional intent to abrogate Indian treaty rights to hunt eagles. In making that determination, the Court stated that it found a strong suggestion of abrogational intent on the face of the Eagle Protection Act, but it relied primarily on the 1962 amendment to the Act and its legislative history.[62] The Court reasoned that, by including an exception to the Act which allows the Secretary of the Interior to issue permits to take eagles for Indian religious purposes, Congress conclusively evidenced that it "considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle."[63] The Court's main impetus for this conclusion was a letter to the House subcommittee on Merchant Marine and Fisheries from the Assistant Secretary of the Interior. The letter mentioned the eagle's religious significance to Indians and suggested that the bill permit the Secretary to allow the use of eagles for Indian religious purposes.[64] The letter was reprinted in both the House and Senate hearing reports on the amendment.[65] This was the sole piece of legislative history upon which the Court based its finding of abrogational intent.

The Court did not address Dion's argument that Congress included the permit provision to allow eagle hunting off of reservation lands, thus enabling non reservation Indians to hunt eagles.[66] In addition, the Court specifically declined to address the question of whether the Endangered Species Act abrogated Dion's right to hunt eagles. It reasoned that Dion's treaty right had been abolished by the Eagle Protection Act and that the later enactment of the Endangered Species Act could not revive a right that had been abrogated. The Court held, therefore, that because Dion's right to hunt eagles had been terminated, it was unnecessary to determine whether Congress intended to abrogate that right through the Endangered Species Act.[67]

ANALYSIS

Recent court treatment regarding the question of congressional intent to abrogate Indian treaty rights indicates a trend to protect those rights. The Indians granted a vast quantity of land to the United States

61. *Id.*

62. The purpose of the 1962 bill was to expand the Act to cover the golden eagle. This was based on the fact that golden eagles are easily mistaken for the bald eagle. S. REP. No. 1986, 87th Cong., 2d Sess. 1 (1962).

63. *Dion*, 106 S. Ct. at 2222.

64. *Id.* at 2221.

65. H.R. REP. No. 1450, 87th Cong., 2d Sess. 3 (1962); S. REP. No. 1986, *supra* note 62, at 5 (1962).

66. *Dion*, 106 S. Ct. at 2223.

67. *Id.* at 2223-24.

Government, and the courts, in return, have seen fit to protect those lands and rights retained by the Indians under a fiduciary standard.[68] The Court manifests this protection by requiring that Congress show a clear and plain intent to abrogate treaty rights.[69] Today, through its decision in *Dion*, the Supreme Court moves away from that fiduciary standard of protection without really 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. The Court in *Dion* found abrogation of an Indian treaty right where Congress never mentioned Indian treaty rights, either on the face of the Act or anywhere in its legislative history.

The first issue regarding the effect *Dion* will have on future abrogation cases deals with what evidence can be used to show congressional intent to abrogate. In *Dion*, the Court relied on a letter from Assistant Secretary of the Interior Biggs to show legislative intent to abrogate Dion's treaty right to take eagles.[70] The letter suggested that the bill should allow Indians to use eagles for religious purposes. Congress followed Interior's suggestion. The Court inferred from that action that Congress interpreted Interior's suggestion to be an abrogation of the Indian treaty right to hunt eagles on reservations.

In giving the letter its own interpretation, the Court chose to ignore the possibility that the suggestion was made because Interior was concerned with non-reservation Indians. Non-reservation Indians do not have

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68. F. COHEN, *supra* note 19, at 225.

69. *Dion*, 106 S. Ct. at 2220.

70. The letter was long, dealing mostly with the similarities of bald and golden eagles, and the protection of the golden eagle up to that point. The small portion referring to Indians is as follows: "The golden eagle is important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them. We note that the Handbook of American Indians (Smithsonian Institution, 1912) Vol. I, p. 409 states in part, as follows:

> "Among the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship. This is expressed in the employment of the eagle by the Indian for religious and aesthetic purposes only.***
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> "The mythology of almost every tribe is replete with eagle beings, and the widespread thunderbird myth relates in some cases to the eagle. In Hopi myth the man-eagle is a sky being who lays aside his plumage after flights in which he spreads devastation, and the hero who slays him is carried to the house in the sky by eagles of several species, each one in its turn bearing him higher. The man- eagle myth is widely diffused, most tribes regarding this being as a manifestation of either helpful or maleficent power.

"There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites. The Hopi, Zuni, and several of the Pueblo groups of Indians in the Southwest have great interest in and strong feelings concerning eagles. In the circumstances, it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle. If enacted, the bill should therefore permit the Secretary of Interior, by regulation to allow the use of eagles for religious purposes by Indian tribes." S. REP. No. 1986, *supra* note 62, at 5.

the treaty rights which reservation Indians enjoy, yet they too may need eagles for religious purposes. Also, there may be no eagles available on reservation lands to fill religious needs; an exception was necessary to facilitate the hunting of eagles off treaty-protected, reservation lands. A memorandum circulated within Interior supports this theory. The memorandum stated that the Eagle Protection Act did not apply to Indians within Indian reservation boundaries.[71] The Court dismissed the significance of the memorandum by saying that there was no reason to believe Congress was aware of its contents.[72]

The memorandum's relevancy, however, lies not in Congress' knowledge of its content, but in the Court's interpretation of Assistant Secretary Biggs' letter. Interior's position, as stated in the memorandum, was that the Eagle Protection Act did not apply within Indian reservations. This supports the argument that Biggs' letter to the subcommittee was only expressing concern for non-reservation Indians who were not already exempted from the Eagle Protection Act because of treaty rights. The logic of this conclusion is that Biggs, as Assistant Secretary of the Interior, was aware of his Department's position on the applicability of the Eagle Protection Act to Indians. Thus, his letter to the subcommittee did not contradict that position but addressed a problem not covered by Interior's policy—the problem of Indians hunting eagles for religious purposes outside reservation boundaries. The danger of the approach taken by the Court in *Dion* is illustrated by the confusion which results from the use of inconclusive evidence of this type to show congressional intent to abrogate Indian treaty rights.

The Supreme Court stated that the new standard for determination of congressional intent is whether there "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."[73] The Court stated its holding and then chose not to follow it. The legislative history on which the Court relied did not indicate that Congress knew it was dealing with an Indian treaty right, nor did it show that Congress consciously or specifically acknowledged and resolved any conflict between congressional intent and a treaty right by abrogation. The Court found abrogation of an Indian treaty right without clear evidence that Congress actually considered the conflict between its intended action and Indian treaty rights, and thus failed to follow its own standard for finding an abrogation. More importantly, it seriously confused the established standard, which properly respected the United States' fiduciary duty towards Indian treaty rights. As if to add insult to injury, the Court offered no explanation for its departure from previous treaty abrogation cases in its short opinion in *Dion*.

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71. Brief of Dion at 21 (citing Memorandum from the Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., to the Director of the Bureau of Sport Fisheries and Wildlife (Apr. 26, 1962)).

72. *Dion*, 106 S. Ct. at 2223.

73. *Id.* at 2220.

One might explain the Court's novel approach in terms of Dion's reason for taking the eagles. The controlling factor in cases finding a violation of the Eagle Protection Act by Indians appears to be the presence of a commercial sale or a nonreligious purpose for taking an eagle. The courts have traditionally had no sympathy for Indians accused of taking eagles for a nonreligious purpose or for those accused of selling eagle parts. They have been quick to find either abrogation of a treaty right or no treaty right at all.[74] Dion was convicted of selling eagle parts,[75] and the Supreme Court was aware of that conviction when it decided the case.[76] This evidence in the record could explain the Court's finding of a treaty right abrogation on the basis of such scant legislative history.

CONCLUSION

In *Dion*, the Supreme Court took a step away from the long-recognized standard of fiduciary protection of Indian treaty rights. The Court found congressional intent to abrogate Indian treaty rights in the Eagle Protection Act absent a showing of clear and plain abrogational intent of any kind. Instead, it relied on inconclusive legislative history, the meaning of which is unclear. As a practical matter, the Court has now confused the established standards for finding congressional intent to abrogate an Indian treaty right. General case law indicates that when the stigma of a commercial purpose is attached to an Indian taking or using an eagle, courts do not hesitate to find a violation of the Eagle Protection Act, which is not subject to a treaty defense. Perhaps that distinction can be used to protect an Indian treaty right to take and use eagles for religious purposes.

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74. *See, e.g.*, United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980); United States v. Allard, 397 F. Supp. 429, 431 (D. Mont. 1975).

75. *Dion*, 752 F.2d at 1262.

76. *Dion*, 106 S. Ct. at 2219. The Court discusses the inconsistency of the en banc court stating Dion was taking eagles for commercial purposes, and then refusing to pass on that issue. *Id.* at 2219 n.3.

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This Section of the Land and Water Law Review
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