

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-246

TITLE UNITED STATES, Petitioner V. DWIGHT DION, SR.

PLACE Washington, D. C.

DATE March 25, 1986

PAGES 1 thru 42



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 85-246

DWIGHT DION, SR. :

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Washington, D.C.

Tuesday, March 25, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:13 o'clock p.m.

APPEARANCES:

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
pro hac vice, on behalf of the petitioner.

TERRY L. FECHOTA, ESQ., Rapid City, South Dakota; on  
behalf of the respondent.

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

JEFFREY P. MINEAR, ESQ.,

pro hac vice,

on behalf of the petitioner

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TERRY L. PECHOTA, ESQ.,

on behalf of the respondent

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 next in United States against Dion.

4                    Mr. Minear,. I think you may proceed whenever  
5 you are ready.

6                    CRAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.,  
7 PRO HAC VICE, ON BEHALF OF THE PETITIONER

8                    MR. MINEAR: Mr. Chief Justice, and may it  
9 please the Court, the question in this case is whether  
10 an Indian may assert tribal hunting rights as a defense  
11 to prosecution for taking wildlife in violation of  
12 federal conservation statutes.

13                   The focus in this case is on protection of our  
14 national symbol, the bald eagle, a majestic but  
15 endangered species. Despite extensive federal  
16 protection under the Bald Eagle Act and the Endangered  
17 Species Act, the eagle remains the frequent object of  
18 black market trade.

19                   In 1980, the Department of Interior initiated  
20 a major undercover operation to halt the illegal killing  
21 and sale of eagles in South Dakota. Respondent, a  
22 Yankton Sioux Indian, was among those apprehended.

23                   At trial, the United States produced extensive  
24 evidence that respondent had engaged in a series of  
25 eagle transactions over a two-year period in which he



1 had offered to kill, killed, and sold eagles for profit  
2 to undercover agents posing as Indian crafts dealers.

3 The jury found respondent guilty of killing  
4 bald eagles, in violation of the Endangered Species Act,  
5 and of selling eagles and other protected birds in  
6 violation of the Bald Eagle Act and the Migratory Bird  
7 Treaty Act.

8 The United States Court of Appeal for the  
9 Eighth Circuit sitting en banc partially vacated  
10 respondent's conviction. The court concluded that  
11 Yankton Sioux Indians have an implied treaty right to  
12 hunt eagles for noncommercial purposes. The court  
13 further concluded that neither the Bald Eagle Act nor  
14 the Endangered Species Act demonstrated sufficient  
15 Congressional intent to limit that right.

16 The court stated that the United States could  
17 retry respondent, but the government would be required  
18 to prove that respondent had taken the eagles for  
19 commercial purposes.

20 The United States' position in this case is  
21 straightforward. We submit --

22 QUESTION: Mr. Minear, may I ask the status of  
23 what it is we are reviewing? I guess the en banc court  
24 remanded to a panel of the Eighth Circuit.

25 MR. MINEAR: That is correct.

1 QUESTION: And the panel on remand found that  
2 the takings were for commercial purposes. And I take it  
3 that is not contested. That is not an issue any more.

4 MR. MINEAR: We don't believe that it is  
5 contested. This is a finding that the Court of Appeals  
6 panel did make. It made it in the context --

7 QUESTION: So are we being asked to review the  
8 en banc judgment that occurred before the remand?

9 MR. MINEAR: Yes, that is right. The issue  
10 that this Court is reviewing is whether or not this  
11 affirmative defense in fact exists. We submit that  
12 there is in fact no commercial or noncommercial taking  
13 defense for Indians in these cases.

14 QUESTION: And all we are looking at is the  
15 question of, if it is not for a commercial purpose and  
16 not for a religious purpose.

17 MR. MINEAR: That is right, Your Honor.

18 QUESTION: Is that right?

19 MR. MINEAR: Yes. We think that the Court of  
20 Appeals has foreclosed takings and made them illegal in  
21 the other situations.

22 Continuing, we submit that Congress does not  
23 compromise Indian hunting rights by an act of general  
24 prohibition on the taking of wildlife applicable to  
25 Indians and non-Indians alike, designed to prevent

1 extinction of the species.

2 In this instance, Congress has given special  
3 protection to the nation's severely threatened eagle  
4 population through the Bald Eagle Act and the Endangered  
5 Species Act. As Congress plainly recognized, these  
6 statutes require nationwide coverage, and cannot  
7 function effectively unless everyone is subject to the  
8 conservation regime.

9 QUESTION: Do you regard the golden eagle as  
10 threatened with extinction today?

11 MR. MINEAR: Your Honor, the Congress has made  
12 that determination in its 1962 amendments to the Bald  
13 Eagle Act. As a preamble to its statutory amendments,  
14 it stated that the Bald Eagle Act --

15 QUESTION: They certainly treated the two  
16 types of eagles differently, did they not?

17 MR. MINEAR: Yes, they did treat them somewhat  
18 differently, although both are --

19 QUESTION: Somewhat? Considerably different.

20 MR. MINEAR: In both cases, bald eagles and  
21 golden eagles, the prohibitions apply to both of these  
22 eagles, in both cases. The only difference of any great  
23 substance, I think, is that in 668, the provision that  
24 permits the Secretary to allow certain limited takings,  
25 and he prescribed those by regulation, while in the case

1 cf the bald eagle they can only be taken by permit.

2 QUESTION: Well, I thought the government  
3 conceded that the golden eagles were not endangered, but  
4 that when they were young they resembled bald eagles,  
5 and therefore as a prophylactic measure the government  
6 decided to prohibit the taking of either. Is that  
7 correct?

8 MR. MINEAR: Your Honor, I don't believe that  
9 is quite correct.

10 QUESTION: That certainly is what came through  
11 to me, too. Straighten us out.

12 MR. MINEAR: Okay. Your Honor, the Bald Eagle  
13 Act was amended in 1962. In the preamble to that Act,  
14 Congress stated --

15 QUESTION: That is 20 years ago.

16 MR. MINEAR: Yes.

17 QUESTION: Go ahead.

18 MR. MINEAR: Stated that it had two purposes  
19 for extending protection to the gold eagle. One was to  
20 prevent the eminent extinction which Congress realized  
21 could occur given the large number of takings that were  
22 occurring at that time. In addition, Congress also  
23 acted that the immature bald eagle was indistinguishable  
24 from the golden eagle, and for that reason protection  
25 was also extended to the golden eagle, to prevent any



1 inadvertent takings of the bald eagles.

2 As this time the golden eagle is not listed as  
3 an endangered species. It has not been listed under the  
4 Endangered Species Act as an endangered species. We  
5 nevertheless submit that there is a substantial threat  
6 to the golden eagle population.

7 We submit that there is no real conflict  
8 between Indian hunting rights and the federal statute.  
9 This conclusion is not only sensible, it is consistent  
10 with the Yankton Sioux treaty, the statutory language,  
11 and the nation's vital interest in protecting endangered  
12 species.

13 We turn first to the Indian treaty itself.  
14 The 1858 treaty with the Yankton Sioux makes no mention  
15 whatsoever of specific Indian hunting rights, much less  
16 the right to hunt eagles. The treaty did not, of  
17 course, prohibit the tribe from continuing to hunt game  
18 on its reserved lands. However, it did not give them an  
19 absolute and unfettered right to take eagles regardless  
20 of consequences.

21 When the treaty was negotiated, both parties  
22 prized eagles, the United States as its national symbol  
23 since 1782, and the Indians as a sacred object. Neither  
24 party recognized that wildlife resources were  
25 exhaustible, and neither contemplated how eagles might

1 be allocated if they later became scarce.

2 Certainly under these circumstances the  
3 government does not surrender through silence its  
4 sovereign power and responsibility to protect eagles for  
5 future generations. Instead, the government retained  
6 that right as an exercise of its tribal trust authority  
7 and for the public at large.

8 Likewise, the Yankton Sioux, who considered  
9 the capture of an eagle a sacred activity, had no reason  
10 to expect that the treaty gave them an absolute right to  
11 kill eagles. Indeed, unlimited Indian hunting of eagles  
12 would destroy the very treaty right they now claim.

13 In short, whatever hunting rights the Yankton  
14 Sioux might possess, they do not have an absolute right  
15 to conduct hunting activities that threaten the survival  
16 of a species that is of great importance to the entire  
17 nation.

18 An examination of the Bald Eagle Act and the  
19 Endangered Species Act leads to the same result.  
20 Congress plainly intended that these statutes, framed in  
21 terms of universal application, would apply to Indian  
22 tribes. It is well settled that federal laws of general  
23 application generally do apply to Indians, and this  
24 principle has been firmly established since the 1930's,  
25 prior to enactment of these statutes.

1 Contrary to respondent's arguments, there was  
2 no need for Congress expressly to include Indians in the  
3 coverage of these Acts. These statutes do not abrogate  
4 any Indian treaty right. Instead, they impose  
5 reasonable regulations that are consistent with the  
6 preservation of those rights.

7 Given the migratory nature of eagles, the  
8 species can only be preserved and restored to its  
9 original numbers if all are subject to the conservation  
10 regime. In turn, all will ultimately benefit from the  
11 fruits of this conservation program.

12 Thus there is no direct conflict between  
13 Indian hunting rights and the federal conservation  
14 statutes. They can be reconciled in much the same  
15 manner that property rights are subject to zoning  
16 restrictions.

17 In all events, the Bald Eagle Act and the  
18 Endangered Species Act amply meet the higher standard  
19 that respondent suggests. Both statutes on their face  
20 show that Congress considered the special cultural and  
21 religious interests of Indians and balanced their needs  
22 against the conservation purposes of these statutes.

23 For example, the Bald Eagle Act provides a  
24 limited exception, authorizing the Secretary to permit  
25 Indians to use eagles for religious purposes. The

1 Endangered Species Act also contains a limited  
2 exception, authorizing Alaskan natives to take  
3 endangered species for subsistence purposes.

4           These carefully limited exceptions applicable  
5 to particular Indian activity demonstrate that Congress  
6 intended these statutes to apply to the Indian tribes.  
7 Moreover, application to the Indians is necessary if the  
8 broad conservation goals of these statutes are to be  
9 met. The nation's 240 Indian reservations have a  
10 population of approximately 750,000 people. They  
11 encompass a land area of approximately 50 million acres,  
12 much of it wildlife habitat.

13           Surely it is unlikely that Congress would have  
14 silently excluded the Indians and their extensive land  
15 holdings from the coverage of these Acts. Indeed, this  
16 point was recently reiterated during the pending  
17 reauthorization of the Endangered Species Act. The  
18 House Subcommittee, informed of the Court of Appeals  
19 decision in this case, held hearings to consider the  
20 need for a legislative response. The Subcommittee  
21 ultimately concluded that there was no need to address  
22 this issue in the reauthorization bill.

23           Representative Breaux, chairman of the  
24 Subcommittee and sponsor of the House bill, explained  
25 this decision on the House floor. He stated, "H.R. 1027



1 does not contain an amendment relating to the take of  
2 endangered species by Native Americans for traditional  
3 purposes. While there have been conflicting court  
4 decisions on this issue, it is clear from the language  
5 of the ESA and the legislative history that the Act is a  
6 nondiscriminatory conservation statute that applies to  
7 all citizens equally."

8 QUESTION: Now, what sort of legislative  
9 history do you feel that is that supports your position?

10 MR. MINEAR: I think it probably could be  
11 characterized as insipient legislative history.

12 QUESTION: Grade F or Grade E perhaps?

13 (General laughter.)

14 MR. MINEAR: At this point the House, shortly  
15 after this statement was made, the House passed the  
16 reauthorization bill, and the action is now pending in  
17 the Senate.

18 QUESTION: Having been assured by the chairman  
19 of the Subcommittee that the coverage of a particular  
20 Act that had been passed many years before was such and  
21 such.

22 MR. MINEAR: Yes, I think that that is  
23 reasonable. It is a reasonable reading of the statutory  
24 language.

25 QUESTION: I do, too, but the question is, how

1 much additional weight do you give to this little  
2 transaction on the House floor? It seems to me it is  
3 pretty close to the bottom of the barrel.

4 MR. MINEAR: I do believe, Your Honor, that it  
5 is relevant and should be brought to the Court's  
6 attention. I think this Court has stated in other  
7 contexts that how statements should be given -- or floor  
8 statements are entitled to less respect than legislative  
9 reports.

10 QUESTION: But we are not talking, as I  
11 understand it, about a floor statement at the time that  
12 the bill in question was passed, whose coverage we are  
13 now trying to ascertain. We are talking about a floor  
14 statement many years later.

15 MR. MINEAR: Yes, that is right, Your Honor.

16 QUESTION: Certainly we didn't mean that all  
17 floor statements should be brought to our attention.

18 (General laughter.)

19 QUESTION: May I ask you about something that  
20 is perhaps more contemporaneous with the enactment?  
21 What do you have to say about the memorandum from the  
22 office of the solicitor of the Department of the  
23 Interior that is quoted in your adversary's brief at  
24 Page 21 that a treaty Indian is not subject to the  
25 Migratory Bird Treaty Act while on his own reservation?

1 Do you think that is simply an incorrect statement, or  
2 you disavow it, or what?

3 MR. MINEAR: That was a 1962 memorandum, an  
4 internal memorandum.

5 QUESTION: Right.

6 MR. MINEAR: It was quoted in the White  
7 opinion. I have not seen that memorandum. I am not  
8 sure it even still exists, for that matter.

9 QUESTION: Whether it still exists or not, you  
10 don't question that it did at one time exist?

11 MR. MINEAR: Yes, it certainly did exist at  
12 one time, and it was quoted, but what I am pointing at,  
13 Your Honor --

14 QUESTION: We may not have the original copy  
15 of Hamlet, either, but we know what it says.

16 (General laughter.)

17 MR. MINEAR: But, Your Honor, I am not sure  
18 what context that was said in. I guess that is my  
19 primary point on this. But I think if we are going to  
20 look at secondary sources for Congressional intent,  
21 there are a lot of conflicting indications during this  
22 period, from the 1940 period, when the Bald Eagle Act  
23 was originally passed, until 1962.

24 QUESTION: I know, but generally -- I know the  
25 Court has frequently -- Mr. Cohen's work on Indian law

1 and so forth has been treated almost like the Bible from  
2 time to time, and I guess this is the -- I don't know  
3 whether this was Felix Cohen or Solicitor Margo. I am  
4 not sure which it was. But I assume that it has often  
5 been given a little more deference than some internal  
6 memoranda.

7 MR. MINEAR: We are not even sure, Your Honor,  
8 this was in fact from the solicitor himself. The  
9 indication is only that it is a memorandum from the  
10 office of the solicitor. So it could very well have  
11 been a staff person's memorandum. We simply don't know  
12 what level of authority this memorandum came from.

13 QUESTION: It is your position it is just  
14 simply wrong?

15 MR. MINEAR: Yes, I think that it is  
16 inaccurate. I think that that is verified by the  
17 Interior Department's action immediately after the  
18 passage of the 1962 amendments, in which case they  
19 extended the -- they provided the religious exception  
20 would only apply to bona fide Indians, and it seems to  
21 me their interpretation of the religious exception  
22 clearly contemplated that this statute would apply to  
23 the Indians.

24 QUESTION: Are you saying that the Department  
25 of Interior says that this does not exist?



1 MR. MINEAR: No, we have simply been unable to  
2 locate that particular memorandum. I have not been able  
3 to --

4 QUESTION: You mean, the Interior Department  
5 can't locate its own files?

6 MR. MINEAR: Sometimes it is difficult to find  
7 memoranda that are 20 years old.

8 QUESTION: But this is impossible. This is  
9 impossible.

10 MR. MINEAR: I cannot say it is impossible,  
11 no.

12 QUESTION: How do you account for the fact  
13 that they have it and the Interior Department doesn't  
14 have it?

15 MR. MINEAR: I believe that they just cited  
16 the White opinion, which quoted this. I am not sure if  
17 Mr. Pechota has a copy of the memorandum or not.  
18 Perhaps he can elaborate on that.

19 We submit the Bald Eagle Act and the  
20 Endangered Species Act amply demonstrate Congressional  
21 intent to regulate Indian activities. But the  
22 government's position is not only consistent with the  
23 relevant treaties and statutes; it is also consistent  
24 with the public interest in protecting endangered  
25 species.

1           The threat to the bald eagle is quite real.  
2   Recent statistics indicate that there are only 12,000  
3   remaining bald eagles in the lower 48 states.

4           QUESTION: You feel the public interest is  
5   something different than the statutes and treaties  
6   involved here? That is another element of the case?

7           MR. MINEAR: I think it is something that  
8   again should be given consideration. The statute should  
9   be construed in order to effectuate its purposes. And I  
10   think that Congress did intend to protect the bald eagle  
11   through the Bald Eagle Act.

12          QUESTION: Yes, but I thought you were just  
13   entering into a discussion of the public interest after  
14   having concluded your discussion of the statutory and  
15   treaties. But this is just another ramification of the  
16   treaty and legislative argument?

17          MR. MINEAR: Yes, essentially it is, Your  
18   Honor. What I am trying to indicate is that the actual  
19   statistics that indicate the threat to the bald eagle in  
20   this case, just so that the Court understands the  
21   seriousness of the concern of the Interior Department in  
22   this area.

23          The peak population at the Karl Mundt Wildlife  
24   Refuge near where these eagles were taken is only 120  
25   birds. And this small refuge, which is located directly

1 across the river from the Yankton Sioux reservation, is  
2 one of the nation's most important eagle sanctuaries.

3 In this case, respondent himself sold seven  
4 bald eagles to undercover agents in a six-month period,  
5 and he told agents that he killed as many as 20 eagles  
6 in the course of a year. Bald eagles are also found on  
7 105 other Indian reservations. Thus continued taking by  
8 other Indians claiming similar treaty rights poses a  
9 very real threat to the bald eagle population.

10 QUESTION: What about the golden eagle  
11 population?

12 MR. MINEAR: It is less clear that there is an  
13 immediate threat to the golden eagle population. Since  
14 the passage of the 1962 amendments to the Bald Eagle  
15 Act, there has been some extensive -- much greater  
16 protection to the eagles.

17 Nevertheless, the Department of Interior  
18 indicates they have a total of about 1,100 eagle killing  
19 cases since 1983. Many of these are golden eagles. The  
20 total population --

21 QUESTION: Do you have comparable statistics  
22 on golden eagle population?

23 MR. MINEAR: I believe the best statistics  
24 that we have that I received from Interior. There are  
25 approximately 60,000 gold eagles, most of these located

1 in the western United States. There are very few  
2 nesting pairs in the eastern United States, which used  
3 to be a portion of their natural habitat.

4 More generally, if federal conservation  
5 statutes are subordinated to Indian hunting rights,  
6 other important species will be threatened. A number of  
7 other wildlife preserves are located in close proximity  
8 to and in some cases within Indian reservations. A  
9 number of important species, including the grizzly bear,  
10 the grey wolf, and the Florida panther, are all  
11 sometimes found on Indian lands.

12 The Court of Appeals decision in this case  
13 seriously undermines the government's ability to enforce  
14 the Bald Eagle Act and the Endangered Species Act. We  
15 ask this Court to restore the enforcement powers that  
16 Congress intended.

17 I would like to reserve the remainder of my  
18 time.

19 CHIEF JUSTICE BURGER: Mr. Pechota.

20 ORAL ARGUMENT OF TERRY L. PECHOTA, ESQ.,

21 ON BEHALF OF THE RESPONDENT

22 MR. PECHOTA: Mr. Chief Justice, and may it  
23 please the Court, the government's position in oral  
24 argument and in its briefs in this case appears to be  
25 that the Bald Eagle Protection Act and the Endangered



1 Species Act abrogated the right of Dwight Dion as a  
2 tribal member to take eagles while on Indian land, while  
3 on his reservation.

4 In their briefs they seem to say that if it  
5 hasn't been shown that that is the case, in other words,  
6 that abrogation has not been shown under the principles  
7 enunciated by this Court, that there seems to be a  
8 limitation, and that is proper.

9 Lastly, they argue that unless Indians are  
10 prevented from taking eagles for traditional cultural  
11 purposes, that will result in extinction of the species.

12 I would like to address those three points  
13 here today. But before I begin, I would like to clarify  
14 what this case involves and what it does not involve.  
15 Dwight Dion, Sr., was indicted in a multicount indictment  
16 in the United States District Court of South Dakota.  
17 Some of those particular charges dealt with selling.  
18 Others, three of them, dealt with taking.

19 The United States District Court -- or rather  
20 the Eighth Circuit Court of Appeals held that he could  
21 not be charged under the Bald Eagle Protection Act or  
22 the Endangered Species Act for taking. That is all that  
23 they held. They did not hold he could not be prosecuted  
24 for selling, or any other Indian could not be prosecuted  
25 for selling.

1           As a matter of fact, in this case it held that  
2 he could be prosecuted still, further on the three  
3 taking counts that are before this Court if the  
4 government merely showed, Number One, that he was an  
5 Indian, Number Two, it happened on Indian land, and  
6 Number Three, that it was for a commercial purpose.

7           QUESTION: And the respondent hasn't contested  
8 that?

9           MR. PECHOTA: The respondent has not contested  
10 that.

11           QUESTION: And you concede that the treaty  
12 does not incorporate taking for commercial purposes?

13           MR. PECHOTA: That is conceded for the  
14 purposes of this appeal. That is not before the Court  
15 at this time.

16           Now, down through the ages, the life of this  
17 Court, this Court has enunciated many times the  
18 principles that are to be followed in order to abrogate  
19 a treaty, and this Court, as a matter of fact, has been  
20 in the vanguard of protecting Indian treaty rights, and  
21 that is what we are asking you to do in this case, Your  
22 Honors.

23           QUESTION: Well, I guess we first have to know  
24 whether the right to hunt to extinction of a species is  
25 included in the treaty rights.

1 MR. PECHOTA: Okay. First of all, I don't  
2 believe that that is an issue in this case. Number One,  
3 the bald eagle, for example, as you have talked with my  
4 counsel about, is not listed as endangered or threatened  
5 under the Endangered Species Act.

6 QUESTION: The golden eagle.

7 MR. PECHOTA: The golden eagle. Excuse me.  
8 Yes. It was included within the Bald Eagle Protection  
9 Act not because it was endangered or threatened, but  
10 because until it was three or four years old, it was  
11 difficult for people to tell the golden eagle from the  
12 bald eagle. People were shooting bald eagles and saying  
13 that they thought it was a golden eagle. So they  
14 included it in there.

15 That is clear from the amendments that were  
16 enacted in 1962. At the same time that those amendments  
17 were enacted in 1962, and this goes to the extinction  
18 argument -- or, excuse me. At the same time that this  
19 investigation, this Sting investigation was undergone in  
20 South Dakota from 1981 to 1983, the Department of  
21 Interior was issuing depredation permits.

22 In other words, they were authorizing ranchers  
23 to shoot eagles because they were harm to their sheep or  
24 their ccws or other types of animals, and this is  
25 admitted by the government in their brief at Footnote 8,

1 the reply brief at Footnote 8.

2 QUESTION: Could we go back for just a moment  
3 to determine whether it is your position that the treaty  
4 gives the tribe and its members a right to hunt eagles  
5 to their extinction?

6 MR. PECHOTA: It is not the position here that  
7 they give the Indians that right. Number Two, I don't  
8 think that we have that kind of factual situation before  
9 the Court, and Number Three, I think we are overlooking  
10 the fact that Indian tribal governments have authority  
11 on their reservations and many of them have taken the  
12 impetus to enact ordinances that protect the wildlife  
13 that they have on their reservations from extinction or  
14 from abuse by hunting and fishing.

15 The Navajos, for example, have one. There was  
16 another one cited in the amicus brief of the parties  
17 here today in the --

18 QUESTION: Well, if the treaty doesn't include  
19 the right to hunt to extinction, then perhaps it is open  
20 to the federal government to regulate hunting to  
21 extinction.

22 MR. PECHOTA: I think that the government can  
23 abrogate a treaty, there is no doubt about it, if in  
24 fact it does it in the proper manner under the  
25 principles that have been enunciated by this Court. If



1 Congress wants to abrogate a treaty, which they have  
2 done in the past --

3 QUESTION: But if the treaty doesn't cover it,  
4 it isn't a question of abrogation of the treaty at all.

5 MR. PECHOTA: Okay. I don't believe the  
6 treaty in this case gives them the right to hunt to  
7 extinction. If you are asking whether or not the treaty  
8 in this case authorizes, gives the Yankton Sioux tribe  
9 the right to hunt and to take eagles, certainly that has  
10 to be the case.

11 This Court has decided the Menominee case, it  
12 decided the Wyanans case, the Washington Fishing Vessel  
13 case, that have said that when particular Indian tribes  
14 have entered into treaties with the United States and  
15 given up thousands and thousands of acres of land, they  
16 have reserved the right to hunt and fish on their  
17 reservation. It doesn't have to say that we have the  
18 right to hunt a particular species.

19 Now, in the early part of this century in the  
20 Leavenworth v. Kansas Railroad case, this Court said  
21 that there has to be an express specific language of  
22 abrogation, and if there isn't, it is presumptively and  
23 conclusively shown that as a matter of fact the treaty  
24 has not been abrogated. That was an 1876 case. In the  
25 Menominee and the Washington Fishing Vessel case that

1 was decided in the 1970's it was determined there the  
2 same way, that absent explicit language of abrogation,  
3 that the treaties would not be deemed to have been  
4 abrogated.

5 QUESTION: May I ask one preliminary question,  
6 counsel? I am over here.

7 MR. PECHOTA: Yes.

8 QUESTION: We start from the premise that  
9 there is a treaty right, and is the right one to kill  
10 the eagles, because I notice in the House legislative  
11 history there was a suggestion that historically the  
12 tribe did not actually kill the eagles, but rather  
13 trapped them and was able to get their feathers without  
14 actually destroying the eagle.

15 MR. PECHOTA: I think that depended on the  
16 particular tribe that was involved. There was some  
17 reference that that was one of the ways that eagles were  
18 taken by Indian tribes. In the record before the  
19 District Court there were other ways that were alluded  
20 to and described that eagles were taken by Indian  
21 tribes.

22 QUESTION: I see. You think it is clear there  
23 was -- at least there was a right -- they were not, I  
24 take it, not -- this is not a right to hunt and fish for  
25 purposes of food. It is only the ceremonial purpose.

1 MR. PECHOTA: That's correct. There was no  
2 evidence that eagles were ever used as a purpose of  
3 sustenance for tribal members.

4 QUESTION: Well, in this particular case it  
5 was solely for money.

6 MR. PECHOTA: Not -- it hasn't been shown that  
7 these three taking counts, in other words, when Dwight  
8 Dion took the three eagles, or the five eagles that are  
9 involved in this case, in the three counts --

10 QUESTION: Well, he sold it to an agent.

11 MR. PECHOTA: But it sold it later. He sold  
12 it later.

13 QUESTION: But he sold it.

14 MR. PECHOTA: He sold it. I agree that there  
15 is evidence --

16 QUESTION: And he got money for it.

17 MR. PECHOTA: And he got money for the --

18 QUESTION: That is sale for profit.

19 MR. PECHOTA: If in fact -- if in fact --

20 QUESTION: If nothing. That is sale for  
21 profit.

22 MR. PECHOTA: If in fact he took the eagles  
23 initially --

24 QUESTION: And that is what you want to  
25 protect.

1 MR. PECHOTA: No.

2 QUESTION: You want to protect his right to  
3 kill off 100 more of these, and that is it.

4 MR. PECHOTA: No, all I want to protect is the  
5 right of Indian individuals to take eagles for  
6 traditional cultural purposes.

7 QUESTION: All 120 of them.

8 MR. PECHOTA: Not all 120 of them. The  
9 evidence in this case does not show that there were ever  
10 taken nearly that many on this reservation.

11 QUESTION: But the evidence shows that one man  
12 took 20.

13 MR. PECHOTA: No, the evidence --

14 QUESTION: Over a period of a year.

15 MR. PECHOTA: The evidence is disputed on  
16 that, as I set out in my brief. The government says --

17 QUESTION: Whether it is disputed or not,  
18 there is evidence that one man took one-twentieth, which  
19 is of 120.

20 MR. PECHOTA: There is evidence --

21 QUESTION: And if five more did it, that is  
22 the end.

23 MR. PECHOTA: That would be correct.

24 QUESTION: That's right.

25 MR. PECHOTA: And I am not saying --



1 QUESTION: And you want me to sit by and see  
2 that happen.

3 MR. PECHOTA: I am not saying that they should  
4 be authorized to sell those eagles or to take that  
5 particular --

6 QUESTION: Isn't that what is involved in this  
7 case?

8 MR. PECHOTA: No, what is involved in --

9 QUESTION: Doesn't this case involve eagles  
10 that were sold?

11 MR. PECHOTA: No, it involves eagles that were  
12 taken.

13 QUESTION: And sold to the agents.

14 MR. PECHOTA: There was a lapse of time in  
15 there between the time that they were taken and the time  
16 that they were sold. There has been no showing and no  
17 court has held --

18 QUESTION: Well, if there is a lapse of time,  
19 they were sold.

20 MR. PECHOTA: Yes.

21 QUESTION: And that was the purpose of taking  
22 them.

23 MR. PECHOTA: I am not sure that the purpose  
24 of --

25 QUESTION: Well, what other purpose was

1 there?

2 MR. PECHOTA: Dwight Dion is a tribal member  
3 who by the evidence in this case had taken eagles for  
4 other purposes, for tribal members to use in cultural,  
5 traditional ways. He was the person that primarily took  
6 the eagles on that particular reservation. And in the  
7 meantime the government undertook this particular Sting  
8 operation, and he was contacted, and he did sell these  
9 eagles that he had.

10 Now, whether he took them initially for the  
11 purpose of selling them or whether he took them for  
12 traditional cultural purposes initially is a matter that  
13 has to be determined on remand when these cases are  
14 tried if it gets that far.

15 QUESTION: But the eagles are gone.

16 MR. PECHOTA: I don't believe that the eagles  
17 are gone, Your Honor.

18 QUESTION: Well, those 20 are gone.

19 MR. PECHOTA: The 20 eagles that he took  
20 exactly are gone.

21 I would like to talk about the Bald Eagle  
22 Protection Act in the --

23 QUESTION: Before we move on --

24 MR. PECHOTA: Yes.

25 QUESTION: I am over here. Before we move on,

1 would you define what traditional purposes includes?

2 MR. PECHOTA: Traditional purposes include  
3 within the context of this case the right to take  
4 eagles --

5 QUESTION: To do what with?

6 MR. PECHOTA: To use them in religious rites  
7 that are used by the Yankton Sicux tribe of people.

8 QUESTION: Did not the District Court in this  
9 case find the eagles were not used for religious  
10 purposes?

11 MR. PECHOTA: He found -- the eagles that were  
12 taken in this case?

13 QUESTION: Yes.

14 MR. PECHOTA: The eagles that were sold, or  
15 that were taken?

16 QUESTION: Well --

17 MR. PECHOTA: I don't think that the District  
18 Court found that they were not taken or that they were  
19 not used for cultural purposes.

20 QUESTION: He says, "The charges against the  
21 defendant relate to the taking and sale of eagles and  
22 other migratory birds, and I conclude that the  
23 prohibition against these practices does not violate the  
24 defendant's religious rights."

25 MR. PECHOTA: Okay, I think they are saying

1 that he took them for commercial purposes, the ones that  
2 were sold.

3 QUESTION: And in addition to religious  
4 purposes, what other would be included within  
5 conventional -- traditional purposes?

6 MR. PECHOTA: Well, that would be the primary  
7 use.

8 QUESTION: That is the primary one?

9 MR. PECHOTA: Right, within the context of  
10 this case.

11 In applying the principles for abrogation of  
12 treaties to the Acts in this case, the Bald Eagle  
13 Protection Act and Endangered Species Act, we start with  
14 the Bald Eagle Protection Act that was passed in 1940.  
15 Nobody maintains, including the government, that there  
16 was any language in that 1940 enactment that abrogated  
17 any particular treaty right.

18 From 1940 until 1962 that particular Act was  
19 not applied against Indians while they were on their  
20 reservation. In 1962, there were some amendments. The  
21 amendments were to increase the penalties and to include  
22 the golden eagle as a part of the particular statute.

23 Contemporaneous almost with the enactment of  
24 that particular statute was the 1962 memorandum. That  
25 was in April.



1           This amendment was passed in October. Where  
2           the solicitor of the Department of Interior indicated  
3           that the Bald Eagle Protection Act and the Migratory  
4           Birds Treaty Act did not apply to Indians while they  
5           were on their reservations.

6           So, it is illogical and certainly would be not  
7           really following that if in fact their solicitor was  
8           telling them that particular Act could not be applied on  
9           the reservation that by those 1962 amendments they  
10          thought that the particular law was to be applied on  
11          Indian reservations.

12          QUESTION: Can you shed any light on the  
13          authenticity and the authorship of this memorandum?

14          MR. PECHOTA: I took that quote in my brief --

15          QUESTION: Just out of the opinion?

16          MR. PECHOTA: -- out of the White --

17          QUESTION: It just comes from the Office of  
18          the Solicitor --

19          MR. PECHOTA: Right.

20          QUESTION: -- and we don't know just how high  
21          up the particular author was.

22          MR. PECHOTA: Right. And that came from the  
23          District Court decision in White.

24          There was the permit provision that was  
25          included in that 1962 amendment, but as the Eighth

1 Circuit Court of Appeals determined, certainly there  
2 were other explanations other than that this was to  
3 apply to the Indian reservations that could explain that  
4 permit provision in that amendment.

5 The Eighth Circuit said that there were  
6 Indians and non-Indians outside of the reservations,  
7 that did not live on the reservations, that certainly  
8 could and probably would have been involved in Indian  
9 religious rites where these particular eagle feathers  
10 and parts of eagles could have been used and would have  
11 been necessary.

12 So, this permit provision does not apply by  
13 its terms to Indian reservations. It applies to Indians  
14 everywhere, whether or not they are on Indian  
15 reservations. Certainly that is a logical explanation,  
16 and it would seem according to the respondent that that  
17 is not sufficient and not sufficient language to result  
18 in an abrogation of his right in this particular case.

19 Now, from 1962 to 1973, the date of the  
20 passage of the Endangered Species Act, I was not able to  
21 find any reported cases where the Bald Eagle Protection  
22 Act was applied to Indians in criminal matters while  
23 they were on the reservation. In 1973, the Endangered  
24 Species Act was passed, and there were two provisions in  
25 that particular Act that the government maintains

1 indicates that it was the intent of Congress to abrogate  
2 the right of Indians to take eagles for traditional  
3 cultural purposes.

4 One of them was the exemption that was set in  
5 the Act for Alaskan natives. However, the Court must  
6 keep in mind that two years prior to 1973 Congress had  
7 passed the Alaskan Settlement Act, where the rights of  
8 natives to hunt and fish had been terminated, had been  
9 abrogated in specific language, so it was necessary to  
10 put in the Endangered Species Act some protection for  
11 the Alaskan natives and the Alaskan Indians.

12 Indian tribes in the lower 48 states did not  
13 need that particular protection because they had the  
14 protection of their reserved rights. In addition, keep  
15 in mind that the Alaskan Indians and Alaskan natives  
16 were treated much differently than Indian tribes in the  
17 lower 48 states. They weren't treaty tribes. Earlier  
18 on this Court held that they had no self-governing  
19 rights, and there were very few reservations that were  
20 in Alaska.

21 And so, a logical explanation for that and the  
22 only explanation is that they thought that they needed  
23 the protection that the lower 48 state Indian tribes did  
24 not need.

25 The other provision that the government points

1 to to show that there is an exemption or that there is  
2 an abrogation in this case was a bill that was enacted  
3 in the 92nd Congress, the Congress immediately preceding  
4 the one that passed the Endangered Species Act, which  
5 was the 93rd Congress, and in that Congress, the 92nd  
6 Congress, there were two bills, one that dealt with a  
7 specific exemption, in other words, included a specific  
8 exemption for Indians from the Act, one which did not.

9 Both of those particular bills died with the  
10 92nd Congress after the 92nd Congress adjourned. They  
11 were not introduced again. In the 93rd Congress the  
12 Endangered Species Act was passed, and so they argue  
13 that because these bills had been introduced in a  
14 previous Congress and died, that that is some indication  
15 that in the 93rd Congress, in its passage of the  
16 Endangered Species Act, that that is some intent that it  
17 was intended to abrogate the rights of Indians to take  
18 wildlife on their reservations for traditional cultural  
19 purposes.

20 As the Eighth Circuit Court of Appeals held,  
21 that they would not sanction that kind of backhanded way  
22 of abrogating the treaty right, certainly this Court has  
23 held that unsuccessful attempts at legislation are not  
24 the best guides of legislative history. Certainly I  
25 question whether or not something that happened in the



1 92nd Congress is proper legislative history for  
2 something that subsequently took place in the 93rd  
3 Congress.

4 They also point out in their briefs that there  
5 were some remarks of Subcommittee counsel in the 92nd  
6 Congress who questioned whether or not the Indians  
7 should be given an exemption. And of course the  
8 relevance of that is certainly questionable and of no  
9 value to the Court even if it could rise above the  
10 principles that remarks of people in opposition to  
11 legislation are given little or no weight.

12 I submit to you that when the legislative  
13 history in these Acts are looked at, that there is no  
14 indication whatsoever of any intent on the part of  
15 Congress to abrogate Indian treaty rights, certainly not  
16 the kind of evidence, the kind of material that has to  
17 be shown under the principle that there has to be a  
18 clear expression that Indian rights are going to be  
19 abrogated either in the legislative history or either on  
20 the face of the Act.

21 All of the provisions, both of the provisions  
22 that the government talks about in support of its  
23 position here have logical reasons for being included in  
24 this particular bill. The legislative history does not  
25 say that we intended by any of the provisions that the

1 government points out here, that we intended to abrogate  
2 the right of Indians to hunt while on their reservation.

3 The government also makes the point in its  
4 brief that there really is not an abrogation here,  
5 because Indians can secure eagle parts through the  
6 permit system under the Bald Eagle Protection Act.  
7 First of all, I would submit to you that any time that  
8 you have to go through an administrative procedure where  
9 that particular individual making the decision as to  
10 whether or not you are entitled to something, especially  
11 when you have a reserve right to take it in the first  
12 place, to have it, is an abrogation and limitation on  
13 the right of Indians to take eagles, and it must be so  
14 in this case.

15 In the case of Tulee v. Washington, this Court  
16 previously held in discussing an in common right  
17 involving fishing rights of Indians in the northwest  
18 that to require them to get a state license is an  
19 abrogation of their right, and the same principle should  
20 apply in this particular case.

21 In addition, under that permit provision,  
22 there have been no permits that have been issued to  
23 allow Indians to take eagles. All the eagle or eagle  
24 parts that Indians have been able to get have been from  
25 the Pocatel Repository in Idaho, and they come in

1 decomposed bags where Indians have to wait a year to a  
2 year and a half to get eagles that they need and that  
3 they have the right to use in their Indian cultural,  
4 religious rights.

5 I think it is an understatement and erroneous  
6 to say that that limitation and that permit provision is  
7 not an abrogation of Indian hunting rights as shown.

8 Now, the government also --

9 QUESTION: Is it contrary to the federal  
10 statute to just capture an eagle?

11 MR. PECHOTA: It is contrary to take an  
12 eagle.

13 QUESTION: In any way.

14 MR. PECHOTA: That's right.

15 QUESTION: It doesn't make any difference  
16 whether you kill it or hurt it or not?

17 MR. PECHOTA: No. It is illegal to possess --

18 QUESTION: Right.

19 MR. PECHOTA: -- a particular -- the  
20 government also contends here that if Indians are  
21 allowed to take eagles for traditional cultural  
22 purposes, that the eagle is going to be rendered  
23 extinct. There is nothing, absolutely nothing in the  
24 legislative histories of these bills that we are dealing  
25 with here today, the Bald Eagle Protection Act or the

1 Endangered Species Act, to show that the impact of  
2 Indians being able to take these eagles for traditional  
3 purposes is going to have any kind of an impact  
4 whatsoever.

5 QUESTION: But there is no traditional purpose  
6 in this case. He sold them. Is that traditional?

7 MR. PECHOTA: There is evidence --

8 QUESTION: Or commercial?

9 MR. PECHOTA: And if he sold them, and I  
10 concede that he sold them --

11 QUESTION: If he sold them? He did sell them.

12 MR. PECHOTA: Right, he did sell them. And  
13 if --

14 QUESTION: Why do you keep saying  
15 traditional?

16 MR. PECHOTA: If someone does sell them, then  
17 certainly there is not a traditional culture purpose,  
18 and they are not included within the holding of the Dion  
19 case. Prosecution certainly would be authorized, and if  
20 you have -- something like that occurs, certainly there  
21 is something that can be done by the federal  
22 government. That is a prosecution.

23 There has been no evidence even in the  
24 reauthorization hearings that were held that the  
25 government makes reference to in this last summer, 1985,



1 about Indians being allowed to take these particular  
2 eagles would render them extinct.

3 Within the context of this case, the  
4 government says that the Karl Mundt Refuge is located  
5 adjacent to the reservation. On the record of this  
6 case, the manager of that wildlife refuge was called to  
7 testify, and he had not mentioned or he had not observed  
8 or noticed any diminution in the population of the  
9 eagles on that reserve during the time that this Sting  
10 operation was in effect for the past two years.

11 The point of it is, even if conservation is a  
12 proper way under the Puyallup kinds of decisions to  
13 abrogate a treaty right, which I do not agree with, but  
14 even if you use that particular standard, there has to  
15 be shown something to indicate that there is an impact  
16 on the particular species by Indian takings. They have  
17 not been shown in this case at any place, so we have  
18 statutes that do not clearly abrogate treaties, nor do  
19 we have any showing that Indian takings would result in  
20 the extinction of the gold eagle or the bald eagle.

21 QUESTION: If Congress had in the statute  
22 itself or in the legislative history clearly said that  
23 it is absolutely essential because of the dangers of  
24 extinction to safeguard both the bald eagle and the gold  
25 eagle, and that was a Congressional finding, would you

1 say you nevertheless would have to have a litigation  
2 about that conclusion in the specific case?

3 MR. PECHOTA: I don't think you would have to  
4 have a litigation if they said, by this particular  
5 statute we clearly intend to abrogate the rights of  
6 Indians under their treaties.

7 QUESTION: No, they didn't say that, but they  
8 just say in the preamble or in the body or the  
9 legislative history that we find that the bald eagle is  
10 in danger of extinction, and any taking of them must be  
11 forbidden, and in order to achieve that end we must  
12 protect the golden eagle, too.

13 MR. PECHOTA: I don't believe that that's  
14 sufficient to abrogate the right of Indian people to  
15 exercise their rights, their reserved rights under their  
16 treaties.

17 QUESTION: Well, so in this case if there had  
18 been evidence put on about the bald and the gold eagle  
19 and the dangers and threats to them, and the judge had  
20 found that it is necessary not to recognize a treaty  
21 right in order to keep the bald eagle from being  
22 extinct, what if there had been a finding like that in  
23 this case? I take it you agree that then the treaty  
24 right would not override it.

25 MR. PECHOTA: No. First of all, I disagree

1 with the Puyallup decisions. I talk about those in my  
2 brief. Second of all --

3 QUESTION: Let's assume that we accept  
4 Puyallup.

5 MR. PECHOTA: If you accept Puyallup and there  
6 is a finding that as a reasonable conservation measure  
7 you have to -- you have to prevent Indians from taking  
8 eagles to a certain extent, then under Puyallup that  
9 would be proper.

10 QUESTION: But you say that would have to be  
11 found in a case, that a Congressional finding to that  
12 effect would not suffice?

13 MR. PECHOTA: If in fact there was a  
14 Congressional finding under Puyallup and you agree that  
15 Puyallup should apply in this case, which I don't, then  
16 I agree that that would be sufficient.

17 I have no further comments.

18 CHIEF JUSTICE BURGER: Very well.

19 Mr. Minear.

20 MR. MINEAR: Mr. Chief Justice, unless the  
21 Court has questions, we will waive rebuttal.

22 CHIEF JUSTICE BURGER: Very well.

23 Thank you, gentlemen. The case is submitted.

24 (Whereupon, at 2:01 o'clock p.m., the case in  
25 the above-entitled matter was submitted.)

# CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-246 - UNITED STATES, Petitioner V. DWIGHT DION, SR.

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BY

Paul A. Richardson

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