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ENDANGERED SPECIES

Interior solicitor: Treaties don't exempt tribes from ESA

Michael Doyle, E&E News reporter • Published: Tuesday, January 19, 2021



A last-minute Interior Department legal opinion says Native Americans can still be charged with violating the Endangered Species Act. Francis Chung/E&E News
 Native Americans can still be charged with violating the Endangered Species Act regardless of treaty protections, under a departing declaration by the Interior Department's top political lawyer.

But environmental prosecutors may also lose a little sway under the latest last-minute opinion by Interior Solicitor Daniel Jorjani.

In what amounts to a complicated legal two-step as his term ends, Jorjani upheld the reach of the landmark 1973 law.

"It remains the position of the United States that the federal government has the authority to enforce the ESA against tribal members," Jorjani wrote in a Friday [memorandum](#).

Jorjani added that it is "settled law that each of the States has the ability to regulate reserved hunting and fishing, consistent with the Supreme Court's [precedents]."

At the same time, while acknowledging that "it is not typically the practice of the Office of the Solicitor to revisit decades-old Solicitor Opinions, particularly where their conclusions may not be wholly incorrect," Jorjani withdrew three related opinions issued by his predecessors.

The three withdrawn legal opinions, dating to 1934, 1980 and 1981, analyzed the impact of certain federal conservation laws on the reserved hunting and fishing rights of individual members of recognized tribes.

Jorjani concluded that, contrary to the earlier opinions, neither the ESA nor the Migratory Bird Treaty Act has "the requisite plain language or legislative history demonstrating congressional intent to abrogate" reserved hunting and fishing rights.

"Federal prosecutors have relied on these published opinions to support arguments that are inconsistent with case law, as well as the Department's long-standing approach to advising whether Congress intended through a particular statute to abrogate a treaty or treaty rights," Jorjani wrote.

In 2018, for instance, prosecutors charged a member of the Seminole Tribe of Florida, who was a resident of the Brighton Seminole Indian Reservation, with violating the ESA and Lacey Act. The defendant claimed that his hunting activities were protected by treaty, but prosecutors countered with the prior Interior legal opinion that Congress had essentially repealed reserved hunting rights through enactment of the ESA.

Twitter: [@MichaelDoyle10](#) | Email: mdoyle@eenews.net

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