Analyzing Conflicts Between Indian Treaty Rights and Federal Conservation Regulations: Are State Regulation Standards Appropriate?

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ANALYZING CONFLICTS BETWEEN INDIAN TREATY RIGHTS AND FEDERAL CONSERVATION REGULATIONS: ARE STATE REGULATION STANDARDS APPROPRIATE?

I. INTRODUCTION

In July 1998, officials of the United States Department of Agriculture's Forest Service cited David J. Gotchnik for using a motorized vehicle in a "no motor" area of the Boundary Waters Canoe Area Wilderness (BWCAW) in the Superior National Forest in Minnesota.\(^1\) Gotchnik was traveling across Basswood Lake in northern Minnesota in a canoe powered by an eight horsepower motor.\(^2\) In April 1998, officials cited Mark F. Steptec for crossing frozen Basswood Lake on a motorized all-terrain vehicle.\(^3\) Using a motor vehicle in a designated wilderness area violates 36 C.F.R. § 261(a).\(^4\) Both Gotchnik and Steptec asserted, as an affirmative defense, their rights as members of the Bois Forte Band of Chippewa Indians, a federally recognized

\(^1\) United States v. Gotchnik, 57 F. Supp. 2d 798, 800 (D. Minn. 1999), aff'd, 222 F.3d 506 (8th Cir. 2000).

\(^2\) Id.

\(^3\) Id.

\(^4\) 36 C.F.R. § 293.6 (2000). The regulation provides that:

Except as provided in . . . [sections] 293.12 through 293.16, inclusive, and subject to existing rights, there shall be in National Forest Wilderness no commercial enterprises; no temporary or permanent roads; no aircraft landing strips; no heliports or helispots, no use of motor vehicles, motorized equipment, motor-boats, or other forms of mechanical transport. 36 C.F.R. § 293.6(a) (2000). The Federal Regulations include special provisions governing the Boundary Waters Canoe Area Wilderness. See 36 C.F.R. § 293.16 (2000). Motorboat use is defined as "watercraft propelled by a gasoline or electric powered motor with the propeller below the waterline." 36 C.F.R. § 293.16(a)(1) (2000). Within the BWCAW, there are exceptions to the motorboat restriction that apply to particular locations and particular types of motors. On Basswood Lake, all motorboats are prohibited on that portion "generally north of the narrows at the north end of Jackfish Bay and north of a point on the International Boundary between Ottawa Island and Washington Island." 36 C.F.R. § 293.16(a)(3) (2000). This is where David Gotchnik was cited. Gotchnik, 57 F. Supp. 2d at 800.
Indian tribe. The Chippewa Indians of Minnesota reserved rights to hunt, fish, and gather on lands ceded to the United States in the Treaty of 1854.

On May 28, 1999, the United States District Court for the District of Minnesota upheld the motor vehicle violation, denying a Gotchnik and Steptec's Motion for Entry of Judgment of Acquittal. The court held that the limitation on motor use did not foreclose the defendants from exercising their fishing rights in the BWCAW, but only made the exercise of those rights less convenient. Alternatively, the court held that even if the treaty right included motorized access to fishing locations, the regulations prohibiting the use of motorized equipment in the BWCAW are permissible, non-discriminatory conservation measures.

It based its alternative holding on standards set forth in Puyallup Tribe v. Department of Game (Puyallup I), a case challenging the validity of state conservation measures when applied to Indian treaty rights. Gotchnik and Steptec appealed the judgment.

On August 21, 2000, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court, concluding that the limitation on motor use did not offend the appellants' rights.

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5. Gotchnik, 57 F. Supp. 2d at 800.
6. In this Comment, the term "Indians" is used to describe a legal entity and political entity consistent with case law.
7. See Treaty with the Chippewas, Sept. 30, 1854, U.S.–Chippewas, 10 Stat. 1109 [hereinafter Treaty of 1854]. Article 11 of the Treaty of 1854 provides: "And such of [the Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." Id.
9. Id. at 802.
10. Id. at 804.
11. 391 U.S. 392 (1968). Litigation between the Puyallup Tribe and the Washington Game Department reached the United States Supreme Court three times. In 1968, the Court upheld non-discriminatory state conservation regulations imposed on treaty fishermen so long as the regulations were necessary for the conservation of particular species of fish. Id. at 402-03. In 1973, the Court struck down a state ban on commercial net fishing for steelhead because it was not a "reasonable and necessary conservation measure." Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 45 (1973). In 1977, the Court upheld a lower court recognition that the treaty fishermen were guaranteed a portion of the fish harvest, rather than merely a right to compete with nontreaty fishermen on an individual basis. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 177 (1977). See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682-84 (1979) (summarizing the "Puyallup trilogy"). The standards addressed in this Comment are those of Puyallup I.
under the Treaty of 1854. In so concluding, the court of appeals declined to consider whether the limitation on motor use is a valid conservation measure.

This Comment will examine whether federal, as opposed to state, conservation regulations should be evaluated using the *Puyallup I* analysis. It will not address whether the usufructuary treaty rights of the Chippewa include motorized access to areas within the BWCAW, nor the district court's holding that its ruling did "nothing to diminish the extent of the rights held by the Chippewa at the time the Treaty was signed." This Comment will focus specifically on the district court's alternative holding concerning conservation regulation and will assume, for the sake of evaluating the BWCAW regulations under *Puyallup I*, that motorized access is part of the Chippewa treaty right.

Part II will summarize the foundations of treaty interpretation established in Indian law. Part III will set forth the basic principles of the *Puyallup I* analysis for conservation regulations. Part IV will examine how the analysis of federal regulations differs from the analysis of state regulations. Part V will evaluate how the *Puyallup I* principles, which were developed to evaluate challenges to state regulations, were applied in two cases from the Eighth Circuit evaluating federal conservation regulations, *United States v. Dion* and *United States v. Bresette*. Part VI will examine the *Gotchnik* case and what is unique about a congressionally designated conservation resource such as wilderness. Part VII will apply the *Puyallup I* standards to the *Gotchnik* situation, relying on the origins of the standards for its analysis. This Comment concludes that treaty rights may be adequately protected, even when regulated, if courts stay grounded in the origins of the *Puyallup I* standards.

**II. FOUNDATIONS OF INDIAN LAW**

This Comment does not analyze the treaty rights of the Chippewa Indians. However, this section will briefly summarize the status of treaties and canons of treaty interpretation as a foundation to

14. Id. at 511.
15. Id.
18. 752 F.2d 1261 (8th Cir. 1985).
understanding the intermingled claims within the BWCAW.

Treaties with Indians have the same status as treaties with foreign nations. They are legally binding agreements that respect the sovereignty of the tribal nation. As such, treaties take precedence over conflicting state laws by virtue of the Supremacy Clause of the United States Constitution.

Treaty terms are interpreted in a way that Indians at the time of the treaty would have understood. When ambiguities exist, the United States must construe treaties in favor of the Indians to compensate for United States negotiators' superior knowledge of the language in which the treaty was recorded.

Treaties that established Indian reservations usually gave tribes complete sovereignty within the reservation boundaries. The United States, in exchange for Indian lands, usually granted the reservation lands along with other forms of compensation.

21. See id. at 560.
22. See id. at 561. The United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.
26. See, e.g., Article 4 of the Treaty of 1854, which reads:

In consideration of and payment for the country hereby ceded, the United States agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit: five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools and building materials, and three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready made clothing, to be distributed among the
Tribes often retained rights to hunt and fish on the lands ceded to the United States. Under the Supremacy Clause, these property rights still exist unless the United States Congress specifically abrogates them. The Supreme Court, in evaluating legislation, is "extremely reluctant to find congressional abrogation of treaty rights." The Court set forth the current test for evaluating abrogation in United States v. Dion. Dion involved the taking of four bald eagles and a golden eagle by members of the Yankton Sioux tribe in violation of the federal Eagle Protection Act. The Court applied what has become known as Dion's "actual consideration and choice test" for evaluating abrogation: "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." Congress must compensate a tribe for the abrogation of a treaty right if it is a recognized property right.

III. REGULATION UNDER PUYALLUP I

In Puyallup I, the Supreme Court defined a series of steps to analyze whether regulating an Indian treaty right is constitutional. Puyallup I was the first Supreme Court opinion handed down during extensive litigation between the State of Washington Department of Game and two Indian tribes. In state court, the Department of Game sought declaratory and injunctive relief against tribal members who claimed a treaty right of "taking fish, at all usual and accustomed young men of the nation, at the next annuity payment.

Treaty of 1854, supra note 7, at art. 4.
27. See supra, note 7.
28. Congress has the power

[T]o abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.

31. See id. at 735.
32. Id. at 739-40.
35. COHEN, supra note 23, at 460-61.
grounds and stations... in common with all citizens of the Territory[]." The State of Washington regulated the taking of salmon and steelhead trout during spawn runs between the Pacific Ocean, Puget Sound, and the Puyallup and Nisqually Rivers. The Supreme Court affirmed the state's authority to regulate the Indians' fishing rights, within particular guidelines, stating, "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

The treaty conflict analysis consists of three steps. In the first step, a court must determine whether a treaty right in fact exists. Such rights must be determined on a case-by-case basis based on the specific treaty language. If a treaty right exists, a court moves on to the second step and determines whether the legislation imposing regulations actually abrogates the treaty right. If the right has not been abrogated, the court completes the third step and evaluates whether the conservation regulation is valid. In this third part of the analysis, the Puyallup I analysis asks three questions concerning the conservation regulation: (1) whether the regulation is reasonable and necessary for conservation of the resource; (2) whether its application to Indians is necessary in the interest of conservation; and (3) whether the regulation discriminates against Indians in its application. This Comment focuses on these three questions evaluating the validity of conservation regulations.

The first two steps of the treaty conflict analysis are supported by a fairly significant body of federal case law. Most abundant are cases interpreting the extent and scope of particular treaty rights. Case law

37. Id.
38. Id. at 398.
39. Id.
40. Id. at 394-95.
42. See Puyallup Tribe, 391 U.S. at 393.
43. See id. at 401.
44. See id. at 401 n.14.
45. See id. at 402.
also provides guidelines for determining whether Congress has abrogated rights through legislation.\textsuperscript{47} By contrast, there is scant federal case law applying the conservation regulation analysis to conflicts between federal conservation regulations and off-reservation treaty rights.\textsuperscript{48} The three conservation regulation questions were developed in response to a conflict between state conservation laws and offreservation treaty rights. Before examining how the standards apply to federal conservation regulations, it is helpful to review the state-based origins of the \textit{Puyallup I} standards. The standards developed through several landmark cases beginning in 1916.

\textbf{A. Is the Regulation Reasonable and Necessary to Conserve the Resource?}

The first conservation regulation requirement of the \textit{Puyallup I} analysis is that the regulation is reasonable and necessary to conserve the resource.\textsuperscript{49} The words "reasonable" and "necessary" stem from the 1916 case of \textit{New York ex rel. Kennedy v. Becker}.\textsuperscript{50} Three members of the Seneca tribe were arrested for spearing fish within ceded territory in the State of New York in violation of state conservation laws.\textsuperscript{51} The Indians argued that New York had no power to control or regulate state lands and waters with respect to members of the Seneca tribe, who held a reserved property right to fish and hunt on the land conveyed in the 1797 treaty of the "Big Tree."\textsuperscript{52} The Seneca argued that the ceded territory was subject to dual sovereignty, with tribal members regulated by the tribe and state citizens regulated by the State, but the Supreme Court held that "[s]uch a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both."\textsuperscript{53} The Court noted that, although the concept of wildlife preservation was


\textsuperscript{48}COHEN, supra note 23, at 463.

\textsuperscript{49}See \textit{Puyallup Tribe}, 391 U.S. at 398-401.

\textsuperscript{50}241 U.S. 556 (1916).

\textsuperscript{51}Id. at 559.

\textsuperscript{52}Id. at 562.

\textsuperscript{53}Id. at 563.
not developed when the Seneca Nation ceded the territory, the concept of state sovereignty "was well understood."54 "It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State, subject of course to any valid exercise of authority under the provisions of the Federal Constitution."55 The Court went on to state that if the "inherent power of preservation" was so divided, "its competent exercise" would be "impossible."56

While the Court's focus in Kennedy was the necessity of regulating preservation by a single sovereign entity, the Court's focus later, in Tulee v. Washington,57 was the conservation regulations themselves. "Tulee, a member of the Yakima [Indian tribe], was convicted ... on a charge of catching salmon with a net, without first having obtained a license as required by state law."58 The Supreme Court declared that "the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."59

The Puyallup I court relied heavily on Tulee when evaluating the validity of State of Washington conservation measures in 1968.60 The Court did not actually rule on specific individual regulations (i.e., the use of set nets in fresh waters), but remanded the case to the trial court with instructions that any regulations upheld must be reasonable and necessary.61 The Court stressed its concept of "necessary" by citing the parties' stipulation that if the Indians continued to operate their annual commercial fishery, their harvest would "'virtually exterminate the salmon and steelhead fish runs of the Nisqually River' and that 'it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River ... that the plaintiffs enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.'"62

Thus, the first conservation regulation question focuses more on the

54. Id.
55. Id. at 562 (citations omitted).
56. Id. at 563.
57. 315 U.S. 681 (1942).
58. Id. at 682.
59. Id. at 684.
61. Id. at 401-02.
62. Puyallup Tribe, 391 U.S. at 402 n.15 (quoting Dep't of Game v. Kautz, 422 P.2d 771, 774 (Wash. 1967)).
need to preserve the resource than the actual "reasonableness" of the regulation.\textsuperscript{63}

\textbf{B. Is Application of the Regulation to Indians Necessary?}

The second conservation regulation requirement of the \textit{Puyallup I} analysis is that application of the regulation to Indians is necessary.\textsuperscript{64} This question focuses on whether the regulation must necessarily apply to Indians, and is distinct from whether the regulation is necessary for conservation of the resource.\textsuperscript{65}

In \textit{Tulee v. Washington}, the Supreme Court upheld the Washington state regulations that were specifically aimed at fish preservation.\textsuperscript{66} In the same opinion, it struck down a state licensing fee as it pertained to Indians.\textsuperscript{67} The Court stated that the licensing fees were revenue producing as well as regulatory.\textsuperscript{68} The licensing fees as applied to Indians were "not indispensable to the effectiveness of a state conservation program" because revenue could be generated by other means.\textsuperscript{69}

The word "indispensable" tempts users to apply it to the conservation of the resource, but the Supreme Court has taken pains to perpetuate the distinction between being indispensable to the effectiveness of the program and being necessary for conservation of the resource.\textsuperscript{70} In \textit{Puyallup I}, the Supreme Court specifically noted that the term "indispensable" had been applied in \textit{Tulee} in the context of the ability "for a State to have the power to tax the exercise of a 'federal right.'"\textsuperscript{71} The Court emphasized that the term "indispensable" was not intended to apply to a limitation placed on the taking of fish.\textsuperscript{72}

The Supreme Court distinguished between a federal right and the valid regulation of that right in \textit{Antoine v. Washington}.\textsuperscript{73} Relying on the precedent of \textit{Puyallup I}, the Court declared:

\textsuperscript{63} See \textit{Tulee}, 315 U.S. at 684.
\textsuperscript{64} Id. at 685.
\textsuperscript{65} See id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 685.
\textsuperscript{68} Id. at 685.
\textsuperscript{69} See id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 685.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 402 n.14 (1968).
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 194 (1975).
Although, [in-common treaty] rights "may... not be qualified by the State, ... the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting], and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation.\(^{74}\)

So clarified, the qualification that a conservation regulation is necessary in its application to the Indians is not to be confused with its necessity for the preservation of the resource.

C. Is the Regulation Non-Discriminatory?

The third conservation regulation requirement of the Puyallup I analysis is that the regulation is non-discriminatory, an important consideration when treaty rights are shared with non-Indians.\(^{75}\) Often treaties preserved a right "in common with all citizens," implying that off-reservation treaty rights could be regulated through the police power of the State.\(^{76}\) However, the Equal Protection clause of the Fourteenth Amendment\(^{77}\) requires that the regulations be imposed equally with all citizens of a territory. The Supreme Court held in Puyallup I that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'"\(^{78}\)

The Supreme Court has consistently reaffirmed the three conservation regulation requirements set forth in the Puyallup I analysis.\(^{79}\) In 1999, the Court stated that it "has[ ] also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation."\(^{80}\) Furthermore, the Court stated that they "have repeatedly reaffirmed state authority to impose reasonable and necessary non-discriminatory regulations on Indian

\(^{74}\) Id. at 207 (emphasis added) (citations omitted) (second and third brackets in original).

\(^{75}\) Puyallup Tribe, 391 U.S. at 403.

\(^{76}\) COHEN, supra note 23, at 453.

\(^{77}\) U.S. CONST. amend. XIV, § 1.

\(^{78}\) Puyallup Tribe, 391 U.S. at 403.


\(^{80}\) Id. (citing Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)).
hunting, fishing, and gathering rights in the interest of conservation."\textsuperscript{81}

IV. PUYALLUP I ANALYSIS APPLIED TO A FEDERAL REGULATION

Fishing, a frequently litigated property right, is generally regulated
by a state under its police power.\textsuperscript{82} \textit{Puyallup I} reached the Supreme
Court because of a conflict between Indian fishing rights and a state
game department's regulations. The analysis has been applied to
federal regulations in only a handful of cases. Challenged federal
regulations include the Migratory Bird Treaty Act,\textsuperscript{83} the Bald and
Golden Eagle Protection Act,\textsuperscript{84} and the Endangered Species Act.\textsuperscript{85}

Two significant differences exist between federal and state
regulation of Indians: (1) the federal government must have
constitutional authority to impose the regulations; and (2) the federal
government's fiduciary relationship with Indian tribes may limit the
imposition of certain regulations.\textsuperscript{86}

The first difference is that the United States must act within the
bounds of its constitutionally granted power. Federal regulations that
affect treaty rights must pass stricter constitutional muster than state
regulations because the powers of Congress are "limited and
enumerated."\textsuperscript{87} State regulations need only demonstrate that they are
rationally related to health, welfare, and safety to be upheld.

Within the U.S. Constitution, the federal government's authority
over Indian tribes can be found in the Commerce Clause, the Treaty
Clause, and the Supremacy Clause.\textsuperscript{88} The Property Clause of the
Constitution is also a source of authority when the land at issue is the
property of the United States.\textsuperscript{89} In addition, various federal agencies

\textsuperscript{81} \textit{Mille Lacs Band of Chippewa}, 526 U.S. at 205.

\textsuperscript{82} \textit{See} Catherine M. Ovsak, Comment, \textit{Reaffirming the Guarantee: Indian Treaty Rights
to Hunt and Fish Off-Reservation in Minnesota}, 20 WM. MITCHELL L. REV. 1177, 1190 (1994)
(citing United States v. Washington, 384 F. Supp. 312, 333 (W.D. Wash. 1974)).


\textsuperscript{86} \textit{See} Ovsak, \textit{supra} note 82, at 1185.

\textsuperscript{87} \textit{See} Utah Power & Light v. United States, 230 F.2d 328, 335 (8th Cir. 1915).

\textsuperscript{88} \textit{See} Bradley I. Nye, \textit{Where Do the Buffalo Roam? Determining the Scope of

\textsuperscript{89} \textit{See} Klamath Indian Tribe v. Oregon Dep't of Fish and Wildlife, 729 F.2d 609, 611
(9th Cir. 1984). The Property Clause provides that "Congress shall have Power to dispose of
and make all needful Rules and Regulations respecting the . . . Property belonging to the
United States[.]" U.S. CONST. art. IV, § 3, cl. 2. It has been suggested that the Property
find authority in their respective enabling legislation. For example, the Forest Service of the United States Department of Agriculture is empowered through its Organic Act, which established the National Forest System.\textsuperscript{90}

The second significant difference between applying the \textit{Puyallup I} test to a federal regulation instead of a state regulation is the United States' federal trust responsibility to tribal nations. Justice Marshall characterized this relationship as similar to that of a guardian and a ward.\textsuperscript{91} The federal government has a duty to take legal action to protect Indian treaty rights when they are threatened, to promote tribal self-government, and to preserve tribal sovereignty.\textsuperscript{92} The federal government must balance its responsibilities to Indians and to protecting natural resources. In contrast, states have no such responsibility to tribes because states were not parties to the treaties creating this relationship.

\textbf{V. \textit{Puyallup I} Analysis Applied to Federal Conservation Regulations in the Eighth Circuit}

In two illuminating cases decided prior to \textit{Gotchnik}, courts in the Eighth Circuit relied on \textit{Puyallup v. Department of Game} when faced
with a conflict between a federal regulation and Indian treaty rights. In both cases, *United States v. Dion* and *United States v. Bresette*, the courts determined that treaty rights existed and had not been abrogated. However, both courts found the conservation regulations invalid under the third step of the *Puyallup I* analysis. The regulations at issue were struck down because they were not necessary for the conservation of the resource.

### A. United States v. Dion

The first case, *United States v. Dion*, was the Court of Appeals forerunner to the Supreme Court case establishing the current test for treaty abrogation. Dion, a member of the Yankton Sioux Tribe, was charged with taking several eagles and selling migratory bird feathers and carcasses in violation of federal regulations. He asserted his treaty right as an affirmative defense. The district court convicted Dion of offering for sale or selling feathers and eagle carcasses in violation of the Migratory Bird Treaty Act and the Eagle Protection Act. The Eighth Circuit, sitting *en banc*, held that the Yankton Sioux treaty rights to hunt existed and had not been abrogated by the legislation. In the conservation regulation step of the *Puyallup I* analysis, the court distinguished hunting that took place on the reservation from hunting rights that existed "in common" with others on ceded territory. An enlightening footnote clarified the extent to which "in common" treaty rights could be regulated, stating: "[T]he government has not established or even claimed that the eagle will become extinct if Indians are permitted to take eagles within the scope of their treaty rights. This court is not confronted with the problem of the imminent extinction of a species." By adding, "Congress may still act if it chooses to do so[,]" the court implied that unless the species faced irreparable harm, the protection of the eagle was better suited to action by the legislature.

The Supreme Court's subsequent opinion in *United States v. Dion* did not address the Eighth Circuit's distinctive interpretation of the

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94. 752 F.2d at 1261.
95. *Id.*
96. *Id.* at 1263.
97. *Id.* at 1262.
98. *Id.* at 1268 n.14.
99. *Id.*
100. 476 U.S. 734 (1986).
Puyallup I standard. Instead, the Court declared that Congress had abrogated the Indians' treaty rights when it enacted the Bald Eagle Protection Act. Because the treaty right was extinguished by one of the challenged regulations, the Court did not need to evaluate the validity of any of the remaining challenged regulations. Still, the Eighth Circuit's holding provides one basis for predicting federal interpretation of Puyallup's "reasonable" and "necessary" standards.

B. United States v. Bresette

In United States v. Bresette, the defendants were accused of selling handcrafted dream catchers containing migratory bird feathers in stores in northern Wisconsin and Minnesota. The Federal District Court of Minnesota held that the defendants, members of the Chippewa Indian tribe, "ha[d] a treaty right to sell these bird feathers which ha[d] not been abrogated and [was] not, under the terms of the Migratory Bird Treaty Act, subject to Puyallup limitation." In reaching the conservation regulation step of the Puyallup I analysis, the court admitted that "[the Puyallup I holding] does not provide a great deal of guidance for the courts to evaluate the appropriateness of the conservation measures." Even so, because the regulations dealt with particular wildlife species, the court relied on a population-based rationale to evaluate the necessity of the regulation:

Puyallup does not support the conviction of defendants for selling the bird feathers at issue. The government cannot reasonably contend that the statute's absolute proscription of the sale of bird feathers in this manner is a non-discriminatory conservation measure intended to prevent the extinction of migratory birds. The partial restrictions addressed in Puyallup were meant to forbid the Indians from "pursu[ing] the last living steelhead until it enters their nets." Here the migratory birds of Northern Minnesota and Wisconsin are not faced with extinction due to the likes of [the defendants].

Both the court of appeals in Dion and the district court in Bresette invalidated the conservation regulations because the protected species was not threatened with imminent extinction as a result of the Indian

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102. Id. at 664-65.
103. Id. at 664.
104. Id. (citation omitted).
VI. WHAT IS UNIQUE ABOUT THE GOTCHNIK CASE AND THE BWCAW?

The Gotchnik case is unique because the conservation regulation in question is the Boundary Waters Canoe Area Wilderness Act, an act that protects a specific geographical area rather than a particular biological species.

The Boundary Waters Canoe Area Wilderness lies immediately south of and adjoining Canada's Quetico Provincial Park, an equally vast and wild area protected by the Canadian government. Voyageurs National Park lies west of the BWCAW and includes an additional 218,000 acres of lakes and boreal forest. Together, the three form a rare international lake country ecosystem.

For almost one hundred years, the federal government has recognized the natural beauty and rich resources of northern Minnesota's vast system of interconnected lakes, streams, and portages. President Theodore Roosevelt created the Superior National Forest in 1909. Restrictions on road construction and logging have been in place since Calvin Coolidge's administration. President Harry S. Truman issued air space regulations over the roadless areas of the Superior National Forest. Despite this history, efforts to further preserve the area spurred tumultuous conflict when U.S. Senator Hubert H. Humphrey first introduced wilderness legislation in 1956. When the Wilderness Act was enacted in 1964, political compromises resulted in the denial of full wilderness status to specific portions of the BWCA. Even so, the BWCA was subsequently embroiled in extensive litigation between wilderness advocates and people who depended on the area for their livelihood. The BWCAW Act of 1978 was an attempt to resolve some of those conflicts through additional

107. See id. at 623.
108. See id.
109. Id. at 624.
110. See id.
111. See id. at 625.
112. See id.
113. See id.
compromise and clarification. Special wilderness exceptions still exist for the BWCAW, including motorboat lake quotas, horsepower restrictions, and a number of mechanized portages.

VII. PUYALLUP I STANDARDS APPLIED TO THE BWCAW

The first two steps of the treaty conflict analysis ask whether a treaty right exists and whether it has been abrogated. In the BWCAW, the usufructuary treaty rights of the Chippewa were guaranteed in the Treaty of 1854. The Gotchnik court held that Congress did not intend to abrogate treaty rights through the BWCAW legislation and, therefore, by specifically limiting motorized travel within the wilderness, Congress was not recognizing motorized access as part of the right.

In order to address the Gotchnik court's alternative holding and evaluate the application of the Puyallup conservation standards to the BWCAW motor restrictions, we must assume for the sake of analysis that motorized access is part of the treaty right.

A. Are the BWCAW Motor Restrictions Reasonable and Necessary to Conserve the Wilderness?

It is interesting to note that the "resource" of the BWCAW is a "creation" of the federal government. It is a congressionally designated area rather than a naturally occurring species with a discrete population. Indians at the time of the Treaty of 1854 could not have imagined the need to protect the wilderness to preserve it. However, this alone does not invalidate a treaty interpretation. The Supreme Court addressed this canon of treaty interpretation in 1916 when it upheld a New York conservation law:

114. See id. at 626.


116. Section 17 of the BWCAW Act reads: "Nothing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the... wilderness." Pub. L. No. 95-495, § 17, 92 Stat. 1649 (1978).


118. A similar rationale was set forth in Minnesota ex rel. Alexander v. United States, part of which addressed the affect of the BWCAW legislation on international treaties with Canada. 660 F.2d 1240 (8th Cir. 1981).
[I]t is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life.\textsuperscript{119}

Therefore, the fact that the Indians did not conceive of the need for a geographically defined resource (designated wilderness) at the time of the treaty does not invalidate the resource as it exists today. Neither fish nor wildlife state regulations were conceived of at the time of many Indian treaties, yet the regulations have long been upheld by courts.\textsuperscript{120}

While some may consider it a "stretch" to define a wilderness area as a conservation resource in the context of the \textit{Puyallup I} standard, others may applaud the recognition that wildlife and humans do not live in isolation.\textsuperscript{121} Supporting this view, one commentator has even proposed that wildlife may be protected by the public trust doctrine:

\begin{quote}
[T]he public trust doctrine offers a framework for resource management and decision making that is ecosystemic. By ecosystemic, I mean an approach that allows resource managers to consider both the short-term and long-term needs of wildlife, the health of the habitat upon which a specific species or variety of species depend for survival, and the needs and goals of those humans who interact with wildlife in the ecosystem.\textsuperscript{122}
\end{quote}

\begin{footnotes}

Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties accordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen.


\textsuperscript{122} Id. at 725.
\end{footnotes}
While wildlife conservation is a typical justification for preserving a unique ecosystem in its natural state, wildlife was not the emphasis of Congress when it designated the BWCAW.\textsuperscript{123} Congress was clearly treating the ecosystem as a conservation resource in and of itself,\textsuperscript{124} and this strongly stated intent has made judicial evaluation fairly consistent. In general, courts have upheld wilderness regulations.\textsuperscript{125} "It has taken strong action by the judiciary to strike the balances and make the determinations that have ensured that qualifying lands were all reviewed [for wilderness designation] and then, when formally dedicated as wilderness, protected."\textsuperscript{126}

\textbf{B. Is Application of the BWCAW Motor Restrictions to Indians Necessary?}

Wilderness areas are intended not only to protect wildlife species but to accomplish other goals equally important in the eyes of Congress, such as maintaining a federal area with primeval character and providing opportunities for solitude and primitive recreation.\textsuperscript{127} Wilderness regulations do not fulfill congressional intent to preserve the solitude and integrity of the ecosystem unless they are applied to all individuals at all times.

Congress states that the boundary of the wilderness defines a pristine area untouched by human civilization in which wildlife may

\begin{enumerate}
\item[123.] See Ruckel,\textit{ supra} note 120, at 612.
\item[124.] "Wilderness" as defined by Congress is:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

\item[125.] See Ruckel,\textit{ supra} note 120, at 619.
\item[126.] See \textit{id}.
\item[127.] 16 U.S.C. § 1131 (c) (1994).
flourish free from modern intervention. This serves not only to benefit wildlife population, but the quality of its environment. Comparing one motor violation in the wilderness is not identical to comparing the loss of a particular number of animals or plants to a total population of that species. One motor violation destroys the wilderness and meets the "imminent extinction" described by the court of appeals in Dion.

In addition to protecting wildlife, wilderness areas are defined by Congress as protecting natural ecosystems so they may be enjoyed by present and future generations of humans. Motorized travel destroys the serenity sought by wilderness explorers traveling by primitive means. The Gotchnik court interpreted Congress's intent in passing the BWCAW Act as prohibiting even one motor violation within the wilderness. Because Congress specifically exercised its discretion in designating "partial" wilderness status for portions of the BWCAW where it allowed motorized travel, the justification is even stronger that Congress intended to strictly regulate all users of the remaining "full" wilderness. Congress's strongly stated intent and its definition of "wilderness" provide firm guidance for judicial interpretation. It is possible that a conservation area that did not enjoy such clearly defined goals would not provide as predictable an outcome when challenged in court.

C. Are the BWCAW Motor Restrictions Non-Discriminatory?

The regulations against motorized travel apply to both Indians and non-Indians and have been enforced against the general public since

128. Id.
129. See United States v. Dion, 752 F.2d 1261 (8th Cir. 1985); see also supra Part III.
131. A variety of geographically designated conservation areas exist within the National Forest System. For example, National Recreation Areas are established by Congress and emphasize the outstanding recreational resources of a particular geographic area. See, e.g., 16 U.S.C. § 460 p-3 (1994) (directing the Secretary of Agriculture to institute accelerated development of outdoor recreation facilities devised to take advantage of the Spruce Knob-Seneca Rocks National Recreation Area). The limits placed on uses within National Recreation Areas are much less specific than those placed on wilderness. National Wild and Scenic Rivers, also designated by Congress, have a clearly stated purpose but Congress grants the administering agency much discretion in determining what uses are allowed within a Wild and Scenic River corridor. 16 U.S.C. § 1281 (1994). Research Natural Areas are small geographical areas designated because they contain remarkable ecological characteristics. See 36 C.F.R. § 251.23 (2000). They are designated administratively and although the reasons for their designation are clear, the restrictions on use within Research Natural Areas are not clear.
1978.\textsuperscript{132} No challenge has been made to this conclusion. However, when applying the equal protection standard to a federal regulation, the guarantee will stem from the Due Process Clause of the Fifth Amendment.\textsuperscript{133}

**VIII. CONCLUSION**

Are the \textit{Puyallup} standards appropriate for federal courts to use when evaluating federal conservation regulations? Apparently some commentators believe they are not. One commentator has stated that "[e]xtending the \textit{Puyallup} rationale from state regulatory jurisdiction to federal statutes would provide an alternative, judicial method of treaty abrogation at the federal level."\textsuperscript{134} "Back-door" abrogation could occur when, by superimposing a "valid regulation" over a treaty right, the right becomes effectively eliminated.\textsuperscript{135}

Another commentator has stated that if the United States acted under its broad Property Clause authority, it would be unrestricted by the judicial limits in place for state conservation regulations.\textsuperscript{136} Such plenary power, however, would not go unchallenged. It would only be a matter of time before judicial standards developed to evaluate the validity of federal conservation regulations.

The \textit{Puyallup} standards are well defined and clear in their intent. They set a high standard for permissible conservation regulation of treaty rights. They have been consistently upheld by the Supreme Court.

However, two additional aspects must be considered when applying the \textit{Puyallup} standards to federal conservation regulations. The first is the need to ensure that the regulation stems from a valid congressional authority. The second is the need to balance any conservation regulations with the United States' trust responsibility to the Indians.

\textsuperscript{132} See United States v. Gotchnik, 57 F. Supp. 2d 798, 804 (D. Minn. 1999), aff'd, 222 F.3d 506 (8th Cir. 2000).

\textsuperscript{133} See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (interpreting the Fifth Amendment of the U.S. Constitution).


\textsuperscript{135} See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan Dep't of Nat'l Res., 141 F.3d 635 (6th Cir. 1998) (striking down a municipal regulation that banned commercial fishing boats from transient mooring at public marinas because it would "simply destroy all rights to commercially fish that were conveyed [to the tribes]").

The clarity of a federal conservation regulation may be diminished because the federal government serves as an advocate for Indian tribes, whose interests must be protected. This need for balance was not addressed in the Eighth Circuit cases discussed.

Courts in the Eighth Circuit have provided a series of opinions that preserve the Supreme Court's intent in allowing the regulation of treaty rights under well defined standards. The cases provide crucial guidance for federal courts evaluating increasingly challenged federal regulations.

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