“Highest Responsibility and Trust”: The National Environmental Policy Act & the Dakota Access Pipeline

Maegan Faitsch

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation
https://opencommons.uconn.edu/law_review/408
Note

“Highest Responsibility and Trust”: The National Environmental Policy Act & the Dakota Access Pipeline

MAEGAN FAITSCH

“All existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . .”

TREATY WITH THE SIOUX – 1868, 15 Stat. 635

The main goal of the National Environmental Policy Act (NEPA) is to compel government agencies to look for and discover possible environmental issues before making decisions that could impact the environment. The statute goes on to require an intensive review process when an environmental issue arises. NEPA can temporarily stop federal projects when an agency has not followed proper procedure or adequately considered certain factors. This Note proposes that under NEPA, courts should consider how agency decisions impact tribal treaty rights. The obligation to consider treaty rights come both from the treaty rights themselves and from the federal government’s trust obligation to Native American tribes.

The Note will discuss this issue through Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, a recent challenge to the Army Corps’ decision to grant an easement for the Dakota Access Pipeline. The Note will look to past infringements on Sioux land and treaty rights and then discuss the NEPA framework. Next, the Note will explain the current challenge and touch on cases that deal with treaty rights inside and outside of NEPA. Finally, the Note argues that the government’s trust obligation requires better treatment and acknowledgement of tribal treaty rights in the NEPA context.
# NOTE CONTENTS

INTRODUCTION .................................................................................................................. 1045

I. HISTORICAL AND MODERN CONTEXT ................................................................. 1047
   A. SIoux Treaty Rights and Past Challenges ......................................................... 1047

II. NEPA, ENVIRONMENTAL JUSTICE, AND TRIBAL NATIONS .......................... 1050
   A. NEPA: An Introduction ...................................................................................... 1051
   B. The Dakota Access Pipeline Challenge and District Court Ruling ............... 1054

III. TREATY RIGHTS, A NECESSARY CONSIDERATION .................................. 1058
   A. The Intersection Between Treaty Rights and the Trust Obligation ................. 1061
   B. Law Regarding Treaty Rights & The Trust Obligation .................................. 1064
   C. United States v. Washington ............................................................................ 1067
   D. Where Does This Leave Tribes? ...................................................................... 1070

CONCLUSION .................................................................................................................... 1072
“Highest Responsibility and Trust”: The National Environmental Policy Act & the Dakota Access Pipeline

MAEGAN FAITSCH

INTRODUCTION

The protests at Standing Rock drew national attention to the clash between fossil fuel and tribal interests in Lake Oahe, North Dakota. After the Army Corps granted an easement through the lake in 2016, the Standing Rock Sioux began a legal challenge, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*. This suit requested both declaratory and injunctive relief to halt the construction of the pipeline for, among other things, violations of the National Environmental Policy Act (NEPA). The injunction was denied, but decisions made by the Obama Administration changed the landscape, promising further review and halting future action on the pipeline.

After several decisive steps, including a memorandum from the Solicitor of the Interior noting issues with the Army Corps’ environmental assessment, the Army Corps reversed its decision. The Army Corps announced on December 4, 2016 that it would not grant an easement for the Lake Oahe crossing and that NEPA required a more thorough

---


3 *Id. at 2.*

4 *Id.*

environmental impact statement. The election of a new executive, however, led to another reversal. At the beginning of his term in office, President Trump issued an order allowing the pipeline to move forward. As a result, the tribe revived its original challenge, filing a motion for summary judgment in February 2017 based in NEPA claims. This challenge became more urgent when the pipeline began pumping crude oil in June 2017.

In an order by D.C. District Court Judge Boasberg in June 2017, the tribe partially succeeded in its motion for summary judgment. The court found that the Corps did not adequately consider environmental justice and the tribe’s treaty rights when the Corps decided to grant the pipeline’s easement. The tribe’s challenge is not the first time NEPA has been used as an offensive measure by tribal nations in an effort to protect natural resources—and this Note will explore the importance of considering tribal treaty rights in parallel with an agency’s NEPA analysis. Without courts calling on the federal government to fulfill its trust obligation to tribes, agencies will be given too much discretion when faced with a project opposed by tribal nations. At the very least, this can be remedied by courts requiring an agency to perform a more thorough Environmental Impact Statement when an action involves a tribe’s treaty rights.

This Note argues for special consideration of tribal treaty rights when an action requires a NEPA analysis because of the government’s trust obligation. Part I will give a brief history of Sioux challenges to encroachments on its reservation land and background of Sioux treaty rights. Part II will outline requirements under NEPA, environmental justice considerations, and how these fit into the tribal context. It will also discuss the findings of the D.C. District Court in the current challenge. Part III will draw on similarly situated cases involving NEPA and non-NEPA treaty

---


10 Id.

11 See infra notes 155–62 and accompanying text (highlighting a previous instance of a tribe using NEPA offensively to protect natural resources).
rights claims and call for greater acknowledgement of tribal rights under the government’s fiduciary relationship with the Sioux tribe. This obligation, as a trustee, calls for the preservation of Native American rights to water, hunting, and fishing on allotted federal lands.

I. HISTORICAL AND MODERN CONTEXT

In order to understand the scope of tribal rights for Native Americans and their relationship to the land, it is essential to put the present-day litigation in a historical context. Encroachments onto Sioux land by both the federal government and private parties have a long history. Systemic loss of the reservation through past public works projects and treaty reconfigurations makes this fight over a crude oil pipeline one part of a larger picture of disputes over Sioux territory. In the past, these federal projects often led to unconsidered effects on the lives of the tribes who lived there. There has been a past “bureaucratic disregard for consultation with indigenous people” adding to continued disenfranchisement for tribal nations attempting to cooperate with agencies in the current legal landscape.

A. Sioux Treaty Rights and Past Challenges

The Sioux challenged infringements on treaty rights in several lawsuits extending to the Supreme Court. The tribe often took different statutory routes in an attempt to preserve its land and promised rights under the Laramie treaties, among them the Indian Claims Commission Act. In this brief synopsis, this Note will attempt to draw on some of these examples to show the importance of the environmental framework as a future remedy for ensuring the continuation of treaty rights, when so many other attempts have failed. These treaty rights mainly include the ability to exercise water, hunting, and fishing rights, which are implicated in the pipeline decision.

The reservation system for Native American tribes was formed in response to the desires of white settlers to expand across the country. The Standing Rock Sioux reservation was once a portion of the larger Great Sioux Nation’s reservation. The first treaty, the Fort Laramie Treaty of 1851, contained much more land for the Sioux, encompassing half of

---


13 See Kaylee Ann Newell, *Federal Water Projects, Native Americans and Environmental Justice: The Bureau of Reclamation’s History of Discrimination*, 20 ENVIRONS ENVT & POL. J. 40, 42 (1997) (explaining that as “white settlers took over Native American lands, the removal policy gave way to the reservation system that exists today”).

14 *History, STANDING ROCK SIOUX TRIBE*, https://www.standingrock.org/content/history (last visited Feb. 7, 2019).
modern-day South Dakota as well as parts of North Dakota, Nebraska, and Wyoming. The treaty expressly preserved the Sioux “privilege of hunting, fishing, or passing over any of the tracts of country” ceded by the treaty. In response to the federal government’s desire to expand westward—manifested in the cross-country railroad, along with settlers who wished to mine—the later iteration, the Fort Laramie Treaty of 1868, stripped the tribe of most of its land outside South Dakota, but did not abrogate tribal hunting and fishing rights. All treaties, moreover, contained implied hunting and fishing rights within their boundaries. In 1875, an executive order set land apart for the Standing Rock Sioux in the northern part of the Great Sioux Reservation. Congress then passed the 1877 Act, “abrogating the earlier Fort Laramie Treaty,” dividing the Great Sioux Reservation into several smaller reservations, and abrogating the Sioux right to the Black Hills.

The United States further diminished the Sioux reservations in the 1950s to build the Lake Oahe Dam. The 1954 Cheyenne River Act took Cheyenne River Sioux land for the dam and recreational projects on the Missouri River. A 1958 act took over fifty thousand acres of Standing

17 John S. Harbison, The Broken Promise Land: An Essay on Native American Tribal Sovereignty over Reservation Resources, 14 STAN. ENVTL. L.J. 347, 353 (1995). This led to systemic takings of Sioux land due to the expansionist desires of the federal government. Harbison further describes the timeline of the changes over almost a hundred years occurring to the Sioux reservation after the Fort Laramie Treaty:

In 1875, the government ordered the Sioux to vacate the Bighorns and the Powder River country entirely. In 1876, after gold had been discovered in the Black Hills, the federal government procured an agreement from tribal chiefs that removed the Black Hills from the reservation. In 1889, under pressure to provide more land for white settlers, Congress abolished the Great Sioux Reservation, opened nine million acres of its territory to settlement, and created five smaller reservations – including the Cheyenne River Reservation – from the remaining land area. In 1908, Congress opened another 1.6 million acres on these reservations to homesteading. Finally, in the 1950s, the construction of a series of dams on the Missouri River inundated over 202,000 acres of what land remained available to the Sioux on the five reservations.

Id. at 353–54. See also The Treaties of Fort Laramie, 1851 & 1868, supra note 15, at Map 2.
19 See Sioux Tribe of Indians v. United States, 316 U.S. 317, 320–21 (1942) (noting that the reservation was created by an executive order specifying “the tract of land involved and declaring that it ‘be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory’”)
Rock Sioux land for the same purpose. Both of these acts contained similar language about the fishing and hunting rights of the Cheyenne River and Standing Rock Sioux, reserving for the tribes “access to the shoreline of the reservoir, including permission to hunt and fish in and on the aforesaid shoreline and reservoir.”

The Sioux have been fighting over the loss of their land for generations. In 1923, Congress granted the tribe jurisdiction to sue for “misappropriation of any of the funds or lands of said tribe.” When the dispute reached the Supreme Court in 1942, however, the Court held that because the 1875 and 1876 reservations were created by executive order, the Sioux Nation had no right to compensation when the United States took their land. The Sioux persisted and won a partial victory in United States v. Sioux Nation of Indians in 1980. In that case, Justice Blackmun described the history of the U.S. government’s relationship with the Sioux, quoting: “[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe.” The Court decided that Congress did not grant the Sioux an appropriate sum when it took its hunting lands (among them the Black Hills) under the 1877 Act. This affirmed a lower court’s remedy for over $17 million in damages for the federal takings. While this was a “successful” legal challenge, it granted only monetary damages, not a right to return to their sacred Black Hills. As a result, the Sioux Nation has refused to accept the monetary award, which, with interest, now is worth over one billion dollars.

The Lake Oahe takings have also reached the Supreme Court. In South

---

22 Pub. L. No. 85-915, 72 Stat. 1762 (1958). In the tribe’s motion for summary judgment in the DAPL case, the tribe describes this land that was taken under the Flood Control Act as “the best remaining Reservation lands, supplying 90% of the Reservation’s timber, as well as wild berries and other plants essential the Tribe’s diet and religious purposes, habitat for animals hunted for subsistence, and fertile lands where families grew their food.” Plaintiff Standing Rock Sioux Tribe’s Memorandum in Support of its Motion for Partial Summary Judgment at 3–4, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 1:16-cv-01534-JEB), 2017 WL 1454134 [hereinafter Standing Rock Motion for Summary Judgment].


25 Sioux Nation of Indians, 448 U.S. at 384.


27 Sioux Nation of Indians, 448 U.S. at 388 (quoting United States v. Sioux Nation of Indians, 518 F.2d 1298, 1302 (Ct. Cl. 1975)).

28 Id. at 422–24.

29 Id. at 371–72. See also Shoemaker, infra note 35, at 77 (explaining that the Sioux tribe never took the money—with the total now over $1.3 billion).

Dakota v. Bourland, the Court held that the Cheyenne River and Standing Rock Sioux could no longer regulate non-Indian hunting and fishing on the lands taken for the project. The Supreme Court found that the Flood Control Act and the Cheyenne River Act “abrogated” the tribe’s right to “absolute and undisturbed use and occupation” of the land, and as a result, the tribes did not have the ability to regulate non-Indians on the land. Nevertheless, the Court explained, the Oahe Acts and the Flood Control Act did not abrogate Sioux treaty rights in the flooded territory. These cases demonstrate the long history of the Sioux Nation trying to remedy the loss of its historic lands; the DAPL pipeline is just another example of that loss.

The Dakota Access Pipeline (DAPL) crosses the land originally granted in the 1851 Treaty and comes within a little over a half mile of the present-day Standing Rock Reservation. But instead of making a claim to the land being crossed by the pipeline, the tribe only claims its previously granted treaty rights to water, to hunt, and to fish on their existing reservation land.

II. NEPA, ENVIRONMENTAL JUSTICE, AND TRIBAL NATIONS

One of the statutes the tribe used to challenge the Dakota Access easement was the National Environmental Policy Act (NEPA). NEPA mandates agencies to follow certain procedures before making decisions for federal projects that have environmental effects. Environmental justice arguments can strengthen NEPA protections, but without showing the agency action is “arbitrary, capricious, and contrary to law,” NEPA will not permanently halt a challenged project.

31 South Dakota v. Bourland, 508 U.S. 679, 697 (1993). See also Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 (8th Cir. 1983) (explaining that the land taken was “of great value because the river bottomland was well suited for raising and grazing domestic animals and was rich in game, and the river was well stocked with fish”).

32 Bourland, 508 U.S. at 697.

33 See id. (explaining that certain rights were reserved in the trust lands, such as “the right to hunt and fish”); see also Lower Brule, 711 F.2d at 813, 824–26 (expressing that flood control projects do not suggest a congressional intent to abrogate Indian rights to hunt and fish); Tompkins, supra note 5, at 11 (“[N]either the Oahe Acts nor the Flood Control Act extinguished Sioux tribal hunting and fishing rights over the taken territory.”).


37 Standing Rock Motion for Summary Judgment, supra note 22, at 16.

38 See Jason J. Czarnecki, Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act, 25 STAN. ENVTL. L.J. 3, 16 (2006) (explaining that if the agency follows NEPA’s procedural requirements, the statute is satisfied).
A. NEPA: An Introduction

NEPA requires agencies to study and consider the environmental consequences of their proposed actions. The statute does not mandate environmentally-friendly actions; it is instead a “procedural” requirement that agencies must comply with when proposing “major Federal actions significantly affecting the quality of the human environment.” The statute requires certain detailed analyses that are regulated by the Council for Environmental Quality (CEQ) under the Executive Office of the President. The two types of documents produced through NEPA are environmental assessments and environmental impact statements.

An Environmental Impact Statement (EIS) is a more thorough and intensive review than an Environmental Assessment (EA). When environmental impacts are not “significant” or the agency is unsure of their significance, an agency can prepare an environmental assessment. If after the preparation of an EA, the agency does not believe there will be a significant impact on the environment, the agency will issue a finding of no significant impact (FONSI). If there is a significant environmental impact, then an EIS is required.

Through these procedural requirements, NEPA is often a valuable tool for advocates arguing against a federal project because of its harmful environmental effects. But NEPA has been criticized for the “discretion” it grants agencies in estimating possible future harm to the environment.

39 See Summary of the National Environmental Policy Act, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act (last visited Feb. 27, 2019) (“NEPA’s basic policy is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.”).
42 See COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, A CITIZEN’S GUIDE TO NEPA 11–19 (2007), available at https://ceq.doc.gov/docs/get-involved/Citizens_Guide_Dec07.pdf (discussing the process for an environmental assessment compared with that of an environmental impact statement, which requires (1) notice of intent and scoping; (2) a draft EIS with public participation through a comment period; (3) analysis of the comments and creating a final EIS; and (4) issuing a record of decision).
43 Id. at 8.
44 Id.
45 Id. at 8, 13. See also 42 U.S.C. § 4332(c) (explaining that detailed statements by responsible officials are necessary when proposed legislation or major Federal actions can significantly affect the environment).
46 See Colburn, supra note 40, at 44, 53 (“If an agency convinces itself that its actions are of little consequence, it will skew the alternatives considered and conventional estimative techniques can easily do so.”). But see Uma Outka, NEPA and Environmental Justice: Integration, Implementation, and Judicial Review, 33 B.C. ENVTL. AFF. L. REV. 601, 605 (2006) (explaining positively that “NEPA is widely regarded as an invaluable, if indirect, protective measure because it makes environmental considerations a central part of federal decisionmaking and opens the process to public dialogue and scrutiny”).
NEPA requires the complying agency to take a “hard look” at its proposed action in the environmental context; if the agency has failed in this regard, it is left up to private groups to challenge the agency action. If the court decides the agency did not fully comply with the consideration requirements, the court can grant an injunction to halt the action. When applied to tribal nations, NEPA has been described as unhelpful, providing “limited protection to tribal communities in the path of energy development.” As a litigation tool, it can halt projects procedurally when an agency has not substantially complied with the level of review required by the statute, but use of NEPA’s “substantive” mandates have been a far cry from providing relief.

Courts review NEPA challenges under the Administrative Procedure Act (APA) when reviewing the agency’s adherence to procedure. When an agency has decided to not issue an EIS or a flawed EA, a court considers whether the decision was “arbitrary, capricious, or an abuse of discretion.” Because of this “narrow standard,” a court is unable to substitute their best judgment for the agency’s. There are divergent opinions on the scope of judicial review: should the agency decision be considered substantively or only procedurally? Under Vermont Yankee v. NRDC, the Supreme Court explained, “NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural,” and as a result a court cannot require extra procedure or mandate the decision a court thinks best. But it is possible under the APA to require something more from the statute because without clear consideration of environmental factors, achievement of NEPA’s statutory goals is impossible.

48 See id. (“NEPA provides no sanctions for a failure to comply, judges have used their equity power to enjoin a project from moving forward until NEPA’s requirements are satisfied.”).
49 See Nadia B. Ahmad, Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty, 41 VT. L. REV. 799, 828, 835 (2017) (“Judicial interpretation of NEPA’s language has prevented tribes from obtaining a remedy through the statute.”).
50 See Colburn, supra note 40, at 3 (“Proposals directly to the courts that they execute NEPA’s substantive aspects have remained heart-felt but mostly pointless.”).
52 Standing Rock Sioux Tribe, 255 F. Supp. 3d at 122 (citation omitted).
53 Id. at 121 (internal quotation marks omitted).
54 Czarnezki, supra note 38, at 4.
56 While there is difficulty in interpreting NEPA substantively under the APA’s arbitrary and capricious standard, it is still possible. See Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 231 (1980) (Marshall, J., dissenting) (“I do not subscribe to the Court’s apparent suggestion that Vermont Yankee limits the reviewing court to the essentially mindless task of determining whether an agency ‘considered’ environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion. . . . Our cases establish that the arbitrary-or-capricious
In addition to the other regulatory duties under NEPA, the CEQ provides guidance for agencies in dealing with environmental justice considerations under the statute. 57 Environmental justice was recognized in an executive order under the Clinton Administration 58 and is required when minority populations, such as Native Americans, suffer “disproportionately high and adverse human health or environmental effects” from federal agency actions. 59 The Executive Order requires consultation with the community during the course of a federal project assessment, “mitigation measures,” and special considerations for those with “subsistence consumption of fish, vegetation, or wildlife.” 60 Under CEQ guidance, “[w]here environments of Indian tribes may be affected, agencies must consider pertinent treaty . . . rights and consult with tribal governments in a manner consistent with the government-to-government relationship.” 61

Additional EPA guidance underscores the importance of this order, stating that “many studies have established that sources of environmental hazards are often located and concentrated in areas that are dominated by minority populations, low-income populations, or indigenous peoples[].” 62 In a 2016 report, the CEQ noted that Native Americans may garner additional consideration as a “transient and/or geographically dispersed population[]” that faces alternate risks due to more environmental exposure and possible risks therein. 63 While agency recommendations exist for how to consider environmental justice, environmental justice is not a standard prescribes a ‘searching and careful’ judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner.”); see also Sierra Club v. Froehlke, 486 F.2d 946, 952 (7th Cir. 1973) (“NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.”); Czarnecki, supra note 38, at 14–15 (discussing one approach to APA interpretation requires a “reasoned, not merely informed, decision-making” (emphasis omitted)).

57 COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf. See also Dan McGovern, The Battle over the Environmental Impact Statement in the Campo Indian Landfill War, 3 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 145, 149 (1995) (“However, if EPA is toothless, so is CEQ, because CEQ also lacks authority to require federal agencies to comply with its rulings.”). In addition, the Environmental Protection Agency has also issued guidance for agencies considering environmental justice. U.S. ENVTL. PROT. AGENCY, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS (2016), https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

59 COUNCIL ON ENVTL. QUALITY, supra note 57, at 1, 3.
60 Id. at 3–4.
61 Id. at 14 (discussing how a minority group’s “cultural practices” should be acknowledged, along with specific treaty rights considerations).
62 U.S. ENVTL. PROT. AGENCY, supra note 57, at 15 (citations omitted). The guidance continues that these populations face more “adverse health conditions” that could be traced back to environmental causes. Id.
discretionary mechanism, and it is required under NEPA as outlined by the Clinton Executive Order. 64

For pipeline projects and tribal nations, environmental justice is, and remains, a necessary consideration under NEPA. This is especially applicable in the realm of the Standing Rock tribe’s treaty rights, which require separate and greater consideration because they are indigenous people with a property right to hunt and fish around the waters of Lake Oahe. 65 In the future, courts should look to environmental justice when reviewing challenges from minority groups such as Native American tribes. For example, environmental justice concerns should trigger the agency to find a potential “significant impact” that requires the weightier Environmental Impact Statement. 66

B. The Dakota Access Pipeline Challenge and District Court Ruling

After other strategies failed, the Sioux Tribes began litigation against the easement for the Dakota Access Pipeline in 2016. The tribes first requested a preliminary injunction to halt the pipeline in August 2016 under the National Historic Preservation Act and NEPA, which was denied by the court. 67 But then the Obama Administration began to cooperate with the tribes’ request, 68 so they no longer needed to pursue the suit. Later, when the Trump Administration refrained from further environmental review and granted the pipeline’s easement in February 2017, the Standing Rock Tribe re-initiated its challenge to the pipeline. 69 In the latest challenge, the D.C. District Court ruled in June 2017 that the Army Corps of Engineers had not sufficiently complied with NEPA, but the court allowed the pipeline to pump crude oil. 70 What led the court to find

65 COUNCIL ON ENVTL. QUALITY, supra note 57, at 15. CEQ guidance explains the required analysis for an agency faced with an environmental justice question. “[T]he agency should state clearly in the EIS or EA whether, in light of all of the facts and circumstances, a disproportionately high and adverse human health or environmental impact on minority populations, low-income populations, or Indian tribe is likely to result from the proposed action and any alternatives. This statement should be supported by sufficient information for the public to understand the rationale for the conclusion. The underlying analysis should be presented as concisely as possible, using language that is understandable to the public and that minimizes use of acronyms or jargon.” Id.
66 COUNCIL ON ENVTL. QUALITY, supra note 57, at 10; see also Note, Judicial Review, Delegation, and Public Hearings under NEPA, 1974 DUKE L.J. 423, 429 (1974) (arguing that the term “significantly” in the statute should be construed broadly and provides a “low threshold” for when an EIS should be prepared).
69 Id.
noncompliance, yet still allow the flawed action to proceed?

The Cheyenne River Tribe began the challenge by requesting a preliminary injunction under the Religious Freedom Restoration Act (RFRA) on February 9, 2017, alleging that it would not be able to practice its religion without access to pure lake waters. The court denied the motion for a preliminary injunction. Dakota Access had also requested a protective order to protect certain documents from being released to the public. These documents included spill models, geographic response plans, and a prevention response plan. The court was not convinced and denied the motion except for certain redacted information in the spill models.

After the second failed attempt to halt the pipeline by challenging it under RFRA, the tribe filed an expedited motion for summary judgment grounded in how the pipeline will affect the environment surrounding the reservation. The partial motion for summary judgment was based on NEPA and the tribe’s treaties. The tribe’s motion emphasized the importance of access to clean water from Lake Oahe for the reservation. Additionally, the tribe pointed to its treaty rights to hunt, fish, and gather on Lake Oahe and surrounding areas. For example, the motion noted, the ability to hunt is essential to the Standing Rock people because of “high poverty levels” and “cultural and religious practices” on the reservation.

The tribe rested its legal argument on the Corps’ failure to prepare a full EIS, specifically arguing that the EA failed to consider, inter alia, environmental justice and take a “hard look” at how the pipeline would affect the tribe’s treaty rights. In response, Dakota Access argued that the tribe had been afforded enough process under NEPA and that the current EA is sufficient, stating that the pipeline was originally halted due to

72 Id. at 100.
74 Id. Dakota Access sought to protect the pipeline from “terrorists” or individuals with “malicious intent” who could do “intentional damage.” Id.
75 Id. at 524.
76 Standing Rock Motion for Summary Judgment, supra note 22.
77 Id. at 7, 17
78 Id. at 4–5. The motion explains that the tribe uses the water from the Lake for many purposes, such as agriculture, industry, hospitals, and schools in the reservation.
79 Id. The tribe argues these were both specified in the Fort Laramie Treaty and preserved in response to the Lake Oahe creation.
80 Id.
81 Id. at 17.
82 Id. at 17, 24.
“[p]olitical interference.” The Corps also countered that (1) the tribe does not adequately argue that the FONSI by the Corps was erroneous; (2) the withdrawal of a notice to prepare an EIS is not a “reversal of agency policy”; and (3) the tribe cannot point to a trust obligation of the federal government that the granting of an easement would breach.

On June 14, 2017, the court granted in part and denied in part Standing Rock’s Partial Motion for Summary Judgment. The court did not agree with Standing Rock that the Corps’ analysis of the chance of an oil spill and discussion of alternate routes was inadequate, nor did it agree with Standing Rock that the Corps was required to look at the cumulative risk. But on several other claims, Judge Boasberg did find the law on the side of the tribe. The court held that the Corps “failed to adequately consider” the likelihood that the pipeline would be controversial and how a spill would affect the tribe’s treaty rights or environmental justice.

In considering how NEPA affected the tribe’s treaty rights, the court dismissed the “existential-scope analysis” that the tribe requested and instead opted for an analysis of whether the “agency adequately analyze[d] impacts on the resource covered by a given treaty.” When performing this analysis, the court deemed the consideration given in the construction phase of the pipeline adequate, but it found that the Corps had not gone far enough when considering the spill impacts on the tribe’s hunting and aquatic resources.

This begs the question of what is enough consideration to satisfy the requirements of NEPA. NEPA regulations state that “[t]he NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” But under NEPA, the agency is not obligated to choose the most environmentally friendly option, but instead must be made aware of any possible future environmental issues before making a decision. At first glance this seems

---

86 Id. at 126–27, 130, 135.
87 Id. at 147.
88 Id. at 131.
89 Id. at 132–33.
91 COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, supra note 41, at 5; see also 42 U.S.C. § 4332(B) (2018) (requiring federal agencies to “identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be
at odds with the aforementioned regulation, which appears to prescribe a dual mandate to make environmentally educated decisions but also to “take actions” that benefit the environment.

In his analysis, Judge Boasberg did point to what the Corps did correctly in its consideration of the treaty rights and water resources. For example, the Corps had used a model that described benzene amounts that could be released into Lake Oahe. The model concluded that in the event of an oil spill, the benzene toxicity of the water would not be too high to safely drink. But the court pointed out that no such analysis had been provided in regards to the fish and game the tribe relies on in the Lake Oahe region. If the Corps had put forth models showing the effect of an oil spill on the aquatic life of Lake Oahe and the surrounding wildlife, this might be considered a sufficient analysis. Or if the Corps were able to produce an estimation that a spill wouldn’t result in adverse conditions for these treaty rights, then this would likely pass muster and it could proceed.

Relying on the environmental justice Executive Order, the tribe’s motion for summary judgment pointed to CEQ guidance, which requests a more pointed look at the effect an agency action will have on a tribal nation. The tribe specifically argued that the Corps intentionally “gerrymandered” the locations it focused on for its environmental justice analysis. The Corps’ Environmental Assessment briefly mentions environmental justice as to the Standing Rock tribe, but found it to be a nonissue.

The tribe described flaws in the analysis, including that it did not contain Sioux County—the county that had a population with specific environmental justice considerations. The Corps used a half mile radius around the proposed easement and left out the reservation which was only .55 miles from the disputed area. The court concluded this buffer area

given appropriate consideration in decisionmaking along with economic and technical considerations” (emphasis added)); W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1269 (10th Cir. 2013) (explaining that “NEPA dictates the process by which federal agencies must examine environmental impacts, but does not impose substantive limits on agency conduct. Rather, it serves to promote informed agency decision making, government transparency, and public access to information” (internal quotation marks and citations omitted)).

92 Standing Rock Sioux Tribe, 255 F. Supp. 3d at 133.
93 Id.
94 Id. at 134.
96 Id. at 37–38. The tribe pointed to the use of “census tracts” that included an almost entirely white population that would be not very affected by an oil spill that occurred downstream.
97 See U.S. ARMY CORPS OF ENG’RS, ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT, CROSSINGS OF FLOWAGE EASEMENTS AND FEDERAL LANDS 85–87 (July 2016) (“The pipeline route expressly and intentionally does not cross the Standing Rock Sioux Reservation and is not considered an Environmental Justice issue.”).
98 Standing Rock Sioux Tribe, 255 F. Supp. 3d at 137.
99 Id.
seemed unreasonable. Just as with the treaty rights analysis, the court found that more consideration was needed for the effects of an oil spill on the downstream population of the Standing Rock reservation.

This third attempt at halting the pipeline was only moderately successful—with the court finding errors in the agency’s NEPA analysis, but not concluding that the pipeline should be halted. In a later ruling, the court decided not to enjoin the pipeline even though the Corps granted it as a result of a flawed EA, acknowledging that “[w]ithout such an easement, the oil cannot flow through the pipeline.” Because the issues with the pipeline could necessitate a fuller Environmental Impact Statement, but could also be satisfied by an Environmental Assessment, the court decided on October 11, 2017 to allow the pipeline to continue its operations over the tribe’s objections.

In an aside that foreshadows the likelihood of the Corps’ success on the environmental justice issue, the court stated that “even if Defendants did conclude on remand that a crossing at the Lake Oahe site may disproportionately affect minority or tribal populations, such an outcome would not compel the Corps to alter its prior decision to issue an EA and FONSI.” This demonstrates a fundamental flaw in the NEPA requirements and draws into question its ultimate efficacy in providing the tribe with relief. Since NEPA does not require the agency to take the environmentally conscious route, even if the Corps decided that the oil spill would disproportionately affect the Standing Rock Sioux tribe over neighboring populations, the court believes it can still grant the easement under this theory. As long as the agency has complied with the consideration requirements of the statute, there seems to be nothing further the court can require. Ultimately, the issue of the agency’s discretion comes into play, armed now with the knowledge that an oil spill might disproportionately affect the Sioux and deciding whether to continue with the agency action.

III. TREATY RIGHTS, A NECESSARY CONSIDERATION

Agency decisions made under NEPA must protect tribal treaty rights and fulfill the trust responsibility to Indian tribes. Some suggest that NEPA and treaty rights “are a wholly separate and distinct consideration” from
one another. But they do not have to be. While NEPA does not include “specific” mention of tribal treaty rights, treaty rights should be considered under NEPA, or in conjunction with the statute, during the agency’s environmental analysis. An EA or an EIS provides thorough information on the environmental risks to natural resources, and analyzing environmental effects on treaty rights separately would be duplicative and wasteful. By considering treaty rights along with NEPA, a federal agency can comply with dual mandates: to honor their tribal obligations and understand environmental impacts. Recognizing and analyzing treaty rights under NEPA provides legitimacy to long-recognized tribal rights and can help eliminate tribal concerns that their rights will be ignored. Without a part in NEPA review, agency decisions will be haphazard. If performed together, it will allow a fully informed decision-making process for a proposed action.

Tribes can use NEPA as a litigation tool to halt or slow agency actions they oppose. Because many Native Americans live on reservations, environmental impacts affect tribes to a greater degree than non-tribal residents. The tribal relationship with the land is further complicated by the ambitions of the federal government to use federal lands for projects such as mining, energy production, and transportation improvements. But these projects cannot be approved with complete

---


109 See supra Part II.A.


disregard for treaty rights due to potential detrimental environmental effects. Tribes have long litigated their treaty rights, leading to gradual recognition by the nation’s courts. Fishing, hunting, and other rights to natural resources play a prominent role in this litigation. Oftentimes when tribes ceded land in a treaty, they would reserve “off-reservation” treaty rights to preserve their ability to hunt and fish on that ceded land.\textsuperscript{114}

The Supreme Court affirmed the importance of these rights in \textit{United States v. Winans} in 1905, in construing the Yakima treaty rights to fish on the Columbia River in Washington.\textsuperscript{115} The tribe’s fishing grounds were obstructed by non-Indian fishing wheels, and the fishermen attempted to exclude the tribe.\textsuperscript{116} In considering the case, the Court declared “[t]he right to resort to the fishing places in controversy . . . were not much less necessary to the existence of the Indians than the atmosphere they breathed.”\textsuperscript{117} Further, the Court stated that “the treaty was not a grant of rights to the Indians, but a grant of rights from them . . . .”\textsuperscript{118} These rights, the Court held, could not be limited by state law or property rights.\textsuperscript{119}

Some federal regulations do protect tribal treaty rights,\textsuperscript{120} but not under NEPA. Specific treaty rights considerations are not outlined when an agency is deciding to prepare an EIS under NEPA.\textsuperscript{121} The agency is required to consider “[p]ossible conflicts” with tribes in an EIS and to give notice to the tribal government.\textsuperscript{122} But when deciding whether to perform a more intensive environmental review, the agency is driven by a standard of whether the action will “significantly affect[] the quality of the human environment.”\textsuperscript{123} The regulations do state that “[s]ignificance varies with the setting of the proposed action.”\textsuperscript{124} Given these regulations, a tribe could argue that significance is met when implicating treaty rights because of the “setting” in tribal territory. Inherently, tribal rights can be a complex and

\begin{flushright}
\textsuperscript{114} COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra note 24, § 18.02; see United States v. Winans, 198 U.S. 371, 379 (1905) (describing the process of creating off-reservation rights, “[t]he object of the treaty was to limit the occupancy to certain lands and to define rights outside of them”).
\textsuperscript{115} \textit{Winans}, 198 U.S. at 377.
\textsuperscript{116} Id. at 372, 382.
\textsuperscript{117} Id. at 381.
\textsuperscript{118} Id. (emphasis added).
\textsuperscript{119} Id. at 384.
\textsuperscript{120} See 25 C.F.R. § 249.1 (1982) (describing the purpose of these regulations as “(1) To assist in protecting the off-reservation nonexclusive fishing rights which are secured to certain Indian tribes by their treaties with the United States; (2) To promote the proper management, conservation and protection of fisheries resources which are subject to such treaties of the United States . . . .”).
\textsuperscript{121} See 40 C.F.R. § 1508.27 (1979) (determining whether an action “[s]ignificantly” affects the environment, but not mentioning tribes). An argument can be made that the term “significantly,” which requires a contextual and intensity analysis, mandates an EIS because treaty rights are implicated, but this is not specified in the regulation. \textit{Id.} NEPA regulations do detail that “[p]ossible conflicts” between the proposed action and the objectives of Indian tribes should be considered under an EIS and that notice should be given to Indian tribes. \textit{Id.} §§ 1502.16, 1506.6.
\textsuperscript{122} 40 C.F.R. § 1502.16.
\textsuperscript{123} 42 U.S.C. § 4332(c) (2018).
\textsuperscript{124} 40 C.F.R. § 1508.27(a).
\end{flushright}
layered consideration, and it is logical to follow an EIS model when they are implicated in a federal project.

Opponents would likely counter that making a bright line rule would lead to an EIS being created for any small federal project that involved a tribal resource. But due to the federal government’s trust obligation to Native Americans, whatever burden this might cause would be warranted. Addressing treaty rights through NEPA is difficult because environmental damages are hard to identify.125 While it might seem inherent that the implication of essential property rights would lead to the fullest extent of environmental review by the federal agency, when an agency is required to perform an EIS is not clear. Instead, this is left to the agency’s discretion. For example, in guidance provided by the Bureau of Indian Affairs on NEPA actions, natural gas and oil pipelines are left out of the description of “Major Actions Normally Requiring an EIS.”126

A. The Intersection Between Treaty Rights and the Trust Obligation

The trust obligation should require federal agencies to honor treaty rights. When a federal agency allows projects to proceed without a full understanding of the effects on treaty rights, its fiduciary duty is breached. In the DAPL case, the tribe argued that the trust obligation created a higher standard of protection and needed “a substantive outcome.”127 Specifically, in its motion for summary judgment, the tribe outlined the source of the government’s trust obligation: the taking of the land to create Lake Oahe, along with treaties and statutes.128 Through this trust duty, the tribe called on the Corps to respect its treaty rights.129 At the very least, other federal agencies requested an EIS to analyze more deeply the question of the trust responsibility.130

The trust responsibility requires specific protection of tribal resources and rights by the federal government. The relationship between the government and Native American tribes comes from three sources: treaties, the Constitution, and federal statutes.131 Early in Native American law, the trust obligation was discussed in Cherokee Nation v. Georgia.132 The Court

---

125 See Ahmad, supra note 49, at 835 (“Environmental damages are vastly more intricate than monetary damages arising from claims for a contractual breach in a construction contract or failure to perform under a services contract. Environmental damages are multifaceted because of complex economic, social, cultural, and ecological variables.”).
127 Mills, supra note 108.
128 Standing Rock Motion for Summary Judgment, supra note 22, at 5.
129 Id. at 6.
130 Id. at 9.
132 30 U.S. (5 Pet.) 1, 2 (1831).
explained the relationship between a tribe and the federal government as “that of a ward to his guardian.” The understanding of the trust doctrine today can be explained as “the federal government’s duty to protect . . . tribal lands, resources, and the native way of life.” This protection began with the injuries to Native Americans throughout history, requiring the federal government to act as a protector over tribal resources. Tribes are considered separate entities, like independent countries, but can be left unable to defend their interests when faced with federal projects. Because of this, the government has a fiduciary duty to protect them.

In the case of the Dakota Access Pipeline, is the trust obligation for the Corps a general mandate or grounded in specific fiduciary authority? The Standing Rock tribe argued that because the Corps has a fiduciary duty to them as a “trustee,” before the Corps grants the easement it will have to consider the impacts on the tribe and treaty rights more seriously. The tribe cites to Northwest Sea Farms, where the court stated that “[i]t is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration.” This understanding of the trust obligation seems to indicate a fiduciary duty to incorporate treaty rights into agency decision-making. But this is complicated by the inclination of other courts to avoid the trust obligation without a specific statutory ground. For example, the Ninth Circuit explained:

[Although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.]

So, does the trust responsibility mandate any action here? The previous Solicitor General agreed that more must be done, and the Assistant Secretary of the Army agreed that, at the very least, a full EIS should be prepared to discuss the treaty rights issue. But the DAPL court declined to extend the trust obligation without “a specific statute, treaty, executive  

---

133 Id. at 17.
135 Id.
136 Standing Rock Motion for Summary Judgment, supra note 22, at 40–41.
137 Id. at 6 (quoting Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng’rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996)). In Northwest Sea Farms, the Corps denied a permit because of the effect it would have on the tribe’s treaty rights to fish.
138 Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998).
139 Standing Rock Motion for Summary Judgment, supra note 22, at 42.
order, or other provision that gives rise to specific fiduciary duties.140

The tribe does have statutory grounds for its trust argument: the Act creating the Oahe Dam and the Fort Laramie treaty. The Standing Rock tribe has fishing and hunting rights granted by the federal government that an oil spill on Lake Oahe would affect. Public Law 85-915 (the Act concerning the Oahe Dam and Reservoir Project) provided for hunting, fishing, and grazing rights for the Standing Rock people.141 The rights outlined in the Act would be suffocated in the event of an oil spill in Lake Oahe, violating the specific trust obligation. In a D.C. Circuit case, 

Cobell v. Norton, the court reviewed the trust relationship between the Departments of the Interior and Treasury in the management of Indian Money accounts.142 There, the court explained that “failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee’s duties” does not always “absolve[] the government of its responsibilities.”143 In 

Muckleshoot Indian Tribe v. Hall, the court stated that “[t]he United States has a fiduciary duty and ‘moral obligations of the highest responsibility and trust’ to protect the Indians’ treaty rights.”144 Here, the Corps serves as a fiduciary for the property right145 which the tribe possesses in its right to hunt and fish.

Any argument that there is no source for a fiduciary relationship in the context of DAPL can be dispelled by the Oahe Dam Act—where specific rights were outlined in exchange for the land sold by the tribes. As a result, the DAPL court should have held the Corps to a higher standard regarding their trust duty to the Standing Rock people even though specific fiduciary duties were not outlined in the Act. Under 

Cobell, federal agencies do not possess as much discretion if the agency is a fiduciary for the tribe.146 The court explained that deference by the courts to agency understandings of “ambiguous statutes entrusted to it for administration” is not appropriate here because statutes must be construed “liberally” for the “benefit” of Indian tribes.147 In 

Cobell, the main statute was the Administrative Procedure Act, but the same argument can be made for NEPA, an agency procedural statute. This “liberal” reading of the statute lends more credence to the trust argument brought by Standing Rock. But this

142 240 F.3d 1081, 1088 (D.C. Cir. 2001). In this case, the Department of the Interior and the Department of the Treasury were specifically delegated as trustees by law. Id.
143 See id. at 1099 (“The Secretary has an ‘overriding duty . . . to deal fairly with Indians.’ This duty necessarily constrains the Secretary’s discretion.” (citation omitted)).
145 Id. at 1510 (“The Tribes’ right to take fish is a property right, protected under the fifth amendment.”).
146 Cobell, 240 F.3d at 1099.
147 Id. at 1101.
argument for a specific fiduciary duty did not succeed with the DAPL court.\textsuperscript{148}

B. Law Regarding Treaty Rights & the Trust Obligation

Federal agencies must consider the effects of a proposed project on tribal treaty rights, and courts rely on these effects in deciding cases with alleged NEPA violations.\textsuperscript{149} A Washington district court considered tribal treaty rights when it granted a tribe’s request for a preliminary injunction after the Corps issued a permit for the construction of a marina after performing an EIS.\textsuperscript{150} The tribe used the proposed area for fishing chinook.\textsuperscript{151} After performing a NEPA analysis, the Corps issued a permit for the marina after considering treaty rights.\textsuperscript{152} But because the tribe was able to show “irreparable injury” to its treaty right, the court granted an injunction.\textsuperscript{153} While the case was based in NEPA, the court decided the treaty rights issue before considering the tribe’s NEPA argument. In another case, however, a Washington district court denied a preliminary injunction after the tribe was unable to demonstrate sufficient harm to its treaty rights stemming from a NEPA decision to build a wharf by the Navy.\textsuperscript{154}

Even if an agency has considered treaty rights in its NEPA analysis, the environmental evaluation allows for insight into adverse results on treaty rights for the court. In No Oilport! v. Carter, the court denied a motion for summary judgment in favor of a tribe because the agency action might violate the tribe’s treaty rights.\textsuperscript{155} There, the tribes were worried—as the Standing Rock tribe is today—that its water source would be polluted by a pipeline.\textsuperscript{156} Under NEPA, the plaintiffs alleged similar claims to those alleged in the Standing Rock case, including “inadequate evaluation of impacts.”\textsuperscript{157} Here, the federal district court for the Western District of Washington considered what was procedurally adequate under NEPA to

\begin{itemize}
\item 149 Tompkins, supra note 5, at 3.
\item 150 Muckleshoot, 698 F. Supp. at 1505. Because the court granted the preliminary injunction on the treaty rights issue, the court did not decide whether the Corps had violated NEPA by failing to consider the tribe’s fishing right. Id. at 1517.
\item 151 Id.
\item 152 Id. at 1507 (“The permit included special permit conditions (‘SPCs’) to mitigate some impacts of the Marina on the Tribes’ treaty fishing rights.”).
\item 153 Id. at 1517.
\item 156 Id. at 344.
\item 157 Id. at 352.
\end{itemize}
satisfy the tribes’ oil spill concerns. Among the factors the EIS considered were: oil spill frequency, the results if a leak occurred, and the effects of an oil spill on tribal fishing. The court analyzed the EIS under the tribal treaty context, specifically the effect it would have on the tribes’ fishing grounds. Unlike the DAPL EA, this EIS discussed the ways the pipeline could affect their treaty rights, along with some negative outcomes. As a result, the court found the agency had complied with the statute’s requirements.

But the tribes also raised an independent violation of treaty rights claim based on the defendants’ actions. The EIS, which outlined the negative impacts of a possible spill on spawning, supported this claim. The court explained that “[i]t is uncontested that if a large enough oil leak or spill did occur, it could significantly degrade the fish habitat.” The court denied the defendants’ motion for summary judgment because there was a possibility that the oil pipeline might “proximately cause” the fishing grounds to be destroyed, demonstrating a recognition of the tribes’ rights even though the Agency had complied with NEPA.

According to the Solicitor General of the Interior, the concerns in No Oilport! can be applied to the Standing Rock case. Following No Oilport!, calling on the Army Corps to adequately consider the effects of an oil spill on the aquatic life and wildlife of the Lake Oahe region should be an effective strategy for the tribe. In the tribe’s motion for summary judgment, it described its need for “subsistence fishery” and use of the shore along Lake Oahe for wild game. If the Corps concludes that there will be an adverse effect on these explicitly guaranteed treaty rights, then perhaps the tribe could succeed on its claim, just as the court decided in No Oilport! that there was a genuine issue of material fact on this issue.

Northwest Sea Farms v. U.S. Army Corps of Engineers recognized the importance of treaty rights when an agency is deciding to grant permits. While not strictly decided under NEPA, the Corps used treaty rights of the

158 Id. at 354.
159 Id.
160 See id. at 354, 356 (“The impacts of minor and major spills and leaks are discussed, including the effect of a spill or leak on Indian fisheries.”).
161 See id. at 356 (“The EIS acknowledges that a major rupture ‘could result in significant loss to Native American tribal fish enterprises in western Washington.’”).
162 Id. at 352.
163 Id. at 371.
164 Id. at 372.
165 Id.
166 Id.
167 See Tompkins, supra note 5, at 20–21 (“[T]here is a similarly demonstrated possibility of impacts on tribal treaty rights that warrant additional review.”).
168 Standing Rock Motion for Summary Judgment, supra note 22, at 5.
Lummi Nation to deny a permit for a fish farm as “against the public interest because it would conflict with the Lummi Nation’s fishing rights.”\(^{170}\) In contesting the denial, the fish farm argued that treaty rights were improperly considered in making the decision.\(^{171}\) The court countered that when “carrying out its fiduciary duty, it is . . . the Corps’[] responsibility to ensure that Indian treaty rights are given full effect,”\(^{172}\) explicitly recognizing the fiduciary relationship between the tribe and the federal government. While the Corps did not have regulations mandating that treaty rights be considered, the court did not find this dispositive because of the trust obligation it had to the tribe.\(^{173}\) The court went so far as to say the fiduciary duty “mandates” that the Corps consider treaty rights when making its decision to grant the permit.\(^{174}\)

Additionally, the Corps argued in *Northwest Sea Farms* that it was *required* to consider the tribe’s rights to fish under the trust responsibility.\(^{175}\) The court explained that this duty extends to the Corps permitting decisions and that it is the agency’s responsibility “to ensure that Indian treaty rights are given full effect.”\(^{176}\) This responsibility stems from the fiduciary duty created by the trust relationship and not an “express regulatory provision.”\(^{177}\) The case clearly demonstrates that, in the context of permitting decisions by a federal agency, treaty rights must be considered under the lens of the trust responsibility. While not considered under NEPA, this case shows that a negative treaty rights determination should disqualify a federal project from approval, either under NEPA or beforehand.

1. Cultural Resources Under NEPA

Courts have also chosen to protect cultural tribal resources under NEPA. In *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, the Bureau of Land Management (BLM) allowed for the exploration of a thirty-thousand-acre area for mineral drilling after a NEPA analysis.\(^{178}\) The project was located on the Te-Moak’s “ancestral lands.”\(^{179}\) Along with religious and cultural importance, the area was home to pinyon pine trees, whose nuts are important to the

\(^{170}\) Id.
\(^{171}\) Id. at 1519.
\(^{172}\) Id. at 1520.
\(^{173}\) Id.
\(^{174}\) Id.
\(^{175}\) Id. at 1519.
\(^{176}\) Id. at 1520.
\(^{177}\) Id.
\(^{178}\) 608 F.3d 592, 596 (9th Cir. 2010).
\(^{179}\) Id. at 597.
tribe’s culture. Since mining had an adverse effect on these pine trees, the plaintiffs introduced a previous study performed by the BLM that supported their claim. The EA mentioned the removal of some of these trees but did not discuss this under the “Native American Religious Concerns” part of the assessment. The court found the approval of the project by the BLM unlawful because of the effects it would have on important sources of culture for the Western Shoshone tribe. While this case considers a food source (the pinyon pine nut) that was previously more important to the tribe and is now considered a cultural resource, the court moved to protect it under NEPA even without specified treaty rights to the pinyon pine. Here, the Ninth Circuit interpreted NEPA in a manner that required more tribal resource protection, not less, even though the land was off-reservation.

C. United States v. Washington

The obligation for the United States to honor treaty rights has been further explored outside of the NEPA context. A recent case affirmed by a per curiam opinion of the Supreme Court, United States v. Washington, also considered treaty rights. The treaty right implicated by the several tribes was the right to fish. The state government’s use of culverts interfered with salmon spawning. But the State argued that the treaty right does not require “habitat protection.” Additionally, the State put forth that while the tribes may take a certain amount of fish, the State is not required to make sure those fish are “available” for the tribe.

In order to analyze the obligation of the State to the tribes, the court considered the dialogue and past promises made in tribal treaties. The court seemed drawn to the following question: Why would the land be set aside for the tribes to fish if the government was not required to protect the source? Because of this, the court insinuated the promises in tribal treaties.

---

180 See id. ("The project area also contains many pinyon pine trees, a source of pine nuts that were once a key component of the Western Shoshone diet and remain a focal point of Western Shoshone culture and ceremony. Although mining has impeded the collection of pine nuts, remnant stands of pinyon pine continue to be used as traditional family gathering areas by contemporary Western Shoshone.").
181 Id. at 606.
182 Id. at 606 n.14.
183 See id. at 607 (finding it “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act).
184 Id. at 606.
186 United States v. Washington, 853 F.3d 946, 954 (9th Cir. 2017).
187 Id.
188 Id. at 960.
189 Id. at 962.
190 Id. at 964.
were meant to assure the existence of fish as part of the treaty right. As a result, the court found that Washington State was violating its treaty obligations to the tribes. This case also stands for permanence of treaty rights in the federal courts, as the court explained, “[b]ecause the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them.”

There are several differences between this case and DAPL. First, the harm to the salmon population was actively occurring at the time of the lawsuit. The court explained that “salmon stocks in the Case Area have declined ‘alarmingly’ since the Treaties were signed, and ‘dramatically’ since 1985.” In the DAPL case, the alleged harm to the fisheries and wildlife is only theoretical and the Corps would argue only finitely so. Because the harm is hypothetical, this makes a claim for the violation of treaty rights much more volatile for the court’s consideration. In order to follow Washington’s reasoning, the tribe could present evidence of a cognizable harm that would occur to specific fish or wildlife populations as the result of a spill. For example, one of the exhibits in the tribe’s motion for summary judgment contains specific fish species, such as the walleye, smallmouth bass, northern pike, and others that are a part of Lake Oahe’s aquatic life. In Washington, the court heard strong evidence about the correlation between changes to culverts and “benefits to salmon.” By drawing a connection between a specific species, for example the walleye, and a defined injury by the pipeline to that species, the tribe could rely on the reasoning in Washington. This injury then extends to the tribal members because they rely on the Lake Oahe area to find food for the winter.

...
Second, the harm to the salmon fish habitats has a more obvious remedy. The court in Washington discussed a “fish passage” that could be put into the culverts to allow salmon to continue their usual movements up and down stream. In the DAPL case, the remedy the tribes are seeking is an injunction to halt the pipeline. The tribe’s harm comes from a possible oil spill, and as a result, there is no visible compromise. But perhaps the compromise is to require the Agency to perform an EIS. By completing an EIS there could also be a more thorough review of alternate routes.

But this does not mean that Washington is inapplicable to the DAPL case. In applying the Washington case to cases outside the Ninth Circuit, it is explained that:

[T]o the extent that any federal land usage triggers evaluations required by the National Environmental Policy Act (NEPA), it would seem that among the reasonable alternatives that a federal agency must consider to comply with NEPA would be one protecting treaty fishing rights. Further, it may be that the agency would have no choice but to select the alternative that protects the right of taking fish, since administrative agencies have no authority to terminate or curtail treaty rights.

In a study of oil spill risks, if harm to a fish population in Lake Oahe could be specifically outlined, under this analysis it seems that the federal agency would be required to choose the option that did not violate the tribe’s treaty right. Along with the tribe’s subsistence fishing is its access to fresh water from Lake Oahe. The Solicitor outlined the tribes’ Winters rights in her memorandum as an “equal consideration as part of the DAPL permitting process” compared to the other treaty rights. Under the regulations and aforementioned cases, NEPA should be read to require treaty right

---

199 Washington, 853 F.3d at 971.
201 The tribe indicates in correspondence with Jo-Ellen Darcy, Assistant Secretary of the Army, that “if the Dakota Access pipeline is so safe that it presents no risk at all when situated on the Tribe’s doorstep, why isn’t the pipeline safe enough to cross the River north of Bismarck, as originally proposed?” Letter to Jo-Ellen Darcy, supra note 198.
203 The Winters doctrine was outlined by the tribe in the motion for summary judgment explaining that the “Winters right is a property right that entails both a sufficient quantity and quality of water to meet these beneficial purposes.” Standing Rock Motion for Summary Judgment, supra note 22, at 4 (citing Winters v. United States, 207 U.S. 564, 577 (1908)). The tribe uses the water from Lake Oahe for drinking and irrigation purposes, and, as a result, an oil spill would be detrimental. Id.
204 Tompkins, supra note 5, at 15–16.
consideration because agencies do not have the discretion to ignore treaties which are already the law of the land. The rights granted to the tribes are not vague promises but explicit grants to use the land’s resources in federal statute. Without honoring the tribe’s treaty rights, an easement should not be granted in the DAPL case.

D. Where Does This Leave Tribes?

Agencies must exercise their trustee responsibilities to tribes, but this can be erroneously left to discretion. Conflicts can arise when agencies are called to mandates that differ from their trust obligation. Even within NEPA there is an inherent conflict of interest—the statute outlines a motivation to “prevent or eliminate damage to the environment,” but the agency is not required to pick the most environmentally friendly option. This is balanced with every agency’s requirement to hold Native resources and lands in trust and other agency motives, such as development of the nation’s natural resources. These other motivations can then outweigh the trust responsibility. The Department of Justice has recognized such conflicts.

In Northwest Sea Farms, the Corps decided to honor the tribe’s treaty rights and not grant a specific permit. In DAPL, the Corps decided to the contrary. Since there is not a clear mandate under NEPA to consider treaty rights, courts may continue to give agencies discretion even though this violates tribal property interests. But agency discretion is restricted by the trust obligation, and agencies must consider environmental effects on treaty rights and use these findings in NEPA decision making. Under APA judicial review, a court should find that an agency’s disregard of the environmental effects a federal project will have on a tribal nation’s treaty rights is arbitrary and capricious. While under Vermont Yankee, courts are not allowed to mandate additional procedure under the APA, considering treaty rights is not an extra layer of procedure, but a necessary starting point.

---

207 Juliano, supra note 205, at 1338.
209 Since the 2017 decision, the Corps has followed up its additional review with the same decision—supported by an additional memorandum that is unavailable to the public. Andrew Westney, Corps, Dakota Access Say Tribes Didn’t Obey Order, LAW360 (Dec. 7, 2018, 7:26 PM), https://www.law360.com/articles/1109156/corps-dakota-access-say-tribes-didnt-t-obey-order.
210 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978) (“Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have chosen not to grant them.”).
Tribes are more likely to clash with federal agencies than other groups because their land exists completely under federal control. In response to the current Administration’s energy and environmental policies, it is likely that this type of litigation will only continue. For example, the Northern Cheyenne Tribe filed a lawsuit against the Department of the Interior and the Bureau of Land Management in March 2017.\textsuperscript{211} The lawsuit centers around the Agency’s decision to repeal a coal moratorium on federal lands and alleges a violation under NEPA for failure to perform an environmental review before making this decision.\textsuperscript{212} Specifically, the suit alleges that coal mining will have a negative impact on the Cheyenne reservation’s air and water quality and makes use of the environmental justice argument.\textsuperscript{213} This litigation stems from the question that is still unclear after the DAPL litigation: whether an agency reversal on an environmental policy (like granting an easement for a pipeline) can be construed as a NEPA violation or simply a result of changing agency policy under a new administration.\textsuperscript{214}

While many consider NEPA non-substantive, in the context of tribes, agencies should be required to consider treaty rights in parallel or before the NEPA analysis.\textsuperscript{215} Since the statute mainly mandates procedural requirements,\textsuperscript{216} it does not promise explicit relief. But coupled with treaty rights and the trust obligation, agency discretion is limited when faced with a proposed project. While this should not lead to an automatic finding that treaty rights trump an agency action, alternative actions and mitigation measures should be taken more seriously and should lead to the creation of an EIS. Rights to hunt, fish, and gather were reserved at great cost for the

\textsuperscript{212} Id. at 1–2. The Obama Administration had requested a “programmatic environmental impact statement (‘PEIS’)” on how the BLM federal leasing program worked under NEPA. Id. at 3.
\textsuperscript{213} Id. at 22–23.
\textsuperscript{214} See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.” (citation omitted)). The tribe argued that this change in administration policy violated the APA under FCC v. Fox Television for failing to provide a reasoned explanation for the agency reversal. Standing Rock Motion for Summary Judgment, supra note 22, at 35–39. But the court did not agree with the tribe. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 255 F. Supp. 3d 101, 143 (D.D.C. 2017). Recently, the Keystone XL pipeline was halted because of NEPA failures. According to the court, “[t]he Department instead simply discarded prior factual findings related to climate change to support its course reversal.” Indigenous Envtl. Network v. U.S. Dep’t of State, No. CV-17-29-GF-BMM, 2018 U.S. Dist. LEXIS 191510, at *40 (D. Mont. Nov. 8, 2018). A “reasoned explanation” for the Trump Administration’s policy change was necessary. Id.
\textsuperscript{215} But see Czarnezki, supra note 38, at 7–11 (comparing the decisions of the Supreme Court which clearly lean toward a procedural interpretation and those of academics and lower courts which find substance in the statute).
\textsuperscript{216} See Colburn, supra note 40, at 15 (“The familiar refrain from the Supreme Court has been that NEPA only requires agencies to take a ‘hard look’ at the environmental consequences of their choices. To many this has meant that NEPA is a purely procedural statute.” (footnotes omitted)).
tribes and should not be discarded by agencies. When treaty rights are considered using the NEPA analysis, the federal agency can fulfill its fiduciary duty.

CONCLUSION

Along with NEPA, agencies should consider treaty rights that are implicated in any agency action. These agencies are called to a higher standard of protection under their trust duty to the tribe. The DAPL court departed from the views of previous courts by wading into the murky waters of environmental justice and finding that deeper consideration of treaty rights is required, but the court did not go far enough. The current deference to agencies performing NEPA assessments leaves treaty rights vulnerable to ideological shifts. But as No Oilport! and Washington demonstrated, treaty rights are not simply additional considerations in a discretionary analysis. They are legal obligations, which the United States has a trust responsibility to fulfill. It is necessary for the courts to hold agencies to a higher standard in NEPA actions when treaty rights are involved. Without such a requirement, tribes like Standing Rock will continue to have their rights eroded as fossil fuel interests expand.