Tribal Treaty Rights: A Powerful Tool in Challenges to Energy Infrastructure

Elizabeth Ann Kronk Warner

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Tribal Treaty Rights: A Powerful Tool in Challenges to Energy Infrastructure

ELIZABETH ANN KRONK WARNER

Energy infrastructure projects throughout the United States are proliferating at a rate unseen in generations. Demand for coal in Asia has resulted in the proposed construction of terminals in the Pacific Northwest to allow for coal to be shipped abroad. Technological advances leading to the efficient extraction of resources using “fracking” lead to increased demand for pipelines across the country. As the demand for energy infrastructure increases, so too does opposition to these projects. Because such projects necessarily crisscross the country encroaching on tribal lands, tribes often find themselves at the vanguard of efforts to halt or slow down such construction. Tribes search for legal claims that may assist them in their efforts. This Article presents a viable option for tribes opposing such development—the assertion of tribal treaty rights. In many instances, tribal challenges based on tribal treaty rights or legal rights implicating treaty rights have been successful. This Article begins with a description of tribal treaty rights and how courts have interpreted those rights. This section demonstrates that courts have consistently upheld tribal treaty rights through 2019. The Article then focuses on two types of energy infrastructure projects, terminals and pipelines, where tribes have relied on their treaty rights, either explicitly or implicitly, to block construction. Examination of these tribal efforts yields helpful guidance for tribes interested in halting similar energy infrastructure moving forward, as well as important lessons for companies and entities wishing to engage in the development of such projects. There are examples of where tribal treaty rights have explicitly halted terminal construction or were used in conjunction with other legal claims to halt construction. The lessons from the pipeline examples are less clear. Tribal treaty rights have been raised as legal objections to the construction of pipelines, but, to date, courts have not rested decisions to halt or slow down construction of pipelines solely on the assertion of tribal treaty rights. Taken together, however, these recent case studies demonstrate that the assertion of tribal treaty rights remains a viable and sometimes potent legal argument to halt and even end the construction of energy infrastructure.
infrastructure projects that potentially threaten the tribal environment and tribal treaty rights.
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Tribal Treaty Rights: A Powerful Tool in Challenges to Energy Infrastructure

ELIZABETH ANN KRONK WARNER *

INTRODUCTION

My ancestor . . . who signed the treaty . . . accepted the word of the United States—that this treaty would protect not only the Indian way of life for those then living, but also for all generations yet unborn.

Jerry Meninick, Citizen of the Yakama Nation1

From the north a black snake will come. It will cross our lands, slowly killing all that it touches, and in its passing the Water will become poison.

Lakota end-of-times Prophecy

A pipeline winds its way around the very lifeblood of a people, threatening their lives and traditions. A massive terminal covering hundreds of acres and bringing thousands of miles of train cars threatens subsistence access and the health of vital fishery resources. Energy infrastructure projects—such as oil pipelines (sometimes referred to by tribes as “black snake[s]”2) and coal terminals—are facing intense pushback from tribes. Grave concerns exist as to the threats to tribes, water, and wildlife, posed by these projects. But how can tribes effectively push back in administrative fora and courts? This Article examines one possibility: the assertion of tribal treaty rights, which many tribes have looked to as an effective legal tool to slow down or even halt such infrastructure development.

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Tribes increasingly find themselves examining potential legal arguments to halt such projects as they are often at the vanguard of efforts to halt energy infrastructure development, as tribal lands, both present-day and historic, are pervasive throughout planned routes, and there is interest in energy and natural resource development in these areas. “Energy and mineral production on Native American lands is substantial, representing over 5% of domestic oil production, 8% of gas, 2% of coal, and substantial renewable energy production.”\(^3\) Given that tribal reservation land accounts for approximately 2% of land within the United States, a disproportionate portion of energy and mineral production comes from Indian country or near tribal lands.\(^4\) According to the Office of Indian Energy and Economic Development, “Indian lands contain up to 5.3 billion barrels of yet undeveloped oil reserves, 25 billion cubic feet of undeveloped gas reserves, 53.7 billion tons of undeveloped coal reserves, and prime target acreage for wind, geothermal, solar, and other renewable energy resources.”\(^5\) Because of this potential opportunity for financially successful natural resource development in Indian country, both private developers\(^6\) and tribal nations themselves\(^7\) are increasingly exploiting these


\(^5\) Slade, *supra* note 3, § 5A.01 (footnotes omitted).


\(^7\) See Paul E. Frye, *Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Tribal Perspective) 1–4* (Rocky Mountain Mineral Law Found.,
opportunities. Furthermore, because of the pervasiveness of tribal lands across the United States, there is always the likelihood that a proposed energy infrastructure will cross or come near to tribal lands.

However, natural resource and energy infrastructure development often present significant environmental challenges. Because of environmental concerns related to such development, many tribes challenge natural resource and energy-related development. Given the connection between many tribes and their environments, these concerns may be especially profound for tribes. Native cultures and traditions are often tied to the environment and land in a manner that traditionally differs from that of the dominant society. For a variety of reasons, including cultural and spiritual reasons, many tribal nations are “land-based.” For example, in the author’s own experience as a citizen of the Sault Ste. Marie Tribe of Chippewa Indians, spiritual ceremonies are held at certain places and at certain times during the year. Spiritual ceremonies are intimately connected to place. This is not unique to the author, as many Native people possess a spiritual connection with land and the environment. As a result,

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9 Natural resource development may have further negative impacts not examined in this Article. For a general discussion of the potential impacts of natural resource development from a legal perspective, see generally JAN G. LAITOS ET AL., NATURAL RESOURCES LAW (2d ed. 2012) (discussing relevant topics such as constitutional and administrative themes in natural resources law, history and development of ownership of public lands, and tribal ownership).

10 It is important, however, to not essentialize tribes as environmental stewards that always object to development, as some tribes have supported and even engaged in such development. For example, as discussed below, the Crow Tribe of Indians had an option to secure a 5% interest in the development of a coal terminal. *SSA Marine Welcomes the Crow Tribe and Cloud Peak Energy as Partners in the Gateway Pacific Terminal*, CLOUD PEAK ENERGY (Aug. 13, 2015), https://investor.cloudpeakenergy.com/press-release/announcements/ssa-marine-welcomes-crow-tribe-and-cloud-peak-energy-partners-gateway-pa.

11 The author recognizes that each Native nation has a different relationship with its environment and is hesitant to stereotype a common “native experience,” recognizing that there is a broad diversity of thought and experience related to one’s relationship with land and the environment. In particular, the author would like to avoid traditional stereotypes of American Indians as “Noble Savages” or “Bloodthirsty Savages.” See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 270 (1996) (“The problems of cross-cultural interpretation and the attempt to define ‘traditional’ indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in ‘perfect harmony’ with nature (the ‘Noble Savage’ resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the ‘Bloodthirsty Savage’ resurrected.”).

12 See id. at 274 (“[V]irtually all traditional Indian cultures had ‘land-based’ rather than ‘industrial’ or ‘market’ economies.”).

13 See id. at 282–83 (“American Indian tribal religions . . . are located ‘spatially,’ often around the natural features of a sacred universe. Thus, while indigenous people often do not care when the particular event of significance in their religious tradition occurred, they care very much about where it occurred.” (emphasis and footnote omitted)).
the spiritual connection between many tribes and their surrounding environment is crucial to the sovereignty of these tribal nations.\textsuperscript{14}

Because of this connection between sovereignty, survival, and the environment, many tribes argue that natural resource and energy infrastructure projects threaten their tribal treaty rights given the potential environmental pollution and land disruption arising from the projects.\textsuperscript{15} In addition to this legal argument, the assertion of tribal treaty rights also arguably promotes tribal sovereignty, as the United States entered into treaties with tribes in recognition of their status as sovereign nations. Sovereignty is important to Indian tribes because its existence allows tribes to enact laws and be governed by them.\textsuperscript{16} The development and enactment of laws are fundamental expressions of sovereignty.\textsuperscript{17} Tribal nations are sovereign nations, yet “[t]ribal sovereignty is . . . a paradox. It transcends, and therefore requires no validation from, the U.S. government. At the same time, tribal sovereignty is vulnerable and requires vigilant and

\textsuperscript{14} See Mary Christina Wood & Zachary Welcker, Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement, 32 Harv. Envtl. L. Rev 373, 424 (2008) (“Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.”).

\textsuperscript{15} See id. at 374 (“The natural and cultural losses at the hands of these new sovereign trustees have been staggering. In just the last 150 years, pollution, ecosystem fragmentation, deforestation, desertification, and sprawling urbanization have accelerated dramatically and bankrupted the natural trust sustained by tribes for millennia.”).

\textsuperscript{16} See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (“Although no longer possessed of the full attributes of sovereignty, [Indian tribes] remain a separate people, with the power of regulating their internal and social relations.” (internal quotation marks omitted)); see also Williams v. Lee, 358 U.S. 217, 223 (1959) (prohibiting “the exercise of state jurisdiction” over the controversy at issue because it “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves”).

\textsuperscript{17} Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. See generally Matthew L.M. Fletcher, American Indian Tribal Law xx1 (2011) (discussing Indian nation authority to legislate through organic documents such as tribal constitutions, treaties with the United States, ordinances, and resolutions); Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies ch. 1 (2d ed. 2010) (emphasizing that tribal law is seen as key to the exercise of tribal sovereignty and incorporates tribal norms, structures, and practices). Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structure. See, e.g., Cohen’s Handbook of Federal Indian Law § 4.05[3], at 271–72 (Nell Jessup Newton ed. 2012) [hereinafter Cohen’s Handbook of Federal Indian Law 2012]. Some tribal constitutions also explicitly reference the inherent sovereignty of the tribe. See, e.g., Const. and By-Laws of the Rosebud Sioux Tribe of S.D. art. IV, § 4 (amended 1966) (referring to reserved powers vested in the tribe). Tribal customary law may also be developed to recognize the tribe’s important cultural ties to the past and the significance of tribal culture in the future. See generally Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, 46 Am. J. Comp. L. 287, 287 (1998) (comparing “distinctively Indian social norms” across multiple tribes’ courts). Overall, “[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matters . . . .” Cohen’s Handbook of Federal Indian Law 2012, supra, § 4.05[1], at 270.
Expressions of tribal sovereignty, such as the assertion of tribal treaty rights, may therefore help reduce this vulnerability.

For these reasons, many tribes challenge natural resource development and energy infrastructure as threats to their tribal treaty rights, environment, and sovereignty. As demonstrated below, in some instances, tribal challenges based on tribal treaty rights or legal rights implicating treaty rights have been successful. This Article therefore details those successes, as well as examples where success is less clear as tribal treaty right claims were combined with other legal claims, and ultimately concludes with thoughts on how tribes might consider using claims based on tribal treaty rights in the future. This Article begins with a description of tribal treaty rights and their interpretation, detailing why they are important and how courts have generally treated claims based on tribal treaty rights. Then this Article focuses on two types of energy infrastructure projects, terminals and oil pipelines, where tribes have relied on their treaty rights to block construction. First, this Article examines terminal projects, such as the Tesoro Pacific Oil Terminal, Millennium Coal Terminal, and Gateway Pacific Coal Terminal, all in Washington, and the Coyote Island Terminal located in Oregon. In the terminal context, tribes have seen explicit success based solely on treaty rights, as terminal projects have been rejected due to interference with treaty rights.

This Article then goes on to examine pipeline projects where tribes have fought to halt construction, in part, on the basis of their treaty rights. This section of the Article explores the controversies surrounding the Keystone Pipeline, Dakota Access Pipeline, and Enbridge Line 5. To date, in the context of pipelines, the success of tribal treaty rights is less clear, as a court has yet to reject a pipeline project based solely on tribal treaty rights. Yet, tribes have seen success challenging pipelines with assertions of tribal treaty rights when those challenges are combined with other legal claims, such as claims based on the National Environmental Policy Act. Examination of these tribal efforts yields helpful guidance for tribes interested in halting similar energy infrastructure moving forward, as well as important lessons for companies and entities wishing to engage in the development of such projects. Accordingly, this Article concludes by examining key takeaways for both tribes and the energy industry moving forward. Ultimately, these recent case studies demonstrate that the assertion of tribal treaty rights remains a viable and, on occasion, powerful legal argument to halt and even end the construction of energy projects.

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infrastructure projects that potentially threaten the tribal environment and usufructuary rights.

I. TRIBAL TREATY RIGHTS AND TREATY INTERPRETATION

Given that over 400 treaties between tribes and the federal government exist, treaties play a significant role in determining the legal rights held by tribes.¹⁹ As explained in Cohen’s Handbook of Federal Indian Law, the seminal treatise on federal Indian law,

Many tribes view these treaties not only as vital sources of law for the federal government, but also as a significant repository of tribal law in such areas as identification of tribal boundaries, environmental regulation, and the use and control of natural resources on the reservation. As organic documents made with the federal government, treaties constitute both bargained-for exchanges that are essentially contractual, and political compacts establishing relationships between sovereigns. In both capacities, treaties establish obligations binding on Indian nations and the federal government alike.²⁰

Because of their importance to both tribes and the federal government, it is helpful to understand what tribal treaty rights are and how courts have relied on such rights to protect tribal interests in the past. Further, as demonstrated in the discussion that follows this Section,²¹ tribes consistently raise arguments related to their treaties with the United States in defending against the construction of infrastructure projects. This Section therefore introduces tribal treaty rights and then discusses judicial treatment of those rights.

Tribal treaty rights refer to rights that tribes retained following negotiation of a treaty with the United States. Between 1789 and 1871, the federal government and numerous tribes entered into treaties.²² Oftentimes, in exchange for significant land cessations to the United States, tribes would negotiate for “protection, services, and in some cases cash payments, but reserved certain lands . . . and rights for themselves and their future


²⁰ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2012, supra note 17, § 4.05[2], at 270–71 (footnotes omitted).

²¹ See discussion infra Section II (discussing how tribes successfully asserted their treaty rights to protect their use of natural resources from energy-related development).

²² COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2012, supra note 17, § 1.03[1], at 23.
generations.\textsuperscript{23} Tribal treaty rights may encompass various rights negotiated by the tribes and federal government. For example, in 2019, the U.S. Supreme Court recognized a Nation’s right to travel without being taxed by the State of Washington\textsuperscript{24} and a Tribe’s right to hunt, even when the hunting conflicted with the State of Wyoming’s hunting regulations.\textsuperscript{25} “In negotiating treaties with the United States, tribes moved from a position of relative equality to a position of far less strength. Yet from the beginning, treaties had a moral and legal force that, while not always respected, was also not easily ignored.”\textsuperscript{26} A treaty between a tribe and the United States “is essentially a contract between two sovereign nations.”\textsuperscript{27} Such treaties have also been described as “quasi-constitutional” documents.\textsuperscript{28}

However, despite the similarity to both contracts and perhaps constitutional documents, the United States Supreme Court developed special Indian canons of construction designed to assist federal courts engaged in treaty or statutory construction.\textsuperscript{29} In essence, “[t]he unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality.”\textsuperscript{30} Since the Supreme Court’s decision in \textit{Worcester v. Georgia} in 1832,\textsuperscript{31} it has consistently held that treaties between tribes and the federal government should not be interpreted in a way that prejudices tribes.\textsuperscript{32}

In \textit{Worcester v. Georgia}, the Court considered whether the State of Georgia could apply its laws to the territory of the Cherokee Nation, then located within the external boundaries of Georgia.\textsuperscript{33} In holding that the laws of Georgia did not apply, the Court interpreted the Treaty of

\textsuperscript{24} Wash. State Dep’t of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1014 (2019).
\textsuperscript{25} Herrera v. Wyoming, 139 S. Ct. 1686, 1700 (2019).
\textsuperscript{26} COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2012, supra note 17, § 1.03[1], at 23–24 (citation omitted).
\textsuperscript{28} See Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 HARV. L. REV. 381, 408 (1993) (explaining that tribal treaties are similar to constitutions because they are “fundamental, constitutive document[s]”).
\textsuperscript{29} See Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (explaining that normal principles of statutory construction do not carry the same authority in Indian law).
\textsuperscript{31} In Worcester, the Court considered whether the laws of Georgia applied to the Cherokee Nation. In finding that the laws did not apply, the Court explained that this was in part due to the extensive relationship between the federal government and tribes, a relationship that largely excluded the states. In discussing the federal-tribal relationship, the Court examined the nature of tribal treaty rights. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 515–16, 593, 596 (1832).
\textsuperscript{32} COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2012, supra note 17, § 2.02.
Hopewell between the Cherokee Nation and the federal government, and it determined that the relationship between the two was like “that of a nation claiming and receiving the protection of one more powerful.”

Therefore, because of the tribes’ dependence on the federal government for protection, the Court explained that “[t]he language used in treaties with the Indians should never be construed to their prejudice.”

In clarifying the reasoning for this method of construction, Chief Justice Marshall explained that it was not “reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish [the legal meaning of specific words used in the treaty].” This rationale is premised on a recognition that most tribal members, at the time, would not have spoken fluent English nor been familiar with the legal meaning of certain English words. That tribes and the federal negotiators would have different understandings of the terms used in the treaties is therefore perfectly reasonable. Accordingly, the canons acknowledge that in order to give purpose to the original meaning of the treaty, it may be necessary to view the treaty as the tribe would have viewed it.

Such interpretation also helps to ensure that interpretation of the treaty reflects the will of the signatories. The *Worcester* decision also stands for

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34 Id. at 555. As explained more fully below in the discussion of the federal government’s trust relationship to tribes, this is not the first time that the Court discussed the relationship between the federal government and tribes in such terms. In *Cherokee Nation v. Georgia*, where the Court considered whether it had original jurisdiction to hear a dispute between the Cherokee Nation and the State of Georgia, the Court ultimately held that it did not have original jurisdiction because the Cherokee Nation was not a foreign nation for purposes of original jurisdiction. 30 U.S. (5 Pet.) 1, 39 (1831). Although the Nation was “a distinct political society,” the Court considered tribes “domestic dependent nations” that “are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.” Id. at 16–17.


37 *Worcester*, 31 U.S. (6 Pet.) at 552–53. Chief Justice Marshall wrote in reference to an argument made by the State of Georgia that the treaty used the term “allotted” which legally generally meant that the land in question had been given to the United States. However, Chief Justice Marshall believed that this language was more consistent with the Tribe’s understanding of establishing a boundary between the tribe and the federal government. *Id.* at 552–53. Similarly, Justice McLean, in his concurrence, explained that “[t]he language used in treaties with the Indians should never be construed to their prejudice . . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.” *Id.* at 582 (McLean, J., concurring); see also Peter S. Heinecke, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1026 (1993) (explaining that Justice McLean’s statement is “the classic formulation of the canon”).

38 *Indian Canon Originalism*, supra note 36, at 1109. Moreover, “[t]he fact that Indian treaties were written in English, a language unfamiliar to the tribes, gave the United States significant leverage when negotiating treaty terms. If read according to its plain meaning, the resulting text would often give the federal government an overwhelming advantage in its relationship with the signatory tribe.” *Id.* at 1118.

39 Id. at 1113.

40 Id. at 1118.
the proposition that the federal government plays the primary role in relations with Indian tribes to the exclusion of states (in most instances).41

Over the ensuing years, the canon favoring Indians has only been strengthened. In fact, the canon has become a “fundamental principle of federal Indian law.”42 Throughout the 19th century, the canon was applied to treaties with Indians, and, eventually, the courts also began to apply the canon to statutes applicable to Indians as well.43 For example, in Choate v. Trapp, the Supreme Court considered whether lands that were previously owned by Indians were tax-exempt.44 The lands in question had previously been allocated to individual Indians on a tax-exempt basis, with the understanding that the lands could not be alienated.45 Congress subsequently removed the restriction on alienation, and Oklahoma attempted to tax the lands, arguing that the removal of the restriction on alienation meant that Congress intended for the lands to now be taxed.46 The Court rejected Oklahoma’s arguments. First, notably, the Court applied the rationale developed in the Worcester case to statutes. Second, the Court elaborated on the method of interpretation, explaining that “doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.”47

Ultimately, because of the tribes’ status as the “ward[s]”48 of the federal government, the Court in Felix v. Patrick explained that tribes and Indians were “entitled to a special protection in [the federal government’s] courts.”49 Although tribes are to receive special protection for these reasons, the federal courts will still give deference to Congress, as Congress has plenary authority over tribes.50 In fact, the Supreme Court explained that the Indian canons “are rooted in the unique trust relationship between the United States and the Indians.”51

Today, the canons of construction of Indian law require that (1) “treaties . . . be liberally construed in favor of the Indians,” (2) “all ambiguities are to be resolved in [Indians’] favor,” (3) “treaties . . . are to be construed as the Indians would have understood them,” and (4) “tribal

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41 See Worcester, 31 U.S. (6 Pet.) at 561 (noting that in this case, state law had no force over the Cherokee nation because it is a “distinct community occupying its own territory, with boundaries accurately described”).
42 Indian Canon Originalism, supra note 36, at 1103.
43 Id.
45 Id. at 668–69, 668 n.1.
46 Id. at 667–75.
47 Id. at 675.
property rights and sovereignty are preserved unless Congress’s intent to
the contract is clear and unambiguous.” These canons have been applied
by the courts over the ensuing decades to protect tribal rights from
infringement by other sovereigns and individuals. 53 Ultimately, the Court
has broadly applied the canons of construction and has only declined to
apply the canons where such application would be inconsistent with the
purposes of the relationship between Congress and the tribe(s) at issue. 54

Tribes have often turned to their treaties with the United States as a
way of protecting valuable rights. As demonstrated below in the
examination of how tribes have successfully invoked treaty rights to
protect against development projects seen as being adverse to tribal
interests, 55 it is clear that the protection of tribal fishing rights is of
paramount importance to many tribes. Because the rights acknowledged in
treaties were intended to be permanent rights, 56 treaties can be particularly
powerful tools in protecting natural resources, which are often compromised when energy infrastructure fails. Treaty rights are, in many
cases, intimately connected to the cultural survival of tribes. 57 For example,
the Swinomish Indian Tribal Community successfully asserted its treaty
rights to fish, a “cultural keystone” for the Tribe, in the 1970s. 58 The U.S.
Supreme Court and other federal courts have consistently upheld the right
of tribes to fish at their usual and accustomed places, as the right is “not
much less necessary to the existence of Indians than the atmosphere they

52 See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2012, supra note 17, § 2.02 (citations
omitted). At least one author, however, has suggested that the canons may be condensed into a single
rule, as “[i]n practice, the apparent multiplicity of ‘Indian canons’ is ultimately reducible to the single
rule of construction, often emphasized by the Supreme Court, that Indian treaties should be interpreted
from the perspective of the signatory tribe.” Indian Canon Originalism, supra note 36, at 1104.
53 Heinecke, supra note 37, at 1026–29. The courts have generally declined to apply the canons
of construction if it is determined that there would be no benefit to the tribe(s) involved. Id. at 1029.
54 Id. But cf. Indian Canon Originalism, supra note 36, at 1103 (“Federal courts continue to use
the Indian canon today, although some commentators worry that it has degraded from a strong
preference in favor of the tribe into a weak end-of-the-game tiebreaker. Indeed, the Supreme Court
recently suggested that the Indian canon is not a mandatory rule, but is instead merely a guide that need
not be conclusive.” (footnotes and internal quotation marks omitted)); Montana v. United States, 450
U.S. 544 (1981) (refusing to apply the Indian Canons of Construction when interpreting a tribal treaty
at issue).
55 See infra note 154 and accompanying text (highlighting one instance where the tribes prevented
construction of a terminal using uncontroverted evidence that it would be detrimental to tribal
interests).
56 Wilkinson & Volkman, supra note 30, at 602. For example, U.S. Senator Sam Houston
described the perpetual nature of treaties in the following way: “As long as water flows, or grass grows
upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you
be protected by [the federal government], and never again be removed from your present habitations.”
Id. (quoting CONG. GLOBE, 33d Cong., 1st Sess. 202 (1854)).
57 Tsosie, supra note 11, at 316–17 (explaining how the rights, such as usufructuary rights,
protected by many treaties are intimately connected to the culture and traditions of tribes; tribes in the
Pacific Northwest and Great Lakes, where fish play a large role in the culture and economy of tribes,
often protected their access to fish in their treaties with the United States).
58 SWINOMISH INDIAN TRIBAL CMTY., SWINOMISH CLIMATE CHANGE INITIATIVE: CLIMATE
ADAPTATION ACTION PLAN 10 (2010).
This right to take fish is a property right protected by the Fifth Amendment of the U.S. Constitution. This right to take fish at usual and accustomed places includes the right to cross private property to access those areas, and, as a result, a servitude is imposed on these lands. Additionally, tribal treaty fishing rights include the right to protect fisheries from actions that may imperil their survival, seeing as a “fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.” Courts have further found that the environment cannot be so degraded as to threaten fish or make the consumption of fish a threat to human health.

Historically, federal courts have interpreted treaties in expansive and progressive ways given the time of such decisions. For example, in 1974, a federal district court determined that tribal treaties provided for a reserved right of tribes to be co-managers of fisheries along with the states, despite the fact that the treaties involved did not explicitly reference such a right to co-management. While these decisions are well-established and respected today, they were groundbreaking and novel in their time. These decisions and others demonstrate the capacity for federal courts to interpret treaties in broad ways to protect tribal resources, which is consistent with the treaty canons of construction mentioned above. Moreover, such decisions demonstrate federal courts’ willingness to demand specific action from the federal government on the basis of implicit treaty provisions.

The recent decision of the U.S. Supreme Court in Washington v. United States demonstrates the strength and utility of tribal treaties in protecting cultural and natural resources important to tribes. In Washington, the United States (on behalf of several tribes) and tribes brought an action alleging that the barrier culverts built and maintained by the State of Washington violated tribal treaties because they prevented salmon from returning to spawning grounds in the sea, prevented smolt from moving out to sea, and prevented young salmon from moving freely.

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61 Winans, 198 U.S. at 381.
62 United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980); see also Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. at 679 (explaining that tribes with treaty reserved fishing rights are entitled to something more tangible than “merely the chance . . . occasionally to dip their nets into the territorial waters”).
63 United States v. Washington, 20 F. Supp. 3d 986, 1021 (W.D. Wash. 2013); see also Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1034–35 (9th Cir. 1985) (holding that a tribe’s fishing right can be protected by enjoining a water withdrawal that would imperil fish eggs that have not yet hatched).
in a way to avoid predators. In the proceedings below in relevant part, the U.S. Court of Appeals for the Ninth Circuit held that treaties required that fish be available to the tribes and that the State of Washington had violated the tribal treaty rights by constructing the culverts in such a way as to threaten the survival of the fish the tribes relied upon. The court explained that “[t]he Indians reasonably understood Governor Stevens [who negotiated the treaty] to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them.” This conclusion was consistent with the court’s understanding that “[w]e have long construed treaties between the United States and Indian tribes in favor of the Indians.” An equally divided U.S. Supreme Court affirmed the Ninth Circuit’s decision in June 2018. The tribes’ and United States’ recent success in this case confirms that tribal treaties continue to be viable legal tools to protect cultural and natural resources of importance to tribes. This conclusion is further buttressed by the fact that in 2019 the Court found in favor of tribal treaty interests in two tribal treaty rights cases—Washington State Department of Licensing v. Cougar Den, Inc., upholding a tribally owned entity’s right to travel without incurring taxes from the State of Washington, and Herrera v. Wyoming, upholding the right of a citizen of the Crow Tribe to hunt in contravention of the State of Wyoming’s hunting regulations.

Admittedly, courts’ interpretations of treaties have not been uniform nor followed one specific test. Nonetheless, treaties still constitute the “supreme law of the land,” and they have occasionally been found to provide rights of action for equitable relief against non-contracting parties. Ultimately, some scholars have concluded: “Indians fought hard, bargained extensively, and made major concessions in return for such rights. Treaties can, therefore, properly be regarded as negotiated contracts of a high order.” It is therefore appropriate that courts should continue to give such hard-fought-for rights effect.

66 United States v. Washington, 853 F.3d 946, 954 (9th Cir. 2017).
67 Id. at 966.
68 Id. at 964.
69 Id. at 963.
70 Washington, 138 S. Ct. at 1833.
71 139 S. Ct. 1000, 1014 (2019).
72 139 S. Ct. 1686, 1700 (2019).
73 Wilkinson & Volkman, supra note 30, at 608 (explaining the ad hoc federal precedent on how to interpret treaties).
75 See United States v. Winans, 198 U.S. 371, 377 (1905) (noting that the Indians of the Yakima Nation brought suit against the State of Washington to enjoin obstruction of fishing rights and privileges claimed under an 1859 treaty made between the Indians and the United States).
76 Wilkinson & Volkman, supra note 30, at 603 (footnote omitted).
II. CASE STUDIES: TERMINALS AND PIPELINES menac h Threatening Tribal Treaty Rights

The previous section established the importance of treaties to both tribes and the federal government in helping to define the law applicable to tribes. Further, because treaties often protect usufructuary rights related to the use of natural resources, such as water and fish, they can be directly implicated by energy-related development threatening such resources. Although other sources of law apply to tribes, such as federal statutes of general application and energy infrastructure development, tribes regularly turn to their treaty rights when trying to impact energy development. This Section therefore examines several instances where tribes have done exactly that—asserted treaty rights in efforts to redirect or halt energy infrastructure development. Ultimately, the Section demonstrates the continued utility of legal arguments based on tribal treaty rights. In the terminal context, terminal projects have been halted solely based on arguments that the project would interfere with tribal treaty rights. And, in the pipeline context, tribes have had more limited success when combining tribal treaty rights with other legal claims, such as claims based on the National Environmental Policy Act.

A. Terminals

The Pacific Northwest has seen an increase in terminal construction the past several years. Because of increased availability of cheap natural gas, there has been a decrease in the demand for coal within the United States. As a result, coal companies are increasingly looking to ship coal to Asia which, in turn, gives rise to desires to develop coal terminals along the Western coast of the United States. As Michael Blumm and Jeffrey Litwak explain: “In 2016, U.S. coal production reached its lowest level since 1979 . . . . Close to a third of all U.S. coal exports went to Asian

77 See supra text accompanying notes 55–64 (providing an example of usufructuary rights, the tribal treaty fishing rights that relate to the use of fish and water and include the right to protect fisheries from actions that could jeopardize their survival).
78 Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 120–21 (1960) (holding that general acts of Congress apply to tribes, unless there is a clear expression to the contrary).
79 See supra note 55 and accompanying text (stating that tribes have frequently turned to their treaties “as a way of protecting valuable rights”).
markets in 2017, indicating a one-year rise in exports to Asia of over fifty percent.  These proposed terminals have become “lightning rod[s] in the debate over whether the Pacific Northwest should become a gateway for exporting fossil fuels to Asia.” As a result, the past couple of years have seen a marked increase in tribes mobilizing to block coal terminal construction, especially in the Pacific Northwest, as demonstrated by the case studies discussed below. As one commentator concluded, “tribal fishing and treaty rights can be added to the substantial list of obstacles for companies seeking to export coal from the Pacific Northwest.”

Perhaps one of the strongest examples of tribal treaty rights playing a significant role in the halting of a terminal project is the Gateway Pacific Coal Terminal (Gateway), where the Army Corps of Engineers rested on concerns about tribal treaty rights in deciding to reject the proposed facility. The original proposal was for the construction of a terminal near Ferndale, Washington (Cherry Point) and “would consist of a three-berth, deep-water wharf, rail facilities, commodity storage areas, material handling equipment, and other required bulk handling infrastructure.” The proposed terminal had a maximum capacity of fifty-four million metric tons and would have been used for dry goods, but mainly used to store coal. If it had been constructed, the Gateway project would have sent U.S. coal to address increasing demand in South Korea, Japan, and Taiwan. Interestingly, the Crow Tribe of Montana joined as a potential partner in the project. The Tribe possessed an option to secure five percent ownership from Cloud Peak Energy, which owned forty-nine percent of the project. In order to be constructed, the Gateway project needed the Army Corps to approve permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The project location is

83 See Blumm & Litwak, supra note 80, at 16 (footnote omitted).
85 See Allan, supra note 81 (describing how tribes have taken action to block coal terminal construction of the Gateway Pacific Terminal and the Morrow Pacific Project).
86 Id.
87 Id.
89 Id.; Ctr. for Media & Democracy, supra note 88; Le, supra note 84.
91 Id. The Chairman of the Crow Tribe’s Executive Branch explained that “[t]his unique opportunity is a continuation of our mutually beneficial relationship with Cloud Peak Energy and further increases the potential for developing the Crow Tribe’s coal resources. Development of Tribal coal will help diversify the Tribe’s long-term revenues and provide much needed, family-wage Tribal jobs.” Id. (internal quotation marks omitted).
92 Allan, supra note 81.
approximately twelve miles away from the Lummi Nation’s reservation, and it is located within the adjudicated usual and accustomed fishing grounds for the Nation.94

On January 5, 2015, the Lummi Nation sent a letter to the Army Corps of Engineers asking that the Corps reject the permits requested for the Gateway project “based, inter alia, on the project’s adverse impact on the treaty rights of the Lummi Nation.”95 The Nation explained that “the proposed project location is within an especially rich and fertile marine environment that serves as important habitat for a number of forage fish, finfish, and shellfish . . . that are inextricably linked to the Lummi Schelangen (‘Way of Life’).”96 The Lummi Nation entered into a treaty with the United States in 1855, which allowed it and its members to continue to fish at “usual and accustomed” places.97 The Lummi Nation’s letter was particularly powerful, as it directly called on the Army Corps of Engineers to deny the requested permit seeing as the proposed project directly impacted the Tribe’s adjudicated usual and accustomed places for fishing.98 Because the impacts of the project could not be mitigated, the Nation asserted that permit denial was appropriate.99 The Nation released its letter after a report found that the Gateway project would increase fishing disruption at the proposed site by seventy-six percent.100

The Nation cited to the district court’s decision in Northwest Sea Farms v. U.S. Army Corps of Engineers to support its assertion that the Corps was duty bound to reject permit proposals for projects threatening tribal fishing rights.101 In Northwest Sea Farms, a fish farm operator appealed the Corps’ denial of a permit for a proposed project to farm fish

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94 Id.
95 Letter from Tim Ballew II, Chair, Lummi Indian Bus. Council, to Colonel John G. Buck, Seattle Dist. Commander, U.S. Army Corps of Eng’rs (Jan. 5, 2015), http://www.documentcloud.org/documents/1390292-lummi-letter-to-army-corps-1-5-15.html. The letter goes on to explain that “[t]he proposed project will impact this significant treaty harvesting location and will significantly limit the ability of tribal members to exercise their treaty rights.” Id. This letter was one of many instances of communication between the Nation and Army Corps. E.g., Letter from Colonel John G. Buck, Corps of Eng’rs, to Skip Sahlin, Pac. Int’l Holdings, LLC (May 9, 2016) (illustrating a communication between the Nation and the Army Corps).
96 Letter from Tim Ballew II, supra note 95.
97 Le, supra note 84 (internal quotation marks omitted).
98 See Letter from Tim Ballew II, supra note 95 (“We are requesting that the U.S. Army Corps of Engineers (Corps) take immediate action and deny the permit application . . . .”); Kari Neumeyer, Lummi Formally Asks Army Corps to Halt Coal Terminal, NW. INDIAN FISHERIES COMMISSION (Jan. 6, 2015), https://nwifc.org/lummi-formally-asks-army-corps-halt-coal-terminal/ (“The Lummi Nation has written a formal letter urging the U.S. Army Corps of Engineers to reject the permit to build the Gateway Pacific Terminal at Cherry Point.”).
99 See Le, supra note 84 (“The tribe last year asked federal regulators to deny permits for the project, saying it would interfere with the tribe’s treaty-reserved fishing rights.”).
100 See Neumeyer, supra note 98 (“The analysis predicts that GPT would increase the Lummi fishing disruption by 76 percent. . . .”).
101 See Letter from Tim Ballew II, supra note 95 (“As part of the permitting process for this project, the Corps is required to ensure that the Nation’s treaty rights are not abrogated or impinged upon.” (citing Nw. Sea Farms v. U.S. Army Corps of Eng’rs, 931 F. Supp. 1515 (W.D. Wash. 1996)).
within the usual and accustomed fishing grounds of the Lummi Nation. The district court upheld the Corps’ decision to deny the permit application because the proposed project impaired the Nation’s treaty fishing rights. In reaching its decision, the court explained that “[i]n carrying out its fiduciary duty, it is the government’s, and subsequently the Corps’, responsibility to ensure that Indian treaty rights are given full effect.” Further, “the Court concludes that the Corps owes a fiduciary duty to ensure that the Lummi Nation’s treaty rights are not abrogated or impinged upon absent an act of Congress.” The decision therefore offers strong support for the Nation’s position that the Corps needed to reject the permit application. Last, as demonstrated by this decision, it is not uncommon for the Army Corps to deny permits on the basis of their impacts to tribal treaty rights.

In addition to concerns about the impact of the Gateway project on treaty fishing rights, the Nation also expressed concerns about the impact of the project on areas of cultural significance, explaining that “the Lummi Nation has a sacred obligation to protect Xwe’chi’eXen based on the area’s cultural and spiritual significance.” Along with the Nation’s responsibility for such sites, the Nation asserted that the Army Corps similarly had a duty under the National Historical Preservation Act to assess the impacts of the proposed projects on areas of cultural importance.

In reaching its decision, the Corps explained that the appropriate standard to apply was whether the proposed project would have more than a *de minimis* impact on the Nation’s tribal treaty rights. Ultimately, because the Corps determined that the Gateway project would have more than a *de minimis* impact on tribal treaty fishing rights, it denied the permit.

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103 Id.
104 Id. at 1520.
105 Id.
106 See Le, supra note 84 (“If the federal agency denies the permit on the grounds of fishing rights, it wouldn’t be the first time.”).
107 Letter from Tim Ballew II, supra note 95.
109 See Allan, supra note 81 (“[T]he Corps identified the relevant standard as whether there is a ‘greater than *de minimis*’ impact to either the U&A [usual and accustomed] treaty right to access fishing areas or the right to take fish: ‘If the impact to either is greater than *de minimis*, in other words the impact is legally significant, the Corps would be required to deny the permit because only Congress can abrogate a treaty right.’” (quoting Memorandum for Record, Application: NWS-2008-260, U.S. ARMY CORPS OF ENGINEERS (May 9, 2016), http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDenomination.pdf)).
applications. The Corps noted that it has a ‘fiduciary duty to take treaty rights into consideration in making its permit decision.’ The Corps determined that the proposed Gateway project would impair the Lummi Nation’s treaty rights in three ways: (1) “[i]mpairing and eliminating part of their U&A [usual and accustomed areas] fishing and crabbing area”; (2) “[i]mpairing and eliminating the time and manner in which the Tribe can fish in their U&A”; and (3) “[i]mpairing and eliminating potential future herring fishing at the site.” Further, the Corps found that its obligation to protect treaty rights was independent of the process under the National Environmental Policy Act. Even if the Lummi Nation were to cease its objections to the proposed project, the Corps indicated that other tribes had similarly expressed concerns that had not yet been evaluated. Following the Corps’ permit denial, the developers of the Gateway project withdrew their local permit applications.

In response to the Army Corps decision, Tim Ballew II, Chairman of the Lummi Indian Business Council, stated:

Because of this decision, the water we rely on to feed our families, for our ceremonies, and for commercial purposes remains protected. But this is more than a victory for our people; it’s a victory for treaty rights.

Treaty rights shape our region and nation. As tribes across the United States face pressures from development and resource extraction, we’ll continue to see tribes lead the fight to defend their treaty rights and protect and manage their lands and waters for future generations.


111 Allan, supra note 81 (quoting Memorandum for Record, Application: NWS-2008-260, supra note 109, at 20).


113 Id.

114 Id. at 32.


116 Id.; Allan, supra note 81 (citations omitted).

The impact of a coal terminal on our treaty fishing rights would be severe, irreparable and impossible to mitigate.\(^{118}\)

Although not examples where decisions were made solely on tribal treaty rights, the three following examples present situations where tribal treaty rights were part of several legal arguments considered in regard to the proposed coal terminal. Litigation is ongoing regarding construction of a coal terminal by Millennium Bulk Terminals (Millennium), which was proposed for construction at Longview, Washington.\(^{119}\) If the proposal is ultimately approved, the terminal could be used to ship coal originating in the Powder River Basin of Montana and Wyoming to Asia.\(^{120}\) “At full buildout, the terminal would export up to 44 million metric tons of coal per year.”\(^{121}\) Millennium is enmeshed in numerous legal challenges at the time of writing, and the future of the Longview project is uncertain.\(^{122}\) Even so, tribes played a key role in efforts to halt the terminal. During the comment period on the draft environmental impact statement (EIS) for the Millennium project, tribes submitted comments\(^{123}\) detailing how the proposed facility would impact tribal treaty rights. The Confederated Tribes of the Umatilla Indian Reservation asserted that the increased rail traffic from the facility would “result in additional air pollution from dust and train exhaust, greater risk of derailments and spills, and magnified dangers to tribal members accessing fishing sites along the river.”\(^{124}\)

Because of these impacts, tribal treaty rights would be endangered, and the


\(^{120}\) Id. The Powder River Basin “produces about 40 percent of all coal mined in the United States.” Id.

\(^{121}\) Id.


\(^{123}\) See MILLENNIUM BULK TERMINALS-LONGVIEW NEPA/SEPA ENVTL. IMPACT STATEMENTS, https://www.millenniumbulkeiswa.gov/sepa-comment-archive.html (last visited Feb. 1, 2019) (providing copies of public comments submitted, including those by the Columbia River Inter-Tribal Fish Commission, Swinomish Indian Tribal Community, and Upper Columbia United Tribes, among others).

Tribes argued that the Draft EIS failed to consider these impacts.\textsuperscript{125} In its comments on the Draft EIS, the Columbia River Inter-Tribal Fish Commission raised similar concerns. The Commission argued that the Draft EIS was inadequate as it failed to consider the impacts of coal dust, train strikes, vessel impacts to the Columbia River estuary, air and water quality, thermal pollution, ballast water discharge, wake stranding of fish, shoreline erosion, among other impacts; impacts that directly threaten tribal treaty rights.\textsuperscript{126} Further, the Commission emphasized that the impacts of Millennium would fall upon “those with the least amount to gain.”\textsuperscript{127} The Final EIS took these and other comments into consideration, finding that the Millennium proposal would lead to significant indirect effects to tribal treaty rights, including indirect effects from construction and operations, including access to fishing areas and adverse impacts to fish habitat and fish themselves.\textsuperscript{128}

Another proposed project raising concerns related to tribal treaty rights was the Coyote Island Terminal (Coyote Island). The proposed project called for Coyote Island to be constructed in Boardman, Oregon, in order to facilitate coal storage and barge loading.\textsuperscript{129} The coal would ultimately be transloaded to Asia.\textsuperscript{130} During the first stage of the proposal, 3.5 million metric tons of coal would be stored at the facility, and, after the second stage of the proposal, a total of 8 million metric tons would be stored.\textsuperscript{131} The proposed project would have also resulted in the movement of “unit trains of coal to the port from the Powder River Basin of Montana and Wyoming.”\textsuperscript{132} The typical coal train, carrying 100 to 120 cars of coal,
would stretch a mile long. The Coyote Island Terminal LLC submitted a joint permit application to the Oregon Department of State Lands (ODSL), which was denied on August 18, 2014. The ODSL needed to approve the permit application under Oregon law governing the remove/fill of waters of the State. In its Findings and Order supporting the permit denial, the ODSL found that the proposed project would have impacts on a “small but important long-standing fishery” utilized by Tribes. Following the permit denial, Coyote Terminal and Port Morrow timely appealed, and the Office of Administrative Hearing gave limited party status to several interested parties, including the Yakama Nation, Confederated Tribes of the Umatilla Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs Reservation. The Tribes objected to the proposal on the ground that it would interfere with tribal treaty rights, specifically fishing rights. Ultimately, in part due to the finding about the impacts to the fishery, a consent agreement was entered into between the parties and those with limited party status, the effect of which was to withdraw the permit application while at the same time the ODSL withdrew the finding of its permit denial.

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133 Id.
134 Consent Agreement & Final Order at 1, Coyote Island Terminal, LLC, OAH Case No. 1403883 and OAH Case No.: 1403884 (Or. Dep’t of State Lands Nov. 10, 2016), https://earthjustice.org/sites/default/files/files/DSLs-11.10.16-Notice-of-Withdrawal.pdf.
135 Allan, supra note 81.
136 Consent Agreement & Final Order, supra note 134, at 2; see also Allan, supra note 81 (“Through public comments and the Department’s requests for clarifying information, several tribal interests provided comment and affidavits containing historical information, descriptions, mapping, photographs and a video that support that there is important commercial, subsistence and cultural fishing uses by tribal fishers of Waters of the State . . . . The Department finds and concludes that the evidence supporting that there is a small but important long-standing fishery at the project site is more persuasive than the evidence submitted by the applicant regarding fishing at the project site.” (citing Findings & Order at 16, Application No. 49123-RF (Or. Dep’t of State Lands Aug. 18, 2014)); George Plaven, Boardman Coal Dock Dead in the Water, E. OREGONIAN (Nov. 10, 2016), https://www.eastoregonian.com/news/local/boardman-coal-dock-dead-in-the-water/article_b6b0afec-4e7c-538c-adac-7b43fd182e91.html (reporting on the permit denial). ODSL also considered Coyote Island’s failure to prepare an adequate mitigation plan in denying the permit application. Judge: No Constitutional Problem in Oregon’s Denial of Columbia River Coal Export Terminal, EARTHJUSTICE (Aug. 12, 2016), https://earthjustice.org/news/press/2016/judge-no-constitutional-problem-in-oregon-s-denial-of-columbia-river-coal-export-terminal.
137 See Allan, supra note 81 (“‘Limited party’ status in this context means that the parties are limited to addressing the issues raised by the applicant and the Port in their Requests for Hearing.”).
138 Id.
139 Plaven, supra note 136.
140 Technically, the decision is based on Oregon law, as the ODSL determined that it could not make the requisite finding that the proposed project is “consistent with the protection, conservation and best use of the water resources of this state.” Allan, supra note 81. However, the finding regarding the tribal fishery played a large role in its final determination, showing how tribal treaty rights can intersect with other sources of law.
141 See Plaven, supra note 136 (“Essentially, it wipes the slate clean for the port to pursue other project [sic] at the site, without setting a legal precedent for future development.”).
The construction of terminals in the Pacific Northwest, however, is not limited to the construction of coal terminals. Oil terminals are also being constructed, and an example of this trend is the Tesoro Savage Oil Terminal (Tesoro). If it had been approved, Tesoro would have been the largest oil shipping terminal in the Northwest.142 Tesoro was a proposed joint venture between Tesoro Refining & Marketing Company LLC, a subsidiary of Tesoro Corporation, and Savage Companies to develop and operate a new 360,000 barrel-per-day crude-by-rail uploading and marine loading facility at the Port of Vancouver, Washington.143 The proposed project would have brought in up to four additional train units a day, which would contain up to one hundred cars filled with crude oil144 and were anticipated to be approximately 1.5 miles long.145 The facility was initially expected to be operational in 2014 and would have represented an approximate investment of seventy-five to one hundred million dollars.146 The Facility’s principal purpose was “to provide North American crude oil to U.S. refineries to offset or replace declining Alaska North Slope crude reserves, California crude production, and more expensive foreign crude-oil imports.”147 In order to construct the proposed facility, Tesoro Savage needed a site certification and air permit from the State of Washington.148 Although approval for such facilities ultimately lies with the Governor, the Energy Facility Site Evaluation Council was the administrative agency created to investigate and report its recommendation on whether the requests should be approved.149 Accordingly, the Council engaged in a lengthy administrative process to review Tesoro Savage’s proposed project.

Several Tribes petitioned to intervene in the consideration of Tesoro’s application for the permit by the State of Washington’s Energy Facility Site Evaluation Council (EFSEC).150 The Confederated Tribes of the

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146 Site Evaluation, supra note 143. Some stated that the true cost of the proposed project was actually closer to $210 million. Solomon, supra note 144.
147 Site Evaluation, supra note 143.
148 Report to the Governor, supra note 145, at 4, 7.
Umatilla Indian Reservation was one of the Tribes to seek intervention.\textsuperscript{151} Although the Tribe is located within Oregon, it owns almost 11,000 acres within the State of Washington.\textsuperscript{152} In its petition for intervention, the Tribe provided a detailed description of its concern regarding the impacts of the proposed project. The Tribe explained its concern for the well-being of both tribal members and the environment as a result of the oil tank cars traveling through the Columbia River Gorge National Scenic Area, “where tribal members have fished since time immemorial.”\textsuperscript{153} The Tribe went on to explain that in its 1855 Treaty it reserved the right to take fish at its usual and accustomed places, and the proposed project imperiled those rights.\textsuperscript{154} To begin, the Tribe explained that thirteen different salmon or steelhead stocks were already listed as either threatened or endangered under the Endangered Species Act (ESA).\textsuperscript{155} Accordingly, given that many fish stocks in the area of the proposed project are already imperiled, the Tribe feared that further development along the lines proposed by the Tesoro project would have disastrous impacts on the fish. The vessels accompanying the proposed project would be in the Estuary, which is of paramount importance for these threatened fish, and the Tribe explained that these vessels would only further imperil the fish.\textsuperscript{156} Further, the Tribe objected to the increased crude oil by rail traffic as against tribal interests because the ecosystem and treaty resources would suffer catastrophic damage from accidents, and spills and increased rail traffic would inhibit access to fishing areas and endanger tribal members.\textsuperscript{157} This increased rail traffic would also damage cultural and religious areas of importance for the Tribe.\textsuperscript{158}

The Confederated Tribes and Bands of the Yakama Nation was another of the Tribes to petition to intervene. The Nation requested intervention “to protect its Treaty-reserved rights, in addition to its inherent and sovereign rights, and the rights of its members.”\textsuperscript{159} The Nation requested intervention because of concerns that the proposed project would directly threaten its citizens as well as its treaty rights, such as through negative impacts to vegetation of cultural significance, fish of great importance to the Nation, and air and water quality, and through climate

\textsuperscript{151} Id.
\textsuperscript{152} Petition for Intervention of the Confederated Tribes of the Umatilla Indian Reservation at 2, In re Application No. 2013-01 (Feb. 27, 2015) (No. 15-001).
\textsuperscript{153} Id. at 1.
\textsuperscript{154} Id. at 2–3.
\textsuperscript{155} Id. at 4.
\textsuperscript{156} Id. at 7.
\textsuperscript{157} Id. at 8–12.
\textsuperscript{158} Id. at 12–13.
\textsuperscript{159} Petition for Intervention [sic] of the Confederated Tribes and Bands of the Yakama Nation at 1, In re Application No. 2013-01 (Feb. 27, 2015) (No. 15-001).
change. The Nation also expressed concern that the proposed project would “imperil historic and cultural resources, including Yakama Nation cultural properties and sites along the transportation corridor.”

In addition to the request from Tribes to intervene, the Columbia River Inter-Tribal Fish Commission (CRITFC) also petitioned to intervene in the Energy Facility Site Evaluation Council’s consideration of the Tesoro permit. CRITFC was created by the four treaty tribes of the Columbia River in 1977 and is “charged by its member tribes to provide coordination services, technical expertise and legal support in regional, national, and international efforts to ensure that treaty fishing rights and fishery resources are conserved and protected.” CRITFC petitioned to intervene in the application consideration, as “[t]he project poses significant risks to riverine resources, including fish and water quality.” In its petition to intervene, CRITFC explained that it had concerns regarding the ability of tribal fisherpersons to access treaty fishing areas in addition to potential adverse impacts to the fisheries and water quality. Ultimately, CRITFC concluded that the proposed project would present a high risk of great damage to the Columbia River basin and to those that rely on it.

Tesoro Savage responded to the issues raised in response to its application. In relevant part, it argued that the proposed terminal and its operation would not interfere with tribal treaty rights for a couple of reasons. First, it asserted that the proposed terminal was located downstream from tribal fishing usual and accustomed places and, as a result, would not interfere with these rights. Second, Tesoro Savage argued that if the Tribes persisted in their assertion that their tribal treaty fishing rights extended beyond this area upstream from the proposed project, then they needed to adjudicate those rights in federal court and not in front of the administrative agency, as the EFSEC does not have the authority to determine the scope of tribal treaty rights.

Ultimately, the Energy Facility Site Evaluation Council did not find Tesoro Savage’s response persuasive. In its report to the Governor released on December 19, 2017, the Council unanimously recommended the Tesoro project not be approved, as “Tesoro Savage has failed to meet its burden of proving that the VEDT sited at the Port will produce a net benefit after

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160 Id. at 2–3.
161 Id. at 3.
162 Petition for Intervention of Columbia River Inter-Tribal Fish Commission at 1, In re Application No. 2013-01 (Feb. 27, 2015) (No. 15-001).
163 Id. at 2.
164 Id. at 3.
165 Id. at 4.
167 Id. at 88–89.
168 Report to the Governor, supra note 145, at 3.
balancing the need for abundant energy at a reasonable cost with the impact to the broad public interest.”¹⁶⁹ In reaching this determination, the Council considered tribal cultural and economic impacts. It recognized that the proposed project could have long lasting and significant impacts on tribal fishing rights.¹⁷⁰ The Council noted that the tribal parties presented largely unrebutted evidence that construction of the terminal would result in the Tribes bearing an unusually high share of the “direct costs associated with oil spills, train derailments and fires, damage to the natural environment, and economic and social costs due to the impacts on their fisheries and to their cultural interest.”¹⁷¹ In particular, the Council found the proposed rail corridor particularly problematic given the number of cultural sites in the area and the impacts of the increased rail traffic on individuals crossing the tracks.¹⁷² The Council was also convinced that increased vessels present as a result of the proposed project would negatively impact water quality, aquatic life, and wetlands, which, in turn, would negatively impact tribal fishing rights.¹⁷³ Therefore, the project proposed great risk to the Tribes, including to their fishing rights and cultural sites, that could not be compensated with monetary damages.¹⁷⁴

Based on the report from the Council, Governor Inslee concurred with the unanimous recommendation to reject the Tesoro project application.¹⁷⁵ In rejecting the application, Governor Inslee indicated that three issues in the report were particularly troubling to him.¹⁷⁶ Although he did not specifically reference the potential impact to tribal treaty rights, he did reference concern that the proposed project would negatively impact water quality and fish without sufficient mitigation.¹⁷⁷ In response to Governor Inslee’s decision to not permit the Tesoro project, Tesoro Savage stated that the decision set “an impossible standard for permitting new energy facilities in the state” and that the rejection sent “a clear anti-development message from state leadership that will have far-reaching negative impacts for industries across Washington [S]tate.”¹⁷⁸

¹⁶⁹ Id. at 4.
¹⁷⁰ Id. at 47.
¹⁷¹ Id. at 47–48.
¹⁷² Id. at 48–49.
¹⁷³ Id. at 49.
¹⁷⁴ Id.
¹⁷⁶ Id.
¹⁷⁷ Id.
¹⁷⁸ Solomon, supra note 144.
B. Pipelines

As with the development of coal terminals, the past several years have seen a marked increase in the number of oil and natural gas pipelines being proposed for construction or remodel throughout the United States.\(^{179}\) This may be the result of significant growth in the areas of natural gas and oil. “America surpassed Russia to become the world’s top producer of natural gas in 2009 . . . . U.S. exports of crude oil and petroleum products have more than doubled since 2010.”\(^{180}\) However, the development of energy infrastructure projects “has not kept pace with this rate of growth.”\(^{181}\) As a result, it perhaps comes without surprise that there would be an increased demand for the development of oil and gas pipelines. This demand is heightened by new technology which makes it increasingly cost effective to remove natural resources through fracking.\(^{182}\) Because of this connection between increased fracking and the resulting need for pipelines, many activists are now challenging pipelines as part of their efforts to halt fracking.\(^{183}\) As the discussion below identifies, tribes have also challenged the increased development related to pipelines given concerns that such development is potentially injurious to tribal treaty rights. Such claims, to date, have had more limited success than those made in the context of terminal projects, as no pipeline has been halted solely on the basis of interference with tribal treaty rights. However, tribes have had success combining their tribal treaty rights with other legal claims, such as claims based on the National Environmental Policy Act.

1. Dakota Access Pipeline

In 2016, indigenous peoples and their supporters, the water protectors, gathered in historic proportions near the Standing Rock Sioux Reservation in North Dakota to protest the construction of the Dakota Access Pipeline.\(^{184}\) The water protectors\(^ {185}\) challenged the construction of the


\(^{181}\) Id.


\(^{183}\) Id.


\(^{185}\) Many of those who worked to halt construction of the pipeline outside of the Tribes’ territory adopted the moniker “water protector,” as they worked to protect the water. Sam Levin, ‘He’s a Political Prisoner’: Standing Rock Activists Face Years in Jail, GUARDIAN (June 22, 2018, 9:36 EDT),
pipeline and related pollution that will occur when it leaks.\footnote{186} Broadly, they argued that Tribes were not adequately included in consultations leading to the pipeline approval,\footnote{187} that the Religious Freedom Restoration Act prohibited construction,\footnote{188} and that the Army Corps of Engineers failed to meet the requirements of the National Environmental Policy Act in approving the required permit.\footnote{189} As to this last point, the Tribe argued that the Corps failed to adequately consider the impacts of the pipeline and any potential spill on the Tribe’s treaty rights, as explained below.\footnote{190} Although the pipeline does not cross existing tribal lands,\footnote{191} it would threaten Lake Oahe, and potentially the Missouri River, which are sources of water vital to the Tribe’s survival.\footnote{192} A spill would also threaten the Tribe’s treaty hunting and fishing rights, as such pollution would imperil animals necessary to fulfill the treaty rights. Further, significant sites of tribal cultural, religious, and spiritual importance are located along the pipeline’s route.\footnote{193}

To fully understand this controversy, it must be put in its proper historical context. The Lakota/Dakota/Sioux people have long suffered at the hands of the federal government. For example, the federal government abrogated treaties with the Great Sioux Nation after finding gold in the Black Hills.\footnote{194} Additionally, after the Sioux gave up the lands in question, the federal government tried to starve them by overhunting buffalo and denying rations guaranteed by treaty.\footnote{195} In 1890, approximately 200 Sioux people were shot and killed by the federal government while they prayed during a ceremony called a Ghost Dance.\footnote{196} Fifty years ago, the federal government seized individual homes on the Standing Rock Reservation to build the Oahe hydroelectric dam project, and today, many descendants of the Great Sioux Nation live in some of the poorest reservations and

\footnote{194} Carpenter & Riley, \textit{supra note 193}.  
\footnote{195} \textit{Id.} 
\footnote{196} \textit{Id.}
counties within the United States. For many of the water protectors, federal approval of the Dakota Access pipeline offered another example in a long history of the federal government acting to the detriment of indigenous people.

As detailed below, the Tribes were ultimately successful on their NEPA claims, which included claims based on a failure to consider their tribal treaty rights. Before examining those legal claims, it is helpful to start with a brief discussion of all of the legal arguments utilized by the Tribes. Although this Article focuses on tribal treaty rights, the Dakota Access controversy suggests that tribes may have other legal claims available to them. Initially, the legal controversy surrounding the pipeline focused on the Tribe’s efforts to secure an emergency injunction to halt construction of the pipeline around the Lake Oahe area. The Tribe argued that an injunction was appropriate because the federal government failed to participate in adequate tribal consultations under the National Historic Preservation Act (NHPA) prior to approval of the pipeline near tribal lands. “The Tribe fears that construction of the pipeline . . . will destroy sites of cultural and historical significance. [The Tribe asserts] principally that the [Army Corps of Engineers] flouted its duty to engage in tribal consultations under the National Historic Preservation Act (the NHPA) and that irreparable harm will ensue.” The U.S. District Court for the District of Columbia denied the Tribe’s motion for preliminary injunction, finding that the Corps complied with NHPA and the Tribe failed to demonstrate irreparable harm.

The Department of Justice, the Department of the Army, and the Department of the Interior, however, released a joint statement regarding the case. While these departments acknowledged and appreciated the district court’s decision, they also recognized that important issues raised by the Tribe remained. The joint statement noted that concerns about the consultation process exist and that there may be a need for reform. The departments announced that “[t]he Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous

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197 Id.
199 Id.
200 Id.
201 Id.
203 Id.
204 Id.
decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws.”

Meanwhile, the Tribe appealed the district court’s decision. On October 9, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied the Tribe’s request for an emergency injunction, finding, as the district court had, that the Tribe failed to meet its burden of demonstrating that such an extraordinary remedy was appropriate.

On December 4, 2016, the Army Corps of Engineers announced it would not grant the easement for the Dakota Access pipeline to cross Lake Oahe. This victory for the Tribe, however, was short-lived. On January 24, 2017, newly-installed President Trump issued a presidential memorandum calling on the Secretary of the Army to direct the appropriate assistant secretary to review and approve the pipeline on an expedited schedule, subject to applicable laws. On February 7, 2017, the Army Corps of Engineers announced its intention to approve the easement for the Dakota Access pipeline under Lake Oahe. The water protectors’ camps were ultimately cleared and closed on February 23, 2017. On March 7, 2017, the district court also rejected the Tribe’s claim that the presence of oil in the pipeline desecrated the Tribe’s sacred water, making it impossible for the Tribe to exercise its religious beliefs and therefore violating the Religious Freedom Restoration Act (RFRA).

In addition to claims based on the NHPA and RFRA, the Tribe also separately claimed that the Corps failed to comply with the National Environmental Policy Act (NEPA). The Tribe argued that the Corps failed to adequately consider the pipeline’s environmental effects before granting the permits to construct and operate the pipeline under Lake

205 Id.
The majority of the Tribe’s NEPA claims were unsuccessful, but the court did find that the Corps failed to adequately consider the impacts of the pipeline on the Tribe’s treaty rights, how highly controversial those impacts would be, and the pipeline’s environmental justice implications. Specific to the Tribe’s treaty rights, Standing Rock argued that the Corps’ Environmental Assessment (EA) failed to adequately consider the effects of the construction and a potential spill on the Tribe’s treaty rights—rights specific to water, hunting, and fishing. The district court disagreed with the Tribe as to the Corps’ consideration of the impacts of construction on the Tribe’s treaty rights, finding that the EA clearly addressed these impacts and that they were insignificant or could be mitigated. The court, however, did agree with the Tribe that the EA failed to adequately consider the impacts of a potential spill on the Tribe’s treaty rights. The court explained that the Corps had a duty in the EA to consider both the probability of harm and the consequences of such a harm. The Corps’ EA failed to consider the consequences; while the EA did discuss potential consequences to the Tribe’s treaty rights related to water, it failed to consider the consequences of a spill on the Tribe’s hunting and aquatic treaty rights. “Without any acknowledgement of or attention to the impact of an oil spill on the Tribe’s fishing and hunting rights, despite Plaintiff’s efforts to flag the issue, the EA—in this limited respect—was inadequate.” Ultimately, the district court determined that the Corps’ EA was inadequate in three respects—consequences of a spill on tribal treaty rights, consideration of environmental justice impacts, and the controversy surrounding a potential spill—and therefore granted the Tribe a partial summary judgement.

Following the district court’s decision, the matter was remanded to the Corps for reconsideration, and the Corps again released a decision affirming the legality of the original EA. The Tribes again challenged this decision, arguing that the remand decision was arbitrary under the

214 Id.
215 Id. at 147.
216 Id. at 130.
217 Id. at 132.
218 Id.
219 Id.
220 Id. at 133–34 (“As to aquatic resources, the EA offered only a cursory nod to the potential effects of an oil spill, stating simply that ‘[t]he primary issue related to impacts on the aquatic environment from operation of the Proposed Action would be related to a release from the pipeline.’ It never explained, though, what those effects would be . . . . Likewise, regarding hunting, the EA only discussed the effects of construction on ‘recreationally and economically important species and nongame wildlife’; it said nothing about the effects of a spill.” (citations omitted)).
221 Id. at 134.
222 Id. at 112.
Administrative Procedure Act (APA) and that it failed to adequately consider the Tribes’ treaty rights.\textsuperscript{224} With regard to the tribal treaty rights, the complaint details the Tribes’ treaty rights and the Corps’ duty to protect those treaty rights.\textsuperscript{225} Ultimately, the complaint alleges that the Corps’ analysis on remand “dismisses the potential impacts to the Tribe’s Treaty hunting and fishing rights by reasoning that the risk of an oil spill is low and its impacts manageable—a conclusion that is fundamentally flawed . . . .”\textsuperscript{226} For this reason, in addition to the APA arguments, the Tribes request that the Corps’ decision following remand be deemed arbitrary and capricious and therefore vacated.\textsuperscript{227}

Much can be learned from the ongoing saga of the Dakota Access pipeline. As the foregoing details, the Tribes raised several legal claims to challenge the Corps’ approval of the permit allowing completion of the pipeline—everything from challenges under the Religious Freedom Restoration Act\textsuperscript{228} to the National Historical Preservation Act.\textsuperscript{229} Most of these legal challenges, however, failed. The assertion of the Tribes’ treaty rights (in addition to environmental justice and controversy under NEPA arguments), however, had traction with the federal courts, as the district court held that the Tribes’ treaty rights remained in place, and that the Corps failed to meet its legal obligations under NEPA when it did not consider the consequences of an oil spill on the Tribes’ aquatic and hunting treaty rights.\textsuperscript{230} Further, because of the potential risks, the district court further granted the Tribes’ request to impose interim conditions on the operation of the pipeline during the remand to the Corps, given ongoing concerns about a potential oil spill.\textsuperscript{231} These results demonstrate that assertions based on tribal treaty rights may be persuasive when combined with other legal arguments, such as arguments based on NEPA.

2. \textit{Keystone XL Pipeline}

Like the Dakota Access pipeline, the inauguration of President Trump dramatically impacted the future of the Keystone XL pipeline. The Keystone XL pipeline is a proposed pipeline expansion of the existing Keystone pipeline system, which currently transports crude oil from

\textsuperscript{225} \textit{Id.} at 13.
\textsuperscript{226} \textit{Id.} at 11.
\textsuperscript{227} \textit{Id.} at 14. At the time of writing, the court has not yet reached a decision on the amended complaint.
\textsuperscript{228} Supra note 188 and accompanying text.
\textsuperscript{229} Supra note 213 and accompanying text.
\textsuperscript{231} First Supplemental Complaint, supra note 224, at 6.
Hardisty, Alberta to the Midwest and Gulf Coast of the United States.\textsuperscript{232} The pipeline is owned by TransCanada, which is a Calgary-based energy company.\textsuperscript{233} The Keystone XL pipeline, if constructed, would add over one thousand miles of pipeline to the existing system to transport crude oil from Hardisty, Alberta to Steele City, Nebraska.\textsuperscript{234} Because the Keystone XL pipeline would cross an international boundary, presidential approval is required.\textsuperscript{235}

Many tribes opposed construction of the Keystone XL. The pipeline’s path directly implicates many tribes, as demonstrated by the fact that the Department of State identified eighty-four tribes for consultation about the proposed project.\textsuperscript{236} Several Lakota, Dakota, and Nakota tribes\textsuperscript{237} vigorously opposed construction of the pipeline, as the pipeline’s path falls within treaty and reservation borders.\textsuperscript{238} In the Mother Earth Accord, which was signed on to by numerous tribes in addition to non-Native groups, Tribes expressed concern that the Keystone XL would intrude on sacred sites, ancestral burial grounds, water resources, and treaty rights.\textsuperscript{239} As with the Dakota Access pipeline, the water potentially to be impacted by the pipeline is vital to the Tribes for survival and for cultural and spiritual traditions, and pollution of the water would also impair tribal treaty rights.\textsuperscript{240} Concern among Tribes is so high that at least one tribal leader threatened to close the Tribe’s borders to the pipeline.\textsuperscript{241}

Prior to the election of President Trump, Congress tried several times to approve the pipeline. In 2014, a bill supporting its approval was narrowly defeated in the Senate.\textsuperscript{242} In 2015, Congress succeeded in passing a bill that would have waived the need for presidential approval of the Keystone XL pipeline, but President Obama vetoed the bill.\textsuperscript{243} Also in 2015, the U.S. State Department formally denied the permit application, and many believed that the project was dead after this decision.\textsuperscript{244} However, as with the Dakota Access pipeline, President Trump resuscitated the pipeline when he issued a Presidential Memorandum on January 24, 2017 calling on TransCanada to resubmit its application for a

\textsuperscript{232} Woods, supra note 2, at 70.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 73.
\textsuperscript{237} These are the traditional names for tribes typically referred to as “Sioux” by non-Natives.
\textsuperscript{238} Woods, supra note 2, at 73. The Rosebud Sioux and Cheyenne River Sioux Tribes both alleged that the pipeline would directly cut through reservation lands, although TransCanada denies this. Id. at 74.
\textsuperscript{239} Id. at 76–77.
\textsuperscript{240} Id. at 77.
\textsuperscript{241} Id. at 78.
\textsuperscript{242} Id. at 68.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
presidential permit and for the appropriate federal agencies to review the permit in an expeditious manner. Following this directive from the President, the Presidential Permit for the Keystone XL was approved in 2017.

Several parties, including the Indigenous Environmental Network, challenged approval of the Keystone XL. On November 8, 2018, the U.S. District Court for the District of Montana released a decision on the challenges brought by the Indigenous Environmental Network, North Coast River Alliance, and Northern Plains Resource Council (collectively “Plaintiffs”). Plaintiffs argued that the United States violated the Administrative Procedure Act, National Environmental Policy Act, and Endangered Species Act when it issued a Record of Decision (ROD) approving a Presidential Permit allowing TransCanada Keystone Pipeline, LP to construct the Keystone XL. Although not explicitly addressing tribal treaty rights, the court’s opinion does touch on many legal issues related to treaty rights, such as climate change, which directly impact animals and water often protected by tribal treaty rights. After reviewing all of the Plaintiffs’ arguments, the court ultimately found the ROD and the 2014 Supplemental Environmental Impact Statement (SEIS) it relied on deficient in several respects: (1) it failed to adequately consider the impacts of oil price volatility on the pipeline’s viability; (2) it failed to adequately consider the cumulative impacts of greenhouse emissions from the approved Alberta Clipper expansion and approval of the pipeline; (3) it failed to properly survey all portions of the pipeline’s route for impacts to cultural resources; (4) it failed to consider updated modeling on oil spills; (5) it failed to provide adequate justification for the Agency “reversing course” from its previous denial of a permit for the pipeline in 2015 to approval in 2017; and (6) there was a failure of the 2012

Indigenous Envtl. Network, 374 F. Supp. 3d at 561. Notably, none of these parties are signatories to tribal treaties.
Id.
Id.
Id.
Id.
Id. Although not directly relevant to tribal treaty rights, the court’s holding that the agency failed to provide a reasoned justification for this policy change, as required by the APA and NEPA, is
Biological Assessment (BA) and 2013 Biological Opinion (BiOp) to adequately consider potential impacts to endangered species from a potential oil spill. Of these conclusions, the potential for oil spills and increased impacts of climate change are of the greatest relevance to tribal treaty rights, as both have great capacity for negatively impacting resources, such as water and wildlife, falling under tribal treaty rights. For example, the United Nations explains that “[w]ater is the primary medium through which we will feel the effects of climate change. Water availability is becoming less predictable in many places, and increased incidences of flooding threaten to destroy water points and sanitation facilities and contaminate water sources.” Additionally, tribal treaty rights can implicate cultural resources, so this finding is relevant as well. Further, as demonstrated above by the Dakota Access pipeline example, tribal advocates are seeing some success in arguing that the potential of oil spills needs to be fully considered. With regard to oil spills, the Plaintiffs argued in this instance that the government failed to consider new information regarding oil spills that suggested a higher likelihood of spills from the Keystone XL than the government previously predicted. Plaintiffs also argued that the type of oil to be carried by the pipeline, bitumen from tar sands, was much more difficult to clean up and the government ignored the study demonstrating this fact. The court agreed, finding that the increased incident of major oil spills between 2014 and 2017 was significant and should have been considered in the ROD. In addition to the increased presence of oil spills themselves, this was also important for the government to consider, as oil spills potentially impact wildlife in the area. The court affirmed this point as to wildlife when it also determined that the BA and BiOp that the ROD relied on were deficient given their failure to consider the impact of oil spills on endangered species. Notably, the court also directed the defendants to consider the impact of oil spills on water, which is often a resource covered by tribal treaty rights. The court’s findings as to climate change and impacts to cultural certainly an interesting development, as it suggests that Presidents cannot make dramatic policy changes without supporting justification.

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256 Id. at 590.
257 Kronk Warner, supra note 250, at 917.
259 Id.
260 See supra text accompanying notes 185–208.
262 Id. at 582.
263 Id.
264 Id.
265 Id. at 587–88.
266 Id. at 582.
resources are also potentially helpful to tribes looking to assert their tribal treaty rights. With regard to greenhouse gas emissions and climate change, the court determined that the federal government failed to meet the requirement under NEPA of considering cumulative impacts when the 2014 SEIS relied on for permitting did not consider the Alberta Clipper pipeline expansion in addition to the Keystone XL approval.\footnote{267 Id. at 577–78.} The government approved a permit for the Alberta Clipper pipeline expansion in 2017, but its approval was not considered in the 2014 SEIS it relied on.\footnote{268 Id. at 578.} As a result of this failure, the government did not consider the cumulative impacts of greenhouse gas emissions from both the Alberta Clipper pipeline and Keystone XL pipeline.\footnote{269 Id. at 578–79.} This led to increased climate change, which violated the NEPA requirement to consider cumulative impacts of a proposed project.\footnote{270 Id. at 578.}

With regard to cultural resources, the court explained that NEPA requires analysis of the impact of the proposed project on these resources.\footnote{271 Id. at 580.} Despite consultation with tribes, federal agencies, and local governments regarding cultural resources, the 2014 SEIS indicated that over 1000 acres of the proposed pipeline location remained unsurveyed.\footnote{272 Id. at 580.} No supplemental information on the unsurveyed land was offered before the government approved the permit in 2017.\footnote{273 Id.} The court therefore determined that the government failed to meet its obligation under NEPA to consider impacts to cultural resources, given the pipeline was approved without updated information on these 1000-plus acres that had previously not been surveyed.\footnote{274 Id.}

Although the court’s analysis does not explicitly discuss tribal treaty rights, the court’s findings as to oil spills, climate change, and cultural resources provide guidance to tribes looking for legal arguments to protect tribal treaty resources threatened by energy infrastructure projects. Further, an argument can be made that failure to mitigate climate change impacts may result in tribal treaty violations.\footnote{275 Kronk Warner, supra note 250, at 917.} This decision also shows the emergence of a pattern: tribes and Native entities, such as the Indigenous
Environmental Network, are seeing success in courts when they bring claims based on NEPA and the APA arguing that federal agencies failed to consider impacts on natural resources—whether through oil spills or increased presence of greenhouse gas emissions. Additionally, as with the Tesoro terminal project discussed above, tribes and Native entities are also seeing success when combining in opposition with other stakeholders opposing the construction of energy infrastructure. Finally, although the court did not choose to develop the Tribes’ treaty claims in its final decision, it is impossible to know whether and how the claims ultimately impacted the court’s decision. Clearly, the tribal claims did not negatively impact the outcome, which supports the conclusion that such assertions can be helpful in coordinated efforts with other stakeholders. This was also evident in the Tesoro terminal project discussed above.\(^{276}\)

3. Enbridge Line 5

The previous discussions about the controversies surrounding the Dakota Access and Keystone XL pipelines involve efforts to halt the construction of new pipelines. Tribal efforts are not constrained to stopping the construction of new pipelines, but also include efforts to shut down existing pipelines that threaten tribal treaty rights. An example of this is the effort to shut down Enbridge Line 5. To clarify, this is not an example where tribes are already asserting tribal treaty rights in ongoing litigation. Rather, it is an example of where tribes have raised the existence of their tribal treaty rights to require effective consultation on the future of the pipeline. Further, some scholars have opined that this is a case where tribes could successfully assert their tribal treaty rights. As a result, tribes interested in asserting their tribal treaty rights to slow down or halt energy infrastructure projects should follow the controversy over Enbridge Line 5.

Enbridge Line 5 is “[a] 30” diameter, 645-mile pipeline that carries light crude oil and liquid propane . . . through Michigan’s Upper Peninsula and then splits into two 20-inch diameter parallel pipelines that cross . . . on the lake floor of the 4.6-mile long Straits of Mackinac (which connect Lake Michigan and Lake Huron).\(^{277}\) The pipeline then heads south ending in Sarnia, Ontario.\(^{278}\) The pipeline first became operational in 1953, and “[t]oday, [it] carr[j]ies up to 23 million gallons daily of light crude oil and liquid natural gas (for propane).\(^{279}\) Because of the age of the pipelines, the significant stress they endure related to their position under water in the Straits of Mackinac, and Enbridge’s poor safety record in Michigan (there

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\(^{276}\) See supra text accompanying notes 175–77.


\(^{278}\) Id.

\(^{279}\) Id.
was a 2010 spill in the Kalamazoo River), there is significant concern from parties opposed to the Line about a rupture that could be “catastrophic.” A 2014 report determined that a spill could do long term damage to birds and fish.

In response to concerns about the pipeline’s integrity, the State of Michigan and Enbridge collaborated on plans to enclose the pipeline in a tunnel below the Straits of Mackinac. Tribes expressed concern that this plan was developed without meaningful input from the tribes that will be potentially impacted should a spill occur, as none of the twelve federally recognized tribes in Michigan were consulted in advance of the announcement. The five Tribes of the Chippewa Ottawa Resource Authority agree that Enbridge Line 5 should be shut down. The Tribes fear that a spill in the Straits would directly threaten their fishing rights, which a 1836 treaty established.

Given the ongoing nature of this controversy, one scholar has opined that the Tribes may be able to use the U.S. Supreme Court’s decision in *Washington v. United States*, the culverts case discussed above, to strengthen their position because the decision can be read to stand for the proposition that the right to protect habitat exists along with the right to

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280 *Id.; But c.f. E-mail from Michael Barnes, Enbridge, to Mike Krings, Pub. Affairs Officer, Univ. of Kan. (Apr. 25, 2019) (on file with author) asserting that the pipeline was safe as, “in 2016 the Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted a study of Line 5 in the Straits of Mackinac and said it was fit for service; . . . in 2017 Enbridge conducted hydrotests on that section of pipe and the pressure tests held without any issue—those results were given to the State of Michigan. . . . [b]ecause the pipelines are in the Great Lakes we are well aware of how important it is to maintain and operate in a safe manner. This section of pipe is one of the most heavily monitored and inspected piece [sic] of pipe in the Enbridge system.”.


282 Andy Balaskovitz, *We Were Here First*: Tribes Say Line 5 Pipeline Tunnel Ignores Treaty Rights, *Energy News* (Oct. 8, 2018), https://energynews.us/2018/10/08/midwest-we-were-here-first-tribes-say-line-5-pipeline-tunnel-ignores-treaty-rights/; see also Levi Rickert, *Tribes Not Happy with Agreement to Construct a New Line 5 in Straits of Mackinac*, NATIVE NEWS ONLINE (Oct. 4, 2018), https://nativenewsonline.net/currents/tribes-not-happy-with-agreement-to-construct-a-new-line-5-instraits-of-mackinac/ (“Michigan Governor Rick Snyder announced the new agreement with Canadian energy company Enbridge for a multi-million tunnel that will be built 100 feet before the lake bed in the Straits of Mackinac. This new pipeline will replace the 65-year-old existing Line 5 pipeline that many environmentalists and other [sic] have said is too old and will likely burst.”).

283 Balaskovitz, *infra* note 282. Some have alleged that the “tunnel plan [is] a sweetheart deal for Enbridge made behind the scenes that would keep Line 5 operating in the Straits while the tunnel is built, which could take up to 10 years.” *Id.*

284 Rickert, *infra* note 282.


286 See *id.* (“Under the 1836 Treaty, tribes retained their right to fish throughout the waters of the upper Great Lakes after ceding nearly 14 million acres in the Upper Peninsula and northern Lower Peninsula. . . . Federal courts have upheld the tribes’ rights and, since 1985, the tribes and the state have partnered to manage the waters of the upper Great Lakes.”).

287 *Supra* text accompanying note 76.
take fish. The “[t]ribes could go as far as to argue Enbridge . . . needs to get rid of the pipeline altogether because, no matter how safe they make the pipeline, there could still be a rupture.” Further, at least one of these tribes, the Bay Mills Indian Community, also opposed a plan calling for Enbridge to install seventy anchors around the pipeline, citing concerns that the proposal under a consent decree would allow the company to circumvent environmental review. Although the future of the Enbridge Line 5 is still very much uncertain at the time of this writing, it is a clear example of how tribal treaty rights potentially apply to the existing pipelines as much as they do to proposed energy infrastructure projects. It is also an example of how tribes are using their tribal treaty rights to gain access to increased and more effective consultation.

As with the construction of terminals, these examples demonstrate that tribes have used tribal treaty rights in their efforts to slow down or halt pipelines to various degrees of success. With regard to the Dakota Access pipeline, the federal court explicitly found that the Corps failed to adequately consider tribal treaty rights in reaching its conclusion that the Corps did not comply with NEPA. The Dakota Access controversy therefore demonstrates that tribes may find success when combining their tribal treaty right claims with other legal arguments. In the case of the Keystone XL pipeline, the federal court did not explicitly reference tribal treaty rights in its conclusion, but it did reference climate change and cultural sites, which are directly related to treaty rights. Finally, although the controversy over the Enbridge Line 5 has not yet led to litigation over tribal treaty rights, it is an example of how tribes: (1) are concerned about existing pipelines, as well as those under construction; (2) may use the existence of tribal treaty rights to demand effective consultation; and (3) as some scholars have opined, could eventually lead to the successful assertion of tribal treaty rights to halt refurbishment of the existing pipeline. On the whole, all of these examples demonstrate that tribal treaty rights are a viable legal tool that tribes interested in slowing down or stopping pipelines should consider.

288 Stateside Staff, Michigan Tribes Could Have Strong Case Against Line 5 Thanks to SCOTUS Decision, MICH. RADIO (June 15, 2018), http://www.michiganradio.org/post/michigan-tribes-could-have-stronger-case-against-line-5-thanks-scotus-decision (“If it can be shown that there is a possibility, and we don’t know what that possibility is, but if it can be shown there is a possibility that the pipeline would rupture and release a catastrophic release of oil, then that directly affects the tribe’s treaty rights.” (internal quotation marks omitted)). However, given this was a plurality decision with no written opinion, this conclusion is speculation. Id.
289 Id.
290 Andrew Westney, Tribe Says Enbridge Pipeline Plan Would Skirt Enviro Review, LAW360 (Sept. 14, 2018, 8:16 PM), https://www.law360.com/articles/1083030/tribe-says-enbridge-pipeline-plan-would-skirt-enviro-review (“The anchors are pipe supports used to secure the Line 5 pipeline through steel saddles that are connected to two 10-foot steel screws apiece, which are then drilled into the floor of the Straits of Mackinac . . . .”).
291 Id.
III. LESSONS LEARNED AND CONCLUDING THOUGHTS

As the foregoing demonstrates, in many instances, tribes have seen success in challenging energy infrastructure projects—such as terminals and pipelines—on the basis of their tribal treaty rights. This success has varied from overt success, such as in the Gateway project, where projects were denied explicitly due to their impacts on tribal treaty rights, to more nuanced success, such as in the example of the Keystone XL pipeline, where the district court relied on legal arguments incidental to tribal treaty rights in finding the approval of the Presidential Permit deficient. Regardless of whether explicit or implicit, however, these examples combined demonstrate that tribal treaties continue to be valuable tools accessible to tribes in their efforts to delay or stop energy infrastructure projects. Notably, these examples demonstrate that tribes may need to be nimble in how they present arguments based on treaty rights. Depending on the situation, an explicit assertion that the proposed project will infringe on tribal treaty rights may be appropriate, such as in the Gateway terminal project example. Alternatively, tribes have also seen success when raising tribal treaty right claims as part of larger legal claims based in NEPA or the APA. In fact, based on these case studies, tribes may be wise to consider arguments that are inclusive of tribal treaty right claims, NEPA claims, and APA claims, where appropriate.

Further, these examples also demonstrate how tribes may improve their position by coordinating with other non-tribal entities, such as in the examples of the Tesoro terminal project and Keystone XL pipeline. In the case of the Tesoro terminal project, significant opposition to the project from the general public grew following the initial public hearing in October 2013. For example, leaders of the Columbia Riverkeeper and Gramor Development (which was a member of Columbia Waterfront LLC) were early objectors to the proposed project. Further, public testimony during a 2014 hearing in front of the port commissioners did not focus on tribal claims; public commentators instead raised concerns about the project related to property values, climate change, volatility of Bakken crude, Tesoro’s safety record, impact of toxic air emissions, impacts on the waterfront development project, and oil spills.

In fact, the Tesoro project is an example of how four years of opposition and organization in conjunction with tribal efforts can

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292 Supra Part II.A.
293 Supra Part II.B.2.
294 See, e.g., Report to the Governor, supra note 145, at 7–8 (noting that “[t]he majority of witnesses testified in opposition” to the project at the October 2013 informational meeting); see also Florip, supra note 142 (describing the project as one that “roils the community” and discussing opposition to the project raised at a March 2014 meeting).
295 Florip, supra note 142.
296 Id.
eventually be successful in blocking a terminal. During the four years that the companies worked through the state administrative process to try to get the project approved, the local grassroots organizations continued to exert pressure. One of the earliest and most consistent entities objecting to the Tesoro project was the neighborhood of Fruit Valley, which would have been significantly impacted by the proposed project, and about a dozen other neighborhood associations followed its lead. This local movement eventually spread to thousands that would show up at public meetings to protest the project. Local community leaders called this process “grindstoning,” as they were slowly “grinding” to oppose the project.

For tribes interested in asserting their tribal treaty rights to halt energy infrastructure development, tribal opposition to the Tesoro project provides valuable lessons. First, it demonstrates that tribes can successfully assert treaty rights in front of an administrative agency, such as the Energy Facility Site Evaluation Council. In that instance, the Tribes successfully raised concerns that the proposed terminal would impact tribal treaty fishing rights, both in terms of restricting access for tribal fishermen and impacts on the fish themselves. The Tribes also presented significant concerns about the impact of such development to their cultural and religious sites. The Council agreed, finding that the Tribes would bear an unusually high cost of the project in terms of impacts to treaty rights and sites of cultural and religious significance.

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297 Solomon, supra note 144.
298 Id.
299 See id. (“[T]he Fruit Valley Neighborhood Association became the first of about a dozen neighborhoods to pass a resolution against the terminal.”).
300 Id.
301 Id.
302 Id. For example, “[t]wo years ago, three oil-by-rail terminals were planned on the Washington coast in Grays Harbor. Plans for all three were eventually cancelled because of fierce local opposition. In September 2017, the final of six coal terminal projects proposed over the last decade in Oregon and Washington was rejected in Longview, Washington.” Id.
303 See Report to the Governor, supra note 145, at 3 (listing the Umatilla Tribes and the Yakama Nation among the intervention parties who appeared before the Energy Facility Site Evaluation Council); see also id. at 84 (discussing treaty rights to fishing sites that would be impacted by the project).
304 See id. at 83–84 (summarizing the proposed terminal’s ecological and economic impacts).
305 See id. (noting the “cultural resources and sacred sites” in the area of the project and the “significant and unique cultural and economic interests at risk”).
306 See id. at 47–49 (“[T]he tribal cultural and economic impacts are great. Many of these impacts cannot be mitigated, nor would the tribes be compensated for the loss. These disproportionate impacts on the tribal people are an unacceptable risk.”); id. at 83–84 (“The Council finds that there are significant tribal cultural impacts. These impacts cannot be mitigated nor can the tribal people be compensated for these losses.”).
opposition to the Tesoro project was not limited to tribes. Rather, non-tribal opposition started early and was continuously asserted for years. Tribes seeking a similar result may therefore be wise to partner with non-tribal entities/individuals in efforts to halt such development. The failure of the Tesoro project was likely due to the sustained efforts and various legal arguments of all parties involved, and not solely the Tribes’ arguments.

These examples are also a cautionary tale for developers of energy infrastructure projects, as they would be wise to reach out to tribes early and often in the development of such projects. Professor Jeanette Wolfley explains that it is important for developers to build relationships with tribes to hopefully avoid controversy later in the lifespan of a potential energy infrastructure project. In addition to demonstrating respect for tribal sovereignty, promoting overall engagement and cooperation, and encouraging community collaboration, such collaboration between tribes and developers also avoids negative consequences for developers, such as the death of a project as seen in the Gateway project example. Other impacts may not be as obvious—in the case of Energy Transfer Partners, which developed the Dakota Access pipeline, the company experienced intense international scrutiny, and, during the height of the controversy surrounding the pipeline, “three international banks divested their money in the DAPL project, and US cities closed their accounts in banks supporting the company.”

Notably, this occurred before the federal district court reached its decision finding that the EIS failed to adequately consider the impacts to tribal treaty rights. In other words, the banks and cities took these steps not in response to court decisions but in response to the perception that the pipeline infringed on the Tribes’ treaty rights. One could imply from this that the assertion of tribal treaty rights has moral force in today’s society beyond its potential legal force. Energy developers, as well as tribes, would therefore be wise to take tribal treaty rights into consideration when proposing and developing energy infrastructure projects.

As Jerry Meninick, a citizen of the Yakama Nation, explained—tribal treaty rights were designed not only to protect the present generation but generations to come. The examples discussed above both in the terminal and pipeline contexts demonstrate that this is true—administrative agencies and courts are indeed interpreting tribal treaty rights to ensure that future generations of tribal members are protected. Tribal treaty rights therefore

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307 Solomon, supra note 144.
309 Supra Part II.A.
310 Wolfey, supra note 308, at 162 (footnote omitted).
311 Wood, supra note 1, at 356.
present challenges to energy infrastructure development unwelcome by tribes.