



UNIVERSITY OF  
OREGON

School of Law

# Environmental and Natural Resources Law Center



## **Tribal Guide to the Legal Landscape of Fossil Fuel Infrastructure Projects**

*A Summary of Tribal Tools & Legal Levers for Halting Fossil Fuel  
Transport and Exports Through the Pacific Northwest*

A White Paper of the University of Oregon School of Law

Environmental and Natural Resources Center Native Environmental Sovereignty Project

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## **About this Paper**

This white paper was created through the University of Oregon Environmental and Natural Resources Law (ENR) Center’s Native Environmental Sovereignty Project, an interdisciplinary research project focused on exploring the intersection of tribal sovereignty with the protection of tribal natural resources.

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As part of the ENR Center's mission of "engaging the law to support sustainability on earth," the ENR Center houses seven theme-based, interdisciplinary research projects that pair law student enthusiasm with faculty expertise in an effort to bring intellectual energy to bear on some of the most challenging and cutting-edge environmental issues of our day. The seven interdisciplinary research projects are: the Conservation Trust Project; the Energy Law and Policy Project; the Food Resiliency Project; the Global Environmental Democracy Project; the Native Environmental Sovereignty Project; the Oceans Coasts and Watersheds Project; and the Sustainable Land Use Project. Each academic year, the Center awards one-year fellowships to a select group of University of Oregon School of Law students to work with ENR faculty members on specific research projects within each of the theme-based, interdisciplinary research projects.

## **About the Native Environmental Sovereignty Project**

The Native Environmental Sovereignty Project is one of seven theme-based, interdisciplinary research projects administered by the University of Oregon ENR Center. The Project is led by faculty leaders Mary Christina Wood and Howie Arnett. The mission of the Native Environmental Sovereignty Project is to examine emerging tribal roles in comanaging lands and resources. Important issues the Project has recently explored include the intersection of Pacific Northwest tribes and fossil-fuel infrastructure projects.

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## **I. INTRODUCTION**

Fossil fuel projects affecting tribal lands and resources pose great risks to the health, safety, and well-being of tribes, particularly in the Pacific Northwest. Tribes have several legal tools available to challenge and stop fossil fuel infrastructure projects. The law governing the transportation of fossil fuels is complex, and the permitting process often involves many entities from the local to the federal level.

The legal landscape can look very different depending on whether the fossil fuel project is on or off reservation land and thus requires two distinct approaches. For on-reservation issues, the relevant law largely includes federal statutes and regulations implemented by the Bureau of Indian Affairs. The potential legal strategies discussed pertain mostly to the issuance and negotiation or re-negotiation of on-reservation right-of-way easements. For off-reservation issues, there is relevant law at the federal, state, and local levels, as well as important treaty rights that may come into play. Off-reservation approaches include: (1) enforcing the federal trust obligation, and (2) enforcing treaty rights at the federal, state, and local levels. Both might provide the basis for permit denials at the administrative level and for judicial injunctive relief.

Many of the cases and legal arguments are complex and depend on the particular facts of the situation, especially in the off-reservation context, and there is undoubtedly no single solution.

As such, this guide provides an overview of the various legal issues, rules, and arguments that are relevant to tribal efforts to halt fossil fuel projects. The guide is divided into two sections: tribal prerogatives at the federal, state, and local level for (1) projects occurring on reservation lands and (2) for projects occurring off reservation lands. Three case studies are included to give real-world examples of the successful application of legal levers available to tribes.

## **II. ON-RESERVATION TRIBAL PREROGATIVES**

Due to their distinct legal status as a separate sovereign, tribes hold unique levers against fossil fuel infrastructure projects that pierce their tribal lands. These levers can be viewed through two distinct frameworks: those derived from property rights and those stemming from the inherent tribal authority to regulate as sovereigns. This section will first discuss the property rights lever and then the extent of tribes' regulatory authority.

### **Property Law Framework**

In the property law framework, tribes hold significant power over easements as specified in the Indian Right-of-Way Act (IRWA). This power emanates from the act's requirement that tribes consent to the easement.<sup>1</sup> Tribes can withhold consent on both proposed easements and renewals or changes to existing easements.<sup>2</sup>

<sup>1</sup> 25 C.F.R. § 169.7(b); For a list of procedural regulation provisions, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-033661.pdf>.

<sup>2</sup> *Id.*

Consent must come as an authorization from the tribe or, if the tribe requires, as a written agreement with the tribe.<sup>3</sup> The requirement to obtain consent functions differently depending on whether the easement is proposed or already exists.

For proposed easements, the consent requirement provides tribes with a powerful tool to decide whether pipelines or rail lines will cross tribal lands.<sup>4</sup> If tribes refuse to consent, the proposed easement will not cross tribal lands. If a tribe does not refuse to consent outright, the tribe can use the requirement to obtain concessions on how the easement will be implemented.<sup>5</sup> Those concessions can include limiting the types and amounts of fossil fuel that will cross the reservation and negotiating for specific remedies if the terms of the easement are breached.<sup>6</sup>

For existing easements, the consent requirement does not provide tribes with a panacea to stop all fossil fuels from moving across their reservations. Rather, the consent requirement empowers tribes to influence existing easements when new uses, amendments, or renewals are proposed. A new use proposal for an existing easement occurs when: (1) there is a proposal for any use that is not within the scope of the original easement, and (2) ground

disturbance is necessary to accommodate the new use.<sup>7</sup> Any amendment to an existing easement requires tribal consent unless such amendments are merely administrative changes, like correcting a legal description within the grant document.<sup>8</sup> Likewise, all renewals of existing easements require tribal consent unless the grantee is able to meet a multitude of statutory provisions and the original easement contained an express provision allowing for automatic renewal without consent.<sup>9</sup> The consent requirement ensures tribes a powerful and influential role in the decision-making process when government and industry either propose or adapt an easement to allow fossil fuels to cross the reservation.

### **Tribal Regulation**

Tribal authority to regulate provides a legal framework for continuous tribal governance of fossil fuels infrastructure projects crossing tribal lands. Tribal regulation can ensure that tribal authority over rail or pipelines is not dependent on the triggering of the consent requirement. Although tribal regulations provide for continuous tribal oversight, these regulations face significant jurisdictional and preemptory challenges.

Evaluating whether a tribe has authority to regulate reservation or trust land

<sup>3</sup> 25 C.F.R. § 169.107(a).

<sup>4</sup> *Id.*

<sup>5</sup> See *Swinomish Indian Tribal Community v. Burlington Northern Santa Fe Railway Company*, 2017 WL 2483071, 1 (W.D. Wash. 2017).

<sup>6</sup> *Id.*

<sup>7</sup> 25 C.F.R. § 169.127(a)(2).

<sup>8</sup> 25 C.F.R. § 169.204(b).

<sup>9</sup> *Id.*

pertinent to a right-of-way easement requires a fact-specific inquiry conducted by the tribe.<sup>10</sup> Factors to consider in this inquiry are the legislation creating the right-of-way, whether the tribe consented to the right-of-way, whether the tribe had the right to exercise dominion and control over the right-of-way, and whether the land was open to the public.<sup>11</sup> The purpose of this inquiry is to determine whether the land pertinent to the right-of-way remains trust land or becomes non-Indian fee land.<sup>12</sup> Tribes can regulate trust land, but tribes can only regulate non-Indian fee land if the regulation: 1) pertains to the activities of non-members who enter consensual relationships with the tribe, or 2) pertains to the conduct of non-Indians that threatens or directly affects the political integrity, economic security, or health and welfare of the tribe.<sup>13</sup> Individual tribes must determine whether the land pertinent to the right-of-way is suitable to tribal regulation.

If tribes determine that they have the authority to regulate, the possibility remains that federal law may preempt tribal regulations over pipelines or rail lines.<sup>14</sup> The federal law regulating

pipelines, the Pipeline Safety Act (PSA),<sup>15</sup> is silent on tribal regulation; therefore the act arguably does not preempt tribal regulatory authority over pipelines on reservations.<sup>16</sup> There is less clarity with the federal laws regulating rail lines, the Interstate Commerce Commission Termination Act (ICCTA) and the Hazardous Materials Transportation Act (HMTA). In the context of fossil fuels, the ICCTA regulates coal trains and the HMTA regulates oil trains. The ICCTA is unclear on whether the act preempts tribal regulation over coal trains. The ICCTA explicitly states that the act preempts other state and federal laws.<sup>17</sup> However, the act also includes a provision maintaining state, local, and tribal authority over certain public transportation and solid waste shipments via rail.<sup>18</sup> The explicit mention of tribal authority in the provision on public transportation and solid waste shipments and not in the preemption provision strengthens the argument that tribal regulations are not preempted by the statute. Currently, courts have not analyzed whether ICCTA preempts tribal regulations, but the foregoing analysis suggests that tribes may enact regulations over coal trains crossing through reservation or trust land.

tribal regulations would not violate the clause because these regulations are being initiated for protecting a "legitimate local public interest with an incidental effect on commerce" rather than economic protectionist measures. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, (US 1970).

<sup>10</sup> *Cohen's Handbook of Federal Indian Law* (2012)

<sup>11</sup> *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000), referencing *Strate*

<sup>12</sup> *Montana v. U.S.*, 450 U.S. 544, 566 (U.S. 1981).

<sup>13</sup> *Id.*

<sup>14</sup> Tribes should not be concerned about the Dormant Commerce Clause preempting tribal regulations because the clause was not intended to limit tribes. Essentially,

<sup>15</sup> 49 U.S.C.A. § 60101 - 60141.

<sup>16</sup> *Id.*

<sup>17</sup> 49 U.S.C.A. § 10501(b).

<sup>18</sup> *Id.*



Tribes face tremendous difficulty regulating oil trains passing through reservations or trust land because the HMTA expressly voids tribal regulation in two situations.<sup>19</sup> The first situation occurs when a regulated entity cannot comply with both tribal regulation and regulation issued pursuant to the HMTA. The second situation occurs when the tribal regulation is “an obstacle to accomplishing and carrying out” the HMTA.<sup>20</sup> An example of a tribal regulation creating an “obstacle” is a Prairie Island Mdewakanton Sioux Indian Community tribal ordinance that requires extensive information on shipments of uranium crossing the reservation. The Eighth District Court of Appeals concluded such a law created an obstacle to the HMTA and therefore was preempted.<sup>21</sup> However, the statute also permits tribes to apply for a preemption waiver from the Secretary of Transportation.<sup>22</sup> Receiving a waiver would ensure that tribal regulations are not preempted and apply to oil trains crossing reservation or trust land.

<sup>19</sup> 49 U.S.C.A. §5101- 5127.

<sup>20</sup> 49 U.S.C.A. § 5125(a)(2).

<sup>21</sup> *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993)

<sup>22</sup> Factors proscribed to guide the inquiry into whether a regulation is unreasonably burdensome are: (1)The “extent to which increased costs and impairment of efficiency” result from the tribe's requirement; (2) Whether the tribe's requirement has a rational basis; (3) Whether the tribe's requirement achieves its stated purpose; and (4) Whether this is a “need for uniformity with regard to the subject concerned,” and if so whether the tribe's

Both the consent requirement and the opportunity for tribal regulation provides tribes with strong levers to prevent fossil fuels from crossing their tribal lands. The consent requirement provides tribes with means of halting new projects and controlling existing projects on their reservations and trust lands. Additionally, tribal regulation of pipeline safety and coal trains seems unhampered. While the regulation of oil trains may face preemption challenges, leverage may be found within the HMTA through the preemption waiver. These tools can be deployed to ensure new fossil fuel infrastructure projects do not cross tribal lands or to influence the scope of existing projects.

### **III. OFF-RESERVATION TRIBAL PREROGATIVES**

Tribes may be successful in halting or delaying off-reservation projects if they assert persuasive arguments at the permitting stage. In the Pacific Northwest, there are two important tools available to tribes: the federal trust obligation and treaty rights. Tribes may be empowered to use either or both of these tools to stop fossil fuel infrastructure projects that impact the health of their people and resources. While tribes are likely familiar with these tools already, this section provides an overview of their significance in the context of fossil fuel projects.

requirement “competes or conflicts” with those of other States, municipalities, or tribes. 49 C.F.R. § 107.221.

The federal Indian trust doctrine is an obligation between the federal government and tribes that requires that the United States act to protect the best interests of federally recognized tribes, along with their natural resources and property.<sup>23</sup> Accordingly, all agencies of the federal government are obliged to uphold this duty.<sup>24</sup> There are a variety of mechanisms for seeking judicial relief for failure of the federal government to uphold the trust obligation. Tribes may seek injunctive relief to stop agency action under the Administrative Procedures Act (APA) or monetary damages under the Tucker Act or the Indian Tucker Act.<sup>25</sup> Trust enforcement under the APA is much broader than under the Tucker Acts because under the APA there is no requirement to premise a claim on a statute or other source of express law, as is required under the latter. However, recent decisions have applied Tucker Act restrictions to claims brought under the APA. This approach is erroneous because the APA does not contain the same restrictive language found in the Tucker Acts.

<sup>23</sup> See *Dept. of Int. & Bureau of Indian Affairs v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 11 (2001) (“The fiduciary relationship has been described as ‘one of the primary cornerstones of Indian law.’”). See *Cohen’s Handbook of Federal Indian Law* (2012).

<sup>24</sup> *Parravano v. Babbitt*, 70 F.3d at 546 (“This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.”).

<sup>25</sup> 28 U.S.C. § 1491(a)(1) and 28 U.S.C. §1505.

In the context of fossil fuel infrastructure projects, tribes will often seek injunctive relief under the APA in order to stop damage before it occurs. Tribes may choose to leverage the trust doctrine to lobby federal agencies to act in accordance with their interests during the fossil fuel permitting process. If the trust is violated in the permitting process or other agency action, tribes that carefully explain the distinct analysis of the trust doctrine under the APA may be successful in receiving equitable relief from courts.

### **Proper Applications of the Federal Indian Trust Doctrine: *Pyramid Lake & Nez Perce***

Tribal challenges to agency actions brought under the APA to enforce the federal Indian trust doctrine were successful in *Pyramid Lake Paiute Tribe of Indians v. Morton* and *Nez Perce Tribe v. U.S. Forest Service*.

In *Pyramid Lake*, the tribe sought injunctive relief under the APA to stop regulations that would result in a diversion of water from the tribe’s reservation. The tribe claimed that the agency action was an abuse of discretion that ignored the agency’s trust responsibilities to the tribe. In response to the Secretary’s “good faith” effort at accommodation, the court stated, “The United States, acting through the Secretary of Interior, ‘has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who

represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.” The court granted the tribe’s requested injunction, concluding that the Secretary failed to act in accordance with the trust duty: “The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result.”<sup>26</sup>

More recently, in *Nez Perce Tribe v. U.S. Forest Service*, the court granted a preliminary injunction against the Forest Service’s approval of the shipment of massive evaporators across National Forest lands. The tribe leveraged and outlined the agency’s trust responsibility in its complaint, albeit without much elaboration. Although the court noted that the agency had a statutory duty to act in accordance with the Forest Plan, which outlined a duty to act in the interest of the tribe, the court also noted that the Forest Service had an “overarching . . . duty as trustee over the Tribe.”<sup>27</sup>

<sup>26</sup> *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 254-56 (D.D.C., 1972).

<sup>27</sup> *Nez Perce Tribe v. U.S. Forest Service*, 2013 WL 5592765 1, 5-6 (D. Idaho, 2013).

Additionally, a tribe seeking to stop fossil fuel infrastructure projects might seek enforcement of its treaty rights to do so. Courts have determined that “usual and accustomed” fishing rights, included in many treaties in the Pacific Northwest, have several corollary rights. These rights include a right of access to fishing sites (even through and within private property), a right to harvest up to half of the harvestable population of a fishery, and the right of habitat protection.<sup>28</sup> The right of habitat protection greatly expands the potential of treaty rights to stop fossil fuel projects, and tribes may assert this duty of protection at every jurisdictional level.

At the federal level, agencies are charged with upholding treaty rights, as they are the supreme law of the land. Courts and agencies use the *de minimis* standard to assess whether an infringement on tribal treaty rights is legally cognizable so as to permit judicial intervention.

<sup>28</sup> *Winans*, 198 U.S. at 381 (holding that UGA tribal treaty rights “imposed a servitude upon every piece of land” that tribal peoples had traditionally used to access fishing waters; also characterized as “easements,” *id.* at 384.). *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974, *aff’d*, 443 U.S. 658 (1979)); see also *Passenger Fishing Vessel*, 443 US at 686 (the court imposed a “moderate living standard” as a ceiling to the harvest amount tribes were entitled to). *U.S. v. Washington*, 827 F.3d 836 (9th Cir. 2016) [hereinafter “*Culverts*”] (amended in part by *U.S. v. Washington*, 853 F.3d 946 (9th Cir. 2017) (affirmed by an equally divided court, *Washington v. U.S.*, 138 S.Ct. 1832 (2018)).

### **The Lummi Nation's Victory Under the *De Minimis* Test**

The Lummi Nation successfully leveraged its usual and accustomed treaty fishing rights to halt a proposed coal terminal at Cherry Point on the Salish Sea. The Lummi provided ample evidence to establish that the terminal threatened guaranteed treaty rights, including:

- Tribal declarations stating that tribal members exercised their fishing treaty rights in the Cherry point area, and detailing the methods used for doing so;
- Maps showing where tribal members harvested fish and shellfish and the areas that would be impacted by the proposed terminal;
- A declaration and data showing millions of fish and shellfish catches over forty years; and
- A risk assessment report concluding that the terminal would result in an increase in the number of Lummi fishing disruptions in the area.

The Army Corp of Engineers concluded that the terminal would have had a greater than *de minimis* impact on treaty protected fishing grounds and therefore denied the permit.<sup>29</sup>

<sup>29</sup> Memorandum for Record from Michelle Walker, Chief, Regulatory Branch, U.S. Army Corps of Engineers (May 9, 2016), <https://turtletalk.files.wordpress.com/2016/05/160509mfruademinimisdetermination.pdf>.

States may also deny permits under statutory and regulatory permitting procedures for fossil fuel infrastructure projects when tribes leverage their treaty fishing rights and use persuasive evidence to demonstrate the negative impacts such projects are likely to have on treaty rights and corollary rights.

### **Considerations of Treaty Rights at the State Level: Examples from Oregon and Washington**

The State of Oregon denied a permit for a coal transport facility at Coyote Island after four tribes, the Umatilla, Warm Springs, Yakama, and Nez Perce, along with the Columbia River Intertribal Fish Commission, submitted extensive evidence during the comment period. The persuasive evidence included “historical information, descriptions, mapping, photographs, and a video that support[ed] commercial, subsistence and cultural fishing uses by tribal fishers.”<sup>30</sup> This victory is particularly noteworthy because the agency considered tribal interests to be part of general public considerations of need, health, and safety, which, under the relevant statutes, are to be balanced against the economic need and benefits of the project.

Similarly, in Washington the state denied

<sup>30</sup> Oregon Department of State Lands, Findings and Order, Application No. 49123-RF at 16 (Aug. 18, 2014), <https://crag.org/wp-content/uploads/2014/08/Findings-and-Order-49123-RF.pdf>.

a permit for the Millennium Bulk Terminal due to concerns about the impact on treaty rights. The Cowlitz Tribe and the Confederated Tribes of the Umatilla Indian Reservation's persistent and continual involvement in the permitting process was integral to securing the denial. The tribes submitted hundreds of comments during the comment period and publicly opposed the project.

The Tribes' success is also noteworthy because the agency focused on the impact of the project on fishery habitat and broadened the scope of the project's potential impact to include the effect of rail operations: "Fugitive coal dust particles generated by the Millennium operations and additional trains . . . could reduce the number of fish surviving to adulthood and returning to Zone 6 of the Columbia River, and could affect the number of fish available for harvest by Native American Tribes."<sup>31</sup> In this respect, tribal efforts likely helped the agency to see and consider the entire picture of potential impact on treaty rights.

Finally, localities may also grant permit denials due to tribal interests, notwithstanding a risk of preemption. Recently, Wasco County denied Union Pacific a permit due to the impact on treaty rights. Upon review, Union Pacific's preemption argument was denied because the local law, an implementation of federal law requirements under the Columbia River Gorge National Scenic Area Act, was itself federal law.

#### **IV. CONCLUSION**

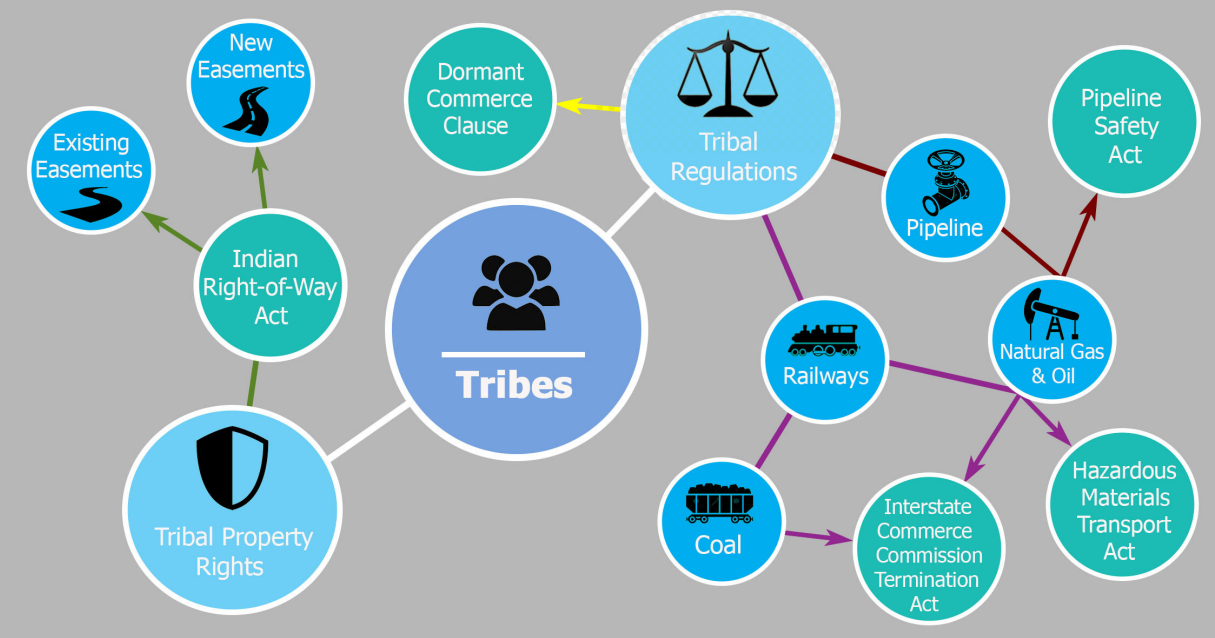
In sum, tribes as original sovereigns have several tools to use in their effort to prevent fossil fuel transportation from occurring in the Pacific Northwest. For on-reservation fossil fuel projects, tribes can use a combination of tribal regulations and the Indian Right-of-Way Act consent requirement to stop these projects. For off-reservation fossil fuel projects, tribes can halt these projects by asserting persuasive arguments at the permitting stage founded on the federal Indian trust obligation or on treaty rights.

<sup>31</sup> Section 401 Water Quality Certification Denial (Order No. 15417), Department of Ecology, State of Washington Sept. 26, 2017, <http://www.millenniumbulk.com/wp-content/uploads/2017/10/401-WQ-Certification-Denial-Letter.pdf>.

V. APPENDIX

# On-Reservation Tools

*Legal Landscape for Exercise of Tribal Sovereignty*



# Off-Reservation Tools

*Legal Landscape for Enforcing Tribal Rights*

