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Tribal Tools & Legal Levers for Halting Fossil Fuel Transport & Exports Through the Pacific Northwest

Mary Christina Wood
University of Oregon

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TRIBAL TOOLS & LEGAL LEVERS
FOR HALTING FOSSIL FUEL TRANSPORT &
EXPORTS THROUGH THE PACIFIC NORTHWEST

*Mary Christina Wood, Anna Elza Brady, &
Brendan Keenan Jr.*

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I. INTRODUCTION

Every day in the Pacific Northwest, untold volumes of fossil fuels pass through tribal geographies *en route* to foreign and domestic markets. Coal and oil trains rumble across Indian reservations and through ceded territories. Pipelines pump oil and natural gas over ancestral homelands to export terminals in treaty fishing waters. Trucks roll down highways carrying volatile materials or heavy equipment used for drilling, sometimes travelling on narrow roads perilously close to salmon streams that Native people have stewarded for millennia.

The transport of toxic fossil fuels through traditional tribal territories poses numerous threats to Native communities as well as their non-Native neighbors. Oil spills, explosions, water contamination, and particulate drift are among the most obvious and

¹Mary Christina Wood: Philip H. Knight Professor of Law and Faculty Director, Environmental and Natural Resources (ENR) Law Center; Anna Elza Brady: Law Clerk to the Honorable Justice Susan Owens, Washington State Supreme Court; Brendan Keenan: Staff Attorney at the Office of Legal Counsel for the Confederated Tribes and Bands of the Yakama Nation. The authors wish to extend tremendous thanks to Charles W. Woodward IV, Research Associate for the ENR Center, for diligent oversight of this research undertaking, and for his expert editing of all sections. The authors also thank research fellows Maggie Massie, Ambriel Sandone, and Whitman Koch. Additionally, the authors would like to thank Howard Arnett, adjunct professor of law at the University of Oregon School of Law and Of Counsel at Karnopp Peterson, LLP, and Sarah Lawson, Of Counsel at Schwabe, Williamson & Wyatt, for their advice and assistance. This article was supported by the Native Environmental Sovereignty Project of the ENR Center. The authors thank Heather Brinton for her continued administrative guidance. The ENR Center sponsored a writing workshop for this article in March 2018, and the authors would like to recognize the invaluable input of the tribal leaders, the tribal attorneys, and the many public interest attorneys that attended.

immediate burdens of risk.² Transport of fossil fuels for ultimate combustion as sources of energy also exacerbates the long-range hazards of climate change. Inundation of coastal Native villages³ and changing harvest cycles of First Foods⁴ are two of the many forms of damage that tribes already experience on the frontlines of the global climate crisis. As sea level continues to rise, extinction rates accelerate, and climate systems grow increasingly erratic, halting fossil fuel transport becomes ever more crucial to the long-term viability of life on Earth.

Tribes are responding with remarkable leadership in the face of climate change and the daily direct risks posed by such fossil fuel transport and export. As the original sovereigns of this continent, tribes possess an array of distinct legal tools, which they are successfully deploying to halt fossil fuel infrastructure in its tracks. Innovating sophisticated legal strategies, tribes are filling a vacuum left by the failure of mainstream political leaders to meaningfully address climate change. Through both cultural practices and political diplomacy, native nations and grassroots indigenous communities now lead the resistance to fossil fuels and the shift to carbon-neutral economies.

Pacific Northwest tribes play a particularly important role in such a shift because of the region's position as the portal—or barricade—in the fossil fuel supply chain. The Pacific Northwest is renowned for its lush temperate forests, pristine waterways, and vibrant fisheries, all of which have sustained indigenous human communities for thousands of years. But more recently, the region's geographic location has become a prominent draw in a global market distribution scheme for fossil fuels. The Pacific Northwest lies poised between major fossil fuel deposits to the east in interior North America, and voracious Asian energy markets west across the Pacific Ocean.⁵ In order for natural gas from the Uintah Basin or oil from North Dakota to reach power plants in Beijing or drivers in Taipei through the most direct route, those fossil fuels must pass

² See *infra* Section II.

³ Ashley Ahearn, "Washington Tribe Confronts Climate Change, Sea Level Rise," KUOW, Dec. 2, 2015: <http://kuow.org/post/washington-tribe-confronts-climate-change-sea-level-rise>

⁴ See "Climate Change," Columbia River Inter-Tribal Fish Commission website: <http://www.critfc.org/fish-and-watersheds/climate/>.

⁵ Sightline Institute, "The Thin Green Line": <http://www.sightline.org/research/thin-green-line/>.

through Oregon, Washington, or British Columbia and then across the Pacific Ocean. The two leading countries caught in this pan-Pacific fossil fuel web also happen to be the world's top emitters of carbon dioxide: together the U.S. and China were responsible for spewing 44% of total global emissions in 2014.⁶ Positioned as an economic valve between these two single greatest contributors to the global climate crisis, giving this damp and sparsely populated region known as the Pacific Northwest holds substantial leverage over the world's total amount of carbon emissions.⁷ Tribal sovereigns of the Pacific Northwest are now using this leverage to block the disastrous flow of fossil fuels.

Fossil fuel transport and export schemes rely on a panoply of permits, and denial of just one layer of authorization can halt a project. Due to the variety of jurisdictions through which transport projects must pass, permitting processes often involve a matrix of regulations. Between federal, state, and local jurisdictions, a dozen or more permits are often necessary in order to ship fuels domestically and export them overseas. A single denial at any level can prevent a fossil fuel transport or export project from proceeding. Permitting authorities exercise discretion at every turn.

As sovereign nations, tribes wield potent legal prerogatives that can directly affect these proposed fossil fuel infrastructure projects. This Article examines and catalogs the array of legal levers available to tribes to halt fossil fuel infrastructure and assert authority as co-trustees of essential natural resources. Section II of this Article surveys the context of urgency that motivates tribes to act. It discusses both the long-range and immediate threats of fossil fuel infrastructure to tribal communities and describes the rising movement of indigenous environmental leadership regionally and nationally. It then sets forth the legal posture of proposed projects in the Northwest. Because the legal tools available to tribes differ on and off reservation, the array and efficacy of legal levers will vary according to the physical geography and political boundaries through which a given transport project proposes to pass. Section III

⁶ International Energy Agency, "CO2 Emissions from Fuel Combustion Highlights," Dec. 2016: https://www.iea.org/publications/freepublications/publication/CO2EmissionsfromFuelCombustion_Highlights_2016.pdf.

⁷ See Eric de Place, "Northwest Fossil Fuel Exports," SIGHTLINE INSTITUTE, Sept. 2014: http://www.sightline.org/research_item/northwest-fossil-fuel-exports-2/.

delves into on-reservation regulatory and property law mechanisms with a specific look at the Bureau of Indian Affairs' recently revised right-of-way easement regulations. Section IV explores potent Indian law doctrines that extend off the reservations: the federal Indian trust responsibility and tribal treaty rights.⁸ Significantly, the trust responsibility functions as both the federal government's duty of trusteeship over tribal property as well as its duty of care and protection towards tribes when federal actions taken off the reservations affect tribal interests. Throughout, this Article presents case studies of tribes successfully asserting sovereign legal prerogatives to stop fossil fuel transport and export at all jurisdictional levels—federal, state, and local.

Through their pursuit of legal remedies to protect their people and resources against transport and export proposals, and by issuing multiple clear resolutions opposing fossil fuel infrastructure projects as a whole throughout the region, tribes are leading a necessary shift toward decarbonizing the global economy—a measure deemed essential by leading scientists to prevent unmitigated climate disaster and runaway heating.⁹ Their assertion of climate leadership at this crucial hour announces the position of Native Nations as rightful sovereign co-trustees of planet Earth. This Article aims to support tribes in this ground-up effort—an effort which, in its broadest sense, endeavors to replace fossil-fueled

⁸ For a general discussion of treaty language in the context of climate change, see Elizabeth Ann Kronk Warner, *Everything Old is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change Threatened Resources*, (Aug. 28, 2015) (unpublished working paper): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652954. By contrast, this article focuses on tribal efforts to use treaty language to stop specific fossil fuel projects.

⁹ See James Hansen, et al., “*Assessing ‘Dangerous Climate Change’: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*,” 8 PLOS One 1, Dec. 3, 2013 [hereinafter “Climate Prescription”]: <https://doi.org/10.1371/journal.pone.0081648>. The goal of decarbonization involves economic and feasibility analysis well outside the scope and purpose of this article. For an in-depth analysis, see Deep Decarbonization Pathways Project: <http://deepdecarbonization.org>. It should also be noted that decarbonization (arriving at zero emissions by 2050) is not even alone sufficient at this point to prevent global climate catastrophe. Scientists emphasize the need for “negative emissions,” i.e. drawing down the excess carbon dioxide from the atmosphere currently heating the planet (and causing present calamities such as superstorms, massive floods, droughts, fires, and heat waves). In other words, there must be a cleanup of excess carbon dioxide from the atmosphere. See Hansen *et al. id.* For natural methods to draw down carbon using soil sequestration techniques, see Bronson W. Griscom, et al., *Natural Climate Solutions*, PNAS (2017): <http://www.pnas.org/content/114/44/11645>.

colonialism with a future that is just, healthful, and sustainable for all people and all beings.

II. CULTURES AND CLIMATE: CONTEXTUALIZING THE CRISIS

Virtually every square mile of the Pacific Northwest is the aboriginal territory of numerous Native tribes who have inhabited these lands since time immemorial. Original tribal rights overlay and extend across the entire region. Recognized in exchange for cession of vast aboriginal tribal territories, these enduring rights remain memorialized in solemn treaty promises and other legal agreements. They affirmatively obligate federal and state co-sovereigns to uphold tribal interests in ancestral lands and resources. Fossil fuel transport and export infrastructure pose grave threats to these longstanding rights.

Such projects include all forms of infrastructure used to move hydrocarbon-rich materials across distances—including oil and natural gas pipelines, coal and oil trains, and export terminals that process and load these fuels (as well as their refined derivatives such as xylene). Transportation of such hazardous substances poses both imminent and long-range dangers. Climate disruption presents an existential threat to Humanity as a whole, but tribes feel immediate and worsening impacts within their traditional territories.

This Section begins with an overview of both the climate threats and the localized, acute, and immediate dangers posed by fossil fuel projects. It concludes with a brief survey of the legal and administrative hurdles that proposed fossil fuel projects must clear in order to operate. As the discussion shows, there are many entry points for tribes to assert their sovereign prerogatives to arrest the flow of fossil fuels across tribal geographies—both reservations and ceded lands subject to reserved rights.

A. *The Climate Emergency*

In September, 2018, the Secretary General of the United Nations issued a warning that the world must begin rapid, deep emissions cuts by 2020 to avert runaway climate change.¹⁰ A year

¹⁰ World Must Act By 2020 to Avoid Runaway Climate Change: UN Chief, PHYS.ORG, Sep. 11, 2018: <https://phys.org/news/2018-09-world-runaway-climate-chief.html#jCp>.

earlier, in 2017, the former United Nations climate chief, Christiana Figueres, joined sixty scientists, policy leaders, and economists to author a comment in the scientific journal *Nature* calling for deep decarbonization and aggressive reduction of fossil fuel usage, warning, “If we delay, the conditions for human prosperity will be severely curtailed.”¹¹ Yet U.S. President Donald Trump has stated his intention to develop \$50 trillion worth of domestic fossil fuels, including shale, oil, coal, and natural gas.¹²

The law has never encountered a threat as pervasive, grave, and urgent as the present climate crisis. Scientists warn that carbon dioxide (CO₂) and other greenhouse gas emissions place Earth in “imminent peril”—on the verge of an irreversible tipping point that would impose catastrophic conditions on generations of humanity to come.¹³ As described by Dr. James Hansen, formerly the chief climate scientist of the United States at NASA’s Goddard Institute of Space Studies, continued carbon pollution will “transform the planet.”¹⁴ Experts predict that floods, hurricanes, killer heat waves, fires, disease, crop losses, food shortages, and droughts will arrive with far greater magnitude and regularity.¹⁵ Rising sea levels would inundate coastal areas worldwide and trigger desperate mass human migrations.¹⁶ In May 2010, two separate groups of scientists published papers warning that the melting of the Western Antarctic ice sheet is now unstoppable, set to cause an inevitable sea level rise

¹¹ Potsdam Institute for Climate Impact Research, *Turning the Climate Tide by 2020*, SCIENCE DAILY, June 28, 2017:

<https://www.sciencedaily.com/releases/2017/06/170628144848.htm>; Christiana Figueres, Hans Joachim Schellnhuber, Gail Whiteman, et al., *Three Years to Safeguard Our Climate*, NATURE, June 28, 2017: <https://www.nature.com/news/three-years-to-safeguard-our-climate-1.22201>.

¹² Michael Bastach, ‘Untapped Energy’: Trump Promises a \$50 Trillion Economic Stimulus, THE DAILY CALLER, Sept. 23, 2016: <http://dailycaller.com/2016/09/23/untapped-energy-trump-promises-a-50-trillion-economic-stimulus/>.

¹³ See generally FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE xxiv-xxvi (2007) (describing “unstoppable planetary forces” and the end of climatic stability).

¹⁴ Jim Hansen, *The Threat to the Planet*, N.Y. REVIEW OF BOOKS, July 13, 2006: <http://www.nybooks.com/articles/archives/2006/jul/13/the-threat-to-the-planet/>.

¹⁵ See generally “Climate Change Impacts In the United States, U.S. National Climate Assessment 4” (2014) [hereinafter “Climate Change Impacts Report”]: <http://nca2014.globalchange.gov/highlights/overview/overview>.

¹⁶ Koko Warner, et al., “In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement” iv, 2 (2009): http://ciesin.columbia.edu/documents/clim-migr-report-june09_media.pdf.

of at least ten feet in coming centuries.¹⁷ They warn that most of the world's coastal cities will have to be abandoned—and Louisiana's state government is already crafting a plan to do just that, depopulating its coastal zone.¹⁸

While some climate dynamics will unfold over longer time spans, it is no longer possible to assume that severe threats are postponed for future generations. Earth has already warmed about 0.8° Celsius over the past century.²¹ A report of the U.S. Global Climate Change Research Program states unequivocally: “Climate change, once considered an issue for a distant future, has moved firmly into the present Precipitation patterns are changing, sea level is rising, the oceans are becoming more acidic, and the frequency and intensity of some extreme weather events are increasing.”²² Though climate disruption affects different parts of Earth in different ways—from droughts to floods to superstorms—no part of Earth is safe from global heating.²³ Climate crisis presents a clear and present danger, threatening the basic habitability of the planet for humans and other species.²⁴ As Dr. Hansen and other scientists stated in an amicus brief supporting youth plaintiffs in a case challenging government's fossil fuel policy, “[F]ailure to act with all deliberate speed in the face of the clear scientific evidence of the danger functionally becomes a decision to eliminate the option of *preserving a habitable climate system*.”²⁵

As elaborated below, the combustion of fossil fuels largely

¹⁷ Justin Gillis & Kenneth Chang, “Scientists Warn of Rising Oceans from Polar Melt,” N.Y. TIMES, May 12, 2014:

<https://www.nytimes.com/2014/05/13/science/earth/collapse-of-parts-of-west-antarctica-ice-sheet-has-begun-scientists-say.html>.

¹⁸ *Id.* For the Louisiana plan, see Christopher Flavelle, *Louisiana, Sinking Fast, Prepares to Empty Out Its Coastal Plain*, BLOOMBERG, Dec. 22, 2017:

<https://www.bloomberg.com/news/articles/2017-12-22/louisiana-sinking-fast-prepares-to-empty-out-its-coastal-plain>.

²¹ “Climate Prescription,” *supra* note 9, at 4. To provide context, the Earth has not been this warm in over 125,000 years. See Doyle Rice, “The Last Time the Earth Was This Warm Was 125,000 Years Ago,” U.S.A. TODAY, Jan. 18, 2017: <https://www.usatoday.com/story/weather/2017/01/18/hottest-year-on-record/96713338/>.

²² “Climate Change Impacts Report,” *supra* note 15, at 1.

²³ See *id.* at 7-10.

²⁴ Brief for Dr. James Hansen as Amicus Curiae Supporting Plaintiffs-Appellants at 7-8, *Alec L. v. Jackson*, No. 4:11-cv-02203-EMC, 2011 WL 8583134 (N.D. Cal. Nov. 14, 2011):

<http://ourchildrenstrust.org/sites/default/files/Hansen%20Amicus%20.pdf>.

²⁵ *Id.* at 7 (internal citation omitted) (emphasis added).

drives the global climate crisis.²⁶ “Fossil fuel” is an umbrella term used to describe a variety of hydrocarbon-rich geologic deposits derived from decayed organic materials such as ancient plants and animals, which were buried underground and transformed over eons into highly combustible sources of energy.²⁷ Common fossil fuels include coal, natural gas, and petroleum, which takes the form of oil, or can be refined into derivatives such as gasoline and diesel fuels. Fossil fuels power much of the world’s transportation and electrical grids. These valuable, common—yet dangerous—substances are extracted from the Earth’s crust through an array of mining methods including pumping, strip and pit mining, and hydraulic fracturing, also known as “fracking.” New technologies have enabled the extraction of fossil fuels from dispersed geologic formations such as oil shale and tar sands, the development of which was economically prohibitive, until recently. Major North American fossil fuel deposits transported and exported through the Pacific Northwest include: oil from the Bakken formation in western North Dakota; coal and coalbed methane from the Powder River Basin of Montana and Wyoming; natural gas from eastern Utah and western Colorado; and tar sands from Alberta, Canada.

The causal relationship between the combustion of fossil fuels and climate change has been exhaustively documented and empirically proven.²⁸ Burning of fossil fuels accounted for 93.7% of all CO₂ emitted within the United States in 2014, with CO₂ accounting for 80.9% of total domestic greenhouse gas emissions.²⁹ The International Energy Agency reports that, in 2015, the United States was responsible for 16% of total global CO₂ emissions, second only to China, which is itself a target market for American

²⁶ See “Climate Change,” UNITED NATIONS: <http://www.un.org/en/sections/issues-depth/climate-change/>. There are other significant factors as well, such as methane from concentrated animal operations, but these causes are beyond the scope of this article.

²⁷ “Fossil Fuel,” SCIENCE DAILY: https://www.sciencedaily.com/terms/fossil_fuel.htm.

²⁸ See, e.g., Environmental Protection Agency, “Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014,” Executive Summary, Apr. 2016: <https://19january2017snapshot.epa.gov/sites/production/files/2016-04/documents/us-ghg-inventory-2016-chapter-executive-summary.pdf>.

²⁹ *Id.* at ES-8-9. According to the EPA, fossil fuel combustion has generated 76% of all U.S. greenhouse gas emissions since 1990. *Id.* at ES-9.

fossil fuel exports.³⁰ In 2007 the U.S. Supreme Court explicitly noted, “[t]he EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming.”³¹ The Court further found, “The harms associated with climate change are serious and well-recognized.”³² While other sources of GHG pollution (such as methane from landfills and concentrated feed lots and emissions from deforestation) must also be addressed, preventing or minimizing fossil fuel extraction and combustion remains an urgent step humans must take to address global climate change.³³

As the original sovereigns of this continent, tribes are both uniquely impacted by, and uniquely positioned to address, global climate change.³⁴ Tribal sovereignty and indigenous cultures are fundamentally tied to ancestral homelands and natural resources endemic to traditional territories.³⁵ Tribal wellbeing remains in many ways contingent on the health of biological communities, which sustain traditional subsistence gathering and Native spiritual practices, as well as modern economic livelihoods. Courts have recognized, for example, that salmon—threatened by climate change—provide a key component of Pacific Northwest tribal diets, cultural identity, and economic livelihoods.³⁶ By upsetting natural balances and triggering unforeseeable cascading effects, climate change unravels the biological systems upon which tribes rely. In

³⁰ International Energy Agency, “CO2 Emissions from Fuel Combustion Highlights,” at 12, Dec. 2016: https://www.iea.org/publications/freepublications/publication/CO2EmissionsfromFuelCombustion_Highlights_2016.pdf.

³¹ *Mass. v. EPA*, 549 U.S. 497, 523 (2007).

³² *Id.* at 521.

³³ See *Climate Prescription*, *supra* note 9, at 9-12. Scientists also emphasize that decarbonization (reducing CO2 emissions to zero by 2015) is not alone enough to stave off climate catastrophe because the atmosphere has excess carbon already driving the current climate disasters. Drawing carbon out of the atmosphere through natural climate solutions will also be necessary, as a cleanup of the atmosphere. *Id.*

³⁴ See Rebecca Tsosie, “*Indigenous People and Environmental Justice: The Impact of Climate Change*,” 78 U. COLO. L. REV. 1625 (2007); Randall S. Abate & Elizabeth Ann Kronk, “*Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*,” 26 TUL. ENVTL. L.J. 179 (2013).

³⁵ Mary Christina Wood & Zach Welcker, “*Tribes as Trustees Again (Part 1): The Emerging Tribal Role in the Conservation Trust Movement*,” 32 HARV. ENVTL. L. REV. 373, 375 (2008).

³⁶ *U.S. v. Washington*, 827 F.3d 836, 845 (9th Cir. 2016).

the Pacific Northwest, many tribal communities and reservations are located in low-lying areas adjacent to the sea and are suffering impacts of sea level rise.³⁷ The region is also already reeling from climate impacts such as extreme wildfires, flooding, loss of snowpack, and ocean acidification.³⁸

Under the public trust doctrine, first articulated in Roman law and long recognized by the United States Supreme Court,³⁹ the states and federal government have a firm fiduciary responsibility to steward natural assets in trust for present and future generations as beneficiaries.⁴⁰ Tribes have an important role to play in this trust framework as well.⁴¹ As the first sovereigns of this continent, tribes remain the original trustees of the entire natural *res* (trust endowment) now imperiled by escalating climate chaos. Landmark treaty fishing rights decisions rendered by Judges Boldt and Belloni more than four decades ago recognized Pacific Northwest tribes as co-tenants of shared fisheries.⁴² Native nations are uniquely well-situated to assert standing as co-tenants and co-trustees of the shared atmosphere as well, to prevent further climate violence to their peoples and, indeed, all people.⁴³

B. *Direct Threats of Fossil Fuel Transport on Tribes*

Beyond systemic damage and threatened societal collapse from climate change, fossil fuel infrastructure carries enormous

³⁷ See Jessica A. Knoblauch, *Climate Change Forces Quinalt Tribe to Seek Higher Ground*, EARTHJUSTICE, Mar. 12, 2018: <https://earthjustice.org/blog/2018-march/climate-change-forces-the-quinalt-tribe-to-seek-higher-ground>.

³⁸ Union of Concerned Scientists, *Confronting Climate Change in Oregon* (2015): <https://www.ucsusa.org/global-warming/regional-information/california-and-western-states/confronting-climate-change-in-oregon#.W7lHpVJRf-Y>

³⁹ See J. INST., 2.1.1 (T Sandars trans. 4th ed. 1867) (“By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”); *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

⁴⁰ See MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE*, Cambridge U. Press: New York (2013).

⁴¹ Mary Christina Wood, “*Tribal Trustees in Climate Crisis*,” 2 AM. IND. L. J. 2 518 (2014).

⁴² *Id.* at 543.

⁴³ *Id.* at 545.

harm to nearby tribal communities—through toxic effluent releases, damaged air quality, desecration of cultural and spiritual sites, and interference with treaty fishing rights.⁴⁴ These climate harms perpetuate the profound assaults of industrial incursion that have persisted since first contact.⁴⁵

Oil spills are among the most serious and common acute dangers of fossil fuel transport. According to the Pipeline and Hazardous Material Safety Administration, 633 pipeline leaks and explosions occurred in the United States in 2016, averaging 1.7 pipeline incidents per day.⁴⁶ These incidents caused 16 deaths, 87 injuries, and more than \$321 million in clean-up costs.⁴⁷ Pipeline ruptures are considered inevitable over time and can present serious catastrophes.⁴⁸

Shipping oil by train poses hazards as well. The 2016 derailment and oil spill at Mosier, Oregon presented a vivid and sobering example of dangerous “bomb trains.” On June 3, 2016, sixteen cars in a 96-car train carrying crude oil derailed beside the Columbia River.⁴⁹ Several train cars ruptured and exploded, releasing 47,000 gallons of oil into the air, soil, and nearby

⁴⁴ See “Environmental Effects Of Oil Spill,” ENVIRONMENTAL POLLUTION CENTERS: <https://www.environmentalpollutioncenters.org/oil-spill/effects/oil>; Zak Cheney Rice, *An Oil Spill Is Threatening Native American Lands-And No One Is Paying Attention*, BUSINESS INSIDER, Jun. 8, 2016: <https://www.businessinsider.com/an-oil-spill-is-threatening-native-american-lands-in-oregon-2016-6>; Maki Somosot, *Indian Tribe Suing Companies For Oil Spill Damages*, HOUMATODAY.COM, Oct. 10, 2015: <http://www.houmatoday.com/news/20151010/indian-tribe-suing-companies-for-oil-spill-damages>.

⁴⁵ See Dobson, Darren, “*Manifest Destiny and the Environmental Impacts of Westward Expansion*,” Flinders Journal of History and Politics, Vol. 29 2013: <https://core.ac.uk/download/pdf/81291419.pdf>.

⁴⁶ “Pipeline Incident 20 Year Trends,” Pipeline and Hazardous Material Safety Administration: <http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends>.

⁴⁷ *Id.*

⁴⁸ See James Conca, *Pick Your Poison For Crude—Pipeline, Rail, Truck or Boat*, FORBES, Apr. 26, 2014: <https://www.forbes.com/sites/jamesconca/2014/04/26/pick-your-poison-for-crude-pipeline-rail-truck-or-boat/#789368fb17ac..>

⁴⁹ “Mosier UPRR Derailment,” Oregon Department of Environmental Quality, updated Jan. 26, 2017: <http://www.deq.state.or.us/Webdocs/Forms/Output/FPCController.ashx?SourceId Type=11&SourceId=6115>.

wastewater system.⁵⁰ Nearly 3,000 tons of contaminated soil have since been removed from the spill site.⁵¹ Upon investigation, the Federal Railroad Administration made a preliminary finding that “Union Pacific’s failure to maintain its track and track equipment resulted in the derailment.”⁵² Six months after the spill, the cost of cleanup at the Mosier site had reached nearly \$9 million.⁵³ The Umatilla, Yakama, Warm Springs, and Nez Perce Tribes all retain and exercise treaty fishing rights within the portion of the Columbia where the Union Pacific spill occurred. Images of burning train cars sending a plume of black smoke skyward confirmed tribes’ concerns about transporting fossil fuels through the Columbia River Gorge.⁵⁴ As JoDe Goudy, Chairman of the Yakama National Tribal Council, remarked, “The oil train derailment threatens our very way of life. The oil seeping into the Columbia is a reminder that these accidents will happen”⁵⁵

Water contamination from oil spills or other fossil fuel leaks can harm the health of tribal members where domestic water supplies have become contaminated. Studies show that exposure to oil through contamination causes problems in human reproductive health, and the chemicals used in oil cleanup operations are linked to certain kinds of cancer.⁵⁶ Destruction of local cultural resources due to oil contamination measurably intensifies rates of depression and other mental and emotional health conditions in affected

⁵⁰ Lauren Dake, “*Mosier’s Derailment Costs Adding Up*,” THE COLUMBIAN, Dec. 1, 2016: <http://www.columbian.com/news/2016/dec/01/mosier-derailments-costs-near-9-million/>.

⁵¹ “Mosier Oil Train Derailment,” EPA: https://response.epa.gov/site/site_profile.aspx?site_id=11637.

⁵² “Preliminary Factual Findings Report,” Federal Railroad Administration, 2-4, June 23, 2016: <https://www.documentcloud.org/documents/2895018-2016-06-03-Preliminary-Factual-Findings-Report.html#document/p1>.

⁵³ See Dake, *supra* note 48.

⁵⁴ *Id.*

⁵⁵ “Mosier Train Derailment and Oil Spill,” Columbia River Inter-Tribal Fish Commission (CRITFC) newsletter, July 2016: http://www.critfc.org/wp-content/uploads/2016/06/2016_07_dipnetter.pdf?x78172.

⁵⁶ See Jon Gay, “The Health Effects of Oil Contamination: A Compilation of Research,” Worcester Polytechnic Institute, 66-70, Dec. 15, 2010: https://web.wpi.edu/Pubs/E-project/Available/E-project-121510-203112/unrestricted/Health_Effects_of_Oil_Contamination_-_Final_Report.pdf; Annie-Rose Strasser, *BP Oil Spill Cleanup Workers Are at a Higher Risk Of Sickness, Cancer*, THINKPROGRESS, Sept. 17, 2013: <https://thinkprogress.org/bp-oil-spill-cleanup-workers-are-at-higher-risk-of-sickness-cancer-aed007083c89/>.

communities.⁵⁷ Fish also suffer from oil contamination, leading to “reduced growth, enlarged livers, changes in heart and respiration rates, fin erosion, and reproduction impairment.”⁵⁸ This directly implicates tribal treaty fishing rights and the commensurate habitat protection duties affirmed by the Ninth Circuit, discussed below.⁵⁹ Other aquatic life, such as shellfish and plants, suffer harm as well from fossil fuel contamination.⁶⁰

Interference with tribal fishing due to marine vessel traffic forms another class of effects from fossil fuel transport. These export schemes necessarily involve large industrial tanker ships that transport coal, oil, natural gas, and other petroleum derivatives across the Pacific Ocean. Each ship must pass through tribal treaty fishing waters at least twice, both inbound and outbound, navigating tidal marine lanes that are complex, narrow, and often busy. Every tanker ship poses risks of spills, leaks, and explosions, as well as incidences of damaged and destroyed tribal fishing gear.⁶¹ In 2003, a barge spilled approximately 5,000 gallons of heavy fuel oil into the Puget Sound near the Suquamish Tribe’s Port Madison Reservation.⁶² The spill damaged an estuary, nearshore habitat, and shellfish beds, and an important cultural and spiritual site within the

⁵⁷ *Id.*

⁵⁸ “How Does Oil Impact Marine Life?,” NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, March 21, 2014: <http://oceanservice.noaa.gov/facts/oilimpacts.html>.

⁵⁹ See *supra* Section IV.B for further discussion of the scope of treaty-guaranteed tribal fishing rights.

⁶⁰ “How Oil Harms Animals and Plants in Marine Environments,” NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, Sept. 21, 2018: <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-harms-animals-and-plants-marine-environments.html>.

⁶¹ See “Weigh Anchor: What Kinder Morgan’s Trans Mountain Pipeline Will Mean for B.C.’s Coast,” THE GLOBE AND MAIL: <https://beta.theglobeandmail.com/news/british-columbia/kinder-morgan-trans-mountain-pipeline-bc-coast/article35043172/?ref=http://www.theglobeandmail.com& see also> Memorandum for Record from Michelle Walker, Chief, Regulatory Branch, U.S. Army Corps of Engineers, 14, 24, (May 9, 2016) [hereinafter Memorandum for Record]: <https://turtletalk.files.wordpress.com/2016/05/160509mfruademinimisdetermination.pdf> (tribal fishing gear loss from tanker traffic).

⁶² James May, *Oil Spill Damages Marine Estuary at Suquamish*, INDIAN COUNTRY TODAY, Jan. 14, 2004: <https://indiancountrymedianetwork.com/news/oil-spill-damages-marine-estuary-at-suquamish/>.

Tribe's Reservation and treaty fishing waters.⁶³ The proposed Trans Mountain expansion of the Kinder Morgan pipeline and export terminal near Vancouver, British Columbia, for example, would increase total tanker traffic in the Salish Sea by a factor of seven⁶⁴ and potentially carry a 16-67% probability of an oil spill over a 50-year period.⁶⁵

Fossil fuel transport vessels require safe places to anchor before and after loading cargo, and many protected anchorages intrude on important tribal fishing sites. When the U.S. Coast Guard proposed a rule in 2017 to expand anchorages and create priority for "deep-draft vessels" extending over 200 feet in length in greater Puget Sound, regional tribes submitted public comments and persuaded the Coast Guard to initiate a formal tribal consultation process pursuant to its federal Indian trust responsibility.⁶⁶

⁶³ The company responsible for the spill, Foss Maritime, ultimately reached a settlement with the Suquamish Tribe for "spiritual and cultural damages" to the tribe's marsh and beach. Tiffany Royal, *Suquamish Tribe Reaches Oil Spill Settlement*, NORTHWEST INDIAN FISHERIES COMMISSION, Feb. 26, 2007: <https://nwifc.org/suquamish-tribe-reaches-oil-spill-settlement/>. In addition to this settlement, the company also made payments for the initial response, the damage assessment, and the federal restoration and mitigation costs. *Id.*

⁶⁴ Jason R.W. Merrick and J. Rene van Dorp, "Vessel Traffic Risk Assessment (VTRA) 2015," George Washington University, Aug. 9-10, 2016: http://www2.seas.gwu.edu/~dorpjr/VTRA_2015/PRESENTATIONS/21%20-%20COMPARISON%20VTRA%202015%20Case%20KM%20348%20to%20VTRA%202015%20Base%20Case.pdf.

⁶⁵ See Hearing Order OH-001-2014, National Energy Board, par. 20336, Feb. 5, 2016: <https://vancouver.ca/files/cov/trans-mountain-pipeline-expansion-proposal-final-argument-transcript.pdf>. The permit for Kinder Morgan was recently denied by the Canadian Federal Court of Appeal for failure to properly consult with First Nations and for failure to address the environmental impacts of the increase in tanker traffic. See Joan Bryden, *Federal Court Quashes Trans Mountain Expansion; Ottawa Forging Ahead with Purchase*, GLOBAL NEWS, Aug. 31, 2018: <https://globalnews.ca/news/4418485/trans-mountain-pipeline-quashed-federal-court/>. However, typical of fossil fuel infrastructure projects, the threat is not over as the Canadian government has purchased the project for \$4.5 billion and plans to push ahead for completion of the pipeline expansion. *Id.*

⁶⁶ See "Anchorage; Captain of the Port Puget Sound Zone, WA," 82 Fed. Reg. 10313 (proposed Feb. 10, 2017): <https://www.federalregister.gov/documents/2017/02/10/2017-02683/anchorage-captain-of-the-port-puget-sound-zone-wa>; see also *id.* § 110.230(b)(1-3). See "Anchorage; Captain of the Port Puget Sound Zone, WA; Supplemental Notice of Tribal Consultation," 82 Fed. Reg. 27639 (proposed June 16, 2017): <https://www.federalregister.gov/documents/2017/06/16/2017-12494/anchorage-captain-of-the-port-puget-sound-zone-wa-supplemental-notice-of-tribal-consultation>.

C. Tribal Leadership and Vision for a Livable Future

Across the country, tribal leaders and grassroots Native American communities are unifying to resist the escalating threats of fossil fuel transport. The unprecedented demonstrations at the Standing Rock Sioux Reservation in 2016 shaped and shifted the dialogue around fossil fuel infrastructure, as the world watched tribal opposition to the Dakota Access Pipeline (DAPL) burgeon into a national and international social movement. Many thousands of individuals traveled to Standing Rock to stand in solidarity against the pipeline over the course of the demonstration—including 2,000 American military veterans and a contingent of Pacific Northwest tribal representatives who arrived in traditional canoes.⁶⁷ Rallies in support of the Standing Rock Sioux were held in at least 300 cities around the globe.⁶⁸ Numerous municipalities affirmatively divested from the financial institutions underwriting DAPL.⁶⁹ Online petitions opposing the pipeline have collected nearly 1.9 million signatures.⁷⁰ Standing Rock highlighted the vital

⁶⁷ See, e.g., Leah Donnell, “*The Standing Rock Resistance is Unprecedented (It’s Also Centuries Old)*,” NATIONAL PUBLIC RADIO, Nov. 22, 2016: <https://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old>; Sarah Van Gelder, “*In Photos: Northwest Canoe Tribes Arrive at Historic Gathering at Standing Rock*,” YES! MAGAZINE, Sept. 9, 2016: <http://www.yesmagazine.org/people-power/in-photos-northwest-canoe-tribes-arrive-at-historic-gathering-at-standing-rock-20160909>; Michael Edison Hayden, Catherine Thorbecke, & Evan Simon, “*At Least 2,000 Veterans Arrive at Standing Rock to Protect Dakota Pipeline*,” ABC NEWS, Dec. 4, 2016: <http://abcnews.go.com/US/2000-veterans-arrive-standing-rock-protest-dakota-pipeline/story?id=43964136>.

⁶⁸ “People in 300+ Cities are Taking Part In the #NoDAPL Day of Action,” COLOR LINES MAGAZINE, Nov. 15, 2016: <https://www.colorlines.com/articles/people-300-cities-are-taking-part-nodapl-day-action>.

⁶⁹ See, e.g., Jimmy Tobias, “*These Cities are Pulling Billions from the Banks that Support the Dakota Access Pipeline*,” THE NATION, March 20, 2017: <https://www.thenation.com/article/these-cities-are-divesting-from-the-banks-that-support-the-dakota-access-pipeline/>.

⁷⁰ “Tell President Obama: Stop the Dakota Access Oil Pipeline, #NoDAPL,” CREDO online petition - 419,164 signatures as of Sept. 20, 2018: <https://act.credoaction.com/sign/NoDAPL/>; “Stop the Dakota Access Pipeline Once and For All - #NoDAPL,” MoveOn.com online petition - 413,259 signatures as of Sept. 20, 2018: <http://petitions.moveon.org/sign/no-dapl>; “Stop the Dakota Access Pipeline,” Change.com online petition - 564,464 signatures as of Sept. 20, 2018: <https://www.change.org/p/stop-the-dakota-access-pipeline>; “Stand With Standing Rock,” online petition - 478,201 signatures as of Sept. 20, 2018: <http://standwithstandingrock.net/take-action/>.

role of tribal leadership at this pivotal ecological moment.⁷¹ As renowned author and climate activist Bill McKibben observed, “The events at Standing Rock also allow Americans to realize who some of the nation’s most important leaders really are. The fight for environmental sanity—against pipelines and coal ports and other fossil fuel infrastructure—has increasingly been led by Native Americans”⁷²

In the Pacific Northwest, a unified coalition of tribal Nations has passed a series of resolutions opposing fossil fuel transport. The Affiliated Tribes of Northwest Indians (ATNI), representing 58 tribal governments in six states across the greater Northwest region,⁷³ adopted its first resolution against fossil fuel transport in 2013.⁷⁴ Since then, this powerful league of sovereign tribal governments has adopted at least nine additional resolutions expressly declaring Northwest tribes’ opposition to fossil fuel infrastructure development at large.⁷⁵ ATNI’s 2017 reaffirmation Resolution unequivocally states, “ATNI calls upon our federal trustees to affirm and preserve decisions denying proposals for unrefined fossil fuel export facilities to date (including coal), and to take every available and appropriate step to deny proposals for future transportation or export facilities”⁷⁶

In addition to this broad institutional tribal opposition, individual tribal leaders across the region have articulated a clear and resounding commitment against fossil fuel transport. Quinalt Indian Nation President Fawn Sharp (former President of ATNI),

⁷¹ See Don Gentry & Emma Marris, *The Next Standing Rock? A Pipeline Battle Looms in Oregon*, N.Y. TIMES, March 8, 2018:

<https://www.nytimes.com/2018/03/08/opinion/standing-rock-pipeline-oregon.html?smid=pl-share>. The Klamath River, which lies within the Klamath Tribes’ ancestral territory in present day Oregon, has been identified as the “the next Standing Rock.” *Id.*

⁷² Bill McKibben, “*A Pipeline Fight and America’s Dark Past*,” THE NEW YORKER, Sept. 6, 2016: <http://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americas-dark-past>.

⁷³ The ATNI represents tribes throughout Washington, Oregon, Idaho, Alaska, Montana, California. Affiliated Tribes of Northwest Indians, “Tribal Memberships”: <http://www.atnitrines.org/tribal-memberships>.

⁷⁴ Affiliated Tribes of Northwest Indians, Resolution #13-47: Oppose the Proposals for Transportation and Export of Fossil Fuels in the Pacific Northwest: <http://www.atnitrines.org/sites/default/files/res-13-47.pdf>.

⁷⁵ See Appendix A, Resolution #17-12: <http://www.atnitrines.org/resolutions/reaffirming-opposition-non-refined-fossil-fuel-transportation-across-and-export-pacific>.

⁷⁶ *Id.*

stated: “The technology exists to safely and affordably transition away from fossil fuels Tools such as the public trust doctrine and treaty law support such a movement legally and invoke a moral responsibility for faster, more decisive action.”⁷⁷ Brian Cladoosby, Chairman of the Swinomish Tribal Indian Community, said in regard to his tribe’s easement battle to limit oil-by-rail across its Reservation: “We as leaders need to protect our treaty resources, our economies, and the human health of citizens and neighbors. We all lose if we give up that which is most precious to us all—our commitment to do what is right for our children and grandchildren, and protect the land and water upon which their lives will depend.”⁷⁸ Yakama Chairman JoDe Goudy declared after the oil train derailment in Mosier, Oregon, in 2016, “We will stand together to speak for those things that cannot speak for themselves. We will stand together to protect our lands, our waters and our rights.”⁷⁹ In September 2013, Nez Perce Tribal Council members joined arms as part of a human blockade to stop a “mega-load” of massive drilling equipment bound for the Alberta tar sands.⁸⁰ Every year for the past four years, members of the Lummi Nation have organized an annual Totem Pole Journey, travelling across the continent with a traditionally carved pole to “bring attention to proposed fossil fuel terminals, oil trains, coal trains, and oil pipelines and the threat they pose to tribes and local communities.”⁸¹

Speaking broadly, Native customary law emphasizes

⁷⁷ Fawn Sharp, “*Tribes Have Up Close Perspective on Climate Change*,” SEATTLE TIMES, April 23, 2016: <http://www.seattletimes.com/opinion/tribes-have-up-close-perspective-on-climate-change/>.

⁷⁸ “Swinomish Tribe Files Suit to Stop Bakken Crude Trains,” Lawsuit Against BNSF Railway, Swinomish Indian Tribal Community website, Apr. 7, 2015: <http://www.swinomish-nsn.gov/news/lawsuit-against-bnsf-railway.aspx>.

⁷⁹ CRITFC, *supra* note 47.

⁸⁰ Kirk Johnson, “*Fight Over Energy Finds a New Front in a Corner of Idaho*,” N.Y. TIMES, Sept. 25, 2013: <http://www.nytimes.com/2013/09/26/us/fight-over-energy-finds-a-new-front-in-a-corner-of-idaho.html>. The Nez Perce Tribe ultimately prevailed in court, securing an injunction against further mega-loads, *Nez Perce Tribe v. U.S. Forest Serv.*, 2013 WL 5212317 (D. Idaho 2013). See also Idaho Rivers United, “Settlement Protects Historic Uses on Highway 12, Restricts Megaloads,” Jan. 27, 2017: <https://www.idahorivers.org/newsroom/2017/1/26/settlement-protects-historic-uses-on-highway-12-restricts-megaloads> (definition of “mega-load”).

⁸¹ See Linda V. Mapes, *A Northwest Traveling Totem-Pole protest Targets Fossil-Fuel Development*, SEATTLE TIMES, Oct. 25, 2017: <https://www.seattletimes.com/seattle-news/environment/a-northwest-traveling-totem-pole-protest-targets-fossil-fuel-development/>.

humanity's duty to respect and steward Nature in trust for future generations,⁸² recognizing that the laws of Nature are non-negotiable and set the parameters for human survival.⁸³ Using a range of legal strategies emanating from traditional values, tribes are showing success in defeating proposed fossil fuel projects. Tribes that have won either in court or in administrative proceedings against fossil fuel transport projects include the Lummi Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Warm Springs, the Swinomish Tribal Indian Community, the Quinault Indian Nation, the Cowlitz Tribe, and the Nez Perce Nation, among others. Sections II and III of this Article draw upon these successes to explore in detail the legal tools available to tribes to stop fossil fuel transport within tribal geographies. The section below describes the legal context framing such strategies.

D. *Legal Posture of Fossil Fuel Transport and Export Projects*

Jurisdictional analyses and best available legal tools will vary depending on whether a proposed project lies within or outside reservation boundaries. On the reservation, tribes may have direct jurisdiction over trains or pipelines crossing into tribal territory. Off-reservation, tribes may exert considerable sway as interested parties and sovereign co-trustees in permit decisions controlled by federal, state, or local agencies. Virtually all proposed fossil fuel projects pass through tribal geographies (reservations and ceded lands) in some capacity.

⁸² 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, 228 (119) ("These similarities are useful for a comparative discussion of Euro-American and indigenous land ethics, and they provide a means to understand the often different values that underlie contemporary tribal environment decision-making.").

⁸³ "Tribal Trustees in Climate Crisis," *supra* note 34, at 526 (citing Oren Lyons, Onondaga Nation leader and faithkeeper, *The Ice is Melting*, Twenty-Fourth Annual E.F. Schumacher Lectures (Oct. 2004): "You can't negotiate with a beetle. You are now dealing with natural law. And if you don't understand natural law, you will soon. [If] you don't abide by that law, you will suffer the consequence. Whether you agree with it, understand it, comprehend it, it doesn't make a difference. You're going to suffer the consequence, and that's where we're headed right now.").

By their nature as projects designed to cover distance, proposed fossil fuel transport and export projects typically require a dozen or more permits from a range of jurisdictional authorities. Every required permit or authorization represents a legal entry point for tribes to assert their sovereign prerogatives. The precise configuration of permits and authorizations will necessarily vary by project according to transport method, fuel type, and route. A single denial can stop a project cold.

Tribes have a unique opportunity and strong basis to insert themselves in these permitting processes. First, “bomb trains” and pipelines directly impinge on tribal property rights. Second, tribes have special responsibilities as co-trustees of natural resources.⁸⁴ Water, air, and fisheries are among the public trust assets over which tribes serve as co-trustees.⁸⁵ Tribes are statutorily positioned to bring claims for natural resources damages (NRD) when private or public actors injure natural assets held in common by all citizens.⁸⁶ The following description of agencies and permits frequently involved in fossil fuel transport provides a useful framework for ascertaining opportunities for tribal intervention.

1. Federal

Given the diversity and reach of the federal government, federal agencies commonly exercise jurisdiction over at least one phase of most fossil fuel infrastructure proposals. Projects involving transportation of coal or oil by rail, for example, will implicate the Interstate Commerce Commission Termination Act (ICCTA).⁸⁷ That statute expressly reserves authority over railroad activities to

⁸⁴ See *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 2488447 *5 (D. Or. 2005) (mandating federal agencies to “collaborate with the sovereign entities, including . . . the Tribes”).

⁸⁵ See *id.*; see also *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1114-15 (D. Idaho, 2003), *modified in part*, *U.S. v. Asarco, Inc.*, 4471 F.Supp.2d 1063, 1068-69 (D. Idaho, 2005) (recognizing the Coeur d'Alene tribe as the co-trustee of Lake Coeur d'Alene for purposes of CERCLA); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”).

⁸⁶ See 42 U.S.C. § 9607(f)(1) (Comprehensive Environmental Response, Compensation, and Liability Act); 33 U.S.C. § 2706(b)(4) (Oil Pollution Act).

⁸⁷ 49 U.S.C. § 10101 *et seq.*

the federal Surface Transportation Board (STB).⁸⁸ The STB is responsible for reviewing permit applications for construction and acquisition of railway lines.⁸⁹

Most new construction requiring federal agency approval obliges these action agencies to engage in the NEPA process.⁹⁰ Environmental Assessments and especially Environmental Impact Statements provide an important opportunity for public participation, though agencies retain discretion in weighing comments.⁹¹ Tribes typically engage in such federal public comment processes for proposed fossil fuel infrastructure. The National Historic Preservation Act (NHPA), crafted to protect historic structures and places, also requires a public comment process similar to NEPA.⁹² Both statutes apply only to federal actions.

The U.S. Army Corps of Engineers exercises jurisdiction over any structures built in, on, or above the navigable waters of the United States, as well as over any activity that obstructs navigation.⁹³ Fossil fuel export terminals and port facilities involve

⁸⁸ 49 U.S.C. § 10501(b) (announcing, “The jurisdiction of the Board . . . is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provide under Federal or State law.”); 49 U.S.C. § 10102(1) (defining “Board”).

⁸⁹ 49 U.S.C. § 10901 *et seq.*

⁹⁰ 42 U.S.C. § 4321 *et seq.* See *Ka Makani ‘O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955 (9th Cir. 2002) (articulating the federal nexus test for NEPA: “in order to have ‘major federal action,’ . . . ‘the federal agency must possess actual power to control the nonfederal activity,’” citing *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (internal quotations and citations omitted)).

⁹¹ Courts generally apply a strict compliance standard to the procedural requirement of NEPA, while applying an “arbitrary and capricious” standard to the substantive requirement, essentially deferring to the agency. See, e.g., *Stryker’s Bay Neighborhood Council Inc. Karlen*, 444 U.S. 223, 228 (1980) (holding that as long as federal agencies consider the environmental consequences of their decisions, “NEPA requires no more.”). Additionally, different administrations interpret and apply NEPA differently. See generally Walter E. Stern, “‘Black Snakes’ or Essential Infrastructure: Dakota Access Pipeline, Standing Rock Sioux Tribe v. U. S. Army Corps of Engineers, The Federal Government’s Tribal Consultation Obligations, and Why This Matters,” MODRALL SPERLING, Jan. 4, 2018:

<https://www.modrall.com/2018/01/17/black-snakes-essential-infrastructure-dakota-access-pipeline-standing-rock-sioux-tribe-v-u-s-army-corps-engineers-federal-governments-tribal-consultation-obligations-m/>.

⁹² 54 U.S.C. § 300101 *et seq.*

⁹³ 33 U.S.C. § 403.

such structures and activities, typically triggering an affirmative obligation for the Army Corps to engage in a full environmental review process under NEPA. Section 404 of the Clean Water Act gives the Army Corps authority to regulate discharge and fill material in navigable waters.⁹⁴ Section 401 requires certification of compliance with state water quality standards.⁹⁵

Other federal agencies that are likely to exercise jurisdiction over various stages or types of fossil fuel transport and export projects include: the Federal Energy Regulatory Commission; the U.S. Department of Energy; the U.S. Department of Transportation and the Pipeline and Hazardous Materials Safety Administration; the U.S. Coast Guard; the U.S. Fish and Wildlife Service; NOAA Fisheries Service; and the U.S. Department of State, among others. Each federal agency owes a fiduciary trust responsibility to tribes and is responsible for upholding this obligation in all decisions implicating tribal interests.⁹⁶

2. State

At the state level, Washington and Oregon both have extensive administrative frameworks relevant to fossil fuel transport permit processes in the Pacific Northwest. In Washington, state agencies likely to be involved in reviewing fossil fuel project permit applications include Washington's Departments of Ecology, Natural Resources, Fish and Wildlife, and Commerce, as well as the Energy Facility Site Evaluation Council (EFSEC), which is specially charged with reviewing permit applications for facilities receiving oil by rail. The EFSEC makes a recommendation to the Governor, who has final say in approving or denying permits.⁹⁷ On January 29, 2018, Governor Jay Inslee affirmed EFSEC's recommendation to reject an application for Tesoro-Savage's proposed oil-by-rail terminal in Vancouver, Washington.⁹⁸

⁹⁴ 33 U.S.C. § 1344.

⁹⁵ 33 U.S.C. § 1341.

⁹⁶ See *infra* Section IV.A.; Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 2000) (“This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.”) (quoting U.S. v. Eberhardt, 789 F.2d 1354, 1361 (9th Cir. 1986) (Beezer, J., concurring)).

⁹⁷ RCW 80.50.100.

⁹⁸ Jay Inslee, letter: “Vancouver Energy Distribution Terminal,” Jan. 29, 2018: https://www.governor.wa.gov/sites/default/files/documents/InsleelettertoEFSEC_TesoroSavage.pdf?utm_medium=email&utm_source=govdelivery.

Oregon's state bureaucratic roster reads somewhat differently than its northern neighbor, though the permit hurdles which proposed projects must clear are similar. The State Land Board (SLB) and the Department of Environmental Quality (DEQ) are important gatekeepers in Oregon, charged with issuing land use permits on state-owned land and water quality certifications, respectively. The SLB and its administrative arm, the Department of State Lands (DSL), maintain jurisdiction over all proposed development within wetlands and waterways. In 2014, the DSL terminated a proposed coal transport project when it denied a removal-fill permit on the middle Columbia, citing a "small but important longstanding fishery" for which treaty tribes had advocated for.⁹⁹

Washington (unlike Oregon) has enacted a State Environmental Policy Act (SEPA),¹⁰⁰ which requires a NEPA-like procedural analysis of state actions and permit decisions. Washington's SEPA was the basis of the Department of Ecology's recent denial of a permit application for a proposed coal-by-rail terminal in Longview, Washington.¹⁰¹ Oregon has never passed a state environmental policy act, though other state laws, such as those governing removal-fill permits, set forth robust environmental policies emphasizing protection, conservation, recreation, and habitat.¹⁰²

Washington and Oregon are also the two longest-standing state participants in the Coastal Zone Management Act (CZMA).¹⁰³ In this capacity, both states have developed and implemented coastal zone management plans to carry out the national policy of preserving, protecting, and sustainably developing coastal zones

⁹⁹ See *infra* Section III.2.; *In re Coyote Island Terminal LLC and Port of Morrow*, Oregon Office of Admin. Hearings for the Dept. of State Lands, Rulings on Motions for Summary Determination (2016): http://media.oregonlive.com/environment_impact/other/morrow%20ruling.pdf.

¹⁰⁰ RCW 43.21C *et seq.*

¹⁰¹ See 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>.

¹⁰² See, e.g., ORS 196.805(1).

¹⁰³ 16 U.S.C. § 1451 *et seq.*; see "Coastal Zone Management Programs," NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: <https://coast.noaa.gov/czm/mystate/>.

“for this and succeeding generations.”¹⁰⁴ The statutory scheme provides yet another avenue for tribes to work with and through states in exerting their sovereign interests in protecting coastal and ocean resources against fossil fuel infrastructure.

Finally, both states also observe and enforce the public trust doctrine, which is unequivocally implicated by any fossil fuel infrastructure proposal involving submerged lands along navigable waterways. Under the public trust doctrine, all submerged lands along navigable waterways are owned by the State in trust for present and future citizens as beneficiaries, and state decision-makers must uphold fiduciary obligations under the public trust when administering and making decisions on all leases and permits involving the seashore, submerged lands, and overlying waters.¹⁰⁵ Not coincidentally, the physical scope of the public trust overlaps substantially with tribal treaty fishing waters, indicating the crucial nature of the aquatic commons to all citizens. Tribes should consider the public trust doctrine among the array of tools available for stopping fossil fuel transport projects that threaten tribal people, resources, and lands.

3. Local

Local jurisdictions also exercise authority over aspects of proposed fossil fuel projects. Port and county commissions are the governmental bodies most likely to hold sway at the local level through their authority over construction and expansion permits for export facilities. While local governments may not always share the same policies or priorities as tribes, formidable alliances may form over common fossil fuel infrastructure threats to communities. In 2016, for example, the Board of Commissioners of Wasco County, Oregon, denied a railway expansion permit based on projected impacts to tribal treaty fishing rights.¹⁰⁶ Cultural resource law has

¹⁰⁴ 16 U.S.C. § 1452(a); *see also* Washington Coastal Zone Management, WA Dept. of Ecology: <https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Coastal-zone-management>; Oregon Coastal Management Program, https://www.oregon.gov/LCD/OCMP/pages/cstzone_intro.aspx. Moreover, in Oregon, the public trust encompasses all beaches up to the high-water mark. *See Stevens v. City of Cannon Beach*, 317 Or. 131, 138-9 (1993) (quoting *State ex rel. Thorton v. Hay*, 254 Or. 584, 588-596 (1969)).

¹⁰⁵ *See Stevens*, 317 Or. at 138-9.

¹⁰⁶ For a detailed discussion of this case, see *infra* Section IV.B.2.c.

also delayed local permitting for development of a proposed liquefied natural gas facility in Coos Bay, Oregon.¹⁰⁷ Local jurisdictional authority has the benefit of devolving power over dangerous infrastructure to those who, like tribes themselves, face direct harm from proposed fossil fuel projects.

Ultimately, arresting proposed fossil fuel projects involves an exercise in braiding the law. Tribal rights, statutory language, and common law doctrines such as the public trust must be woven together into innovative, sophisticated legal arguments. Tribes stand positioned to assert their sovereign legal prerogatives by denying or negotiating easements, invoking the federal Indian trust responsibility and treaty rights, appealing directly to jurisdictional decision-makers, and, when necessary, challenging those decisions in court. The precise contours of legal levers available to halt fossil fuel transport on-reservation and off-reservation is the focus of the next two Sections of this Article.

III. ON-RESERVATION TRIBAL PREROGATIVES

Tribes, as unique legal sovereigns, hold on-reservation levers against fossil fuel projects unavailable to state or local governments. 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.

Through the property rights lever, tribes can exert power over fossil fuel export projects by exercising control over the easement agreements that allow the projects to cross the reservation. The regulatory lever, on the other hand, allows tribes to more directly control projects through the application of tribal law. An example of direct regulation would be a tribal ordinance stating that no trains transporting crude oil shall pass through the tribe's reservation boundaries.

Tribes likely possess the most effective means of stopping these projects on-reservation by operating within the property framework and using the rules prescribed by the regulations. Every fossil fuel export project that crosses reservation lands will require an easement, which is granted by the Secretary of the Interior to third

¹⁰⁷ Oregon Shores Conservation Coalition v. Coos County, LUBA No. 2016-095, 43-53, Nov. 27, 2017: <http://www.oregon.gov/LUBA/docs/Opinions/2017/11-17/16095.pdf>.

parties through statutory processes. Under the implementing regulations for that statute, however, tribes may refuse, revoke, or enforce easement agreements. This article will explore those options in Section A, and Section B will analyze the potential of direct regulation through tribal law and discuss the federal preemption barriers that such regulation will likely face.

To preface this discussion, several items should be noted. First, any individualized analysis must tie to a highly fact-specific context. Each right-of-way grant will have unique language. Moreover, treaty rights interpretations, as well as the history and status of particular tribal land holdings, differ between tribes. Second, some of these matters are still laden with uncertainty. A multitude of laws remain at play, and on-point precedent is often elusive. While not providing hard-and-fast answers, this section provides guidance for tribes exercising on-reservation prerogatives by highlighting relevant case law, identifying probable obstacles to the assertion of tribal authority, and describing potential pathways around those obstacles.

A. *Tribal Property Rights Tools*

Right-of-way easements through reservations are governed by specific statutes and Bureau of Indian Affairs (BIA) regulations. These laws offer significant leverage to tribes seeking to exercise dominion over easements. Caselaw dealing with these issues is sparse, but the language in the regulations provides tribes with significant control.

This section begins by describing the federal scheme that governs rights-of-way through tribal lands. It then reviews potential property rights levers operating within the regulations. These levers function against both new right-of-way applications and existing grants. Finally, this section concludes with a discussion of *Swinomish v. Burlington Northern Santa Fe Railway Company*, a recent case that has affirmed tribal power in this context.

1. Federal Law over Rights-of-Way

All infrastructure poised to cross over an Indian reservation requires a right-of-way from the tribe, whether that infrastructure is a telecommunications line, water pipe, or railroad. Federal laws

governing rights-of-way through tribal lands historically favored non-Indian economic development.¹⁰⁸ The Secretary of the Interior has long held the ultimate power to grant right-of-way easements in Indian Country. Originally, that power derived from a handful of piecemeal right-of-way statutes.¹⁰⁹ In 1948, however, Congress passed sweeping legislation enabling rights-of-way for any use or purpose, including pipelines and railroad tracks. Commonly called the Indian Right-of-Way Act (or IRWA),¹¹⁰ the statute conferred broad authority to the Secretary of the Interior to grant easements, subject to a requirement for consent from the affected tribe.¹¹¹ The newest iteration of the implementing regulations, published in 2016, suggests that the longtime trend of placing tribal interests subordinate to non-Indian development interests may be receding.

Purpose of the New Right-of-Way Regulations: BIA's purpose in updating the IRWA regulations was to “streamline the procedures and conditions” for application and approval of a right-of-way grant.¹¹² The regulations apply to all right-of-way grants issued on or after April 21, 2016.¹¹³ For grants issued prior to that date, the procedural provisions apply retroactively, unless those provisions are incompatible with the express terms of the grant.¹¹⁴

The new rules are meant to bolster tribal self-determination by “acknowledging and incorporating tribal law and policies” and by deferring to tribal decisions wherever possible.¹¹⁵ Such language makes clear a policy to respect the sovereign authority of tribes in

¹⁰⁸ See, e.g., Ward Churchill & Winona LaDuke, *Native America: The Political Economy of Radioactive Colonialism*, 13 *The Journal of Ethnic Studies* (Fall 1985).

¹⁰⁹ 25 U.S.C.A. § 311-22. Strangely, IRWA made clear that the prior right-of-way statutes would not be repealed. In hindsight, this preservation of the older statutes has only added confusion to the already unclear scheme of federal dominion over tribal easements.

¹¹⁰ 25 U.S.C.A. § 324.

¹¹¹ 25 U.S.C.A. § 324 (consent required for tribes organized under Indian Reorganization Act); see also *Coast Indian Community v. U.S.*, 550 F.2d 639 (Ct. Cl. 1977) (holding that the Bureau of Indian Affairs violated the law sold right-of-way over Indian lands without obtaining consent of majority of adult members of Indian community).

¹¹² 25 C.F.R. § 169.1.

¹¹³ 25 C.F.R. § 169.7(a).

¹¹⁴ 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>.

¹¹⁵ 25 C.F.R. § 169.7(b).

choosing whether to allow these projects to carve through tribal lands.¹¹⁶

Obtaining a Right-of-Way: To obtain a right-of-way easement, the applicant, or grantee, must submit an application to the regional BIA office.¹¹⁷ The BIA must determine if the right-of-way is in the best interest of the tribe.¹¹⁸ As a predicate to the decision, BIA must analyze any potential environmental or other adverse impacts and confirm that the proposed easement complies with applicable federal laws.¹¹⁹ Significantly, BIA must defer “to the maximum extent possible” to the tribe on whether the right-of-way is in its best interest.¹²⁰

Consent Requirements for Right-of-Ways: Most importantly, the regulations underscore a clear tribal consent requirement and clarify the tribe's authority over how that consent is negotiated.¹²¹ Consent is required for any new easement that crosses “tribal land.”¹²² Consent must come as an authorization from the tribe or, if the tribe requires, as a written agreement with the tribe.¹²³ Apart from new right-of-way applications, the consent requirement may also be triggered by a number of actions on existing easements: new uses, amendments, assignments, and renewals elaborated below.

New Uses under Existing Easements Agreements: Easement holders can utilize their existing rights-of-way for a new use under certain circumstances, without obtaining tribal consent.¹²⁴

¹¹⁶ The agency's position is also apparent from its filings in a suit challenging the new regulations, discussed *infra* in FN 141.

¹¹⁷ 25 C.F.R. § 169.101(a).

¹¹⁸ 25 C.F.R. § 169.124.

¹¹⁹ 25 C.F.R. § 169.123.

¹²⁰ 25 C.F.R. § 169.124.

¹²¹ Although IRWA only required consent from tribes organized under IRA, the regulations made clear that the consent requirement applies to all tribes. 25 C.F.R. § 169.107. *See also* Kevin K. Washburn & Jody Cummings, “Explaining the Modernized Leasing and Right-of-Way Regulations for Indian Lands,” University of New Mexico School of Law Research Paper No. 2017-10: <https://ssrn.com/abstract=3055854>.

¹²² 25 C.F.R. § 169.107(a). Tribal land is defined as any tract where a tribe owns at least an undivided interest in the surface estate in trust or restricted status. 25 C.F.R. § 169.2. Under that definition, the regulations seemingly expand the requirement from applying only to trust lands to also applying to fee land in which a tribe has an undivided ownership interest.

¹²³ 25 C.F.R. § 169.107(a).

¹²⁴ 25 C.F.R. § 169.127(a). “An example of uses within the same scope would be an underground telephone line being used for an underground fiber optic line. A

Grantees may use existing easements for a use not stipulated in the original grant as long as the original grant has not yet expired, the new use is “within the same scope” as the original use, and no ground disturbance is necessary.¹²⁵ On the other hand, if the new uses are not within the same scope of the original easement and involve ground disturbance, such change would require a brand-new application, triggering the consent requirement.¹²⁶

Amendments to Existing Easement Agreements:¹²⁷

Grantees can also make certain changes to their easements through amendments, at any point in the lifetime of the grant.¹²⁸ However, if a proposed amendment makes any material changes, the BIA may instead require an application for a new grant.¹²⁹ Further, even if the proposed amendment lacks material changes, tribal consent must be obtained unless the amendments are merely administrative changes, such as correcting a legal description within the grant document.¹³⁰ The BIA can only disapprove an amendment request if: consent (if required) has not been obtained; the grantee has violated the original grant; the BIA finds a “compelling reason” for withholding approval to protect the tribe's best interest (the agency must defer to the maximum extent possible to the tribe); or any other requirements of the regulations have not been met.¹³¹

Renewals of Easement Agreements: Easements are granted for a definite period of time, as specified in the grant document, and the BIA will defer to the tribe's determination on

pipeline easement being used for a railroad, on the other hand, is not within the same scope.” *Id.* at (c).

¹²⁵ 25 C.F.R. § 169.127(a). This action is attractive to grantees because it does not require the resources necessary for a brand-new application.

¹²⁶ 25 C.F.R. § 169.127(a)(2).

¹²⁷ The regulations also prescribe rules for assignments of existing grants. Assignments are used when a grantee wants to transfer their right-of-way interest to another actor. As with amendments, the regulations require tribal consent for assignments, unless the express terms of the grant provide otherwise. Even with such terms, however, the BIA may still need to approve the assignment. The disapproval factors for assignments are nearly identical to the amendment factors. 25 C.F.R. § 169.207. Note that assignments with new proposed uses may also require a new grant application. 25 C.F.R. § 169.127(b).

¹²⁸ For example, new uses outside the scope of the original grant that will not require ground disturbance may only require an amendment. 25 C.F.R. § 169.127(a)(1).

¹²⁹ 25 C.F.R. § 169.204(a).

¹³⁰ 25 C.F.R. § 169.204(b).

¹³¹ 25 C.F.R. § 169.206. BIA notes in this provision that the agency will not “unreasonably withhold approval of an amendment.”

whether the original right-of-way term is reasonable.¹³² Once the right-of-way term expires, the grantee may renew the existing grant.¹³³

However, a renewal will only be granted if several conditions are met: the initial and renewal term do not cumulatively exceed the maximum term under the regulations; the existing grant explicitly allows for renewal and specifies compensation terms; the grantee provides an affidavit stating that there is no change in right-of-way size, type, or location; there are no uncured violations under the regulations or the existing grant's terms; the grantee confirms that consent has been obtained (or, if the original right-of-way explicitly allows for renewal without consent, the grantee has provided notice to the tribe); and the initial right-of-way term has not already expired.¹³⁴ If *any* of these conditions are not met, the grantee must reapply for a new right-of-way, and the BIA must handle the application as a new right-of-way application that requires tribal consent.¹³⁵

Negotiating for Conditions, Restrictions, Remedies, and Compensation: Tribes have significant negotiating power with respect to right-of-ways that trigger the consent requirement. The consent agreement may impose conditions or restrictions on the right-of-way grant.¹³⁶ The consent document may also include negotiated remedies for violations, such as termination of the grant.¹³⁷ If the remedies provide the tribe or the grantee with the power to terminate the grant, then BIA approval of termination is not required; if an express negotiated remedy for termination is not included, then BIA approval is necessary.¹³⁸ The tribe also has the power to negotiate the monetary compensation that will be paid by the grantee for the right-of-way.¹³⁹

¹³² 25 C.F.R. § 169.201.

¹³³ 25 C.F.R. § 169.202.

¹³⁴ 25 C.F.R. § 169.202(a).

¹³⁵ 25 C.F.R. § 169.202(c).

¹³⁶ *Id.*

¹³⁷ 25 C.F.R. § 169.403(a).

¹³⁸ *Id.*

¹³⁹ 25 C.F.R. § 169.110(a). The compensation can be “any payment amount negotiated by the tribe.” The BIA will defer to the tribe's valuation if the tribe submits an authorization expressly stating that it has agreed to satisfactory compensation, waives the BIA valuation process, and has determined that accepting the agreed upon compensation and waiving BIA valuation is in its best interest.

2. Property Rights Levers Using IRWA and the Regulations

The new regulations, while far from perfect, do offer potential leverage for tribes through the consent requirement.¹⁴⁰ The need for consent may be triggered at various times through the lifetime of an easement and can essentially act as a tribal veto power.

Whether or not tribal consent is needed, the BIA remains obligated to act in accordance with the trust obligation, as reflected in the regulatory language requiring decisions that protect the “best interests” of the tribe. The trust obligation permeates all federal agency discretionary actions, including right-of way decisions.¹⁴¹ Even in those instances where the tribal consent requirement is not triggered, there is a manifest policy throughout the regulations to promote consultation with tribes, and defer to their decisions.¹⁴² The next subsections will review in more detail the tribal role in projects crossing reservations. Subsection (a) considers new applications, while subsection (b) discusses existing grants.

¹⁴⁰ Importantly, tribal claims that are based off noncompliance with the regulations, such as failure to obtain consent, should not be defeated by a preemption-style challenge. Although existing federal regulation of fossil fuel transport is overarching and may have limited tribal authority to directly regulate using tribal law, the right-of-way regulations operate under IRWA. Federal statutes do not preempt one another, and there is no indication that IRWA has been implicitly repealed. Instead, Congress's failure to repeal IRWA demonstrates its intent to allow tribes to pursue IRWA-based remedies despite the overarching federal regulation. *See Swinomish Indian Tribal Community v. BNSF Railway Company*, 228 F.Supp.3d 1171, 1180-3 (W.D. Wash. 2017).

¹⁴¹ “It is well established that the BIA holds a fiduciary relationship to Indian tribes, and its management of tribal rights-of-way is subject to the same fiduciary duties.” *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002).

¹⁴² *See* 25 C.F.R. § 169.1(a) (stating that these regulations are intended to also intended to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land.”); *see also*: 25 C.F.R. § 169.209(b) (stating that BIA will defer to the tribe, even where tribal consent is not necessary, in determining whether to approve a right-of-way assignment); 25 C.F.R. § 169.206(b) (stating that BIA will defer to the tribe, even where tribal consent is not necessary, in determining whether to approve a right-of-way amendment); 25 C.F.R. § 169.202(a)(1) (stating that, in determining whether to grant a right-of-way renewal, BIA will defer to the tribe on whether the length of renewal is reasonable, regardless of whether consent is required).

a. *New Right-of-Way Grant Applications*

Tribes hold the greatest leverage against proposed projects that will require a new right-of-way grant to pass through the reservation, due to the consent requirement. Without consent, there can be no new pipeline or rail line built across tribal land.¹⁴³ The BIA cannot consent on behalf of a tribe, and the Secretary cannot grant a right-of-way without consent.¹⁴⁴ Thus, the tribe holds an absolute power over projects that do not already have grants.

If a tribe does not wish to refuse consent outright, the regulations provide an opportunity for it to nevertheless retain significant control over an easement. Written consent agreements can contractually impose conditions and restrictions, including the type or amount of fuel transported through the easement area.¹⁴⁵ Moreover, the tribe increases control over these projects by including negotiated remedies for violating the terms of the written agreement. In particular, unilateral termination without BIA approval allows a tribe to cancel the right-of-way agreement at any time, though enforcement may pose a challenge.¹⁴⁶ BIA's trust

¹⁴³ 25 C.F.R. §169.107(a).

¹⁴⁴ 25 C.F.R. § 169.108(a); 25 C.F.R. § 169.107(a).

¹⁴⁵ Typically, breach of contract claims based on easement agreement conditions that de facto regulate may be preempted because of their potential effect on interstate commerce (*U. S. v. Baltimore & O. R. Co.*, 333 U.S. 169, 176 (U.S. 1948), holding that noncarrier regulation of cargo type through contract with a rail carrier is preempted Interstate Commerce Commission Termination Act (ICCTA), even when the noncarrier owns the track itself, not merely the land crossed by easement). *See also*, *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 297 F.Supp.2d 326, 333 (D. Me. 2003), holding that a breach of contract claim for “exemplary” damages was preempted by the ICCTA). However, this rule should not apply in this context. Through IRWA, Congress has expressly granted the Secretary of Interior authority to promulgate regulations specific to right-of-way agreements through tribal lands. Through that authority, the Secretary has created a process for tribes to impose conditions and restrictions on easement consent agreements. *See Swinomish Indian Tribal Community v. Burlington Northern Santa Fe Railway Company*, 2017 WL 2483071, 1 (W.D. Wash. 2017).

¹⁴⁶ The written agreements may also contain negotiations for compensation between the tribe and the grantee. The monetary negotiations form an additional possible lever. The regulations explicitly provide that this can be “any payment amount negotiated by the tribe” and that the BIA will give deference to the tribe's valuation. 25 C.F.R. § 169.110(a). In theory, the tribe could negotiate for an amount so obscenely high that no company, no matter how well funded, would be willing to pay for rights to cross over a relatively small piece of land. It is a bit unclear what would happen in this scenario, as the regulations state

obligation to act in a tribe's best interests should compel the agency to support and enforce tribally-proposed conditions, restrictions, and negotiated remedies that mirror the trust obligation owed by the agency to the tribe. Given the clarity of the IRWA regulations, prospective grantees would have difficulty challenging a tribe that withheld consent.

b. *Existing Right-of-Way Easements*

Existing right-of-way easements demand a different analysis, because many provisions in the IRWA regulations are prospective only, applying to projects initiated after the regulations took effect.¹⁴⁷ Moreover, the express terms of the applicable grant will always govern the particular situation.¹⁴⁸ Although the prospective-only regulations and the binding nature of existing grant terms do present obstacles, tribes still hold potential levers against existing grants. Those spring from regulatory provisions controlling renewal, assignment, and changes (including both minor amendments and material changes in use) of existing easement agreements.¹⁴⁹

that if agreement is not reached then BIA will require the grantee to pay the fair market value. 25 C.F.R. § 169.110(c).

¹⁴⁷ This was necessary, perhaps, for the BIA to avoid a flurry of challenges arguing that existing property interests had been altered by the regulations. One such challenge has already been attempted, albeit unsuccessfully. Western Energy Alliance (WEA), an organization of individuals “involved in all aspects of exploration, production, and transportation of oil and natural gas on federal and Indian lands”, brought a claim in federal court to invalidate the regulations. Order, *Western Energy Alliance v. United States Department of Interior*, Case no. 1:16-cv-050, 2 (D.N.D. 2016) [hereinafter *WEA Order*]. WEA's primary argument was that the regulations are contrary to federal Indian law principles and improperly altered property rights on existing easements. *Id.* at 3. The Dept. of Interior countered that the regulations were consistent with federal court decisions regarding tribal jurisdiction and did not affect existing property interests. Defendants' Opposition to Motion for Preliminary Injunction, *Western Energy Alliance v. United States Department of Interior*, Case no. 1:16-cv-050, 21 (D.N.D. 2016). WEA's motion for a preliminary injunction was denied, and the organization voluntarily dismissed their suit. *See WEA Order*, at 15. These documents available through PACER.

¹⁴⁸ These terms could undermine tribal power, such as terms providing automatic renewal without consent or an absolute waiver of tribal jurisdiction over the right-of-way.

¹⁴⁹ *See* 25 C.F.R. § 169.202, 25 C.F.R. § 169.127, and 25 C.F.R. § 169.204.

Perhaps most notably, tribes retain the power to refuse to renew an easement grant upon expiration.¹⁵⁰ The provisions governing renewals are procedural, thereby applying retroactively to existing grants.¹⁵¹ Barring any express terms for automatic renewal without consent, the BIA must disapprove of a renewal unless the grantee obtains consent from the tribe.¹⁵² Further, if the original grant was silent to renewals altogether, then a brand-new right-of-way application will be necessary, triggering the consent requirement discussed above and affording the tribe the opportunity to negotiate a written agreement with conditions and restrictions.¹⁵³ The BIA must also disapprove renewal requests where there is a change in the easement's size, type, or location, where the original grant has already expired, or where there are any outstanding grant violations.¹⁵⁴ Lastly, the BIA may not approve a renewal if the aggregate lease or right of way term is considered unreasonable under the regulations.¹⁵⁵ The regulations state that BIA must defer to the tribe on the question of reasonableness.¹⁵⁶ If any of these procedural obstacles materialize, existing infrastructure would be subject to removal, as any possession or use without a right-of-way grant warrants treatment as trespass by the BIA.¹⁵⁷

A proactive approach is key in the context of existing rights-of-way. For tribes seeking to extinguish existing grants, tribal attorneys must determine when each grant expires and what the terms prescribe for renewal. Grantees, and perhaps even the BIA, are unlikely to alert a tribe of a grant's approaching expiration, particularly in this era in which many tribes are demonstrating opposition to these fossil fuel projects.

In an interesting application of the IRWA regulations, the Bad River Band of the Lake Superior Tribe of Chippewa Indians in 2017 refused to renew an easement for the Enbridge Line 5 through

¹⁵⁰ 25 C.F.R. § 169.202.

¹⁵¹ *Id.*; see also “What are PROCEDURAL PROVISIONS of the Rights-of-Way on Indian Land Final Rule?” at 4:

<https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-033661.pdf>.

¹⁵² 25 C.F.R. § 169.202(a)(6).

¹⁵³ 25 C.F.R. § 169.202(c).

¹⁵⁴ 25 C.F.R. § 169.202(a)(3); 25 C.F.R. § 169.202(a)(4); 25 C.F.R. § 169.202(a)(5).

¹⁵⁵ 25 C.F.R. § 169.202(a)(1).

¹⁵⁶ 25 C.F.R. § 169.201(b).

¹⁵⁷ 25 C.F.R. § 169.413.

certain parcels of its reservation.¹⁵⁸ The particular easement agreement covered only a small portion of the pipeline that crosses the reservation, and the remaining easements were not due to expire for quite some time.¹⁵⁹ Though it is too early to determine whether the refusal will block transport of oil through the entire pipeline, the tribe broadcast a powerful message through its spokesman who stated: “No form of compensation or negotiations will change our decision...It’s not about the money. It’s about the environment and what we leave behind for our next generations.”¹⁶⁰

A grantee’s attempt to assign an easement presents another lever over existing rights-of-way. Tribal consent must be obtained for assignments, unless the express terms of the grant provide otherwise.¹⁶¹ Even where the grant expressly provides for assignment without tribal consent, the BIA still must approve the assignment, and that approval process necessarily invokes the trust obligation.¹⁶² This broad federal obligation is captured by language directing BIA to reject an assignment to “protect the best interests” of the tribe, and to defer as much as possible to the tribe’s position.¹⁶³ The language bears the indicia of a classic trust relationship. Thus, if relatively benign right-of-way grantee, such as an operator of a water line, seeks to assign its grant to an oil pipeline company, the tribe likely can prevent such an assignment, either by refusing its consent or by imploring the BIA to honor the trust obligation, defer to the tribe’s refusal, and disapprove the assignment.¹⁶⁴

Changes in the grant carry similar potential for the exercise of tribal sovereignty. Changes can range from minor clerical

¹⁵⁸ See Karen Graham, *Spills on Enbridge’s Old Line 5 Pipeline Tops One Million Gallons*, DIGITAL JOURNAL, Apr. 26, 2017: <http://www.digitaljournal.com/news/environment/spills-on-enbridge-s-old-line-5-pipeline-tops-one-million-gallons/article/491245>.

¹⁵⁹ See Danielle Kaeding, *Bad River Band Won’t Renew Land Easements With Enbridge*, BUSINESSNORTH, Jan. 9, 2017: http://www.businessnorth.com/kuws_wisconsin_public_radio/bad-river-band-won-t-renew-land-easements-with-enbridge/article_e3e9fb0e-d6e1-11e6-b75c-93b69f176c42.html.

¹⁶⁰ *Id.*

¹⁶¹ 25 C.F.R. § 169.207(a)(1).

¹⁶² 25 C.F.R. § 169.207(b).

¹⁶³ 25 C.F.R. § 169.209.

¹⁶⁴ An interesting quandary arises when the opposite scenario occurs, with BIA denying a right of way after the tribe approves it, on the grounds that the right of way would harm the tribe’s ecological or other interests. This circumstance is not the focus of this article, but does underscore the complexity of the federal trust obligation.

amendments in the grant to a material change in use. The former category would not require tribal consent, but the latter would require at least BIA approval, if not complete tribal consent.¹⁶⁵ The approval considerations for amendments mirror the trust language used for assignment approval, exposing the grantee to possible denial.

As to changes in use, it is worthy of note that an unauthorized use amounts to a violation of the right-of-way grant and constitutes trespass, meaning that the BIA may—and under the trust obligation must—take action to recover possession of the easement and pursue any other available remedies.¹⁶⁶ Drawing from established principles outside of the federal Indian law context, significant changes in use implicate traditional property law concepts regarding easements. Under these concepts, a user violates its easement when using the land for a use not specified in the original agreement or grant.¹⁶⁷ The unstipulated use is said to be an “adverse” one, meaning a “wrongful use, made without the express or implied permission of the owner of the land.”¹⁶⁸ Adverse uses “exceed the scope” of the original easement and create an undue burden on the easement, which may compel a forfeiture by the user.¹⁶⁹ In this event, forfeiture should revert the land back to the tribe.¹⁷⁰

Moreover, it is important to bear in mind that a change in use may mean a change in the frequency of use, rather than the type of use. There is already at least one notable example of such unauthorized use, where a railroad allegedly ramped up the frequency of trains carrying oil through a reservation without notifying the tribe, despite a requirement for notice in the terms of the easement.¹⁷¹ The next subsection analyzes the litigation that ensued.

3. Case Study on Enforcement of Existing Easement Agreements: *Swinomish v. Burlington Northern Santa Fe*

¹⁶⁵ 25 C.F.R. § 169.127(a).

¹⁶⁶ 25 C.F.R. § 169.413.

¹⁶⁷ Carye Cole Chapman, “Railroads Across Tribal Lands,” 20 AM. INDIAN L. REV. 489, 499 (1996).

¹⁶⁸ O'Dell v. Stegall, 703 S.E.2d 561, 583 (W. Va. 2010).

¹⁶⁹ See Chapman, *supra* note 165, at 499.

¹⁷⁰ *Id.* at 500.

¹⁷¹ See *Swinomish Indian Tribal Community v. Burlington Northern Santa Fe Railway Co.*, 228 F.Supp.3d 1171 (2017) [hereinafter *Swinomish I*].

In 2015, the Swinomish Indian Tribal Community (the tribe) brought suit against Burlington North Santa Fe (BNSF) railroad company, claiming that BNSF had violated an easement agreement with the tribe.¹⁷² The tribe asserted that BNSF unilaterally chose to start moving 100-car oil trains through the right-of-way, allegedly violating its obligation under the easement grant to both inform and receive approval by the tribe before increasing train traffic.¹⁷³

BNSF conceded that a breach of the easement occurred.¹⁷⁴ Its argument, however, was that an immediate injunctive remedy was unavailable from a federal court, because the Surface Transportation Board (STB) was the proper entity to initially hear disputes that could potentially stop rail traffic.¹⁷⁵ Therefore, BNSF argued, any remedies from federal court are preempted by the Interstate Commerce Commission Termination Act (ICCTA), which created the STB. Further, it concluded that the ICCTA usurped any authority to proceed under the previously enacted IRWA for easement violations.¹⁷⁶

Ultimately, the court found that there was no preemption issue between ICCTA and IRWA, as federal statutes do not preempt one another.¹⁷⁷ Although the two statutes do intersect and at times conflict, any potential conflict is not “irreconcilable” to point of

¹⁷² *Id.*

¹⁷³ *Id.* at 1176.

¹⁷⁴ *Id.*

¹⁷⁵ BNSF Motion to Dismiss or Stay, at 15. The Interstate Commerce Commission Termination Act (ICCTA), discussed in depth *infra*, gives the STB exclusive jurisdiction over “transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers,” as well as the “abandonment, or discontinuance of” tracks.

¹⁷⁶ *Swinomish I*, at 1179-80. The court initially misunderstood the tribe’s contract and trespass arguments to be state law claims. The ICCTA, the court held, preempted any injunctive relief under these claims. The court drew from cases where agreements, arising under state contract law, constituted *de facto* regulation of rail carriers and therefore were preempted by federal railroad law. Such agreements “burden interstate commerce” because they “effectively require a common carrier to discriminate against a particular type of cargo and/or a particular region.” Thus, the ICCTA precluded federal courts from enforcing state contract claims through an injunction if that injunction would burden commerce by interrupting rail traffic. *Id.* at 1179. The tribe successfully motioned for reconsideration based on this error, and the court issued a second, corrected order.

¹⁷⁷ *Id.* at 1180.

repealing IRWA.¹⁷⁸ In fact, there is no clear or even implicit indication that federal railroad law has repealed IRWA. The ICCTA did not mention IRWA, despite IRWA predating it significantly.¹⁷⁹ Furthermore, the STB has repeatedly recognized the Bureau of Indian Affairs' primary role in handling disputes over rights-of-way between tribes and grantees.¹⁸⁰ Finally, the Secretary of the Interior made clear that the IRWA regulations applied to railway rights-of-way.¹⁸¹ Therefore, any contract or trespass remedies available to tribes under IRWA are not foreclosed merely because the right-of-way at issue belongs to a railroad regulated by the STB.¹⁸²

Enforcing the easement, the tribe asserted treaty rights in the land underlying the railroad tracks,¹⁸³ thereby prompting a question of whether the ICCTA abrogated the tribe's treaty right of exclusive use.¹⁸⁴ The court recognized that such treaty rights remain on equal footing with statutes.¹⁸⁵ Given the ICCTA's lack of express abrogation language and the presumption against implicit divestment of treaty rights, the court concluded that the ICCTA did not affect the tribe's treaty right.¹⁸⁷ When the ICCTA was enacted, many railroads crossed reservation lands—yet Congress failed to mention any conflict with treaty rights in the ICCTA, a factor weighing against abrogation. The IRWA, on the other hand, expressly recognized the intersection of railroads and treaties, making clear that unauthorized uses constitute trespass.¹⁸⁸ In sum,

¹⁷⁸ *Id.* at 1181.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1182.

¹⁸¹ *Id.*

¹⁸² In the past, the STB's predecessor has conditioned its ultimate approval of a railroad construction project through a reservation on consent from the governing tribe, through the BIA. In one notable case, a U.S. District Court gave deference to the BIA decision to uphold the tribe's consent refusal and to deny the railroad an appeal hearing. *See* *Star Lake R. Co. v. Lujan*, 737 F.Supp. 103 (D.D.C. 1990).

¹⁸³ *See* *Swinomish Indian Tribal Community v. Burlington Northern Santa Fe Railway Co.*, 2018 WL 1336256 (2018) [hereinafter *Swinomish III*].

¹⁸⁴ *See* *Swinomish Indian Tribal Community v. Burlington Northern Santa Fe Railway* 2017 WL 2483071, 2 (2017) [hereinafter *Swinomish II*]. “Where... a treaty is pitted against a federal statute, there is no issue of preemption.” *Id.*

¹⁸⁵ *Id.*

¹⁸⁷ *Id.* Congressional abrogation of treaty rights must be clear and express; generally, implicit abrogation of such rights is disfavored.

¹⁸⁸ *Id.* (stating that tribes “may pursue any available remedies under applicable law,” including treaty-based trespass actions in federal court.).

the *Swinomish* court held that the tribe could proceed with its claims without facing any preemption by federal railroad regulation.

It is important to note at this juncture that an IRWA statutory claim of unauthorized use is distinct from a treaty claim asserting an inherent and unabrogated right to exclude non-tribal members from the reservation. Tribal attorneys should exercise caution in basing claims solely on a treaty right to exclude, because, as discussed below, the Supreme Court has suggested that this right may have been abrogated, at least in part, in the context of right-of-way easements.¹⁸⁹ But despite the murkiness surrounding the treaty right to exclude—and *Swinomish*'s failure to sort out the confusion—the case makes clear that, under IRWA, unauthorized easement use amounts to a trespass, and tribes may seek redress in federal court to prevent that trespass. That statutory proposition (grounded in the IRWA), unlike the treaty-based right to exclude, which may have been limited by the Supreme Court.¹⁹⁰ By leaving IRWA intact, Congress demonstrated that tribal right-of-way claims are unique. IRWA granted the Secretary of the Interior (through BIA) authority to prescribe right-of-way regulations, and those regulations provide mechanisms for tribes to pursue when easement agreements are violated. Because rights-of-ways invoke BIA's trust obligation, any grant of exclusive authority to other agencies, such as the STB, would be improper.

The *Swinomish* case is still in its early stages, and the rulings thus far may be overturned or limited on appeal, so it remains difficult to predict what effect the decision will have on tribal rights-of-way.¹⁹¹ Nevertheless, the case represents a positive legal development for tribes, in that a court has affirmed a tribe's ability to exercise dominion over a right-of-way easement through its own

¹⁸⁹ “[S]o long as that [easement] is maintained as part of the State's highway, they cannot assert a landowner's right to occupy and exclude.” *Strate v. A-1 Contractors*, 520 U.S. 438, 440 (U.S. 1997). Nevertheless, this statement specifically references the *landowner* right to exclude, rather than a treaty right to exclude. *Strate* did not expressly contemplate treaty rights. Moreover, other treaty rights, such as the right to hunting and fishing, may be implicated by a significant increase in fossil fuel transport through a reservation, especially when such an increase did not receive tribal approval.

¹⁹⁰ See *supra* FN 166.

¹⁹¹ Most recently, BNSF motioned for clarification and reconsideration on whether the right-of-way was actually located on tribal land. If not, no treaty rights could be asserted, and the claims were preempted. The court granted the motion for clarification, answered in the affirmative, and denied the motion for reconsideration of the issue. See *Swinomish III*.

lands. Such an affirmation empowers tribes, by asserting their property rights, to address the threat from irresponsible fossil fuel transport. The potential implications for tribes, energy extractors and transporters, and federal agencies are far-reaching.

B. *Tribal Regulatory Tools*

The prior section discussed property-based tools available to a tribe to limit or prevent fossil fuel transportation through its reservation. The other framework that exists within the reservation boundaries is direct tribal regulation action, stemming from inherent governmental authority to pass laws that regulate conduct within sovereign boundaries.¹⁹² Tribes, as the original sovereign nations of this continent, have historically used regulatory systems to ensure that natural resources are sustained and protected. In the context of modern fossil fuel projects on reservations, direct regulation would likely be applied through tribal laws prescribing rules and limitations on fossil fuel transport within the tribe's jurisdiction. Such rules might include, for example, a moratorium against rail transport of oil or a requirement to use the best available technology for pipeline leak prevention. This approach is quite distinct from (but complimentary to) one asserting property rights.

Direct tribal regulation would seem to be much more straightforward and absolute than working within the property easement framework.¹⁹³ However, this area faces preemption obstacles in federal court. While there is no bright-line rule against tribal regulation, tribal authority over easements and, more specifically, fossil fuel transport, has been somewhat diminished by judicial characterizations of easements over reservation and trust

¹⁹² The “Treatment as States” provisions of several federal environmental laws, such as the Clean Water Act (33 U.S.C.A. § 1377), also equip tribes with powerful regulatory tools in this context. Treatment as states provisions allow federal agencies to treat tribes as states for purposes of applicable federal laws, placing tribes on equal footing as states in terms of enforcement mechanisms. These federal laws are outside the scope of this article, which focuses on the viability of tribal regulation through tribal law.

¹⁹³ Notably, the property and regulatory approaches, while theoretically distinct, are easily confused because federal Indian law jurisprudence has greatly constrained tribal regulation over non-tribally owned lands within the reservation—thus making regulatory outcomes contingent on property ownerships. Tribal governments and attorneys must assess the riskiness of asserting such regulatory authority, as an unfavorable court decision could strip tribes of regulatory authority in this context entirely.

lands as being equivalent to easements over non-Indian fee land. Tribal regulatory authority over fossil fuel projects encounters the preemptive nature of overarching federal legislative control in this area, which may in some circumstances exclude tribal authority.

This section explores such limitations on tribal regulatory power. It begins by analyzing whether tribes retain the inherent authority to regulate fossil fuel infrastructure over easements passing through reservations. It then examines the relevant federal legislation that expressly limits tribal authority. Finally, it briefly considers whether the Dormant Commerce Clause operates to thwart tribal regulation.

1. Authority to Regulate

For a tribe seeking to use direct regulation to protect its natural resources and the health of its members from the harm posed by fossil fuel infrastructure, the first inquiry is a foundational one: does the tribe possess basic authority to regulate?

This question is deceptively simple and depends largely on property ownership. Tribes generally have inherent authority to assert jurisdiction over their reservation and trust lands in civil and, to some extent, criminal matters.¹⁹⁴ Civil authority largely extends over nonmembers. As the Supreme Court declared in *Montana v. United States*, “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations.”¹⁹⁵ However, tribal authority does not indefinitely extend to nonmembers on “non-Indian fee land” that has been transferred out of trust and into non-tribal member fee ownership through an act of Congress.¹⁹⁶ A complicated patchwork of authority exists on many reservations, often making jurisdictional analyses rather difficult.

Tribal regulation of fossil fuel infrastructure will likely entail regulation over right-of-way land, given that these projects almost always require an easement as discussed in the previous

¹⁹⁴ “Handbook of Federal Indian Law,” Felix S. Cohen (2012).

¹⁹⁵ *Montana v. U.S.*, 450 U.S. 544, 565 (U.S. 1981) [hereinafter *Montana*]. *Nevada v. Hicks* did prohibit tribal jurisdiction over nonmembers on trust lands, but that was under an extremely particular set of facts involving state law enforcement capability. 533 U.S. 353 (U.S. 2001).

¹⁹⁶ *Montana*, at 566.

section.¹⁹⁷ The first question for a jurisdictional analysis, then, is what type of property are rights-of-way through tribal lands: do they remain standard trust land, or do they constitute fee land? The answer seems to be somewhere in between.

Under traditional property law principles, rights-of-way are conventionally viewed as non-possessory interests—“easements that do not convey fee title and may be limited to a specific use or purpose.”¹⁹⁸ Thus, under a traditional interpretation, a tribe would have regulatory jurisdiction over a right-of-way as it would over any other reservation or trust land. But in the world of federal Indian law, traditional interpretations have morphed into complex and confusing arrangements. In a handful of opinions, federal courts have concluded that right-of-way easements are “equivalent” to non-Indian fee land for purposes of tribal jurisdiction. These opinions continue a multi-decade trend of the judiciary to erode tribal jurisdiction, but ultimately should not categorically foreclose regulation here, for reasons explained below.

The leading case in this line is *Strate v. A-1 Contractors*, which dealt with a state highway right-of-way and a tribe's authority to adjudicate a tort claim over an accident that occurred on that highway.¹⁹⁹ The Court concluded that although the right-of-way passed over tribal trust land, the land within the right-of-way was “equivalent, for nonmember governance purposes, to such alienated, non-Indian land.”²⁰⁰ To reach this conclusion, the Court considered several factors: “the legislation creating the right-of-way; whether the right-of-way was acquired with the consent of the tribe; whether

¹⁹⁷ Given that significant portions of land in many reservations has been transferred to nonmembers in fee through various allotment-style actions, it is possible that a pipeline or railroad could pass through a reservation but remain entirely within fee land without a right-of-way. In this scenario, the *Montana* analysis discussed *infra* would still apply. It is also worth noting that regulation would also likely occur over *existing* easements, because new projects could conceivably be denied through the regulations' consent requirement without the need for regulatory action. Yet, there is much clearer tribal authority for regulatory jurisdiction over new easements than existing easements; § 169.10 preserves tribal jurisdiction, but BIA has characterized that provision as prospective only.

¹⁹⁸ *United States v. Jackson*, 697 F.3d 670, 676 (8th Cir. 2012).

¹⁹⁹ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) [hereinafter *Strate*].

²⁰⁰ *Id.* at 454. However, the regulations discussed *supra* aim to contain this holding by clearly noting that a right-of-way grant does not diminish tribal jurisdiction. Kevin Washburn refers to this provision as a “*Strate* ‘Fix.’” Washburn & Cummings, *supra* note 119, at 4.

the tribe had reserved the right to exercise dominion and control over the right-of-way; whether the land was open to the public; and whether the right-of-way was under state control.”²⁰¹ Although this case dealt with adjudicative, rather than regulatory, jurisdiction, the Court stated that “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”²⁰²

Despite this overarching precedent, the Department of the Interior, under the Obama administration, took the position that no categorical rule exists on the question of whether a right-of-way easement is equivalent to non-Indian fee land; rather, a fact specific inquiry is necessary using the *Strate* factors.²⁰³ As made apparent by several cases discussed below, this is also the position that the Ninth Circuit has implicitly taken. That court has never concluded absolutely that a right-of-way is non-Indian fee land without first considering the facts, even if the court ultimately determined that tribal jurisdiction is lacking. Because the context can vary dramatically with respect to the *Strate* factors, a fact specific inquiry is the correct analysis.

If pipeline or railroad rights-of-way are determined to be conventional trust land for jurisdictional purposes, as distinguished from the highway right of way in *Strate*, then tribes have the underlying authority to regulate activity over that right-of-way, and the basic jurisdictional inquiry ends there. If, on the other hand, fossil fuel easements are equivalent to non-Indian fee land for jurisdictional purposes (applying the *Strate* test), the “*Montana* Test” will apply.²⁰⁴ Under *Montana*, inherent sovereign jurisdiction over nonmembers on nonmember fee land is prohibited unless one of two exceptions are met.²⁰⁵ First, tribes may exercise jurisdiction

²⁰¹ Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944, 950 (9th Cir. 2000) (referencing *Strate*).

²⁰² *Strate*, at 453.

²⁰³ Brief for Dept. of the Interior, Western Energy Alliance v. United States Department of the Interior, 2016, at 30.

²⁰⁴ Burlington Northern R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999).

²⁰⁵ *Montana*, at 565. Although the two are usually what is being referred to when one mentions the “*Montana* Test,” the Court made clear that a treaty could also empower tribes to exercise jurisdiction over non-Indian fee land. This article does not delve too deeply into the matter of whether the *Montana* treaty basis would apply here. The question would be whether the statute that transferred property interests away from the tribe, IRWA, abrogated the tribe’s treaty-based right to exclude non-members. Although *Strate* implies that it did, the tribe in that case did not raise treaty arguments. *Strate* instead dealt with a landowner’s

over the activities of nonmembers who “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.”²⁰⁶ Second, tribes may assert jurisdiction over “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁰⁷ A line of cases in the Ninth Circuit applies the *Montana* Test to determine tribal jurisdiction over rights-of-way in Indian Country.²⁰⁸ These cases do not involve fossil fuel easements, but examination of the judicial analyses does provide some important insight to how a court might characterize jurisdiction over such a right-of-way.

In *State of Montana Department of Transportation v. King*, the court prohibited the assertion of a tribal employment preference ordinance against a state conducting maintenance on a state highway right-of-way through a tribe's reservation.²⁰⁹ The court applied the *Strate* factors and concluded that the highway was equivalent to non-Indian fee land, thus triggering the *Montana* test.²¹⁰ Applying the test, the court rejected the consensual relationship exception, stating that “transfers of property interests between governmental entities create property rights; they generally do not create

right to exclude. Moreover, *South Dakota v. Bourland*, a case very similar to *Montana*, says that the effect on the land at issue is dispositive. 508 U.S. 679, 692 (1993). In *Bourland*, the Court concluded that because the land was opened to the public, the tribe lost its right to “absolute and undisturbed use and occupation.” *Id.* at 697. Arguably, IRWA did not have this effect. Instead, it only grants a usufructuary interest to a nonmember. In addition, tribal consent was always required. Therefore, a tribe under the Treaty of Point Elliot may still retain its right to exclusive use, despite some property interests being transferred away from the tribe. This treaty-based approach opens up an entirely new and distinct analysis. We save that full discussion of a treaty-based right to regulate for another article, although several subsequent footnotes in this article will address the question. Moreover, there is a very strong argument that the tribal regulation via inherent regulatory authority, under the second *Montana* Test exception, applies per se (see *infra* discussion).

²⁰⁶ *Montana*, at 565.

²⁰⁷ *Montana*, at 565.

²⁰⁸ See also *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) (holding that a tribal lacked jurisdiction to tax the property of a telecommunications company when that property sat atop a right-of-way granted to the company).

²⁰⁹ *Montana Dept. of Transp. v. King*, 191 F.3d 1108, 1110 (9th Cir. 1999) [hereinafter *King*].

²¹⁰ *Id.* at 1113.

continuing consensual relationships.”²¹¹ The court went on to conclude that the health and welfare exception was not satisfied either.²¹² Although the tribe's interest in mitigating the harm caused by unemployment on the reservation might have been legitimate, this was not the type of harm to health and welfare contemplated by *Montana*.²¹³

Drawing on this precedent, the Ninth Circuit in *Burlington North Railroad Company v. Red Wolf* rejected tribal adjudicative jurisdiction over a tort claim by tribal members against a railroad for an accident occurring on the railroad's right-of-way through trust lands.²¹⁴ Using the *Strate* factors, the court concluded (as it did in *King*) that the right-of-way was equivalent to non-Indian fee land and that application of the *Montana* Test was appropriate.²¹⁵ The tribal members argued that because tribal consent is required before a right-of-way through a reservation may be granted, a consensual relationship is created between the grantee and the tribe.²¹⁶ The court rejected this argument, citing *King* for the principle that “A right-of-way created by Congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee.”²¹⁷ The court also rejected application of the second exception, noting that the threat to health and welfare must be “demonstrably serious” and that railcar accidents, even those with the “possibility of injuring multiple tribal members” do not meet that standard.²¹⁸

Unlike the cases discussed above, where jurisdiction was asserted over relatively benign activity, the potential for accidents during fossil fuel transport does indeed pose a grave threat to tribal health and natural resources. Thus, if a court were to apply the

²¹¹ *Id.*

²¹² *Id.* at 1114.

²¹³ *Id.*

²¹⁴ 196 F.3d 1059, 1062 (9th Cir.1999) [hereinafter *Red Wolf*].

²¹⁵ *Id.* at 1063. Referring to a tribe's adjudicative jurisdiction over a tort claim, “[t]here is no principled distinction to be made between the jurisdictional analysis applicable to a congressionally-granted highway right-of-way and a congressionally-granted railroad right-of-way.” *Id.* The reason, in both scenarios, was that Congress acted consistent with its plenary power “to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land.” *Id.*

²¹⁶ *Id.* at 1064.

²¹⁷ *King*, at 1113-14.

²¹⁸ *Red Wolf*, at 1065, quoting *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997).

Montana Test to a tribe's assertion of regulatory jurisdiction over fossil fuel right-of-way easements, then the “health and welfare” exception appears satisfied, as even a cursory examination of fossil fuel transport accidents shows that the potential harm posed by some of these projects is “demonstrably serious,” meeting the standard announced in *Red Wolf*.

As an example of the grave harm posed by oil “bomb trains” carrying Bakken crude oil, a derailment in Lac-Mégantic, Quebec killed fifty people and destroyed or contaminated nearly every building in the downtown area.²¹⁹ Fire response personnel testified in later hearings before the U.S. Congress that people were “vaporized” upon exiting their homes.²²⁰ The derailed train dumped 26,000 gallons of crude oil into the Chaudière River.²²¹ In the Pacific Northwest, the 2106 derailment at Mosier, Oregon along the Columbia River Gorge necessitated a clean-up with short-term costs of nearly \$9 million.²²² In periods of low precipitation, explosions carry the added potential of sparking a wildfire capable of eradicating entire communities of the sort that incinerated Paradise, California, in a matter of hours in November 2018.²²³ Oil train

²¹⁹ “Canada Train Derailment: Death Toll at 50; Lac-Mégantic Residents Jeer Rail CEO,” ASSOCIATED PRESS, July 11, 2013: http://www.syracuse.com/news/index.ssf/2013/07/canadian_train_derailment_death_roll_at_50_residents_of_lac-megantic_jeer_rail_c.html.

²²⁰ Nick Sambides, Jr., “Rangeley Fire Chief Tells Senate Subcommittee People ‘Vaporized’ in Quebec Rail Disaster,” BANGOR DAILY NEWS, April 9, 2014: <https://bangordailynews.com/2014/04/09/news/state/rangeley-fire-chief-tells-senate-subcommittee-people-vaporized-in-quebec-rail-disaster/>.

²²¹ “Leaking Oil from Lac-Mégantic Disaster Affects Nearby Towns,” CBN NEWS, July 7, 2013: <http://www.cbc.ca/news/canada/montreal/story/2013/07/07/quebec-lac-megantic-questions-raised-environmental-safety-concerns.html>; https://www.securitepublique.gouv.qc.ca/fileadmin/Documents/securite_civile/accident_ferroviaire_lac-megantic/reintegration_citoyens_lac-megantic_en.pdf.

²²² Dake, *supra* note 40. Further, the railroad companies have been known to be unwilling or unable to pay clean-up costs, leaving the financial burden to government entities. For example, in the Quebec disaster, the rail and fuel companies at fault delegated blame to one another, leaving the city to pay the bill until litigation between the companies was finished. See Allan Woods, *Lac-Mégantic Mayor Says Town Stuck With \$4 Million in Unpaid Bills for Cleanup*, THE STAR, July 23, 2103: https://www.thestar.com/news/canada/2013/07/23/lacmegantic_residents_allowed_brief_visit_home.html.

²²³ Alastair Gee and Dani Anguiano, “Last Day in Paradise: The Untold Story of How a Fire Swallowed A Town,” THE GUARDIAN, December 20, 2018: <https://www.theguardian.com/environment/2018/dec/20/last-day-in-paradise-california-deadliest-fire-untold-story-survivors>.

explosions and the resulting contamination pose threats to tribal members' health and welfare that fall into a different league than the car accidents considered by the courts in *Strate* and *Red Wolf*.

Safety records point to grave threats from pipelines as well. In 2016, 633 pipeline leaks and explosions occurred in the United States; on average, a pipeline incident occurred almost twice a day during that year.²²⁴ These accidents caused sixteen deaths, eighty-seven injuries, and well over \$321 million in clean-up costs.²²⁵ Such data suggests that pipeline ruptures and explosions are common, and sometimes catastrophic. Fossil fuel contamination, whether from oil train derailments or pipeline ruptures, can ruin reservation water supplies, expose tribal members to acute short-term and long-term health effects, and damage tribal fisheries and wildlife.²²⁶ A multitude of experiences, studies, and data build a case towards making a categorical determination that fossil fuel transport meets the health and welfare exception of *Montana*, thereby justifying tribal jurisdiction over these activities across reservations. Indeed, the federal government and court decisions have already recognized that the health and welfare exception of *Montana* may be met when a tribe's water resources are threatened.²²⁷

The second, consensual relations, exception of *Montana* triggers a different analysis, one turning on variable circumstances involving the precise right-of-way, so it is not susceptible to a presumptive (or categorical) application. The most recent Ninth Circuit precedent stems from the *Red Wolf* decision, which held that no consensual relationship was formed by a right-of-way grant. But

²²⁴ "Pipeline Incident 20 Year Trends, "Pipeline and Hazardous Material Safety Administration", accessed Feb. 9, 2017:

<http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends>.

²²⁵ *Id.*

²²⁶ For various impacts, see "How does oil impact marine life?" NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, March 21, 2014, <http://oceanservice.noaa.gov/facts/oilimpacts.html>; Bittel, Jason, "*Oil Spills Are Even Worse for Birds than We Thought*," NATURAL RESOURCES DEFENSE CENTER, July 7, 2017, <https://www.nrdc.org/onearth/oils-spills-are-even-worse-birds-we-thought>; Gay, Jon, "The Health Effects of Oil Contamination: A Compilation of Research," Worcester Polytechnic Institute, Dec. 15, 2010. https://web.wpi.edu/Pubs/E-project/Available/E-project-121510;203112/unrestricted/Health_Effects_of_Oil_Contamination_-_Final_Report.pdf.

²²⁷ 33 U.S.C.A. § 1377(e); *see also* *Montana v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998); *Colville Confederated Tribes v. Walton*, 647 F.2d. 42, 52 (E.D. Wash. 1978) (holding that threats to water quantity rights can satisfy the *Montana* Test).

in so finding, *Red Wolf* seemingly misplaced its reliance on *King*. *King* involved a tribal-state dispute over right-of-way jurisdiction, and that court clearly stated that “transfers of property interests between a *tribal governmental entities* create property rights; they generally do not create continuing consensual relationships” (emphasis added).²²⁸ While the *King* context involved a tribal-state transfer, the fossil fuel context involves a property relationship between a *government and a private* entity, such as a railroad or pipeline developer. This indeed may create a consensual relationship that is absent in the government-to-government transfer. While the *Red Wolf* court collapsed the two contexts into one test, it seemingly did so without analysis, and a future court would be justified in revisiting the question and distinguishing the private fossil fuel context from the *King* facts.

But even more notable, these cases (*King* and *Red Wolf*) were both decided prior to the enactment of the new right-of-way regulations. As discussed in the previous section, the new regulations clearly form a continuing relationship between the grantee and the tribe, because they require tribal consent at multiple points in the lifetime of the grant rather than only at the initial application stage. They also provide tribes with significant negotiating power to set conditions and restrictions when that consent requirement is triggered. Within this new regulatory regime, it seems paradoxical to condition continued activity on affirmative tribal consent yet deny that a continuing consensual relationship exists.²²⁹ But, in any event, the argument for satisfying the “health and welfare” exception of *Montana* is strong enough (as explained above) that tribes should not have to premise their regulatory authority on the consensual relationship exception.

To summarize, tribes should retain inherent regulatory jurisdiction over fossil fuel rights-of-way, despite the multi-layer jurisdictional analysis required to arrive at that conclusion. If the right-of-way is found to be trust land, the tribe retains its sovereign authority unfettered by narrowing court opinions. If the right-of-way

²²⁸ *King*, at 1113.

²²⁹ In addition, the Department of Interior recently took the position that consensual relationships between right-of-way grantees and tribes are, at the very least, not categorically foreclosed moving forward Brief for Dept. of the Interior, *Western Energy Alliance v. United States Department of the Interior*, 2016, at 30.

is found to be the equivalent of non-Indian fee land, thus triggering the *Montana* test, the tribe seemingly retains its sovereign authority to regulate because one, if not both, of the exceptions can be satisfied.²³⁰

2. Federal Preemption Issues

If tribes retain authority to regulate, the second issue is whether that authority is preempted by federal law.²³¹ Federal statutory regulation of these fossil fuel projects is sweeping and expressly preempts most state and local laws. Several of the relevant federal laws, however, fail to make any reference to tribal regulation or tribes generally, and there may be a sound argument that they do not even apply to tribes in some circumstances.²³² But even if they do apply, no express conflict exists under the plain language in two of the three relevant statutes.

This article does not analyze in depth whether each applicable federal law preempts tribal regulation; such analysis draws a complex inquiry and warrants a dedicated commentary of

²³⁰ Moreover, IRWA regulations seem to concede initial tribal jurisdiction, though they limit such jurisdiction by preemption concepts, discussed in the next section. Under the regulations for rights-of-way, easements are subject to tribal law except to the extent that tribal law is inconsistent with federal law. In other words, tribes can regulate except to the extent that federal law preempts the exercise of tribal law. 25 C.F.R. § 169.6. Kevin Washburn impliedly characterized this provision as a “*Strate* fix,” preserving tribal jurisdiction over easements moving forward. Washburn & Cummings, *supra* note 119, at 17-9.

²³¹ Again, the terms of each particular grant will likely control. For example, a grant might expressly and absolutely waive tribal jurisdiction over the easement. The analysis here presumes that a grant is silent as to jurisdiction and regulatory authority.

²³² With some exceptions, courts have generally adhered to the principle that Congressional intent to divest a tribe of sovereign authority should be clear and express. Furthermore, the Indian Canons of Construction, which say that “any doubtful expressions of legislative intent must be resolved in favor of the Indians” should operate in this context. A statute of general applicability will apply to tribes unless one of the following exceptions are met: 1) application would impede purely intramural tribal government processes, 2) the application would infringe on treaty rights, or 3) Congressional intent to exclude tribes is demonstrated. *See Donovan v. Coeur D’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Arguably, applying these statutes, particularly to the extent that concurrent tribal regulation is precluded, would infringe on the treaty right to exclude, as tribes would not be able to exclude export projects from their reservations.

its own.²³³ The following discussion instead maps the terrain generally and examines the statutory language for express reference to tribes and their laws. Because the statutes governing pipelines and those governing railroads are distinct, this section handles them separately. Subsection (a) examines preemption under the Pipeline Safety Act (PSA), which controls pipeline safety standards. Subsection (b) considers the preemption provisions of the ICCTA, which governs coal-by-rail and oil-by-rail, and the Hazardous Materials Transportation Act (HMTA), which governs oil-by-rail only.

a. *Federal Pipeline Regulation*

Pipeline construction and safety is regulated by a myriad of federal and state statutes and regulations.²³⁴ State law cannot preempt tribal law, so the preemption analysis only involves federal law.²³⁵ Further, because the right-of-way regulations require consent for new easements (as previously explained), any new pipeline construction could conceivably be denied on consent grounds without the need for tribal regulation.²³⁶ Any regulation from a tribe would instead likely be over *existing* infrastructure through safety requirements, such as design, emergency plans and procedures, operation, and maintenance of pipeline facilities.

The closest federal parallel to such regulation appears to be the PSA.²³⁷ The PSA's stated purpose is to "provide adequate protection against risks to life and property posed by pipeline

²³³ Aside from the complexity of the statutory analysis involved, the policy justifications for preemption differ enormously between contexts. It matters greatly whether federal preemption operates as a tool to drive destruction of local ecological and human communities, or whether it provides a bar against the same. Conceivably, cases could arise out of federal environmental protection rules imposed on tribal-led projects, approved by a tribal council, that threaten irrevocable damage to reservation lands and resources that are held in trust to perpetually sustain future generations of tribal members. That is not the case addressed in this article, where tribal councils oppose numerous fossil fuel projects that have high potential for damage but are nevertheless streamlined by federal law. It is sufficient here to note that the federal Indian trust responsibility imposes a duty of protection that frames any preemption issue.

²³⁴ "Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority": <https://fas.org/sgp/crs/misc/R44432.pdf>.

²³⁵ See Cohen, *supra* note 177.

²³⁶ 25 C.F.R. § 169.107(a).

²³⁷ 49 U.S.C.A. § 60101 - 60141.

transportation and pipeline facilities.”²³⁸ To that end, the statute grants the Secretary of Transportation the power to promulgate and enforce minimum pipeline and facility safety standards.²³⁹

While expressing preempting state standards, the PSA is altogether silent as to tribal regulation.²⁴⁰ The omission suggests that tribal governments have retained regulatory authority over pipeline safety within their borders. The PSA stands in marked contrast to the HMTA, discussed *infra*, where both tribal and state regulation is expressly limited by the same preemption provision. Since Congress enacted the PSA four years after amending the HMTA to preempt tribes, it would seem that Congress intentionally omitted tribes from the PSA preemption provision.²⁴¹ There appears to be no mention of tribes within the legislative history, much less a discussion of the implications on tribal regulation. In sum, there are no clear signs of preemption or express conflict in the PSA. The lack of preemption or conflict suggests that, through tribal regulatory law, tribes may create and enforce pipeline safety standards more stringent than federal standards.²⁴²

b. *Federal Rail Regulation*

i. Interstate Commerce Commission Termination Act (ICCTA)

²³⁸ 49 U.S.C.A. § 60102.

²³⁹ 49 U.S.C.A. § 60101-60141.

²⁴⁰ 49 U.S.C.A. § 60104(c).

²⁴¹ See FN 251 *infra*. The PSA was enacted in 1994 to combine and recodify the Hazardous Liquid Pipeline Safety Act of 1979 (formerly 49 U.S.C.A. 2001-2014) (HLPESA) and the Natural Gas Pipeline Safety Act of 1968 (formerly 49 U.S.C.A. 1671). See Sutton, Randy J., *Validity, Construction, and Application of Pipeline Safety Act, 49 U.S.C.A. §§ 60101 et seq., and Other Acts Subsumed Therein*, 186 A.L.R. FED. 361 (2003).

²⁴² Importantly, a safety standard that temporarily shuts down flow may, in the context of natural gas, implicate the Natural Gas Act (NGA, 15 U.S.C. § 717f) and involve the Federal Energy Regulatory Commission (FERC). Like the PSA, the NGA is also silent on tribal regulation. However, courts have held that “once natural gas is “dedicated” to interstate commerce under a certificate of public convenience and necessity, that gas may not be withdrawn from the interstate market without prior [FERC] approval,” even when a tribe is electing to withdraw the gas on tribal lands. However, the case involved a taxation dispute, not an attempt by a tribe to regulate for environmental protection purposes. See *Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*, 578 F.2d 289, 291 (10th Cir. 1978).

The ICCTA provides the Surface Transportation Board (STB) with general federal oversight of railway operations.²⁴³ The aim of the ICCTA is to improve the consistency and efficiency of interstate rail traffic by centralizing authority within this agency.²⁴⁴ The ICCTA controls general rail transportation, meaning that both coal trains and oil trains fall within the STB’s regulatory scheme. The ICCTA grants the STB exclusive authority over two general matters: 1) Transportation by rail carriers, and remedies with respect to rates, routes, and services; and 2) Construction of tracks and facilities.²⁴⁵

Preemption language in the statute’s section 10501(b) makes clear that the “remedies provided” under the ICCTA are “exclusive and preempt the remedies provided under Federal or State law.”²⁴⁶ Ordinances from states and local governments that seek to regulate rail traffic are commonly invalidated under this “exclusive” authority provision.²⁴⁷ Courts have held that state and local law may not impose “operating limitations,” such as limits on train length, speed, or scheduling, on rail carriers.²⁴⁸ Further, state and local laws compelling rail carriers to undergo “substantial capital improvements” are preempted.²⁴⁹

Although the explicit ICCTA preemption language has been construed to bar state and local regulation, courts have not evaluated

²⁴³ “Regulation - Interstate Commerce Commission Termination Act Preemption,” 65 Am. Jur. 2d Railroads § 184 (2018).

²⁴⁴ *Id.*

²⁴⁵ 49 U.S.C.A. § 10501(b).

²⁴⁶ *Id.* Interpreting this provision, one court stated, “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” See *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

²⁴⁷ *City of Auburn*, at 1033; see also, *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9th Cir. 2010); *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638, 640 (2nd Cir. 2005). However, courts have noted that state laws which have a “remote or incidental” effect on rail transportation are permissible. The question is to what degree the state law burdens rail transportation. Furthermore, the STB has ruled that the preemption provision does not extinguish the right of state and local actors to “impose appropriate public health and safety regulation on interstate railroads,” as long as regulation does not interfere with or unreasonably burden rail transportation. Tovah R. Trimming, “*Derailing Powder River Basin Coal Exports: Legal Mechanisms to Regulate Fugitive Coal Dust from Rail Transportation*,” 6 GOLDEN GATE U. ENVTL. L.J. 321 (2013).

²⁴⁸ See *supra* Section IV.B.2-3.

²⁴⁹ *Id.*

tribal regulation through the provision. The statutory language of section (b) expressly preempts only “Federal and State” laws.²⁵⁰ Tribes are referenced in subsection (c) which notes that state, local, and tribal authority over certain public transportation and solid waste shipment by rail is unaffected by the statute.²⁵¹ One might argue that tribal authority over these matters would not need to be preserved if the statute did not otherwise apply to preempt tribal regulation. However, the explicit mention of tribal authority in section (c) also shows that Congress was aware of the potential for tribal regulation, and suggests that the omission of tribes from (b) must be purposeful, particularly given the placement of (b) and (c) quite literally next to each other in the statute.

Similar to the PSA analysis above, the ICCTA can and should be viewed in comparison to the HMTA. The ICCTA was enacted after tribes were added to the HMTA.²⁵² Despite the HMTA's five-year-old express preemption against tribal regulation of certain rail traffic, Congress did not expressly preempt tribal regulation of rail traffic more broadly in the ICCTA. Accordingly, tribal regulation of coal and oil trains should not be hindered by the ICCTA's preemption provision directed to states.²⁵³ However, as noted previously, federal oversight of oil trains falls under the HMTA as well, which has a preemption provision that bars tribal laws. The next subsection discusses that provision along with a potential work-around through a preemption waiver.

²⁵⁰ 49 U.S.C.A. § 10501(b).

²⁵¹ 49 U.S.C.A. § 10501(c).

²⁵² See FN 251, *infra*. Moreover, the ICCTA was enacted around fifty years after IRWA, meaning that railroad rights-of-way through Indian Country were commonplace at the time of enactment.

²⁵³ The Federal Rail Safety Act (FRSA) (49 U.S.C.A. § 20106), which governs rail safety requirements, also potentially preempts state rail safety rules. However, as with the PSA and the ICCTA, FRSA's preemption provision does not mention tribes. Furthermore, the regulations implementing the HMTA regulations covering preemption also reference FRSA as another potential source of preemption. However, those regulations clearly refer only to the preemptive nature of the HMTA in regard to tribal regulation, while referring to both the HMTA and FRSA as potentially preempting state regulation. 49 C.F.R. § 174.2, 49 C.F.R. § 179.8.

ii. Hazardous Materials Transportation Act (HMTA)

The HMTA regulates shipment of hazardous materials, including oil-by-rail, declaring its purpose to “protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.”²⁵⁴ The HMTA gives the Secretary of Transportation authority over the “safe transportation, including security, of hazardous materials” in commerce.²⁵⁵

In contrast to the PSA and the ICCTA, the HMTA does abrogate tribal regulatory power over oil trains, expressly contemplating tribal regulation.²⁵⁶ The statute contains an express preemption provision, declaring that “unless authorized by another law,” a tribal “requirement” is preempted if one of two conditions is met:²⁵⁷ 1) if compliance with the tribe's requirement and “a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security” would not be possible;²⁵⁸ of 2), if the tribal requirement “is an obstacle to accomplishing and carrying out” the HMTA, a regulation of the HMTA, or any other hazardous materials transportation requirement from the Secretary of Homeland Security.²⁵⁹

The provision has generated some caselaw. In *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community*, a tribal law that regulated the transport of nuclear

²⁵⁴ The HMTA does not apply to pipelines, 49 U.S.C.A. 5126(b)(1) and does not appear to cover coal-by-rail. 49 U.S.C.A. § 5126(b)(1). Although the statute and regulations do not explicitly say so, coal train regulations are generally under ICCTA, rather than HMTA, preemption. *See* *Holmquist v. U.S.*, 2017 WL 3013259 (E. D. Wash. 2017); *see also* *Norfolk Southern Ry. Co. v. Goldthwaite*, 176 So.3d 1209 (Ala. 2015). Thus, any preemptive effect of the HMTA for tribal oil train regulation should not apply for tribal coal train regulation. Comes down to whether it meets one of the 9 hazard classes activated charcoal.

²⁵⁵ 49 U.S.C. § 5103(b).

²⁵⁶ 49 U.S.C.A. § 5125(a), 49 C.F.R. § 171.1, 49 C.F.R. § 174.2, 49 C.F.R. § 179.8. Tribes were not listed in the HMTA's preemption provision until 1990. *See* PL 93–633 (HR 15223) (1975). HMTA that did not include tribes in preemption provision 49 USC 1811; *but see* PL 101–615 (1990) (HMTA that included tribes in preemption provision 49 USC 1811); PL 101 (HR 3229), from Sept. 7, 1989, was the first proposed version of amended HMTA with “tribes” to appear in history.

²⁵⁷ 49 U.S.C.A. § 5125(a).

²⁵⁸ 49 U.S.C.A. § 5125(a)(1).

²⁵⁹ 49 U.S.C.A. § 5125(a)(2).

material through a reservation was held to be preempted by the HMTA.²⁶⁰ The Eighth Circuit concluded that the tribal ordinance's extensive information requirements would demand too much of transporters and frustrate shipping that was allowed under the HMTA.²⁶¹ The court concluded that the tribal law created an obstacle to the goals of the HMTA and was therefore preempted by that statute.²⁶²

A court following on *Prairie Island* would likely hold that a tribal ordinance regulating oil trains (rather than nuclear waste trains) is likewise prohibited. Yet one possible, largely untested, workaround exists in the statute's waiver application. A provision of the HMTA allows for a tribe to apply to the Secretary of Transportation to waive federal preemption of a tribal ordinance.²⁶³ As a requirement of the waiver application, the tribe must concede that its law is preempted by the HMTA.²⁶⁴ The Secretary may then grant the waiver if two conditions are met: 1) that the tribal ordinance "provides the public at least as much protection" as the HMTA and its regulations; and 2) that the ordinance is not an unreasonable burden on commerce.

The first prong is easily satisfied by a tribal regulatory ordinance restricting rail transport of oil via "bomb trains" currently allowed by federal law. The second prong, on the other hand, makes for a more difficult argument against preemption, as "unreasonable burden" on commerce is not defined. The only guidance comes from the relevant regulations, which prescribe several factors to govern the inquiry:

²⁶⁰ In 1991, the Prairie Island Mdewakanton Sioux Community passed an ordinance that required shipping companies to obtain a tribal permit one hundred and eighty days prior to transporting nuclear material through their reservation. The ordinance gave the tribe power to deny permits and impose a substantial fine for willful violations. Northern States Power Company sought declaratory judgment that ordinance was preempted by the HMTA. The court concluded that the tribal ordinance's 180-day license and notice requirements create a much stricter standard than that which HMTA requires, creating an obstacle to the HMTA's goals. The tribal ordinance was ruled to be preempted. The holding suggests that a similar regulatory ordinance that acts upon fossil fuels rather than nuclear material would also be preempted. *See* Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir.1993) [hereinafter *Prairie Island*].

²⁶¹ *Id.* at 462.

²⁶² *Id.*

²⁶³ 49 U.S.C.A. § 5125(e).

²⁶⁴ *Id.*

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 there is a “need for uniformity with regard to the subject concerned,” and if so whether the tribe's requirement “competes or conflicts” with those of other States, municipalities, or tribes.²⁶⁵

A well-crafted ordinance, complemented by accident impact data that demonstrates necessity, should easily secure the second and third factors as weighing in favor of the tribe. The efficiency factor and the uniformity factors, on the other hand, will likely weigh against a restrictive tribal ordinance. The PHMSA, the agency charged with authority over hazardous materials, has indicated that the need for efficiency and uniformity prevent tribal “opt out” from transport routing decisions,²⁶⁶ and the agency may cite this “need” to deny a waiver application. However, the discretion involved in a waiver determination also conjures federal trust and treaty obligations, which must permeate the agency’s consideration of these factors. Acting in the tribe’s best interest may well mean waiving preemption for a tribal regulation designed to protect tribal resources, particularly if those regulations promote the statute’s stated protectionary purpose.

Judicial guidance on the likelihood of waiver application success is almost nonexistent, as there is only one published case in which a state or local government applied for a waiver of preemption, and tribes apparently never have.²⁶⁷ Regardless, if the Secretary refused the tribal waiver, then the tribe may be positioned to bring suit for a breach of the trust obligation (described in Section IV.A). While the waiver cannot be viewed as a guaranteed avenue around preemption, the process itself may provide a platform for judicial interpretation of the trust responsibility.

iii. The Dormant Commerce Clause

²⁶⁵ 49 C.F.R. § 107.221.

²⁶⁶ Final Rule on Oil Trains, Pipeline and Hazardous Materials Safety Administration, at 293.

²⁶⁷ *New York v. U.S. Dept. of Transp.*, 700 F.Supp. 1294 (S.D.N.Y. 1988) (where state of New York applied for a waiver of preemption).

Apart from statutory preemption, the Dormant Commerce Clause raises an inquiry. It comes into play when state laws impede interstate commerce, so the question is whether it operates in a similar way for tribes. The answer should be no, as the Dormant Commerce Clause was not designed to limit tribes. The doctrine derives from the Interstate Commerce Clause of the U.S. Constitution and addresses the federalism relationship between states and the federal government. Courts crafted this doctrine to prevent states from passing overly-protectionist economic laws that frustrate interstate commerce, thus interfering with the overall federal commerce schemes.²⁶⁸ The Interstate Commerce Clause, which provides the source of the doctrine, expressly references states and not tribes.²⁶⁹ An entirely separate clause, the Indian Commerce Clause, forms the source of Congressional power over tribes.²⁷⁰ As separate sovereigns (albeit “domestic dependent nations”), tribes should arguably be free to promote or restrain economic ventures regardless of how those actions affect the states. Notably, the Supreme Court has refused to equate states and tribes for purposes of the Interstate Commerce Clause in challenges to tribal tax regiments,²⁷¹ though the Court has not addressed the tribal regulatory measures.

In the event a court applied the Dormant Commerce Clause to tribes, the analysis still allows substantial opportunity for tribes to regulate. The courts have deemed permissible under the Dormant Commerce Clause state regulations that are not inherently protectionist and that merely cause an “incidental burden” on

²⁶⁸ Philadelphia v. New Jersey, 437 U.S. 617, 622 (U.S. 1978).

²⁶⁹ Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191 (U.S. 1989).

²⁷⁰ See Cohen, *supra* note 177.

²⁷¹ See *Cotton Petroleum Corp.*, at 192 (“It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation... the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs...”); see also, *Merrion v. Jicarilla Apache*, 455 U.S. 130, 154 (U.S. 1982). Examining a tribal tax regiment under Commerce Clause scrutiny, the Court prefaced that examination by noting “even if we assume that tribal action” is subject to the Commerce Clause. *Id.* Thus, although not an explicit answer, such a qualification by the Court implies would that it did not believe that such scrutiny was necessary, on the grounds that the Commerce Clause does not limit tribal action.

commerce.²⁷² The Supreme Court articulated the general test as follows:

Where the statute regulates even-handedly to effectuate a *legitimate local public interest*, and its effects on interstate commerce are only *incidental*, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.²⁷³

Increasingly, as local non-tribal governments seek to regulate “bomb trains” through their jurisdictions as well as other fossil fuel infrastructure, the Dormant Commerce Clause will gain attention. In depth analysis of this area is beyond the scope of this article, but a few observations are in order. First, well-crafted tribal regulations would not be geared toward “economic protectionism” but rather would be aimed at safeguarding health and resources, deemed a “legitimate local public interest,” and any burden on commerce would amount to an “incidental”—not primarily intended, though clearly significant—effect of such protection. Second, although regulations would likely burden interstate commerce, that burden would arguably not be “clearly excessive” against the threat posed to tribal life, property, and natural resources. Finally, considering that the passage of these trains and pipelines through tribal lands creates an inherent and fairly unavoidable risk of disaster, there is seemingly no viable alternative to protect these interests that would lessen the impact on commerce.

In sum, while the Dormant Commerce Clause clearly applies to states, the reasoning behind the doctrine and language from Supreme Court caselaw weigh against its application to tribes. But even if a court were to conclude that the doctrine applied to tribes, regulations designed to limit fossil fuel transport through reservations may be justified under the prevailing Supreme Court test. Admittedly the Dormant Commerce Clause is relevant, but it remains difficult to predict the outcome of any application in the fossil fuel context

²⁷² National Ass’n of Optometrists & Opticians v. Harris, 682 F3d 1144, 1148 (9th Cir. 2012).

²⁷³ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (US 1970) (emphasis added).

C. Conclusion: On-Reservation Prerogatives

In sum, tribes retain a great deal of power over fossil fuel projects that pierce directly through tribal lands, despite a judicial trend over the past century to constrain the power of tribes over their reservations. In the property law framework, tribes retain significant power over easements as specified in the IRWA: they can refuse to consent to new grants, refuse to consent to renewal of existing grants, and enforce the terms of existing grants against grantees that attempt to quietly violate those terms. In the regulatory framework, tribes retain at least some direct authority over these projects. Regulation of pipeline safety and coal trains seems unhampered by preemption concerns. Regulation of oil trains may face difficult preemption-style barriers, though leverage may be found within the largely untested waiver of preemption found in the HMTA.

The tools discussed in this section are available against on-reservation projects only. Unfortunately, on-reservation action will not always be sufficient. Many of these fossil fuel projects skirt around reservations so that their physical footprints never actually cross tribal land, yet their disastrous impacts threaten to cross jurisdictional boundaries or damage treaty resources outside those boundaries. Off-reservation projects require a different approach described in the next section, one that makes demands and asserts unique tribal rights within the matrix of federal, state, and local processes.

IV. OFF-RESERVATION TRIBAL PREROGATIVES

Much as tribes' ecological interests and environmental ethics transcend modern political borders, so do tribal legal prerogatives reach beyond reservation boundaries.²⁷⁴ To halt fossil fuel infrastructure off-reservation, tribes must apply their legal levers within the permit systems of federal, state, and local jurisdictions. Two types of tribal rights are particularly relevant to these efforts in the Pacific Northwest. First, the federal Indian trust responsibility affirmatively imparts a fiduciary duty on all branches

²⁷⁴ See Elizabeth Ann Kronk Warner, "Looking to the Third Sovereign: Tribal Environmental Ethics as an Alternative Paradigm," 33 PACE ENVTL. L. REV. 397 (2016).

and agencies of the federal government, as trustees, to protect the interests of federally recognized tribes, as beneficiaries.²⁷⁵ The trust responsibility is triggered any time a federal action or decision implicates tribal interests.

Second, treaty-guaranteed “usual and accustomed” fishing rights ensure tribes’ sovereign entitlements to fishing access, harvest, and habitat protection in and around traditional tribal fishing waters.²⁷⁶ Pacific Northwest tribal treaty fishing rights have been robustly interpreted by the federal judiciary, in effect reserving a considerable management role in shared resources to the region’s original sovereigns.²⁷⁷

This Section begins by examining the role of the federal trust responsibility in the context of fossil fuel transport and export projects, then turns to tribal treaty fishing rights as they operate to constrain hazardous off-reservation fossil fuel infrastructure. Throughout, this Section examines case studies of tribes successfully asserting core sovereign legal prerogatives to halt the transport of fossil fuels across their ancestral lands and waters.

A. *The Federal Indian Trust Responsibility in the Century of Climate Change*

For nearly 200 years, the U.S. Supreme Court has consistently articulated a trusteeship between the federal

²⁷⁵ See *U.S. v. White Mt. Apache Tribe*, 537 U.S. 465, 474 n. 3 (2003) (recognizing the general trust relationship between tribes and the United States as one of “a ward to his guardian” (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831))).

²⁷⁶ See *Washington v. Wash. St. Com. Passenger Fishing Vessel Ass’n.*, 443 U.S. 658, 674-79 (1979) (“At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would *forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising*. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians’ understanding of the meaning of the treaty.” (quoting *U.S. v. Washington*, 384 F.Supp 312, 381 (W.D. Wash. 1974)) (emphasis added) (internal quotations omitted)) (harvest); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (access); *U.S. v. Washington*, 827 F.3d 836, 852-53 (9th Cir. 2016) (habitat).

²⁷⁷ For background and commentary on recent cases, see Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1 (2017).

government and all federally recognized tribes.²⁷⁸ As the Court proclaimed in *Dept. of Int. & Bureau of Indian Affairs v. Klamath Water Users Protective Assn.*:

The fiduciary relationship has been described as ‘one of the primary cornerstones of Indian law,’ and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.²⁷⁹

Though the history of federal Indian relations is marked more by a breach of the trust obligation than its fulfillment,²⁸⁰ nevertheless the principle remains an important and enduring legal obligation towards tribes. As first articulated by Justice John Marshall in the 1830s, a core fiduciary duty of the federal trustee is to protect sovereign tribal nations and Native American persons as beneficiaries.²⁸¹ In 1886, the Court stated that this “duty of protection . . . has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.”²⁸² In 1924, the Court found that, in regard to tribal interests, the United States is “bound by every moral and equitable consideration to

²⁷⁸ *See Dept. of Int. & Bureau of Indian Affairs v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 11 (2001) (noting “The fiduciary relationship has been described as ‘one of the primary cornerstones of Indian law’”) (quoting FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221 (Rennard Strickland et al. eds., Michie Bobbs-Merrill 1982) (citation omitted)); *see also Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁷⁹ 532 U.S. 1, 11 (2001).

²⁸⁰ *See generally* CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (W.W. Norton 2006); *see also* “Report of the Commission on Indian Trust Administration and Reform,” Department of the Interior, Dec. 10, 2013: https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf.

²⁸¹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). In characterizing the nature of the trust responsibility, Justice Marshall made clear that the affirmative trust obligation of the federal government toward tribes in no way diminishes tribes’ inherent sovereignty. “This relation [is] that of a nation claiming and receiving the protection of one more powerful.” *Worcester*, at 555; “Protection does not imply the destruction of the protected.” *Id.* at 518.

²⁸² *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

discharge its trust with good faith and fairness.”²⁸³ The Indian trust responsibility obligates the federal government to protect tribal lands and off-reservation resources on ceded lands²⁸⁴ whether that cession was accomplished by treaty, statute, or executive order.²⁸⁵

The federal government’s “overriding duty” to tribal nations and people is ongoing,²⁸⁶ as the modern Supreme Court acknowledges “the undisputed existence of a general trust relationship between the United States and the Indian people.”²⁸⁷ An earlier landmark case, *Seminole Nation v. U.S.*, provides the enduring benchmark of the federal trust responsibility and is still cited today by the Bureau of Indian Affairs (BIA) as defining its fiduciary obligations.²⁸⁸

Under a humane and self-imposed policy which found expression in many acts of Congress and numerous decisions of this Court, [the federal government] 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.*²⁸⁹

The trust responsibility is germane to virtually every proposed fossil fuel transport project, whether on- or off-reservation, because federal decision-making is likely to be involved at one or more stages of permitting, construction, and development. The federal fiduciary duty of protection towards tribes is incumbent

²⁸³ *U.S. v. Payne*, 264 U.S. 446, 448 (1924) (citing *Choctaw Nation v. U.S.*, 119 U.S. 1, 298 (1886)).

²⁸⁴ *See, e.g., Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) (“[T]he tribes’ federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.”); *Muckleshoot v. Hall*, 698 F.Supp. 1504, 1510-11 (W.D. Wash. 1988) (finding tribal fisheries are property rights protected by federal trust responsibilities).

²⁸⁵ *Parravano*, 70 F.3d at 545 (“We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise.”).

²⁸⁶ *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

²⁸⁷ *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983).

²⁸⁸ “Frequently Asked Questions—What is the Federal Indian Trust Responsibility?” Bureau of Indian Affairs, U.S. Dept. of Interior: <https://www.bia.gov/frequently-asked-questions>.

²⁸⁹ *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942) (emphasis added).

on federal agents every time a proposed fossil fuel project directly or indirectly implicates tribal property, including shared waters and fisheries to which tribes retain harvest rights.^{290 291} While the BIA is specially charged with administering Indian trust lands and services for Native American tribes and individuals, the trust responsibility extends to all branches, agencies, and agents of the federal government. The Ninth Circuit has emphasized, “This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole,”²⁹² and “any Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes.”²⁹³ As such, the trust remains a key potential legal lever for tribes opposing permit decisions (before a multitude of varied federal agencies) for fossil fuel projects that threaten tribal fishing or hunting rights or water rights off their reservations.

1. The Modern Trust: A Muddled Context

In its most fundamental form, the trust responsibility toward tribes creates a duty of protection—imposing the “most exacting fiduciary standards”—towards tribal lands, waters, treaty rights, and other tribal resources.²⁹⁴ As straightforward as that seems, enforcement of the trust responsibility is quite complex due to a line of cases decided over the past three decades reflecting basic

²⁹⁰ See *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988) (finding tribal fisheries are property rights protected by federal trust responsibilities); Robert T. Anderson, “Indian Water Rights and the Federal Trust Responsibility,” *Natural Resources Journal*, vol. 46, no. 2, 2006, pp. 399–437.

²⁹¹ See *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.”); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (hereinafter *Pyramid Lake*); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981); *N.W. Sea Farms, Inc. v. U.S. Army Corps of Engrs.*, 931 F.Supp. 1515, 1519 (W.D. Wash. 1996) (“This [trust] obligation has been interpreted to impose a fiduciary duty owed in conducting ‘any Federal government action’ which relates to Indian tribes.” (quoting *Nance*, 645 at F.2d at 711)).

²⁹² *Parravano*, 70 F.3d at 546.

²⁹³ *Nance*, 645 F.2d at 711.

²⁹⁴ *Seminole Nation*, 316 U.S. at 297.

confusion between the two contexts in which the trust responsibility is enforced against agencies.²⁹⁵

One such context involves tribes seeking injunctive relief under the Administrative Procedure Act (APA) in federal district court.²⁹⁶ This context for federal trust responsibility is important because injunctive relief aims to stop damage before it happens. Tribes will likely seek injunctive relief when challenging federal agency decisions regarding fossil fuel transport and export projects. Trust claims for injunctive relief are most often brought under the (APA), which allows courts to set aside an action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁹⁷ Early cases arising in this context rendered decidedly favorable decisions towards tribes. One of the clearest declarations of the administrative trust responsibility in this context was made in *Pyramid Lake Paiute Tribe v. Morton*, a case involving the Secretary of the Interior’s water allocations from a river, to the detriment of tribal fisheries.²⁹⁸ The Court stated:

The Secretary was obligated to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his regulatory and contractual authority *to the fullest extent possible* to accomplish this result . . . The Secretary’s action . . . fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This is also an abuse of discretion and not in accordance with the law.²⁹⁹

²⁹⁵ See Warner, *supra* note 8, at 20-28. See also Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003). Parts of this discussion are adapted from that article. For a textbook treatment of this area of Indian law, see LAITOS, ZELLMER, AND WOOD, NATURAL RESOURCES LAW 2D 394-397 (West 2012).

²⁹⁶ See *supra* note 32-42 and accompanying text (discussing cases).

²⁹⁷ 5 U.S.C. §706(2)(A). For cases that have incorporated trust analysis within statutory claims brought under the APA, see *Northwest Sea Farms v. U.S. Army Corps of Engrs.*, 931 F.Supp. 1515 (W.D. Wash. 1996); *Quechan Tribe of the Fort Yuma Reservation v. Dept. of Interior*, 755 F.Supp.2d 1104 (2010); *Gros Ventre Tribe v. U.S.*, 469 F.3d. 801 (9th Cir. 2006); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9th Cir. 2006).

²⁹⁸ 354 F.Supp. 252 (D.D.C. 1972).

²⁹⁹ *Id.* at 256-57 (emphasis added).

Several other cases decided after *Pyramid Lake* also invoked the trust obligation to protect Indian lands and resources against harm by federal agencies acting either through the federal government's permitting role or its public land management role.³⁰⁰

The second, and notably distinct, context of trust enforcement involves tribes seeking monetary damages against the BIA for mismanaging their lands, a line of challenge not so pertinent to the off-reservation context. Those suits are brought in the Court of Federal Claims under the Tucker Act³⁰¹ or the Indian Tucker Act.³⁰² The language of those statutes is far more restrictive than the APA because both of the Tucker Acts require express law supporting claims for damages against the United States.³⁰³ The Indian Tucker Act requires claims be based on express law found in the Constitution, statutes, executive orders, or treaties.³⁰⁴ The Tucker Act requires that claims be based on the Constitution, a statute, regulation, or contract.³⁰⁵ The Supreme Court has stressed

³⁰⁰ See, e.g., *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065 (D. Mont. 1985) (mem.) (finding violation of trust responsibility by Dept. of Interior in issuing coal leases on public lands adjacent to Cheyenne Reservation); *Klamath Tribes v. U.S. Forest Service*, 1996 WL 924509 (D. Or. 1996) (enjoining timber sales that could adversely affect treaty hunted deer herds, finding that the Forest Service has a "Substantive duty to protect 'to the fullest extent possible' the tribes' treaty rights, and the resources on which those rights depend."); *Northwest Sea Farms*, 931 F.Supp. at 1520 ("In carrying out its fiduciary duty, it is [the federal agencies'] responsibility to ensure that the Indian treaty rights are given full effect.").

³⁰¹ 28 U.S.C. § 1491(a)(1).

³⁰² 28 U.S.C. § 1505.

³⁰³ See Warner, *supra* note 8, at 20-28. The Tucker Act allows individuals to pursue monetary claims against the federal government. This act extends to claims by allottees on Indian reservations. The Indian Tucker Act allows tribes to sue the federal government for damages. See *United States v. Mitchell*, 463 U.S. 206, 211-12 (1983) (hereinafter *Mitchell II*).

³⁰⁴ The Indian Tucker Act provides:

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which would otherwise be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. 28 U.S.C. § 1505 (emphasis added)

28 U.S.C. § 1505 (emphasis added).

³⁰⁵ The Tucker Act provides in pertinent part:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or an Act of Congress or any regulation of an

that the express source of law supporting either Tucker Act claim must “fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.”³⁰⁶ Several major Supreme Court cases dealing with the federal trust obligation arise out of this damages context, where tribes have challenged BIA’s mismanagement of their lands or resources such as timber or minerals.³⁰⁷

Trust enforcement under the APA is much broader than under the Tucker Acts because under the APA there is no requirement of premising a claim on a statute or some other source of express law.³⁰⁸ Due to the two statutory contexts, courts should treat trust issues arising under the Tucker Acts and the APA separately to develop two distinct prongs of the overall trust doctrine. But recent decisions have ignored the different contexts in which trust claims are brought, applying Tucker Act restrictions to claims brought under the APA.³⁰⁹ These holdings require a tribe to premise its APA trust claims on a statute or other source of express law.³¹⁰ This approach is erroneous because the APA does not have the restrictive language found in the Tucker Acts.

The judicial error confusing the two prongs of trust enforcement traces back through the case law to a 1980 case decided by the D.C. Circuit, *North Slope Borough v. Andrus*.³¹¹ In that case the Inupiat people of Alaska sued the Secretary of the Interior,

executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1983) (emphasis added).

³⁰⁶ Mitchell II, *supra* note 299, at 216-17 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1132 (2003) (hereinafter *White Mountain Apache Tribe*). The Supreme Court has also indicated that the federal government’s “elaborate control” over tribal property may support a claim under both Tucker Acts. *See* Mitchell II, at 209, 225; *White Mountain Apache*, at 1133. This control theory, however, is generally not applicable where the government is taking action off the reservation, thereby incidentally affecting, rather than directly controlling, tribal property.

³⁰⁷ *United States v. Mitchell*, 445 U.S. 535 (1980) (hereinafter Mitchell I); Mitchell II; *White Mountain Apache Tribe*; *United States v. Navajo Nation*, 123 S.Ct. 1079 (2003).

³⁰⁸ *See* Warner, *supra* note 8, at 28-29; *see also* APA, 5 U.S.C. 706 (granting general authority to courts to set aside agency action “not in accordance with law.”).

³⁰⁹ *See* Warner, *supra* note 8, at 30-31.

³¹⁰ *Id.*

³¹¹ *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

asserting that the Secretary's program of federal oil leasing in the Beaufort Sea would threaten the bowhead whale population the Inupiat people hunted, and therefore would violate the Secretary's trust responsibility toward them to protect their harvest rights. This was a suit seeking injunctive relief under the APA.³¹² In language that launched the present confusion, the court applied *United States v. Mitchell* (a Tucker Act case known as *Mitchell I* because it was the first of two Supreme Court decisions in the same case) and held:

[A] trust responsibility can only arise from a statute, treaty, or executive order; in this respect we are governed by the recent Supreme Court decision in *United States v. Mitchell* holding that the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute. . . . We have no specific provision for a federal trust responsibility in any of the statutes argued to us. . . . by confining the extension of trust responsibility, however defined and whatever the source, to the area of overlap with the environmental statutes, the district court was arguably consistent with the Supreme Court's rationale in *United States v. Mitchell*. Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.³¹³

This judicial misstep remains rather astonishing, because it amounts to applying the strict requirements of one statute (the Tucker Act) to a case premised on an entirely different statute (the APA) lacking such restrictive language.³¹⁴ The *Mitchell I* holding (upon which the *North Slope* court relied) was unambiguously tied to the express language in the Tucker Act.³¹⁵ Unfortunately, once a mistake takes

³¹² *Id.* at 592.

³¹³ *Id.* at 611-12 (citing district court opinion).

³¹⁴ For further discussion, see Warner, *supra* note 8, at 30-31; Wood, Trust II, *supra* note 1, at 117-21.

³¹⁵ See *Mitchell I*, at 546, emphasizing:

The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. 1491, which gives that court jurisdiction of 'any claim against the United States founded either upon the Constitution or any Act of Congress.' . . . The General

hold in one case, it becomes *stare decisis* that judges rely upon in deciding future cases and can thereby metastasize through an entire body of caselaw. The misapplication of the trust doctrine originating in *North Slope v. Andrus* found its way into Ninth Circuit law, blurring the critical distinction between the two prongs of trust enforcement. In a 1998 case, the Morongo Band of Mission Indians brought a claim under the APA against the Federal Aviation Administration for situating a flight path into Los Angeles International Airport directly over canyons on the reservation where tribal members conducted traditional ceremonies.³¹⁶ The court applied *United States v. Mitchell* (a case arising under the Tucker Act) and concluded: “[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting tribes.”³¹⁷ This flawed line of precedent led some courts, including the Ninth Circuit, to collapse the Indian trust responsibility with federal laws and regulations of general application.³¹⁸

Allotment Act . . . cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act.

See also Mitchell II, at 217-18:

[I]n *United States v. Mitchell I*. . . this Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States. . . . [W]e held that the Act creates only a limited trust relationship. The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof. . . . Thus, for claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,' 28 U.S.C. 1491, a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. . . . The question in this case is . . . whether the statutes or regulations at issue can be interpreted as requiring compensation.

³¹⁶ *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.2d 569 (9th Cir. 1998) (hereinafter *Morongo Band*).

³¹⁷ *Id.* at 574; *see also Skokomish Indian Tribe v. F.E.R.C.*, 121 F.3d 1303 (9th Cir. 1997) (rejecting argument that FERC “must afford an (sic) tribes greater rights than they would otherwise have under the [Federal Power Act] and its implementing regulations.”).

³¹⁸ *See Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (“Federal agencies owe a fiduciary responsibility to Native American tribes. In the absence of a specific duty, this responsibility is discharged by ‘the agency's compliance with general regulations and statutes not specifically aimed

The requirement of filing suit under a specific statutory duty operates as a barrier for tribes seeking to protect their lands and natural resources because there are few environmental or natural resources statutes that impose specific duties toward tribes. Such an interpretation of the trust obligation is inaccurate and may severely limit its benefit to tribes. Fortunately, tribes' equitable challenges to off-reservation fossil fuel infrastructure now create fresh opportunities for the courts to reflect on the meaning and scope of the federal Indian trust responsibility. One such case involved the Nez Perce Tribe successfully challenging large fossil fuel extraction equipment passing through its ceded territory, as described in Section 2 below.

2. Enforcing the Trust Through the APA: *Nez Perce Tribe v. U.S. Forest Service*

In 2013, the District of Idaho held that Indian trust responsibility required the United States Forest Service to exercise its statutory authority to protect tribal property rights that were being directly threatened by fossil fuel infrastructure.³¹⁹ This “mega-loads” case involved shipments of massive evaporators, used in tar sands oil extraction, across the Rocky Mountains and into Canada, through traditional Nez Perce territory and National Forest lands on

at protecting Indian tribes.”) (citing *Morongo Band*, *supra* note 312)(other citations omitted); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 2000); *Gros Ventre Tribe v. U.S. Bureau of Land Management*, CV 00-69-M-DWM (Order) at 6-7 ((D. Mon. Jan. 29, 2001) (“The United States' trust obligations are content-less unless a statute, regulation, or treaty supplies the imperatives.”). *But see* *Island Mountain Protectors, et. al.*, 144 IBLA 168, at 184-85 (May 29, 1998) noting:

In addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility (citing *Mitchell II*) BLM had a trust responsibility to consider and protect Tribal resources. 'A federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation.' While the trust responsibility created by environmental laws may be 'congruent' with other duties they impose, the enactment of those laws does not diminish the Department's original trust responsibility or cause it to disappear. BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its [decision approving expansion of mine].” (Other citations omitted).

³¹⁹ *Nez Perce Tribe v. U.S. Forest Serv.*, 2013 WL 5212317 (D. Idaho 2013) [hereinafter *Nez Perce*].

U.S. Highway 12.³²⁰ The Forest Plan governing the National Forest at issue directed the Forest Service to “[e]nsure that Forest actions are not detrimental to the protection and preservation of Indian Tribes’ religious and cultural sites and practices and treaty rights.”³²¹ According to the court,

The Forest Service has a statutory duty, under the National Forest Management Act (NFMA),³²² to act consistently with this Forest Plan direction. Overarching [the Forest Service’s] statutory duty, is the Government’s duty as trustee over the Tribe. The Supreme Court has held that the ‘constitutionally recognized status of Indians justifies special treatment on their behalf when *rationaly related* to the Government’s unique obligation toward the Indians.’³²³

The Nez Perce Tribe prevailed in leveraging the trust responsibility to obtain a preliminary injunction ordering the Forest Service to close Highway 12 to the mega-loads.³²⁴ The Court held that “the mega-loads at least had the *potential to be ‘detrimental’*” to the tribal rights and interests protected by the Forest Plan, which “triggered a duty on the part of the Forest Service to consult with the Tribe.”³²⁵ Moreover, the Court expressly and correctly characterized its exercise of jurisdiction pursuant to the trust responsibility as purely equitable: “The plaintiffs are not seeking damages; they are seeking to preserve their Treaty rights along with cultural and intrinsic values that have no price tag.”³²⁶

While the District of Idaho’s opinion failed to elaborate extensively on the Indian trust responsibility, its ruling underscores the equitable powers of the court in this context and puts all federal agencies on notice that they must fulfill their trust obligations to tribes when taking action carrying the “potential to be ‘detrimental’”

³²⁰ *Id.* at 1-2.

³²¹ *Id.* at 5, quoting Forest Plan for the Clearwater National Forest: <https://www.fs.usda.gov/detail/nezperceclearwater/landmanagement/planning/?cid=stelprdb5404075>. The Nez Perce Tribe reserved treaty rights to hunt and fish within the present-day National Forest. *Id.*

³²² 16 U.S.C. § 1604(a)(i).

³²³ *Id.* at 5-6 (citing *Washington v. Wash. Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 673 n. 20 (1979)) (emphasis added).

³²⁴ *Id.* at 8.

³²⁵ *Nez Perce*, at 6 (emphasis added).

³²⁶ *Id.* at *7.

to tribal interests. The opinion marks an important return to earlier caselaw enforcing the trust obligation through equitable relief in the APA context. As a practical matter, tribal challenges to modern fossil fuel projects will likely invoke both statutory and trust grounds. The *Nez Perce* court recognized the agency's statutory authority to halt the mega-loads and imposed the trust obligation on the agency to use such authority to protect tribal interests.³²⁷ This approach very much parallels that taken in the *Pyramid Lake* case discussed above where the court required the Secretary of Interior to "assert his regulatory and contractual authority *to the fullest extent possible*" to preserve water for the tribe.³²⁸

In sum, fossil fuel transport and export projects that propose to cross off-reservation ceded territories may seriously impinge on tribal interests, including property rights. Tribes continue to press federal agents to fulfill their duties under the federal Indian trust responsibility and deny permits for mega-loads, bomb trains, and other hazardous fossil fuel infrastructure. When that trust obligation is not upheld, courts may exercise their equitable jurisdiction to enjoin federal agency action.³²⁹ Though this trust responsibility has received erratic and inconsistent interpretation and enforcement against environmental threats (over the past few decades in particular), it remains a reservoir of legal obligation that can be invoked by Pacific Northwest tribes to stop fossil fuel export permits,³³⁰ as with the notable success of the Nez Perce Tribe. In

³²⁷ The case implicitly left an open question what the result would have been if the Forest Plan had lacked protective language towards tribes. Because the trust obligation originated long before any statutory scheme and stands apart from statutes, federal managers are obligated by that trust to protect tribal interests even if their prior planning processes fail to articulate the duty.

³²⁸ See *Pyramid Lake*, 354 F.Supp. at 256-57 (emphasis added) (demonstrating that where a federal agent has authority over matters implicating tribal interests, the agencies have a duty to uphold the trust responsibility by prioritizing tribal rights to the maximum extent possible within the bounds of their discretion); see Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 UTAH L. REV. 1471, 1529 n.275.

³²⁹ See *Northern Cheyenne Tribe v. Hodel*, 12 INDIAN L. RPTR. 3065, 3071, 3074 (D. Mont. 1985); *Pyramid Lake*, at 256.

³³⁰ The trust responsibility was also used as a basis by the U.S. Army Corps of Engineers to deny a permit for a coal export facility at Cherry Point, Washington. See discussion *infra* Section IV.B.1.a. For an amicus brief setting forth the federal Indian trust responsibility in a case supporting a motion for summary judgement by the Standing Rock Sioux Tribe seeking to enjoin construction of the Dakota Access Pipeline, see https://www.indian-affairs.org/uploads/8/7/3/8/87380358/amicus_brief_supporting_srst_smj.pdf.

addition to this trust responsibility, some tribes also have enduring treaty rights that provide a powerful source of protection against federal and state agency permitting actions as described in the next section.

B. *Tribal Treaty Fishing Rights Asserted Against Fossil Fuel Projects*

Treaty-reserved fishing rights are tribes' most potent tool for stopping off-reservation fossil fuel infrastructure in the Pacific Northwest. Through nineteenth-century treaties with the United States, tribes reserved "usual and accustomed" (U&A) fishing rights to most rivers, streams, and marine waters across the region.³³¹ As the U.S. Supreme Court has observed, "the Indians were vitally interested in protecting their right to take fish at all usual and accustomed places, whether on or off the reservations. . . ."³³² Today, tribes continue to exercise considerable influence over activities that impact off-reservation treaty waterways and fisheries. The transport of oil, gas, coal, and other fossil fuel derivatives within or along treaty fishing waters may directly imperil tribal fishing either by interfering with access or by damaging fish habitat through spills and pollution.³³³ In response, tribes are drawing upon their treaty-reserved fishing rights to successfully block fossil fuel infrastructure projects in ancestral territories beyond modern reservation boundaries.

Treaty rights represent the first, original, and antecedent property rights in the Pacific Northwest. Since time immemorial, tribes have possessed what modern legal systems recognize as property rights, over vast ancestral territories. Through extensive jurisprudence, courts have enumerated the dimensions of aboriginal rights legally retained by tribes.³³⁴

³³¹ U&A tribal treaty fishing rights operate distinctively on the Columbia River, which tribes have managed as a shared fishery since time immemorial and regard as "The Great Table." Today, the entirety of Columbia River Zone 6 constitutes a U&A fishing site. This 147-mile stretch of the Columbia River between Bonneville and McNary dams is an exclusive tribal treaty commercial fishing area. See "Columbia River Zone 6," Columbia River Inter-Tribal Fish Commission: <http://www.critfc.org/about-us/columbia-river-zone-6/>.

³³² *Passenger Fishing Vessel*, 443 U.S. at 667.

³³³ See *supra* Section II.B.

³³⁴ See generally Michael Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern*

Notably, treaties did not create or give rights to tribes, but rather memorialized the inherent property rights that tribes reserved from their land cessions to the United States.³³⁵ In this way, treaty rights represent unbroken threads of continuity between tribes and the landscapes, waterways, and biotic communities that tribes have stewarded for millennia. The U.S. Constitution honors the antecedent nature of tribes' sovereign property rights, declaring treaties to be "the supreme law of the land."³³⁶ The treaties negotiated between tribal nations and the United States supersede all local and state laws, as well as most federal laws.³³⁷

The treaty fishing rights reserved across the Pacific Northwest have turned out to be among the strongest and most expansive in the nation. Between 1854 and 1856, many tribes throughout the Puget Sound, Pacific Coast, and Columbia River Basin regions entered into treaties negotiated by Isaac Stevens, the first governor of what was then the Washington Territory. All of these so-called "Stevens treaties" include the following clause, expressly reserving tribal fishing rights: "The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all other citizens of the Territory"³³⁸ These treaty fishing rights are commonly referred to as "usual and accustomed," or "U&A" fishing rights.

Courts have held that U&A tribal fishing rights accord Pacific Northwest tribes important corollary rights. First, tribal

Natural Resources Policy in Indian Country, Aboriginal Policy Research Consortium International (2004):

<https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1241&context=aprci>.

³³⁵ *Winans*, 198 U.S. at 381 (explaining, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted").

³³⁶ Art. VI, cl. 2, U.S. Constitution.

³³⁷ Under the plenary power doctrine, Congress has the authority to enact laws which limit or take away, i.e. abrogate, treaty-reserved tribal rights. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). However, the U.S. Supreme Court has repeatedly held that tribal property rights and sovereignty are preserved unless Congress evinces a clear and unambiguous intent to abrogate. *See Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968) (noting the intention to abrogate treaty rights is "not to be lightly imputed to Congress," quoting *Pigeon River, etc., Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)); *U.S. v. Dion*, 476 U.S. 734 (1986) (emphasizing, "Indian treaty rights are too fundamental to be easily cast aside").

³³⁸ *See, e.g.*, Treaty with the Duwamish, Suquamish, etc., 1855, 12 Stat. 927, ratified Mar. 8, 1859, proclaimed Apr. 11, 1859: <http://www.washington.edu/diversity/files/2013/03/treaty-point-elliott.pdf>.

treaty fishing rights include the right of access to all usual and accustomed fishing sites, including through and within private property.³³⁹ Second, tribal treaty fishing rights include the right to take up to half of the harvestable portion of a particular fishery,³⁴⁰ and in 2016, Pacific Northwest tribes won a landmark victory securing a third right when the Ninth Circuit upheld a ruling that tribes’ “right of taking fish” included a corollary right: the right of habitat protection.³⁴¹ The case described below is known as the “Culverts case.”

Culverts Treaty Rights Victory

The *Culverts* case began in 2001, when a coalition of twenty-one tribes across Washington State filed a claim against the State regarding “barrier culverts.”³⁴² Barrier culverts are large pipes beneath roadways allowing streams to flow but obstructing the migration of anadromous fish.³⁴³ Anadromous fish include salmon and trout species that spawn (lay eggs) in freshwater streams, migrate out to the sea as juveniles, then return upstream as adults to spawn.³⁴⁴ Barrier culverts restrict access to spawning habitat, ultimately reducing the number of adult fish available for catch.³⁴⁵ The tribes alleged that the State had unlawfully abrogated treaty fishing rights by cutting off spawning habitat through installing and maintaining these non-fish passable culverts.³⁴⁶ The tribes sought declaratory and injunctive relief mandating that the State remove and replace over 1,000 barrier culverts.³⁴⁷ Taken together, the identified culverts blocked fish migration on approximately 1,000

³³⁹ *Winans*, 198 U.S. at 381 (holding that U&A 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.).

³⁴⁰ *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).

³⁴¹ *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)).

³⁴² *Id.* at 841.

³⁴³ *Id.* at 845.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 857.

³⁴⁷ *Id.*

linear miles of streams and 5 million square meters of habitat: enough to produce an additional 200,000 adult salmon each year.³⁴⁸

The district court for the Western District of Washington, and subsequently the Ninth Circuit, ruled in favor of the tribes.³⁴⁹ The District Court found the tribes had relied on the treaties to secure a continuing supply of fish when they ceded vast lands to the federal government containing U&A fishing sites.³⁵⁰ The barrier culverts violated the expectations memorialized by those treaties. An *en banc* panel of the Ninth Circuit affirmed the district court's ruling and held that, by building and maintaining barrier culverts, Washington State "has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties."³⁵¹ The court found the State had breached its treaty duty to the tribes despite the Court's finding that "this consequence was not the State's 'primary purpose or objective.'"³⁵² Because diminishing the supply of fish available to tribal fishers was an incidental impact, rather than the primary purpose, of the State's barrier culverts, "[t]he 'measure of the State's obligation therefore depends 'on all the facts presented' in the 'particular dispute.'"³⁵³ The case was appealed to the United States Supreme Court, resulting in a 4-4 split vote of the Justices, thus affirming (without an opinion) the Ninth Circuit decision.³⁵⁴

The same fact-based standard applied to the culverts context seemingly applies to proposed fossil fuel transport projects because oil and gas pipelines, coal and oil trains, and export terminals similarly impact tribal treaty fishing rights in an incidental rather

³⁴⁸ *Id.*

³⁴⁹ *U.S. v. Washington*, 20 F.Supp.3d 828 (W.D. Wash. 2007); *U.S. v. Washington*, 2013 WL 1334391 (W.D. Wash. 2013); *Culverts*, 827 F.3d 836.

³⁵⁰ *U.S. v. Washington*, 20 F.Supp.3d at 897-99.

³⁵¹ *Culverts*, 827 F.3d at 865.

³⁵² *Id.* at 853, citing *U.S. v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) ("*U.S. v. WA 1985*") (articulating the test for determining the proper scope of judicial authority over government actions that impact tribal treaty fishing rights: "If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts. In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute.").

³⁵³ *Culverts*, 837 F.3d at 853 (citing the test established in *U.S. v. WA 1985*, at 1357).

³⁵⁴ Justice Kennedy recused himself from the case because he had participated in the case as a Judge on the Ninth Circuit many years earlier.

than directly intentional manner.³⁵⁵ Professor Michael Blumm offers a useful analysis of the legal standard set forth in the *Culverts* case, noting “Applying treaty rights to particular activities will be a factual decision” involving a two-step test:³⁵⁶ (1) there must be “an affirmative action adversely affecting fish subject to the treaties,” and (2) such action “must proximately cause significant damage.”³⁵⁷ Accordingly, courts will most likely assess and adjudicate threats to tribal treaty fishing rights and fisheries on a case-by-case basis.³⁵⁸

The *Culverts* decision clarifies the affirmative duty of both state and federal agencies to carefully consider potential impacts on fish habitat as well as other U&A tribal treaty fishing rights.³⁵⁹ As Blumm explains, “The Ninth Circuit’s decision . . . make[s] clear that regulatory agencies cannot approve developments that block access to treaty fishing sites or diminish the availability of harvestable fish.”³⁶⁰ In effect, the Ninth Circuit has embraced a test that places the onus on lawmakers and resource managers at every level of government to uphold tribal treaty rights of access, harvest, and habitat, bound by duties flowing from tribes’ treaty-guaranteed fishing rights.³⁶¹ As Professor Blumm describes, “all non-tribal entities should now feel prodded to improve salmon habitat-harming processes of their activities.”³⁶² The following Subsections explore tribal strategies to leverage treaty fishing rights in order to defeat proposed fossil fuel transport projects at every jurisdictional level.

³⁵⁵ Curtailing tribal fishing is probably never the “primary purpose” of fossil fuel infrastructure projects.

³⁵⁶ Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 31 (2017).

³⁵⁷ *Id.* at 31-32; see also Robert T. Anderson, “Federal Treaty and Trust Obligation, and Ocean Acidification,” 6 WASH. J. ENVTL. L. & POL’Y 474 (2016).

³⁵⁸ Blumm, *supra* note 352, at 32.

³⁵⁹ Pursuant to the Ninth Circuit’s reasoning in *Culverts*, the duty of habitat protection logically extends to regional and local governmental bodies as well. See *Culverts*.

³⁶⁰ Blumm, *supra* note 352, at 37.

³⁶¹ Agencies are legally obligated to take into account tribal treaty fishing rights regardless of whether or not tribes affirmatively assert their sovereign prerogatives. Tribes should not be expected to monitor every prospective fossil fuel project or associated administrative action that threatens to affect treaty fishing. Many tribes are choosing to do so, however, in order to defend their treaty rights and help mitigate the climate crisis. See Wood, *supra* note 294.

³⁶² *Id.* at 33.

1. Federal: The *De Minimis* Impacts Test

As explained at the outset of this article, federal agencies are frequently involved in facilitating, reviewing, and permitting proposed fossil fuel transport and export projects.³⁶³ On reservation, the BIA plays an important role approving or disapproving third party applications seeking rights-of-way across tribal reservation land.³⁶⁴ Off reservation, the array of federal actors multiplies (due to the several environmental permitting requirements triggered when a project threatens to damage air and water resources), and any number of agencies may exercise permitting authority (or similar approval) over areas within a tribe's U&A territory. Federal agencies that may exercise jurisdiction over proposed fossil fuel infrastructure impacting treaty fishing rights include: the Army Corps of Engineers, the Bureau of Reclamation, the Department of Energy and the Bonneville Power Administration (within DOE), the Department of Transportation and the Pipeline and Hazardous Materials Safety Administration (within DOT), the Federal Energy Regulatory Commission, the National Marine Fisheries Service (Department of Commerce), the U.S. Fish and Wildlife Service (Department of Interior), the Environmental Protection Agency, the Coast Guard, and the State Department.³⁶⁵ Insofar as tribes hold U&A treaty fishing rights in portions of rivers and streams that pass through federal public lands, federal land management agencies such as the United States Forest Service, the Park Service or Bureau of Land Management may also be involved.³⁶⁶ All federal agencies are legally bound to protect and uphold tribal treaty rights as the "supreme law of the land."³⁶⁷

The Army Corps of Engineers is one of the federal agencies tribes are most likely to confront at the interface of tribal treaty fishing rights and proposed fossil fuel infrastructure projects.³⁶⁸ The Army Corps has jurisdictional authority over all construction, fill, or excavation in "navigable waters" of the United States.³⁶⁹ By definition and precedent, navigable waters includes all non-enclosed

³⁶³ See *supra* Section II.D.

³⁶⁴ See *supra* Section III.

³⁶⁵ See *supra* Section II.D.

³⁶⁶ See, e.g., *Nez Perce*.

³⁶⁷ U.S. Constitution, Art. VI, cl. 2.

³⁶⁸ The Federal Energy Regulatory Commission is another.

³⁶⁹ 33 U.S.C. § 403.

marine waters and fresh water bodies capable of being navigated for purposes of interstate commerce as well as wetlands associated with navigable waters.³⁷⁰ The geographic scope of Army Corps authority is thus largely coextensive with major tribal U&A treaty fishing territories, including the Puget Sound and the greater Salish Sea, as well as the Columbia River and its tributaries.³⁷¹ The Army Corps is an important gatekeeper in permitting any port facility, and typically serves as the lead agency in the NEPA process for any project slated to be constructed in, on, or overlying, navigable waters. For example, The Army Corps was the primary federal agency exercising regulatory authority over the proposed Gateway Pacific Terminal at Cherry Point, which the Corps denied in 2016 based on the Lummi Nation's successful assertion of U&A treaty fishing rights, discussed below.³⁷²

Lummi Nation Protects Cherry Point

The Lummi Nation's Cherry Point victory is probably the most significant and widely known example to date of a tribally led, treaty rights-based defeat of a proposed fossil fuel export project in the Pacific Northwest. Located on Rosario Strait outside the city of Bellingham, Washington, Cherry Point lies within the Lummi Nation's adjudicated U&A fishing grounds, reserved by the tribe in the 1855 Treaty of Point Elliott.³⁷³ The proposed Gateway Pacific Terminal (GPT) slated to be constructed at Cherry Point would have been the largest coal export facility in North America,³⁷⁴ designed to process up to 48 million metric tons of coal annually for export to Asian markets.³⁷⁵ The Lummi Nation formally filed opposition to

³⁷⁰ See 33 C.F.R. § 329.4.

³⁷¹ Army Corps of Engineers jurisdiction also coextends with the aquatic public trust.

³⁷² See Memorandum for Record from Michelle Walker, Chief, Regulatory Branch, U.S. Army Corps of Engineers (May 9, 2016) (hereinafter Memorandum for Record): <https://turtletalk.files.wordpress.com/2016/05/160509mfrudademinimisdetermination.pdf>.

³⁷³ *Id.* at 26. In the Native language of the Lummi Tribe, the Cherry Point area is known as Xwe'chi'eXen and is part of the Tribe's larger traditional cultural property.

³⁷⁴ See de Place, *supra* note 5, at 3:

http://www.sightline.org/research_item/northwest-fossil-fuel-exports-2/.

³⁷⁵ Ralph Schwartz, "How Indigenous Tribes Are Fighting the Fossil Fuel Industry—and Winning," YES! MAGAZINE, Aug. 9, 2016:

construction of the GPT in January 2015 by submitting a request to the Army Corps' Seattle District to deny the GPT's Section 404 permit application.³⁷⁶ Through declaratory evidence and technical fish catch data, the tribe was able to satisfactorily demonstrate to the Army Corps that the Cherry Point area is an important tribal fishing site that is "productive and regularly fished."³⁷⁷ As a result, the Army Corps found that the GPT "would have a greater than *de minimis* impact on the Lummi Nation's access to its usual and accustomed fishing grounds," and it denied the permit.³⁷⁸

The *de minimis* impacts standard is an important precept for tribes and tribal attorneys to grasp and argue when attempting to stop a proposed or existing fossil fuel transport or export project. The *de minimis* standard is fundamentally rooted in the important Indian law tenet and canon of construction that tribal treaty rights may not be abrogated without express authorization by Congress.³⁷⁹ Courts and federal agencies use the *de minimis* standard to assess whether an infringement on tribal treaty fishing rights rises to the level of being "legally significant," *i.e.* de facto abrogation, and therefore meritorious of judicial intervention.³⁸⁰ As the Army Corps explained in its decision denying the GPT, "If the impact on either [the right of access or the right to take fish] 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."³⁸¹

The Lummi Nation carried its burden by building a strong evidentiary foundation for the Corps' "greater than *de minimis*" determination. To begin with, the Nation provided fourteen tribal declarations demonstrating exercise of treaty fishing rights by tribal

<http://www.alternet.org/environment/how-indigenous-tribes-are-fighting-fossil-fuel-industry-and-winning>. At full operational capacity, GPT would have handled 487 total annual vessel calls, an average of 1.3 cargo ships traveling through of Lummi U&A treaty fishing territory every day. *See* Memorandum of Record at 10.

³⁷⁶ Memorandum of Record, at 1.

³⁷⁷ *Id.* at 26.

³⁷⁸ *Id.* at 31.

³⁷⁹ *See* FN 312 (Lonewolf v. Hitchcock), *supra*; *see also* *Passenger Fishing Vessel*, 443 U.S. at 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights").

³⁸⁰ Memorandum for Record, at 1; *see also* *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515, 1520-22 (W.D. Wash. 1996) (applying the *de minimis* test to the Lummi's right to access for fishing).

³⁸¹ Memorandum of Record, at 20.

members in the Cherry Point area.³⁸² These declarations included maps showing where tribal members fished, specifically, “all the maps show fishing or crabbing within or near the footprint of the GPT.”³⁸³ The Lummi Fisheries Harvest Manager also provided a declaration supported by nearly 40 years of data demonstrating that tribal fishing at Cherry Point and within the GPT footprint had “resulted in millions of fish and shellfish catches by Lummi fishermen.”³⁸⁴ In addition, the Tribe submitted an independently prepared Vessel Traffic and Risk Assessment Study,³⁸⁵ which demonstrated that Lummi fishers “spend at least 1/3 of their time in the Cherry Point subarea.”³⁸⁶ The Study concluded that, at full operation, the GPT footprint and associated marine vessel traffic would disrupt the Lummi fishing in the Cherry Point subarea by 76 percent.³⁸⁷ Altogether, the Corps found the body of evidence assembled and presented by the Lummi Nation “substantial”³⁸⁸ and “sufficient to support a finding that the construction of GPT would have greater than a *de minimis* impact on Lummi U&A treaty fishing rights.”³⁸⁹ As a result, the Corps was obligated to deny the Section 404 permit for GPT.³⁹⁰

Tribes seeking to stop fossil fuel export or transport projects within U&A treaty fishing territories are well-advised to look to the Lummi Nation’s successful strategy.³⁹¹ In particular, tribes may wish to collect declarations from tribal members or gather commission studies regarding the tribal exercise of treaty fishing rights and anticipated project impacts and submit this record to federal regulatory authorities responsible for granting or denying permits for projects in treaty fishing waters.³⁹² However,

³⁸² *Id.* at 21.

³⁸³ *Id.* at 21-22.

³⁸⁴ *Id.* at 22.

³⁸⁵ *Id.* at 1; study prepared by Glosten Associates, a naval architecture and marine engineering firm based in Seattle: www.glosten.com.

³⁸⁶ Memorandum for Record, at 22.

³⁸⁷ *Id.* at 11.

³⁸⁸ *Id.* at 24.

³⁸⁹ *Id.* at 25.

³⁹⁰ *Id.* at 31.

³⁹¹ Export and transport projects entail different physical footprints on the landscape and carry different risks. For risks associated with transport projects, see *supra* Section II.B.

³⁹² Once shared with a federal agency, information regarding traditional knowledge would be subject to public disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

circumstances vary tremendously, and some tribes may encounter more difficulty demonstrating clear conflict between a given fossil fuel project and tribal U&A treaty fishing rights. As Professor Robert T. Anderson has observed, “The Cherry Point decision rested on evidence of direct interference with Lummi fishing by increased shipping traffic (at the terminal). The less direct the connection between such interference and environmental harm, the more difficult the case will be.”³⁹³

Still, the Lummi Nation’s landmark victory at Cherry Point provides a valuable template of how one tribe successfully defeated a fossil fuel infrastructure project by proving to a federal decision maker the greater than *de minimis* impact on U&A treaty fishing rights that would result.³⁹⁴ As the Federal District Court of Washington made clear in a case decided over 20 years earlier concerning the same treaty fishing area, “In 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.”³⁹⁵ The court’s statement makes clear that the federal trust obligation (explained in Section IV.A.) reinforces treaty rights as well. Reflecting this duality, the Army Corps expressly noted in its Memorandum of Record regarding the GPT and Lummi treaty fishing rights, “the Corps [has a] fiduciary duty to take treaty rights into consideration when making its permit decisions.”³⁹⁶ The next section explains the application of treaty rights to states and local entities in more detail.

2. States: Protecting Tribal Resources Through General Public Benefits Standards

³⁹³ See Schwartz, *supra* note 15.

³⁹⁴ At a 2017 presentation on the Cherry Point victory, Lummi tribal attorney Mary M. Neil emphasized the important role of the Tribe’s coordinated public relations campaign strategy alongside legal efforts; she noted that such an initiative is “more impactful when it comes from the people themselves.” Mary M. Neil, Panel: The Intersection of Tribal Religion and Environmental Claims, Federal Bar Association 42nd Annual Indian Law Conference, Talking Stick Resort - Scottsdale, AZ, April 6, 2017.

³⁹⁵ *Northwest Sea Farms*, 931 F.Supp. at 1520 (salmon farming permit properly denied by Army Corps as infringing on the Lummi Nation’s treaty right of access); see also *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (court enjoins Army Corps from permitting construction of marina that would interfere with treaty fishing rights).

³⁹⁶ Memorandum for Record, at 20.

While states have historically demonstrated tense relationships with tribes³⁹⁷ and outright hostility to tribal treaty fishing rights,³⁹⁸ Pacific Northwest states in particular have begun to signal legal regard for tribal authority and treaty fishing rights when tribal interests conflict with proposed fossil fuel infrastructure. Both expressly and implicitly, state agencies in Oregon and Washington have denied permits for fossil fuel transport projects based in part on prospective impacts to tribal treaty fishing rights. State agencies appear to be recognizing that tribes' treaty-guaranteed rights to fisheries in fact promote public benefits of ecosystem protection and align naturally with states' broader environmental policy mandates.³⁹⁹ By denying permits for fossil fuel infrastructure projects that endanger tribal treaty fishing rights, states are taking steps to fulfill what the Ninth Circuit has referred to as "the State's precise obligations and duties under the treat[ies]."⁴⁰⁰ The discussion below elaborates upon key examples to provide guidance to tribes in navigating state permitting processes triggered by fossil fuel project proposals.

³⁹⁷ For example, the passage of Public Law 280 in 1953, statutorily extended state criminal and civil jurisdiction into tribal reservations within a number of states, in effect abrogating tribes' inherent sovereign jurisdiction within unceded reservations. 18 U.S.C. § 1162; 28 U.S.C. § 1360. See Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); Carole Goldberg, *Public Law 280 and the Problems of Lawlessness in Indian Country*, 44 UCLA L. REV. 1405 (1997).

³⁹⁸ See *Sohappy v. Smith*, 302 F.Supp. 899 (D. Or. 1969); *Passenger Fishing Vessel*, 443 U.S. 658 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); see also Charles Wilkinson, *Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way*, Uni. of Wash. Press: Seattle, WA (2000).

³⁹⁹ See WAC 173-802-110, State Environmental Policy Act: Policies and procedures for conditioning or denying permits or other approvals (1984) (including an iteration of the public trust doctrine at § (1)(b)(i): "Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations"). See ORS § 196.825 Removal and Fill: Permit criteria (1991) (including § (1) "The Director of the Department of State Lands shall issue a permit applied for . . . if the director determines that the project described in the application: (a) Is consistent with the protection, conservation and best use of the water resources of this state . . . ; and (b) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation" (emphasis added)).

⁴⁰⁰ *U.S. v. Washington*, 759 F.2d 1353, 1357 (1985).

a. *Coyote Island Terminal Defeat*

When a fossil fuel export facility involves construction along navigable waters, the permitting process typically requires approval from one or more state agencies (in addition to federal approvals). This type of requirement became center stage in a controversy over the proposed Coyote Island Terminal in Oregon in 2014. The company financing Coyote Island Terminal had sought a removal-fill permit from the Department of State Lands for construction of an industrial loading dock on the Columbia River, at the Port of Morrow in Boardman, OR, approximately 270 miles upstream from the mouth of the Columbia.⁴⁰¹ Coyote Island was designed to serve as a transfer station for 8.8 million tons of coal per year, which would be transported by rail to the Port of Morrow, loaded onto barges at Coyote Island, then shipped downriver, where the coal would be transferred onto oceangoing cargo ships bound for Asia.⁴⁰²

On August 18, 2014, the Oregon Department of State Lands denied a permit for the proposed coal transport facility on the Columbia River.⁴⁰³ The matter was then appealed to the Office of Administrative Hearing. On August 11, 2016, after an extensive review, the administrative law judge issued a ruling upholding the Department of State Land's earlier order rejecting the permit.⁴⁰⁴

Four Columbia River tribes with U&A treaty fishing rights in and along the Columbia—the Confederated Tribes of the Umatilla Reservation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe⁴⁰⁵—as well as their inter-tribal

⁴⁰¹ *Id.* at 1.

⁴⁰² *Id.*

⁴⁰³ The order, hereinafter referred to as DSL Order, is available at <https://crag.org/wp-content/uploads/2014/08/Findings-and-Order-49123-RF.pdf>. Parts of the order are also excerpted in an order subsequently issued by a hearings examiner on motions for summary determination, see *In re Coyote Island Terminal LLC and Port of Morrow*, Oregon Office of Admin. Hearings for the Dept. of State Lands, Rulings on Motions for Summary Determination at 5 (2016) (hereinafter Administrative Hearings Order), http://media.oregonlive.com/environment_impact/other/morrow%20ruling.pdf.

⁴⁰⁴ Administrative Hearings Order, *supra* note 399, at 426.

⁴⁰⁵ Treaty with the Nez Percés art #, Jun. 9, 1863, 14 Stat. 647; art #, Aug. 13, 1868, 15 Stat. 693. Treaty with the Walla Walla art #, Cayuse, etc. Jun. 9, 1855, 12 Stat. 945. (Umatilla). Treaty with the Tribes of Middle Oregon art #, Jun. 25, 1855, 12 Stat. 963. Treaty with the Yakima, Jun art #. 9, 1855, 12 Stat. 951.

fishery agency, the Columbia River Inter-Tribal Fish Commission (CRITFC)—played a key advocacy role in challenging the permit. During the initial comment period for the permit application, and in response to a subsequent investigation by the Department of State Lands, the four tribes and CRITFC submitted information and affidavits showing that “negative impacts would occur to tribal fishing and fisheries from: fill size and location physically interfering with fishing; operation of the dock facility causing noise, light, vibration, and increased barge interference.”⁴⁰⁶ The Department described the tribal information as “extensive, robust, and persuasive input,” and cited numerous affidavits, reports, photos, and declarations.⁴⁰⁷ The submitted evidence included “historical information, descriptions, mapping, photographs, and a video,” the totality of which, in the Department’s words, “support that there is commercial, subsistence and cultural fishing uses by tribal fishers of Waters of the State in the project area.”⁴⁰⁸ At the later procedural stage in the administrative process, the four tribes were granted authority to participate as “limited parties” and submitted an extensive response to the proponent’s Motion for Summary Determination.⁴⁰⁹

The written opinions of both the Department of State Lands and the Administrative Law Judge reflect the significance of tribal fishing interests in the permit denial. The regulatory decision-making context was set by ORS 196.825, a state law which governs permit issuance. A permit may only issue if the Department determines that the project 1) “is consistent with the protection, conservation and best use of the water resources of this state,” and 2) would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.”⁴¹⁰ The Department is required to examine several listed factors in making these determinations.

⁴⁰⁶ DSL Order, *supra* note 399, at 3.

⁴⁰⁷ *Id.* at 16.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 2 (noting Consolidated Response by tribes opposing Motions for Summary Determination that had been filed by CIT, the Port of Morrow, and the states of Montana and Wyoming). The states of Montana and Wyoming were similarly granted authority to participate in the proceeding as limited parties. A coalition of environmental organizations including Columbia Riverkeeper, Sierra Club, and Friends of the Columbia also filed motions of opposition to the proposed project. *Id.*

⁴¹⁰ ORS § 196.825(1).

In evaluating the list of factors, the Department's order referenced evidence of tribal fishing use on multiple occasions. Tribal fishing interests made a prominent appearance in the Department's evaluation of the first factor, (3)(a), which focuses on the "public need for the proposed fill" and the public benefits likely to result from the fill. The opinion listed evidence submitted by both the project proponents (arguing public need for the facility) and the opponents, which included the tribes describing their distinct fishing interests. The Department concluded that low public need did not justify the fill, and that evidence regarding social and economic benefits (presumably of the natural area without the fill) was "inconclusive, with the notable exception of the fisheries." Since the only evidence on fisheries that appeared in the written decision pertained to tribal fisheries, it may be assumed that the subsequent finding pertained to those tribal fisheries: "Regarding fisheries. . . the preponderance of the evidence demonstrates that there is a small but important long-standing fishery at the project site, which is itself a social, economic and other benefit to the public. The fishery is more significant than the public benefits that may be derived from the proposed fill."⁴¹¹ The conclusion is dramatic in many ways, as it represents the outcome of a balancing test between conflicting public economic and environmental needs. By weaving the tribal fishery interests into "public need," the Department opened an avenue for tribal interests through the express language of the statute (language likely replicated in other state statutes as well).

Another key statutory factor, (3)(e), requires the Department to assess "whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety."⁴¹² Evaluating this factor, the Department referenced extensive impacts to tribal fishing (both commercial and subsistence) in the immediate vicinity of the project area as well as in the Columbia River system. These impacts included, for example, physical interference with fishing nets, conflicts between barges and nets, safety threats from entanglements between nets and boats, or from capsized boats, and the impacts to fish from noise and light.⁴¹³ The tribal fishing evidence might not have been the only fisheries evidence in the record that influenced the agency in weighing this

⁴¹¹ DSL Order, *supra* note 399, at 3.

⁴¹² ORS § 196.825 (3)(e).

⁴¹³ DSL Order, *supra* note 399, at 8.

factor because the Department noted that it had received “thousands of comments that . . . the facility may lead to adverse effects to aquatic habitat, fishing or public health and safety.” However, this evidence was the only fishing evidence set forth in the Department’s discussion of this important factor. At the end of that discussion the agency stated, “The Department finds that the proposed fill does not conform to sound policies of conservation. For example, the proposed fill would obstruct a small but important long-standing fishery in the project area.”⁴¹⁴

In the portion of the opinion actually applying the two governing standards, the Department again emphasized tribal fishing. It found the proposed project would not be “consistent with the protection, conservation, and best use” of the state’s water resources. While the Department noted that the determination was supported by a number of considerations, it chose to elaborate on just two: alternatives to the project, and the impact of tribal fishing in the project area. Listing extensive submitted tribal evidence and affidavits, the agency wrote, “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.”⁴¹⁵ Similarly, the agency found that the proposed project would not be consistent with the second governing standard, to “preserve . . . waters for navigation, fishing and public recreation.” Its treatment of this standard was brief, concluding (yet once again) that the project would “unreasonably interfere with a small but important and long-standing fishery . . . at the project site.” The Department’s decision was upheld by the Office of Administrative Hearings in 2016.⁴¹⁶

Beyond the importance of the Coyote Island Terminal denial to the immediate tribal fishing interests, the administrative saga is quite instructive on a broader level. First, it demonstrates how tribal treaty rights may play a role in a state agency’s decision that is structured by a statutory regime intended to benefit the general public. In this case, there were statutory principles providing protection of waters and fisheries, and the tribal fishing rights successfully fit within that principled realm. It is likely that other

⁴¹⁴ DSL Order, *supra* note 399, at 8.

⁴¹⁵ DSL Order, *supra* note 399, at 16.

⁴¹⁶ Hearings Opinion, at 22.

states have similar broad statutory standards intending to protect water and fisheries, and these too may provide a legal hook for the assertion of unique tribal interests. Second, this case study demonstrates the important role of tribal advocacy. The tribes had submitted extensive evidence that formed a major basis of the Department's conclusions. The Columbia River tribes were greatly assisted by CRITFC, having over 100 staff persons, including scientists, advocates, and policy experts charged with promoting the protection of the tribes' treaty fisheries and fishing rights.⁴¹⁷ And finally, as parties in the administrative proceedings surrounding this project, the tribes were positioned to assert staunch opposition to fossil fuels more broadly through the media. When Umatilla tribal leader Chuck Sams was interviewed about the Coyote Island project, he explained (as paraphrased in the article) that the tribe "does not approve of the Columbia River as a corridor for dangerous fossil fuels."⁴¹⁸ JoDe Goudy, the Yakama tribal council chairman, said in a statement, "Yakama Nation will not rest until the entire regional threat posed by the coal industry to our ancestral lands and waters is eradicated."⁴¹⁹ By affirmatively asserting their treaty-guaranteed U&A fishing rights, these four Columbia River fishing tribes played an important role not only in defeating a looming fossil fuel transport project on the Columbia River, and in blazing a way through a state permit system that failed to include tribal interests in its express provisions, but also in using their legal platform to assert a broad leadership vision for opposing fossil fuels region-wide.

b. *Millennium Bulk Terminals Denial*

Most recently, in September 2017, the State of Washington denied a permit with prejudice for another coal export facility on the Columbia River, citing potential harm to tribal treaty fishing rights

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⁴¹⁸ See George Plave, *Port of Morrow Agrees to Withdraw Coyote Island Terminal Application*, EAST OREGONIAN, Nov. 10, 2016: <http://www.eastoregonian.com/eo/local-news/20161110/port-of-morrow-agrees-to-withdraw-coyote-island-terminal-application> (quoting article's paraphrase of tribal spokesperson Chuck Sam's statement).

⁴¹⁹ See Kim Kalliber, *Big Coal's Plans for the Pacific Northwest Take A Major Hit*, TULALIP NEWS, Aug. 20, 2014: <http://www.tulalipnews.com/wp/2014/08/20/big-coals-plans-for-the-pacific-northwest-take-a-major-hit/>.

as one of several grounds.⁴²⁰ The proposed Millennium Bulk Terminal at Longview, Washington, was designed to transfer 44 million metric tons of coal from trains to ocean going vessels per year, enough to increase U.S. coal exports by 40 percent.⁴²¹ The proposed export facility necessitated construction of rail beds, loading and dock facilities, transfer stations, pads, conveyors, and various buildings.⁴²² The project would have impacted over thirty-two acres of wetlands and included nearly five acres of new overwater coverage.⁴²³ The construction required a Section 401 Water Quality Certificate issued by the Washington Department of Ecology, exercising its authority under the federal Clean Water Act.⁴²⁴ In order to issue such a certification, the agency must determine the project will not only comply with state water quality standards, but also with “other appropriate requirements of state law.”⁴²⁵ The agency scrutinized the Millennium Bulk Terminal application to measure its compliance with not only water quality standards, but also the State Environmental Policy Act (SEPA).

Tribes played an active role in opposing construction of the Millennium Bulk Terminal. The Cowlitz Tribe, whose tribal headquarters are located in Longview and whose ancestral territory includes much of southwest Washington, filed written comments with the Department of Ecology and requested government-to-government consultations with state and federal officials regarding the proposed facility.⁴²⁶ Cowlitz Chairman Bill Iyall publicly stated

⁴²⁰ Section 401 Water Quality Certification Denial (Order No. 15417), Department of Ecology, State of Washington, Sept. 26, 2017 (hereinafter DOE Order), <http://www.millenniumbulk.com/wp-content/uploads/2017/10/401-WQ-Certification-Denial-Letter.pdf>. That denial was upheld on August 16, 2018 by the State Water Pollution Hearings Board. <http://www.spokesman.com/stories/2018/aug/16/millennium-water-quality-permit-denial-upheld/>. The order is available at: <https://www.columbiariverkeeper.org/sites/default/files/2018-08/20180815113207753.pdf>.

⁴²¹ DOE Order, *supra* note 415, at 1; *see also* Rachel La Corte, “State Denies Key Permit for Coal Export Project in Longview,” THE BELLINGHAM HERALD, Sept. 26, 2017, <http://www.bellinghamherald.com/news/state/washington/article175458506.html>.

⁴²² DOE Order, *supra* note 415, at 2-3.

⁴²³ *Id.*

⁴²⁴ *Id.* at 3 (detailing authorities).

⁴²⁵ *Id.* at 13.

⁴²⁶ Tony Schick, *Cowlitz Tribe Asserts Opposition to Longview Coal Terminal*, OREGON PUBLIC BROADCASTING, Oct. 21, 2016:

the proposed project “represents a massive movement of fossil fuels across the landscape through sensitive environments, impacting animals, fish, plant life.”⁴²⁷ The Confederated Tribes of the Umatilla Indian Reservation, which holds U&A treaty fishing rights in and along the Columbia, also actively opposed construction of the facility and the associated transport of coal-by-rail along its treaty fishing waters.⁴²⁸ The tribe’s Department of Natural Resources submitted comments in the State Environmental Policy Act (SEPA) process highlighting not only the potential harm to fishing at treaty sites, but also more broadly, the harm to fish habitat, air quality, and the climate system in general from greenhouse gas emissions as a consequence of massive coal transported by rail as a result of the proposed project.⁴²⁹

In its order denying the application, the Washington Department of Ecology (WDOE) found the proposed project failed to meet the water quality standards, but more importantly for this discussion, found it conflicted with the stated purposes of the SEPA to “avoid or mitigate adverse environmental impacts.”⁴³⁰ The WDOE relied heavily on evidence developed through an environmental impact statement (EIS) prepared jointly by Cowlitz County and the WDOE. That EIS identified nine areas of “unavoidable and significant adverse environmental impacts” that would result from the project and could not be mitigated.⁴³¹ The first eight dealt with, respectively: 1) air quality; 2) vehicle transportation; 3) noise and vibration; 4) social and community resources (including impacts on health); 5) rail transportation; 6) rail safety; 7) marine vessel transportation; and 8) cultural resources. With the exception of the last, which made brief mention of “potentially affected Native American tribes,” those areas did not focus on uniquely tribal concerns. The final, ninth ground, however, was devoted solely to “tribal resources” which the agency defined

<http://www.opb.org/news/series/coal-in-the-nw/cowlitz-tribe-asserts-opposition-to-longview-coal-terminal/>.

⁴²⁷ *Id.*

⁴²⁸ “CTUIR Pleased with Coal Terminal Decision,” MY COLUMBIA BASIN, Oct. 6, 2017: <http://www.mycolumbiabasin.com/2017/10/06/ctuir-pleased-with-coal-terminal-decision/>.

⁴²⁹ Letter from Eric Quaempts, Director, CTUIR Department of Natural Resources, to DOE, Nov. 18, 2013 (on file with author).

⁴³⁰ *Id.* at 3-4.

⁴³¹ *Id.* at 3-4.

to “refer to tribal fishing, and gathering practices and treaty rights.” The language clearly incorporates the interests of the Umatilla Tribe, which asserted its treaty rights in its comments, and the Cowlitz Tribe, which has no federally recognized treaty rights at this time but nevertheless had significant interests at stake.⁴³² WDOE specified, “These [tribal] resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.”⁴³³

The discussion of tribal resources, while only one of many grounds for permit denial, was ground-breaking in many important aspects. First, the WDOE recognized not just direct impacts from the project on tribal fishing, but also the indirect ecological impacts to the fishery itself. Applying, but without explicitly mentioning, the *Culverts* treaty right of environmental protection, the agency examined the many potential harms to the fishery including: 1) the risk of fish being stranded through vessel wakes; 2) the addition of coal dust to waters and habitat areas; and 3) the potential harm to fish behavior caused by dredging and noise and other effects.⁴³⁴ These impacts led the agency to conclude, “these impacts could reduce the number of fish surviving to adulthood and . . . affect the number of fish available for harvest by Native American Tribes.”⁴³⁵

Second, the agency explored not just the project area around the proposed terminal, but the much more expansive area impacted by rail operations associated with the proposed terminal. The expansion of scope was key, and urged by the Umatilla Tribe, because its treaty fishing occurs in Zone 6 upriver of Bonneville Dam and several miles upstream from the actual proposed terminal at the Port of Longview. Recognizing the associated train traffic was a predictable consequence of the project, the denial order stated, “The additional Project-related trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes could restrict access to fishing areas in the

⁴³² See U.S. Army Corps of Engineers, Draft NEPA Environmental Impact Statement for Millennium Bulk Terminals-Longview, Chapter 4 Built Environment: Affected Environment and Project Impacts, Sep. 2016: https://www.millenniumbulkeiswa.gov/assets/chapter_4.5_tribal_treaty_rights_and_trust_responsibilities.pdf.

⁴³³ Section 401 Water Quality Certification Denial (Order No. 15417) at 12, <http://www.millenniumbulk.com/wp-content/uploads/2017/10/401-WQ-Certification-Denial-Letter.pdf>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

Columbia River.”⁴³⁶ The WDOE specified, “The increase in 16 additional Millennium-related trains per day traveling through areas adjacent to and within the fishing areas of Native American Tribes would restrict access to 20 tribal fishing sites . . . in the Columbia River. There are additional access sites that are not mapped that would be impacted.”⁴³⁷

Third, WDOE recognized a realm of impacts that could not be quantified with precision—factors such as fish distribution and fish migration periods made it difficult to quantify the effect of the project on tribal fishing—but found that these factors could not be ignored or dismissed, citing SEPA’s language that “presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.”

Fourth, the agency’s ruling did not fall back on mitigation promises made by the railroad, but instead drew a strict line on the role of mitigation. Acknowledging that conceivable mitigation steps (such as minimizing noise and conducting fish monitoring prior to dredging) could be required of Millennium to reduce impacts to fisheries and tribal fishing interests, the agency held, “[t]hese mitigation steps are inadequate because although noise impacts from construction would be reduced, *they would not be eliminated*, and fish behavior could be altered and *affect the number of fish* available for harvest by Native American Tribes.”⁴³⁸ Through its discussion of “mitigation” measures, the agency set a low threshold of harm that would trigger permit denial, arguably paralleling the *de minimis* federal standard established in caselaw dealing with impacts to treaty rights.⁴³⁹

Finally, the agency precisely tied the impact on tribal resources to its governing statutory authority of SEPA, as it must under established Washington law if it relies on SEPA to deny a permit.⁴⁴⁰ The impact of SEPA can be substantive, supporting a

⁴³⁶ *Id.* at 13-14.

⁴³⁷ *Id.*

⁴³⁸ *Id.* at 12 (emphasis added).

⁴³⁹ See discussion at Section IV.B.1, *supra*.

⁴⁴⁰ WAC 197-11-660(1)(b); *Cougar Mt. Assoc. v. King County*, 111 Wn.2d 742, 752-53, 765 P.2d 264 (1998). See also Order of Pollution Control Hearings Board on appeal from the WDOE, <https://www.columbiariverkeeper.org/sites/default/files/2018-08/20180815113207753.pdf>.

permit denial even if all other statutory and permit requirements are met,⁴⁴¹ but courts demand precision in citing the agency SEPA policy that is the basis of any denial. WDOE concluded, as a factual matter, that “Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources” and stated that such impacts to tribal resources are “inconsistent with the following Ecology SEPA policies:”

- 1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- 2) Preserve important historic, cultural, and natural aspects of our national heritage;
- 3) [E]nsure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making. . . .

On appeal, the State Pollution Hearings Board upheld the decision in a lengthy opinion. Notably, the Board underscored the WDOE’s authority to deny a permit on substantive SEPA grounds, relying on established Washington law making clear that “[a]ny governmental action may be conditioned or denied’ based on the adverse environmental impacts disclosed in an EIS.” The board added, “Using SEPA substantive authority, a decision maker may deny a permit even if it meets all of the requirements for approval under permit criteria.”⁴⁴² This substantive effect of SEPA effectively means that, as long as impacts to tribal resources are substantiated, the decision-making agency has a realm of authority under state law within which to deny permits in furtherance of treaty obligations, even if all other statutory permit requirements are met. Oregon lacks such a state environmental policy act, but as the *Coyote Island* case showed, the state has other potential statutory protections that can import treaty rights protection into the legal regime.

The company seeking to develop Millennium Bulk appealed the State’s denial of a Section 401 Certificate to the Superior Court of Cowlitz County,⁴⁴³ so the future of this landmark decision remains unsettled. However, the case as it stands now holds

⁴⁴¹ See discussion *infra* note ___ and accompanying text.

⁴⁴² See Order of Pollution Control Hearings Board, at 12 (citing Polygon, 90 Wn. 2d at 65).

⁴⁴³ “Appeal,” Millennium Bulk Terminals Longview, LLC: <http://www.millenniumbulk.com/wp-content/uploads/2017/10/Complaint-and-Petition.pdf>.

tremendous importance as a guiding light for tribes seeking to assert their treaty rights (and non-treaty fishing rights) to halt fossil fuel transport. Like the *Coyote Island* case, the *Millennium Bulk Terminals* case represents a state agency premising its denial substantially, although not exclusively, on tribal fishing interests. These case studies both show the potential for Pacific Northwest state agencies to factor tribal treaty rights into state decisions regarding fossil fuel infrastructure, and legally tie the tribal interests into broader state law standards focused on promoting general public concerns. The fusion of state environmental standards with treaty rights obligations (the supreme law of the land) holds significant potential in fortifying a legal blockade against fossil fuel transport through the Pacific Northwest.

3. Local: Applying the “Supreme Law of the Land” at Ground Level

Local governments also provide a jurisdictional context for tribes to assert treaty rights to block fossil fuel infrastructure projects. Notably, local governments may have considerable interest in stopping oil “bomb trains,” coal trains, and pipelines that threaten the health and safety of citizens and harm ecosystems. Counties and cities can choose to pass ordinances prohibiting fossil fuel infrastructure from entering their jurisdictions.⁴⁴⁴ The potential issue with such ordinances is preemption, just as it is with tribal ordinances that seek to prevent fossil fuel transport on-reservation. However, recent case law suggests that local governments may in some circumstances secure local permit denials against preemption claims if they deny local fossil fuel infrastructure permits on the sole ground of carrying out their sovereign duty to uphold federal treaty promises to tribes.⁴⁴⁵ The case below involving Wasco County’s denial of a railroad expansion permit represents one such instance and provides a fascinating glimpse into this legal possibility. While this case arose out of a unique legal context explained below—one

⁴⁴⁴ Spokane, Washington and Portland, Oregon are two cities that have passed such ordinances. The issue of whether local ordinances will withstand preemption without any role of treaty rights is a timely and complex issue, but beyond the scope of this Article. This article limits the focus to a case study involving one town that denied a permit based exclusively on treaty rights considerations.

⁴⁴⁵ This article does not explore other arguments that may be successful in defeating preemption.

that should invoke caution against simplistic overgeneralization of its applicability to other contexts—nevertheless, the legal possibility raised by this case invites tribes and local decision makers to become allies in a joint effort to combat fossil fuel proposals that threaten their mutual interests.

a. *Wasco County Halts Oil-by-Rail Expansion*

The leading case of a local government invoking and upholding treaty rights in the face of fossil fuels has played out in Wasco County, Oregon, along the banks of the Columbia River where three different interests converge. Four tribes retain U&A treaty fishing rights within this section of the Columbia River: the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of Warm Springs, and the Confederated Tribes of the Umatilla Indian Reservation.⁴⁴⁶ The same area features spectacular scenery and is a designated national scenic area protected under the National Scenic Area Act.⁴⁴⁷ And, the corridor also serves as a primary transportation route for trains carrying highly volatile Bakken oil as well as coal from the interior United States to western ports such as Portland, Oregon and Longview, Washington. Wasco County found itself at the intersection of those interests when Union Pacific Railroad applied to the County in January 2015 for a permit to construct and expand a section of rail track along the Columbia River near the city of Mosier in the designated National Scenic Area. The county permit requirement derived from, and was developed pursuant to, the federal legislation creating the scenic area (the National Scenic Area Act, described more fully below). The track expansion would have allowed Union Pacific to increase transport of trains carrying crude oil through the Columbia River Gorge.⁴⁴⁸

On June 3, 2016, as the permit application was pending before the County, a Union Pacific train hauling ninety-six tank cars carrying Bakken oil from North Dakota derailed near the very project site that was subject to the permit application.⁴⁴⁹ Several cars

⁴⁴⁶ See 16 U.S.C. § 544(b)(2)(D).

⁴⁴⁷ 16 U.S.C. §§ 544-544p (2012).

⁴⁴⁸ Union Pacific Railroad Co. v. Runyon, 320 F.R.D. 245 (D. Or. 2017).

⁴⁴⁹ See Union Pacific Railroad Co. v. Wasco County Board of Commissioners, CRGC No. COA=16-02, Final Opinion and Order, Sept. 8, 2017, at 44 (hereinafter CRGC Order).

exploded, sending black plumes of smoke high into the air. The nearby town of Mosier was evacuated, as well as a school and homes in close proximity to the flaming railcars, and Interstate 84 was shut down to traffic. A total of 42,000 gallons of oil spilled, leaving about 18,000 gallons of oil in the soil near the Columbia River, and an oil sheen appeared on the Columbia River the day following the accident; subsequently 10,000 gallons of oil were recovered from the city's sewer plant.⁴⁵⁰ Multiple agencies responded to the fire, and with the threat of the blaze triggering a uncontrollable wildfire in the dry Gorge during a hot summer, Governor Kate Brown invoked the Conflagration Act to augment fire-fighting resources needed to contain the blaze. While there were no fatalities from the train wreck and resulting explosion, Executive Director Paul Lumley of the Columbia River Intertribal Fish Commission told the press, "We've got to do something to stop this. This was too close of a call."⁴⁵¹

Despite the remarkable backdrop set by the calamity at the site just three months earlier, the Wasco County Planning Commission approved Union Pacific's application for track expansion with conditions on September 29, 2016.⁴⁵² The Yakama Nation as well as Union Pacific and a coalition of non-governmental organizations filed three separate appeals of the decision to the Wasco County Board of Commissioners. That board reversed the Planning Commission's decision on November 14, 2016 on the basis that the project would impair the fishing rights of the four tribes with treaty rights in the National Scenic Area.⁴⁵³ Pursuant to the process set forth in the National Scenic Area Act described below, Union Pacific appealed the decision the Columbia River Gorge Commission (CRGC), a regional agency established by the

⁴⁵⁰ Groundwater in the area remains contaminated, but the river itself is not polluted from the accident according to the Oregon Department of Environmental Quality. See Patrick Mulvihill, *Mosier Derailment: No Pollution in Columbia, Groundwater Tests Continue*, May 13, 2017: <http://www.hoodrivernews.com/news/2017/may/13/mosier-derailment-no-columbia-pollution-groundwater/>. For an article examining the safety aspects of the derailment, see Rob Davis, *'Mosier Really Dodged a Bullet': Gorge Derailment Highlights Oil Train Dangers*, June 4, 2016: https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/mosier_really_dodged_a_bullet.html.

⁴⁵¹ Worst Fears Realized for Mosier Residents with Train Wreck, KGW8, June 4, 2016: <https://www.kgw.com/article/news/worst-fears-realized-for-mosier-residents-with-train-wreck/283-231100297>.

⁴⁵² CRGC Order, *supra* note 444, at 9.

⁴⁵³ *Id.*

Act.⁴⁵⁴ Shortly after filing that administrative appeal, and while it was pending, Union Pacific filed a separate complaint in the federal district court of Oregon against Wasco County commissioners as well as members of the CRGC seeking a declaratory order to end the ongoing administrative process, arguing that federal law pertaining to railroad transportation preempts the permitting process established under the National Scenic Area Act.⁴⁵⁵ On March 8, 2017, the court dismissed the case on a procedural ground described in Section 4 below (an appeal of that decision is pending in the Ninth Circuit). On September 8, 2017, the CRGC issued a lengthy and thorough opinion upholding the decision of the Wasco Board of Commissioners to deny the permit on the basis of tribal treaty rights impairment. The discussion below examines in detail the CRGC decision, focusing on its conclusions regarding the Board's authority to deny a permit based on tribal treaty rights, and, relatedly, its discussion of a threshold preemption issue. Section 4 then discusses the federal district court's dismissal of the railroad's challenge to the administrative process, highlighting the intertwined procedural principles of tribal sovereign immunity and indispensable parties that prompted the dismissal.

b. *The County's Permit Requirement and the Board's Denial*

While it likely comes as a surprise to many that a local county board of commissioners in Oregon would deny a land use permit solely on the basis of treaty rights, the result is quite explainable by reference to the federal statutory context authorizing the land use decision. Wasco County's permit requirement derives from both the National Scenic Area Act that established the 300,000-acre federally protected area spanning both the States of Washington and Oregon in the Columbia River Gorge, and the associated Columbia River Gorge Compact that was executed between the two states and received consent of Congress. Pursuant to the compact, the CRGC was created as a regional agency to write (in concert with the U.S. Forest Service) a management plan for the National Scenic Area. The Act mandated that all land use within the scenic area was to be consistent with the standards set forth in the

⁴⁵⁴ *Id.* at 12-13.

⁴⁵⁵ *Union Pacific Railroad Co. v. Runyon*, 320 F.R.D. 245, 248 (D. Or. 2017).

Act.⁴⁵⁶ The federal legislation relied on local counties to carry out the federal protections through their local land use mechanisms. Under this federal scheme, the six counties within the National Scenic Area were required to adopt land use ordinances to carry out the purposes of the act. Such ordinances were subject to review by the CRGC for consistency with the management plan it formulated for the Gorge.⁴⁵⁷ The permit sought by the Union Pacific was required by Wasco County's National Scenic Area Land Use and Development Ordinance (referred to as NSALUDO), which is the County's land use regulation implementing the National Scenic Area Act.⁴⁵⁸

Wasco County's NSALUDO, as an instrumentality of the federal law from which it derives, both reflects and incorporates the National Scenic Area Act's emphasis on protection of Indian treaty rights in the Gorge. Express statutory language in that Act specifies that nothing in the Act shall "affect or modify any treaty or other rights of any Indian Tribe."⁴⁵⁹ This provision manifests in the Management Plan devised by the CRGC: that plan expressly prohibits uses that would affect or modify a treaty right.⁴⁶⁰ The Plan defines "effect on treaty rights" (in pertinent part) as "to bring about a change in . . . or to have a consequence to Indian treaty or treaty related rights in the Treaties of 1855 with the Nez Perce, Umatilla, Warm Springs and Yakima tribes. . . ." ⁴⁶¹ Wasco County's NSALUDO (the land use provision implementing the Act) brings the federal prohibition to the local level by expressly stating: "The County shall decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe. . . . Uses that would affect or modify such rights shall be prohibited."⁴⁶²

Three of the four tribes with treaty rights in the Columbia

⁴⁵⁶ See CRGC Order, *supra* note 444, at 11 (explaining federal statutory regime governing the Gorge).

⁴⁵⁷ *Id.* at 12-13 (explaining legal context).

⁴⁵⁸ See §§ 1.80(A), 14.800, "National Scenic Area Land Use and Development Ordinance (NSA-LUDO) for Wasco County Oregon," adopted May 1994, most recently updated August 2010: http://www.co.wasco.or.us/docs/Planning%20Ordinances/MERGED_NSALUDO.pdf.

⁴⁵⁹ 16 U.S.C. 544o(a)(1).

⁴⁶⁰ See CRGC Order, *supra* note 444, at 35 (paraphrasing and quoting management plan).

⁴⁶¹ *Id.* at 35.

⁴⁶² *Id.* at 38 (citing NSALUDO 14.800.D).

Gorge—the Yakama Nation, Umatilla Tribe, and Warm Springs Tribe—all provided evidence to the Wasco County Board of Commissioners describing how the Union Pacific proposal would violate their treaty rights.⁴⁶³ Based on this evidence, the Board denied the permit in November 2016, finding an impermissible impairment of treaty-reserved rights, and denied the permit application, carrying out the mandate (of the local ordinance implementing the federal law) that “uses that would affect or modify such rights shall be prohibited.”⁴⁶⁴ Applying the County Ordinance, the Wasco County Board of Commissioners “conclude[ed] that the project would impair treaty-reserved fishing rights of the four Columbia River Treaty Tribes.”⁴⁶⁵

c. *The CRGC’s Review*

Pursuant to the process established by the National Scenic Area Act, Union Pacific brought an appeal of the Wasco County Board of Commissioner’s decision before the CRGC. The CRGC is charged with supervising the development and enforcement of county land use ordinances within the National Scenic Area, including resolving appeals from county permitting decisions.⁴⁶⁶ During the course of the permit appeal before the CRGC, tribes participated in various ways. The Yakama Nation, as a party to the appeal, provided extensive evidence and briefing regarding how the Union Pacific proposal would affect its treaty reserved fishing rights.⁴⁶⁷ The Warm Springs and Umatilla Tribes and Columbia River Inter-Tribal Fish Commission submitted separate amicus curiae briefs setting forth evidence of treaty interference caused by the proposal.⁴⁶⁸ Importantly, the arguments propounded by the tribes focused not only on acute, immediate threats posed by increased train traffic and infrastructure development, but also the risk of

⁴⁶³ *Id.* at 39 (summarizing arguments).

⁴⁶⁴ *Id.* at 9 (describing procedural history and Board’s denial of permit application).

⁴⁶⁵ *Wasco Co. Board of Comm’rs*, CRGC at 9.

⁴⁶⁶ 16 U.S.C. §§ 544c, 544e, 544m(a); *see also* “Land Use Decision: Appeals,” Columbia River Gorge Commission: <http://www.gorgecommission.org/land-use/appeals/>. The appellate posture before the CRGC was more complicated for reasons not pertinent to this discussion, as the CRGC actually faced two appeals consolidated into one. *See* CRGC Opinion, at 2.

⁴⁶⁷ *See* CRGC Order, *supra* note 444, at 39 (summarizing Yakama arguments).

⁴⁶⁸ *Id.* at 4, 39.

derailment and spill, and more broadly, the aggravation of climate change caused by emissions from the transported oil.⁴⁶⁹ The CRGC’s 52-page opinion handed down on September 8, 2017 upheld the permit denial and provides deep contextual grounding for the remarkable outcome of Wasco County’s process, a local land use permit denial based exclusively on grounds of interference with treaty rights.

i. The CRGC’s Preemption Analysis

The CRGC opinion confronted the preemption argument at the outset. Union Pacific argued that Wasco County’s permit requirement was local in nature and preempted by the federal Interstate Commerce Commission Termination Act (ICCTA), which regulates rail transportation.⁴⁷⁰ As observed throughout this article, the preemption issue is pivotal to the ability of local governments to stop dangerous fossil fuel transportation through their jurisdictions, such as the “bomb trains” carrying Bakken oil like the one that derailed and exploded in Mosier, Oregon in June 2016.

The CRGC soundly rejected the preemption argument on seemingly two separate bases. First, the CRGC reviewed substantial precedent and concluded the local ordinance warrants treatment as federal law because it is both required by federal law and implements federal law (the National Scenic Area Act). As the CRGC concluded: “These National Scenic Area authorities and other case law involving other cooperative federalism laws also suggest that Wasco County’s NSALUDO is itself federal law, again, not local or state law.”⁴⁷¹ As a federal law, it resists preemption as long as the law from which it derives (the National Scenic Area Act) may be harmonized with the ICCTA. Applying relevant factors from case law, the CRGC found the two laws could coexist harmoniously, and that Wasco County’s regulation (and implementing decision)

⁴⁶⁹ *Id.* at 39.

⁴⁷⁰ 49 U.S.C. § 10101 *et seq.*, establishing the Surface Transportation Board (STB) and giving the STB exclusive jurisdiction over rail routes and rates.

⁴⁷¹ See CRGC Order, *supra* note 444, at 11, 15. While the Columbia Gorge legal regime is unique, there may be other laws with similar features that may in effect federalize local law. The Coastal Zone Management Act, for example, is a federal law protecting coastal zones that relies on local planning and regulation as its primary implementation mechanism. See 16 U.S.C. 1451(i), (m).

was not preempted.⁴⁷²

The importance of this analysis directly extends beyond Wasco County to the other five counties that implement the National Scenic Area Act. Under this analysis, any of those counties could similarly defeat preemption challenges to their local ordinances carrying out the Act. This is significant for the future of fossil fuel transport proposals, because the Columbia River rail corridor, situated as it is between the U.S. interior's coal and oil reserves and the coastal ports of Oregon and Washington, presumably remains a key link in the global export designs of the fossil fuel industry. Beyond the practical significance of the stunning leverage held by those six counties under the National Scenic Area Act, the Wasco County case opens a field of questions as to whether any other statutory areas of localized federalism operate in a manner sufficient to defeat preemption (a matter beyond the scope of this Article but worth noting).

The second basis asserted by the CRGC for finding no preemption bar seemingly rested entirely on treaty rights grounds.⁴⁷³ The CRGC concluded: "The ICCTA does not preempt Wasco County's NSALUDO because Wasco County is complying with the Columbia River Treaties."⁴⁷⁴ It reasoned that, since the ICCTA does not evince clear congressional intent to abrogate tribal treaty rights, "the treaties remain the supreme law of the land."⁴⁷⁵ While the CRGC's discussion is brief, its conclusion is weighty: Wasco County's Ordinance, by carrying out the supreme law of the land, survives a preemption challenge.⁴⁷⁶

Stepping back to the preemption analysis in its entirety

⁴⁷² See CRGC Order, *supra* note 444, at 18-23.

⁴⁷³ There is a bit of ambiguity, however, in the CRGC's passing statement that treaty rights creates an "additional layer of preemption analysis on top of factors expressed by the STB and Ninth Circuit." The statement could be interpreted as providing a treaty-rights backdrop to what is essentially a driving statutory analysis. However, the segregation of the analysis in a different section of the opinion, set apart and following the statutory analysis section, indicates that indeed the CRGC regarded the treaty rights basis as a separate basis for finding no preemptive effect of federal transportation law.

⁴⁷⁴ *Id.* at 23.

⁴⁷⁵ *Id.* at 24.

⁴⁷⁶ In theory, the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, which covers the coastal reaches of Washington and Oregon, as well as California, provides a parallel federal beltway. Tribes could strategize with state and local leaders to develop plans and protocols for protecting coastal areas from fossil fuel transport and export.

(encompassing both grounds), the significance of the CRGC's holding is great. The county's denial of a fossil fuel infrastructure permit amounts to assertion of local control in a legal context heavily dominated by federal law.⁴⁷⁷ Here, the local entity succeeded in shielding its action from the inevitable preemption challenge both by 1) linking it to the federal legal structure of the National Scenic Area Act (from which the permit requirement derived); and by 2) premising the denial exclusively on treaty rights, which remain the supreme law of the land unabrogated by any federal rail transportation laws. The duality of that defense begs the question of whether a local ordinance protecting treaty rights can alone, without the backing of a federal statutory structure such as the Scenic Area Act, can survive a preemption challenge.⁴⁷⁸ In light of the counties' derivative responsibility (as sub-sovereigns of the state) to uphold treaty promises securing fishing rights—promises that recently received a strong judicial pronouncement of environmental protection in the *Culverts* case described in section—a strong argument exists that local entities in the Pacific Northwest may legally shield some decisions from preemption even outside a federal scheme such as the Scenic Area Act if they carefully tailor their regulatory decision to the binding federal purpose of protecting the use and enjoyment of treaty secured tribal fishing rights. In short, applying the “supreme law of the land” at the local level brings an entirely new frame to traditional preemption challenges. In this manner, while the National Scenic Area Act provides the genesis of

⁴⁷⁷ Moreover, the project had already obtained another necessary permit from the U.S. Army Corps of Engineers. *See* <https://www.statesmanjournal.com/story/news/2017/06/14/board-affirms-wasco-countys-denial-railroad-expansion/395962001/>.

⁴⁷⁸ Of course, a separate question pertains to whether there may be other federal statutory schemes that parallel the basic structure of the Columbia Gorge Act in ways important for preemption analysis. The Columbia Gorge Act essentially created a federalized structure for local regulation, a fact deemed important to the Columbia Gorge Commission's analysis. There may be other acts that present this basic model. While outside the scope of this Article's analysis, the Coastal Zone Management Act certainly creates a unique context for preemption by setting forth federal goals carried out through state or local action. 16 U.S.C. 1451 *et seq.* (1982 ed. and Supp. III); *c.f.* California Coastal Commission v. Granite Rock Company, 480 U.S. 572 (1986) (interpreting statute involving different preemption question of state regulation of mining claim on federal public land). The jurisdictional reach of the CZMA overlays tribal U & A sites on major waterways and coastal zones in the Stevens Treaty area of the Pacific Northwest. *See* 16 U.S.C. 1453(1) (defining “coastal zone” to mean “coastal waters . . . and the adjacent shorelands”).

Wasco County's unique regulation, the circumstances of this case suggest a window of possibility much broader than the Wasco County permit saga itself. The possibility of treaty rights protection through localized regulation will undoubtedly be explored as local entities and tribes develop stronger partnerships to resist dangerous fossil fuel transportation through their shared geographies.

ii. The CRGC's Treaty Rights Analysis

Moving to the substantive heart of the matter, the CRGC upheld Wasco County's decision to deny the rail expansion permit, finding that it was supported by substantial evidence of impacts on tribal treaty fishing rights.⁴⁷⁹ The CRGC's opinion set forth several important analytical steps worthy of note and provides valuable guidance on some of the more nuanced issues raised in the enforcement of treaty promises.

Geographical Scope of the U&A Right

One central issue concerned the geographic scope of the treaty right—a matter approached quite differently by the tribes and Union Pacific. The railroad argued the right attached only to specific U&A locations that were historically identified, as well as “in-lieu” sites (provided as replacements for sites inundated by dams). The treaty tribes defined the treaty reserved rights as applying to the entire Columbia River in Zone 6, the river area managed under treaty cases as the exclusive Indian commercial fishing area.⁴⁸⁰ Obviously, beyond the immediate impacts to tribal fishing in the project area, the effects of increased rail traffic could affect fishing throughout Zone 6 because the rail line follows the river. The CRGC summoned extensive and longstanding case law dealing with Columbia River tribal treaty rights to adopt the tribes' geographical interpretation of the treaty zone of interest, concluding:

We agree with the tribes and Columbia River Inter-Tribal Fish Commission that treaty fishing rights are not

⁴⁷⁹ *Wasco Co. Board of Comm'rs*, CRGC, at 51.

⁴⁸⁰ See CRGC Order, *supra* note 444, at 26-27. Notably, the tribes' interpretation correctly also includes “a property right in adjacent lands to the extent and for the purpose mentioned in the treaties.” See *id.* (quoting Yakama Nation response brief).

geographically limited to specifically identifiable historically used stations, but that the term ‘usual and accustomed’ encompasses all of Zone 6 without need to establish specific historical access points to Zone 6. The right also includes the right of crossing land to access the Columbia River from the *Winans* case noted above.⁴⁸¹

The CRGC also underscored the role of the tribes in the Gorge protection framework established under the Management Plan and highlighted a presumption that worked in their favor. The plan incorporates a process that both secures tribal governments a role in decision-making and provides space for the “Indian world-view,” which the Plan drafters recognized as being different from the non-Indian approach.⁴⁸² To that end, as noted by the CRGC in its Order, “the treaty rights protection process in the Management Plan creates [a] rebuttable presumption in favor of tribal governments when they identify and describe an effect on treaty rights in the National Scenic Area.” At various points in the opinion, the CRGC applauded and affirmed Wasco County’s approach, which “consider[ed] the Indian world view and adopted the tribes’ perspective of effect of treaty rights.”⁴⁸³

The Treaty Right of Environmental Protection and the Role of Risk

Having defined the geographic scope of the treaty right, the CRGC next addressed the substantive rights secured by the treaty. The tribes presented evidence of interference with their fishing site access as a result of increased train traffic and mounting safety concerns relating to tribal fishers who regularly cross train tracks. Such interference directly impinges on the access that is part of the treaty secured fishing right and would seemingly be an ample ground to deny the permit. The CRGC noted that it did not need a

⁴⁸¹ *Id.*

⁴⁸² As described by Kristine Olson Rogers in her article describing the collaborative approach underlying the Management Plan and the emphasis on recognizing the Indian worldview, “Western scientists and planners expect a checklist; Native Americans do not operate that way.” See CRGC Order, *supra* note 444, at 36-7 (quoting Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area, 17 VT. L. REV. 741 (1993)).

⁴⁸³ See CRGC Order, *supra* note 444, at 42.

second reason to uphold the permit denial.⁴⁸⁴ But the tribes also presented environmental threats posed by increased train traffic, leading the CRGC to squarely address the right of habitat protection. It began with the correct premise that the treaty fishing right includes a right to fish habitat as a result of the recent *Culverts* decision (described in Section IV.B, *supra*), stating, “Courts have now settled that the Columbia River Treaty Tribes’ treaty fishing right includes the right to fish habitat free from human acts of despoliation.”⁴⁸⁵ It then substantially advanced the analysis of the environmental protection right by observing,

This matter presents a slight twist on the culverts case that Judge Martinez [of the Western District of Washington] decided. In the culverts case, the tribes presented specific information about current habitat damage relating to fish-blocking culverts. Here the tribes describe a high risk of future environmental degradation rather than current degradation. . . . Nothing in [the Culverts decision and Ninth Circuit decision affirming it] requires the tribes take a wait and see approach to protecting their treaty-reserved places from environmental degradation where [the] administrative record contains substantial evidence that a derailment and spill into or adjacent to the Columbia River would damage or destroy habitat in Zone 6, which the federal government, the tribes, and others have spent decades restoring.⁴⁸⁶

This interpretation of the habitat protection right is path-breaking in the sense that it applies the right prospectively against significant risk. Turning to the evidence developed by Wasco County in its record, CRGC noted that the railroad project would allow for five to seven more trains to pass through Zone 6, “and those trains [would be] longer and travel faster.”⁴⁸⁷ Citing a report stating that there were more than 2,500 derailments between 2008 and 2015, that “greater tank car damage can be expected at higher speeds,” and referencing the derailment and explosion in Mosier in 2016 at the proposed project site, the CRGC concluded,

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 34; *see also id.*, at 32 (noting that the same standard was advanced by the tribes and CRTIFC).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 43.

While no party can say for sure whether or when a train will derail and affect treaty-protected habitat, the record . . . supports Wasco County’s conclusion that this project *significantly increases the likelihood that it will happen.*”⁴⁸⁸ We believe that Wasco County honored Governor Stevens’s promise of salmon forever when it concluded that it could not approve Union Pacific’s application where there was concrete and substantial evidence . . . in the whole record of a significantly increased risk of treaty fishing habitat degradation.⁴⁸⁹

In its totality, the CRGC’s decision relied upon substantial precedent to forge analysis of treaty rights in the modern era where the major threats to Indian treaty rights arise not from state game wardens arresting tribal fishers, but from the risk of catastrophic spills into the river, and more existentially, a heated planet that would send the salmon into collapse.⁴⁹⁰ While the statutory context giving rise to the Wasco County denial is unique, the case sends a clear indication that tribes are playing a historic role through science, advocacy, and assertion of their treaty rights in protecting their traditional territories and time-honored cultural practices against the next wave of industrial onslaught coming down the tracks.

4. Procedural Power: Tribal Sovereigns as Necessary and Indispensable Parties

Another chapter of the Wasco County case unfolded in the federal district court of Oregon, resulting in a 2017 decision that turned on an aspect of tribal sovereignty. As noted earlier, while the Columbia River Gorge Commission’s administrative process described above was underway, Union Pacific brought a complaint in federal court seeking to stop the process. In the case called *Union*

⁴⁸⁸ *Id.* at 44.

⁴⁸⁹ *Wasco Co. Board of Comm’rs*, CRGC, at 44-45.

⁴⁹⁰ See generally NOAA, Impacts of Climate Change on Salmon of the Pacific Northwest, https://www.nwfsc.noaa.gov/assets/4/9042_02102017_105951_Crozier.2016-BIOP-Lit-Rev-Salmon-Climate-Effects-2015.pdf.

Pacific Railroad v. Runyon.⁴⁹¹ Union Pacific argued (as it did before the CRGC) that the ICCTA preempted Wasco County’s ordinance. The federal district court dismissed the complaint based on procedural grounds that may have potential application in other instances of state or local permit denials of fossil fuel projects.

The ruling navigated a complicated realm at the intersection of federal Indian law and the rules of civil procedure. In a nutshell, the court dismissed the case because it found the tribes to be “necessary and indispensable parties” (as described under Rule 19 of the Federal Rules of Civil Procedure (FRCP)), without which the case could not proceed, yet the tribes could not be joined by the defendant railroad because of their inherent sovereign immunity. This interaction of tribal sovereign immunity and Rule 19 is familiar in the context of federal Indian law, but threads a narrow jurisdictional needle nonetheless. The ramifications may be pivotal when applied to Pacific Northwest treaty tribes that are fighting fossil fuel proposals, because the major potential impediment to local and state regulation is the preemption bar raised by federal transportation laws. Fossil fuel interests have long enjoyed dominance within the scheme of federal preemption,⁴⁹² yet preemption is only relevant if enforced in court. The *Runyan* ruling suggests that, under Rule 19 of the FRCP,⁴⁹³ sovereign tribal nations possess a unique procedural power to prevent companies involved in transporting fossil fuels from invalidating permit denials by local and state authorities.

Tribes Prevailing on Rule 19 in the District of Oregon

Three tribes with treaty-reserved fishing rights in the Columbia River successfully leveraged their tribal sovereign immunity to win dismissal of Union Pacific’s federal preemption suit on procedural grounds.⁴⁹⁴ Though they were not parties in the suit,⁴⁹⁵ The Yakama, Umatilla, and Warm Springs Tribes filed a motion with the court to dismiss the case for failure to join them as necessary and indispensable parties under Rule 19, “while expressly

⁴⁹¹ 320 F.R.D. 245 (D. Or. 2017).

⁴⁹² See, e.g., Hazardous Materials Safety Act, 49 U.S.C. §§ 5101-5127.

⁴⁹³ Fed. R. Civ. P. 19, “Required Joinder of Parties.”

⁴⁹⁴ *Runyon*, 320 F.R.D. 245.

⁴⁹⁵ *Id.* at 248.

reserving their sovereign immunity.”⁴⁹⁶

As the *Runyon* court summarized, Rule 19 creates a three-step inquiry for determining whether a case must be dismissed for failure to join a party:

- 1) Is the absent party necessary to the case?
- 2) If so, is it feasible to order that the absent party be joined?
- 3) If joinder is not feasible, can the case proceed absent the party, or is that party so indispensable that the action must be dismissed in that party’s absence?⁴⁹⁷

The *Runyon* court applied three factors to the tribes, emphasizing along the way the Ninth Circuit’s “broad, practical, and fact-specific approach” to Rule 19(a)(1)’s “Required Party” requirements. First, the Court determined that the treaty tribes were “necessary parties,” based on their vital treaty interests at stake in the case. The tribes demonstrated their treaty fishing rights were cognizable interests⁴⁹⁸ sufficiently related to the subject of the action (challenge to the permit denial) so that proceeding without the tribes would impair the court’s abilities to protect the tribes’ interests in treaty fishing, and further, that the present parties were not capable of adequately representing the tribes’ interests.⁴⁹⁹ A significant part of the Court’s reasoning was that “[t]he *sole* basis for [the county’s permit] denial was interference with the Treaty Tribes’ treaty-reserved fishing rights.” As the court elaborated, “Had the Wasco Board made a different finding about treaty rights, it would have granted the permit and this lawsuit never would have been filed. . . . Similarly, if plaintiff’s argument regarding preemption were to succeed, it would affect the Treaty Tribes’ treaty-reserved fishing rights because it would enable plaintiff to proceed with its railway expansion project through land that is subject to those rights.”⁵⁰⁰

⁴⁹⁶ *Id.* at 249.

⁴⁹⁷ *Id.* at 250.

⁴⁹⁸ *Id.* at 251 (“Such rights are much more than a financial stake or speculation. They are rights that are of great significance to tribes generally. . . . They are a function of tribal sovereignty They are so strong they survive the conveyance of title to underlying land the Treaty Tribes’ [possess] indisputable interest in their treaty-reserved fishing rights” internal citations omitted).

⁴⁹⁹ *Id.* at 250-53.

⁵⁰⁰ *Id.* (original emphasis); *see also id.* at 257 (“If [UPRR] were to succeed in this lawsuit, that success would necessarily and immediately invalidate a permit

Applying the second factor, the Court held that due to their tribal sovereign immunity, the tribes could not be compelled to join the action, and therefore, their joinder was not feasible.⁵⁰¹ The doctrine of sovereign immunity is an ancient common law doctrine shielding sovereign governments from suit unless the sovereign consents to an action. The principle was imported into American jurisprudence early in this country's history⁵⁰² and has been applied to federal, state, and tribal governments.⁵⁰³ In *Santa Clara Pueblo v. Martinez*, the U.S. Supreme Court announced, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."⁵⁰⁴ Courts have recognized tribal sovereign immunity as one of the "important rights and protections" of tribes' sovereign status.⁵⁰⁵

The third and final phase of the court's Rule 19 analysis established that Tribes were "indispensable" parties.⁵⁰⁶ The court

denial [by the Wasco County Commission] that rested solely on the finding that the Project would harm Treaty Tribes' rights. The relationship between this lawsuit and the Treaty Tribe's rights is direct, not incidental.").

⁵⁰¹ *Id.* at 253.

⁵⁰² *See, e.g.*, Alexander Hamilton, *The Federalist* No. 81, at 414 (Gary Willis ed. 1982) (asserting "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent").

⁵⁰³ *See, e.g.*, Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, 'Accident,' and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 773-80 (2008).

⁵⁰⁴ 436 U.S. 49, 58 (1978). The immunity extends to tribal officials and employees as well. *See, e.g.*, *Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718 (9th Cir. 2008) ("Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority"); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (holding that claims against various tribal officials were "barred by the Tribe's sovereign immunity"). Tribal sovereign immunity is not absolute, but "limited." *See Kahwaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004). Tribes can be sued if: (a) Congress affirmatively abrogates a tribe's sovereign immunity, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (citing *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)); (b) the United States brings suit against a tribe, *see E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005); or (c) a tribe expressly and unequivocally waives immunity," *see Santa Clara Pueblo*, at 58 (citing *U.S. v. Testan*, 424 U.S. 392, 399 (1976) (quoting *U.S. v. King*, 395 U.S. 1, 4 (1969)).

⁵⁰⁵ *Kahwaiolaa*, at 1273.

⁵⁰⁶ *Runyon*, at 253. The *Runyon* Court further held that the "public rights" exception to joinder did not apply. *Id.* at 256-57. The public rights exception is unlikely to apply in fossil fuel preemption cases generally because the exception is available only when an action transcends private interests and seeks to vindicate a public right. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citing *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v.*

emphasized the unique factual circumstances before it, and the risk to the tribes' interests should the case go forward.⁵⁰⁷ Moreover, it found that the plaintiff retained an adequate remedy after dismissal, because the Columbia River Gorge Commission provided an adequate alternative forum for Union Pacific to air its grievances.⁵⁰⁸

Accordingly, the *Runyon* Court dismissed Union Pacific's preemption suit for failure to join the Umatilla, Warm Springs, and Yakama Tribes as necessary and indispensable parties to the action.⁵⁰⁹ Though the case is now on appeal before the Ninth Circuit, it provides a valuable template for how tribes may assert tribal sovereign immunity as a procedural shield against preemption claims that undermine local protection of treaty resources. While preemption certainly has a legitimate and complicated place in the federal-state allocation of power, its singular use by fossil fuel corporations to thwart local protection of vital resources perpetuates, in essence, an industrial hegemony over natural wealth and local landscapes—and may prove disastrous to tribes and local communities alike. As established in the *Runyon* case, Rule 19 provides one important legal avenue for tribes to push back, exerting their role as necessary, indispensable, and inherent sovereigns of the Pacific Northwest.

V. CONCLUSION

In the face of record-breaking temperatures and rising sea levels, tribes of the Pacific Northwest are emerging as leaders in this planetary crisis. While federal officials in power continue to speed full-throttle toward climate chaos, the region's original sovereigns are taking legal action to curb dangerous fossil fuel transport and export. For example, the Lummi Nation prevented the release of ninety-six million metric tons of carbon dioxide annually when the tribe halted the construction of Gateway Pacific Terminal at Cherry

Babbitt, 43 F.3d 1491, 1500 (D.C. Dist. 1995) (citing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)).

⁵⁰⁷ *Id.* at 254-55. "[T]he Treaty Tribes have a major concern about plaintiff's project as it would increase [train] traffic . . . as much as twenty-five percent, leading to more spills that would damage the water in which the Tribes fish." *Id.* at 254.

⁵⁰⁸ *Id.* at 255.

⁵⁰⁹ *Runyon*, 320 F.R.D. at 257.

Point, or Xwe'chi'eXen, in northwest Washington State.⁵¹⁰ The Umatilla, Warm Springs, Yakama, and Nez Perce Tribes prevented an additional 16 million metric tons of carbon dioxide from being released into the atmosphere each year when together they stopped Coyote Island Terminal on the Columbia River.⁵¹¹ Tribes are deploying sophisticated legal strategies to halt the transport and export of fossil fuels through the Pacific Northwest, perhaps transforming what industry once deemed a regional gateway for fossil fuel transportation into a chokehold instead.

Every ruling in favor of tribal communities against pipelines, coal cars, and “bomb trains” is also a victory for the planet and future generations of all people. The climate crisis dwarfs virtually all other crises Humanity faces. There is frighteningly scant time to change course, as the Chief of the United Nations emphasized in September 2018, when he issued a warning that the world must take action by 2020 to avert runaway climate change.⁵¹² As underscored by Pacific Northwest tribes in their multiple resolutions, an urgent climate response demands rejecting fossil fuel infrastructure proposals.

Absorbing the gravity of this moment, tribes are reasserting leadership as the necessary and indispensable original sovereigns of planet Earth. From the banks of the Columbia River to the shores of the Salish Sea, Northwest native nations are showing that an effective, resilient, and inspiring environmental movement must be rooted in a worldview that brings human activities back into balance with Nature's supreme laws. As our colleague, historian and former Dean Rennard Strickland, wrote, “If there is to be a post-Columbian future—a future for any of us—it will be an Indian future . . . a world in which this time, . . . the superior world view . . . might even hope to compete with, if not triumph over, technology.”⁵¹³ Opposing fossil fuel transport and export proposals, —and winning key regulatory battles —tribes of the Pacific Northwest are creating that Indian future today.

⁵¹⁰ See *supra* Section IV.

⁵¹¹ *Id.*

⁵¹² See *supra* note 10 and accompanying text.

⁵¹³ Rennard Strickland, *Tonto's Revenge: Reflections on American Indian Culture and Policy*, 130 (1997).