Articles

Democratizing Treaty Fishing Rights: Denying Fossil-Fuel Exports in the Pacific Northwest

Michael C. Blumm* & Jeffrey B. Litwak**

Indian treaty fishing rights scored an important judicial victory recently when an equally divided U.S. Supreme Court affirmed the Ninth Circuit's decision in the so-called "culverts case," which decided that the Stevens Treaties of the 1850s give the tribes a right to protect salmon migration obstructed by barrier road culverts. The implications of that decision on other habitat-damaging activities have yet to be ascertained, but even prior to the resolution of the culverts case there were significant indications that federal, state, and local administrative agencies were acting to protect treaty fishing rights from the adverse effects of large fossil-fuel export projects proposed throughout the Pacific Northwest.

After briefly explaining the culverts decision, this Article examines five recent examples of agencies denying permits for fossil-fuel developments at least in part on treaty rights grounds. We draw some lessons from these examples concerning the importance of tribal participation in administrative processes and explore some knotty evidentiary issues that tribal efforts to protect their historic fishing sites raise. We conclude that safeguarding their treaty rights in the twenty-first century will require tribes to be as vigilant about the administrative process as they have been about seeking judicial protection.

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* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Courtney Engel, Lewis and Clark class of 2019, supplied superb research assistance.

** Counsel, Columbia River Gorge Commission; Adjunct Professor, Lewis and Clark Law School.

INTRODUCTION

Indian treaty fishing rights have long been controversial in the Pacific Northwest. The states of Oregon and Washington fought against them throughout the twentieth century—at least until the Supreme Court affirmed the Boldt decision in 1979.[1] Historically, the Washington Supreme Court was unquestionably racist in its attitude, epitomized in its 1916 decision of *State v. Towessnute*, which is worth quoting at some length:

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors, in getting title to this continent, ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could come from them was always disdained . . . . Only that title was esteemed which came from white men . . . .
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> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence . . . .
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> These arrangements were but the announcement of our benevolence . . . . Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to

[1] *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 (1979) (largely affirming Boldt decision, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), which decided that the tribes' treaties entitled them to one-half of the salmon harvests returning to their off-reservation "usual and accustomed" fishing places).

> destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.[2]

The Washington Supreme Court proceeded to make a habit of ruling against treaty claims and getting reversed by the U.S. Supreme Court.[3] For example, the state court allowed Washington to charge tribal members for fishing licenses,[4] ban tribal net fishing,[5] and ignore a federal court decree ordering equitable harvests as inconsistent with state law.[6] These decisions, while not as explicitly racist as the *Towessnute* opinion, were just as inimical to the exercise of treaty fishing rights.[7] Oregon

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[2] State v. Towessnute, 154 P. 805, 807 (Wash. 1916) (citations omitted).

[3] *See generally* Fay G. Cohen, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986) (discussing the Boldt decision).

[4] Tulee v. Washington, 109 P.2d 280 (Wash. 1941), *rev'd*. 315 U.S. 681 (1942).

[5] Puyallup Tribe v. Dep't of Game (Puyallup II), 497 P.2d 171, 174 (Wash. 1972), *rev'd,* 414 U.S. 44 (1973) (where the Supreme Court reversed the Washington Supreme Court's decision and lifted the state's ban of net fishing on the Puyallup River). Earlier, the Supreme Court agreed with the Washington court that the state could regulate tribal fishing in the interest of conservation, the so-called "conservation necessity" test. Puyallup Tribe v. Dept. of Game of Wash. (Puyallup I), 391 U.S. 392 (1968), *aff'g*, 422 P.2d 754 (Wash. 1967).

[6] *See* Purse Seine Vessel Owners Ass'n v. Tollefson, 571 P.2d 1373, 1378 (Wash. 1977); Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151, 1159 (Wash. 1977), *rev'd,* Washington v. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[7] Nor was the hostility to treaty rights confined to the Washington courts. As the following account notes, the state legislature, agencies, and the electorate all actively sought to undermine the exercise of treaty rights:

> In 1927, two years after the Washington legislature declared that steelhead were a 'game' fish, it eliminated an exception for streams on or bordering Indian reservations, effectively banning native steelhead harvests and eliminating an important source of winter food for the tribes. In 1933, a successful initiative sponsored by sport fishers established a new Washington Game Department, funded primarily by license fees, to serve sports fishing interests and which soon became a virulent opponent of native fishing rights. Two years later, in 1935, another successful initiative banned use of all fixed harvest gear, such as traps, which had the effect of reallocating harvest in favor of ocean trollers, gillnetters, and purse seiners, displacing native fisheries.

MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 75 (2002).

regulation was also insensitive to the exercise of treaty rights,[8] although Oregon courts were not as expressly bigoted.

The states have continued to seek narrow interpretations of the treaties, most recently arguing that the treaties do not protect against blockages of salmon habitat in the "culverts case."[9] Yet, ironically, at the same time as the states sought a narrow interpretation of the treaties in the road culverts case, state regulators were invoking tribes' treaty fishing rights arguments to deny several regulatory permits for fossil-fuel related development proposals, in part on grounds that the projects would threaten tribal access to historic fishing sites as well as the number of fish available for harvest. Federal and local regulators also denied permits for fossil-fuel related proposals, relying in part on treaty rights.

The states' long history of discriminatory treatment and recent arguments for narrow interpretation of the treaties makes these recent regulatory permit decisions one of the more unlikely, perhaps astonishing,

[8] For example, the Ninth Circuit struck down the application of Oregon Game Commission "conservation" regulations to tribal harvesters because they prohibited fishing on certain tributaries of the Columbia and Snake Rivers during salmon spawning seasons, with no consideration of treaty rights. Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169, 174 (9th Cir. 1963). The court concluded that the regulations aimed to protect only non-Indian commercial and sport fisheries and ruled that to curtail treaty harvests the state had to establish: (1) a need for restricting harvests; and (2) the restriction was "indispensable" to accomplish the necessary conservation. *Id.* at 172. Another Oregon Game Commission regulation failed to survive federal court review in Holcomb v. Confederated Tribes of the Umatilla Reservation, 382 F.2d 1013, 1014 (9th Cir. 1967) (reaffirming that the state had to show that a regulation restricting treaty fishing rights was indispensable to conservation, not merely reasonable). U.S. District Court Judge Robert Belloni also struck down Game Commission regulations that emphasized protecting non-treaty fisheries with no consideration of effects on treaty harvests. Sohappy v. Smith, 302 F. Supp. 899, 910 (D. Or. 1969). Judge Belloni stated that protection of the treaty right of taking fish had to be a state objective that was "co-equal" with conserving fish runs for non-treaty harvesters. *Id.* at 911.

[9] United States v. Washington, 20 F. Supp. 2d 828, 889 (W.D. Wash. 2007), *aff'd*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018) (where Oregon filed *amici curiae* briefs in support of the State of Washington in the Ninth Circuit, but not in the U.S. Supreme Court); Brief of Amicus Curiae the State of Oregon in Support of Appellant State of Washington and Supporting Reversal, United States v. Washington, 864 F.3d 1017 (9th Cir. 2013) (Nos. 13-35474, 13-35519), 2013 WL 5798905.

developments in treaty rights law.[10] Treaty tribes will no doubt rely on these recent permit decisions and the U.S. Supreme Court's affirmance of the Ninth Circuit's decision in the culverts case, when deciding whether to assert their treaty rights in future state regulatory permit proceedings. If so, these remarkable results could spread.

This Article discusses these developments and assesses their implications for treaty rights in the twenty-first century. Part I briefly discusses the culverts case, recently affirmed by the Supreme Court, as well as its relationship to the regulatory processes described later in the article. Part II describes the Tesoro Pacific oil terminal proposed for the Port of Vancouver, Washington, on the Columbia River, which the State of Washington rejected in 2018 in part on grounds of adverse effects on treaty fishing. Part III considers the Millennium Coal Terminal proposed on the Columbia River near Longview, Washington, downriver from Portland, for which the State of Washington denied a water quality certification necessary to permit the project, in part due to its potential effects on tribal fishing. Part IV assesses the decision to reject a fill permit for the Coyote Island Terminal, another coal-export project on the Columbia River which the State of Oregon denied due to likely deleterious effects on treaty rights.

Federal and local regulators also denied permits for fossil fuel-related development proposals based primarily on impacts to treaty rights. Part V examines the controversy over the Gateway Pacific Coal Terminal at Cherry Point, Washington, along the Strait of Georgia near the Canadian border, for which the federal U.S. Army Corps of Engineers rejected a permit, in important part because of its effects on treaty fishing rights. Part VI turns to a local decision, that of Wasco County, Oregon, which denied a Columbia River Gorge National Scenic Area land use permit to expand a railroad track near Mosier, Oregon that could have facilitated the current transport of oil, because the project would adversely affect access to treaty fishing and fish habitat.

In all of these regulatory processes, the tribes had to choose whether to raise their treaty rights and provide evidence disclosing the nature of

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[10] However, in *Washington v. Buchanan*, the Washington Supreme Court may have signaled the attitudinal changes described in this Article, interpreting the treaty hunting right to extend to lands not expressly ceded in the relevant treaty and preempting state regulation that closed an area to hunting absent a demonstrated conservation necessity. Washington v. Buchanan, 978 P.2d 1070, 1073 (Wash. 1999). The scope of the treaty hunting right is currently before the U.S. Supreme Court in *Herrera v. Wyoming*, concerning "whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe's 1868 federal treaty right to hunt on the 'unoccupied lands of the United States,' thereby permitting the criminal conviction of a Crow member who engaged in subsistence hunting for his family." Herrera v. Wyoming, 138 S. Ct. 2707 (granting Petition for Writ of Certiorari).

their access and fishing locations and use. Tribal members have experienced interference and harassment when exercising their treaty fishing rights as well as property damage to their fishing sites, and their expertise about local conditions and fishing techniques are often passed down orally from generation to generation. For these reasons, tribal members must make a difficult choice whether to reveal location and use information necessary to create evidentiary support for permit decisions. Although tribes may request regulators and parties in a regulatory proceeding to keep this information confidential, confidentiality is not assured. Wasco County's permit decision discussed below used a different evidentiary standard for treaty rights claims which, if broadly recognized, would better ensure confidentiality of treaty fishing information and eliminate this barrier to tribal participation in regulatory proceedings. Part VII examines this issue.

This Article maintains that when regulators rely on the tribes' understanding and defense of their treaty rights, the regulators become defenders of those treaty rights as well. Whether these recent permit decisions are the precipice of a new era in which the democratic branches of government are prepared to defend treaty rights remains to be seen, especially given the state of Washington's recent willingness to contest the culverts case all the way to the Supreme Court. Since tribes cannot rely on the democratic branches to consistently protect their treaty rights, the lesson of the permit denials discussed in this Article is that tribes need to increase their participation in those largely administrative decision-making processes, in addition to defending their rights in court.

I. THE AFFIRMATION OF THE CULVERTS CASE

The issue of whether the Stevens Treaties of the 1850s, in which tribes ceded 64 million acres of land to the United States for trivial economic benefits and "the right of taking fish at all usual and accustomed fishing stations in common with" the incoming settlers,[11] protected fish habitat at the center of the treaty has been at issue for nearly a half-century, since the tribes filed suit in 1970, which resulted in what became known

[11] According to the Ninth Circuit, "In 1854 and 1855, Indian tribes in the Pacific Northwest entered into a series of treaties, now known as the 'Stevens Treaties,' negotiated by Isaac I. Stevens, Superintendent of Indian Affairs and Governor of Washington Territory. Under the Stevens Treaties, the tribes relinquished large swaths of land…In exchange for their land, the tribes were guaranteed a right to off-reservation fishing, in a clause that used essentially identical language in each treaty. The 'fishing clause' guaranteed 'the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.'" United States v. Washington, 827 F.3d 836, 841 (9th Cir. 2016).

as the "Boldt Decision."[12] The Boldt Decision held that the tribes' treaty right to take fish meant that the tribes were entitled to up to half of the harvestable fish. In 2007, the successor of Judge Boldt, U.S. District Court Judge Ricardo Martinez, ruled that the Stevens Treaties forbade the State of Washington from constructing and maintaining road culverts that blocked salmon passage because these culverts diminish the number of fish available for harvest.[13] Six years later, Judge Martinez imposed an injunction requiring the state to, among other things, fix all so-called "barrier culverts" by 2030.[14] A unanimous Ninth Circuit panel affirmed the Martinez injunction in 2016.[15] An equally divided Supreme Court affirmed without opinion in 2018.[16]

The effect of the culverts case could be substantial. Some of its potential judicial effects were explored in an earlier study.[17] This Article suggests that the effects could be widespread in the regulatory arena as well. The following sections explore five examples of what we think might prove to be the beginning of an era of the democratization of treaty rights.

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[12] United States v. Washington, 384 F. Supp. at 344 (which was eventually largely affirmed by the Supreme Court in *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 659); Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration,* 92 WASH. L. REV. 1 (2017) (explaining the history of federal court decisions regarding tribal fishing in Washington state) [hereinafter *Treaty Rights and the Environment*].

[13] United States v. Washington, 20 F. Supp. 3d at 889; *Treaty Rights and the Environment, supra* note 12, at 18–19; *see also* R.J. BARNARD ET AL., WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, *Water Crossings Design Guidelines* (2013) https://wdfw.wa.gov/publications/01501. Road culverts allow water to pass underneath roads. They are commonly large steel pipes that overhang creeks on the downhill side of a road and create a waterfall spillway that fish cannot swim through. They may also block passage through improper sizing, depth, water velocity, and improper maintenance. Fish-friendly culverts may be larger in diameter, have bottoms that mimic stream beds, and have a shallow enough slope to allow fish to swim through.

[14] United States v. Washington, 20 F. Supp. 3d 986, 1023 (W.D. Wash. 2013); *Treaty Rights and the Environment, supra* note 12, at 20–21, 32 (barrier culverts are those that completely block salmon migration).

[15] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *amended and superseded by* 864 F.3d 1017 (9th Cir. 2017); *Treaty Rights and the Environment*, *supra* note 12, at 21–26. Because the Ninth Circuit amended its opinion after publication of the article, the page numbers to the court's opinion cited in the article are now outdated.

[16] United States v. Washington, 138 S. Ct. 1832 (2018) (mem).

[17] *See Treaty Rights and the Environment, supra* note 12, at 27–33.

II. THE TESORO SAVAGE PETROLEUM TERMINAL

One of the most publicized rejections of a fossil-fuel development project in recent years was the Tesoro Savage oil terminal—which would have been the largest oil shipping terminal in North America—proposed for the Port of Vancouver, Washington. The terminal would have received an average of more than four 1.5 mile-long oil trains per day, which would then be loaded on ships for export of Bakken crude oil, mostly from North Dakota and Canada.[18] The project would have exported in excess of 130 million barrels of oil annually down the Columbia River to the Pacific.[19]

In early 2018, Washington Governor Jay Inslee rejected the proposal after a unanimous state Energy Facility Site Evaluation Council ("EFSEC") recommended against approving the project, largely on the grounds of potential catastrophic risks from oil spills, earthquakes, and fire which could damage the Columbia River and the Pacific Ocean; increased rail traffic through the Columbia River Gorge damaging public health and safety; and adverse effects on tribal fishing and fishing sites.[20] In addition to numerous environmental groups, several tribes and tribal representatives, including the Columbia River Inter-Tribal Fish Commission and representatives of the Umatilla and Yakama tribes, participated in the administrative proceedings before EFSEC, arguing against project approval.[21] EFSEC and the governor proved responsive to their opposition.

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[18] WASH. ENERGY FACILITY SITING EVALUATION COUNCIL, REPORT TO THE GOVERNOR ON APPLICATION NO. 2013-01 5 (2017), https://www.efsec.wa.gov/Tesoro%20Savage/Recommendation/RecommendationPacket/20171219_ReptGov_s.pdf [hereinafter *2017 EFSEC decision*].

[19] *Id*.

[20] Letter from Gov. Jay Inslee to Kathleen Drew, Chair, Energy Facility Site Evaluation Council (Jan. 29, 2018).

[21] *2017 EFSEC decision*, *supra* note 18, at 3.

The tribes presented evidence from tribal fishers,[22] fishery scientists,[23] environmental staff,[24] and cultural resources staff.[25] Together, the tribes' witnesses testified about tribal fishing locations, fishing practices, and the spiritual significance of fishing; fish habitat and water quality in the Columbia River and the estimated damage of oil spills; and potential damage to known and unknown cultural sites along the Columbia River. Adverse effects on treaty rights extended along the nearly 100-mile length of BNSF tracks adjacent to the Columbia River from the John Day Dam to the project site in Vancouver, Washington. The applicant's response argued only that the terminal site was outside of recognized usual and accustomed grounds, the risk that a spill that would affect returning fish sites was remote, and that compliance with Washington's spill planning and response regulations was adequate to avoid adverse effects.[26]

After holding both a public and an adjudicatory hearing, EFSEC concluded, among other things, that the project would risk substantial economic losses due to the adverse effects on salmon from an oil spill, and that spills, fires, explosions, train derailments, and increased rail traffic would damage tribal cultural resources, sacred sites, and tribal fishing.[27] These risks could not be successfully mitigated and conflicted with EFSEC's obligations under the State Environmental Policy Act

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[22] Transcript of Record, Tesoro Savage LLC, Vancouver Energy Distribution Terminal, No. 2013-01, 1 (Wash. Energy Facility Siting Evaluation Council July 21, 2016), https://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/TSVEPadj.html# Transcripts (testimony of Kathryn Brigham); Transcript of Record at 3916–17 (testimony of Wilbur Slockish), Tesoro Savage LLC, Vancouver Energy Distribution Terminal, No. 2013-01 (Wash. Energy Facility Siting Evaluation Council July 22, 2016) (No. 15-001) [hereinafter Tesoro Savage Transcript]; *Id*. at 3976 (testimony of Randy Settler).

[23] Tesoro Savage Transcript, *supra* note 22, at 3779, 3867–68, 3996, 4018, 4062 (testimony of Stuart Ellis and Blaine Parker).

[24] Tesoro Savage Transcript, *supra* note 22, at 3938–39 (testimony of Elizabeth Sanchey).

[25] Tesoro Savage Transcript, *supra* note 22, at 3847 (testimony of Audie Huber).

[26] *Applicant Tesoro Savage Petroleum Terminal, LLC's Post-Hr'g Br.,* No. 2013-01, at 88 (Wash. Energy Facility Site Evaluation Council Sept. 6, 2016), https://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/PostHearingBriefs/20160906_TSS.pdf.

[27] *2017 EFSEC decision*, *supra* note 18, at 83–84. EFSEC: (1) noted that the project risked "hundreds of irreplaceable cultural resources and sacred sites" that were "priceless" and whose loss would be "beyond monetary"; (2) found that there "would be unacceptable impacts from a derailment resulting in an oil spill, fire and/or explosion"; and (3) concluded that increased rail traffic posed a safety issue to tribal members who must cross tracks without adequate safety measures. *Id.*

("SEPA"),[28] including the Council's obligation to act as trustee for future generations.[29] Rejection of the Tesoro Savage oil terminal continued what had become a pattern of regulatory denials of applications for fossil-fuel related projects, relying in large part on the objection of Northwest tribes.

III. THE MILLENNIUM COAL TERMINAL

In early 2012, the same motivation to reach Asian markets behind the Tesoro Savage project propelled Millennium Bulk Terminals-Longview, LLC ("MBT-L")[30] to seek approval to construct a large marine terminal on the Columbia River near Longview, Washington—about fifty miles downriver from Portland, Oregon. This project would have exported some

[28] *Id.* at 90–92. EFSEC interpreted its SEPA obligations to impose an "overriding policy . . . to avoid or mitigate adverse environmental impacts which may result from the council's decisions" and to not require it to recommend approval of projects with "significant impacts on the public interest that protective measures cannot adequately mitigate." *Id.* at 93. For an explanation of SEPA's substantive obligations, which set it apart from the National Environmental Policy Act on which it was modeled, see Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 242–43 (1992) (discussing how Washington's SEPA has "a far stronger policy statement than that found in the National Environmental Policy Act" and considering SEPA's substantive authority "rare among environmental planning statutes").

[29] *2017 EFSEC decision*, *supra* note 18, at 90–91 (stating that SEPA imposed at least four substantive obligations: (1) act as a trustee for future generations; (2) "attain the widest range of beneficial uses without degradation, risk to health and safety, or other undesirable and unintended consequences"; (3) "preserve important historic, cultural, and natural aspects of our national heritage"; and (4) "ensure that presently unquantified environmental amenities and values [are] given appropriate consideration in decision making along with economic and technical considerations").

[30] MBT-L is a wholly owned subsidiary of Lighthouse Resources (formally known as Ambre Energy). Lighthouse Resources et al. v. Inslee, et al., No. 3:18-cv-05005, 2018 WL 316729 (W.D. Wash.) (trial pleading).

44 million metric tons of coal annually to Asia.[31] Because it involved filling wetlands and dredging the Columbia River bottom,[32] MBT-L needed a Clean Water Act Section 401 water quality certification from the state Department of Ecology ("Ecology"), a prerequisite to obtaining a federal permit from the U.S. Army Corps of Engineers ("the Corps") under Section 404 of that statute.[33]

Ecology's decision relied on the findings from a state environmental impact statement ("EIS") completed in April 2017 that identified several issues that MBT-L could not entirely mitigate,[34] including damage to cultural resources,[35] decreased rail safety,[36] and adverse effects due to increased vessel traffic;[37] increased rail transport;[38] noise and vibration pollution;[39] increased vehicle transport;[40] reduced air quality;[41] and "unavoidable indirect" effects on treaty reserved fishing and gathering

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[31] The site of the proposed coal terminal already functioned as a marine terminal for coal export, but the proposed terminal called for large increases in the amount of coal exported, requiring the building of two docks, rail facilities, ship loading facilities, equipment and stockpiles, rail track, rail storage tracks, and rail car unloading facilities. *See* 401 Water Quality Certification to Millennium Bulk Terminal, No. 15417, at 1 (Wash. Dep't of Ecology Sept. 26, 2017) [hereinafter Ecology Denial Order]. The project promised to boost the local and state economy by creating upwards of 1,000 temporary jobs, over 130 permanent jobs, and close to $5.4 million in tax revenue. By the time Ecology denied the certification in September 2017, MBT-L had spent close to $40 million on the project. *See* Marissa Luck & Andre Stepankowsky, *Ecology Denies Key Permit for Millennium Coal Terminal*, THE DAILY NEWS (Sept. 26, 2017), https://tdn.com/news/local/ecology-denies-key-permit-for-millennium-coal-terminal/article_0936300e-ea3b-5980-b3b4-874d7a784789.html.

[32] *See* Luck & Stepankowsky, *supra* note 31.

[33] 33 U.S.C. § 1341 (1977) (state water quality certification); *Id*. § 1344 (1987) (federal permit).

[34] COWLITZ COUNTY & WASH. DEP'T OF ECOLOGY, MILLENNIUM BULK TERMINALS-LONGVIEW STATE ENVIRONMENTAL POLICY ACT FINAL ENVIRONMENTAL IMPACT STATEMENT at 3-1 to -2 (2017), http://millenniumbulkeiswa.gov/sepa-eis.html.

[35] *See* Ecology Denial Order, *supra* note 31, at 11–12 (explaining that the project would destroy 30 of 39 historic resources in the district**,** including the Reynolds Metal Reduction Plant Historic District).

[36] *Id.* at 10 (discussing an increase in train accident rates by 22%).

[37] *Id.* (explaining the detrimental effects of an increase in 25% of vessel traffic on the Columbia).

[38] *Id.* at 9 (declaring the project's addition of 16 trains a day would overload rail capacity).

[39] *Id.* at 7 (addressing noise mitigation efforts would not be in MBT-L's complete control but subject to the Federal Railroad Association).

[40] *Id.* at 5 (stating increases in road traffic would lead to excessive delays at crossings).

[41] *Id.* at 4 (linking increased train emissions to increased cancer risks in the local area).

rights.[42] Ecology examined each of these project effects in light of the policies proclaimed in SEPA.[43]

The tribes made extensive comments on the EIS, which caused Ecology to recognize that the project would detrimentally affect treaty fishing and gathering rights for commercial, subsistence, and ceremonial practices.[44] The agency explained that fugitive coal dust particles entering the waterway could potentially reduce the number of adult salmon available for tribal harvest,[45] noting that increased vessel traffic by as many as 1,680 extra vessels in the harbor per year would likely lead to fish stranding.[46] The proposed dredging would also harm the river's Eulachon ("candlefish") population.[47] Ecology determined that increased rail traffic would limit tribal access to at least twenty usual and accustomed fishing sites above the Bonneville Dam by delaying tribal members from

[42] *Id.* at 12–13.

[43] *Id.* at 3–4 ("The overriding policy of the department of ecology is to avoid or mitigate adverse environmental impacts which may result from the department's decisions . . . the department recognizes that each person has a fundamental and inalienable right to a healthful environment . . . ."), citing WASH. ADMIN. CODE § 173-802-110(1)(a)–(c). The language is from SEPA. WASH. REV. CODE § 43.21C.020(3) (2009). SEPA also employs trust language, declaring that the "continuing policy" of the state is to "[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations." WASH. REV. CODE § 43.21C.020(2)(a) (2009). *See also* Ferester, *supra* note 28, at 242 (noting the United States Senate originally planned but dropped identical trust language from the National Environmental Policy Act).

[44] Letter from Babtist Paul Lumley, Columbia River Inter-Tribal Fish Commission, to Millennium Bulk Terminals EIS, c/o ICF International (June 13, 2016); Letter from Eric Quaempts, Dep't of Nat. Resources, Confederated Tribes of the Umatilla Indian Reservation, to Sally Toteff, et al. (June 13, 2016); Oral Testimony of Matthew Tomaskin, Yakama Nation (June 2, 2016), all available at https://www.millenniumbulkeiswa.gov/assets/05-volume-iv-appendix-tribes2.pdf. Other non-Columbia River treaty tribes and organizations commented as well.

[45] Ecology Denial Order, *supra* note 31, at 12.

[46] *Id.*

[47] *Id.* Eulachon, a kind of smelt, are called candlefish because when dried they can be lit and used as a source of light. The Nisga'a tribe used candlefish as lights, and aboriginal tribes extracted the oil from the fish to make a thick grease used in cooking and for other purposes. These uses fueled trade so much that routes in the Canadian Northwest were referred to as "grease trails." *See* J. B. MacKinnon, *"Salvation Fish" That Sustained Native People Now Needs Saving*, NATIONAL GEOGRAPHIC (July 7, 2015), https://news.nationalgeographic.com/2015/07/150707-salvation-fish-canada-first-nations-animals-conservation-world. Eulachon populations began steadily declining in the early 1990s.

crossing,[48] and that noise pollution from construction would hamper the tribes' ability to fish by disrupting fish habits.[49] Thus, the project would impinge on the tribes' treaty rights both by limiting tribal access to fishing sites and reducing the quantity of fish available for harvest.[50]

Ecology decided that an examination of treaty rights was appropriate in a 401 certification analysis because of SEPA's policies of: (1) fulfilling "the responsibilities of each generation as trustee of the environment for succeeding generations";[51] (2) preserving "important historic, cultural, and natural aspects of our national heritage";[52] and (3) ensuring "that presently unquantified environmental amenities and values will be given appropriate consideration . . . ."[53] The agency concluded that MBT-L's proposed treaty rights' mitigation measures, which included developing a coal spill and containment plan, minimizing underwater noise, conducting Eulachon surveys, and monitoring fish before and after dredging, would be inadequate because noise and disruption could not be eliminated, which

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[48] *See* Ecology Denial Order, *supra* note 31, at 12. The EIS study area covered 147 miles of the Columbia River and, although not included in the Ecology decision, the SEPA analysis noted eleven other tribal fishing sites that would be affected by the project in Oregon. *See* COWLITZ COUNTY & WASH. DEP'T OF ECOLOGY, *supra* note 34, at 3.5–.9. "Usual and accustomed fishing sites," or a slight variation, are important terms in Stevens Treaties. In each of the treaties, the tribes reserved their rights to access and use these historic fishing sites off their reservations, regardless of subsequent land ownership. *See id* at 3.5–.6.

[49] Ecology Denial Order, *supra* note 31, at 13 (acknowledging that the "extent of which [p]roject related rail operations would affect tribal fishing is difficult to quantify" because of other non-project related factors which affect fishing).

[50] *Id.* at 12–13; *See* Muckleshoot v. Hall, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988) (concluding that treaty fishing rights encompass: (1) the ability to access usual and accustomed) sites; and (2) the ability to harvest a certain number of fish); COWLITZ COUNTY & WASH. DEP'T OF ECOLOGY, *supra* note 34, at 3.5-1 (explaining that the EIS study area included tribal resources important to the following: the Confederated Tribes of Warm Springs, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Cowlitz Indian Tribe, and the Nez Perce Tribe, as well as the Columbia River Inter-Tribal Fish Commission and the Bureau of Indian Affairs).

[51] WASH. ADMIN. CODE § 173-802-110(1)(b)(i) (2018).

[52] *Id.* at § 173-802-110(1)(b)(iv).

[53] *Id.* at § 173-802-110(1)(d); WASH. STATE DEP'T OF ECOLOGY, STATE ENVIRONMENTAL POLICY HANDBOOK (2017) (expressly stating that SEPA operates as a supplementary authority for all state and local agencies, including local governments, districts, and public corporations and expressly states that "[a]ny governmental action may be conditioned or denied pursuant to SEPA."), https://fortress.wa.gov/ecy/publications/documents/98114pdf.

would leave the tribes vulnerable to detrimental changes in fish behavior.[54] Moreover, the agency determined that MBT-L's proposed mitigation to minimize the effects of increased rail traffic on the tribes' access to usual and accustomed sites was outside MBT-L's control, and thus was too speculative.[55] Like the Tesoro Savage project described above,[56] Ecology concluded that there would be adverse effects on treaty fishing throughout the study area of the EIS.

Ecology also lacked reasonable assurances that the project would comply with state water quality standards.[57] For example, the company failed to submit sufficient stormwater and wastewater information for Ecology to determine the sources and volumes of wastewater and concentration of pollutants from the project.[58] Moreover, the company's proposed mitigation plan did not adequately portray the extent of the terminal's effects on the wetlands because it lacked a boundary verification,[59] and the plan also failed to ensure that the project's filling of over 30 acres of wetlands would be offset by a promised creation of 100 acres of artificial wetlands.[60] The agency consequently denied the certification on grounds that the project was inconsistent with SEPA[61] and failed to meet applicable water quality and other environmental

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[54] *See* Ecology Denial Order, *supra* note 31, at 12. The Department of Ecology thus concluded that "Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources." *Id.* at 13.

[55] *Id.* at 12–13.

[56] *See supra* notes 18–29 and accompanying text.

[57] Ecology Denial Order, *supra* note 31, at 13–17 (remarking on insufficiencies in the project due to the lack of reasonable assurance that the project would meet water quality standards based on its wetland mitigation proposal, wastewater characterization, and water rights permitting).

[58] *Id.* at 14–15.

[59] *Id.* at 14. A boundary verification by the U.S. Army Corps of Engineers is necessary to determine federal jurisdiction over the waters. Without the boundary determination, Ecology could not "quantify the extent of the wetlands impacts." *Id.*

[60] *Id.* at 2–3 (noting that the company did not confirm the suitability of the soil for its proposed 100 acres of artificial wetlands).

[61] *See id.* at 3.

standards.[62] MBT-L has filed a blizzard of appeals that are still pending as of this writing.[63]

IV. THE COYOTE ISLAND COAL TERMINAL

Another project seeking to export coal was the Morrow Pacific Project proposed by Coyote Island Terminal, LLC in 2014. The facility would have been a train unloading and storage facility in an industrial park at the Port of Morrow, in Oregon about 50 miles downriver on the Columbia from its intersection with the Snake River.[64] The facility would receive coal by rail and store it until it could be loaded onto covered barges for transport down the Columbia River.[65] The ability to load the barges

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62 *See* Letter from Maria D. Bellon, Dir. of the Wash. Dep't of Ecology, to Kristen Gaines, Millennium Bulk Terminals-Longview (Sept. 26, 2017) (denying the permit with prejudice).

63 *See, e.g.*, Millennium Bulk Terminals-Longview v. Wash. Dep't of Ecology, Pollution Control Hearings Board, No. 17-090, at 18 (2017) (explaining that MBT-L filed an appeal to the state's pollution control hearings board, claiming that Ecology's denial was improper because it was based on factors other than the project's effect on water quality standards) http://www.millenniumbulk.com/wp-content/uploads/2017/10/PCHB-Notice-of-Appeal-with-Exhibits.pdf (Notice of Appeal); Northwest Alloys, Inc. et al., v. Dep't of Natural Res., No. 17-2-00125-3 (Wash. Sup. Ct. 2018) (showing the company sued the state over the denial of a tidelands/submerged lands sublease in early 2017); Marissa Luck, *Judge Sides with Millennium, says State Unfairly Denied Sublease,* THE DAILY NEWS, (Oct. 28, 2017), https://tdn.com/news/local/judge-sides-with-millennium-says-state-unfairly-denied-sublease/article_b2fcb091-a15b-51ae-ae4a-c2e5861d0d4f.html (pointing out that the court required DNR to reconsider its tidelands sublease denial); Lighthouse Resources et. al. v. Inslee, et. al., No. 3:18-cv-05005, 2018 WL 316729 (W.D. Wash.) (trial pleading) (showing that MBT-L filed a federal suit in the Western District of Washington, arguing that Ecology's denials were unconstitutional under the dormant foreign and interstate commerce clauses and the equal protection clause, and were inconsistent with various federal statutes); Dylan Brown, *Trade Groups Back Suit Against Wash. for Denying Port*, E & E NEWS REPORTER (May 3, 2018), https://www.eenews.net/eenewspm/2018/05/03/stories/1060080783 (explaining that four major trade associations joined the suit as amici, claiming Ecology denied the certification for "anti-coal" political reasons); Dylan Brown, *6 States Join Wash. Export Lawsuit*, E & E NEWS (May 9, 2018) https://www.eenews.net/eenewspm/2018/05/09/stories/1060081275 (showing six states also joined the suit).

64 Letter from Charles P. Redon, Resource Coordinator, Wetlands and Waterways Conservation Division, to John Thomas, Coyote Island Terminal, LLC (April 2, 2014) [hereinafter Letter from Charles P. Redon]; *see* Findings and Order, Or. Dep't of State Lands, Application No. 49123-RF at 1 (Aug. 18, 2014) (showing the Oregon Department of State Lands referred to this August 1, 2014 submittal as the "final compiled version of the application.").

65 Letter from Charles P. Redon*, supra* note 64, at 4.

necessitated construction of a large dock and conveyor.[66] The project would require extensive filling in the Columbia River,[67] and thus required an Oregon Department of State Lands Removal-Fill permit, which regulates removal and filling of material within waters of the state.[68]

All four Columbia River treaty tribes and the Columbia River Inter-Tribal Fish Commission objected to the permit and actively participated in the regulatory process. Their participation included submitting affidavits of tribal members that discussed the exercise of treaty fishing rights and the adverse effect that the project would have on them.[69] Tribal participation led the Oregon Department of State Lands to conclude that the application failed to meet several regulatory requirements and thus deny the fill and removal permit.[70] Among the reasons for the permit denial was "[i]nterference with tribal fishing (commercial and subsistence) both in the immediate vicinity of the dock and elsewhere in the Columbia River system" by "obstruct[ing] the small but important long-standing fishery in the project area."[71] According to the Department of State Lands, the project's interference with treaty fishing not only included physical interference with fishing sites, but also entanglements between barges and set nets; safety concerns endangering tribal fishers; increased noise, vibrations, night lights; and pilings and barge traffic adversely affecting fish behavior.[72] This interference led the department to conclude that the project would be inconsistent with "sound policies of conservation" and would "interfere with public health and safety."[73]

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[66] *Id.* (explaining that the project included construction of a 275-foot long elevated fixed dock and conveyor system; an 1160-foot elevated walkway to provide personnel access; and nine dolphins installed adjacent to the walkway to assist in vessel mooring activities; and restoration).

[67] Findings and Order, *supra* note 64, at 1 (describing 572 cubic yards of permanent fill and 256 cubic yards of temporary fill).

[68] *See* OR. REV. STAT. §§ 196.800–.990. The project also required numerous other permits. Only the fill and removal permit is discussed here.

[69] *See Consolidated Response of The Confederated Tribes of The Umatilla Indian Reservation, The Confederated Tribes of The Warm Springs Reservation of Oregon, The Confederated Tribes and Bands of the Yakama Nation, and The Nez Perce Tribe to the Motions for Summary Determination Filed on Behalf of The State of Wyoming, The State of Montana, The Port of Morrow and Coyote Island Terminals*, Nos. 1403883 and 1403884 (discussing the tribes' confidential Traditional Use Report and the applicant's confidential Meyer Report).

[70] *See* Findings and Order, No. 49123-RF (Aug. 18, 2018). The Department Considerations are at OR. ADMIN. R. § 141-085-0565(4) (2018).

[71] Findings and Order, No. 49123-RF, at 8 (Aug. 18, 2018).

[72] *Id*.

[73] OR. ADMIN. R. § 141-085-0565(4)(e).

In its decision denying the permit, the Department of State Lands expressly noted the opposition of the tribes and the Columbia River Inter-Tribal Fish Commission to the project.[74] Coyote Island submitted affidavits from Port of Morrow staff, fishing guides, and tug/barge operators claiming that the site was little used for tribal or recreational fishing.[75] Nevertheless, the department concluded the project did not conform to existing public uses of the waters, as required by its regulations.[76]

Coyote Island, the Port of Morrow, and the State of Wyoming all appealed the department's denial by requesting a hearing from the director of the department.[77] The director granted Coyote Island and the Port of Morrow's requests for a hearing,[78] allowed the tribes and a coalition of environmental groups to participate, and referred the matter to the state Office of Administrative Hearings to hold the hearing.

The hearing never occurred. Coyote Island pulled out of the project and assigned its interests in the permit application to the Port of Morrow.[79] Shortly thereafter, all parties signed a consent agreement in which the applicant withdrew its permit application and agreed that the department's order would be vacated.[80]

V. THE GATEWAY PACIFIC COAL TERMINAL

Federal regulators also rejected a permit for the Gateway Pacific coal terminal, a fossil-fuel development proposal that would transport Powder River Basin coal for export. The Powder River Basin in southeast Montana

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74 Findings and Order, No. 49123-RF, at 8–9 (Aug. 18, 2018).

75 *Id*. at 9.

76 OR. ADMIN. R. § 141-085-0565(4)(f) (2017) (requiring permitted activities to be "in conformance with existing public uses of the waters").

77 *See* Findings and Order, *supra* note 64, at 17 (stating appeal rights in the Order); Coyote Island Terminal, LLC Request for Hearing (Sept. 8, 2014); Port of Morrow Request for Hearing (Sept. 8, 2014); State of Wyoming Appeal from Denial (Sept. 8, 2014).

78 *Ruling on the Coyote Island Terminal, LLC (Applicant) Request for Hearing* (Oct. 1, 2014). The director denied the requests from Wyoming and Montana to participate because they had not participated in the department's permit decision, and thus lacked standing to request a hearing. *Ruling on the State of Wyoming Request for Hearing* (Or. Dep't of State Lands Oct. 1, 2014).

79 Coyote Island Terminal, LLC's Substitution of Parties, Or. Off. of Admin. Hrgs. No. 1403883 (Oct. 13, 2016).

80 Consent Agreement and Final Order, Coyote Island LLC, Port of Morrow, Or. Off. of Admin. Hrgs. No. 1403883 (Nov. 10, 2016), attached to Or. Dep't of State Lands' Notice of Withdrawal, Or. Off. of Admin. Hrgs. No. 1403883 (Nov. 10, 2016).

and northeast Wyoming contains rich deposits of coal and methane.[81] According to a 2012 U.S. Geological Survey estimate, the basin's recoverable coal was 162 billion tons,[82] and coal mined in the region accounts for nearly forty percent of the total mined in the United States.[83] But in recent years the rise of cheap natural gas has led to decreased demand for coal and, consequently, decreased mining. In 2016, U.S. coal production reached its lowest level since 1979.[84] Declining market demand in the United States encouraged coal companies to seek increased access to Asian markets.[85] Close to a third of all U.S. coal exports went to Asian markets in 2017, indicating a one-year rise in exports to Asia of over fifty percent.[86]

In 2011, Pacific International Terminals (now Pacific International Holdings, or "PIH")[87] applied for permits to construct the Gateway Pacific Coal Terminal at Cherry Point in Whatcom County, Washington on the Strait of Georgia to try to reach the export market.[88] The plan was to export over 54 million tons of coal annually from the Powder River Basin to

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[81] *Powder River Basin, Wyoming and Montana*, USGS: ENERGY RESOURCES PROGRAM, https://energy.usgs.gov/regionalstudies/powderriverbasin.aspx#3832131-overview (last modified Oct. 13, 2017).

[82] David Scott et al., *Assessment of Coal Geology, Resources, and Reserve Base in the Powder River Basin, Wyoming and Montana*, USGS 1 (Feb. 2013).

[83] Alan Propp*, Beyond the Coal Boom: Powder River Basin Residents Look to a Diversified Future*, THE BILL LANE CENTER FOR THE AMERICAN WEST (Mar. 6, 2017), https://west.stanford.edu/news/blogs/and-the-west-blog/2017/beyond-coal-boom-powder-river-basin-residents-look-diversified-future.

[84] U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2016, at vii (2017), https://www.eia.gov/coal/annual/archive/05842016.pdf.

[85] Press Release, Arch Coal, Inc., Arch Coal Establishes Asia-Pacific Subsidiary, Names Paladino President (May 9, 2011, 9:03 AM), http://news.archcoal.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mp3PLi8+rGCqsqvZcryOZeVGN2A9JgmUOIUUGjCHOATR3n4sYF0pmjiHctH9oumBN6g==.

[86] Elias Johnson, *U.S. Coal Exports Increased by 61% in 2017 as Exports to Asia More Than Doubled,* U.S. ENERGY INFO. ADMIN. (Apr. 19, 2018), https://www.eia.gov/todayinenergy/detail.php?id=35852.

[87] *History*, SSA MARINE, http://www.ssamarine.com/about-us/history; *Cloud Peak Energy, Inc., SSA Marine Welcomes the Crow Tribe and Cloud Peak Energy as Partners in the Gateway Pacific Terminal* (Aug. 13, 2015).

[88] *See* BP United States, *Cherry Point Refinery*, https://www.bp.com/en_us/bp-us/what-we-do/refining/cherry-point.html.

Asia.[89] The proposed marine terminal included a large wharf,[90] along with numerous upland and rail facilities.[91] Because the project required installation of structures in navigable waters and the filling of adjacent wetlands, PIH needed a federal permit from the U.S. Army Corps of Engineers under both section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act.[92]

Although the proposed terminal was twelve miles from the Lummi Nation's reservation, its location at Cherry Point was significant because it was within one of the tribe's adjudicated usual and accustomed fishing sites reserved in 1855 by the Point Elliot Treaty.[93] In early 2015, the

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[89] *See*, *e.g.*, Phuong Le, *Feds Deciding if Coal-Export Project Violates Tribal Rights*, BELLINGHAM HERALD (Apr. 24, 2016, 11:24 AM), http:// www.bellinghamherald.com/news/state/washington/article73652197.html.

[90] The 2016 application included a wharf some 3,000 feet long and 107 feet wide suitable for deep draft barges, which are merchant ships designed to transport unpackaged bulk cargo. *See* Memorandum for Record, U.S. Army Corp of Engineers Gateway Pacific Terminal Project and Lummi Nation's Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County 6 (May 9, 2016) [hereinafter Army Corps Denial Memo]. A related project called for the extension of the BNSF Custer Spur rail line to extend to the line to the end of the PIH development site. *See* Memorandum for Record, U.S. Army Corps of Engineers Scope of Analysis and Extent of Impact Evaluation Law for National Environmental Policy Act Environmental Impact Statement 1–2 (July 3, 2013) [hereinafter Army Corps Scope Memo].

[91] This was not the first proposed Gateway Pacific Terminal. A similar but substantially smaller project was originally proposed for the same Cherry Point area in the late 1990s, leading to a settlement requiring PIH's predecessor to re-evaluate the proposed terminal's effect on the environment. *See* David A. Bricklin et al., *Coal and Commerce: Local Review of the Gateway Pacific Coal Terminal*, 4 SEATTLE J. ENVTL. L. 283, 292 (2014) (discussing the history of Gateway Pacific Terminal and suggesting how the dormant commerce clause of the U.S. Constitution could affect the permitting of terminal).

[92] *See* Army Corps Scope Memo, *supra* note 90, at 1–2. PIH also needed local approvals: a major project permits, a zoning variance, and shoreline development permit. The Gateway project was unusual in that the Corps denied the federal permit before the PIH obtained a state water quality certification. The Corps could not issue a federal permit without the state certification, *see* Clean Water Act, § 401, 33 U.S.C. § 1341 (2012) ("No license or permit shall be granted until the certification required by this section has been obtained . . . ."). Usually the Corps defers making permit decisions until the states take action on the 401 certification.

[93] *See* United States v. Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974) (Boldt decision), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (quoting the Treaty of Point Elliott, Art. I, 12 Stat. 927 (Jan. 22, 1855) ("The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . .")). The Lummi refer to Cherry Point as "Xwe'chi'eXen" due to the mink that the tribe formerly hunted in the area. Wesley Furlong, *"Salmon Is Culture, and Culture Is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, 37 PUB. LAND & RESOURCES L. REV. 113, 155 (2016).

Lummi Nation submitted its first letter to the Army Corps maintaining that the Army Corps had to deny the permit because the project would produce adverse effects on its treaty rights that could not be mitigated.[94] Over the next year, the Army Corps provided the Lummi Nation's comments to the applicant and the applicant's responses to the tribe. The applicant and Lummi Nation submitted several responsive letters and declarations, and other evidence to the Corps, including fourteen declarations from enrolled tribal members discussing their fishing techniques, types of fish sought, and the cultural significance of the project area.[95] The Lummi Nation's harvest manager also described tribal fishing in the area and the cultural significance of the site to its fishers, and the fact that Lummi harvested over 45 million salmon and crab in the area over a thirty-five-year period.[96]

PIH proposed a number of mitigation measures, including attempting to minimize the adverse effects of vessel traffic by limiting vessel types, increasing communication between approaching vessels and Lummi fishers, and allowing fishing and crabbing alongside the wharf at specified locations and times.[97] But the Corps determined that the proposed mitigation would place unreasonable restrictions on the tribe's time, place,

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94 Letter from Timothy Ballew II, Lummi Indian Business Council Chairman, to Col. John G. Buck, Army Corps of Engineers (Jan. 5. 2015), https://nwifc.org/lummi-formally-asks-army-corps-halt-coal-terminal.

95 *See* Army Corps Denial Memo, *supra* note 90, at 8.

96 *Id*. at 23. PIH argued that the allegations of the Lummi were insufficient for the Corps to make a *de minimis* determination, distinguishing Muckleshoot v. Hall*,* 698 F. Supp. 1504 (W.D. Wash. 1988), on the ground that the Lummi Nation did not provide the Corps sufficiently detailed information about the project's potential disruption. The Corps rejected PIH's argument based on Lummi declarations about harvests and a vessel-traffic study, which were more detailed than the submittals in *Muckleshoot*. *Id*. at 23–24. For example, the Lummi harvest manager submitted catch statistics (fish tickets) for the period of 1975 to 2014, numbering 45 million harvests in the region, including Cherry Point. The fish tickets did not have precise locations, so some of the harvested fish could have been caught outside the Cherry Point area, but the Corps noted that "all areas include Cherry Point and the footprint of the GPT project." *Id.* The agency also determined that the proposed terminal's adverse effects on the tribe's regular fishing and crabbing in the area justified protection. *Id.* at 25 (citing Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996)) (holding that a usual and accustomed area protected by the Point Elliot Treaty must be fished on a more than extraordinary basis but "need not be the primary or most productive one for fishing."). The Corps pointed out that PIH conceded that the Lummi fished the area on an occasional basis, which by definition was more than extraordinary. *Id*. at 26.

97 *Id*. at 13.

and manner of fishing.[98] Moreover, the mitigation would not adequately compensate for the 122 acres of physical space occupied by the project.[99]

The Corps recognized its responsibility to protect treaty rights,[100] and that in order to approve the project, it needed to find that the activity would produce no effect or only *de minimis* adverse effect.[101] Since Corps concluded that the Cherry Point project would in fact have such an effect,

[98] *Id.* at 30–31.

[99] *Id.* at 31 (considering the adverse effects of the project after the proposed mitigation to be greater than *de minimis*). *See infra* note 101 (discussing the *Nw. Sea Farms* case); *see infra* note 102 (discussing the *Muckleshoot* and *Cunningham* cases); *see also* Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 556 (D. Or. 1977) (requiring "specific congressional authority" to permit a dam that would cause the flooding of some fishing stations with 200 feet of water effectively eliminating those stations).

[100] The Corps explained that Indian treaty rights "were not a grant of rights from the United States to the tribes, but were instead a reservation of rights held by the tribe as a sovereign people from time immemorial." *See* Army Corps Denial Memo, *supra* note 90, at 19. The Corps included the potential future restoration of a currently depleted herring population in its analysis due to the agency's interpretation of *United States v. Washington,* known as the Boldt decision, to impose an affirmative duty to do so. *See id.* at 27 (citing the Boldt decision*,* 384 F. Supp. at 402 ("regulations that affect the harvest by the tribes on future runs must receive a full, fair and public consideration . . . .")). The Boldt decision was central to the Corps' decision because it established the Lummi's usual and accustomed treaty rights areas. *See* Army Corps Denial Memo, *supra* note 90, at 19. According to the Corps, the reasoning of the Boldt decision was that the Lummi have the right to follow the fish to wherever they have "fished in the past, currently fish, or may fish in the future" within the adjudicated case area. *Id.*

[101] The *de minimis* standard is from Nw. Sea Farms v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520–22.

it denied the permit.[102] The agency pointed to evidence of increased vessel traffic by up to 487 tankers per year—a potential increase of seventy-six percent—as well as an estimate that the wharf, trestle, and new vessel traffic lanes would occupy up to 122 acres of physical space. These changes would impair Lummi fishing rights both by limiting the tribe's access to its usual and accustomed site and detrimentally affect fishing by tribal members.[103] The tribe's participation in the administrative process made the Corps aware that the affected usual and accustomed site was a sacred site to the Lummi Nation.[104] The agency determined that the

[102] Army Corps Denial Memo*, supra* note 90, at 1–2 ("To evaluate impacts on treaty fishing rights, the Corps conducts a *de minimis* determination to determine whether the impacts to treaty fishing rights are of legal significan[ce]. If it is legally significant, then Congressional authorization would be required to allow the impact."). Later in its decision, the Corps quoted from an unpublished opinion, Order on Motions, Lummi Indian Nation v. Cunningham, No. C92-1023C (W.D. Wash. Aug 28, 1992), to reiterate the *de minimis* standard. *See id*. at 20. In *Cunningham*, Judge John Coughenour used an example of pleasure boats crossing a usual and accustomed treaty fishing area as the sort of *de minimis* intrusion that would not trigger legal inquiry, stating the correct questions to ask are whether treaty rights have been, "impaired, limited, or eliminated." *Cunningham*, slip op. at 4. Thus, the court reasoned that the Port of Bellingham's dumping of dredged materials into Bellingham Harbor could continue because it caused only a slight harm. *See* Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 693–94 (2009). Prior to *Cunningham*, in Muckleshoot v. Hall*,* 698 F. Supp. 1504, 1516 (W.D. Wash. 1988), the Corps and project developers maintained that a proposed marina development would have only a minimal impact on the tribe because the tribe could fish elsewhere, the area was not heavily fished, and the area impinged upon would be small in comparison to the total usual and accustomed fishing area. But the court described the tribes' fishing rights as including two separate rights: (1) the ability to access the usual and accustomed sites; and (2) the ability to harvest a certain number of fish (for a moderate living). Thus, the *Muckleshoot* court enjoined the development because it considered the physical elimination of the tribes' usual and accustomed area to be a substantial harm, requiring congressional approval. *Id.* at 1515–16 (the proposed elimination of a portion of the usual and accustomed fishing ground where the Marina is to be built will deny the Tribes access to their usual and accustomed fishing ground, and the loss to the Tribes will be substantial).

[103] *See* Army Corps Denial Memo*, supra* note 90*,* at 23; *see also* United States v. Oregon*,* 718 F.2d 299, 304 (9th Cir. 1983) (treaty rights separately protect both access to usual and accustomed sites and the ability to take a "fair share" of fish). Thus, the government cannot defend an action by suggesting that, overall, the treaty rights would not be significantly affected if the action physically displaced tribal use of a usual and accustomed site.

[104] *See* Tim Ballew, *Cherry Point Victory Shows Treaty Rights Protect Us All*, BELLINGHAM HERALD, May 14, 2016, https://www.bellinghamherald.com/opinion/op-ed/article77537072.html; *see also* Furlong, *supra* note 93, at 155.

proposed wharf would eliminate "a geographic area where fishing and crabbing occurs" and found these grounds sufficient for permit denial.[105]

To date, PIH has yet to file an appeal. The Corps' denial letter suggested that PIH could reapply for a permit if the tribe's objections to the project could be resolved.[106] But that would seem an unlikely outcome considering the evidence and vehemence with which the Lummi opposed the terminal.[107]

VI. THE UNION PACIFIC SECOND MAINLINE RAILROAD TRACK

Fossil fuels of course can be transported by rail as well as barge. In 2014, Union Pacific Railroad Company sought land use approval from Wasco County, Oregon to construct roughly four miles of a second mainline track near Mosier, Oregon, within the Columbia River Gorge National Scenic Area.[108] Union Pacific sought land use approval from Wasco County because the county administers regulations for new development in the Columbia River Gorge National Scenic Area, as required by federal law.[109] Union Pacific sought county approval, although it maintained that the Interstate Commerce Commission Termination Act preempted the National Scenic Area regulations.[110] While the project was not specifically for the purpose of transporting fossil fuel—the railroad claimed the project would "decrease the number of

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105 Army Corps Denial Memo, *supra* note 90, at 30.

106 Letter from Col. John G. Buck, Dist. Engineer, Army Corps. of Engineers, to Skip Sahlin, Pacific International Holdings (May 9, 2016), http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/GPT%20denial%20letter%20-%209%20May%202016.pdf.

107 *See Lummi Nation Wants Immediate Action In Halting Proposed Bulk Coal Terminal At Cherry Point,* COLUMBIA BASIN FISH AND WILDLIFE BULLETIN (January 09, 2015), *available at* http://www.cbbulletin.com/432887.aspx. On the Lummi's alliance with environmental organizations that led to the Corps' permit denial, see Maggie Allen et al., *Stronger Together: Strategies to Protect Local Sovereignty, Ecosystems, and Placed-Based Communities from the Global Fossil Fuel Trade,* 80 MARINE POL'Y 168 (2017).

108 Wasco County Bd. of County Comm'rs, Final Report, PLASAR-15-01-0004 at 1 (Nov. 10, 2016) (citing 49 U.S.C. § 10501(b)). Union Pacific proposed a total of 5.37 miles of second "mainline" track, but only 4.02 miles of which would be new track. The application would convert approximately 1.34 miles of existing "siding" track to mainline track.

109 *See* Columbia River Gorge Comm'n v. Hood River County, 152 P.3d 997 (2007).

110 Letter from Jeremy Sande, Project Manager, CH2M HILL Engineers, LLC to Angie Brewer, Planning Director, Wasco County at 2 (Jan. 9, 2015) (submitting an application for National Scenic Area Development Review).

delayed or stopped trains, reduce barriers to industry-standard train lengths, and improve the efficiency and fluidity of train movement in the area, all while maintaining safe operating conditions"[111]—the tribes were especially aware of oil transport on this segment of track.

Only a few months earlier, a Union Pacific train carrying oil derailed at the project site, resulting in a fire that consumed four cars. [112] A greater catastrophe was narrowly avoided as that day was unusually without wind, the derailment occurred immediately adjacent to the City of Mosier's wastewater treatment plant, and most of the oil from the damaged rail cars spilled into the treatment plant, not the adjacent Columbia River.[113] Aware of the tribes' concern for safe access for their members to get to the Columbia River, Union Pacific also argued that the increased train traffic would be safer for tribal members crossing the tracks because they would be "a bit more diligent" where there are fast moving trains than where there are stopped trains.[114]

The Wasco County Planning Commission approved the project but imposed several conditions, including a requirement that Union Pacific construct two rail crossings for treaty fishermen to access their fishing sites.[115] Union Pacific, the Yakama Nation, and a coalition of environmental organizations led by Friends of the Columbia Gorge all filed appeals to the Wasco County Board of County Commissioners.[116] Hearing the tribes' concerns, the county board reversed the planning commission and denied the permit based on its adverse effects on tribes' treaty fishing rights.[117] The board found that

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[111] Brief of Appellant at 6, Union Pacific R.R. Co. v. Wasco County, Columbia River Gorge Comm'n (filed on Apr. 5, 2017) (Nos. COA-16-01 & 16-02).

[112] *See* Tony Hernandez, *Oil Train Derails near Mosier in Oregon's Columbia River Gorge*, OREGONIAN (June 4, 2016, 12:14 PM), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/oil_train_derails_near_hood_ri.html; Everton Bailey, Jr., *Mosier Oil Train Derailment: 65 Truckloads of Crude Cleared, 25 More to go*, OREGONIAN (June 8, 2016, 12:15 PM), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/mosier_oil_train_derailment_30.html.

[113] Hernandez, *supra* note 112; Bailey, Jr., *supra* note 112.

[114] Brief of Appellant, Union Pacific R.R. Co., *supra* note 111, at 33.

[115] Wasco County Planning Comm'n, Final Decision & Conditions of Approval, No. PLASAR-15-01-0004 at 4 (Sept. 29, 2016).

[116] Friends of the Columbia Gorge, et al., Appeal of Land Use Decision, Wasco County, No. PLAAPL-16-10-0001 (filed Oct. 13, 2016); Union Pacific R.R. Co., Appeal of Land Use Decision, Wasco County, No. PLAAPL-16-10-0002 (filed Oct. 14, 2016); Confederated Tribes and Bands of the Yakama Nation, Appeal of Land Use Decision, Wasco County, No. PLAAPL-16-10-0003 (filed Oct. 14, 2016).

[117] Wasco County Bd. of County Comm'rs, Final Report, No. PLAAPL-16-10-0001, 0002, and 0003 of PLASAR-15-01-0004 (Nov. 14, 2016).

> adverse impacts to Treaty rights were raised by the [tribes]. Concerns focused on Treaty-reserved rights and Treaty protected resources, including impacts to and possible elimination of fishing access, ecosystem health that would harm the tribal members' ability to hunt, fish and gather for foods at usual and accustomed areas, participate in traditional religious and cultural practices, and likely damage cultural resources.[118]

Union Pacific and the environmental coalition appealed the county's denial to the Columbia River Gorge Commission ("Gorge Commission"),[119] which affirmed on two grounds. First, the Gorge Commission concluded that federal railroad law did not preempt the land use standards and permit standards required by the Columbia River Gorge National Scenic Area Act.[120] Second, the Gorge Commission affirmed Wasco County's conclusion that a second mainline track would adversely affect treaty rights to fish at usual and accustomed fishing places and would also affect the habitat of treaty-protected fish.[121] Union Pacific challenged this decision in the Oregon Court of Appeals, whose decision is pending as of this writing.[122]

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[118] *Id*. at 121–22.

[119] Union Pacific R.R. Co., Notice of Appeal, Union Pacific R.R. Co. v. Wasco County, Columbia River Gorge Comm'n No. COA-16-01 (filed Dec. 9, 2016); Friends of the Columbia Gorge, et al., Notice of Appeal, Friends of the Columbia Gorge, et al. v. Wasco County, Columbia River Gorge Comm'n No. COA-16-02 (filed Dec. 9, 2016). 16 U.S.C. § 544m(a)(2) requires persons adversely affected by the decision of a county relating to the implementation of the Columbia River Gorge National Scenic Area Act to appeal the county decision to the Columbia River Gorge Commission.

[120] Final Opinion and Order, *Union Pacific R.R. Co. v. Wasco County Board of Commissioners*, Col. R. Gorge Comm'n Nos. COA-16-01 & COA-16-02 at 9–24 (Sept. 8, 2017) [hereinafter Final Opinion and Order]. For additional discussion, see Dayna Jones, *The Gorge Commission: An Adequate Forum for States, Counties, Tribes, and the Railroads Operating in the Columbia River Gorge*, 8 WASH. J. ENVT'L L. & POL'Y 80 (2018). After filing its appeal to the Gorge Commission, Union Pacific sought a federal court order enjoining Wasco County and the Gorge Commission from applying the National Scenic Area standards. The court dismissed the case for failure to join the tribes as necessary parties as required by Rule 19. The court concluded that since the case involved treaty rights, the tribes were necessary parties but had sovereign immunity, and the court could not "in equity and good conscience, proceed without them." Union Pacific RR Co. v. Runyon, 320 F.R.D. 245, 249 (D. Or. 2017). As of this writing, appeal of that dismissal is pending in the Ninth Circuit. Union Pacific RR Co. v. Runyon, No. 17-35207 (9th Cir. filed Mar. 14, 2017).

[121] Final Opinion and Order, *supra* note 120, at 25–47 (concluding that the county's decision was supported by substantial evidence).

[122] Petition for Judicial Review, Union Pacific R.R. Co. v. Wasco County Board of Commissioners, Columbia R. Gorge. Comm'n No. A166300 (Or. Ct. App. filed Nov. 7, 2017).

The tribes' participation in this proceeding was key to Wasco County's evidentiary findings. County officials spoke with staff from the tribes, and the chairmen of two tribes wrote letters and gave testimony about the use of the area and the presence of historic scaffolding not visible from the shore.[123] Only tribal fishers would know about this evidence.

VII. ELIMINATING BARRIERS TO TRIBAL PARTICIPATION

The tribes' decisions to raise treaty rights claims in state proceedings are understandably difficult given the states' historical treatment of the treaties and the tribes' concern for backsliding on current judicial interpretation of the treaties.[124] The recent permit denials discussed above may give tribes some indication that at least some state as well as federal and local regulators may be more open to treaty rights claims than in the past. However, Washington State's appeal and Oregon's amicus participation in the culverts case[125] suggest that Washington and Oregon have yet to fully embrace the tribes' understanding of the rights the tribes reserved in their treaties.

Once a tribe decides to raise a treaty rights claim in an administrative adjudicatory proceeding, it must supply evidence to support that claim. While this requirement may seem to be a relatively simple matter, it can be a hard decision and impose a barrier to tribal participation in administrative proceedings. Tribal members consider their fishing sites to be proprietary and may be reluctant to share information with the public. In the past, tribal members have experienced interference, physical harassment, damage to their platforms and fishing gear, and use of their fishing areas by others.[126] Understandably, tribal members may be unwilling to reveal where and when they fish.[127]

Tribes have faced a similar situation concerning sacred sites (which the federal government has pledged to protect and ensure continued tribal

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123 *Id*. at 40.

124 *See, e.g.*, *supra* notes 1–8 and accompanying text.

125 *See supra* notes 11–17 and accompanying text.

126 *See, e.g.*, Coyote Island Terminals, LLC, Oregon Off. Of Admin. Hrgs. Case No. 1403883 and 1403884 (June 30, 2015) (Declaration of Wilbur Slockish, Jr.).

127 *Id*.

access)[128] because information concerning their location is publicly available under the Freedom of Information Act and the Supreme Court has ruled that this information must be disclosed even to a party who is adverse to a tribe in litigation.[129] Oregon and Washington public records disclosure laws protect site-specific archaeological information,[130] but they contain no express statutory exemptions from disclosure of sites used for tribal members exercising their treaty reserved rights.

How can a tribe simultaneously provide evidentiary support for a treaty access and fishing rights claim if tribal members wish to keep private their location and manner of fishing? This issue arose in the Union Pacific case, discussed above.[131] There were no publicly identified treaty fishing sites within the project boundary in that case.[132] The record evidence concerning access and use of the shoreline adjacent to the railroad expansion project was from a tribal staff person who stated that "historic scaffolding not visible from the shore may be present in the vicinity of the development site," which two tribal council chairmen echoed and expanded in letters and testimony.[133] But no tribal fisher submitted a declaration or other testimony stating that he or she crossed the rail tracks to access a fishing site within the project area.

In affirming Wasco County's decision that the project would adversely affect reserved treaty fishing rights, the Gorge Commission's rules required it to find that the decision was supported by "substantial evidence in the whole record."[134] The Gorge Commission's rules do not define "substantial evidence," but the Gorge Commission uses the

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[128] Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996) (directing government agencies, where practicable, to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.").

[129] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) (rejecting a tribal and government argument that documents that the tribes submitted to the government were exempt from disclosure due to the federal trust relationship with the tribes). *See* JUDITH V. ROYSTER, ET AL., NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 41–43 (4th ed. 2018) (discussing Executive Order 13007 on Sacred Sites, 61 Fed. Reg. 26,771 (1996), and other case law).

[130] OR. REV. STAT. § 192.345(11) (2017) (exempt "unless the public interest requires disclosure in the particular instance."); WASH. REV. CODE § 42.56.300 (2006).

[131] *See supra* Part VI.

[132] Final Opinion and Order, *supra* note 120, at 40. Union Pacific cited to a Columbia River Inter-Tribal Fish Commission map of in-lieu fishing sites on the Columbia River.

[133] *Id*.

[134] Col. R. Gorge Comm'n Rule 350-60-220(1)(f), http://www.gorgecommission.org/images/uploads/rules/Commission_Rule_350-60_20110501.pdf.

common "reasonable person" standard.[135] In the Union Pacific case, the Gorge Commission first observed that the National Scenic Area regulations that protect cultural resources and treaty rights intend "for local governments to follow the comments, recommendations, and concerns of the treaty tribes unless the local government can justify otherwise."[136] The Gorge Commission then decided that in the context of evidence of the existence of treaty rights, "[e]ssentially the 'reasonable person' standard for determining substantial evidence must consider the 'Indian world view.'" [137] Because tribal fishers have reason not to disclose their fishing locations and practices in detail,[138] the reasonable person from a tribal perspective does not require such disclosure where there is otherwise credible information in the administrative record. The Gorge Commission consequently concluded that Wasco County's decision was supported by substantial evidence because

> Wasco County explained that there was evidence of treaty fishing in the project area and vicinity of the project, and cited the tribes' comments and testimony, which identified their treaty-reserved fishing right and the effect that a second mainline would have on that right immediately by impacting access to the Columbia River . . . .[139]

By defining the "reasonable person" to include a tribal perspective, the Gorge Commission concluded that a different form (and perhaps quantum) of evidence than would normally be considered "substantial evidence"[140] satisfied the reasonable person standard. In effect, by concluding that Wasco County could rely on evidence other than tribal members revealing their access, fishing sites, and fishing practices, the

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[135] *See* Final Opinion and Order, *supra* note 120, at 35 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (substantial evidence is "more than a mere scintilla" and "such evidence as a reasonable mind might accept as adequate to support a conclusion."); OR. REV. STAT. § 183.482(8)(c) (2017) ("Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.").

[136] Final Opinion and Order, *supra* note 120, at 38.

[137] *Id*. The term "Indian world view" originated in a law review article describing the Gorge Commission's intent in adopting its cultural resource and treaty rights protection regulations. The author of the article, a member of the Gorge Commission at the time, wrote it nearly concurrently with the Gorge Commission's adoption of the Columbia River Gorge National Scenic Area regulations. *Id*. at 36–37 (citing Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741 (1993)).

[138] *See supra* note 126 and accompanying text.

[139] Final Opinion and Order, *supra* note 120, at 46.

[140] For example, affidavits from tribal members about their fishing locations and practices. *See, e.g.*, *supra* note 126.

Gorge Commission recognized that the reasonable person standard in the context of evidence of treaty use should include tribal members' concerns for their safety, property, and traditions. Three factors make this work. First, as noted above, the National Scenic Area regulations require decision makers to rely on evidence from the tribes of their treaty rights unless the decision makers can justify otherwise—in other words, evidence from the tribes creates a rebuttable presumption that a treaty right exists and would be adversely affected by a project. Second, the National Scenic Area Act uses a "no effect" standard for treaty rights in the National Scenic Area.[141] Relying on evidence other than tribal members revealing their access sites, fishing sites, and fishing practices better ensures permit decisions and project proposals would have no effect on treaty rights. Third, decision makers in the National Scenic Area must trust that the tribes are providing accurate information and are not merely aiming to obstruct proposed projects.[142]

In contrast to the Gorge Commission's consideration of the tribal perspective as part of the reasonable person standard, the traditional means of protecting treaty rights information in adjudicatory proceedings is by protective order. While a protective order could protect such information, such an order is hard to obtain in an administrative hearing, and tribal members must submit evidence of their treaty fishing use without knowing whether the state can keep it confidential. For example, in the Coyote Island Terminal case discussed above,[143] the administrative law judge refused to issue an order protecting public disclosure of the identities of tribal fishers and their fishing activities, reasoning,

> the Tribes and tribal members previously submitted fishing activity to [the Department of State Lands] in response to requests for public input on [Coyote Island Terminal's] permit application without any claim or expectation of confidentiality. [The Department of State Lands] and the Tribes have made no showing that, in the context of this contested case, disclosure of tribal fishing information, in particular the identities of tribal

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[141] 16 U.S.C. § 544o(a)(1). This standard differs from the Army Corps of Engineers' "de minimis" effect standard for treaty rights. *See supra* note 101. Indeed, the Corps issued a nationwide permit verification authorizing Union Pacific to discharge fill material into the Columbia River to construct the project after concluding that the project would have only *de minimis* effect on treaty rights. Army Corps of Engineers, Memorandum for Record at 12–15, Application No. NWP-2014-364 (Nov. 4, 2016).

[142] Final Opinion and Order, *supra* note 120, at 38. The Gorge Commission noted that concerns the tribes would use the rebuttable presumption to "stall development in the Gorge" never materialized. *Id.* at 38 n.18.

[143] *See supra* Part IV.

> fishers, would lead to annoyance, embarrassment, or oppression of these potential witnesses.[144]

In contrast to the uncertainty of safeguarding treaty fishing locations and activities through a protective order, as demonstrated in the Coyote Island Terminal case, the Union Pacific case shows that decision makers can rely on more generic evidence than site-specific and activity-specific testimony of individual tribal members. As of this writing, Union Pacific's appeal of the Gorge Commission's decision is pending at the Oregon Court of Appeals,[145] so it is too early to know whether that court will affirm that using the tribal perspective as part of the reasonable person standard, and that testimony from tribal staff and tribal leaders rather than tribal fishers is a sufficient quantum of evidence. Similarly, it is too early to know whether the Gorge Commission's approach to protecting site-specific and activity-specific treaty rights use may encourage tribes to increase their participation in other adjudicatory processes. But if the Commission's interpretation were adopted by other agencies, it would eliminate one barrier to tribal participation in the administrative process and perhaps provide a new paradigm for ensuring the protection of cultural sites that are known only to the tribes and their members.[146]

CONCLUSION

The permit denials described in this Article were certainly influenced by the active participation of Northwest tribes in the administrative processes governing energy permit decisions.[147] The tribes vigorously

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[144] Ruling on Dep't of State Lands' Motion for Protective Order No. 1403883 at 3, Or. Off. of Admin. Hearings. (Feb. 11, 2016).

[145] *See* Petition for Judicial Review, *supra* note 122.

[146] *See, e.g.*, Testimony of Elizabeth Sanchey, Tesoro Savage Transcript, *supra* note 22, at 3953:16–19 (testifying that she used "cultural monitors" to observe clean-up efforts at the Mosier spill (*see supra* note 112 and accompanying text)); *Id*. at 3959:68 (explaining that it was necessary because, "Often we don't publish or make people aware of our sites because of looting or damages. It's a way of protection.").

[147] *See* Sarah Tory, *Northwest Tribes are a Growing Obstacle to Energy Development*, HIGH COUNTRY NEWS (May 27, 2015), https://www.hcn.org/articles/in-the-pacific-northwest-tribes-block-new-energy-development-1 (remarking on the change from "a situation where (tribes) feel powerless to one where companies are very worried that they're not able to build these terminals."); *see* Kirk Johnson, *Tribes Add Potent Voice Against Plan for Northwest Coal Terminals,* N.Y. TIMES (Oct. 11, 2012), https://www.nytimes.com/2012/10/12/us/tribes-add-powerful-voice-against-northwest-coal-plan.html?hpw (discussing how tribal pressure acts differently upon the regulatory system than blanket environmental concern).

opposed coal exports as active participants in these processes.[148] In some of the proceedings, tribal leaders submitted an abundance of evidence to regulatory bodies.[149] Early on in the processes, in 2012, the Columbia River Inter-Tribal Fish Commission, comprised of the four tribes with treaty fishing rights on the Columbia River, officially opposed the coal terminals.[150] The Affiliated Tribes of Northwest Indians, an organization of fifty-seven tribes from seven states, passed a resolution requesting thorough environmental assessments of all proposed coal terminals in the Northwest.[151] The success that the tribes had in opposing the fossil-fuel export projects discussed in this study should encourage more active participation in administrative process in the future.

Washington State's SEPA process not only gave the tribes an opportunity to participate in the permit decisions but also required the state to anticipate the likely effects of the projects on treaty rights and salmon habitat. Further, SEPA authorized the state to deny permits based on the state's substantive environmental policy to avoid or minimize environmental damage in light of the state's recognition of the "fundamental and inalienable right to a healthful environment" and its role

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[148] Tony Schick, *Rejection for Longview Project Spells Doom for Coal Exports Through the Northwest,* OPB: EARTHFIX, (Sept. 26, 2017, 2:34 PM) https://www.opb.org/news/article/washington-denies-longview-coal-water-quality-permit.

[149] *See, e.g.*, Letter from Tim Ballew II, Lummi Indian Business Council, to Colonel Bruce A. Estok, District Engineer, U.S. Army Corps of Engineers (July 30, 2013), http://www.coaltrainfacts.org/docs/Lummi-letter-to-USACOE.pdf (espousing the Lummi's "unconditional and unequivocal opposition to the proposed Gateway Pacific Terminal"). The tribes referred to coal as "the black death." Lynda V. Mapes, *Northwest Tribes Unite Against Giant Coal, Oil Projects,* SEATTLE TIMES (Jan. 16, 2016), https://www.seattletimes.com/seattle-news/environment/northwest-tribes-unite-against-giant-coal-oil-projects (discussing NW tribes banding together to oppose the projects and noting that tribes refer to coal as "the black death"); *See* Johnson, *supra* note 147.

[150] *See e.g.,* Clark Williams-Derry, *Tribes vs. Coal: Native Americans act to protect fish and sacred places from coal exports*, SIGHTLINE INSTITUTE (Oct. 18, 2012), https://www.sightline.org/2012/10/18/tribes-vs-coal. The mission is to manage Columbia River fisheries and to protect treaty rights through the "unified voice" of its members: the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation. *See* Columbia River Inter-Tribal Fish Commission, *CRITFC Mission & Vision*, https://www.critfc.org/about-us/mission-vision (last updated 2018); CRITFC, *Member Tribes Overview*, https://www.critfc.org/member_tribes_overview (last updated 2018).

[151] *Res. No. 12-53: Calling For Full, Transparent Environmental Review of the Port of Morrow Proposal, Consultations, and Regional Review of All Six NW Coal Export Proposals*, AFFILIATED TRIBES OF NW. INDIANS (Sept. 24-27, 2012), http://www.atnitribes.org/sites/default/files/res_12_53_with%20attachment.pdf.

as trustee of the environment for future generations.[152] The tribes were well positioned to ensure that the state in fact fulfilled these duties.

No similar environmental process or obligations apply in Oregon, which lacks a state environmental policy act, although the state did provide the tribes with an opportunity to participate in the permit proceedings. Moreover, both the Wasco County Board of County Commissioners and the interstate Columbia River Gorge Commission cited adverse effects on treaty fishing rights in denying Union Pacific's proposed track expansion.[153]

Finally, the federal courts have adopted precautionary standards in judging the suitability of activities affecting tribal fishing rights. First, actions that interfere with tribal access to historic fishing sites may be enjoined even if there is no discernable substantial effect on tribal harvests.[154] Second, where there is no access obstruction, actions that produce a greater than *de minimis* adverse effect may also be enjoined—a risk-averse standard.[155] Perhaps even more importantly, the federal Army Corps of Engineers is implementing that standard in its permit decisions.[156]

The Gorge Commission went a step further, however, by adopting an interpretation of a "reasonable person" standard for determining whether an adjudication was based on "substantial evidence" that incorporated the tribal concerns about producing specific site and manner of fishing evidence.[157] By accepting testimony of use and practice without location or other specifics, the Gorge Commission eliminated one barrier to tribal participation. Although courts employ an interpretative canon of construing treaties as tribes would understand and resolving ambiguities in their favor,[158] an administrative entity adopting an Indian world view in treaty rights cases is quite unusual and perhaps a model for other state and federal agencies to follow.

All of these developments augur well for treaty fishing rights in the twenty-first century. Coupled with the Supreme Court's affirmation of the Ninth Circuit's decision in the culverts case,[159] these cases suggest that

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[152] WASH. REV. CODE § 43.21C.020(3) (2009).

[153] *See supra* notes 120, 139 and accompanying text.

[154] *See supra* note 102 and accompanying text.

[155] *Id. But see supra* note 141 and accompanying text (Columbia River Gorge National Scenic Area Act requires "no effect").

[156] *See supra* notes 102, 141, and accompanying text.

[157] *See supra* notes 134–42 and accompanying text.

[158] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1) (Nell Jessup Newton ed., 2017); Royster, et al., *supra* note 129, at 138.

[159] *See supra* Part I.

administrators, even state administrators long antagonistic toward treaty rights (and even in the state that recently contested the culverts case all the way to the Supreme Court) seem to have embraced treaty fishing rights, at least in the permit decisions discussed in this Article. If they are indeed a harbinger of the future in which the democratic branches of government affirmatively protect treaty rights, the beneficiaries will not only be the salmon and their habitat—the fundamental *res* of the Stevens Treaties of the 1850s—but also tribal economies and tribal culture.[160]

[160] Worth noting is that the beneficiaries of salmon habitat protection are not merely tribal harvesters but all who fish in the Pacific Northwest for commerce or for sport because the Stevens Treaties recognize only "in common" rights, shared with the non-tribal population. *See supra* note 11 and accompanying text on the treaty language.