

Tribal Treaty Rights Now Driving Environmental Law Developments

Environmental lawyers increasingly acknowledge the importance of Native American issues to their practice. Nowhere is that more apparent than with respect to tribal treaty rights. Courts and advocates are grappling with the environmental dimensions of tribal reserved hunting and fishing rights; controversies continue to brew over whether NEPA reviews of energy projects have adequately considered impacts on tribal rights and resources; and federal agencies seek to harmonize modern environmental statutes with centuries-old Indian law treaties and other agreements.

From 1778 to 1871, the United States' relations with American Indian tribes were conducted largely through the treaty-making process, in which many tribes agreed to cede millions of acres of their homelands in return for recognition of unique rights in land and natural resources and other federal law protections. Tribal treaties cover a wide variety of subjects, including in many cases reserved rights to hunt, fish, and gather

on land both retained and given up by tribes. Senate-ratified treaties remain "the supreme law of the land," with the same legal force as federal statutes.

The interplay between tribal treaties and environmental law was brought to life in a recent Supreme Court argument in *United States v. Washington*. The so-called "Culverts Case" addresses whether and to what extent the "Stevens Treaties," which 21 Puget Sound Indian tribes negotiated with territorial governor Isaacs Stevens in the 1850s, included a promise to protect salmon habitat from environmental degradation. In particular, the case asks whether the tribes were guaranteed not only the right to one-half the harvestable salmon run at their "usual and accustomed"

fishing grounds, but also the right to insist that the state repair and replace culverts under state roads that have over the decades obstructed salmon passage and access to spawning streams — a significant factor in the drastic decline of fish populations.

Federal District Judge Ricardo Martinez sided with the tribes, imposing a costly injunction requiring the state to repair and replace hundreds of culverts over the next 17 years. The court of appeals affirmed, questioning whether the tribes could enjoy a meaningful fishing right in the absence of any obligation to protect the habitat on which the fish depend — finding that the Indians would not have understood Governor Stevens to make "such a cynical and disingenuous promise."

At the Supreme Court, the justices traded competing interpretations of the treaty. Ruth Bader Ginsburg, for example, asked whether the fishing right could simply be construed as an anti-discrimination provision, requiring Indians to be treated no worse than non-Indians. Neil Gorsuch, by contrast, suggested that the "point of [the] treaty . . . would have been to freeze in time certain rights" to take fish "and to ensure their existence in perpetuity." Practitioners are watching for the decision, as the standard by which treaty fishing rights are defined could have implications for myriad other environmental issues affecting salmon habitat.

Disputes over the environmental implications of tribal fishing rights are not limited to the West. For example, EPA and Maine are locked in a legal battle over the federal agency's disapproval under the Clean Water Act of the state's proposed water quality standards for tribal waters. EPA contends that the standards must be adequate to protect high-fish-consuming tribal

Senate-approved treaties with tribes are the "supreme law of the land," akin to statutes



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populations with sustenance fishing rights under the Maine Indian Claims Settlement Act. The state argues that any such tribal fishing rights are outside the ambit of the Clean Water Act. Other states with similar issues see this as a test case for whether the courts will uphold EPA's efforts to harmonize environmental statutes with federally protected tribal rights.

Indian law is also having an impact on issues relating to energy development, as tribes and environmental groups challenge pipelines and other energy transmission and transportation projects that cross through or near tribal lands and communities. The Dakota Access Pipeline controversy may be the most high-profile example. While the Standing Rock Sioux Tribe has not been successful in halting construction or operation of the project, District Court Judge James Boasberg caught the attention of NEPA lawyers when he held that the Army Corps' environmental reviews were deficient to the extent they failed adequately to consider impacts on tribal fishing rights, hunting rights, or environmental justice.

EPA issued its first treaty rights guidance in 2016. An adjunct to the agency's tribal consultation policy, the guidance is intended to help ensure consideration of tribal rights, where relevant, across the agency's programs: "EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so." If nothing else, the guidance should convince environmental practitioners that tribal issues are here to stay.