
CHAPTER TWO

INDIGENOUS INTERPRETATIONS: INVOKING THE THIRD INDIAN CANON TO COMBAT CLIMATE CHANGE

“As long as the rivers run, as long as the tide flows, and as long as the sun shines, you will have land, fish and game for your frying pans, and timber for your lodges,” Washington Territorial Governor Isaac Stevens reassured the signatories of the 1855 Treaty of Point Elliott.¹ The Duwamish, Suquamish, Snoqualmie, Snohomish, Lummi, Nooksack, Skagit, Swinomish, and other allied tribes’ delegates took him at his word when formulating the agreement.² Yet today, in what is now Washington State, climate change threatens to dry rivers, raise tides, burn timber, and deprive Indigenous communities of ancestral lands and subsistence sources.³

Climate conditions disproportionately impact Native nations, especially in coastal regions like the Pacific Northwest.⁴ Indigenous peoples are turning to traditional management practices to revive struggling ecosystems.⁵ The Swinomish Tribe, sitting on low-lying coastal land it has inhabited for ten thousand years, calls itself the People of the Salmon.⁶ But the centerpiece of its culture is in danger; due to warming waters,

¹ AS LONG AS THE RIVERS RUN (Survival of American Indians Association 1971), <https://archive.org/details/AsLongAsTheRiversRun> [<https://perma.cc/2WZB-MFNU>].

² See generally Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 [hereinafter Treaty of Point Elliott].

³ See Jodi Helmer, *As the Ocean Encroaches, This Washington State Tribe Is Building Its Next Chapter*, NAT. RES. DEF. COUNCIL (Mar. 30, 2020), <https://www.nrdc.org/stories/ocean-encroaches-washington-state-tribe-building-its-next-chapter> [<https://perma.cc/2SGZ-GZ2X>]; see also *Quinault Climate Change Program*, QUINAULT DIV. NAT. RES., <http://qlandandwater.org/departments/environmental-protection/climate-change> [<https://perma.cc/NPH8-AKD6>].

⁴ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 1 (Jan. 26, 2021), *reprinted in* 86 Fed. Reg. 7491 (Jan. 29, 2021) (“The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans.”); Rachel Treisman, *How Loss of Historical Lands Makes Native Americans More Vulnerable to Climate Change*, NPR (Nov. 2, 2021, 7:00 AM), <https://www.npr.org/2021/11/02/1051146572/forced-relocation-native-american-tribes-vulnerable-climate-change-risk> [<https://perma.cc/MMA8-253M>] (discussing a multiyear study showing that as a result of their displacement and the loss of ninety-nine percent of their lands, Native Americans live in areas that are “more exposed to climate change hazards like extreme heat and decreased precipitation”).

⁵ See Nicola Jones, *How Native Tribes Are Taking the Lead on Planning for Climate Change*, YALE ENV’T 360 (Feb. 11, 2020), <https://e360.yale.edu/features/how-native-tribes-are-taking-the-lead-on-planning-for-climate-change> [<https://perma.cc/9T57-R2KR>].

⁶ See Jim Morrison, *An Ancient People with a Modern Climate Plan*, WASH. POST (Nov. 24, 2020), <https://www.washingtonpost.com/climate-solutions/2020/11/24/native-americans-climate-change-swinomish> [<https://perma.cc/VPW6-PUWX>].

the salmon season has shrunk from eight months to a few days.⁷ To fight the further degradation of the coastal habitat, the Tribe has invested in restoring tidelands and channels, planting trees along streambeds to cool waters, cultivating native plants to manage coastal flooding naturally, and restoring reefs to reduce ocean acidification.⁸ Even with these efforts, experts estimate that it could take ninety years for their fisheries to recover.⁹ This climatological innovation illustrates Indigenous resilience;¹⁰ however, tribes alone should not bear the burden of these mitigation efforts.

As climate conditions worsen, scholars and tribal leaders have proposed using treaty-based litigation to spur remediation of tribal lands.¹¹ Some have highlighted how tribes are both adapting to climate change¹² and fighting to maintain treaty rights as climate change forces migration away from treaty homelands.¹³ Others have observed that tribes are well positioned to bring these claims because “tribal treaty rights claims may face fewer issues related to redressability, such as manageable standards of judicial review and concerns about the political question doctrine, as compared to other climate change suits.”¹⁴ Several have

⁷ *Id.*

⁸ See *id.*; Swinomish Indian Tribal Cmty., *Fisheries*, SWINOMISH CLIMATE CHANGE INITIATIVE (2019), <https://www.swinomish-climate.com/fisheries> [<https://perma.cc/8SA3-GFZU>].

⁹ Morrison, *supra* note 6.

¹⁰ See generally, e.g., NW INDIAN FISHERIES COMM’N, CLIMATE CHANGE AND OUR NATURAL RESOURCES: A REPORT FROM THE TREATY TRIBES IN WESTERN WASHINGTON (2016).

¹¹ See, e.g., Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 917 (2016) (“Today, an environmental challenge looms over Indian country — climate change — prompting one to wonder whether such tribally revered text, treaties, can be applied in new ways to provide a legal avenue with the potential to alleviate the impact of climate change.”); Alex Brown, *Once-Ignored Promises to Tribes Could Change the Environmental Landscape*, THE PEW CHARITABLE TRS.: STATELINE (Dec. 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/01/once-ignored-promises-to-tribes-could-change-the-environmental-landscape> [<https://perma.cc/4P9W-5SUB>].

¹² See, e.g., Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 528 (2015).

¹³ See, e.g., Hope Babcock, *Here Today, Gone Tomorrow — Is Global Climate Change Another White Man’s Trick to Get Indian Land? The Role of Treaties in Protecting Tribes as They Adapt to Climate Change*, 2017 MICH. ST. L. REV. 371, 371; Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179, 179 (2020).

¹⁴ Noelia Gravotta, Note, *A Great Nation Keeping Its Word: The Role of Tribal Treaty Rights in Climate Change Litigation*, 29 N.Y.U. ENV’T L.J. 118, 120 (2021) (footnote omitted); see also Evan Neustater, Note, *Litigating for the Homeland: An Indian Treaty Framework to Climate Litigation in the Wake of Juliana*, 10 MICH. J. ENV’T & ADMIN. L. 303, 305 (2020) (arguing that the federal government’s trust responsibility to tribes makes them better plaintiffs in climate litigation); Mary Annette Pember, *Treaties Offer New Aid in Environmental Fights*, INDIAN COUNTRY TODAY (June 2, 2021), <https://indiancountrytoday.com/news/treaties-offer-new-aid-in-environmental-fights> [<https://perma.cc/JM6P-G2L5>] (“[T]reaties have impact far beyond Native communities. Treaties guarantee protections of the highest legal order for the health and safety of the environment, natural resources, land and water — protections that benefit the entire community.”).

argued the federal government must act proactively to reduce the effects of climate change on Indigenous homelands to fulfill its federal trust obligation as a guardian to tribal interests.¹⁵ And a few have pointed to litigation from tribes in Washington State as illustrating that state and federal governments must affirmatively protect treaty habitats.¹⁶ Despite academic interest in this area, treaty-based litigation to combat the effects of climate change remains relatively untested.¹⁷

Another strand of scholarship focusing on interpretative theories in American Indian law has identified the growing utility of the Indian canons of construction to treaty-based litigation.¹⁸ The Supreme Court established these canons in the nineteenth century.¹⁹ The purpose of these interpretive rules is to ensure that “[t]he language used in treaties with the Indians should never be construed to their prejudice.”²⁰ While the U.S. Supreme Court has applied the Indian canons since the 1800s, its adherence to them has waxed and waned over two centuries.²¹ Following Justice Gorsuch’s arrival, the Court has more explicitly

¹⁵ See, e.g., Robert T. Anderson, Commentary, *Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENV’T L. & POL’Y 473, 475–76 (2016); see also Logan Cooper, *Rising Tides, Rising Obligations: Enforcing Tribal Trust Responsibility for Climate Change Mitigation*, 9 ARIZ. J. ENV’T L. & POL’Y 62, 87 (2019) (arguing the trust responsibility should compel equitable relief to tribes for climate change’s effects).

¹⁶ See, e.g., Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 5 (2017); Nathan Frischkorn, Note, *Treaty Rights and Water Habitat: Applying the United States v. Washington Culverts Decision to Anishinaabe Akiing*, 11 ARIZ. J. ENV’T L. & POL’Y 34, 36 (2020).

¹⁷ See Anna V. Smith, *How Do Tribal Nations’ Treaties Figure into Climate Change?*, HIGH COUNTRY NEWS (May 14, 2019), <https://www.hcn.org/articles/tribal-affairs-how-do-tribal-nations-treaties-figure-into-climate-change> [<https://perma.cc/VQE4-8MVU>] (featuring Robert Anderson, now the Biden Administration’s Solicitor for the Department of the Interior, discussing how tribes could use treaty-based litigation to shift public opinion and force the federal government to combat climate change in Indigenous spaces); see also Press Release, U.S. Dep’t of Interior, Robert Anderson Nominated as Solicitor of the Department of the Interior (Apr. 7, 2021), <https://www.doi.gov/news/robert-anderson-nominated-solicitor-department-interior> [<https://perma.cc/DB58-7LUM>].

¹⁸ See Lauren King, Essay, *The Indian Treaty Canon and McGirt v. Oklahoma: Righting the Ship*, 56 TULSA L. REV. 401, 402–03 (2021); Sammy Matsaw et al., *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe’s Understanding*, 50 ENV’T L. 415, 419–20 (2020); Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM (forthcoming 2022) (manuscript at 1–2), <https://ssrn.com/abstract=3813569> [<https://perma.cc/UYJ8-R47P>]; Bryan H. Wildenthal, *Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update*, 6 AM. INDIAN L.J. 98, 99 (2017); Ray Martin, Note, *Justice Scalia and Tonto Fistfight in Heaven*, 5 AM. INDIAN L.J. 696, 697–99 (2017).

¹⁹ See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2017).

²⁰ Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

²¹ Skibine, *supra* note 18 (manuscript at 12–15); cf. Samuel E. Ennis, *Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 623 (2011) (“Rather, the Court has selectively employed the canons in order to sequester tribal rights within ‘traditional’ Indian activities such as hunting and fishing, areas where the Court is comfortable with Indian self-government.”).

embraced the third canon of interpreting treaty language in the way that Indigenous peoples would have understood it at the time of signing.²² The result has been resounding victories for tribes.²³ While publications about treaties and climate change have discussed the canons, they have not extensively examined the third canon and its utility to climate change suits.²⁴ All the canons are crucial in treaty-based litigation, but this Chapter focuses on the third as it especially empowers Indigenous perspectives and emphasizes Native nations' sovereignty in making these agreements.²⁵ This approach may yield better litigation outcomes for tribes than pursuing causes of action under federal law that do not foreground Indigenous voices.

This Chapter argues that by showing courts how tribes would have understood treaty language at the time of signing, tribes can successfully sue to enforce treaty provisions that may blunt the worst impacts of climate change on traditional lifeways. Because many tribal hunting, fishing, and gathering resources are disappearing due to environmental degradation, this interpretive canon may be a potent tool for tribes in climate change litigation. By underscoring Indigenous understandings of these resources' preservation in perpetuity, treaty-based litigation may force states and the federal government to protect this wildlife, even as it faces extinction fueled by climate change. Tribes may seek government removal of man-made structures that harm the environment and support for state-tribal and federal-tribal co-management of resources, among other remedies. Ultimately, by integrating Indigenous worldviews into legal arguments via this canon, tribes may convince federal courts to vindicate the rights of nature for the first time.

Section A gives background on treaty-making with Native nations, tribal litigation against states and the federal government, and the Indian canons of construction. Section B shows how the third canon played a critical role in the long-running *United States v. Washington*²⁶ (*Culverts Case*) litigation and Supreme Court treaty cases, which provide

²² See Matsaw et al., *supra* note 18, at 418–20 (arguing that the Rehnquist Court retreated from the Indian canons but that the Roberts Court has shown renewed interest in the Indian canons).

²³ See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (upholding the Crow Tribe's 1868 federal treaty right to hunt).

²⁴ See, e.g., Gravotta, *supra* note 14, at 131–32 (“[T]ribal claims would be bolstered by the ‘Indian canons’ . . . [because] these canons can read ambiguity and uncertainty to favor tribal litigants’ claims, where non-Indian litigants may have been disfavored.”); Warner, *supra* note 11, at 933 (“In the context of climate change, however, the question becomes whether the treaty language requires the federal government to take affirmative action to protect fisheries in the region from the impacts of climate change. . . . Based on the importance of fish to many tribes both historically and contemporaneously, it seems reasonable that the tribes negotiating for such provisions would have assumed that fisheries would exist in perpetuity.”). These assertions deserve greater unpacking to describe how the third canon leads to understandings of resource protection in perpetuity.

²⁵ See *infra* ch. II, section A.3, pp. 1574–75 (discussing the other canons).

²⁶ 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

precedents for tribes' climate change suits. Section C surveys how tribes have brought climate-related suits against state governments and the federal government in the past two years. It suggests that tribes should explicitly invoke the third canon in suits addressing megafires, drought-stricken rivers, and fossil fuel pollution plaguing tribal lands. Section D addresses counterarguments and illustrates how this canon will effectively defend tribes' rights, even as available resources are rapidly disappearing due to climate change.

A. Background

1. *Native Nations, Treaty-Making, and Sovereign Agreements.* — Between 1778 and 1868, the United States ratified approximately 368 treaties with Native nations.²⁷ These agreements were between sovereigns — negotiated by federal commissioners of an American empire intent on expansion and tribal representatives seeking to shield their people and lifeways from settler violence.²⁸ Tribes ceded millions of acres in exchange for the federal government's guarantee of tribal self-government,²⁹ as well as hunting, fishing, and gathering rights. Under the U.S. Constitution, these treaties are the "supreme Law of the Land," and courts are bound to uphold their terms.³⁰ There are 574 federally recognized tribes and hundreds of state-recognized tribes, many of which were parties to these documents ratified by Congress.³¹

But some tribes do not have these documents.³² Because formal congressional treaty-making with tribes ended in 1871, many Native nations instead procured executive agreements or sought legislation to

²⁷ Mark G. Hirsch, *1871: The End of Indian Treaty-Making*, AM. INDIAN, Summer/Fall 2014, at 40, 41, <https://content.yudu.com/web/1q1ji/oA1r2jl/nmai-summerfall-2014/html/index.html> [<https://perma.cc/RNP2-6DKY>].

²⁸ See *id.* at 41, 44.

²⁹ *Tribal Governance*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance> [<https://perma.cc/PD2D-VZ6V>].

³⁰ U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (stating that the Constitution "directs that federal treaties and statutes are the 'supreme Law of the Land'" (quoting U.S. CONST. art. VI, cl. 2)).

³¹ NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS & THE UNITED STATES: AN INTRODUCTION 11 (2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [<https://perma.cc/LCF8-SWVR>].

³² For instance, Congress never ratified the treaties that it made with California tribes. *Who We Are*, U.S. DEP'T OF INTERIOR, <https://www.bia.gov/regional-offices/pacific/who-we-are> [<https://perma.cc/336D-UQRG>]. The U.S. government recognized Alaska Native communities under their own unique regional and village corporations system. *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2435 (2021). Tribes without federal recognition have significantly less recourse through litigation. See Debra Utacia Krol & Allison Herrera, *Environmental Justice for Non-recognized Tribes*, N. CAL. PUB. MEDIA (2020), <https://norcalpublicmedia.org/environment/environmental-justice-for-non-recognized-tribes> [<https://perma.cc/N8C2-PW3L>].

protect tribal sovereignty for the last 150 years.³³ The move away from ratifying treaties was characteristic of not just federal Indian law but also international law in the late nineteenth and especially twentieth centuries, when executive agreements and legislation supplanted the old form of treaty-making.³⁴ Recently, some courts have refused to apply the Indian canons of interpretation to these statutes.³⁵ Yet this ignores the profound role Native nations had in shaping these agreements by legislation.³⁶ Courts should continue to apply the Indian canons to safeguard the sovereign interests of tribes in these more modern cases of agreement-making, which the Supreme Court has held to have the same status as treaties.³⁷

2. *Litigation Possibilities.* — As these agreements constitute federal law, the federally recognized tribes — or the United States on behalf of tribes — may litigate to enforce treaty rights.³⁸ The United States can sue states that infringe on treaty rights in federal court and has done so on numerous occasions.³⁹ While tribes typically cannot sue states,⁴⁰ they can ask states to waive their sovereign immunity, request that the federal government sue on their behalf, or seek prospective equitable relief against a state official who violated a treaty.⁴¹ Beyond suing states, tribes can sue the federal government for breach of its treaties if the U.S.

³³ Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. REV. 1460, 1468 (2018) (noting that “negotiations memorialized in statutes and executive orders” are “constitutional negotiations”). For more on viewing intergovernmental agreements as treaty-like contracts, see generally Bridget Fahey, *Federalism by Contract*, 129 YALE L.J. 2326 (2020).

³⁴ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1815 (2019) (drawing the connection between federal Indian law and “twentieth-century international lawmaking . . . made largely by ex ante congressional-executive agreements”).

³⁵ See, e.g., *Penobscot Nation v. Frey*, 3 F.4th 484, 503 (1st Cir. 2021) (not applying principles of treaty interpretation to an agreement between the United States and the Penobscot Nation passed by statute).

³⁶ See Brief of Members of the Cong. Native Am. Caucus as Amicus Curiae in Support of Petitioners at 1–2, *Penobscot Nation v. Frey*, Nos. 21-838, 21-840 (U.S. Jan. 6, 2022) (arguing the First Circuit broke with precedent by not applying the canons to a legislatively enacted agreement between the Penobscot Nation, Maine, and the United States to “preserve the rights of the Nation’s members to sustenance fishing, hunting, and trapping within its reservation without interference from the State,” *id.* at 2).

³⁷ See, e.g., *Antoine v. Washington*, 420 U.S. 194, 204 (1975) (“Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land.”).

³⁸ See, e.g., *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1020, 1023 (8th Cir. 2021) (holding that the Rosebud Sioux Tribe may sue the United States to enforce duties based on an 1868 treaty between the parties).

³⁹ See *United States v. Minnesota*, 270 U.S. 181, 195 (1926) (holding that the United States can sue to protect tribes’ rights because a state’s sovereign immunity “is subject to the constitutional qualification that she may be sued in this Court by the United States” (citing *United States v. Texas*, 143 U.S. 621, 642 (1891))).

⁴⁰ See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991).

⁴¹ See *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

government consents to suit.⁴² They can also sue agencies.⁴³ But in some areas, tribal suits against the federal government are rare, including for environmental harm to tribal lands held in trust or ecological damage on off-reservation hunting and fishing grounds recognized in treaties.⁴⁴ But moving forward, tribes might begin suing to remove man-made structures that exacerbate climate change's effects, to force the federal government to adopt better management practices, or to stop permitting of industries that harm the environment of hunting, fishing, and gathering species protected by agreements between the United States and Native nations.⁴⁵

3. *Indian Canons of Construction.* — The Supreme Court first articulated the Indian canons in 1832 in *Worcester v. Georgia*.⁴⁶ The canons interpret treaties to “manifest a firm purpose to afford that protection which treaties stipulate”⁴⁷ and ensure that “[t]he language used in treaties with the Indians should never be construed to their prejudice.”⁴⁸ There are four canons.⁴⁹ The first canon mandates that courts construe treaties, agreements, statutes, and executive orders liberally to tribes’ benefit.⁵⁰ The second resolves ambiguities in treaties, agreements, statutes, and executive orders in favor of tribes.⁵¹ The third

⁴² The U.S. government consented to suit in one of the largest class actions in its history, which resulted in a \$3.4 billion settlement to tribal members. See Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 653 (2011).

⁴³ See, e.g., *Rosebud Sioux Tribe*, 9 F.4th at 1021 (suing a department — the United States Department of Health and Human Services — and an agency — the Indian Health Service).

⁴⁴ Tribes also may seek injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 553–559, 701–706. Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 362 (2003). For example, the Standing Rock Sioux Tribes and Cheyenne River Sioux Tribes sued the U.S. Army Corps of Engineers under the APA for violating federal law by failing to conduct a proper environmental impact study before granting an easement to Dakota Access Pipeline, LLC. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 471 F. Supp. 3d 71, 77 (D.D.C. 2020), *aff’d in part, rev’d in part*, 985 F.3d 1032 (D.C. Cir. 2021). The district court found for the tribe and vacated the easement, thus requiring the suspension of the pipeline’s operation. *Id.* at 88 (requiring “the oil to stop flowing and the pipeline to be emptied within 30 days”). Despite this brief victory, the U.S. Court of Appeals for the D.C. Circuit soon overturned this injunction, even as it upheld the finding of a violation. *Standing Rock*, 985 F.3d at 1053–54.

⁴⁵ See *infra* ch. II, section C, pp. 1582–88, for further discussion of possible suits.

⁴⁶ 31 U.S. (6 Pet.) 515 (1832).

⁴⁷ *Id.* at 556–57.

⁴⁸ *Id.* at 582; see also Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1141 (1990).

⁴⁹ See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 2.02. But see Skibine, *supra* note 18 (manuscript at 2) (defining a fifth canon of tribal sovereign immunity, which states that tribes are exempt from suit unless there is congressional authorization, as first elaborated in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

⁵⁰ See, e.g., *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942).

⁵¹ See, e.g., *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973) (citing *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)).

requires judges to interpret the language of treaties as Indians would have understood it at the time.⁵² And the fourth dictates that the rights reserved by treaties persist unless Congress explicitly abrogates them.⁵³ Together, these canons recognize that tribes were at a disadvantage in the treaty-making process: often their “only knowledge of the terms in which the treaty [was] framed [was] that imparted to them by the interpreter employed by the United States.”⁵⁴ They also respect that tribes made tremendous land concessions to procure terms; indeed, the canons acknowledge tribes’ preexisting rights, such that a treaty is “not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.”⁵⁵ The Court has been particularly committed to preserving hunting, fishing, and gathering rights.⁵⁶

B. *The Use of the Third Canon in Recent Cases*

Recent litigation suggests that tribes can use the third canon to combat climate change’s effects on tribal lands. Although other canons are useful and should be cited in these cases, the third canon’s emphasis on original Indigenous understandings of treaties especially allows for creativity in thinking about how to hold the government to its treaty guarantees on Indigenous terms.

z. United States v. Washington. — These cases show how tribes can employ the third canon to enforce treaty rights affected by climate change and to interpret treaty rights to impose affirmative obligations on the states — and the United States — to take action to ensure that the environment does not become degraded to the point that tribes cannot exercise their treaty rights. This line of litigation has spanned nearly fifty years.⁵⁷ The ongoing dispute revolves around the tribal fishing rights established in the eleven treaties negotiated by Washington

⁵² See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citing *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675–76 (1979)) (looking to the historical record to “shed[] light on how Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them”).

⁵³ See *United States v. Dion*, 476 U.S. 734, 739–40 (1986).

⁵⁴ *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

⁵⁵ *United States v. Winans*, 198 U.S. 371, 381 (1905).

⁵⁶ See *King*, *supra* note 18, at 403–04; see, e.g., *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) (holding the State could not charge tribal citizens a fishing license fee because it is the Court’s “responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council,” *id.* at 684); *Winans*, 198 U.S. at 381 (preserving fishing rights that “were not much less necessary to the existence of the Indians than the atmosphere they breathed”). *But cf.* *King*, *supra* note 18, at 405 (noting that this bar has been lower with cases involving the diminishment of tribal reservations).

⁵⁷ See *United States v. Washington (Boldt Decision)*, GALLAGHER L. LIBRS. (Feb. 25, 2022, 11:46 AM), <https://guides.lib.uw.edu/law/indian-tribal/us-v-wash> [<https://perma.cc/W5ZS-U8DJ>].

Territorial Governor Isaac Stevens with tribes between 1854 and 1855.⁵⁸ These treaties almost identically⁵⁹ provide that “[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory.”⁶⁰ Throughout the 1950s, 1960s, and early 1970s, state officers harassed and arrested tribal members exercising these rights on nonreservation land.⁶¹ In response, in 1970, the U.S. Attorney for the Western District of Washington sued the State for injunctive relief on behalf of the United States and seven tribes to allow tribal citizens to assert their fishing rights.⁶²

The 1974 decision by Judge Boldt upheld the tribes’ right to fish off-reservation under the third canon.⁶³ The district court noted that “[t]reaties with Indian tribes must be construed . . . with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation.”⁶⁴ Based on this canon,⁶⁵ the court recognized that every fishing ground that tribal members had customarily fished at “from time to time at and before treaty times, however distant from the then usual habitat of the tribe, . . . is a usual and accustomed ground or station at which the treaty tribe reserved . . . the right to take fish.”⁶⁶ Environmental degradation could not abrogate these rights, for “changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties.”⁶⁷ While later decisions modified the tribes’ allocation,⁶⁸ sixty-plus opinions published since 1974 have upheld Judge Boldt’s decision.⁶⁹

⁵⁸ *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975).

⁵⁹ *Id.* at 331.

⁶⁰ *See, e.g.*, Treaty of Point Elliot, *supra* note 2, art. 5.

⁶¹ Jovana J. Brown, *Treaty Rights: Twenty Years After the Boldt Decision*, WICAZO SA REV., Fall 1994, at 1, 2.

⁶² *Washington*, 384 F. Supp. at 327–28.

⁶³ *Id.* at 331–32.

⁶⁴ *Id.* at 401.

⁶⁵ *Id.* at 406 (“*Usual and accustomed places*: Those areas in, on and around the freshwater and saltwater areas within the Western District of Washington, which were understood by the Indian parties to the Stevens’ treaties to be embraced within the treaty terms ‘usual and accustomed’ ‘grounds,’ ‘stations’ and ‘places.’”).

⁶⁶ *Id.* at 332. The only restriction on this right was that the share of this resource “in common with all the citizens of the territory,” *id.* at 406 — up to fifty percent of the annual catch, *id.* at 343 — had to be consistent with the preservation of that fish, *id.* at 402.

⁶⁷ *Id.* at 401.

⁶⁸ *See Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979) (holding that treaty rights to a natural resource, like fish, once exclusively used by Indians secure as much of that resource as is necessary to preserve Indians’ livelihood and provide a “moderate living”).

⁶⁹ *See United States v. Washington (Boldt Decision)*, *supra* note 57.

In 2001, the United States and tribes party to the treaty again sued the State to replace its state-managed culverts over streams and rivers containing salmon.⁷⁰ The culverts inadvertently obstructed the passage of salmon on a thousand miles of stream, resulting in substantial decreases to their population.⁷¹ Both the tribes and the United States requested a declaration that the Stevens Treaties' fishing clauses imposed a duty on the state government "to refrain from degrading the fishery resource" through culverts constructed on state-owned roads and highways because to do so deprived tribes of a moderate living from fishing.⁷² The federal government sought injunctive relief requiring Washington to replace or repair 817 state-owned culverts in treaty areas.⁷³ The district court held for the plaintiffs and issued a permanent injunction in 2013.⁷⁴

The Ninth Circuit affirmed,⁷⁵ reasoning that maintaining fisheries that could feed the tribe was a central concern for tribal representatives in 1855 when granting land cessions.⁷⁶ The Indigenous signatories "did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs."⁷⁷ According to the panel, the purpose of the agreement required interpreting the promise to last "forever."⁷⁸ Culverts were not the primary reason for the salmon population's decline, but the culverts' role in leading to the deaths of an estimated several hundred thousand mature salmon in the treaty area — and the corresponding harm to the tribal members, who could no longer earn a living from fishing — was sufficient to show a treaty violation.⁷⁹

⁷⁰ *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) (mem.) (per curiam).

⁷¹ *Id.* at 970.

⁷² *Id.* at 960.

⁷³ *Id.* at 960, 976.

⁷⁴ *Id.* at 961. But it allowed the State to defer correction of 230 culverts. *Id.* at 977.

⁷⁵ *Id.* at 980.

⁷⁶ *Id.* at 964; *see also id.* at 963 (noting that these treaties "must . . . be construed . . . in the sense in which they would naturally be understood by the Indians" (first omission in original) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899))).

⁷⁷ *Id.* at 964.

⁷⁸ *Id.* at 961, 964–65.

⁷⁹ *Id.* at 976; *see also id.* at 955 ("[L]egal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." (quoting *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc))). The Ninth Circuit panel concluded that the district court's injunction accorded with equitable principles, noting the district court's analysis of treaty purposes and the public interest. *Id.* at 977.

The decision, which was affirmed by an equally divided Supreme Court in a per curiam opinion,⁸⁰ had massive implications. Most importantly, the holding forced the State to take affirmative steps to ensure that tribes continue to enjoy the rights guaranteed in their treaty. It required the State to modify its culverts within seventeen years at a cost of hundreds of millions if not billions of dollars.⁸¹ Despite the State's arguments that it would divert revenue that could be spent on other salmon recovery efforts,⁸² the Court affirmed that neither the federal government nor the states may violate treaty provisions interpreted as Indians would have understood them.

2. *Recent Developments in Treaty-Based Litigation at the Supreme Court.* — Several recent Supreme Court cases, spurred by the changed composition of the Court, reveal the power of the third canon in treaty-based litigation and offer lessons for future litigation.

(a) *Indian Law in the Current Supreme Court.* — Between 1986 and 2016, the Supreme Court decided seventy-two percent of Indian law cases against Native interests;⁸³ however, it has increasingly ruled in tribes' favor following Justice Gorsuch's 2017 confirmation.⁸⁴ The Justice's previous post in the western Tenth Circuit ensured his exposure to Indian law, and his jurisprudence illustrates his enduring commitment to upholding its principles.⁸⁵ Over the past several years, he joined with an otherwise liberal voting bloc of Justices Ginsburg, Breyer, Sotomayor, and Kagan to vindicate treaty rights through the Indian canons.⁸⁶ As a result, the Court ruled in tribes' favor in *Washington State Department of Licensing v. Cougar Den, Inc.*,⁸⁷ *Herrera v. Wyoming*,⁸⁸ and *McGirt v. Oklahoma*.⁸⁹ Other federal courts may follow suit.

⁸⁰ *United States v. Washington*, 138 S. Ct. 1832 (2018) (mem.) (per curiam).

⁸¹ *United States v. Washington*, 864 F.3d 1017, 1023 n.1 (9th Cir. 2017) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

⁸² Brief for the Petitioner at 54, *Washington*, 138 S. Ct. 1832 (No. 17-269), 2018 WL 1083741, at *54.

⁸³ See *Developments in the Law — Indian Law*, 129 HARV. L. REV. 1653, 1655 (2016).

⁸⁴ *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 609 & n.106 (2020).

⁸⁵ John Dossett, *Justice Gorsuch and Federal Indian Law*, AM. BAR ASS'N (Sept. 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol-43/vol-43--no--1/justice-gorsuch-and-federal-indian-law [<https://perma.cc/HAT9-YMV3>] (noting Justice Gorsuch's significant experience in Indian law cases as compared to other recent Supreme Court nominees as well as his interest in preserving tribal sovereignty); see also John L. Berrey, *Neil Gorsuch for the High Court*, INDIAN COUNTRY TODAY (Sept. 12, 2018), <https://indiancountrytoday.com/archive/neil-gorsuch-high-court> [<https://perma.cc/8TJD-WNQL>] (discussing Justice Gorsuch's adherence to the Indian canons of construction).

⁸⁶ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1017 (2019) (Gorsuch, J., concurring in the judgment).

⁸⁷ 139 S. Ct. 1000 (2019).

⁸⁸ 139 S. Ct. 1686 (2019).

⁸⁹ 140 S. Ct. 2452 (2020).

(b) *Applications of the Canon to Climate Change Litigation.* — Applying the Court’s understanding of the canon to these cases will be crucial for attorneys seeking to bring treaty-based climate change litigation. When citing the third canon, litigants should look to records of negotiations, analyze treaty text using Indigenous languages, and acknowledge Indigenous cultural practices to evaluate how tribal representatives understood a treaty’s terms at the time of signing.

First, in *Cougar Den*, the Court used the third canon⁹⁰ to hold that a provision of an 1855 treaty between the United States and the Yakama Nation preempted the State’s \$3.6 million fuel tax on a Yakama company’s importing fuel via public highway within the reservation.⁹¹ The treaty established the “right, in common with citizens of the United States, to travel upon all public highways.”⁹² Justice Breyer, writing for a plurality of the Court,⁹³ referred to the historical record — especially treaty negotiations discussing Yakama members’ emphasis on the right to travel on public highways with goods for trade purposes without burdens — to discern the Indigenous meaning of this provision in 1855.⁹⁴

In his concurrence,⁹⁵ Justice Gorsuch elaborated on the Yakama peoples’ conception of the treaty.⁹⁶ First, he underscored that the Tribe ceded ten million acres in exchange for promises, including travel, signifying its importance to tribal members.⁹⁷ “[I]n common with” in the Yakama language would have indicated a lack of restrictions to tribal representatives.⁹⁸ In addition to probing Yakama linguistic understandings, he showed that far-reaching travel and trade were essential to Yakamas’ way of life.⁹⁹ He reasoned that they would not agree to a treaty unless it protected their preexisting access to the markets.¹⁰⁰ Since there was no ambiguity in how Yakama signers viewed the treaty,

⁹⁰ *Cougar Den*, 139 S. Ct. at 1011 (plurality opinion) (citing *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 677–78 (1979); *Tulee v. Washington*, 315 U.S. 681, 683–85 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 196–98 (1919); *United States v. Winans*, 198 U.S. 371, 380–81 (1905)).

⁹¹ *Id.* at 1006–07.

⁹² *Id.* at 1007 (quoting Treaty with the Yakima art. III, June 9, 1855, 12 Stat. 951).

⁹³ Justice Breyer was joined by Justices Sotomayor and Kagan.

⁹⁴ *Cougar Den*, 139 S. Ct. at 1012–13. The State’s imposition of a tax on traveling with specific goods burdened Yakama travel, and the treaty provided for a right to travel without burdens. *Id.* at 1013.

⁹⁵ Justice Ginsburg joined Justice Gorsuch’s opinion.

⁹⁶ *Cougar Den*, 139 S. Ct. at 1016 (Gorsuch, J., concurring in the judgment) (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)).

⁹⁷ *Id.* at 1016, 1020.

⁹⁸ *Id.* at 1017, 1020 (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)).

⁹⁹ *Id.* at 1017.

¹⁰⁰ *Id.* at 1018 (“Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yakamas would have understood the treaty to preserve that liberty.”).

their understanding was “binding” and sufficient to “resolve this case.”¹⁰¹

Second, courts should not void a treaty right when Indigenous signatories did not contemplate that future conditions would extinguish that right. In *Herrera*, the Court held that Wyoming’s admission to the Union and the establishment of the Bighorn National Forest did not abrogate the Crow Tribe’s 1868 treaty “right to hunt on the unoccupied lands of the United States.”¹⁰² Because Congress had not clearly stated that Wyoming’s admission to the Union extinguished the treaty right, the Tribe’s hunting right was intact.¹⁰³ Writing for the majority, Justice Sotomayor turned to the treaty’s text and construed it as it would have been understood by Indians at the time.¹⁰⁴ The meaning of “occupation” in 1868 was “[t]o hold in possession; to hold or keep for use” — where “use” implied “actual use, possession or cultivation by a particular person.”¹⁰⁵ There was very little settlement of the Bighorn Forest in 1868, so the Crow Nation would not have thought of it as “occupied,” nor would they have anticipated that statehood would diminish that land.¹⁰⁶ Since they agreed to the treaty’s terms with that understanding, subsequent occupation or statehood could not change them.

Third, courts must uphold a treaty right even where it significantly impacts the State. In *McGirt*, Justice Gorsuch’s majority opinion held that the Oklahoma land reserved for the Creek Nation in its 1866 treaty remains Indian country because Congress never diminished or disestablished it through a “clear expression of [its] intention” in its subsequent allotment statutes.¹⁰⁷ The Court found no ambiguity in the language of later statutes, so it did not consider contemporary understanding of the congressional statutes or treatment of those lands.¹⁰⁸ The State’s erroneous exercise of jurisdiction over criminal cases on these lands for over a hundred years did not authorize further unlawful exercise,¹⁰⁹ as

¹⁰¹ *Id.* at 1016.

¹⁰² *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691 (2019) (quoting Treaty Between the United States of America and the Crow Tribe of Indians, Crow-U.S., art. IV, May 7, 1868, 15 Stat. 649); *see id.* at 1691–92 (invalidating a conviction for a Crow tribal member hunting on those lands).

¹⁰³ *Id.* at 1698 (“If Congress seeks to abrogate treaty rights, ‘it must clearly express its intent to do so.’” (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999))).

¹⁰⁴ *Id.* at 1701 (citing *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979)).

¹⁰⁵ *Id.* at 1702 (alteration in original) (quoting WILLIAM C. ANDERSON, A DICTIONARY OF LAW 725 (Chicago, T.H. Flood & Co. 1889)). The Court suggested that “unoccupied” and lack of non-Indian settlement were synonymous. *Id.*

¹⁰⁶ *Id.* at 1701–02.

¹⁰⁷ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)).

¹⁰⁸ *Id.* at 2468.

¹⁰⁹ *Id.* at 2481 (“By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again,

Native peoples would have never anticipated this condition at the time the treaty was signed. The possible repercussions of the ruling included recognizing that almost half of Oklahoma's land was still Indian country and overturning more than a thousand criminal convictions.¹¹⁰ Still, this consequentialist argument was not sufficient for the Court to ignore the treaty's guarantees.¹¹¹

(c) *Changes in the Court's Composition.* — Since these 5–4 opinions, the Court's composition has shifted, calling into question the Court's recent embrace of the third canon. Justice Ginsburg, who was in the majority in each of the aforementioned cases, passed away,¹¹² and Justice Barrett joined the Court.¹¹³ However, Justice Barrett might follow Justice Gorsuch's lead in using the canons. In her article *Substantive Canons and Faithful Agency*, Justice Barrett detailed the history of six well-known substantive canons, including “the Indian canon.”¹¹⁴ She described it as: “How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”¹¹⁵ Her acknowledgment of the Indian canons' ongoing application suggests she will be familiar with the third canon if treaty-based climate change litigation comes before the Court.¹¹⁶ She has expressed slight skepticism about the canons' applications to statutes, but she has not questioned their continued use in treaty interpretation.¹¹⁷ This distinction raises concerns for tribes who

the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.”)

¹¹⁰ See *id.* at 2479–82 (“[M]any [Oklahoma residents] will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.” *Id.* at 2479.)

¹¹¹ See *id.* (“[T]he magnitude of a legal wrong is no reason to perpetuate it.” *Id.* at 2480.)

¹¹² See “A True Champion of Justice,” INDIAN COUNTRY TODAY (Sept. 21, 2020), <https://indiancountrytoday.com/news/a-true-champion-of-justice> [<https://perma.cc/WUY8-DG2Z>] (discussing Justice Ginsburg's mixed legacy on Indian law cases).

¹¹³ Cf. Memorandum from Joel West Williams, Senior Staff Att’y, Native Am. Rts. Fund, to Tribal Leaders & Nat’l Cong. of Am. Indians, Project on the Judiciary, on the Nomination of Amy Coney Barrett to the Supreme Court of the United States 1 (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurisprudence/amy_coney_barrett_indian_law.pdf [<https://perma.cc/F3MA-EG5N>] (describing Justice Barrett's record prior to her confirmation).

¹¹⁴ Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010).

¹¹⁵ *Id.* at 151 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (M’Lean, J., concurring)).

¹¹⁶ See *id.* at 152.

¹¹⁷ See *id.* (“What is interesting about the Indian canon for present purposes is that it jumped without discussion from the interpretation of treaties to the interpretation of statutes. . . . When courts began interpreting these statutes in the early 1900s, they assumed, without reflection, that the canon should continue to apply. . . . That is not to say that federal courts have been wrong to apply the Indian canon to statutes.”) *But see* Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 116 (2020) (“Federal Indian affairs statutes are usually more than mere federal statutes; they are negotiated agreements between sovereign entities: the United States and the Indian tribes. To treat a federal Indian affairs statute as merely a creature of Congress is wrong.”).

have agreements with the federal government rather than ratified treaties, but it seems to suggest that the present Court may faithfully execute the third canon, at least for pre-1871 treaties.

C. Strategies for Treaty-Based Climate Change Litigation

In the past several years, tribes have begun to bring treaty-based litigation to combat climate change's effects. They may improve their prospects by foregrounding tribes' interpretations of treaty provisions at the time of signing. Promising avenues include suing federal agencies for federally managed infrastructure contributing to drying waterways; for failure to manage forest fires destroying treaty-guaranteed hunting, gathering, and fishing grounds; and suing federal and state agencies for permitting pipelines that interfere with the rights of nature.

1. *Droughts.* — Tribes can sue the federal government for changing water levels that harm their traditional fishing grounds. In the summer of 2021, the Klamath River Basin experienced an unprecedented drought that caused the suckerfish — the heart of the Klamath Tribes' subsistence diet and creation story — to die in droves.¹¹⁸ Without an immediate increase in water levels, which are limited by a nearby federally managed dam, the suckerfish species likely will disappear within decades.¹¹⁹ This trajectory undermines the United States' agreement with the Tribes, who in 1864 ceded twenty-two million acres to the United States in exchange for retaining 1.5 million acres¹²⁰ on which they had “the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits.”¹²¹ Their Chairman lamented: “I don't think any of our leaders, when they signed the treaties, thought that we'd wind up in a place like this. We thought we'd have the fish forever.”¹²²

To enforce their treaty right, the Klamath Tribes may sue the Federal Energy Regulatory Commission (FERC) for its dam management.¹²³ They may seek injunctive relief requiring the removal

¹¹⁸ Gillian Flaccus, *Water Crisis Reaches Boiling Point*, INDIAN COUNTRY TODAY (July 13, 2021), <https://indiancountrytoday.com/news/water-crisis-reaches-boiling-point> [https://perma.cc/XR6L-XFPG].

¹¹⁹ *Id.*

¹²⁰ *History*, THE KLAMATH TRIBES, <https://klamathtribes.org/history> [https://perma.cc/H22G-5CWF].

¹²¹ Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians art. 1, Oct. 14, 1864, 16 Stat. 707.

¹²² Flaccus, *supra* note 118; see also Joe Purtell, *Another Hurdle Cleared, Klamath Dams Closer to Coming Down: Advocates Hope to Have Dams Out by 2024*, SIERRA CLUB: SIERRA (Jan. 14, 2021), <https://www.sierraclub.org/sierra/another-hurdle-cleared-klamath-dams-closer-coming-down> [https://perma.cc/XJ2N-SJDF].

¹²³ See Kimberly Wear, *Historic Klamath Dam Removal Project Takes Another Step Forward*, N. COAST J. POL. PEOPLE & ART (June 17, 2021, 12:27 PM), <https://www.northcoastjournal.com/NewsBlog/archives/2021/06/17/historic-klamath-dam-removal-project-takes-another-step-forward>

of dams to protect the treaty's right to fishing in this area in perpetuity.¹²⁴ To strengthen their claims, the Klamath Tribes can cite *Cougar Den* for the proposition that the suckerfish is essential to the Tribes' traditional lifeway and thus the treaty preserved their right to fishing.¹²⁵ *Herrera* supports the argument that changing environmental conditions do not abrogate that right.¹²⁶ And because there is clear and direct federal action damaging fish runs by maintaining the dams, the *Culverts Case* further bolsters the argument that treaty signers would not have understood the right to fish "with a qualification that would allow the government to diminish or destroy the fish runs."¹²⁷ The *Culverts Case* and *McGirt* also support the idea that even if dam removal is logistically difficult and costly for the federal government, such challenges would not be sufficient to defeat a treaty right.¹²⁸ Although the Tribes' treaty does not specify a water right, the treaty creates a duty to maintain enough water to support the Tribes' fishing population per the Ninth Circuit's opinion in *United States v. Adair*.¹²⁹ With the assistance of the third canon, the Tribes' lawsuit to remove the Klamath Dams may be among the first successful tribal suits to mitigate climate change's impact on the surrounding ecosystem.¹³⁰

2. *Forest Fires*. — As rising temperatures stoke forest fires, tribes can sue the U.S. government for failing to manage forest health. The

[<https://perma.cc/3D3E-Q9GB>] (describing the removal of four of the six such dams clogging the Klamath river); cf. *Snoqualmie Indian Tribe v. Fed. Energy Regul. Comm'n*, 545 F.3d 1207, 1212 (9th Cir. 2008) (reviewing FERC's order granting a license to a hydroelectric power-plant operator on petition by the Snoqualmie Tribe).

¹²⁴ Letter from Deb Haaland, Sec'y, Dep't of the Interior, to Kimberly D. Bose, Sec'y, Fed. Energy Regul. Comm'n 2 (June 10, 2021), https://elibrary.ferc.gov/eLibrary/filelist?accession_num=20210611-5056 [<https://perma.cc/VPA2-68CW>] ("[R]emoval will advance the Biden-Harris administration's commitments to combat the climate crisis, increasing resilience to the impacts of climate change[,] . . . and fulfill the Federal Government's . . . treaty responsibilities."); Wear, *supra* note 123 (noting that dam removal will open up 420 miles of salmon-spawning habitat by improving water quality and temperature).

¹²⁵ *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1017 (2019) (Gorsuch, J., concurring in the judgment).

¹²⁶ See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1702 (2019).

¹²⁷ *United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) (mem.) (per curiam).

¹²⁸ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479–82 (2020); *Washington*, 853 F.3d at 967.

¹²⁹ 723 F.2d 1394 (9th Cir. 1983); see *Washington*, 853 F.3d at 965 (inferring "a promise of water sufficient to ensure an adequate supply of game and fish" guaranteed by the treaty (citing *Adair*, 723 F.2d at 1411)).

¹³⁰ The neighboring Yurok Tribe, which has lived on the river for thousands of years, also relies on the Klamath River for its subsistence. Brook Thompson, *The Familial Bond Between the Klamath River and Yurok People*, HIGH COUNTRY NEWS (Aug. 24, 2021), <https://www.hcn.org/issues/53.9/indigenous-affairs-klamath-basin-the-familial-bond-between-the-klamath-river-and-the-yurok-people> [<https://perma.cc/2TFE-9SR5>]. In 2019, the Yurok Tribe recognized the Klamath River's legal personhood. Anna V. Smith, *The Klamath River Now Has the Legal Rights of a Person*, HIGH COUNTRY NEWS (Sept. 24, 2019), <https://www.hcn.org/issues/51.18/tribal-affairs-the-klamath-river-now-has-the-legal-rights-of-a-person> [<https://perma.cc/9H29-H4FQ>].

federal government holds eighteen million acres of Indian forests in trust across twenty-four states.¹³¹ Timberlands make up almost half, if not more, of total trust lands.¹³² Woodlands are the principal source of income for many tribes, and they are critical to fish, wildlife, sustenance, medicines, fuel, shelters, transportation, and spiritual practice.¹³³ The task of maintaining them to prevent destructive fires is part of the federal government's responsibility to safeguard treaty lands.¹³⁴ But its management was so insufficient that Congress passed a 1990 law mandating ongoing assessments of tribal forest lands to ensure compliance.¹³⁵ Decades later, reports showed little progress toward preventing fires in Indian country.¹³⁶ With climate change warming the American West and worsening wildfires, tribes have borne the brunt of these blazes, particularly in California, Oregon, and Washington.¹³⁷ In response, in 2021, the Confederated Tribes of the Colville Reservation filed suit against the U.S. government, seeking monetary compensation for the wildfires that scorched 240,000 acres, "sterilized the soil[,] and created a moonscape."¹³⁸

The Colville tribes and others can strengthen their suit over forest-fire mismanagement by alleging not simply economic hardship from the government's failures but also the federal government's affirmative

¹³¹ *Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S. 3014, A Bill to Improve the Management of Indian Forest Land, and for Other Purposes: Hearing Before the S. Comm. on Indian Affs.*, 114th Cong. 8 (2016) (statement of Michael Black, Director, Bureau of Indian Affairs).

¹³² *Id.*

¹³³ *Wildfires and Forest Management: Prevention Is Preservation: Hearing Before the S. Comm. on Indian Affs.*, 113th Cong. 4 (2014) (statement of Hon. Kevin Washburn, Assistant Secretary for Indian Affairs, U.S. Department of the Interior).

¹³⁴ *Id.* at 10 (statement of James Hubbard, Deputy Chief, State & Private Forestry, U.S. Forest Service).

¹³⁵ See 25 U.S.C. § 3111.

¹³⁶ Cf. *Indian Forest Management Assessment Team Report: "Tribal Forest Management: A Model for Promoting Healthy Forests and Rural Jobs": Hearing Before the H. Comm. on Nat. Res.*, 113th Cong. (2014) (statement of Michael Black, Director, Bureau of Indian Affairs).

¹³⁷ See *Wildfires in the West Are Putting Parched Tribal Lands in Growing Danger*, NPR (July 14, 2021, 8:30 AM), <https://www.npr.org/2021/07/14/1015941674/wildfires-in-the-west-are-putting-parched-tribal-lands-in-growing-danger> [<https://perma.cc/F2KH-9BLH>].

¹³⁸ Orion Donovan-Smith, *Colville Tribes Sue U.S. Government, Seeking Damages for Failure to Manage Forests that Burned in Massive 2015 Wildfires*, THE SPOKESMAN-REV. (Aug. 4, 2021), <https://www.spokesman.com/stories/2021/aug/04/colville-tribes-sue-us-government-seeking-damages-> [<https://perma.cc/XY2X-9BT8>]. The Tribe presented evidence that the government did not thin trees or conduct controlled burns, creating "tinderbox conditions in which catastrophic fire was inevitable" and resulting in the loss of 800,000 board feet of timber from the burned area — over one-third of the Tribe's commercial forest. Courtney Flatt, *Colville Tribe Sues Federal Government over 2015 Fires, Forest Mismanagement*, KUOW (Aug. 5, 2021, 5:21 PM), <https://www.kuow.org/stories/colville-tribe-sues-federal-government-over-2015-fires-forest-mismanagement> [<https://perma.cc/VD3B-6K34>]. The Confederated Tribes' 2021 suit has not yet yielded a decision or settlement. *Id.*

duty to improve these practices to protect hunting, fishing, and gathering grounds from further fires. Many treaties in Oregon granted the tribes “the privilege of hunting” and “gathering roots and berries” on unclaimed lands, which were mostly forest lands.¹³⁹ These areas are especially susceptible to climate change–related fires. As a former resident of the Warm Springs Reservation and now acting Fire Chief for the Bureau of Indian Affairs (BIA) reflected: “We didn’t have that decades ago Fires just never burned that hot.”¹⁴⁰ Per *Herrera*, these changed conditions should not infringe on the tribes’ rights because tribes did not anticipate these conditions at the time.¹⁴¹ Tribes can show that the United States’ rejection of the controlled burns practiced by Indigenous peoples for hundreds to thousands of years has resulted in a proliferation of highly combustible underbrush and, as a result, more intense fires; these fires have destroyed traditional food systems in violation of the treaty.¹⁴² The *Culverts Case* additionally suggests that even though the BIA’s mismanagement is a secondary cause of forests burning on treaty lands (relative to climate change), the agency must pay for the damage and take affirmative measures to mitigate future environmental degradation.¹⁴³

¹³⁹ Treaty Between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon art. 1, June 25, 1855, 12 Stat. 963, 964. Likewise, a fire recently destroyed 180,000 acres — or twenty-five percent — of the Klamath Tribes’ praying, hunting, and gathering grounds. Mariah Mills, *Klamath Tribes Concerned About Scorched Land Following Bootleg Fire*, KOB-TV NBC5 (Aug. 17, 2021), <https://kobi5.com/news/local-news/klamath-tribes-concerned-about-scorched-land-following-bootleg-fire-16508> [<https://perma.cc/GT7Z-UQEP>]. In addition to decimating subsistence sites, the runoff from the blackened fields sickened endangered fish populations the Tribes had spent significant capital trying to restore. See Alex Schwartz, *Crews Work to Mitigate Bootleg Fire Sediment Loading, But Hurdles Remain*, HERALD & NEWS (Nov. 22, 2021), https://www.heraldandnews.com/news/local_news/crews-work-to-mitigate-bootleg-fire-sediment-loading-but-hurdles-remain/article_cdca2fe1-4169-53b6-87d4-6a3b567c5ba4.html [<https://perma.cc/6KXY-2EVC>]. The Tribes might sue the federal government for harming “usual and accustomed stations for fishing” by failing to stop these fires and compel it to remediate these waters.

¹⁴⁰ Bradley W. Parks, *After Lionshead, Threat of Megafires Looms Large on Warm Springs Reservation*, OPB (Aug. 30, 2021, 9:00 AM), <https://www.opb.org/article/2021/08/30/wildfire-warm-springs-lionshead-prescribed-burning> [<https://perma.cc/N2BD-KWDV>].

¹⁴¹ See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1702 (2019).

¹⁴² Tribes can also petition the Department of the Interior to transfer management authority to tribes themselves. In 2020, the Coquille Indian Tribe became the first tribe to participate in the Indian Trust Asset Management Demonstration Project. Press Release, U.S. Dep’t of the Interior, Indian Affs., Assistant Secretary Sweeney Signs Coquille’s Indian Trust Asset Management Plan and Tribal Forestry Regulations (Oct. 20, 2020), <https://www.bia.gov/as-ia/opa/online-press-release/assistant-secretary-sweeney-signs-coquilles-indian-trust-asset> [<https://perma.cc/2E5H-8VK6>]. It enabled the Tribe to “take control of its trust forest land and resources, and manage them in a way that meets their needs,” strengthening sovereignty in the process. *Id.* (quoting Assistant Secretary of Indian Affairs Tara Katuk Sweeney).

¹⁴³ See *United States v. Washington*, 853 F.3d 946, 977 (9th Cir. 2017), *aff’d by an equally divided court*, 138 S. Ct. 1832 (2018) (mem.) (per curiam).

3. *Pipelines.* — Tribes may bring suits that interpret treaty text using tribes' understanding of their relationship to nonhuman relatives.¹⁴⁴ Some tribes and tribal courts are already beginning to recognize the rivers' rights against environmental degradation.¹⁴⁵ U.S. courts have yet to establish the "rights of nature" — when an ecosystem has legal personhood and thus the right to defend itself in court against harm.¹⁴⁶ Although other countries' court systems have recognized rights of nature,¹⁴⁷ attempts in the United States have faltered.¹⁴⁸ U.S. courts have long rejected the legal personhood of ecosystems under the standing doctrine.¹⁴⁹ But tribes may convince federal courts to acknowledge the rights of nature by showing how tribes understood the provisions of their treaties to recognize the personhood of those resources at the time of signing.¹⁵⁰

As resistance against the Enbridge Line 3 oil pipeline ramped up in Minnesota in 2021, the White Earth Band of Ojibwe sued the Minnesota Department of Natural Resources Commissioners in tribal court in the "first case brought in a tribal court to enforce the rights of nature."¹⁵¹ The Tribe asserted that the State's issuance of a permit to

¹⁴⁴ Anglo-American law refers to these relatives as natural resources. See *Tribal Nations*, U.S. CLIMATE RESILIENCE TOOLKIT (Sept. 28, 2020, 9:55 AM), <https://toolkit.climate.gov/topics/tribal-nations> [<https://perma.cc/R374-PJWJ>] ("By regarding all things as relatives — not resources — natural laws dictate that people care for their relatives in responsible ways. As climate change increasingly threatens Tribal Nations, cultural identities, and practices, documenting the impacts on traditional lifestyles may strengthen adaptive strategies.").

¹⁴⁵ See, e.g., Anna V. Smith, *Some Indigenous Communities Have a New Way to Fight Climate Change: Give Personhood Rights to Nature*, MOTHER JONES (Sept. 29, 2019), <https://www.motherjones.com/environment/2019/09/some-indigenous-communities-have-a-new-way-to-fight-climate-change-give-personhood-rights-to-nature> [<https://perma.cc/EQ8S-K9U3>] (describing the Yurok Tribe's resolution to grant the Klamath River personhood in tribal court).

¹⁴⁶ See Tiffany Challe, *The Rights of Nature — Can an Ecosystem Bear Legal Rights?*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (Apr. 22, 2021), <https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits> [<https://perma.cc/LLM5-JRXW>].

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., Order at 1, *Colo. River Ecosystem v. Colorado*, No. 17-cv-02316 (D. Colo. Dec. 4, 2017) (granting plaintiff's motion to dismiss with prejudice); Complaint for Declaratory Relief at 2–3, *Colo. River Ecosystem*, No. 17-cv-02316 (seeking recognition of the river's personhood and declaration that Colorado violated its rights to a healthy environment).

¹⁴⁹ See *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) ("The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage." (footnote omitted)).

¹⁵⁰ See Mary Annette Pember, *"Rights of Nature" Lawsuits Hit a Sweet Spot*, INDIAN COUNTRY TODAY (Aug. 15, 2021), <https://indiancountrytoday.com/news/rights-of-nature-lawsuits-hit-a-sweet-spot> [<https://perma.cc/5WGP-E4DZ>].

¹⁵¹ Sebastien Malo, *Minnesota Hit with Novel "Natural Right" Tribal Lawsuit over Line 3*, REUTERS (Aug. 7, 2021, 12:05 AM), <https://www.reuters.com/legal/litigation/minnesota-hit-with-novel-natural-right-tribal-lawsuit-over-line-3-2021-08-06> [<https://perma.cc/6DMK-3K4B>] (quoting plaintiffs); see also Complaint for Declaratory and Injunctive Relief at 1, *Manoomin v. Minn.*

use five billion gallons of public groundwater for Enbridge's Line 3 pipeline project violated the Tribe's rights recognized in its 1837, 1854, and 1855 treaties with the United States.¹⁵² The Tribe argued that the pipeline's permitting violated the treaty rights of manoomin, wild rice that is the cultural center and subsistence staple of the Anishinaabe peoples.¹⁵³ Climate change presents an existential threat to manoomin.¹⁵⁴ The Tribe offered evidence of its original understandings about usufructuary property rights to the lands and waters being ceded and held in common among Chippewa Indians across Mississippi and Lake Superior, exclusive from the state and federal government.¹⁵⁵ According to the Tribe, the water diverted for Line 3 was not the State's to give because it belonged to manoomin.¹⁵⁶ It is an open question whether a tribe can sue a state department official for violation of a treaty right in tribal court.¹⁵⁷ But a federal court recently dismissed the State's bid to end the case.¹⁵⁸ This case's outcome may bring hope to other tribes trying to recognize the rights of nonhuman relatives mentioned in treaties.

The White Earth Band of Ojibwe also may endeavor to bring this claim in federal court and bolster its chances for success by invoking the third canon. Since courts will consider Indigenous linguistic understandings of treaties, the Tribe might use testimony from language keepers of Anishinabemowin to demonstrate that manoomin's relationship

Dep't of Nat. Res. (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021) (No. GC21-0428), <https://whiteearth.com/assets/files/programs/judicial/cases/Manoomin%20et%20al%20v%20DNR%20Complaint%20w%20Exhibits%208-4-21.pdf> [<https://perma.cc/P5H4-YCVQ>].

¹⁵² Complaint for Declaratory and Injunctive Relief, *supra* note 151, at 7, 38–39.

¹⁵³ *Id.* at 1–3, 8–9.

¹⁵⁴ Danielle Johnson, Medill Sch. of Journalism, *Who Is Manoomin?: A Clash Between Culture and Climate Change*, INDIAN COUNTRY TODAY (Jan. 6, 2020), <https://indiancountrytoday.com/news/who-is-manoomin> [<https://perma.cc/454G-Y7WU>]; Will Parrish, “They Screwed Up Our Lake”: Tar Sands Pipeline Is Sucking Water from Minnesota Watersheds, THE GUARDIAN (Sept. 19, 2021, 4:00 AM), <https://www.theguardian.com/environment/2021/sep/19/tar-sands-pipeline-minnesota-lakes> [<https://perma.cc/466R-KTWJ>] (“Enbridge’s Line 3 tar sands pipeline has taken a substantial toll on watersheds in the region . . .”).

¹⁵⁵ Complaint for Declaratory and Injunctive Relief, *supra* note 151, at 4–6.

¹⁵⁶ *Id.* at 7–8.

¹⁵⁷ See Alex Brown, *Cities, Tribes Try a New Environmental Approach: Give Nature Rights*, THE PEW CHARITABLE TRS.: STATELINE (Oct. 30, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/30/cities-tribes-try-a-new-environmental-approach-give-nature-rights> [<https://perma.cc/ZLT9-BZDL>] (“It’s very difficult to get standing [to sue],” said Rain Bear Stands Last, executive director of the Global Indigenous Council. “When you come to wild rice protection or protection of rivers or salmon, you can go into a tribal court theoretically with a case, but you actually would have to get the defendant to show up. . . . The tribe doesn’t have jurisdiction outside the boundaries of the reservation.” (alteration and omission in original)).

¹⁵⁸ Sebastian Malo, *Minn. Appeals Tribal Court’s Greenlight on “Wild Rice” Lawsuit re Line 3*, REUTERS (Sept. 14, 2021, 1:54 PM), <https://www.reuters.com/legal/litigation/minn-appeals-tribal-courts-greenlight-wild-rice-lawsuit-re-line-3-2021-09-14> [<https://perma.cc/S48Q-8AFP>].

with the Tribe has existed for centuries.¹⁵⁹ It can also use language to show manoomin was not simply an object but a relative to the Anishinaabe people with its own stories and history.¹⁶⁰ Finally, it might point to manoomin's primacy in the negotiations, in which tribal representatives endeavored to ensure that tribal members would always have enough water to thrive.¹⁶¹

D. Challenges to Using the Third Canon in Climate Change Litigation

This section responds to possible arguments against relying on the third canon, including that some treaties have qualified provisions that suggest rights to resources expire when the resources do, that there are cases where it may be more difficult to prove causation, and that the third canon may contradict the textual reading of a treaty.

i. Treaties with Qualified Provisions Affected by Climate Change. — Some treaties have terms with language like “until” and “so long as” that seem to imply that the relevant right lasts only as long as that resource does,¹⁶² but the third canon can protect even these seemingly qualified rights from changed climate conditions. For example, from Washington to Minnesota, dozens of treaties specified “the right to hunt on the unoccupied lands of the United States so long as game may be found thereon.”¹⁶³ But game may no longer live in tribes' traditional hunting grounds because of inhospitable conditions caused by climate change.¹⁶⁴ Tribes in this predicament may analogize to the *Culverts Case* litigation by showing that state or federal activities contributed to the decline. Defendants likely will counter that unlike the fishing rights in usual and accustomed places, this right expires when game disappears.¹⁶⁵ And no case has decided what “game thereon” means for this

¹⁵⁹ Complaint for Declaratory and Injunctive Relief, *supra* note 151, at 1–2; see GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, MANOOMIN~WILD RICE: THE GOOD BERRY, https://glifwc.org/publications/pdf/Goodberry_Brochure.pdf [<https://perma.cc/5NWE-S6LX>].

¹⁶⁰ See Johnson, *supra* note 154.

¹⁶¹ See Complaint for Declaratory and Injunctive Relief, *supra* note 151, at 3–5; see also Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), <https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement> [<https://perma.cc/4W8Z-LEK7>].

¹⁶² See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1705 (2019) (Alito, J., dissenting) (suggesting that treaty rights are not reserved in perpetuity if they depend “on the continuation of several conditions”).

¹⁶³ *E.g.*, Treaty Between the United States of America and the Crow Tribe of Indians, Crow-U.S., art. IV, May 7, 1868, 15 Stat. 649; Treaty Between the United States of America and the Eastern Band of Shoshones and the Bannack Tribe of Indians art. IV, July 3, 1868, 15 Stat. 673.

¹⁶⁴ Cf. Ivy Engel, *From Migration to Diet, Climate Change Makes Things More Complicated for Wyoming's Big Game*, WYO. PUB. MEDIA (Nov. 5, 2021, 9:40 PM), <https://www.wyomingpublicmedia.org/open-spaces/2021-11-05/from-migration-to-diet-climate-change-makes-things-more-complicated-for-wyomings-big-game> [<https://perma.cc/N3AE-5XSQ>].

¹⁶⁵ See, e.g., Katherine M. Cole, Note, *Native Treaties and Conditional Rights After Herrera*, 73 STAN. L. REV. 1047, 1087 (2021) (“There could be some higher threshold required than a single elk — if Herrera had shot the very last animal in the forest, for example, that may not have been

climate change question and in the context of the *Culverts Case*, where the government cannot contribute to destroying or diminishing game.¹⁶⁶

But by citing Justice Gorsuch's concurrence in *Cougar Den* or the Ninth Circuit's opinion in the *Culverts Case*, tribes could provide evidence that "so long as game may be found thereupon" was understood to mean "forever" by Indigenous signatories. For instance, that phrase appeared in the Fort Laramie Treaty of 1868 with the Očhéthi Šakówin, or Great Sioux Nation.¹⁶⁷ The word meaning for "as long as" in Lakhotiyapi, "toháŋhuŋniyaŋ," denotes "forever, always, all the time, from time immemorial."¹⁶⁸ So, a tribe bringing suit under this treaty could show, along with other notes from the negotiations and oral histories, that Lakota treaty signers considered this provision to mean that they could hunt on these lands for all time — not conditionally. Tribes bringing suits can consult language speakers to see if "so long as" has different understandings in their Indigenous languages and worldviews. Even if the translation of "so long as" were ambiguous, courts should resolve ambiguities in favor of tribes under the second canon.¹⁶⁹ Tribes also might show that the treaty signers could not imagine a world without a specific right or resource because it was so central to lifeways for hundreds to thousands of years before climate change. For instance, it was persuasive to Justice Gorsuch in *Cougar Den* that travel along highways to facilitate trade was essential to Yakama lifeways at that time and that they would never sign this right away.¹⁷⁰ The case for the centrality of hunting to lifeways will likely be easier to prove because it was crucial to feeding the Tribe. Thus, tribes likely will prevail despite the uncertainty around this language.

2. *The Harder Cases.* — The case studies involving man-made, government-managed culverts, pipelines, and dams that debilitate fish

enough for a court to find that 'game may be found thereon' — but those limits have not been established. Because states can regulate treaty rights if necessary for conservation, that protective stopgap would likely be triggered before falling below any floor for what is considered an adequate presence of game." (footnotes omitted).

¹⁶⁶ A Westlaw case search has not identified any case that addressed this particular question. *See also id.* at 1085 ("[N]o court has held that a Native hunting right has lapsed just because the game may no longer be found on the land.").

¹⁶⁷ Treaty Between the United States of America and Different Tribes of Sioux Indians art. XI, Apr. 29, 1868, 15 Stat. 635, 639 (reserving "the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon").

¹⁶⁸ *Toháŋhuŋniyaŋ*, NEW LAKOTA DICTIONARY (Lakota Language Consortium Mobile Version 3.0 2021) (mobile app).

¹⁶⁹ The case may be harder to make for treaties that refer to a "number" of game, such as the Navajo Treaty of 1868, which states that tribes "retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase." Treaty Between the United States of America and the Navajo Tribe of Indians art. IX, June 1, 1868, 15 Stat. 667, 670.

¹⁷⁰ *See Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1017 (2019) (Gorsuch, J., concurring in the judgment).

runs demonstrate clear causation to those species' decline. But many tribes also suffer from climate change–related conditions, such as rising sea levels,¹⁷¹ where the state and federal governments' roles are less concrete.¹⁷² These cases are more challenging than the *Culverts Case*. However, they suggest that as long as the government-related decision was an “important cause of the decline” of a species, even if it was not a primary cause, the United States must take affirmative actions to remediate treaty-related habitats.¹⁷³ Still, courts may invoke Judge O’Scannlain’s dissent from the denial of rehearing en banc in the *Culverts Case*, which was deeply concerned about turning federal courts into environmental regulators in treaty cases — even where a physical government barrier had a demonstrable connection to the decline of a species.¹⁷⁴

3. *Textualist Rebuttals to the Third Canon’s Use.* — Opponents may assert that using the third canon to prioritize Indigenous linguistic understandings of treaty provisions is incompatible with textualism.¹⁷⁵ In *Cougar Den*, Justice Kavanaugh, a self-professed textualist,¹⁷⁶ argued against well-established precedent, contending that the plurality and concurrence did not adhere to the treaty’s “textual meaning” by considering what the treaty text would mean to signatory tribes.¹⁷⁷ This approach to interpreting Indian law treats “Indians and Indian tribes as passive recipients of federal law and policy, with little or no input in the

¹⁷¹ See, e.g., *Quinault Indian Nation Plans for Village Relocation*, U.S. CLIMATE RESILIENCE TOOLKIT (Aug. 9, 2021, 2:42 PM), <https://toolkit.climate.gov/case-studies/quinault-indian-nation-plans-village-relocation> [https://perma.cc/4QKA-7WLS].

¹⁷² See, e.g., *Lawsuit Aims to Block Drilling in Arctic National Wildlife Refuge*, EARTHJUSTICE (Aug. 24, 2020), <https://earthjustice.org/news/press/2020/lawsuit-aims-to-block-drilling-in-arctic-national-wildlife-refuge> [https://perma.cc/87FQ-39BT] (describing a lawsuit that sought to block extractive industries in Indigenous subsistence areas).

¹⁷³ *United States v. Washington*, 853 F.3d 946, 976 (9th Cir. 2017), *aff’d by an equally divided court*, 138 S. Ct. 1832 (2018) (mem.) (per curiam).

¹⁷⁴ See *United States v. Washington*, 864 F.3d 1017, 1032 (9th Cir. 2017) (O’Scannlain, J., dissenting from the denial of rehearing en banc); see also Diarmuid F. O’Scannlain, *19th Century Indian Treaties and 21st Century Environmental and Natural Resources Issues: Is There a Connection?*, 49 ENV’T L. 837, 851 (2019) (“By relying on local environmental agencies tasked with solving such a problem, the State had crafted a finely-tuned regulatory scheme that kept one eye toward preserving salmon runs, with another aimed at preserving other important State interests. Yet one could argue that by affirming the district court’s broad injunction, our court ignored the State’s expertise and abandoned such delicate balance.”).

¹⁷⁵ There is also an argument about its compatibility with originalism. See generally Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1101 (2013) (“[A] treaty should be read as the tribe would have understood it because this method reflects the most faithful application of the original meaning of the treaty text.”).

¹⁷⁶ Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909–10 (2017) (reaffirming Justice Scalia’s position to “read the words of the statute as written,” *id.* at 1909).

¹⁷⁷ See *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1027–28 (2019) (Kavanaugh, J., dissenting).

process.”¹⁷⁸ Because of this perception, this textualism uses only the semantic context of non-Indians.¹⁷⁹

But as Justice Gorsuch’s concurrence explains, textualism should highlight not only non-Indigenous perspectives: reading a treaty provision just to “some modern ears” would favor “the drafter who enjoys the power of the pen.”¹⁸⁰ Native nations’ representatives often negotiated in second languages and could not review the final treaties transcribed in English.¹⁸¹ They had to trust interpreters’ translations and promises.¹⁸² As one of the oldest substantive canons favored by textualists,¹⁸³ the third canon recognizes that these supreme laws of the land were more than simply congressional dictates — they were agreements between nations in which peoples without the pen’s original understanding of terms mattered, as well.¹⁸⁴

Conclusion

Native nations have been at the forefront of fighting climate change. Now, tribes have brought this battle to the courtroom. Building on the *Culverts Case* and recent Supreme Court readings of treaty rights using the third canon, tribes can pursue litigation to reduce federal and state governments’ roles in environmental degradation related to climate change. Tribes can wield the third canon creatively to argue for extending the rights of nature to resources that tribes viewed as relatives when drafting their treaties. Claims grounded in the third canon can help uphold rights that may disappear with the changing climate and may be particularly strong in cases where the federal government has assumed management over resources. Such strategies — combined with efforts outside the courtroom that strengthen tribal sovereignty, restore Indigenous stewardship, and prioritize thousands of years of land management knowledge — will help ensure that the rivers, game, and fish continue to run as long as the sun shines.

¹⁷⁸ Matthew L.M. Fletcher, *Muskral Textualism*, 116 NW. U. L. REV. 963, 974–75 (2022).

¹⁷⁹ *See id.*

¹⁸⁰ *See Cougar Den*, 139 S. Ct. at 1016 (Gorsuch, J., concurring in the judgment).

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See Barrett, supra note 114*, at 127; *see also* Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1989) (noting that once canons of construction “have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language”).

¹⁸⁴ *Cf. Barrett, supra note 114*, at 181 (“At least when a substantive canon promotes constitutional values, the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy.”).