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## FIGHTING ON BEHALF OF THE SALISH SEA

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FIGHTING ON BEHALF OF THE SALISH SEA  
*Cloie M. Chapman*•

I. INTRODUCTION .....	128
II. HISTORY OF THE TRANS MOUNTAIN PIPELINE AND SUBSEQUENT EXPANSIONS .....	130
A. <i>Support for the Pipeline</i> .....	133
B. <i>Resistance to the Pipeline</i> .....	135
C. <i>Anticipated Threats to the Salish Sea Ecosystem</i> .....	137
III. THE TRADITIONAL APPROACH: ADVOCATING FOR TREATY RIGHTS .....	140
A. <i>Treaty Rights of Coast Salish Tribes</i> .....	141
B. <i>Joining Litigation Efforts in Canada</i> .....	141
IV. AN EMERGING LEGAL STRATEGY: THE RIGHTS OF NATURE MOVEMENT.....	145
V. CONCLUSION .....	148

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• J.D. Candidate Class of 2020, Seattle University School of Law. Executive Editor for American Indian Law Journal 2019-2020. I am not indigenous and do not claim to speak on behalf of indigenous people. My interest in writing this article came from my background of studying the interactions between marginalized communities and policy, especially with regards to environmental issues. I would like to thank those at Fairhaven College and Western Washington University for teaching me the importance of learning about American Indian history and centering marginalized perspectives in social justice work. I am grateful for my parents, Ling Liu and Eric Chapman, my partner, Will McCoy, and the rest of my family for supporting me throughout my education and always encouraging me to follow my dreams. Finally, I'd like to thank the Associate Editors of the American Indian Law Journal and my fellow Editorial Board members Jessica, Julie, Keegan, and Phoebe for all of your incredible work on this issue. You all make me so proud to be on this journal.

## I. INTRODUCTION

The fossil fuel industry is made up of companies who extract, produce, and refine oil, natural gas, and coal. <sup>1</sup> Fossil fuels have been the main source of energy in the United States since the end of the Industrial Revolution and have since become embedded in our daily life. <sup>2</sup> Despite being identified as a prominent contributor to climate change, the industry is doubling down on production and exportation through a proliferation of pipeline projects.

Pipeline projects have triggered controversy all over the world due to their history of spills, infringement on indigenous land and resources, and contributions to the success of the fossil fuel industry. In the United States, activists have recently protested the Keystone XL and Dakota Access Pipelines. These movements have been led by indigenous communities and have garnered significant social media attention.<sup>3</sup> Despite these efforts, the projects have succeeded due to support from the government and those who prefer the economic benefits despite the environmental threats.

Like other fossil fuel pipeline projects, the Trans Mountain Pipeline in Canada has gained significant public attention since the announcement of the expansion. There has been a heated debate about the project in Canada, but other countries, tribes, and interest groups have joined the conversation.

This issue has been litigated for years and has included wins and losses on both sides which has led to confusion and frustration for opponents and proponents. Construction has been halted multiple times due to the public outrage and environmental concerns, but because of the potential for economic benefits there has been enough support to keep the project alive. The Canadian government purchased the pipeline from Kinder Morgan amidst

<sup>1</sup> U.S. Dep't of Energy, *Fossil*, <https://www.energy.gov/science-innovation/energy-sources/fossil> [<https://perma.cc/7MWA-YJU4>].

<sup>2</sup> U.S. Energy Info. Admin., *History of Energy Consumption in the United States 1775-2009*, <https://www.eia.gov/todayinenergy/detail.php?id=10> [<https://perma.cc/LJ93-E873>].

<sup>3</sup> See generally Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlight Unavoidable Reality—Pipelines Leak*, <https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/> [<https://perma.cc/PXX9-YUEW>]; Nick Tilsen, *South Dakota Can't Silence Our Protest Against the Keystone XL Pipeline*, <https://www.aclu.org/blog/free-speech/rights-protesters/south-dakota-cant-silence-our-protest-against-keystone-xl> [<https://perma.cc/CE6D-SECC>].

these delays, which has bolstered the project's success. At this point, it seems that too much has been invested to let the project die.

Though the pipeline will not physically cross into the United States, the secondary impacts are certain to go beyond the Canadian border. This poses a special risk to those who derive their livelihood from ecosystems like the Salish Sea, particularly the Coast Salish tribes that inhabit the region.

The pipeline's expanded capacity to transport oil will impose direct impacts to the Salish Sea, a body of water that spans from Washington to British Columbia. The increased tanker traffic poses a risk of increased oil spills which threatens the survival of the entire Salish Sea ecosystem. Coast Salish tribes, particularly those in Washington State, may be in the best position to fight the project. In addition to these direct impacts, the increased production of fossil fuels is likely to exacerbate climate change, which carries inherent risks to the Salish Sea and its inhabitants.

Now is the ideal time for international parties to step in. Given the risks posed by increased fossil fuel production, this may be the last opportunity for interested groups to intervene and end centuries of environmental degradation.

This article addresses the possible approaches that Coast Salish tribes could take to oppose the pipeline. Many tribes have already intervened in the litigation, but more can be done. One promising approach would be to follow in the footsteps of the rights of nature movement by establishing rights for the Salish Sea that would allow tribes and other interested parties to advocate on behalf of the body of water. The rights of nature movement is relatively new, which means there are a number of barriers to its success. That being said, there are enough models from other countries and cities in the United States to create a framework under which these rights could be established.

The following section explains the evolution of the Trans Mountain Pipeline. The pipeline has a long history and it is important to understand that history in order to address the current issue. This section also details the controversy that has surrounded the project. Part III addresses why this issue is important to those in the United States, especially for Coast Salish tribes and how the potential to utilize the traditional approach of securing intervenor status in Canadian courts. Part IV considers a more emerging approach that focuses on establishing rights of the Salish Sea and

leveraging those rights to stop the expansion of the Trans Mountain Pipeline. 4

## II. HISTORY OF THE TRANS MOUNTAIN PIPELINE AND SUBSEQUENT EXPANSIONS

In the late 1940s, oil deposits were discovered outside of Edmonton, Alberta. This prompted the creation of a pipeline that would carry crude oil, a liquid form of fossil fuel extracted from underground reservoirs,<sup>5</sup> to the western coast of British Columbia to meet the growing demands for oil in Canada, the United States, and Asia.<sup>6</sup> The 1150 km long pipeline was finished in 1953 with an initial capacity of 150,000 barrels of oil per day.<sup>7</sup>

Kinder Morgan, a Texas oil corporation, is one of the largest energy infrastructure companies in North America.<sup>8</sup> The company initiated a number of expansion projects between 2006 and 2008, increasing the capacity from 260,000 barrels per day (bpd) to 300,000 bpd.<sup>9</sup> In 2013, Kinder Morgan submitted an application to the National Energy Board (NEB) for another expansion project that would begin in 2017 and finish in December 2019. The project entailed the construction of a pipeline that would run parallel to the

4 The prescription offered by this article assumes that it would be in the best interests of Coast Salish tribes to oppose the Trans Mountain Pipeline and other fossil fuel infrastructure projects to preserve the environment. This is not true for all tribes and this article does not impose any judgment towards tribes who have chosen to support the pipeline projects for various reasons.

5 Crude oil is taken to refineries to be converted into petroleum products such as motor gasoline, diesel fuel, and jet fuel. *Oil: Crude and Petroleum Products Explained*, U.S. Energy Info. Admin. (May 23, 2019), <https://www.eia.gov/energyexplained/oil-and-petroleum-products/> [https://perma.cc/8PPE-CCQU].

6 Can. Nat'l Energy Bd., *Trans Mountain Pipeline ULC*, NEB Rep. MH-052-2018, pt. 1.1, at 2 (2019), <https://www.ceaa-acee.gc.ca/050/documents/p80061/126868E.pdf> [https://perma.cc/T66J-HQMW].

7 CP, *The Canadian Press, Timeline: Key Dates in the History of the Trans Mountain Pipeline*, *Calgary Herald* (May 29, 2018), <https://calgaryherald.com/business/energy/timeline-key-dates-in-the-history-of-the-trans-mountain-pipeline> [https://perma.cc/A2QH-2GUZ].

8 Kinder Morgan, [https://www.kindermorgan.com/pages/about\\_us](https://www.kindermorgan.com/pages/about_us) [https://perma.cc/YT5Y-4RJQ] (last visited Nov. 2, 2019).

9 One barrel of crude oil is 42 U.S. gallons. This translates to about 20 gallons of motor gasoline, 12 gallons of distillate (diesel) fuel, and 4 gallons of jet fuel. *Supra* note 5.

existing pipeline<sup>10</sup> and carry diluted bitumen<sup>11</sup>, a viscous mixture of sand and bitumen extracted from “tar sands”, nearly tripling the capacity.<sup>12</sup> The pipeline was boasted as a way to increase jobs for Canadians, introduce Canada to diverse oil markets, develop capacity for indigenous tribes, and generally increasing revenue for all levels of Canadian government.<sup>13</sup>

This announcement of the expansion ignited protests from the public based on concerns about how this increase in oil distribution might contribute to climate change. Controversies continued to plague the NEB hearings. There is dispute between government officials as to whether this is in the best interests of the provinces and country.<sup>14</sup>

The Federal Liberal government changed the assessment criteria in 2016 to include consultation with First Nations and consideration of greenhouse gas emissions from the extraction and production of oil that would be carried in the pipeline. The NEB recommended the federal government to approve of the pipeline with 157 conditions based on the adverse environmental impacts.<sup>15</sup> Canadian Prime Minister Trudeau sanctioned the pipeline expansion while other Canadian government officials backed the project based on its anticipated benefits to the Canadian economy.

<sup>10</sup> Wilderness Committee, *Kinder Morgan Pipeline Route Maps* (Mar. 2018), [https://www.wildernesscommittee.org/kinder\\_morgan\\_pipeline\\_route\\_maps](https://www.wildernesscommittee.org/kinder_morgan_pipeline_route_maps) [https://perma.cc/2EVN-VF75].

<sup>11</sup> Alan Taylor, *The Alberta Tar Sands*, *The Atlantic* (Sept. 25, 2014), <https://www.theatlantic.com/photo/2014/09/the-alberta-tar-sands/100820/> [https://perma.cc/A2G9-6PXX]; *Glossary*, U.S. Energy Info. Admin., <https://www.eia.gov/tools/glossary/index.php?id=B> [https://perma.cc/R8FS-XLU6] (last visited Nov. 2, 2019).

<sup>12</sup> Trans Mountain, *Expansion Project*, <https://www.transmountain.com/project-overview> [https://perma.cc/R2TC-N5ZL] (last visited Nov. 2, 2019).

<sup>13</sup> Sydney Brownstone, *Canada to Seattle Environmentalists: We Stand Behind the Kinder Morgan Pipeline*, *The Stranger* (Apr. 18, 2018, 11:34 AM), <https://www.thestranger.com/slog/2018/04/18/26055210/canada-to-seattle-environmentalists-we-stand-behind-the-kinder-morgan-pipeline> [https://perma.cc/7DQ6-PVD3]; Can. Nat'l Energy Bd., *Trans Mountain Pipeline ULC*, NEB Rep. MH-052-2018, pt. 2.2, at 30 (2019), <https://www.ceaa-acee.gc.ca/050/documents/p80061/126868E.pdf> [https://perma.cc/T66J-HQMW].

<sup>14</sup> Government of Canada, *Trans Mountain Expansion Project*, <https://www.nrcan.gc.ca/energy/resources/19142> [https://perma.cc/5Q4H-N3ZD] (last visited Nov. 11, 2019).

<sup>15</sup> Can. Nat'l Energy Bd., *Trans Mountain Expansion Project*, NEB Rep. OH-001-2014, pt. 2.4, at 18 (2016).

Litigation against Kinder Morgan and the NEB on the expansion project began in 2017.<sup>16</sup> The plaintiffs, including environmental and aboriginal groups as well as coastal municipalities, argued that the NEB did not properly review the project because an environmental review was not considered, and the First Nations were not consulted. The litigation continued into 2018 and concluded when the Federal Court of Appeals rejected approval of the project, holding that the Canadian government failed to adequately consult with First Nations who were opposed. The court also held that the government had ignored the impacts of increased marine vessel traffic and its threats to the orca population.<sup>17</sup>

The NEB released its Reconsideration Report in 2018, focusing on the impacts of the related marine shipping on the orca population and indigenous cultural use of the waters. The NEB reaffirmed their recommendation for approval after analyzing the project under the Canadian Environmental Assessment Act (CEAA) and the Species at Risk Act (SARA). The NEB reasoned that the economic benefits outweighed the adverse environmental effects of the project.<sup>18</sup>

After Kinder Morgan announced its suspension of the project in May 2018, the Canadian government's Crown corporation took control for \$4.5 billion in an attempt to guarantee completion of the expansion.<sup>19</sup> The project reportedly lost private funding

<sup>16</sup> Ethan Lou, *Lawsuit against Kinder Morgan Pipeline Expansion Starts in Canada*, Business Insider (Oct. 2, 2017, 4:00 AM), <https://www.businessinsider.com/r-lawsuit-against-kinder-morgan-pipeline-expansion-starts-in-canada-2017-10> [https://perma.cc/TLT4-HSG5].

<sup>17</sup> *Tsleil-Waututh Nation v. Canada*, (2018) F.C. 153 (Can. Ont.); see also Lynda V. Mapes, *Concern over Endangered Orcas Blows Up Approval of Trans Mountain Pipeline in Canada*, The Seattle Times (May 13, 2019, 9:18 AM), <https://www.seattletimes.com/seattle-news/environment/concern-over-endangered-orcas-blows-up-approval-for-trans-mountain-pipeline-in-canada/> [https://perma.cc/DBK9-4S8Z].

<sup>18</sup> Can. Nat'l Energy Bd., *Trans Mountain Pipeline ULC*, NEB Rep. MH-052-2018, pt. 2.3.2, at 34 (2019), <https://www.ceaa-acee.gc.ca/050/documents/p80061/126868E.pdf> [https://perma.cc/T66J-HQMW].

<sup>19</sup> See, e.g., Elmira Aliakbari & Ashley Stedman, *Trudeau Government Nationalizes Trans Mountain Pipeline Project - Further Proof That Canada Is Closed for Business*, Fraser Institute (May 29, 2018), <https://www.fraserinstitute.org/article/trudeau-government-nationalizes-trans-mountain-pipeline-project-further-proof-that-canada-is-closed-for-business> [https://perma.cc/RW87-JT8A]; Ian Austen, *Canadian Government to Buy Kinder Morgan's Trans Mountain Pipeline*, The New York Times (May 29, 2018), <https://www.nytimes.com/2018/05/29/world/canada/canada-oil->

because of the mounting environmental opposition and regulatory obstacles.<sup>20</sup> It is expected that private parties—perhaps even some First Nations—will purchase and operate the pipeline once it is finished.<sup>21</sup>

Litigation is still pending, but those in opposition to the expansion do not seem optimistic as the focus is solely on whether indigenous consultation was adequate, not whether the approval should be rescinded. <sup>22</sup> Recently, in November 2019, two tribes in British Columbia, the Upper Nicola Band and Stk'emlupsemc te Secwepemc Nation, dropped out of the case and signed agreements with the Crown corporation in the hopes of changing the consultation process to include First Nations' perspectives.<sup>23</sup> This case will not be resolved until after this article has been published so this article operates under the assumption that the pipeline will be expanded.

#### A. *Support for the Pipeline*

Most of the support for the pipeline is based on the potential for the pipeline to create new jobs and boost economic growth. The supporting parties include members of the Canadian government, Canadian citizens, regulators, and some First Nations tribes that could benefit from the pipeline by investing in it. Governmental preference for job creation and a lucrative industry is apparent in the United States as well.

In regard to governmental support, the Canadian federal government has shown its endorsement of the pipeline by purchasing it from Kinder Morgan. This was in part a strategic move because of the risk of losing millions of invested funds if the litigation were to halt construction. Other government officials

pipeline.html [<https://perma.cc/BZ7R-HP3E>]; Peter Kujawinski, *Canada's Troubled Pipeline Projects*, *The New York Times* (May 30, 2018), <https://www.nytimes.com/2018/05/30/opinion/canadas-troubled-pipeline-projects.html> [<https://perma.cc/HY7A-PM4Y>].

<sup>20</sup> Chris Hall, *Bill Morneau's Kinder Morgan Surprise Comes with Huge Price Tag, Lots of Political Risk*, *CBC News* (May 29, 2018, 12:05 PM), <https://www.cbc.ca/news/politics/pipeline-morneau-nationalize-1.4682199> [<https://perma.cc/6GAP-XDR3>].

<sup>21</sup> Global News, *2 B.C. First Nations drop out of Trans Mountain court challenge, sign deals with corporation*, <https://globalnews.ca/news/6176615/bc-first-nations-drop-trans-mountain/> [<https://perma.cc/6495-N9MQ>].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

support the expansion because they are responding to their constituents' interests in job creation and economic prosperity.

Canadian citizens have overwhelmingly supported the project. A poll conducted in 2018 revealed that a significant majority of Canadian citizens support the pipeline.<sup>24</sup> Though the most vocal supporters are in Alberta (84% in support) and British Columbia (55%), the regions through which the pipeline will run, support for the project extends throughout the country.<sup>25</sup>

This does not mean that all proponents of the pipeline believe that it is completely safe. Forty-four percent of those polled do not have confidence in the Canadian government that it will be able to mitigate the risk of oil spills. Some proponents are convinced that the pipeline will actually pave the way for a greener future as funds from the project can be used to invest in renewable energy sources and energy efficient technologies.<sup>26</sup>

The NEB, Canada's energy regulator, has changed its position on the pipeline multiple times. The Board is responsible for the approval of the project and has controlled the future of the pipeline throughout the litigation. Most recently, in February of 2019, the NEB voiced its support for the pipeline, stating that it is in the public interest despite the threat to the orca population.<sup>27</sup> This change in opinion is a result of the hundreds of conditions that the NEB imposed on the project in the past in an effort to mitigate environmental risks. Those conditions included reducing underwater noise, improving oil spill response, and reducing greenhouse gas emissions resulting from the increased tanker traffic.

A select few First Nations groups have sought to invest in the project to benefit from the economic potential of the expansion. The Indian Resources Council explained that a majority of the 134 First Nations were interested in financially supporting the project,<sup>28</sup>

<sup>24</sup> Rebecca Joseph, *Majority of Canadians Support Trans Mountain Pipeline Expansion: Ipsos Poll*, Global News (May 2, 2018, 10:47 PM), <https://globalnews.ca/news/4180482/majority-of-canadians-support-trans-mountain-pipeline-expansion-ipsos-poll/> [<https://perma.cc/RSJ8-TR55>].

<sup>25</sup> *Id.*

<sup>26</sup> See generally Government of Alberta, *TMX Benefits us all*, <https://yestotmx.ca> [<https://perma.cc/V4GS-F7BA>].

<sup>27</sup> *Trans Mountain Pipeline Gets Energy Regulator Support*, BBC News (Feb. 22, 2019), <https://www.bbc.com/news/world-us-canada-47336694> [<https://perma.cc/4KLL-V7TA>].

<sup>28</sup> *Oilpatch CEOs Support Indigenous Bid for Trans Mountain*, CBC News (Jan. 17, 2019, 4:00 AM), <https://www.cbc.ca/news/business/tmx-irc-trans-mountain-1.4981171> [<https://perma.cc/W73P-Q3MA>].

but this does not reflect the views of all First Nations. Because of the uncertainty surrounding the project, First Nations leaders have mostly expressed interest in purchasing the pipeline once it has been completed. Despite the concerns about environmental impacts, First Nations leaders believe that investing in the pipeline will allow for more stability in their governments.

Indigenous support for the pipeline has caused a rift between First Nations. Many of the tribes, especially those in British Columbia, are more concerned about the potential impacts to their land and how this might affect their cultural survival. For this reason, many tribes oppose the expansion.

### B. *Resistance to the Pipeline*

First Nations have been at the forefront of the fight against the pipeline expansion, joined by various Canadian environmental groups and government officials.<sup>29</sup> As explained before, this resistance was strong enough to halt the project a few times and convince Kinder Morgan to withdrawal from the project altogether.<sup>30</sup>

Many tribes have clearly expressed their opposition to the Trans Mountain Pipeline and projects that pose a similar threat to their survival. For example, the Treaty Alliance Against Tar Sands Expansion has voiced disapproval because of the energy intensive extraction process and threats to water quality.<sup>31</sup> The alliance relies on Indigenous rights and leadership to reduce reliance on fossil fuels and the effects of climate change.

Other lawsuits have been initiated by indigenous tribes to confront fossil fuel companies and hold them accountable for their contributions to climate change and other environmental hazards.<sup>32</sup>

<sup>29</sup> Lynda V. Mapes, *'It's Standing Rock North': Trans Mountain Pipeline in Canada Stirs Strong Opposition*, The Seattle Times (Nov. 26, 2016, 6:00 AM), <https://www.seattletimes.com/seattle-news/its-standing-rock-north-trans-mountain-pipeline-in-canada-stirs-strong-opposition/> [<https://perma.cc/797F-GJEQ>].

<sup>30</sup> CP, The Canadian Press, *Trans Mountain Timeline: A Look at Key Dates in the Project's History*, CTV News (June 18, 2019, 5:23 PM), <https://www.ctvnews.ca/canada/trans-mountain-timeline-a-look-at-key-dates-in-the-project-s-history-1.4471117> [<https://perma.cc/7Q9B-VGSP>].

<sup>31</sup> Treaty Alliance Against Tar Sands Expansion, <http://www.treatyalliance.org> [<https://perma.cc/VF4W-DREJ>].

<sup>32</sup> John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, The New York Times (Apr. 18, 2018),

First Nations members participated in hearings to voice their opposition and to advocate for the salmon and orca populations.<sup>33</sup> Washington tribes were also present in some of these hearings.<sup>34</sup> The tribes have staged public protests to gain publicity on the issue and engage the public to encourage widespread opposition.

Government officials have also spoken out against the project,<sup>35</sup> even after the Canadian government took ownership. Officials are concerned about environmental impacts and seem to be echoing the opinions of their constituents. The government in British Columbia has a significant stake in the matter as the pipeline will end in the province. Green Party Leader Elizabeth May and New Democrat members of Parliament (MPs) oppose the project and declare it to be inconsistent with Canada's commitment to reducing climate change emissions.<sup>36</sup>

Opposition to the project is not contained within Canada because it is well-understood that potential environmental damage will not be restrained by a political border. British Columbia is situated directly North of Washington state and the Pacific Northwest region is connected by a large body of water known as the Salish Sea. Petroleum products from the pipeline will be transported through this sea, threatening the health of all who inhabit it, including the endangered Southern Resident orca whales and species of salmon that are vital to the cultural identity of Coast Salish tribes.<sup>37</sup> This triggers special concerns about the potential

<https://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html> [<https://perma.cc/K4LB-WD44>].

<sup>33</sup> Dirk Meissner, *Expansion of Trans Mountain Pipeline Poses Risks that Could Harm Homes, Culture: B.C. First Nations Leaders*, *The Globe and Mail* (Nov. 26, 2018), <https://www.theglobeandmail.com/canada/article-serious-concerns-about-potential-impacts-of-an-expanded-trans-mountain/> [<https://perma.cc/CJ3K-BEES>].

<sup>34</sup> Chris Jordan-Bloch & Liz Judge, *Inside the Fight to Save the Salish Sea*, *Earthjustice* (Jan. 22, 2016), <https://earthjustice.org/features/photos-pipeline#> [<https://perma.cc/85K2-C2ZQ>].

<sup>35</sup> Mike Laanela *B.C. Premier Concerned about 'Catastrophic Consequences' Regardless of Pipeline's Owner*, *CBC News* (May 29, 2019, 7:44 AM), <https://www.cbc.ca/news/canada/british-columbia/b-c-premier-concerned-about-catastrophic-consequences-regardless-of-pipeline-s-owner-1.4682167> [<https://perma.cc/Z74V-QZDM>].

<sup>36</sup> Chris Hall, *Bill Morneau's Kinder Morgan Surprise Comes with Huge Price Tag, Lots of Political Risk*, *CBC News* (May 29, 2018, 12:05 PM), <https://www.cbc.ca/news/politics/pipeline-morneau-nationalize-1.4682199> [<https://perma.cc/6GAP-XDR3>].

<sup>37</sup> This term is used to describe tribes in the United States and Canada that live in proximity to the Salish Sea. These tribes include the Tulalip, Lummi, Swinomish, and Suquamish nations.

infringement of indigenous treaty rights and cultural preservation for tribes located near the Salish Sea.

### C. *Anticipated Threats to the Salish Sea Ecosystem*

The Salish Sea is a vibrant network of waterways encompassing the Strait of Juan de Fuca, Haro Strait, Strait of Georgia, and the Puget Sound. It reaches from British Columbia to Washington state, and is not constrained by the international border.<sup>38</sup> The sea is 7,470 km long and contains 419 islands, the maximum reaching 650 meters.<sup>39</sup> The body of water contains thirty-seven species of mammals, 172 species of birds, 253 species of fish, and more than 3,000 species of invertebrates.<sup>40</sup> Over seven million people inhabit the area around the sea.<sup>41</sup> Though the total value of this body of water is not evident from these numbers, it is clear that the Salish Sea is a significant ecosystem in the region and that many lives depend on its health.

#### 1. Direct Impacts from the Pipeline

An increase in the capacity to transport oil and bitumen will lead to an increase in exports through the Vancouver, B.C. port. This poses two related threats: increased traffic through the Salish Sea and a higher likelihood of spills.<sup>42</sup>

Tanker traffic is expected to increase 700%, which translates to at least 21,000 tankers in the next fifty years.<sup>43</sup> This would threaten the vulnerable habitat of Southern Resident orca whales.

<sup>38</sup> *About the Salish Sea*, The SeaDoc Society, <https://www.seadocsociety.org/about-the-salish-sea> [https://perma.cc/P5CS-JKGY] (last visited Nov. 5, 2019).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> U.S. Env'tl. Prot. Agency, *Executive Summary: Health of the Salish Sea Report*, <https://www.epa.gov/salish-sea/executive-summary-health-salish-sea-report> [https://perma.cc/2T3F-YA4T].

<sup>42</sup> Ben Adler, *The Next Standing Rock*, The New Republic (Sept. 8, 2017), <https://newrepublic.com/article/144538/next-standing-rock-new-canadian-pipeline-game-over-climate-activists-lining-up> [https://perma.cc/798M-VU5Q].

<sup>43</sup> Dyna Tuytel & Margot Venton, *Challenging the Trans Mountain Pipeline Expansion*, Ecojustice, <https://www.ecojustice.ca/case/challenging-trans-mountain-pipeline/> [https://perma.cc/MQD2-ZRA5] (last visited Nov. 5, 2019).

The First Narrows is a difficult passage to navigate currently, but more tankers will undoubtedly disturb this area even more.<sup>44</sup>

Oil spills would threaten not only the species that inhabit the sea but the entire ecosystem. Given the established history of oil spills in the region, many opponents to the pipeline argue that it is not a matter of if, but when.<sup>45</sup> Spills are understood as catastrophic events as accidental discharges, overfilling fuel tanks, and sinking vessels put oil and other dangerous products into the water. Measures taken to mitigate the impacts of oil spills are ineffective. In many incidents, less than half of the oil is successfully removed from the water.<sup>46</sup> The rest of the oil will either wash up on the shores or sink to the bottom, contaminating all levels of the sea.

Kinder Morgan has experience dealing with litigation related oil spills and other contamination. <sup>47</sup> The Trans Mountain Pipeline Accident Report reveals a long history of incidents,<sup>48</sup> and the environmental impact statement reveals a potential for more, though it is deemed acceptable by the NEB.<sup>49</sup> Despite mounting evidence that spills do happen, projects like this press on because of our

<sup>44</sup> Khelsilem, *Just Trudeau Promised to Protect Indigenous Rights. He Lied, Again*, The Guardian (June 19, 2018, 6:00 AM), <https://www.theguardian.com/world/commentisfree/2018/jun/19/salish-sea-pipeline-indigenous-salish-sea-canada-trans-mountain> [<https://perma.cc/H2V6-C98B>] (Khelsilem is a counselor for the Squamish Nation).

<sup>45</sup> See Eric de Place & Ahren Stroming, *Northwest Oil Spills: The Raw Data and the Growing Risk*, Sightline Institute (Jan. 26, 2015, 6:30 AM), <https://www.sightline.org/2015/01/26/northwest-oil-spills-the-raw-data-and-the-growing-risk/> [<https://perma.cc/8GT5-DELQ>].

<sup>46</sup> See Nuka Research and Planning Group, *Technical Analysis of Oil Spill Response Capabilities and Limitations for Trans Mountain Expansion Project* (Figure 3), <https://vancouver.ca/images/web/pipeline/NUKA-oil-spill-response-capabilities-and-limitations.pdf> [<https://perma.cc/BAN4-AWWZ>].

<sup>47</sup> See *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018) (conservation groups brought a valid claim under the Clean Water Act for discharges of pollutants into water); Bernd, *The Long Battles to Stop the Kinder Morgan Pipeline*, Texas Observer (Nov. 5, 2019) <https://www.texasobserver.org/kinder-morgan-texas-hill-country-lawsuit/> [<https://perma.cc/56HV-7LTD>].

<sup>48</sup> See Trans Mountain (Apr. 1, 2017), [https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/1491240428-170401\\_Spill-Chart-for\\_w\\_locations\\_TMEP\\_FINAL.pdf?mtime=20170622173437](https://s3-us-west-2.amazonaws.com/transmountain-craftcms/documents/1491240428-170401_Spill-Chart-for_w_locations_TMEP_FINAL.pdf?mtime=20170622173437) [<https://perma.cc/S5QB-PGWT>] (This chart details all of the oil spills reported by Trans Mountain from 1961 through April 2017, including the location size of each spill.)

<sup>49</sup> Can. Nat'l Energy Bd., *Trans Mountain Pipeline ULC*, NEB Rep. MH-052-2018, pt. 1.7.1, at 26 (2019), <https://www.ceaa-acee.gc.ca/050/documents/p80061/126868E.pdf> [<https://perma.cc/T66J-HQMW>].

societies' reliance on fossil fuel. There are not only the direct effects of the pipeline to consider, but the general consequences of increased production of fossil fuels.

## 2. Effects of Increased Fossil Fuel Production

Climate Change presents issues on a global scale, but those effects would certainly be felt in the Salish Sea. Specifically, in the Northwest region of the United States, government reports anticipate rising sea levels and ocean acidification.<sup>50</sup> Though the causes of climate change are a popular topic of debate, scientists are confident that climate change is a result of the “greenhouse effect”, the warming of the planet due to an increase of gases in the atmosphere that trap heat.<sup>51</sup> These gases include water vapor, carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), and chlorofluorocarbons (CFCs).<sup>52</sup> Carbon dioxide emission is linked to the burning of fossil fuels as that process releases carbon which then combines with oxygen in the air.<sup>53</sup>

Efforts to increase production and exportation of fossil fuel go against popular opinion in the environmentalist community that the fossil fuel industry is losing ground.<sup>54</sup> Reliance on fossil fuels is a dangerous path to choose given that we have already seen some of the impact of centuries of fossil fuel use.

The environmental justice aspects of climate change are not lost on tribes.<sup>55</sup> Though they typically contribute the least to climate change, communities of color and low-income communities are especially vulnerable to its impacts. Tribes have already been

<sup>50</sup> Intergovernmental Panel on Climate Change [IPCC], *Fifth Assessment Report, Climate Change 2014: Impacts, Adaptation, and Vulnerability (Regional Aspects, North America)* 1459 (Romero-Lankao, P., Smith, J.B.), available at [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap26\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap26_FINAL.pdf) (Contribution of Working Group II).

<sup>51</sup> Nat'l Aeronautics and Space Admin [NASA], *Facts: The Causes of Climate Change*, <https://climate.nasa.gov/causes/> [<https://perma.cc/QB2P-357Z>].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Bill McKibben, *Some rare good news: the fossil fuel industry is weaker than ever*, THE GUARDIAN (June 21, 2018), <https://www.theguardian.com/commentisfree/2018/jun/21/climate-change-fossil-fuel-industry-never-been-weaker> [<https://perma.cc/Z4BU-CRLP>].

<sup>55</sup> For more information on the concepts of environmental justice and environmental racism, see generally Exec. Order No. 12898, 59 C.F.R. 32 (1994); BULLARD, R.D., CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (South End Press, 1993).

exploited and subjected to policies that have attempted to restrict their agency for centuries. Their livelihood and cultural identity are directly tied to natural resources. Fish, orcas, plants, and water are all essential to the Coast Salish tribes. The impacts of climate change are likely to be felt by those closer to the coast and those who derive most of their food from the seas. This presents an intolerable inequality – those who have worked hardest to save the environment will suffer the effects of climate change sooner and to a higher degree. Because they have perhaps the most to lose, tribes stand to gain immeasurable value from joining the legal battle against projects like the Trans Mountain Pipeline Expansion.

Though this threat should be concerning to non-Indians as well, these risks directly implicate the treaty rights of Coast Salish tribes. Tribes in Western Washington have initiated cases many times to define these rights and the responsibilities of the government to protect and enforce them. If they want to defend these rights and the ecosystem against the pipeline, tribes may need to consider traditional and emerging legal solutions.

### III. THE TRADITIONAL APPROACH: ADVOCATING FOR TREATY RIGHTS

The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes the importance of indigenous rights but provides little guidance as to how they might enforce them.<sup>56</sup> Article 37 declares that, “Indigenous peoples have the right to recognition, observance, and enforcement of treaties, agreements and other constructive arrangements concluded with States...and to have States [honor] and respect such treaties....”<sup>57</sup> Courts in the United States have recognized treaty rights to varying degrees, resulting in a complicated legal framework. The treaty rights of the Coast Salish tribes are clearly implicated by the anticipated impacts of the Trans Mountain Pipeline expansion, but it is unclear how those rights could be leveraged in another country. This section explores a traditional approach to litigation that has been used before—challenging harmful projects by advocating for tribal treaty rights—and the potential limitations of using this method to resist the Trans Mountain Pipeline expansion.

<sup>56</sup> G.A. Res. 61/295 (Sept. 13, 2007).

<sup>57</sup> *Id.* at 28-29

### A. *Treaty Rights of Coast Salish Tribes*

It is difficult to sufficiently capture the centuries of exploitation conducted by the United States federal government against indigenous peoples.<sup>58</sup> At first, settlers from Europe seized the land in North America through genocide and abuse of tribal hospitality. Changes in policy forced the federal government to turn to legal matters to continue their exploitation of tribes. Throughout the 1800s, the federal government proposed over 500 treaties with recognized tribes in exchange for land rights.<sup>59</sup> Many tribes were displaced from their original land so colonists could take it and establish the country. Tribes that entered into treaty agreements then struggled to have them recognized by the federal government, despite the fact that treaties are designated as the supreme law of the land in the U.S. Constitution.<sup>60</sup>

Tribes in Western Washington had to live on reservations to survive.<sup>61</sup> They secured rights to fish, hunt and gather in their original lands through five treaties: Medicine Creek, Neah Bay, Olympia, Point Elliot and Point No Point.<sup>62</sup> Each of these treaties include a clause that guarantees “the right of taking fish at usual and accustomed grounds.”<sup>63</sup> This clause has proven useful in a number of cases interpreting treaties and the rights they conveyed to tribes.

In the 1960s, the depletion of fish in Western Washington caused tensions to grow between the tribes and the state, resulting in a period called “the Fish Wars.”<sup>64</sup> Coast Salish members practiced civil disobedience through the use of “Fish-Ins” and tactics common in the Civil Rights Movement.<sup>65</sup> The state of Washington arrested many tribal members for exercising their

<sup>58</sup> For further reading see ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES (Beacon Press, 2015); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton, et al., Lexis/Nexis, Mathew Bender, 2005 ed.).

<sup>59</sup> See *American Indian Treaties*, National Archives, <https://www.archives.gov/research/native-americans/treaties> [<https://perma.cc/4F4G-5ZZJ>].

<sup>60</sup> U.S. Const. amend. VI, § 1, cl. 2.

<sup>61</sup> *Understanding Tribal Treaty Rights in Western Washington*, Northwest Indian Fisheries Commission, <https://nwifc.org/member-tribes/treaties/> [<https://perma.cc/QT8T-GMS4>] (last visited Nov. 6, 2019).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 2.

fishing rights. Billy Frank Jr. (Nisqually) was a notable champion for fishing rights in the state. He was arrested over fifty times in defiance of the laws denying the tribes' treaty rights to fishing.

In 1973, *US v. Washington*,<sup>66</sup> known as the Boldt Decision, was initiated by the U.S. Attorney for western Washington, Stan Pitkin, after he was caught in the midst of police cracking down on tribal members fishing in Tacoma. Testimony of tribal elders was used to demonstrate times when the treaties were recognized and conveyed valuable information to Judge Boldt about the cultural significance of protecting these rights. The treaty rights were upheld by interpreting use of the language “the right of taking fish at usual and accustomed grounds...” to mean that tribes were entitled to half of the salmon moving through the usual and accustomed grounds. This ruling established tribes as co-managers of the salmon resource in the state noting, “if the state can regulate, so can the tribes” and setting conservation standards to restrict the ability of the state to regulate tribal fishing.

In Phase II in 1980,<sup>67</sup> Judge Orrick's decision upheld these rights again, including salmon produced in hatcheries in the 50/50 sharing formula and confirming a state duty not to impair salmon habitats.<sup>68</sup> The Supreme Court upheld the decision in 1979, causing Washington to finally implement the law.

In 1994, Judge Rafeedie's decision extended the 50/50 rule to harvestable shellfish, stating that “the treaty is not a grant of rights to the Indians, but a grant of rights from them.”<sup>69</sup>

Despite the notable cases in Washington's history, treaty rights are not always recognized, and tribes may not be in a position to seek legal relief for each violation. Thus, advocacy for treaty rights may be limited by the traditional legal framework, especially when those rights are being used to challenge projects in another country. In order to challenge the Trans Mountain Pipeline, it is likely that tribes would have to join the litigation in Canada, as they have done before with some success.

<sup>66</sup> This case remained active for a number of years and addressed other issues related to treaty rights in subsequent cases. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>67</sup> *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980);

<sup>68</sup> *Id.* at 207.

<sup>69</sup> *United States v. Washington*, 19 F. Supp. 3d 1126 (1994).

## B. *Joining Litigation Efforts in Canada*

Intervention is a common practice in the legal system, but the passage of the Canadian Charter of Rights and Freedoms allowed for the process of intervention to flourish in the 1990s. Intervention allows interested third parties to assert arguments in cases where they otherwise would not have standing to participate. Third parties often intervene in cases that present public policy and human rights issues. The court must grant leave for intervention to occur, which poses a significant barrier for groups who would merely echo the same arguments being made. Intervenors are limited in what they can argue—they cannot expand on issues; they can only provide a different perspective on the claims asserted. They may submit a written argument, known as a *factum*, or they can present an oral argument at trial.<sup>70</sup>

There are a number of court rules governing the process of intervention, but judges have discretion in granting leave to intervenors. Multiple reasons may prompt someone to intervene in a case. The first is when an individual (or group) believes that the outcome of a case would have a direct impact on their well-being. The second situation occurs when an individual is more interested in the legal principles considered than the outcome. The final situation arises when someone who does not have a stake in the outcome of the case feels that a legal issue has been overlooked by the parties.

It seems that the Coast Salish tribes would fall into the first category. They foresee a direct impact to their ecosystem should the pipeline be constructed. This categorization is not relevant to the requirements that must be satisfied, but it may convince the court to grant intervenor status because so much is at stake.

In 1990, a common law test for intervention was established in *Rothmans, Benson & Hedges Inc. v. Canada*.<sup>71</sup> That test was later modified in *Canada v. Pictou Landing First Nation*,<sup>72</sup> but the same basic principles remained.

<sup>70</sup> Linda McKay-Panos, *Intervenors in Human Rights Cases*, LawNow (Sept. 8, 2017), <https://www.lawnow.org/intervenors-in-human-rights-cases/> [<https://perma.cc/JR7M-VR2U>].

<sup>71</sup> *Rothmans, Benson & Hedges Inc. v. Canada (Att'y Gen.)* (1990), 1 F.C. 74 at paragraph 12 (T.D.), *aff'd* (1990) 1 F.C. 90 (Can. Ont. C.A.).

<sup>72</sup> *Canada (Att'y Gen.) v. Pictou Landing First Nation*, 2014 FCA 2, 456 N.R. 365 at paragraphs 6-10 (Can.).

First, the court must consider whether the proposed intervenor has complied with the specific procedural requirements and offered well-detailed evidence in support. If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and therefore must deny intervenor status.

The next inquiry is whether the proposed intervenor has a genuine interest in the matter to ensure that the intervenor has sufficient knowledge and skills to participate effectively. A similar question is raised as to whether the intervenor will advance a different and value insight or perspective that will further the court's determination.

Finally, the court considers whether the interests of justice permit intervention. Relevant factors include the public nature of the claim and intervenor's involvement in earlier proceedings. A particular consideration is whether granting intervention would secure "the just, most expeditious and least expensive determination of every proceeding on its merits."<sup>73</sup>

Though it is not guaranteed that the satisfaction of these requirements would grant intervenor status to the Coast Salish tribes, it is necessary to consider whether they could meet the factors of the test. First, the procedural requirements are easy enough to comply with but may require legal assistance. This does not appear to pose an issue as there are plenty of legal organizations who are interested in opposing the pipeline.

Coast Salish tribes undeniably have a genuine interest in the matter and will advance a unique perspective that would require the court to consider impacts that go beyond their jurisdiction. By bringing in this perspective, tribes could change the legal understanding of environmental issues to comport with the reality that the environment is not confined by political borders. This shift could set legal precedent that would open the door for others looking to fight similar projects.

Finally, it seems that the interests of justice permit intervention. The issue's publicity is apparent based on the controversy explained earlier. Many groups have a stake in the success or failure of the project. It would be speculative to conclude that granting intervention would secure an efficient proceeding, but

<sup>73</sup> *Canada (Att'y Gen.) v. Canadian Doctors for Refugee Care et al.*, 2015 FCA 34, at 14 (Can.).

it could be argued that a determination of this claim on the merits requires the input of indigenous perspectives.

Overall, it is likely that the Coast Salish tribes could make a successful claim for intervenor status. They seem to meet the substantive requirements of the *Pictou* test, and given that some tribes have intervened in the past, there is a good chance that the Canadian courts would grant intervenor status. However, this decision would be limited to litigation of the Trans Mountain Pipeline. When other international threats to the Salish Sea arise, Coast Salish tribes will have to establish intervenor status each time.

#### IV. AN EMERGING LEGAL STRATEGY: THE RIGHTS OF NATURE MOVEMENT

In the footsteps of the Rights of Nature<sup>74</sup> movement, which has recently seen victories in Ecuador, Colombia, India, and New Zealand, people in the Pacific Northwest could establish rights for the Salish Sea. This movement seeks to achieve rights for natural resources by changing the concept of nature from property, giving humans the right to destroy it, to legal entity, with its own right to exist and flourish.<sup>75</sup>

Ecuador was the first country to incorporate rights of nature in their constitution. Chapter Seven of the Ecuadorian constitution states, “In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.”<sup>76</sup> Though the instances are few, these rights have been enforced in some high profile cases, including a lawsuit against British Petroleum in 2010 following the memorable oil spill in the Gulf of

<sup>74</sup> Sigal Samuel, *Lake Erie Now Has Legal Rights, Just Like You*, Vox (Feb. 26, 2019, 11:00 PM), [https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio?fbclid=IwAR3cC0qbhOTRe7ilGBRpiUiFBe\\_owDDdSKgcoez7yqrKFWutpNvux5atjb0](https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio?fbclid=IwAR3cC0qbhOTRe7ilGBRpiUiFBe_owDDdSKgcoez7yqrKFWutpNvux5atjb0) [<https://perma.cc/P7XC-HCHS>].

<sup>75</sup> Global Alliance for Rights of Nature, *What is Rights of Nature?*, <https://therightsofnature.org/what-is-rights-of-nature/> [<https://perma.cc/P6X4-XPGD>].

<sup>76</sup> Ecuador Const. ch. 7, art. 72.

Mexico.<sup>77</sup> Some have commented on the more subtle, theoretical impacts of the rights, which is often the effect of a constitutional provision.<sup>78</sup> The way the Ecuadorian government considers the environment has changed, allowing those principles to become interwoven in the rest of the government's actions.<sup>79</sup> Those interested in securing the rights of the Salish Sea could seek a theoretical approach as Ecuador has by relying on more progressive state constitutions or even considering taking a federal approach.

Tribes could also look to more local efforts to establish rights of nature. In 2013, Mora County, New Mexico passed an ordinance creating rights for the water in the county, establishing a public trust.<sup>80</sup> The ordinance rejected the exploitation of county water by corporations in response to hydrofracking efforts. The authority was based on the Treaty of Guadalupe Hidalgo, which guaranteed tribal members "free enjoyment of their liberty and property."<sup>81</sup> The ordinance established communal rights to these resources, which the ordinance converted into a duty to safeguard those resources. Further, it included rights to the use and consumption of water, rights to a sustainable energy future, and makes it unlawful for corporations to engage in the extraction of natural resources that would endanger water quality.<sup>82</sup> When an energy exploration firm brought suit to enjoin the enforcement of these rights in 2015, the District Court of New Mexico invalidated the ordinance in its entirety, citing violations of the Supremacy Clause and the First Amendment.<sup>83</sup> This experience demonstrates the number of obstacles that must be overcome in the process of establishing rights. This approach is so experimental that many of these attempts will be unsuccessful.

More recently, in March 2019, Toledo, Ohio granted legal rights to Lake Erie. The referendum allows citizens to sue polluters

<sup>77</sup> Kyle Pietari, *Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, 5 WILLAMETTE ENVTL. L.J. 59-61 (2016) available at: <https://willamette.edu/law/resources/journals/welj/pdf/2016/2016-f-welj-pietari.pdf> [<https://perma.cc/VHM2-NPVL>] (the case was ultimately dismissed for lack of jurisdiction and injury in 2012).

<sup>78</sup> *See id.* at 54-59.

<sup>79</sup> *Id.*

<sup>80</sup> Mora County, N. M., Ordinance 2013-01.

<sup>81</sup> Treaty of Guadalupe Hidalgo, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

<sup>82</sup> *See* Mora County, N. M., Ordinance 2013-01 §4-5.

<sup>83</sup> *SWEPI v. Mora County, N.M.*, 81 F.Supp.3d 1075, 1211-1212 (D. N.M. 2015).

on behalf of the lake.<sup>84</sup> This would have been the first law in the United States to establish rights for an entire ecosystem, allowing citizens to sue on behalf of the lake when there is a danger of harm.<sup>85</sup> A lawsuit was filed after the initiative was passed, which is still pending at the time of publication.<sup>86</sup>

The few developing models available leave us with a limited framework and little evidence of successful enforcement. Some view the lack of confirmation as daunting, while others view it as an opportunity for creative solutions. Many of the concepts invoked would allow individuals to act as guardians or trustees on behalf of the entity. This would confer standing to initiate a claim under state or federal tort laws. Incorporation of these rights into state and federal constitutions could allow for civil rights actions and a shift in the theoretical understanding of the environment. The possibilities are endless, providing flexibility to fit the intricacies of each natural entity.

An ideal framework for the Salish Sea would allow any interested party (environmental groups, tribes, or concerned individuals) to initiate a lawsuit on behalf of the Salish Sea. Considering typical tort actions, one would have to establish causation between the act (expansion of the pipeline) and the injury (environmental degradation, decline in water quality, loss of species, etc.). Traditionally, that causation may be quite attenuated as environmental issues may become apparent over longer periods of time. Using a different rights framework could allow for a change in the definition of causation or a different standard altogether. The ability to initiate litigation on behalf of the Salish Sea creates a more immediate alternative to long-term policy goals. Because oil infrastructure projects can move quickly through the process, a quick response is necessary to succeed in preventing, or at the very least stalling, these kinds of projects.

It is evident that the success of this movement in the Salish Sea would require both a shift in the way the legal system considers

<sup>84</sup> Ohio Rev. Code § 1506.10.

<sup>85</sup> Tish O'Dell, *Toledo Voters Enact Lake Erie Bill of Rights*, Community Environmental Legal Defense Fund (Feb. 26, 2019), <https://celdf.org/2019/02/breaking-news-toledo-voters-enact-lake-erie-bill-of-rights/> [https://perma.cc/YG8A-VWEV].

<sup>86</sup> *Drewes Farms Partnership v. City of Toledo*, 2019 U.S. App. LEXIS 14844 (2019).

the environment when crafting policy and a mechanism for the public to bring suit against polluters who pose immediate threats.

## V. CONCLUSION

Tribal members hold a unique position in the struggle to preserve and protect the environment. While other people may be able to establish standing under certain circumstances, treaty rights may provide the strongest claim for preventing oil companies from devastating our ecosystems. Those rights would certainly be bolstered by the establishment of rights of nature for the Salish Sea.

As policymakers struggle to choose between protecting the environment and advancing the economy, the public can intervene to put the interests of the environment first. Climate change amplifies the urgency of crafting policy to preserve natural resources. Reliance on fossil fuels is dangerous for the environment and the economy. Allowing our natural resources to be degraded has already and will continue to cause irreparable damage. It is imperative that citizens do everything they can to protect these resources from exploitation if they want to address climate change. This will require persistence and creativity within the legal framework, but most importantly it will require a shift in the way we consider the environment and its inherent value.

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