

# Strategies to Oppose Pipeline Permitting Around Tribal Reservations and Uphold Treaty-based Usufructuary Rights

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Introduction .....	29
Pipelines on Land Surrounding Reservations Pose an Increasing Threat to Tribes .....	30
Pipelines Threaten Tribal Sovereignty Across the United States .....	30
Trump’s Executive Actions Make It More Difficult to Challenge Permits .....	32
Case Study: Pipelines Threaten Ojibwe Usufructuary Rights Around the Great Lakes .....	33
Three Strategies May Protect Land Around Reservations from Pipeline Permitting Without Relying on NEPA Environmental Review .....	35
A. Tribes Can Assert Usufructuary Rights Established in Treaties to Oppose Pipeline Permitting .....	35
1. Legal Authority: The Supreme Court’s Decision in Mille Lacs Established Usufructuary Rights.....	35
2. Arguments Brought in Minnesota Litigation Against Pipeline Projects Show Usufructuary Rights Are Considered in Permitting Decisions.....	36
3. Usufructuary Rights Could Be Expanded and Strengthened to Further Oppose Pipelines Based on United States v. Washington .....	38
B. The Public Trust Doctrine Presents Another Legal Avenue to Oppose Pipelines.....	40
C. Supporting Protest Rights is Critical for a Tribally Driven Movement to Delay and Cancel Pipeline Projects in the Trump Era.....	42
Conclusion.....	44

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## INTRODUCTION

Protecting natural resources in the territories surrounding tribal reservations—not only on the reservations themselves—is critical to preserving tribes’ self-determined ways of life. Some treaties between tribal governments and the United States reserve tribes’ usufructuary rights, which are the rights to *use* but not own land in areas surrounding their reservations.<sup>1</sup> Consequently, oil and gas development projects permitted in areas surrounding reservations can still harm tribes by impacting the areas where tribes have these treaty-established usufructuary rights.

In his second term, President Donald Trump escalated oil and gas project development while weakening the National Environmental Policy Act (NEPA) environmental review procedures that may delay or counter pipeline permitting.<sup>2</sup> Because of these new challenges, this Note proposes strategies to challenge the permitting of pipelines in off-reservation areas that both strengthen NEPA-based claims and supplement them with alternative advocacy methods. Specifically, this Note will focus on ongoing litigation against pipeline reroute projects in the Great Lakes, which particularly threaten the way of life of the local Ojibwe<sup>3</sup> and manoomin (wild rice), an important tribal food source.<sup>4</sup> Based on this litigation, three strategies stand out as the most effective means to protect lands around reservations.

First, litigants should consider asserting treaty-based tribal usufructuary rights in ceded territories.<sup>5</sup> Usufructuary rights refer to the “right to use and

1. Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 69, 71-73 (2015); Zoe Loftus-Farren, *Pushing for a Just Transition: Plains Tribes Versus Big Energy*, PBS SOCAL (May 2, 2017), <https://www.pbssocal.org/shows/earth-focus/pushing-for-a-just-transition-plains-tribes-versus-big-energy> [<https://perma.cc/7DKN-K984>].

2. Exec. Order No. 14,156, 3 Fed. Reg. 8433; Fact Sheet: President Trump Is Delivering Historic Permitting Wins Across the Federal Government, THE WHITE HOUSE (June 30, 2025), <https://www.whitehouse.gov/fact-sheets/2025/06/fact-sheet-president-trump-is-delivering-historic-permitting-wins-across-the-federal-government/> [<https://perma.cc/26AM-JBGG>]; Spencer Kimball, *Trump Laid Out a Sweeping Energy Agenda. Here Are All the Key Actions He Took on Day One*, CNBC (Jan. 21, 2025), <https://www.nbcnewyork.com/news/business/money-report/trump-laid-out-a-sweeping-energy-agenda-here-are-all-the-key-actions-he-took-on-day-one/6116101/> [<https://perma.cc/LL9V-RXYT>].

3. This Note will refer to the Indigenous tribe in the region as the Ojibwe, to reflect current language used by the Leech Lake Band, the Bad River Tribe, and the Mille Lacs Band, as well as common use today. See *About Leech Lake Band of Ojibwe*, <https://www.llojibwe.org/aboutUs/demographics.html> [<https://perma.cc/85U7-8DSA>]; *Bad River Tribe, Gaa-pi-inakamigak: History*, <https://www.badriver-nsn.gov/history/> [<https://perma.cc/AM5Z-RXM8>]; *Mille Lacs Band of Ojibwe*, <https://millelacsband.com/> [<https://perma.cc/CM3S-QKK6>]. The Ojibwe also “refer to themselves as *Anishinabe* (‘original man’ or ‘people’).” Aurelien Bouayad, *Wild Rice Protectors: An Ojibwe Odyssey*, 22 ENV’T L. REV. 25, 26 n.1 (2020). The name “Chippewa,” an anglicized version, is also sometimes used. Peter Erlinder, *Treaty-Guaranteed Usufructuary Rights: Minnesota v. Mille Lacs Band of Chippewa Indians Ten Years On*, 41 ENV’T L. REP. 10921, 10921 n.3 (2011).

4. Aurelien Bouayad, *Wild Rice Protectors: An Ojibwe Odyssey*, 22 ENV’T L. REV. 25, 26-27 (2020).

5. In the United States legal system, usufructuary rights may be reserved and outlined “either explicitly or implicitly in treaty, statutory agreements or executive orders establishing reservations.”

benefit from a property” that is under the ownership of someone else, such as hunting, fishing, and gathering rights.<sup>6</sup> Second, litigants can bring public trust claims, particularly when pipelines cross navigable bodies of water. Public trust claims uphold the public’s right to use certain natural and cultural resources and require the government to protect those resources, particularly navigable bodies of water.<sup>7</sup> Ongoing litigation in Michigan suggests that the public trust doctrine may complement right-to-use clauses in treaties in efforts to protect tribal resources.<sup>8</sup> Third, protest and other social movement strategies are integral to pipeline opposition. Movements focused on pressuring state actors may create opportunities to terminate projects by targeting key administrative steps in the pipeline approval processes.<sup>9</sup>

PIPELINES ON LAND SURROUNDING RESERVATIONS POSE AN INCREASING  
THREAT TO TRIBES

*Pipelines Threaten Tribal Sovereignty Across the United States*

Lands surrounding reservations do not have the same protections as reservations themselves. For instance, while states generally do not have jurisdiction on tribal reservations, areas off-reservation may be subject to state and federal jurisdiction.<sup>10</sup> Still, off-reservation lands influence ecosystems on reservations and provide important resources for tribes. Some treaties between tribes and the U.S. government secure usufructuary rights for tribes on these off-reservation lands, which may include harvesting, fishing, and hunting rights.<sup>11</sup>

Off-reservation usufructuary rights are important to tribes for subsistence, cultural, and religious purposes.<sup>12</sup> Areas off-reservation also provide habitat for traditional foods such as salmon and wild rice, and a tribe’s ability to harvest

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Charlton, *supra* note 1, at 72, 72 n.10. This Note will focus on usufructuary rights reserved in treaties. Indigenous Peoples have an inherent right to possess and occupy land in the United States. *See id.* at 75-76. When entering treaties with the United States, tribes granted certain lands or rights according to the treaty and reserved all remaining un-ceded “natural rights’ to sovereign authority in areas where it has not been relinquished.” *Id.* at 81, 81 n.37, n.39. The rights to hunt, gather, or otherwise use land in a given area are thus reserved rights that can be found explicitly or implicitly in treaties or agreements. *See id.* at 102-03.

6. *See* Usufruct, LEGAL INFO. INST. (Oct. 2021), <https://www.law.cornell.edu/wex/usufruct> [https://perma.cc/S5Q8-DSPS]; Charlton, *supra* note 1, at 100-02.

7. *See* Public Trust Doctrine, LEGAL INFO. INST. (May 2022), [https://www.law.cornell.edu/wex/public\\_trust\\_doctrine](https://www.law.cornell.edu/wex/public_trust_doctrine) [https://perma.cc/4983-4ACL].

8. *See* Brief of Amici Curiae Tribal Nations in Support of Plaintiff-Appellant at 18-21, *Nessel v. Enbridge Energy* (6th Cir. Sep. 25, 2023) (No. 23-1671), <https://earthjustice.org/wp-content/uploads/2023/09/2023.09.25-amicus-brief-of-tribal-nations.pdf> [https://perma.cc/9SG6-FLPJ].

9. *See* David J. Hess, Yu-Ri Kim & Kaelee Belletto, *How Do Coalitions Stop Pipelines? Conditions That Affect Strategic Action Mobilizations and Their Outcomes*, ENERGY RSCH. & SOC. SCI., 2023, at 9-10.

10. Charlton, *supra* note 1, at 73-74.

11. Charlton, *supra* note 1, at 71.

12. *See* Bouayad, *supra* note 4, at 27.

traditional plants is important to their right to self-determination.<sup>13</sup> Tribal communities have traditionally relied heavily on land through their robust agricultural and harvesting systems. But the federal government's fractionation and dispossession of tribal lands have eroded traditional land uses, leading to disproportionately high rates of food insecurity and poverty across Native communities.<sup>14</sup> The degradation and loss of land over time have separated tribes from their traditional diets, medicines, and religious practices.<sup>15</sup> Thus, protecting and restoring natural resources on and off reservation lands can help to protect and restore their ways of life.

Many types of development and extraction have jeopardized the natural resources outside of reservation areas where tribes have usufructuary rights.<sup>16</sup> Today, one major threat to these lands is pipeline permitting. An estimated 20 percent of oil and gas reserves lie beneath tribal reservations, making regions surrounding the reservations potentially vulnerable to extraction projects and pipeline permitting if they also contain these reserves.<sup>17</sup> The wide reach of major pipelines also increases the risk of harm to reservations and Indian Territories; for instance, the Dakota Access Pipeline (DAPL) proposals create potential oil spill risks that could affect thirteen distinct tribes.<sup>18</sup>

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13. See Rebecca Tsosie & Michael Kotutwa Johnson, *"The Seed is the Law": Creating New Governance Frameworks for Indigenous Heirloom Seeds and Traditional Knowledge*, 71 U.C.L.A. L. REV. 1770, 1785, 1827-28 (2025). Self-determination encompasses factors such as "the right to protect Indigenous cultural heritage, both tangible and intangible, and to participate in current global and national discussions that affect Indigenous peoples' rights," based on the 2007 UN Declaration on the Rights of Indigenous Peoples. *Id.* at 1808 (citing the G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007)).

14. See *id.* at 1787; SARA USHA MAILLACHERUVU, CENTER ON BUDGET AND POLICY PRIORITIES, *THE HISTORICAL DETERMINANTS OF FOOD INSECURITY IN NATIVE COMMUNITIES* 3, 8 (2022). A Native American Agriculture Fund study of American Indians and Alaska Natives found that 56% of survey respondents experienced food insecurity during the COVID-19 pandemic. *Id.* at 3. Prices for some foods, such as bread and milk, were found to be higher on reservations according to a First Nations Development Institute report. *Id.* at 5.

15. See Charlton, *supra* note 1, at 72; see MAILLACHERUVU, *supra* note 17, at 8.

16. See Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 Env't L. 279, 282 (2000).

17. See Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016), <https://www.reuters.com/article/business/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B0/>. The U.S. Geological Survey Energy Resources Program conducts assessments of potential oil and natural gas reserves and indicates oil reserves in the general area of some reservations, particularly in New Mexico and Utah, and to a lesser extent, North Dakota, Wyoming, Michigan, and New York. *Compare National Oil and Gas Assessments*, USGS, <https://energy.usgs.gov/naga-map> [<https://perma.cc/4R8V-875T>] (last visited Mar. 10, 2026) (showing oil wells in green); *with National Pipeline Mapping System*, DEP'T OF TRANSP., <https://www.npms.phmsa.dot.gov/> [<https://perma.cc/U47V-4FYR>] (last visited Mar. 10, 2026) (showing "Tribal Government Lands" layer, when checked, in red).

18. Loftus-Farren, *supra* note 1 (citing Candice Landry & Jennifer Veilleux, *Maps: Missouri River Basin Contemporary Tribal Land and the Proposed Oil Pipeline*, Jennifer Veilleux, PHD, <https://www.jenniferveilleux.com/maps> [<https://perma.cc/84AY-VZ7U>] (last visited Mar. 9, 2026)); see also, U.S. Department of Transportation mapping tool shows hazardous liquid pipelines overlaid on Tribal Government lands. *National Pipeline Mapping System*, DEP'T TRANSP., <https://www.npms.phmsa.dot.gov/> [<https://perma.cc/U77E-VF9X>] (last visited Dec. 7, 2025).

The risk of oil spills is perhaps the biggest threat from pipelines permitted near tribal land, most often caused by “equipment failure, corrosion, material and welding failure, and improper operation.”<sup>19</sup> These spills are not infrequent; for instance, Texas, which experienced by far the most spills out of any U.S. state, experienced 1,034 accidents on crude oil pipelines between 2010 and 2021.<sup>20</sup> One of these spills spread through a 24-kilometer coastline, while another travelled almost 40 miles down a river.<sup>21</sup> Thus, pipelines *around* reservations may present serious risks to tribes and their use of land.

*Trump’s Executive Actions Make It More Difficult to Challenge Permits*

When tribes or litigants have opposed pipeline projects in previous decades, many arguments focused on a project’s non-compliance with environmental review requirements and were further bolstered by protests to delay permitting.<sup>22</sup> However, recent executive action under President Trump, which narrowed the scope of permitting requirements, will likely make challenging permits more difficult and decrease the opportunities that trigger environmental review under NEPA.

In a 2025 executive order declaring a national energy emergency, Trump directed the U.S. Army Corps of Engineers to fast-track energy permitting, which consequently removed environmental review requirements that necessitated federal actions to be more transparent and allowed the public to voice opposition to and even delay harmful projects.<sup>23</sup> The executive order could also prevent judicial stays that typically pause project building while environmental review is still in progress.<sup>24</sup> In addition, the administration has significantly weakened NEPA by lessening the Act’s requirements and narrowing the scope of projects to which it applies.<sup>25</sup>

19. Hongfang Lu, Dongmin Xi & Guojin Qin, *Environmental Risk of Oil Pipeline Accidents*, SCI. TOTAL ENV’T 874 (2023) 162386, at 2.

20. *Id.* at 5.

21. *Id.* at 2; see Kelly House, *10 Years Later, Kalamazoo River Spill Still Colors Enbridge Pipeline Debate*, BRIDGE MICH. (July 24, 2020), <https://bridgemi.com/michigan-environment-watch/10-years-later-kalamazoo-river-spill-still-colors-enbridge-pipeline> [https://perma.cc/6JYX-7TP7].

22. See Rachel Mintz, *Federal Appeals Court Hears Ongoing Line 5 Case Over Pipeline in Straits of Mackinac*, MICH. PUB. (Mar. 18, 2025), <https://www.michiganpublic.org/environment-climate-change/2025-03-18/federal-appeals-court-hears-ongoing-line-5-case-over-pipeline-in-straits-of-mackinac> [https://perma.cc/HUJ3-R9BY]; see Bouayad, *supra* note 4, at 36.

23. Exec. Order No. 14,156, 3 Fed. Reg. 8433 (Jan. 20, 2025); see Kristen Hite & Heather McPherron, *National Environmental Policy Act: An Overview*, Congress.gov, <https://www.congress.gov/crs-product/IF12560> (June 26, 2025).

24. See *Line 5 and American Indian Law: ‘It’s Really Quite Orwellian,’* UNIV. MICH., VICE PRESIDENT FOR COMMUN: MICH. NEWS (May 28, 2025), <https://news.umich.edu/line-5-and-american-indian-law-its-really-quite-orwellian/>.

25. See *id.* Passed into law in 1970, NEPA requires agencies to assess environmental impacts for major federal actions and consider alternatives to lessen impacts. Agencies must complete Environmental Impact Statements (EIS) for projects that will significantly affect the environment, and a shorter Environmental Assessment for major projects without expected significant effects. *What Is the National Environmental Policy Act?* U.S. EPA (Apr. 11, 2025), <https://www.epa.gov/nepa/what-national-environmental-policy-act> [https://perma.cc/6URZ-LSVT]. The Trump administration placed extremely

While other presidential administrations have encouraged energy project permits on and around tribal lands,<sup>26</sup> the Trump Administration's approach is distinct in its wide-reaching changes to NEPA regulatory procedures and its explicit support for fossil fuels, both of which wrest decision-making and project consultation away from tribes.<sup>27</sup>

#### CASE STUDY: PIPELINES THREATEN OJIBWE USUFRUCTUARY RIGHTS AROUND THE GREAT LAKES

Ojibwe Tribes have fought over the past decade against multi-state pipeline projects around the Great Lakes.<sup>28, 29</sup> Both existing and proposed pipeline routes lie adjacent to many reservations and pose a major threat to culturally significant Great Lakes ecosystems.<sup>30</sup> While Trump's actions to circumscribe NEPA have weakened some avenues for opposing these pipelines, the Tribes' resistance provides a case study for various legal and activist strategies to oppose pipelines in this new regulatory era.

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short deadlines and page limits on environmental review documents; limited actions to which NEPA's environmental assessment process applies; and simplified the categorical exclusion process. *Fact Sheet: President Trump Is Delivering Historic Permitting Wins Across the Federal Government*, THE WHITE HOUSE (June 30, 2025), <https://www.whitehouse.gov/fact-sheets/2025/06/fact-sheet-president-trump-is-delivering-historic-permitting-wins-across-the-federal-government/> [https://perma.cc/L428-WZ63].

26. See *Department of Energy Makes Up To \$11.5 Million Available for Energy Infrastructure Deployment on Tribal Lands*, U.S. DEP'T OF ENERGY (Feb. 16, 2018), <https://www.energy.gov/articles/department-energy-makes-115-million-available-energy-infrastructure-deployment-tribal> [https://perma.cc/ZR6D-NQVK] (reporting on policies for energy development on tribal land under the Biden Administration).

27. See *id.*; see Exec. Order No. 14,156, 3 Fed. Reg. 8433.

28. In Minnesota, six different bands formed the Minnesota Chippewa Tribe, which is federally recognized. *About*, MINNESOTA CHIPPEWA TRIBE, <https://mnchippewatribe.org/about> [https://perma.cc/SEC3-GRHL] (last visited Mar. 10, 2026). The Minnesota Chippewa Tribe shares one Constitution, but each Band has an individual governing system and laws. *Our Government*, MILL LACS BAND OF THE OJIBWE, <https://millelacsband.com/home/communities> [https://perma.cc/MUQ6-RUYB] (last visited Mar. 10, 2026).

Within Wisconsin, there are six federally-recognized Ojibwe tribes, four of which have reservations, alongside other tribes in the state. *Introduction*, BAD RIVER BAND, <https://www.badriver-nsn.gov/history> [https://perma.cc/58US-ZRAR] (last visited Mar. 10, 2026); *Tribal Nations of Wisconsin*, WI DEP'T OF PUBLIC INSTRUCTION, <https://dpi.wi.gov/amind/tribalnationswi> [https://perma.cc/EQE3-TL3H] (last visited Mar. 10, 2026).

In Michigan, The Council of The Three Fires is comprised of three Native Nations: the Ojibwe, Odawa, and Bodewadomi. *Research Guides: Indigenous Peoples of Michigan*, U. OF MICH., <https://guides.lib.umich.edu/c.php?g=283427&p=8234907> [https://perma.cc/X952-SEHR] (last updated Nov. 10, 2025); *Timeline Demo 3: Historical Events Timeline*, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, <https://nhbp-nsn.gov/history-timeline> [https://perma.cc/K85K-AKVV] (last visited Mar. 10, 2026). Among these nations, there are 12 federally recognized tribes, and in addition four state-recognized tribes. U. OF MICH. Several of these tribes retain usufructuary rights from ceded territory surrounding Lake Michigan, including those who signed the 1836 Treaty of Washington, reserving "the right of hunting on the lands ceded, with the other usual privileges of occupancy." Treaty with the Ottawa, etc., Ottawa and Chippewa Nations-U.S., Mar. 28, 1836, <https://treaties.okstate.edu/treaties/treaty-with-the-ottawa-etc-1836-0450> [https://perma.cc/FL5X-YJJ2].

29. See Bouayad, *supra* note 4, at 36.

30. *Id.* at 35.

The Great Lakes are not only the ancestral home of the Ojibwe but also home to “manoomin,” wild rice that grows in the wetlands of Minnesota, Michigan, and Wisconsin surrounding the lakes.<sup>31</sup> Manoomin has been integral to the life of the Ojibwe in the region for over 200 years and is central in Ojibwe origin stories.<sup>32</sup> The Ojibwe use manoomin as a dietary staple, medicine, and component in cultural and spiritual ceremonies, particularly around harvests.<sup>33</sup>

The range of manoomin has shrunk by 70 percent after many years of development under European settlement, in part due to dams, logging, mining, manufacturing, and climate change.<sup>34</sup> After the Mille Lacs Band’s century-long fight to protect manoomin, the Supreme Court recognized treaty-based usufructuary rights for the Band to harvest rice off-reservation.<sup>35</sup> Bands across the lakes have since implemented wild rice restoration projects using traditional seeding methods.<sup>36</sup>

However, pipeline routes along the Great Lakes still pose a threat to the ecosystem at large, spurring protest from many Ojibwe Tribes around the lakes. Enbridge, a Canadian energy company, is rerouting portions of a major pipeline running from Alberta, Canada, to Wisconsin, with reroute projects in Minnesota, Michigan, and Wisconsin.<sup>37</sup> The pipeline has a history of environmental damage. In 1991, an oil spill ejected 1.7 million gallons of oil from the pipeline into the Prairie River near Grand Rapids, Minnesota.<sup>38</sup> Enbridge was also responsible for a major 2010 oil spill in Michigan, where its Line 6b pipeline ruptured and spilled 840,000 gallons of oil into the Kalamazoo River, resulting in a cleanup effort that exceeded 1 billion dollars.<sup>39</sup>

Ojibwe Bands and Tribes have either led or joined lawsuits and administrative proceedings against the pipelines in all three states, but some of these challenges still centered on procedural violations under NEPA, including

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31. Spoorthy Raman, *Culture and Conservation Thrive as Great Lakes Tribes Bring Back Native Wild Rice*, MONGABAY (Mar. 4, 2024), <https://news.mongabay.com/2024/03/culture-and-conservation-thrive-as-great-lakes-tribes-bring-back-native-wild-rice/> [https://perma.cc/C57P-67T6]. Manoomin grows on the bottom of shallow lakes and riverbeds in the wetlands and supports a diverse ecosystem of birds, fish, and wetland mammals. *Id.*

32. Bouayad, *supra* note 4, at 27. Manoomin forms the basis of origin stories for the Ojibwe’s migration from the East to the lakes region, when they were told to “follow the shell that appeared in the sky” to “the place where food grows on the water.” *Id.*

33. *Id.* at 27, n.8.

34. Raman, *supra* note 31; Bouayad, *supra* note 4, at 27, 30-32.

35. Bouayad, *supra* note 4, at 30-32.

36. *Id.*; Raman, *supra* note 31.

37. Bouayad, *supra* note 4, at 35; see *Infrastructure Map*, ENBRIDGE, <https://www.enbridge.com/Map#map:infrastructure> [https://perma.cc/RE8F-7S9W].

38. Bouayad, *supra* note 4, at 35; Aki Nace & Erin Hassanzadeh, *Line 3 Oil Pipeline: A Look at What’s Happened Since the Pipeline Started Operating in Northern Minnesota*, CBS NEWS (May 3, 2023), <https://www.cbsnews.com/minnesota/news/line-3-oil-pipeline/> [https://perma.cc/4XWG-SYK7].

39. See Kelly House, *10 Years Later, Kalamazoo River Spill Still Colors Enbridge Pipeline Debate*, BRIDGE MICH. (July 24, 2020), <https://bridgemi.com/michigan-environment-watch/10-years-later-kalamazoo-river-spill-still-colors-enbridge-pipeline/> [https://perma.cc/VZ7Y-NXW5]; Elena Bruess, *Treaty Rights Acknowledged for First Time in Oil Pipeline’s Controversial History*, MICH. PUB. (Mar. 12, 2021), <https://www.michiganpublic.org/environment-science/2021-03-12/treaty-rights-acknowledged-for-first-time-in-oil-pipelines-controversial-history> [https://perma.cc/B2K9-LG8X].

allegations of insufficient Environmental Impact Statements (EIS).<sup>40</sup> After litigation and protests delayed the projects for years, the Minnesota Line 3 reroute was approved in 2021.<sup>41</sup> Litigation in Michigan and Wisconsin is still pending.<sup>42</sup> Changes to NEPA under the Trump Administration have already come into play in the Michigan Line 5 project, where the Trump Administration fast-tracked the permitting process and released a draft EIS that does not account for oil spill risk or climate impacts.<sup>43</sup>

### THREE STRATEGIES MAY PROTECT LAND AROUND RESERVATIONS FROM PIPELINE PERMITTING WITHOUT RELYING ON NEPA ENVIRONMENTAL REVIEW

#### *A. Tribes Can Assert Usufructuary Rights Established in Treaties to Oppose Pipeline Permitting*

##### *1. Legal Authority: The Supreme Court's Decision in Mille Lacs Established Usufructuary Rights.*

Tribal resistance around the Great Lakes demonstrates three strategies that may be used to oppose pipelines. First, tribes with treaty-recognized hunting, fishing, or usufructuary rights on land around reservations may be able to assert these rights to oppose projects.

In an 1837 treaty, the Ojibwe ceded land now located in Minnesota and Wisconsin to the United States in exchange for payment, but the Tribe retained usufructuary rights on these lands.<sup>44</sup> The Fifth Article of the Treaty provided the “privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded” to the Tribe.<sup>45</sup> The 1999 Supreme Court case *Minnesota v. Mille Lacs Band of Chippewa Indians* upheld those usufructuary rights after several Ojibwe Bands, including the Mille Lacs Band, brought suit.<sup>46</sup>

The Mille Lacs Band sought declaratory judgment confirming its usufructuary rights and an injunction against state interference with those

40. Historically, an EIS was an extensive report and could take multiple years to complete. See Hite & McPherron, *supra* note 23.

41. Nace & Hassanzadeh, *supra* note 38.

42. See *Bad River Band Testifies to U.S. Army Corps about Line 5 Dangers*, EARTHJUSTICE: PRESS ROOM (May 14, 2025), <https://earthjustice.org/press/2025/bad-river-band-testifies-to-us-army-corps-about-line-5-dangers> [<https://perma.cc/5FEB-UQKY>]; see *Michigan Supreme Court Takes Up Challenge to Line 5 Oil Tunnel*, EARTHJUSTICE: PRESS ROOM (Sep. 19, 2025), <https://earthjustice.org/press/2025/michigan-supreme-court-takes-up-challenge-to-line-5-oil-tunnel> [<https://perma.cc/59DT-BB92>].

43. See Todd Richmond, *US Army Engineers Decide to Fast-track Great Lakes Tunnel Permits Under Trump Energy Emergency Order*, ASSOCIATED PRESS (Apr. 16, 2025), <https://apnews.com/article/enbridge-line-5-tunnel-great-lakes-expedited-381e7488c07e38f4965f40ea66fc4043> [<https://perma.cc/3VKF-JM9Y>].

44. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175-76 (1999).

45. *Id.* at 176-77 [sic].

46. *Id.* at 176-77, 208.

rights.<sup>47</sup> Though the Minnesota state government claimed that several subsequent developments had nullified the Bands' usufructuary rights, the Supreme Court ruled that none of those developments nullified the Mille Lacs Band's right to use the land.<sup>48</sup> Rather, nullifying usufructuary rights requires a clear intent to abrogate the treaty.<sup>49</sup> The Supreme Court found that the Band retained its usufructuary rights despite a presidential removal order, because the subsequent treaty did not "expressly mention[]" usufructuary rights.<sup>50</sup>

While similar usufructuary rights reserved by treaties have not been defended on a wide scale following *Mille Lacs*, other treaties that use similar language reserving rights to use land could be invoked as an authority to protect lands surrounding reservations. The Department of Justice website acknowledges these potentially wide-reaching implications, stating that "[t]he Court's affirmation of the Chippewa treaty rights was an important decision...for all tribes asserting their usufructuary treaty rights."<sup>51</sup> Legal scholar Peter Erlinder has suggested the formative *Mille Lacs* holding can be asserted regarding any similar treaty, in which a tribe's cession of territory was conditional on the tribe retaining rights to use the land in some way.<sup>52</sup> He posits that the lingering question after *Mille Lacs* is "the scope of these rights as related to land use, development, and environmental issues."<sup>53</sup>

## 2. Arguments Brought in Minnesota Litigation Against Pipeline Projects Show Usufructuary Rights Are Considered in Permitting Decisions

Usufructuary rights reserved in treaties may serve as a basis for different claims to enjoin harm or enforce environmental protection. In Minnesota, Ojibwe bands have invoked usufructuary rights to strengthen arguments for the necessity of environmental review of the Enbridge pipelines. One band challenged another proposed Enbridge pipeline called the Sandpiper Pipeline, set to run 616 miles and carry oil from North Dakota to Superior, Wisconsin.<sup>54</sup> The White Earth Band petitioned to intervene in the Minnesota Public Utility Commission's (PUC) Enbridge permitting proceeding and argued that the Commission did not have the authority to issue a permit for the project without completing an EIS and

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47. *Id.* at 185.

48. *Id.* at 176.

49. *Id.* at 195-96, 200, 203.

50. *Id.* at 193-95, 204-05.

51. *Minnesota v. Mille Lacs Band*, U.S. DEP'T OF JUST., ENV'T & NAT. RES. DIV. (June 6, 2023), <https://www.justice.gov/enrd/indian-resources-section/minnesota-v-mille-lacs-band> [<https://perma.cc/8X7J-E6NV>].

52. Erlinder, *supra* note 3, at 10922. According to the USDA, roughly 60 Tribes have treaties with the United States containing "some rights to off-reservation lands and resources." *Section 2: Treaty Rights and Forest Service Responsibilities*, FOREST SERV., U.S. DEP'T OF AGRIC., at 41, <https://www.fs.usda.gov/people/tribal/trib-2.pdf> [<https://perma.cc/Q9MY-5VQ9>].

53. *Id.* at 10933.

54. See Danielle Kaeding, *Enbridge Drops Sandpiper Pipeline Project*, WIS. PUB. RADIO (Sep. 2, 2016), <https://www.wpr.org/topic/energy/alternative-energy> [<https://perma.cc/ET66-NNGS>].

seeking rights-of-way from the Secretary of the Interior.<sup>55</sup> In making these arguments, the White Earth Band asserted that Enbridge “failed to recognize off-reservation gathering, hunting, fishing, ricing, and other usufructuary rights as a compensable property interest in its Application for Certificate of Need and Pipeline Routing Permit.”<sup>56</sup> By September 2016, Enbridge withdrew the proposed pipeline plan three years after the initial filing, citing a drop in oil production from the pipeline’s source.<sup>57</sup> Another regional business leader, however, attributed Enbridge’s withdrawal to procedural barriers and delays, signaling that the Tribe may have been the driving force in the project’s outcome.<sup>58</sup>

When Enbridge announced in 2014 a plan to replace a portion of the Line 3 pipeline,<sup>59</sup> Six Ojibwe Bands intervened in the Minnesota PUC’s administrative hearings and brought similar arguments.<sup>60</sup> Though the PUC found the initial EIS adequate, the plaintiffs successfully appealed.<sup>61</sup> The Minnesota Court of Appeals then found the initial EIS inadequate, requiring the PUC to complete a second revised final EIS.<sup>62</sup> Though the PUC noted Line 3 would cross land where the “Ojibwe and Chippewa tribes hold usufructuary hunting, fishing, and gathering rights,” the PUC ultimately approved Enbridge’s Certificate of Need to replace a portion of the pipeline.<sup>63</sup> The Court of Appeals upheld approval in 2021,

55. Petition to Intervene at 2-3, In the Matter of the Application of Enbridge Pipelines (Minn. P.U.C. May 1, 2014) (OAH 8-2500-31259/MPUC PL-6668/CN-13-474, OAH 8-2500-31260/MPUC PL-6668/PPL-13-473).

56. *Id.*

57. See Kaeding, *supra* note 54; Certificate of Need Notice Plan, In the Matter of the Application for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota from the North Dakota Border to the Wisconsin Border, Docket No. PL6668/CN-13-473, <https://efiling.web.commerce.state.mn.us/documents/%7B7D22BCE3-AE5D-4984-835D-95D659A13781%7D/download?contentSequence=0&rowIndex=786>.

58. See Kaeding, *supra* note 54.

59. Bouayad, *supra* note 4, at 35.

60. Bouayad, *supra* note 4, at 35.

61. Brief in Support of Motion for Stay Pending Appeal of Relators Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe at 2-3, *In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project* (Minn. App. Ct. Dec. 29, 2020) (A20-1071, A20-1072, A20-1074, A20-1075, A20-1077), <https://efiling.web.commerce.state.mn.us/documents/%7BB00DB476-0000-C559-BBCC-DFDE201429DA%7D/download?contentSequence=0&rowIndex=443>.

62. Brief in Support of Motion for Stay Pending Appeal of Relators Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe at 2-3, *In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project* (Minn. App. Ct. Dec. 29, 2020) (A20-1071, A20-1072, A20-1074, A20-1075, A20-1077), <https://efiling.web.commerce.state.mn.us/documents/%7BB00DB476-0000-C559-BBCC-DFDE201429DA%7D/download?contentSequence=0&rowIndex=443> [<https://perma.cc/K4V6-FS3Z>].

63. In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border: Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified at 13, PL-9/CN-14-916, PL-9/PPL-15-137 (Minn. P.U.C. 2020), <https://efiling.web.commerce.state.mn.us/documents/%7B20540C74-0000-C79D-A04F-599223932566%7D/download?contentSequence=0&rowIndex=640>. Still, one commissioner dissented, noting the proposed project would “directly, materially, and adversely impact” the Indigenous community, including “significant risks to wild rice beds.” *Id.* at D-8.

reasoning that continuing to operate the existing Line 3 posed an even greater adverse impact given that the current route ran over both ceded territory *and* reservations, and the pipeline was nearly 50 years old and corroding.<sup>64</sup>

The Minnesota Court of Appeals thus acknowledged in its Order that the Tribe had legitimate usufructuary rights, even if it ultimately ruled that these interests were outweighed by other factors.<sup>65</sup> In approving the Line 3 re-route, the court allowed the pipeline to be decommissioned and removed from the Leech Lake Reservation, which was a critical win for tribal sovereignty.<sup>66</sup> Concurrently, re-routing the pipeline elsewhere in the region still threatened tribal sovereignty by endangering land where the Tribe held usufructuary rights.<sup>67</sup> However, protecting reservations and surrounding off-reservation areas need not be a dichotomous choice. While the Minnesota decision was driven by a desire to replace and continue operating the pipeline, claims to protect both reservations and off-reservation areas could work in tandem for campaigns to cancel pipeline projects altogether.<sup>68</sup> The difference in outcome between the Sandpiper pipeline (where developers abandoned plans for a *new* pipeline) and the Line 3 pipeline (where developers wanted to replace a pipeline segment that already crossed reservation land) shows that courts consider usufructuary rights at various stages of a pipeline's life cycle, and suggests these arguments may be more successful when there is less pressure to keep an existing pipeline system in operation.<sup>69</sup>

### *3. Usufructuary Rights Could Be Expanded and Strengthened to Further Oppose Pipelines Based on United States v. Washington*

The 2017 Ninth Circuit case, *United States v. Washington*, provides a legal basis to strengthen and expand usufructuary right claims.<sup>70</sup> *Washington* suggests

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64. Dan Kraker, *Minnesota Appeals Court Upholds Approval of Enbridge's Line 3 Oil Pipeline*, WIS. PUB. RADIO (June 14, 2021), <https://www.wpr.org/environment/minnesota-appeals-court-upholds-approval-enbridges-line-3-oil-pipeline> [https://perma.cc/9CAT-6TR7]. Matter of Enbridge Energy, Limited Partnership, 964 N.W.2d 173, 205-06, 206 n.47 (Minn. Ct. App. 2021). Line 3 presented a particularly complex affront for the various bands in the region: the original pipeline route directly crossed reservations of the Leech Lake and Fond du Lac Bands. *Id.* at 208-09. Though the Mille Lacs Band preferred the route replacement to be made "in-trench" to avoid the disruption of new pipelines built around their reservation, the Leech Lake Band did not wish to renew an easement for the pipeline and strongly opposed any pipeline replacement on their reservation. *Id.* at 208-09, 209 n.52.

65. *See id.* at 205-06, 206 n.47.

66. *Id.* at 205-06, 206, 209 n.52.

67. *See id.* at 205-06, 206 n.47.

68. *See id.* at 206-09; *see* In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border: Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified at D-7, PL-9/CN-14-916, PL-9/PPL-15-137 (Minn. P.U.C. 2020).

69. *See* Matter of Enbridge Energy, Limited Partnership, 964 N.W.2d at 208-09; *see* Kaeding, *supra* note 54.

70. *See United States v. Washington*, 853 F.3d 946 (2017). The case was taken up by the Supreme Court, but the justices came to a tie (one justice recused himself), meaning the Ninth Circuit holding was

that gathering rights, much like fishing rights, may provide a potential path to challenge projects that threaten the availability of off-reservation resources.

The court in *Washington* held that the State of Washington must ensure fish are “available” for tribes that have treaty-based fishing rights.<sup>71</sup> In 1854 and 1855, many Tribes in the Pacific Northwest region entered treaties, titled the “Stevens Treaties,” that ceded large areas of land and major watersheds in exchange for off-reservation fishing rights on the ceded territory.<sup>72</sup> The treaties’ fishing clause noted that “[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians.”<sup>73</sup> Salmon is important to tribes in the Pacific Northwest, not only as a dietary staple, but also for religious and cultural uses and for commercial fishing.<sup>74</sup> In response to the construction of culverts in rivers, which significantly affected salmon populations, a coalition of Tribes sued the State of Washington for a permanent injunction that would require the State to open culverts as part of its treaty obligation to maintain fish populations.<sup>75</sup>

The court found that the state violated the Stevens Treaties by obstructing salmon populations and issued an injunction against Washington to “correct” the culverts that harmed salmon populations, ensuring that fish would be “available” for harvest.<sup>76</sup> The court granted the injunction based on the absolute centrality of salmon to the Tribes, the Tribe’s concern that they would lose the means to fish and feed themselves, and spoken assurances during negotiations that the Tribes would have continued access to salmon.<sup>77</sup>

Past cases have not widely applied the “availability” argument used in *Washington* to gathering rights, but some scholars have suggested the “availability” requirement should extend more broadly.<sup>78</sup> Just as a treaty upholding fishing rights becomes “worthless without harvestable fish,” a treaty upholding usufructuary gathering rights for manoomin would be “worthless” if the ecosystem were so damaged that wild rice no longer grew.<sup>79</sup> By claiming that a given resource must be made “available,” tribes could supplement their NEPA claims during the administrative review process. Going even further, however, *Washington* shows that treaty rights may be affirmed against harmful

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affirmed but is not Supreme Court precedent. Ann E. Tweedy, *Off-Reservation Treaty Hunting Rights, the Restatement, and the Stevens Treaties*, 97 WASH. L. REV. 835, 861 (2022).

71. *Washington*, 853 F.3d at 961-62.

72. *Id.* at 953-54.

73. *Id.* at 962.

74. *Id.* at 958. Culverts are constructions that allow streams to pass under roads, but many present barriers to fish passing through and prevent salmon from travelling upstream to spawn in freshwater. *Id.* at 958, 961.

75. *Id.* at 958-60.

76. *See id.* at 954, 962, 966.

77. *Id.* at 963-64.

78. For instance, Ann E. Tweedy sees overlap between the “habitat right” referenced in *U.S. v. Washington* and Section 83 of the Restatement of the Law of American Indians, which upholds a “habitat right” that is “implicit” in rights to fishing in off-reservation territories. Tweedy posits these both may apply to other usufructuary rights as well. *See Tweedy, supra* note 70, at 840-41, 861.

79. *See Washington*, 853 F.3d at 965.

development without relying wholly on the NEPA process. Plaintiffs may be able to demand an injunction against state or federal actions that threaten natural resources that were explicitly or impliedly reserved for use by treaty.<sup>80</sup> By arguing for a broader application of *Washington* to include gathering rights, tribes would expand the scope of ecosystems protected under treaties.<sup>81, 82</sup>

*B. The Public Trust Doctrine Presents Another Legal Avenue to Oppose Pipelines*

As a second strategy, tribes can bring or encourage public trust claims to oppose pipelines. The public trust doctrine requires the government to preserve certain natural and cultural resources for public use and is most pertinent to navigable bodies of water.<sup>83</sup> While not used extensively, public trust claims can be brought based on common law or by explicit public trust provisions in statutes.<sup>84</sup> One benefit of the public trust doctrine is its overlap in intended outcomes with a tribe's usufructuary rights. By referencing usufructuary rights in public trust claims, litigants may strengthen public trust arguments. Conversely, public trust claims can affirm tribal interests in protecting resources outside of reservations, even when a tribe may not have usufructuary rights written into a treaty.<sup>85</sup>

Michigan has had two high-profile lawsuits over oil spill risks around Lake Michigan, both focusing on the public trust doctrine.<sup>86</sup> First, in 2019, Michigan Attorney General Dana Nessel sued Enbridge seeking to shut down Enbridge's Line 5 pipeline, which consists of dual pipelines, runs across the Straits of

80. See *Washington*, 853 F.3d at 960, 965.

81. Applying a historical approach in usufructuary right claims, based on the "practical construction" of the treaty as parties saw it, may also appeal more to conservative courts. See Tweedy, *supra* note **Error! Bookmark not defined.**, at 855, 862.

82. In the Oklahoma State University Tribal Treaties Database, 101 treaties are tagged with the "hunting fishing gathering" label, indicating similar arguments could be made across many treaties. OKLAHOMA STATE UNIVERSITY, TRIBAL TREATIES DATABASE: TREATIES, AGREEMENTS, AND DOCUMENTS, "hunting fishing gathering," 101 results (Dec. 7, 2025), <https://treaties.okstate.edu/tags/treaties-by-tag?tag=hunting+fishing+gathering&key=treaty-tags> [<https://perma.cc/BEF4-JE4S>].

83. *Public Trust Doctrine*, LEGAL INFO. INST. (May 2022), [https://www.law.cornell.edu/wex/public\\_trust\\_doctrine](https://www.law.cornell.edu/wex/public_trust_doctrine) [<https://perma.cc/AS78-BWVX>]. The Supreme Court established in *Illinois Central Railroad Co. v. Illinois* that submerged lands generally belong to states, "held in trust for the people of the State." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-90 (1970) (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

84. Alicia Muir, *Trust Issues: Using States' Public Trust Doctrines to Advance Environmental Justice Claims*, 46 WM. & MARY ENV'T L. & POL'Y REV. 707, 721-22 (2022), <https://scholarship.law.wm.edu/wmelpr/vol46/iss3/5> [<https://perma.cc/ZQ9Q-AFUF>]. Public trust doctrines for the environment have been incorporated in statute in "[a]t least sixteen states," and have made it into some state constitutions as well. *Id.*

85. See Complaint for Declaratory and Injunctive Relief at 7-16, *Nessel v. Enbridge Energy*, (Mich. 30th Cir. June 27, 2019) (No.19.474 - CE).

86. Mintz, *supra* note 22.

Mackinac to Ontario, Canada, and has a history of dangerous oil spills.<sup>87</sup> She argued in her initial complaint that Line 5 violated the public trust doctrine, constituted a public nuisance, and violated the Michigan Environmental Protection Act.<sup>88</sup> Nessel claimed that the operation of the pipeline violated the public trust doctrine under federal precedent, because the areas were not “used in improvement” of the public interest, and could not be given to private interests “without detriment to the public interest.”<sup>89</sup> The complaint cited a very high risk of anchor strikes on the pipeline, which could cause a rupture and oil spill, thus endangering the ecology and damaging “recreational fishing, recreational boating, commercial fishing, and commercial navigation” covered in the public trust.<sup>90</sup>

In 2023, 63 Tribes in the Great Lakes area submitted a joint amicus brief to support Michigan, also arguing that Line 5 presents an “unacceptable risk” of oil spills.<sup>91</sup> The amicus brief cited the 1836 Treaty of Washington, which reserves for the five tribal signatories the “right to hunt, fish, gather, and continue living as Anishinaabe.”<sup>92</sup> In 2024, the Bad River Band also submitted an amicus brief, citing the usufructuary rights guaranteed in the same treaty.<sup>93</sup>

Concurrent to the litigation against Enbridge, Michigan Governor Gretchen Whitmer rescinded an easement for the existing Line 5 pipeline in 2020 and ordered the pipelines to be shut down.<sup>94</sup> Whitmer argued that the oil spill risk posed by Enbridge’s pipelines violated the public trust doctrine based on federal and state law.<sup>95</sup> In response to Whitmer’s notice of revocation, Enbridge sued

87. *Id.* Mintz, *supra* note 22; see *Infrastructure Map*, ENBRIDGE, <https://www.enbridge.com/Map#map:infrastructure> [https://perma.cc/DTL6-SKY9].

88. Complaint for Declaratory and Injunctive Relief at 2, *Nessel v. Enbridge Energy*, (Mich. 30th Cir. June 27, 2019) (No.19. 474 - CE).

89. *Id.* at 9 (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 456 (1892), and *Obrecht v. Nat’l Gypsum Co.*, 105 N.W.2d 143, 149 (1960)).

90. *Id.* at 14, 24-25.

91. Brief of Amici Curiae Tribal Nations in Support of Plaintiff-Appellant at 1, *Nessel v. Enbridge Energy* (6th Cir. Sep. 25, 2023) (No. 23-1671), <https://earthjustice.org/wp-content/uploads/2023/09/2023.09.25-amicus-brief-of-tribal-nations.pdf> [https://perma.cc/RS95-B82X].

92. *Id.* at 5. Several tribal Bands in Michigan signed onto the 1836 Treaty of Washington, reserving “the right of hunting on the lands ceded, with the other usual privileges of occupancy.” Treaty with the Ottawa, etc., Ottawa and Chippewa Nations-U.S., Mar. 28, 1836, <https://treaties.okstate.edu/treaties/treaty-with-the-ottawa-etc-1836-0450> [https://perma.cc/4ULD-3BET]; see Michigan, 471 F. Supp. at 225–40.

93. Brief Of Amici Curiae Bad River Band of the Lake Superior Tribe of Chippewa Indians, et al., at 12, *Nessel v. Enbridge Energy* (Mich. 30th Cir. Dec. 2, 2024) (CASE NO. 19-474-CE), <https://earthjustice.org/wp-content/uploads/2025/01/tribal-amicus-brief-filed-version-12.02.24.pdf> [https://perma.cc/NLB4-F434]. The pipeline also directly crosses the Bad River Band’s reservation, and the tribe has brought its own lawsuit against Enbridge in Wisconsin to uphold its right-to-exclude against the company. *Id.* at 1.

94. MICH. OFF. OF THE GOVERNOR, DEP’T OF NAT. RES., Notice of Revocation and Termination of Easement at 1 (Nov. 13, 2020).

95. *Id.* at 1, 5-9. Governor Whitmer cites the Michigan Supreme Court case *Glass v. Goeckel* as grounds for a state public trust doctrine. See *id.* at 2. The *Glass* court wrote, “Michigan’s courts recognized that the principles that guaranteed public rights in the seas apply with equal force to the Great Lakes . . . . Accordingly, under longstanding principles of Michigan’s common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public.”

the Governor and the Michigan Department of Natural Resources.<sup>96</sup> In December 2025, a Michigan District Court struck down Governor Whitmer's order to shut down the pipelines, holding that federal regulation of pipeline safety preempted the state action.<sup>97</sup> The Michigan Attorney General is reviewing the opinion and has not yet ruled out taking action in an appeal.<sup>98</sup>

Because litigation against the Michigan lines has continued so far and has the support of state leaders, Michigan litigation against Line 5 shows how invoking the public trust doctrine may be a viable strategy to challenge pipeline projects that cut across major water bodies. To support her claim of public trust violation, Whitmer also noted that the region vulnerable to oil spills is significant to tribes, including to those “that retain reserved hunting, fishing and gathering rights in the lands and waters ceded” in the Treaty of Washington.<sup>99</sup> These references show how tribal usufructuary rights can add strength and dimension to public trust claims, as well as how public trust claims can further affirm tribal usufructuary rights.

*C. Supporting Protest Rights is Critical for a Tribally Driven Movement to Delay and Cancel Pipeline Projects in the Trump Era*

In addition to litigation, protest movements led by Tribes have been essential in delaying pipeline reroutes. In opposition to the Minnesota Line 3 project, an Ojibwe coalition formed resistance camps and pushed the public to divest from banks funding various pipeline projects in a major civil disobedience campaign.<sup>100</sup> The White Earth Band, Leech Lake Band, and Mille Lacs Band also took part in actions harvesting wild rice or fishing without permits to protest the state's disregard of usufructuary rights.<sup>101</sup> This resistance helped delay Line 3's permitting by seven years and simultaneously generated momentum for other

*Glass v. Goeckel*, 473 Mich 667, 678 (2005). Governor Whitmer also writes that several state statutes refer to public trust claims. See MICH. OFF. OF THE GOVERNOR, DEP'T OF NAT. RES., Notice of Revocation and Termination of Easement at 2, 2 n.2 (Nov. 13, 2020).

96. Mintz, *supra* note 22.

97. See *Enbridge Energy, Ltd. P'ship v. Whitmer*, No. 1:20-cv-1141, 2025 WL 3707609 (W.D. Mich. Dec. 17, 2025), [https://storage.courtlistener.com/recap/gov.uscourts.miwd.99729/gov.uscourts.miwd.99729.164.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.miwd.99729/gov.uscourts.miwd.99729.164.0_2.pdf) [<https://perma.cc/4DUS-YHJ2>]; see also Colin Jackson, Federal court sides with Enbridge, blocks Michigan's effort to shut down Line 5, MPRN (Dec. 17, 2025), <https://www.wnmufm.org/local-regional-news/2025-12-17/federal-court-sides-with-enbridge-blocks-michigans-effort-to-shut-down-line-5> [<https://perma.cc/TF2W-GAXP>].

98. Jackson, *supra* note 97.

99. MICH. OFF. OF THE GOVERNOR, DEP'T OF NAT. RES., Notice of Revocation and Termination of Easement at 9 (Nov. 13, 2020).

100. See Bouayad, *supra* note 4, at 35-36; see Andy Monserud, Enbridge's Line 3 Oil Pipeline Back in Minnesota Appeals Court, Courthouse News Service (June 10, 2021), <https://www.courthousenews.com/enbridges-line-3-oil-pipeline-back-in-minnesota-appeals-court> [<https://perma.cc/TF2W-GAXP>]; see also Global protests target banks funding Line 3 pipeline, STOP THE MONEY PIPELINE (May 7, 2021), <https://stopthemoneypipeline.org/global-protests-target-banks-funding-line-3-pipeline/> [<https://perma.cc/X4ZD-9WVK>].

101. Bouayad, *supra* note 4, at 36.

protest movements in the Great Lakes.<sup>102</sup> In Michigan, the Sault Ste. Marie Tribe of Chippewa Indians and the Grand Traverse Band of Ottawa have also been mobilizing against Enbridge's pipelines for over a decade, long before the State filed its current litigation.<sup>103</sup>

Tribes that direct protests at state-level actors may be particularly effective in cancelling pipelines altogether.<sup>104</sup> One study found that involvement of state government officials was correlated with higher rates of pipeline cancellations, which aligns with the ongoing success of the Tribal movement against Line 5 in Michigan.<sup>105</sup> Among state government actors, state agencies that are in charge of certifying a project's compliance with water quality standards have been influential in halting project development by denying certification or threatening litigation over certification.<sup>106</sup> State water quality certification may be an effective roadblock to pipelines because state standards can be more stringent than those at the federal level.<sup>107</sup> Protestors may thus want to target state governments and officials to maximize their impact.<sup>108</sup>

As response to protests and surveillance of protestors become more intense and invasive, there is a greater need for lawyers to protect protesters, who are often the first line of defense in opposing pipelines. In Minnesota, police violently arrested hundreds of tribal members and allies who participated in civil disobedience campaigns.<sup>109</sup> Activists have seen more aggressive responses and more heavily armed police in modern protests, stemming from the Keystone XL

102. See Nace & Hassanzadeh, *supra* note 38.

103. See Brian Bienkowski, *From the Sioux to the Sault: Standing Rock Spirit Spreads to Michigan's Upper Peninsula*, ENV'T HEALTH NEWS (Nov. 21, 2016), [https://www.ehn.org/from\\_the\\_sioux\\_to\\_the\\_sault\\_standing\\_rock\\_spirit\\_spreads\\_to\\_michigans\\_upper\\_peninsula](https://www.ehn.org/from_the_sioux_to_the_sault_standing_rock_spirit_spreads_to_michigans_upper_peninsula) [https://perma.cc/SQ4A-VDAA].

104. Protests also have power in and of themselves. An interview with Tara Houska, a Citizen of the Couchiching First Nation and an activist and attorney who was involved with protests against both the Line 3 and Dakota Access pipelines, suggested the success of major demonstrations may be measured by "more and more . . . youth realizing their own power, standing up and fighting for their futures." Tara Houska & Yasmin Belkhyr, *Native American Activism After Standing Rock: Where Is It Now?* IDEAS.TED.COM (Nov. 15, 2018), <https://ideas.ted.com/native-american-activism-after-standing-rock-where-is-it-now/> [https://perma.cc/B9KA-4VHL].

105. See Hess, Kim & Belletto, *supra* note 9, at 9-10; see Mintz, *supra* note 22.

106. See Hess at 9. The Clean Water Act Section 401 allows state governments the "authority to certify that a project meets its water-quality standards." *Id.* The paper identifies examples where developers walked out of projects after a state denied water certification, or when state agencies began litigation to withhold water certification. See *id.* at 7, 9. Denial of water quality certification, or threat of litigation about certification, at the state level was influential in preventing four different pipeline projects across the country, out of nine cases examined with "high opposition and a no-build outcome." See *id.* at 9-10. According to this study, the state water quality certification "decision point . . . may be the most significant of all decision points in this data set" associated with no-build outcomes for pipelines. *Id.* at 9.

107. See *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 723 (1994) (holding that states can generally impose conditions on certifications "insofar as necessary to enforce a designated use" in the State's water quality standards, in issuing water quality certification under CWA 401).

108. However, cancellations are more common in Democratic-led states, which suggests the need for some tailoring to location. See Hess, Kim & Belletto, *supra* note 9, at 10.

109. See Monserved, *supra* note 100.

Pipeline movement and disobedience campaigns against Enbridge in Minnesota.<sup>110</sup>

Surveillance and legal action against pipeline protestors have increased as well.<sup>111</sup> In response to the Dakota Access Pipeline protests, the pipeline developer brought suit against the Red Warrior Camp, Greenpeace, and other organizers and alleged “eco-terrorism, racketeering and other crimes”—a particularly “aggressive lawsuit[]” for environmental action, according to environmental law professor Michael Gerrard.<sup>112</sup> While this aggression is troubling for protestors’ safety, it also may indicate that opposing companies and governments consider such protests a significant threat. Moving forward, effective challenges to pipelines must include strategies to protect protestors’ safety and rights in the face of increasing aggression, ensuring that those who are on the frontlines are not facing outsized police and government targeting.

#### CONCLUSION

Under the Trump administration’s oil and gas permitting reform, there are few strategies for opposing pipelines in areas surrounding reservations, despite the significant risks they pose to tribes. Litigation and other forms of activism led by tribes around the Great Lakes show potential methods that can be used to strengthen arguments grounded in the environmental review process, or to bring new claims outside of this process. First, tribes can assert usufructuary rights to oppose pipeline permitting that conflicts with their treaty-reserved usufructuary rights. Second, litigants can invoke the public trust doctrine to challenge risky development projects, particularly in bodies of water, to protect natural resources; litigants can further strengthen these claims by pointing to overlapping usufructuary rights. Lastly, protest movements can be particularly effective in delaying or forcing the cancellation of pipeline development, though movements should prioritize strategies that protect protestors’ rights. Collectively, these methods can provide an avenue for tribes to contest resource exploitation and defend their ability to use ancestral resources both in and around reservations.

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110. See *id.*; see, e.g., Adam Federman, *How the US Government Began Its Decade-long Campaign Against the Anti-pipeline Movement*, GRIST (Feb. 14, 2024), <https://grist.org/protest/keystone-pipeline-fbi-government-documents>. The Keystone XL Pipeline sustained a long history of opposition and protest. Melissa Denchak & Courtney Lindwall, *What Is the Keystone XL Pipeline?*, NRDC (Jan. 30, 2025), <https://www.nrdc.org/stories/what-keystone-xl-pipeline> [<https://perma.cc/DM3R-C4ZP>].

111. The FBI monitored Keystone XL activists starting in 2012, characterizing the “Native Youth Movement” as a “radical militia and a survivalist group,” and the US State Department tracked activist activity across the country. Federman, *supra* note 111.

112. Ashley A. Glick, *The Wild West Re-Lived: Oil Pipelines Threaten Native American Tribal Lands*, 30 VILL. ENVTL. L.J. 105, 127 (2019). Available at <https://digitalcommons.law.villanova.edu/elj/vol30/iss1/4> [<https://perma.cc/BBA2-YM4C>].