

**THE VIRTUES OF UNCERTAINTY: LESSONS FROM THE  
LEGAL BATTLES OVER THE KEYSTONE XL PIPELINE**

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## INTRODUCTION

The seven-year fight over the Keystone XL Pipeline (KXL), which would have brought crude oil from the tar sands of Alberta to refineries in Oklahoma and the Gulf Coast, ended in November of 2015 with the federal government’s rejection of the pipeline’s permit application.<sup>1</sup> This decision, practically unimaginable at the outset of the conflict, was unsurprising by its end. It concluded a diverse and multifaceted conflict over both the future of energy infrastructure in the United States and the causes and consequences of climate change. To the winners and losers in the fight over the pipeline, its defeat represented the first major political victory for the climate movement. The practical and symbolic significance of this victory remains unclear.<sup>2</sup>

This article focuses on the legal aspects of the KXL conflict: how struggles over the pipeline manifested themselves in legal action, and how legal action contributed to the final outcome. This focus is intended to provide lessons for the study of climate-change law, a nascent field whose contours and direction are much in doubt. The article also offers insight into how legal ideas and assumptions influence battles in the climate-change movement. In essence, this article treats law as a mode of political conflict, distinguishable from other movement strategies by its particular method of practice, its antagonists, and its possibilities for success. What follows is not a social-movement analysis, and the Article does not claim that outcomes determined through legal action were more important than other

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1. Barack Obama, President of the U.S., Statement on the Keystone XL Pipeline (Nov. 6 2015), <https://perma.cc/9VJN-DMQD>.

2. Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, N.Y. TIMES (Nov. 6, 2015), <https://perma.cc/HJW8-29LC>.

types of struggle. In fact, considering the legal aspects of the KXL conflict is particularly compelling because of what the law did not do: it did not win rejection of the pipeline in a courtroom, it did not set any precedent against future projects, and it did not even provide a unified strategy through which anti-pipeline lawyers could combine efforts.

Instead, the legal efforts of the anti-pipeline movement contributed to the most important factor in the KXL's rejection—delay. By creating reasons for government decision-makers to defer approval and by helping to reframe the KXL debate in terms of uncertainty and risk, these efforts made rejecting the pipeline more politically palatable. Ironically, deflecting the legal battle away from direct judicial deliberation on the harms of climate change toward more peripheral pipeline issues proved the most effective strategy for combating the KXL—a fact with significant implications for the use of law to address global warming.

The potential global-warming consequences of the KXL, and how much global warming is already locked into the earth's atmosphere, are ongoing matters of debate. This article will not offer the customary preface summarizing the latest climate science and the dire state of the planet's increasing emissions; suffice it to say that under every projection, current and predicted rates of fossil fuel development, extraction, and combustion leave the planet beyond recognized limits of manageable warming.<sup>3</sup>

The law of climate change has mostly been reactionary rather than precautionary. Climate scientist James Hansen's 1988 congressional testimony on the risks of global warming is often cited as the inaugural moment of serious attention to the phenomenon of climate change;<sup>4</sup> although, Lyndon Johnson warned of the warming effects of carbon pollution in 1965.<sup>5</sup> In any event, major legal efforts to address climate change only arose after the turn of the twenty-first century. To date, legal efforts have accomplished little in terms of actually reducing greenhouse-gas emissions or setting major laws, precedents, or principles that encourage a shift away from our fossil-fuel economy and the legal licenses and assumptions that support it.

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3. See THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT: CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT 40–48 (Ranejndra K. Pachauri et al., eds. 2014) (stating most recent climate-change assessments).

4. NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE 22 (2014) (“In the face of an absolutely unprecedented emergency, society has no choice but to take dramatic action to avert a collapse of civilization. Either we will change our ways and build an entirely new kind of global society, or they will be changed for us.”).

5. Marianne Lavelle, *A 50th Anniversary Few Remember: LBJ's Warning on Carbon Dioxide*, DAILY CLIMATE (Feb. 2, 2015), <https://perma.cc/Z28A-EFR7>.

For the purposes of this article, “the law of climate change” means legal action intended to reduce greenhouse-gas emissions. Furthermore, this article divides the law of climate change into legal action that takes place at its “core” and at its “periphery.”

The climate core is where global warming’s causes and effects are directly confronted, in the sense that the science, economics, and politics of climate change provide the factual material upon which legal claims are based. Legal action at the core usually seeks government intervention to stop public or private contributions to warming or to provide relief from climate-change harms.

The climate periphery is where issues indirectly related to global warming form the substance of legal conflict. Legal action here usually seeks outcomes that do not themselves reduce greenhouse-gas emissions but rather lead to further legal, political, or economic consequences that will have that effect, such as the siting of pipeline routes.

It should be stressed that the distinction between the core and periphery is deliberately artificial. The distinction does not correspond to any real difference between direct and indirect causes of climate change or its more- and less-immediate effects. Instead, it corresponds to legal and social category-making. What happens at the periphery may be more important to the future of the climate than what happens at the core. The KXL conflict, with its many peripheral battles, suggests just that. Despite its constructed nature, the distinction is justified by common-sense understandings about priority and hierarchy within the field of climate law. For example, the main American compendium of climate-change cases presents Statutory Claims as its first category, followed by Common Law Claims and Public International Law Claims. Within the first category, the first subset is Force Government to Act, and this first subset’s first division is Clean Air Act.<sup>6</sup> This scheme roughly corresponds to the core and periphery distinctions described below.

As a first step to analyzing the peripheral nature of the KXL legal struggle, this article argues that legal action at the climate core has mostly failed. This is due to the structural incompatibility between the phenomenon of global warming and the resources of public and private law. Additionally, certain judicial attitudes hinder administrative and judicial action on climate change. Both structure and attitude protect the political and economic *status quo* that produced global warming through frictionless

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6. Michael B. Gerrard et al., *Climate Change Litigation in the U.S.*, ARNOLD & PORTER, LLP, <https://perma.cc/S63S-3PTE> (last updated Oct. 3, 2016).

approval of projects similar to the KXL. Courts thus operate against an ostensibly neutral background that climate legal actions seek to disturb.

In this unfriendly legal environment, judges are less receptive to legal claims that demand action and more receptive to legal claims that invite inaction. Whether claims are seen to demand action or invite inaction is not a given and significantly depends on each claimant's legal strategy.

Action is generally chosen in an atmosphere of certainty, where judges or other government decision-makers understand the legal, political, and economic consequences of their decisions. Inaction is more often the result of uncertainty. At the climate core, the trend is for judges to signal their discomfort with the degree of uncertainty involved in the claims and remedies before them and to choose inaction because of the uncertainty.

The core-uncertainty-inaction association is a persistent problem in climate politics. The fossil-fuel industry has spent millions of dollars maintaining the perception that scientific and economic uncertainty surrounds global warming and that any climate-friendly action is unpredictable and dangerous.<sup>7</sup> Meanwhile, climate activists can only fall back upon their certainty of the impending climate crisis, and their calls to action necessarily provoke fear and doubt from established interests. In an effort to strategize ways to use the core-periphery, certainty-uncertainty, and action-inaction distinctions to the climate movement's benefit, this article uses the case study of the KXL conflict to reimagine their alignments in the context of climate legal action.

The first step, then, is a review of climate-change litigation and an analysis of the problems of climate legal action at the core.

## I. REVIEW OF THE LAW OF CLIMATE CHANGE: CORE-PERIPHERY, CERTAINTY-UNCERTAINTY, ACTION-INACTION

### *A. The Poor Fit Between Public Environmental Law (The Super-Core) and Climate Change*

The most obvious place to turn for legal relief from climate-change harms would appear to be public environmental law. The classic suite of environmental statutes passed in the 1970s, including the National Environmental Policy Act and the Endangered Species Act, remains the lodestar of environmental legal action. The professional field of environmental law, which grew up with and around these statutes, still

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7. See generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* (2010) (illustrating that extractive industries have continually used money and influence to spuriously attack peer reviewed scientific findings).

draws upon them as its primary practical and imaginative resources. As such, these laws form the “super-core” of legal treatment of the environment. Both pro-environmental skeptics of the laws, who view them as inadequate, co-opted, and in need of serious revision, and pro-environmental admirers, who view the statutes as a model success,<sup>8</sup> accept this social understanding of public law as core. Unsurprisingly, the most significant legal struggles over climate change have occurred here, reflecting the common-sense identification of climate change as an environmental issue regulable under one of the major statutes. But, the overarching lesson of these statutory efforts is that public environmental law is ill-suited to deal with the political and economic problems posed by climate change and that direct confrontation with the consequences of global warming may in fact hamper climate legal strategy.

### 1. The Clean Air Act

Climate law’s natural home would seem to be the Clean Air Act. Passed in 1970 and significantly amended in 1977 and 1990, the Act proposes “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”<sup>9</sup> The statute directs the Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for “criteria pollutants.”<sup>10</sup> Permitting agencies, usually at the state level, then issue permits reflecting these standards to power plants, factories, and other stationary sources.<sup>11</sup> Mobile sources are more directly regulated by the EPA.<sup>12</sup> Reading the Act, the most straightforward method for regulating greenhouse gases would appear to be setting a NAAQS for carbon dioxide, thus forcing major emitters like coal plants to cap their emissions. This approach has worked for other atmospheric pollutants like carbon monoxide.<sup>13</sup> A direct link exists between the government’s “harm-based” understanding of how much nationwide pollution is acceptable and the amount of emissions allowed under a given permit. Yet, the EPA has not listed carbon dioxide or any other greenhouse gas as a criteria pollutant,

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8. MARY C. WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 9 (2014); *see, e.g.*, Richard Lazarus, *Judging Environmental Law*, 18 *TULANE ENVTL. L.J.* 201, 201 (2004) (“My thesis is that environmental law is one the law’s great success stories of the twentieth century.”).

9. 42 U.S.C. § 7401(b)(1) (2012).

10. *Id.* § 7408.

11. *Id.* § 7410.

12. *Id.* § 7521.

13. NATIONAL RESOURCES COUNCIL, *MANAGING CARBON MONOXIDE POLLUTION IN METEOROLOGICAL AND TOPOGRAPHICAL PROBLEM AREAS I* (2003).

despite a standing 2009 petition by the Center for Biological Diversity to do so.<sup>14</sup> The difficulties surrounding the EPA's more indirect attempts to deal with climate change under the Clean Air Act, discussed below, likely explain this reluctance to tackle the issue. Greenhouse-gas emissions remain unregulated under the most obvious public-law tool for addressing them.

But, the Clean Air Act is expansive enough that the EPA cannot escape all demands for greenhouse-gas regulation simply by withholding criteria pollutant status. *Massachusetts v. EPA*, still the seminal American climate-change case, finally applied minimal public law oversight to the problem of climate change, decades after the issue was first brought to the attention of the federal government.<sup>15</sup> Under the Bush Administration, the EPA had refused to consider the question of whether greenhouse gases contributed to climate change, arguing that its regulatory mandate did not allow it to regulate the gases.<sup>16</sup> In an opinion by Justice Stevens, the Supreme Court held that the EPA must at least decide whether greenhouse gases qualified as "air pollutants" under § 202(a)(1) of the Clean Air Act,<sup>17</sup> which regulates motor-vehicle emissions.<sup>18</sup> This was a major moment for legal treatment of climate change at the core, involving a major piece of environmental legislation and a direct encounter with the questions of climate-change science, harm, and responsibility. The Court acknowledged the reality of climate change<sup>19</sup> and granted standing to states suffering sea-level rise: finding it immaterial that global-warming injuries are "widely shared";<sup>20</sup> that agency inaction was only one cause of harm among many;<sup>21</sup> and that EPA regulation by itself would not reverse global warming.<sup>22</sup> Significantly for future litigation, the Court also held that the EPA could not rely on *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, to claim that Congress never intended § 202(a)(1) provisions to create such broad regulatory authority over the automobile industry.<sup>23</sup>

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14. Citizens may petition for new criteria pollutant listings under 42 U.S.C. § 7409 (2014). The EPA has not responded to the 2009 petition. CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT (2009), <https://perma.cc/SU4Q-5GGE>.

15. See *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 528 (2007) (holding that the EPA could regulate greenhouse gases under the Clean Air Act because "such emissions contribute to climate change").

16. *Id.* at 511–13.

17. *Id.* at 534–35.

18. 42 U.S.C. § 7521(a)(1) (2012).

19. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 504–05.

20. *Id.* at 522.

21. *Id.* at 523–24.

22. *Id.* at 525.

23. *Id.* at 530–31.

This was an auspicious beginning for direct judicial treatment of climate change: the problem of global warming was faced head-on, the science was accepted, and the main arguments for why climate change could not be dealt with by traditional agency action or judicial review—widely-shared harms, attenuated causation, minimal redressability—were rejected. The Court’s ultimate holding was admittedly rather narrow. The EPA had to explain why it found greenhouse gases insufficiently dangerous to warrant regulation, but it was not ordered to make an endangerment finding or take any anti-warming action.<sup>24</sup> Still, the EPA’s excuses for not bringing global warming under the aegis of the Clean Air Act had been defeated, and the Court’s broad language boded well for the application of public environmental law to climate change.<sup>25</sup>

Chief Justice Roberts’s dissent raised serious objections to such an application, however, and in retrospect, his opinion seems like a warning bell of what was to come for environmental climate lawyers.<sup>26</sup> The Chief Justice found that the petitioners were “[a]pparently dissatisfied with the pace of progress on this issue in the elected branches” and had jumped the gun by bringing their problems to court.<sup>27</sup> In expansive language, he argued that climate change and Article III’s particularized standing requirements were incompatible: “The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon ‘harmful to humanity at large,’ and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.”<sup>28</sup> The Chief Justice chastised the majority for “ignor[ing] the complexities of global warming,” which in his mind presented an insurmountable obstacle to proof of causation or redressability and claimed that there was an “evident mismatch between the source of [the petitioners’] alleged injury—catastrophic global warming—and the narrow subject matter of the Clean Air Act provision at issue in this suit.”<sup>29</sup>

This “evident mismatch”—whether based in some real incompatibility between statutory provisions and global warming or in regulators’ and judges’ unwillingness to extend existing remedies to climate-change harms—continues to haunt legal attempts to directly confront global

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24. *Id.* at 534–35.

25. *See id.* (holding that the EPA has existing authority under the Clean Air Act to address climate change).

26. *See id.* at 540–42 (Roberts, J., dissenting) (attacking the majority’s holding that standing is present).

27. *Id.* at 535–36.

28. *Id.* at 541 (internal citation omitted).

29. *Id.* at 543, 546.

warming, despite the promise of *Massachusetts v. EPA*.<sup>30</sup> Two years after the decision, the EPA finally released an endangerment finding for greenhouse gases.<sup>31</sup> This finding provided the basis for warming regulations, including the 2010 Tailpipe Rule, which imposed higher gas-mileage standards on new vehicles.<sup>32</sup> The New York Times noted this as the federal government's "first formal step to regulate global warming pollution."<sup>33</sup>

Obama's EPA next turned to regulating stationary sources<sup>34</sup> but found its statutory resources inadequate for dealing with the large volume of greenhouse gases emitted by such sources. The Clean Air Act's Prevention of Significant Deterioration Program, which covers areas of the country that have satisfied NAAQS for one or more criteria pollutants, requires permits and technology standards for major stationary sources that emit 100 or 250 tons per year (tpy) of "any air pollutant," depending on industrial category.<sup>35</sup> Applying these standards would allow regulation of carbon dioxide even without a separate criteria-pollutant designation, but due to the nature of greenhouse gases—which are emitted in much higher volumes than other pollutants—nearly six million facilities (including churches and schools) would have been required to meet the new limits, drastically expanding the statute's reach.<sup>36</sup> To avoid this result, the EPA released the Tailoring Rule, adjusting these thresholds to 100,000 tpy of carbon-dioxide equivalent.<sup>37</sup> This put the EPA in the odd position of arguing that the greenhouse-gas endangerment finding triggered the "any air pollutant" provisions of the Clean Air Act but that those provisions would produce absurd results; therefore, the provisions had to be specially adjusted to the realities of carbon emissions.

The Supreme Court did not look favorably upon this statutory tweaking, even as it let the EPA's program survive. In *Utility Air Regulatory Group v. EPA (UARG)*, the Court held that the EPA was wrong to conclude that its endangerment finding "triggered" the absurd regulatory

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30. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 525 (finding that individuals did have standing to bring claims for climate change).

31. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

32. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

33. John M. Broder, *U.S. Issues Limits on Greenhouse Gas Emissions from Cars*, N.Y. TIMES (Apr. 1, 2010), <https://perma.cc/HZN3-VSSS>.

34. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

35. 42 U.S.C. §§ 7475(a)(1), (5), 7479(1) (2012).

36. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31536 (June 3, 2010) [hereinafter Tailoring Rule].

37. Tailoring Rule, 75 Fed. Reg. at 31,516.

consequences of the Clean Air Act's stationary-source provisions.<sup>38</sup> Greenhouse gases, the Court argued, are simply too different in kind and degree from other regulated pollutants to warrant regulation under the same scheme, even with the Tailoring Rule.<sup>39</sup> However, the Court allowed the EPA to use an indirect approach to save its stationary-source regulations, tweaking the definition of "any air pollutant" to mean any criteria pollutant—those with NAAQS, as discussed above.<sup>40</sup> Thus, only those stationary sources already emitting a criteria pollutant could be further regulated for greenhouse-gas emissions, according to the limits imposed by the Tailoring Rule.<sup>41</sup> In practice, this meant that the EPA was able to regulate 83% of stationary-source, greenhouse-gas emissions rather than the 86% it would have regulated under its preferred rule.<sup>42</sup>

But, even while the warming regulatory program survived, the Court raised red flags about such further efforts to apply the Clean Air Act to global warming.<sup>43</sup> As Jody Freeman has argued, the Court's intense scrutiny of the EPA's creative methods to make the statute fit the crisis suggests that future regulations will be strictly evaluated on a program-by-program basis, with little leeway for the particular difficulties of climate change.<sup>44</sup> The majority cited *Brown & Williamson* for the claim that "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization" made its "trigger" idea unreasonable.<sup>45</sup> In the ongoing absence of such congressional authorization, because the EPA is working off environmental statutes crafted before widespread climate-change awareness, any serious administrative treatment of global warming will have to stretch the limits of regulatory authority. The *UARG* decision signaled that, despite the Court's opening of the Clean Air Act to climate-change applications in *Massachusetts v. EPA*, the necessarily broad extent and impact of such applications would face serious judicial scrutiny and possible reversal.<sup>46</sup>

The EPA's latest and most ambitious climate-change regulation, the Clean Power Plan, has already faced such scrutiny. The Plan targets power plants running on fossil fuels and requires states to develop plans to cap

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38. *Util. Air Regulatory Grp. v. Env'tl. Prot. Agency*, 134 S. Ct. 2427, 2442 (2014).

39. *Id.* at 2444–45.

40. *Id.* at 2449.

41. *Id.*

42. *Id.* at 2438–39.

43. *Id.* at 2440.

44. Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 14 (2015).

45. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

46. See Freeman, *supra* note 44, at 16–17 (stating that subsequent EPA regulations will be subject to judicial scrutiny to ensure that EPA's regulatory authority is not inordinately expanded in scope or degree).

power-plant emissions below a state-specific limit set by the EPA.<sup>47</sup> Should these caps be met, the Plan will reduce power-sector emissions 32% by 2030 from 2005 levels.<sup>48</sup> The primary statutory authority for the Plan is § 111(d) of the Clean Air Act, which allows state-specific regulation of pollutants that are neither criteria nor hazardous, like greenhouse gases.<sup>49</sup> But, § 111(d) has seldom been used, exposing the EPA to overreaching attacks similar to those offered in the *UARG* case. More troublingly, the Plan relies heavily upon so-called “outside the fenceline” measures to reach its emissions targets, including improvements in electrical grid efficiency, transitions to natural gas from coal, and other techniques that require state action beyond the specifically regulated facilities.<sup>50</sup> Twenty-four states filed suit against the Plan, objecting particularly to expanded regulation of the energy grid and the Plan’s ramifications for the coal industry.<sup>51</sup>

Given the *UARG* Court’s skepticism toward creative or non-traditional use of the Clean Air Act to address climate change, the novel regulatory approach of the Clean Power Plan might be too ambitious for the Court.<sup>52</sup> In a sure sign that the current state of public environmental law is ill-prepared to deal with climate change—whether because of statutory deficiencies, regulatory inertia, judicial reactionism, or all three—the Court issued an extraordinary stay of the Clean Power Plan in February of 2016, pending review in the D.C. Circuit Court of Appeals.<sup>53</sup> Such stays are extremely rare; the Court provided no justification for its action, though the stay itself spoke volumes about the Court’s enthusiasm for climate-change regulation.<sup>54</sup> With Justice Scalia’s death and the balance of the Court undecided, it is difficult to predict the legal fate of the Plan.

What is clear, however, is that efforts to deal with climate change through the Clean Air Act have been at best tardy and insufficient. Using the nation’s major statute on air pollution as a means to limit greenhouse-gas emissions makes intuitive sense. But, without political support, this

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47. Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Clean Power Plan), 80 Fed. Reg. 64,662, 64,662 (Oct. 23, 2015).

48. *Id.* at 64,665.

49. 42 U.S.C. § 7411(d) (2012).

50. Clean Power Plan, 80 Fed. Reg. at 64,667–68.

51. Opening Brief of Petitioners on Core Legal Issues, *West Virginia v. Env’tl. Prot. Agency*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

52. See, e.g., Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 31–32 (2015) (analyzing potential legal weaknesses in the Clean Power Plan).

53. *West Virginia v. Env’tl. Prot. Agency*, No. 15A773 (U.S. Feb. 9, 2016) (interim order granting stay for the Clean Power Plan).

54. See Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama’s Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <https://perma.cc/9U5W-9K3Z> (“[T]he Supreme Court had never before granted a request to halt a regulation before review by a federal appeals court.”).

statute could not even be deployed for climate-change purposes until the Supreme Court directs the EPA to make the obvious finding that greenhouse gases are dangerous to human health. Were the regulatory wheels set in motion, judicial hesitation and reaction toward the prospect of what effective climate regulation would require—disruption of the existing fossil-fuel economy and expansive agency powers in the absence of legislative guidance—would serve as a brake on ambition and effectiveness. The Court’s reliance on *Brown & Williamson* in the *UARG* decision is symptomatic of a judicial tendency to recognize a problem that cannot be ignored, while insisting that the solutions must lie elsewhere: in the legislature, private industry, or at the global level, wherever the courts will not be implicated. Should the Clean Power Plan survive judicial review, it would do much to lower power-sector emissions, but the United States would still fall well short of its Paris Agreement commitment to reduce emissions between 26% and 28% by 2025 from 2005 levels.<sup>55</sup> The Clean Power Plan, along with other regulations, would result in 17% lower emissions by 2020.<sup>56</sup> While much remains undecided regarding climate regulation under the Clean Air Act, it remains, at best, a square peg for the round hole of the climate crisis.<sup>57</sup>

## 2. Public Environmental Avenues to Address Climate Change Outside the “Super-Core”

Greenhouse-gas regulation is possible under other parts of the public environmental law system. Because climate change causes a panoply of environmental harms, legal efforts have been launched based on the mandates of the Endangered Species Act, the Alternative Motor Fuels Act, and the Energy Policy Act.<sup>58</sup> Since the first climate legal efforts were

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55. *What Is the U.S. Commitment in Paris?*, EARTH INST. COLUMBIA UNIV. (Dec. 11, 2015), <https://perma.cc/TZ8C-6B44>.

56. *Id.*

57. A major exception to this trend is the Sierra Club’s “Beyond Coal” campaign, which has relied in part upon the Clean Air Act to shut down or prevent 232 coal plants. *Beyond Coal*, SIERRA CLUB, (last visited Nov. 28, 2016). The legal strategy of “Beyond Coal” often involves uncovering Clean Air Act permit violations or, where pre-Act plants were “grandfathered in” with statutory exemptions, forcing disclosure of the price disparities between coal and renewable energy sources. *Id.*; see also Michael Grunwald, *Inside the War on Coal*, POLITICO (May 26, 2015), <http://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002> (discussing climate-oriented legal strategy that operates without directly confronting global warming—proposed plants are rejected because of minor permitting violations, not because of their predicted harm to the climate—further supporting this article’s thesis about the relative success of climate legal action at the periphery as opposed to the core).

58. See, e.g., Gerrard et al., *supra* note 6 (listing statutory claims under NEPA and other statutes); see *Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (approving, for

launched over two decades ago, the most significant alternative to the Clean Air Act has been the National Environmental Policy Act (NEPA). NEPA, passed in 1970, requires federal agencies to consider the environmental impacts of projects that they undertake or approve.<sup>59</sup> The primary method for doing so is the Environmental Impact Statement (EIS), which details environmental impacts and potential action alternatives.<sup>60</sup> As early as 1990, cities, states, and environmental organizations sued the National Highway Traffic Safety Administration (NHTSA) for failing to issue an EIS considering the global-warming effects of its new vehicle emissions standards.<sup>61</sup> Although the citizens lost on the merits, the D.C. Court of Appeals recognized the petitioners' standing claims in part because the "new and potentially catastrophic phenomenon" of global warming deserved attention under NEPA.<sup>62</sup> Later, in *Mid States Coalition for Progress v. Surface Transportation Board*, an EIS for a project to expand rail access to a coal mine was found insufficient because it did not take into account the fact that the project would incentivize coal consumption, thus contributing to global warming.<sup>63</sup> The Court refused to allow the agency to rely upon the uncertainty of the project's warming consequences in order to ignore those consequences altogether, holding, "when the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect."<sup>64</sup> More recently, the Ninth Circuit upheld another challenge to NHTSA vehicle emission standards because the agency assigned a zero value to the potential benefits of reduced carbon emissions resulting from the standards.<sup>65</sup> The Court also rejected the argument that because climate change is a global phenomenon with many contributors, the agency did not need to consider its own relatively minor contribution.<sup>66</sup> This evasion of responsibility was likewise

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the first time, an agency's use of Social Cost of Carbon (SCC) calculations in assessing a regulation's environmental impact). In evaluating the effects of refrigerator greenhouse-gas emissions, the Department of Energy considered SCC warming externalities, such as agricultural damage, human health impacts, and property damage from flooding. *Id.* The Seventh Circuit found such considerations within the purview of the Energy Policy and Conservation Act's consideration of environmental effects. *Id.* This decision may signal increasing judicial consideration of the diffuse, indirect impacts of climate change that do not fit within traditional notions of environmental harm.

59. 42 U.S.C. § 4321 (2012).

60. Council on Environmental Quality, 40 C.F.R. §§ 1500-08 (2011).

61. *City of L.A. v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 481-82 (D.C. Cir. 1990).

62. *Id.* at 492.

63. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

64. *Id.*

65. *Ctr. for Biological Diversity v. Nat'l. Highway Traffic Safety Admin.*, 538 F.3d 1172, 1199 (9th Cir. 2008).

66. *Id.* at 1217.

frowned upon in *Massachusetts v. EPA*.<sup>67</sup> In 2014, the Council on Environmental Quality, which administers many of NEPA's provisions, built on these decisions and released its Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, directing agencies to consider both direct and indirect global-warming implications of their projects.<sup>68</sup>

These cases underscore the federal administrative state and judiciary's long-standing encounter with climate change under the aegis of public environmental law. By forcing agencies to consider their own contributions to global warming when disclosing environmental impacts, courts reviewing NEPA challenges have reinforced the idea that climate change fits within the purview of environmental policymaking, despite the difficulties of proving causation and redressability. But, judicial attention to climate change in the NEPA context may be only as aspirational and programmatic as the strong language in *Massachusetts v. EPA*, recognizing that global warming deserves to be dealt with without much regulatory consequence.<sup>69</sup> Mandates to seriously consider climate change in agency decision-making require only procedural measures.<sup>70</sup> Even the limited information-gathering, disclosure, and administrative benefits of including climate change in NEPA processes may be limited by continued agency defiance, judicial reluctance, and the lack of signals from Congress that such climate consideration is important.<sup>71</sup> These exact issues came to the fore in the fight over the Keystone XL pipeline, where a series of State Department EISs survived NEPA challenges, despite finding no adverse global-warming effects from the proposed pipeline.

### 3. The Lessons of Public-Law Litigation at the Core

A pattern of judicial recognition and reluctance emerges from these public-law cases and represents part of the legal core where courts directly consider the problem of global warming. When this encounter is staged in such a way that courts need only address the certainties of climate-change

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67. See *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 523–24. (suggesting that *de minimis* contribution is not a legitimate reason for inaction).

68. Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (Dec. 24, 2014).

69. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 524.

70. See *id.* at 498–500 (suggesting that Petitioners need only question the rulemaking process).

71. See, e.g., Amy Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. Colo. L. Rev. 473, 474–79 (2010) (reviewing various barriers to full NEPA consideration of climate change).

science and the failure of agencies to acknowledge them, courts are quite comfortable making pro-climate rulings: *Massachusetts v. EPA*, *Mid States Coalition v. Surface Transportation Board*, and *CBD v. NHTSA* are part of this high-rhetoric, low-outcome trend.<sup>72</sup> But, where this encounter with climate change runs the risk of uncertain economic, political, or doctrinal consequences, the core proves a hostile place to climate advocates: the progression from *Massachusetts v. EPA* through *UARG* to the extraordinary stay of the Clean Power Plan can best be read as the Supreme Court's raising of the drawbridge to protect itself from the coming climate storm. With the Court already split on the question of whether climate should come into the courtroom at all—recall Chief Justice Roberts's forceful argument that standing doctrine excludes global-warming claims—legal and political arguments that would require disruption of the *status quo* face a hostile bench.<sup>73</sup>

But, thus far, only statute-based litigation has been considered. Clearly, with Congress having failed to pass a major environmental statute for nearly three decades, the laws on the books are not up to the task of curbing greenhouse-gas emissions. Perhaps, even at the core, where global warming is directly confronted, prospects are better in private law.

### *B. Judicial Resistance to Private Law Climate Claims*

To date, private-law claims related to climate change have mainly consisted of tort actions against private fossil-fuel extractors and carbon emitters. One of the first cases of this sort was *American Electric Power Co. v. Connecticut*, (*AEP*), in which eight states, New York City, and three land trusts sued large power plant operators under a theory of public-nuisance liability for climate-change harms.<sup>74</sup> Citing damage to public rights, including health, infrastructure, and public lands, the plaintiffs sought reduced annual greenhouse-gas emissions caps for each defendant.<sup>75</sup> Although litigation in the lower court involved complex disputes over standing—the District Court dismissed the claims as non-justiciable, while the Second Circuit reversed and found that the claims could stand under the federal common law of nuisance<sup>76</sup>—the Supreme Court's treatment of the

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72. See *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 534–35 (finding that Petitioner's had standing to sue for climate change); *Ctr. for Biological Diversity*, 538 F.3d at 1227; *Mid States Coal. for Progress*, 345 F.3d at 550 (8th Cir. 2003).

73. See *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 540–42 (Roberts, J., dissenting) (stating that climate change did not provide adequate standing).

74. *Am. Elec. Power Co., v. Connecticut*, 131 S. Ct. 2527, 2532 (2011).

75. *Id.* at 2534.

76. *Id.*

case was straightforward. Prior to the related suits in 2004, the Court had ruled that greenhouse gases were “air pollutants” under the Clean Air Act, and the EPA had released an endangerment finding to that effect.<sup>77</sup> With emissions harms now a matter of statutory and administrative remedy, there no longer existed “any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”<sup>78</sup> In other words, climate-based, common-law harms against power-plant emitters were fully displaced from federal court. The Court even held that it was immaterial whether the EPA regulated the particular plants or companies accused of public nuisance: as soon as Congress delegated the hypothetical power to do so, the matter was removed from the federal common law.<sup>79</sup> In reaching these conclusions, the Court relied heavily upon notions of judicial (in)expertise and separation of powers, holding that because regulating greenhouse-gas emitters is so complex, the judiciary should defer to expert administrative agencies.<sup>80</sup>

The broad sweep of the *AEP* Court’s displacement holding was reiterated in *Native Village of Kivalina v. ExxonMobil*, in which an Alaskan village north of the Arctic Circle sought damages from various energy producers for emissions that caused melting sea ice and coastline erosion, threatening the village’s existence.<sup>81</sup> The Ninth Circuit relied solely upon the recent *AEP* Court’s precedent to hold that the village’s federal common-law claims were displaced, despite the difference in relief sought.<sup>82</sup> The Court did not address the lower court’s holding that the claims were non-justiciable under the political question doctrine—the idea that any decision would require the court to inappropriately intervene in climate politics, which is the legislature’s purview—and that the plaintiffs lacked Article III standing due to lack of causation.<sup>83</sup> Both the *AEP* and *Kivalina* decisions thus demonstrated the danger that public environmental law posed to private plaintiffs seeking remedies for climate-change injuries. Just a few short years after the Supreme Court finally compelled the EPA to deal with the severity of global warming, that very attention to the issue was used to prevent any serious judicial accounting of global-warming responsibility and harms. The decisions were paradigmatic of judicial reaction at the core. Relying on the doctrine of legislative displacement, both the Supreme Court

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77. See *supra* Part I.A.1.

78. *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

79. See *id.* at 2538 (“[T]he relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’”).

80. *Am. Elec. Power Co.*, 131 S. Ct. at 2539–40.

81. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

82. *Id.* at 856.

83. *Id.* at 854, 858.

and the Ninth Circuit washed their hands of any responsibility for the continued legal license held by large corporations to damage the climate.<sup>84</sup>

A final glimmer of hope was snuffed out in the tortuous litigation of *Comer v. Murphy Oil USA*. In 2005, a class of Gulf Coast residents sued various oil and chemical companies in the Southern District of Mississippi for nuisance, trespass, negligence, and other torts for contributing to the severity of Hurricane Katrina and its damage to property.<sup>85</sup> In its initial decision, the Fifth Circuit overturned the lower court's dismissal on standing grounds, finding that, at the pleading stage, it was reasonable to suggest that a "chain of causation" could link the defendants' emissions to the plaintiffs' global-warming harms.<sup>86</sup> The Court also held that the political question did not bar its consideration of the claims, as courts are not simply free to "abstain from deciding politically charged cases."<sup>87</sup> Furthermore, the Clean Air Act did not displace the state claims at issue.<sup>88</sup> Nevertheless, these legal victories, which had the potential to prevent the *AEP* and *Kivalina* decisions from barring future climate tort actions at the federal level, were short-lived. As the case was reheard *en banc*, several recusals caused the Fifth Circuit to miss a quorum and the case was dismissed.<sup>89</sup> When the plaintiffs refiled, the Southern District Court of Mississippi dismissed again, on *res judicata* grounds, and a finding that, despite the favorable language in *Massachusetts v. EPA* and the Fifth Circuit's opinion, the plaintiffs lacked standing because they could not prove that "the defendants' particular emissions led to their property damage."<sup>90</sup> The Fifth Circuit affirmed this decision.<sup>91</sup>

Tort law, with its balancing of rights, duties, and obligations and its ability to hold the more powerful accountable for injuring the weak, would seem to be one of the few social arenas in which the real consequences of global warming could be investigated and accounted. But, judges have repeatedly denied climate-based claims by appealing to alleged doctrinal pitfalls; direct causation between specific emissions and a victim's harms is impossible to prove, harms are diffuse and often somewhat speculative, and laying blame for the global problem of climate change on a single tortfeasor

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84. *Id.* at 858.

85. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859–60 (5th Cir. 2009).

86. *Id.* at 865.

87. *Id.* at 873.

88. *Id.* at 878.

89. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053–54 (5th Cir. 2010).

90. *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 853, 861 (S.D. Miss. 2012).

91. *Comer v. Murphy Oil USA*, 718 F.3d 460, 469 (5th Cir. 2013).

does not square with traditional notions of fault and culpability.<sup>92</sup> These conceptual difficulties are not natural or irresolvable. In fact, the history of tort law is one of modification and expansion in response to social need. For example, the direct causation requirement has long been relaxed or eliminated in environmental cases involving toxic and long-term pollution, giving rise to the use of “substantial factor” or “increased risk” causation theories.<sup>93</sup> Strict and absolute liability emerged in the middle of the twentieth century to shift the burden of care from relatively helpless individuals to powerful corporations and producers.<sup>94</sup> Tort scholars and litigants have elaborated many doctrinal fixes to accommodate climate change.<sup>95</sup> This includes a precautionary principle that would hold individual carbon polluters liable unless they could prove an absence of injury.<sup>96</sup> Clearly, then, courts could, at their discretion, marshal the resources of tort law to directly address climate-change harms.

This intransigence represents a second plane of uncertainty that closely parallels the uncertainties of climate change and climate politics. Like public environmental law, where core climate legal strategies face serious resistance as soon as they call upon the courts to disturb established economic and political arrangements in favor of uncertain regulatory strategies, private law proves an inhospitable field for dealing directly with the causes and effects of global warming because any relief requires some resolution of climate-change uncertainties. Chief Justice Roberts’s solution to the problem of standing in climate-change cases, that no one has standing, seems wholly inadequate for legal treatment of the climate crisis.<sup>97</sup> Even though Roberts’s view did not win out in *Massachusetts v. EPA*, his rationale for withholding relief continues to pervade the law of climate change.<sup>98</sup>

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92. See, e.g., Luciano Butti, *The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America*, 11 SUSTAINABLE DEV. L. & POL’Y 32, 33 (2011) (discussing the difficulties of proving direct responsibility of one specific emitter and the lack of redressability available); David Weisbach, *Negligence, Strict Liability, and Responsibility for Climate Change*, 97 IOWA L. REV. 521, 522, 525–27, 564–65 (2012).

93. Sanne H. Knudsen, *The Long-Term Tort: In Search of a New Causation Framework for Natural Resource Damages*, 108 NW. U. L. REV. 475, 501 (2014).

94. *Id.* at 512; Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 697–701 (1993).

95. See, e.g., Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 350 (2011).

96. Butti, *supra* note 92, at 33.

97. See *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. at 535 (Roberts, J., dissenting) (arguing that claims challenging the EPA’s failure to regulate greenhouse gases should be dismissed as nonjusticiable).

98. See *id.* at 547 (Roberts, J., dissenting) (illustrating the problems with applying traditional standing to climate-change claims).

*C. A New Core? Public Trust and Constitutional Claims*

The recent wave of public-trust and constitutional litigation linked to climate-change harms is a major potential exception to this pattern. The public trust doctrine holds that certain natural resources, traditionally coastlines and navigable rivers, are held by the government in trust for the benefits of its citizens.<sup>99</sup> In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court recognized that the doctrine limits the ability of governments to degrade or alienate such resources, holding that the city of Chicago could not sell off a large part of its lakefront to a private party.<sup>100</sup> Since Joseph Sax's article,<sup>101</sup> the doctrine has been a constant recourse for environmentalists. In *National Audubon Society v. Superior Court of Alpine County*, for example, plaintiffs successfully argued that the public trust required the state to ensure that Mono Lake would not be irreparably harmed by Los Angeles's water diversion program.<sup>102</sup> Mary Wood has notably argued for the extension of the public trust doctrine to the atmosphere, claiming that "all nations owe a primary fiduciary obligation toward their citizen beneficiaries to restore atmospheric health."<sup>103</sup>

Litigation advocating the "atmospheric trust" doctrine has achieved some success. In 2014, the D.C. Court of Appeals summarily dismissed a public-trust action against the EPA, which alleged that the agency is a "trustee[] of essential natural resources pursuant to various provisions of the Constitution, and that the defendants have abdicated their trust duty to protect the atmosphere from irreparable harm."<sup>104</sup> The Court ruled that the public trust doctrine was purely a matter of state law and that there was no subject-matter jurisdiction over the case.<sup>105</sup> In an ongoing case in the state of Washington, youth plaintiffs appealed the state Department of Ecology's denial of their petition to issue new rules limiting greenhouse-gas emissions. A Superior Court judge ruled in November that the agency has legal obligations under the public trust doctrine to protect at least the state's navigable waters, which are intertwined with the atmosphere and likewise

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99. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 397, 435–37 (1892).

100. *Id.* at 455–56.

101. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1969-1970).

102. *See Nat'l Audubon Soc'y v. Superior Court of Alpine Cty.*, 658 P.2d 709, 732 (Cal. 1983) (stating that the human and environmental uses of Mono Lake are protected by the public trust doctrine and should be taken into account by the state).

103. WOOD, *supra* note 8, at 221.

104. Alec L. *ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014).

105. *Id.*

harm by global warming.<sup>106</sup> After the agency withdrew its rulemaking, the judge ordered it to promulgate new rules in consultation with the plaintiffs and in accordance with its public-trust duties.<sup>107</sup>

Another ongoing case, *Juliana v. United States*, suggests that the story at the climate core may be changing. In 2015, several youth plaintiffs brought public-trust, equal-protection, due-process, and Ninth-Amendment claims against the President, the EPA, and other federal actors.<sup>108</sup> They alleged climate-change injuries caused by the defendants' exercise of sovereign authority over the nation's fossil-fuel reserves, in the form of permitting, subsidizing, and promoting fossil-fuel extraction and combustion.<sup>109</sup> In November of 2016, Judge Aiken of the District of Oregon denied motions to dismiss by the federal defendants and fossil-fuel industry intervenors, issuing an opinion that is by far the strongest pro-climate judicial pronouncement to date.<sup>110</sup>

In finding that the political question doctrine did not preclude judicial consideration of the claims, the court noted that the subject matter was not clearly reserved for the executive or legislature: “[T]he Constitution does not mention environmental policy, atmospheric emissions, or global warming.”<sup>111</sup> Similarly, “logistical difficulties” would not preclude the court from engaging in a discussion of appropriate emissions levels,<sup>112</sup> and the plaintiffs’ general request for a declaration requiring a climate-action plan meant that the court would not need to meddle inappropriately in the specifics of agency action.<sup>113</sup> The court noted that any potential difficulty in crafting a remedy was insufficient to support dismissal at an early stage.<sup>114</sup> Most importantly, the plaintiffs had cleverly avoided the pitfalls of the public environmental core and its “technical regulatory violations”<sup>115</sup> by instead asserting broad constitutional claims—the classic purview of federal

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106. Order Affirming the Department of Ecology’s Denial of Petition for Rule Making at 8, *Foster v. Wash. Dep’t of Ecology*, 362 P.3d 959 (2016) (No. 14-2-25295-1).

107. See Press Release, Our Children’s Trust, Youth Secure Second Win in Washington State Climate Lawsuit (Apr. 29, 2016), <https://perma.cc/5PLR-WXHT>. Several other public trust cases have been brought in other states. See Gerrard et al., *supra* note 6 (listing public trust actions under “Common Law Claims”).

108. Complaint at 84–93, *Juliana v. United States*, No. 6:15-cv-1517-TC (D. Or. Nov. 10, 2016).

109. *Id.*

110. *Id.* at 54.

111. *Id.* at 10.

112. *Id.* at 12.

113. *Id.* at 13.

114. *Id.* at 17.

115. *Id.* at 13–14.

courts. The court stated: “There is no need to step outside the core role of the judiciary to decide this case.”<sup>116</sup>

The court’s standing analysis likewise represented a strong step forward in judicial treatment of climate change. Following *Massachusetts v. EPA*, the court held that standing could be based on generalized harms so long as they were also concrete and particularized.<sup>117</sup> The plaintiffs could adequately demonstrate causation of these harms, given that the United States is responsible for approximately a quarter of historical greenhouse-gas emissions.<sup>118</sup> Remarkably, the court was not intimidated by the difficulty in predicting whether its remedy might actually reduce global emissions: “redressability does not require certainty.”<sup>119</sup>

Most importantly, the court’s acceptance of the plaintiffs’ theory of the intersection between climate, the Constitution, and public trust suggest an opening for direct judicial treatment of climate change outside of statutory environmental law. Judge Aiken granted that the Constitution forbids government-caused degradation of the atmosphere, citing the Supreme Court’s recent expansion of the notion of fundamental rights in the same-sex marriage case, *Obergefell v. Hodges*:<sup>120</sup>

I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.<sup>121</sup>

The court went on to withhold judgment on whether the public trust extends to the atmosphere, given that the plaintiffs had alleged global-warming harms to the territorial sea, which is clearly protected.<sup>122</sup> However, the court parted ways with the D.C. Circuit’s decision in *Alex L.* in finding

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116. *Id.* at 16 (reiterating the wisdom of choosing a cause of action outside of classic environmental law: “[The defendants] are correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case”)

117. *Id.* at 21.

118. *Id.* at 23–24.

119. *Id.* at 27.

120. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

121. Complaint, *supra* note 108, at 32–33.

122. *Id.* at 40.

that a federal public-trust duty exists,<sup>123</sup> and denied the defendants' argument that *AEP v. Connecticut* compelled displacement of the claims: "A defining feature of [the public-trust] obligation is that it cannot be legislated away."<sup>124</sup>

In an auspicious move for climate litigants, Judge Aiken devoted the conclusion of her opinion to chastising the federal judiciary for failing to confront climate change. Noting that "a deep resistance to change runs through defendants' and intervenors' arguments for dismissal" and that "[t]his lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss," Judge Aiken wrote that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."<sup>125</sup> She quoted Judge Alfred T. Goodwin to the effect that "the third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government"<sup>126</sup> and stressed that "[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."<sup>127</sup>

*Juliana* and the other public-trust cases belong at the core of climate-change litigation because they ask courts to confront global warming and its implications for government duties. Ideally, such a confrontation will result in wide-ranging mandates to correct government policy in accordance with climate science. This result was achieved in the recent *Urgenda Foundation v. Kingdom of the Netherlands* case, where a Dutch court ruled that the government had to reduce the country's emissions by 25% from 1990 levels by 2020.<sup>128</sup> The Court relied upon a variety of legal sources, including the national constitution and the government's reduction commitments under European Union (EU) and international law.<sup>129</sup> The government has appealed the ruling.<sup>130</sup> If public-trust and constitutional actions in the United States result in similar holdings, this will be a significant climate-legal victory at the core. However, much depends on what relief such a

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123. *Id.* at 46.

124. *Id.* at 49.

125. *Id.* at 52.

126. *Id.* (quoting Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 785–86, 788 (2015)).

127. Complaint, *supra* note 108, at 54.

128. Rb. Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda Foundation/The State of the Netherlands*) (Neth.).

129. *Id.*

130. See, e.g., Megan Darby, *Netherlands Enters Appeal Against Climate Ruling*, CLIMATE HOME (Jan. 1, 2010, 5:26 PM), <https://perma.cc/6M99-WUY9> (outlining the basis for the appeal).

ruling would provide. The *Urgenda* case is the strongest example of judicial action on climate change, with a direct mandate to cap emissions.<sup>131</sup> In the public-trust and constitutional context, relief could vary from equally strong mandates to much weaker declaratory judgments recognizing a public-trust duty, a recognition that, in the past, has done little to provide the environmental relief plaintiffs seek.<sup>132</sup> *Juliana*, with its strong endorsement of public-trust and constitutional claims, suggests that courts may respond favorably to a reframing of the climate core that addresses the federal judiciary's traditional competencies. This core confrontation could produce dramatic judicial intervention premised on a new understanding of the public trust and the constitutional implications of government inaction on climate change. This understanding would bypass the administrative and legal uncertainties of Clean Air Act regulation and the private law uncertainties of tort actions, while embracing the economic and political uncertainties of comprehensive national emissions reductions. Alternatively, this core confrontation could produce another judicial recognition of climate change along the lines of *Massachusetts v. EPA*—acknowledgment without action, avoidance of uncertainty, and abdication of scrutiny in favor of the *status quo*.

#### *D. Legal Structure and Strategy at the Climate Law Core*

This review of climate legal action at the core demonstrates how, when legal claims force courts to deal with the phenomenon of global warming, the preferred judicial response is to force as little action as possible and to avoid the legal, political, and economic uncertainties that would result from climate-favorable rulings. Two important observations flow from this point.

First, judicial inaction premised on uncertainty favors the *status quo* of the fossil-fuel economy. Although there is nothing natural or inevitable about societal reliance on coal, oil, and gas, this situation is treated as the background against which climate legal interventions are staged. When agency action to alter this background is treated as potentially disruptive or illegitimate (as in *UARG* and the Clean Power Plan challenges) or when tort claims that would introduce fault and entitlement into the fossil-fuel *status quo* are deemed unsuitable for judicial resolution, the *status quo* is legitimized and reinforced. This judicial externalization of climate change

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131. Rb. Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (Ugenda Foundation/The State of the Netherlands) (Neth.).

132. See, e.g., *Paepcke v. Pub. Bldg. Comm'n of Chi.*, 263 N.E.2d 11, 21 (Ill. 1970) (denying complaint to prevent construction of a school in a city park despite recognition that public trust extended to the park).

mirrors—and perpetuates—the externalization of human and environmental costs accomplished by the major beneficiaries of the fossil-fuel *status quo*, including oil companies and individuals with carbon-intensive lifestyles. In both instances, the best way to deal with the threat to settled arrangements posed by climate change is to call it someone else’s problem.

It is hardly surprising that courts, and the federal bench in particular, would protect business as usual and prove unwilling to outpace legislatures in dealing with climate change. In aid of this unwillingness, the legal avenues employed by climate advocates in the cases above are structurally ill-suited to climate claims. By “structure” I simply mean the non-climate-related legal authority, precedent, and common sense that climate advocates must work with and through to seek relief. This structure is hardly natural; it is the outcome of social conflicts, played out through the law, which predated the climate-change era, and of environmental policies designed before global warming was well understood. When climate advocates enter the legal system, they encounter rules and procedures that were either designed to favor the sorts of actors who oppose action on climate change—namely big business—or were made in ignorance of the special exigencies of climate change. In the public-law context, examples of this structurally poor fit include Clean Air Act § 111 emissions limits far too low for reasonable greenhouse-gas caps, state common carrier laws envisioning the government’s primary role as encouraging rather than monitoring (let alone limiting) infrastructure expansion, and agency procedural requirements incentivizing administrative disclosure rather than action.<sup>133</sup> In private law, structural impediments include: tort standing, causation and redressability standards, the concept of legislative displacement, and the political question doctrine. At a more general level, these obstacles are part of an American judicial culture that frowns upon regulatory “interference” with the market (especially where unsanctioned by Congress) and relies on an adversarial mode of dispute resolution that is incapable of capturing the diffuse, widely shared injuries caused by global warming and its many unequally responsible contributors. Benjamin Ewing and Douglas A. Kysar attribute judicial inaction on climate change to a widespread understanding that the American “limited government” system of checks and balances simply cannot bring regulatory power to bear on enormous societal threats like global warming.<sup>134</sup> Judges therefore take advantage of the “malleable escape hatches” that tort law offers to avoid disruptive rulings in the sorts

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133. See Clean Air Act § 111, 42 U.S.C. § 7411 (2012) (setting standards for new stationary sources).

134. Ewing & Kysar, *supra* note 95, at 353–54, 411–12.

of climate nuisance actions discussed above.<sup>135</sup> Although these attitudes and norms pre-date the climate-change era, they are symptomatic of an individualistic, free-market ideology that impedes action on, if not actively encourages, global warming.

As important as these structural problems are, they must be qualified by the second observation flowing from the preceding discussion: nothing in the law at the climate core, even when it is ideologically biased and climate-unfriendly, determines climate-unfavorable results. This is more than just the legal realist claim that the law is indeterminate. The favorable standing language of *Massachusetts v. EPA*, the initial climate-tort-friendly Fifth Circuit opinion in *Comer v. Murphy Oil USA*, and the very recent public-trust and constitutional opinions in Washington and Oregon demonstrate that petitioners can use the public and the private law to reach climate-favorable results.<sup>136</sup> These are also exemplary instances of the “prodding and pleading” that Ewing and Kysar argue judges should practice in global-warming cases. This signals to the other branches that action is needed on global warming, even when the merits of a particular case do not warrant climate-favorable rulings.<sup>137</sup> Should the Clean Power Plan survive judicial review, it will be clearer than ever that the fate of climate litigation at the core depends as much on structure as it does on political change, public attitudes, and even judicial personality. Like global warming, judicial resistance at the core is not a fact of nature but rather a temporary arrangement of forces that can be undone—*Juliana* suggests that this may already be happening. Although it is already too late to reverse the harms that both have caused, much greater damage can still be prevented.

Understanding the legal difficulties that climate advocates encounter when they bring global warming into the courtroom is important to strategizing how the climate movement can best use the law to reach its goals. It is also important to account for the variety of ways in which resistance to the fossil-fuel economy is practiced. If climate change is a prism through which traditional legal problems like blame, causation, and government intervention are refracted, then the main lesson of climate law at the core is that courts do not want to follow the light through the prism. They do not want to see its odd, diffracted outcomes; they prefer to dutifully marvel at the prism’s properties, then hand it off to someone else

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135. *Id.* at 355.

136. *See Comer*, 585 F.3d at 855; *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. at 497; Order and Findings & Recommendation, *Juliana v. United States*, No. 6:15-cv-1517-TC (D. Or. Apr. 8, 2016); Order Affirming the Department of Ecology’s Denial of Petition for Rule Making, *Foster v. Wash. Dep’t of Ecology*, 362 P.3d 959 (2016) (No. 14-2-25295-1).

137. Ewing & Kysar, *supra* note 95, at 354, 356–57.

to deal with. But, if courts' attention is directed to the resulting refractions rather than to the prism itself—to the indirect social causes and effects of global warming, rather than to the atmospheric phenomenon—then new possibilities of legal action open up. These new legal possibilities are tightly connected to different modes of climate resistance. As the story of the Keystone XL Pipeline demonstrates, this alternative model of climate legal action and resistance offers some promise of more climate-favorable outcomes, even as its actual effect on greenhouse-gas emissions remains unclear.

## II. LEGAL RESISTANCE TO THE KEYSTONE XL PIPELINE

The movement to stop the Keystone XL Pipeline was always primarily about climate change. But, whereas other climate movement efforts, like the legal efforts discussed above or the push to pass the Waxman-Markey bill,<sup>138</sup> sought legislative, regulatory, or judicial action squarely addressing global warming, the KXL resistance adopted a much more diffuse and multifaceted approach. While attempts were launched to secure rejection of the pipeline based on climate concerns, many legal strategies implicated global warming only indirectly: battles over the right of a pipeline company to appropriate private lands, challenges to collusion between industry players and administrative decision-makers, and criminal defense of anti-pipeline activists. These efforts shifted judicial attention away from climate-change harms and toward various supports, effects, and causes of the fossil-fuel economy. Linked by their overall goal of preventing pipeline construction, the success of these legal actions was measured less by individual courtroom victories than by contributions to the lengthy delay and the ultimate, decidedly political rejection of the pipeline.

The importance of delay in the defeat of the KXL cannot be understated. Over the course of seven years, the pipeline went from an acknowledged *fait accompli* to the first major fossil fuel extraction development to be defeated by the climate movement. The movement's strategic use of delay employed a tactic that had long been used by fossil-fuel advocates to prevent government action on climate change, whether by postponing an EPA finding on the dangers of greenhouse gases or by bogging the Clean Power Plan down in judicial review.<sup>139</sup> But this was not the only important reversal of tactics in the legal fight against the KXL.

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138. Bryan Walsh, *Why the Climate Bill Died*, TIME (July 26, 2010), <https://perma.cc/Q8L2-TCBP>.

139. See *infra* Part II.B (discussing the fraught history of delay in environmental conflicts).

As discussed above, legal efforts at the climate core are stymied by judicial fear of uncertainty and a preference for inaction when uncertainties arise. The legal fight against KXL largely abandoned the core to focus on the climate periphery. Not incidentally, this periphery is where many of the more concrete and immediate effects of the fossil-fuel economy and global warming are discernible. It is also where uncertainty works for, rather than against, climate advocates. Uncertainty at the core is linked to the effects of climate-change regulations; uncertainty at the periphery, in this instance, is linked to the economic, legal, and diplomatic effects of approving a pipeline. As the ability of the KXL to survive its various legal and political challenges became less and less certain—and crucially, as the pipeline’s economic benefits grew ever more questionable—rejection of the pipeline became an increasingly defensible decision based on the certainty of an unchanging background. Indeed, the final permit denial was justified largely on the grounds that the pipeline’s economic benefits and even its eventual construction were difficult to determine. Whereas at the climate legal core the movement sought proactive government action to stop global warming, anti-KXL campaigners at the periphery pushed for government inaction to maintain the *status quo*: a world without the pipeline. By pushing uncertainty to the periphery and flipping the action–no-action alternative, the legal resistance to the KXL was able to frame the pipeline issue in such a way as to make rejection politically palatable. Fossil-fuel proponents in turn were forced to argue for government intervention and for the certainty of the pipeline’s benefits—a reversal of their prior reliance on the tropes of inaction and uncertainty.

In a certain sense, the anti-KXL movement’s legal strategy in this context mirrored judicial reaction to the climate core by obscuring or avoiding the core issue of climate change. For example, the lead lawsuit over pipeline siting authority in Nebraska, which served a crucial delaying and uncertainty-making role, made no mention of global warming.<sup>140</sup> Bracketing the issue made it possible for courts, perhaps inadvertently, to serve the climate-favorable purposes of the litigants. It is tempting to say that, even when global warming was not mentioned, everybody knew that these legal efforts were really about the pipeline’s effect on climate change. But, this is likely untrue; some observers considered the KXL primarily about the rights of indigenous peoples and landowners.<sup>141</sup> Part of what

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140. See *Thompson v. Heineman*, 857 N.W.2d 731 (Neb. 2015) (failing to mention “global warming” or “climate change”).

141. See Rebecca Adamson, *The Corruption of Keystone: Congressional Permits to Drill Don’t Change Public Opinion*, TRUTHOUT (Mar. 27, 2016), <https://perma.cc/X5Q4-6SJQ> (“The

made the diffuse legal efforts to stop the pipeline so effective was that this diversity of intent simply did not matter; a confluence of interests arose such that the climate movement could defeat the KXL without having to make climate change a universally shared concern of activists and decision-makers. This distinguishes the anti-pipeline strategy from legal action at the core, where the only relevant consideration is one's contribution to, or concern about, global warming, and it accounts for the value of action at the periphery.

To clarify, because the pipeline crossed a border, final approval authority rested with the State Department; thus, the primary climate policy decision-makers were the President and State Department officials, whereas the relevant decision-makers in the discussion above were federal judges. This distinction clearly had ramifications for how climate legal activists framed arguments about discretion and legal authority and for how the certainty–uncertainty and action–inaction distinction operated. For example, the importance of precedent was diminished, while the timing of elections was crucial. But, inaction in the face of uncertainty and allegiance to the *status quo* were still the major institutional dispositions with which activists had to contend. The pipeline opposition's move from the core to the periphery in its legal action was thus successful even though, and perhaps because, the final result was decided in an executive agency rather than a federal courtroom. This strategy is an ironic instance of the “prodding and pleading” that Ewing and Kysar envision for judicial action on climate,<sup>142</sup> with the legal outcomes here serving not so much as a clarion call as an excuse for executive climate (in)action. This strategy certainly helped to secure a dramatic public victory for the climate movement. Whether the anti-KXL effort is a suitable model for future climate legal action remains, however, a live question and one that will be addressed at the end of the article.

#### *A. The Proposed Pipeline and the (Un)certainty of its Benefits*

In 2008, TransCanada, a Canadian oil services company, applied to the United States Department of State for a permit to build the KXL across the U.S.-Canadian border.<sup>143</sup> The pipeline represented the third phase of

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Keystone XL pipeline debate is not about climate change, oil independence, or increased jobs . . . . [It is about] [a] government that overruns its peoples' lands by granting eminent domain.”)

142. Ewing & Kysar, *supra* note 95, at 354, 356.

143. See PAUL W. PARFOMAK ET AL., CONG. RESEARCH SERV., R43787, KEystone XL PIPELINE: OVERVIEW AND RECENT DEVELOPMENTS (2015) (discussing original application for the pipeline in 2008 in the report summary).

TransCanada's Keystone project, which aimed to carry crude oil extracted from the tar sands of northern Alberta through a 36-inch-diameter pipeline approximately 2,000 miles to the Gulf Coast.<sup>144</sup> The first two phases of the project, which required conversion of natural-gas pipelines and reinforcement of existing connections between Steele City, Nebraska and Cushing, Oklahoma, were already complete.<sup>145</sup> The Alberta tar sands were a newly exploitable resource thanks to developments in energy-intensive *in situ* mining, which usually involves the use of steam to heat trapped oil for extraction.<sup>146</sup> Of the estimated 170 billion barrels of tar sands oil in Alberta,<sup>147</sup> the KXL would have transported approximately 830,000 barrels a day, or 300 million barrels a year; by comparison, 420 million barrels of Canadian synthetic crude were shipped to the United States in 2013.<sup>148</sup> Because of the tremendous amounts of energy involved in extraction, a given barrel of Alberta tar sands oil is estimated to cause 17% more "lifetime" greenhouse-gas emissions than other crude oil.<sup>149</sup> TransCanada claimed that the KXL, which would join a network of other cross-border oil pipelines, would enhance United States energy security and provide economic benefits in the form of jobs and lower gas prices.<sup>150</sup>

At first, the pipeline appeared to have an easy path to approval. The State Department approved a preliminary, smaller part of the project, and TransCanada began acquiring land along the pipeline route in anticipation of its final permit.<sup>151</sup> The company and its supporters cited a promised 2,500 to 4,650 new construction jobs resulting from the pipeline.<sup>152</sup> Canadian provincial and federal support was lined up, and conventional Washington wisdom saw no reason for rejection.<sup>153</sup> Initially, even many environmental groups lambasted attempts to stop the pipeline, citing the

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144. *Id.*

145. Megan O'Rourke, *The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 VILL. ENVTL. L.J. 149, 150–52 (2013).

146. JONATHAN L. RAMSEUR ET AL., CONG. RESEARCH SERV., R42611, OIL SANDS AND THE KEystone XL PIPELINE: BACKGROUND AND SELECTED ENVIRONMENTAL ISSUES 9 (2014).

147. *Id.* at 5.

148. *Id.* at 13.

149. *Id.* at 26–27.

150. See *Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United-States Canada Border*, TRANSCANADA KEystone PIPELINE (May 4, 2012), <https://perma.cc/J2UQ-H8C5> (indicating that approval of KXL would increase local employment in construction and maintenance and reduce volatile United States gas prices).

151. O'Rourke, *supra* note 145, at 152–53.

152. CORNELL UNIV. GLOB. LABOR INST., PIPE DREAM?: JOBS GAINED, JOBS LOST BY THE CONSTRUCTION OF KEystone XL 7 (2011) [hereinafter PIPE DREAM?].

153. See Jeff Goodell, *Obama's Last Shot*, ROLLING STONE (Apr. 23, 2014), <https://perma.cc/T3QA-SCNA> ("Five years ago, it would have gone through without comment.").

issue's obscurity with the American public, lack of established political support, and ambivalence over the anti-pipeline campaign's strategic value to the broader climate movement.<sup>154</sup>

Nonetheless, pipeline opponents were able to quickly organize resistance while the State Department considered TransCanada's permit application. In early 2009, climate scientist, James Hansen, argued in a widely distributed op-ed that "[t]he horrendously carbon-intensive unconventional fossil fuels, tar shale in the US and tar sands in Canada, cannot be developed" because of their relative dirtiness and the threat that their development posed to the Northern Boreal Forest, a crucial "carbon sink" that helps to offset global warming.<sup>155</sup> Seeking to capitalize on newly inaugurated President Obama's pledges to take action on climate change, climate activists staged several protests, culminating in massive sit-ins around the White House in the summer of 2011 that resulted in over 1,000 arrests.<sup>156</sup> Meanwhile, organizing drives and litigation drives were launched along the pipeline route in Nebraska, Texas, and various native communities,<sup>157</sup> and the democratically controlled House Energy and Commerce Committee recommended that the State Department reject the pipeline in June of 2010.<sup>158</sup>

The core issue for anti-pipeline activists was the actual and symbolic contributions that the KXL would make to global warming. James Hansen's oft-cited calculations predicted that full extraction of the tar sands would add 120 parts per million of carbon dioxide to the atmosphere, at a time when the world was already moving well beyond the maximum of 350 parts per million, widely recognized as the limit beyond which warming would spin out of control.<sup>159</sup> Moreover, in response to local resistance along the pipeline route, public calls to resistance by climate activist, Bill McKibben, and growing frustration with President Obama's lack of action on global warming, the climate movement began to present the KXL fight as a referendum on the future of the fossil-fuel economy and "business as

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154. See Jane Kleeb, *Guest Post by Kenny Bruno: Lessons from Behind the Scenes of KXL Campaign*, BOLD NEBRASKA (Nov. 10, 2015), <https://perma.cc/W5PX-W477> ("When we started work on KXL, virtually no one in the US had even heard of it.").

155. James Hansen, *Obama's Tar Sand Trap*, THE GUARDIAN (Feb. 18, 2009), <https://perma.cc/PP7H-HT6J>.

156. Mark Guarino, *Hundreds Arrested Protesting Keystone XL Oil Pipeline*, CHRISTIAN SCI. MONITOR (Sept. 3, 2011), <https://perma.cc/9WD9-H99D>.

157. See Kleeb, *supra* note 154 (stating that a tribal organizer traveled up and down the route calling attention to the KXL project in South Dakota and Oklahoma).

158. O'Rourke, *supra* note 145, at 153–54.

159. James Hansen, *Game Over for the Climate*, N.Y. TIMES (May 9, 2012), <https://perma.cc/H8CC-DKEY>.

usual”; if serious efforts were ever going to be undertaken to mitigate climate change, then the first step had to be preventing expanded oil infrastructure.<sup>160</sup> The implication of this movement message was that pipeline approval would push the planet past a tipping point into an uncertain, environmentally disastrous future.

Pipeline supporters, meanwhile, caught off guard by the size and spirit of the resistance, doubled down on their claims of the KXL’s beneficial effects on employment and energy security. The weakness of these claims proved disastrous for the pipeline’s prospects. A 2011 Cornell University study found that TransCanada had overstated the amount it would spend on the pipeline in the United States by at least \$3 billion, and that only 50 permanent jobs would remain after the pipeline had been completed,<sup>161</sup> a figure later confirmed by the State Department.<sup>162</sup> Furthermore, KXL supporters stressed the importance of exploiting fossil fuels as close to the United States as possible in order to avoid supply interruptions. But, this concern was in many ways a hangover from the days of the Organization of the Petroleum Exporting Countries (OPEC) crises and “peak oil” paranoia in the 1970s.<sup>163</sup> By the time the pipeline was proposed, the bigger problem for the global energy economy was how much oil to let onto the market, rather than the prospect of its exhaustion, and the United States stood at no serious risk of being choked off from foreign energy supplies.<sup>164</sup> Just as importantly, the extraction of North American shale oil and natural gas has increased exponentially over the past decade, including inside the United States;<sup>165</sup> therefore, as the strength and viability of United States domestic supply became clear, the argument that KXL was needed to lock in safe, stable energy lost much of its force. Incidentally, so too did the environmentalists’ contention that KXL represented a point of no return for continued fossil-fuel combustion. More damningly, the promise that the pipeline would produce lower gas prices for years to come<sup>166</sup> proved to be the precise opposite of what would occur. According to TransCanada’s own

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160. See, e.g., KC Golden, *The Keystone Principle: Stop Making Climate Disruption Worse*, HUFFINGTON POST (Jan. 29, 2014, 4:33 PM), <https://perma.cc/LKK8-ZV9N> (suggesting that the keystone principle to climate-change mitigation is to stop exacerbating the problem).

161. PIPE DREAM?, *supra* note 152, at 2, 25.

162. U.S. DEP’T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 15 (2015) [hereinafter NID].

163. Sam Kalen, *Thirst for Oil and the Keystone XL Pipeline*, 46 CREIGHTON L. REV. 1, 12–14 (2012).

164. *Id.*

165. Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 965 (2015).

166. Terry Lee, *Keystone XL: The Pipeline to Energy Security*, 46 CREIGHTON L. REV. 61, 81–82 (2012).

profit estimates used to justify its investment in pipeline construction, the KXL and its partner, Gulf Coast Pipeline, (discussed below) would allow more oil to move quickly from Cushing, Oklahoma—the major Midwestern refining hub—to refineries in and around Port Arthur and Houston, relieving a glut of crude oil that had developed in the Midwest.<sup>167</sup> With supply opened up, the crude oil could then be quickly refined (mostly as diesel) and shipped for export. Any remaining surplus would then be shipped back to Cushing for domestic shipment—eliminating any savings from the reduced costs of shipping via the KXL and securing TransCanada and its partners a profit margin superior to that currently available.<sup>168</sup> In other words, TransCanada and the oil industry would use the KXL to raise gas prices. This projection was consistent with experts' analysis of the global crude market, where profits are determined by the global crude price point rather than domestic supply and demand.<sup>169</sup> Whereas KXL opponents were able to present a convincing picture of the pipeline's risks, supporters were then left with little to show in terms of convincing benefits for the nation's security or economy.

*B. The KXL's Legal Context and the Mixed History of Delay*

The KXL proved an ideal target for the climate movement thanks to the apparent lack of project benefits and the multifarious opportunities for direct action and legal resistance that the pipeline presented. Equally important was the pipeline's unique legal setting, which channeled final decision-making power over the project to the State Department and allowed for an entirely discretionary National Interest Determination (NID) of whether a permit was warranted.<sup>170</sup> With the pipeline requiring affirmative executive action for its approval and only vague foreign policy justifications for its denial, anti-KXL legal action had the modest aim of generating as many reasons for inaction as possible.

The federal government generally has no regulatory power over oil pipelines.<sup>171</sup> However, pipelines crossing national borders are matters of foreign policy, and since 1968, the authority to determine whether a given border-crossing project is in the national interest has been delegated to the

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167. Edwin Slade, *The Keystone Pipeline Addition: Assessing the Potential Benefits of Reduced Gasoline Prices and Increased National Security*, 46 CREIGHTON L. REV. 27, 45–46 (2012).

168. *Id.*

169. ANTHONY SWIFT, KEystone XL: A TAR SANDS PIPELINE TO INCREASE OIL PRICES 3–4, 8 (2012), <https://perma.cc/9ZVP-6XWS>.

170. NID, *supra* note 162.

171. *See infra* Part II.D.

State Department.<sup>172</sup> Executive Order 13337, the most recent presidential statement on pipeline approval authority, grants the State Department wide latitude in making this decision, although consultation with various department and agency heads and the preparation of a Record of Decision is required.<sup>173</sup> In essence, the executive branch is free to consider cross-border pipeline projects in the manner and at the speed it chooses.

As late as the fall of 2010, State Department approval of the KXL seemed imminent, as then-Secretary of State Hillary Clinton remarked that her Department was “inclined” to approve the project.<sup>174</sup> Activist reaction to this comment was swift; with the Administration hoping to avoid alienating both KXL supporters and opponents until after the midterm elections, and with ongoing legal and political battles over the pipeline in Nebraska providing a convenient reason for delay,<sup>175</sup> the State Department announced that it would defer a decision on its NID.<sup>176</sup> In late 2011, Congress attempted to force the President’s hand, passing legislation requiring action on the application within two months.<sup>177</sup> The State Department stated that this was insufficient time to complete its environmental review, and President Obama subsequently rejected the permit with the understanding that it would be resubmitted.<sup>178</sup> In turn, TransCanada decided to adjust its proposal: in 2012, it resubmitted its permit application, splitting the nearly 2,000-mile long pipeline project into two parts.<sup>179</sup> TransCanada now sought executive permission only for an 875-mile long pipeline from Alberta to Cushing; the southern leg of the pipeline, from Cushing to the Gulf Coast, was renamed the “Gulf Coast Project” and did not require State Department approval because it crossed no borders.<sup>180</sup> Together, the pipelines would still transport 830,000 barrels of crude per day.<sup>181</sup> In March of 2012, President Obama ordered expedited environmental review of the Gulf Coast pipeline; legal challenges from groups like the Sierra Club were unsuccessful.<sup>182</sup>

After 2012, the KXL fight changed drastically. In its new application for the shortened northern KXL project, TransCanada proposed an

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172. Exec. Order No. 11423, 33 Fed. Reg. 11,741, 11,742 (Aug. 20, 1968).

173. 3 C.F.R. § 13337 (2005).

174. Luiza Ch. Savage, *Hillary Clinton: “Inclined to” Okay Keystone XL Pipeline*, MACLEAN’S (Oct. 20, 2010), <https://perma.cc/5DK3-NDNW>.

175. *See infra* Part II.D.

176. Kalen, *supra* note 163, at 4–5.

177. *Id.* at 4.

178. *Id.* at 5.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 5–6.

alternative route around the Nebraska Sand Hills region—a clear concession to environmentalists who had expressed concern over the disastrous consequences that an oil spill would cause in the ecologically sensitive region.<sup>183</sup> Meanwhile, removal of the southern segment of the pipeline (which TransCanada had determined had “independent economic utility”)<sup>184</sup> from the process of discretionary executive decision-making gave the company the upper hand over movement activists. While construction of the Gulf Coast pipeline concentrated political resistance on fights over eminent domain and civil disobedience in East Texas, TransCanada aggressively acquired land alongside the pipeline route, defeating blockades and lawsuits and successfully completing construction of the pipeline in 2014.<sup>185</sup> As discussed below, this result casts serious doubt on the extent of the climate movement’s victory in the KXL conflict and demonstrates the risks of climate legal action at the periphery.

Meanwhile, the State Department continued to review the new KXL permit application, granting further delays as litigation in Nebraska called the pipeline route into question.<sup>186</sup> Congress tried several times, including as late as 2014, to force the executive branch’s hand and grant immediate approval, without success.<sup>187</sup> By that time—six years after the initial application—political insiders had concluded that President Obama would reject KXL due to concerns about his legacy, and that he was only postponing a decision so as not to harm Democrats in the 2014 midterm elections in states with significant KXL support.<sup>188</sup> Throughout this delay, TransCanada had continued to pursue eminent domain actions against landowners in Nebraska and elsewhere in anticipation of pipeline construction, but in November 2015, the company asked the State Department to suspend its three-year-long review of the KXL permit application.<sup>189</sup> This was widely seen as a political calculation: TransCanada likely hoped to defer any decision in the hope that a Republican president would take office in early 2017.<sup>190</sup> The request was denied.<sup>191</sup> Finally, on

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183. NID, *supra* note 162, at 8.

184. *Id.*

185. PARFOMAK ET AL., *supra* note 143, at 2 n.4; BERNARD L. WEINSTEIN ET AL., THE KEYSSTONE/GULF COAST PIPELINE SYSTEM: A CATALYST FOR AMERICAN JOBS AND ENERGY SECURITY 28 (2014).

186. *Id.* at 6.

187. *Id.* at 7.

188. See Goodell, *supra* note 153 (stating that Obama was getting letters from Democratic senators in tough re-election fights arguing that if he delays approving the pipeline, it could cost them the election).

189. Julie H. Davis, *State Dept. Denies Request for Delay on Pipeline Review*, N.Y. TIMES (Nov. 4, 2015), <https://perma.cc/8FMM-UNV4>.

190. *Id.*

191. *Id.*

November 6, the State Department released its NID with the recommendation that the KXL be rejected.<sup>192</sup> President Obama formally denied the permit that same day, reiterating the State Department's finding that, regardless of KXL's actual effect on greenhouse-gas emissions, rejection of the project was essential to the United States's international prestige and bargaining power in climate negotiations.<sup>193</sup> As the NID inartfully put it: "How the U.S. is viewed as addressing climate change may affect the U.S. relationships with many . . . countries, especially those that are vulnerable to climate change impacts, across a range of foreign policy priorities."<sup>194</sup>

Was the rejection of the KXL a climate movement victory? The answer depends on the standard used to evaluate movement success. One standard—the commonly understood “core” standard—is how many tons of greenhouse gases were prevented from entering the atmosphere. As discussed below, it remains unclear whether the absence of the KXL will prevent the Alberta tar sands from being exploited or slow down North American fossil-fuel infrastructure development. In the long run, it appears unlikely that the rejection of the KXL will in itself block a large amount of emissions. Another standard of success is the change in media attention and public opinion regarding climate change and the fossil-fuel industry. The anti-KXL activists were definitively successful in this regard, keeping a struggle over fossil-fuel infrastructure in the headlines for many years and emerging victorious in the public narrative. Yet, another standard is the growth of the climate movement and advances in activist expertise, capacity, and solidarity. This again was a certain success for pipeline opponents, considering that the anti-KXL struggle continues to serve as a model for climate-change battles.<sup>195</sup> A final standard of success is the degree to which the politics of fossil fuels has shifted in climate-favorable ways, whether by undermining the presumptive validity of fossil-fuel infrastructure projects or by creating political incentives for decision-makers to act aggressively in reducing emissions. The KXL was the first climate political question to achieve major national prominence, and the question was resolved in favor of climate activists. The mere fact that fossil fuels became a question at all—pre-KXL infrastructure projects, though eminently political, were generally not perceived as such—was a victory in itself. Even if all the barrels of oil that would have flowed through the

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192. NID, *supra* note 162, at 2–3.

193. Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, N.Y. TIMES (Nov. 6, 2015), <https://perma.cc/MM94-TKZL>.

194. NID, *supra* note 162, at 26–27.

195. *See infra* CONCLUSION.

pipeline will be burned anyway and even if the pipeline resistance fails to survive as an effective constituency, the climate movement is certainly better off than it was before the KXL conflict. To win on the issue of climate change, climate change must be an issue and it must be winnable. The KXL resistance achieved the former to a greater degree than any past campaign, and it delivered at least the possibility of the latter.

But, several factors besides the climate movement's successful strategies contributed to the pipeline's defeat. First and most problematically, North American oil transport infrastructure, including the Gulf Coast pipeline, grew tremendously in the seven years between the pipeline's proposal and its rejection.<sup>196</sup> By the end of 2015, any additional capacity that the KXL would have provided was already in place, and the *status quo* against which the pipeline was rejected more closely resembled the "game over for climate" that James Hansen had warned about than the KXL-less context of 2008. Second, oil prices had plummeted, weakening support for the fossil-fuel industry and leaving investors skeptical about additional capital investment in infrastructure, particularly for expensive tar sands.<sup>197</sup> Third, oil spills in Michigan<sup>198</sup> and Montana<sup>199</sup> had raised public awareness about the pipeline risks. Finally, the defeat of KXL supporter Tim Harper and the election of Canada's liberal Prime Minister Justin Trudeau made pipeline rejection more diplomatically palatable.<sup>200</sup>

However, these factors were effective in encouraging rejection only because the climate movement, in part through legal action, had managed to delay the permit decision for so long. The discussion below does not analyze the various political developments (such as President Obama's re-embrace of climate policy after the 2012 election)<sup>201</sup> or non-legal movement efforts (such as repeated protests at the White House)<sup>202</sup> that contributed to this delay. Instead, it focuses on legal action that contributed to a particular and strategic perception of the KXL: a project that would require

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196. Clifford Krauss, *Oil Supply Picture Has Changed Since Keystone Was Proposed*, N.Y. TIMES (Nov. 6, 2015), <https://perma.cc/MU8Q-ND6A>.

197. Ian Austen, *Oil Sands Boom Dries Up in Alberta, Taking Thousands of Jobs with It*, N.Y. TIMES (Oct. 12, 2015), <https://perma.cc/UM94-R28Z>.

198. Emma Graves Fitzsimmons, *Michigan Governor Warns of Oil Spill Threat*, N.Y. TIMES (July 28, 2010), <https://perma.cc/Q6Z6-4NFM>.

199. Anahad O'Connor, *Ruptured Pipeline Spills Oil into Yellowstone River*, N.Y. TIMES (July 2, 2011), <https://perma.cc/E9EG-A7A3>.

200. Ian Austen, *Justin Trudeau and Liberal Party Prevail with Stunning Rout in Canada*, N.Y. TIMES (Oct. 19, 2015), <https://perma.cc/6863-G2SQ>.

201. See generally Barack Obama, President of the U.S., Remarks by the President on Climate Change (June 25, 2013), <https://perma.cc/G2UN-NWA6> (discussing the effects of climate change and how to fight them).

202. DeNeen L. Brown, *Hundreds of Keystone XL Pipeline Opponents Arrested at White House*, WASH. POST (Mar. 2, 2014), <https://perma.cc/KE9F-R4VG>.

affirmative government action in the face of legal, political, and economic uncertainty. Having succeeded in imposing this political framework, activists' overarching strategy was to drag the fight out as long as possible so as to hinder the otherwise straightforward process of approval and construction.

This delay strategy was advisable only because climate advocates were opposing infrastructure development. A similar emphasis on dragged-out litigation, extensive agency study and consultation, and multiple rounds of administrative and judicial review—all with the goal of raising political resistance or exhausting the opponent—has been a mainstay of other environmental struggles, in particular under NEPA.<sup>203</sup> An illustrative example is the 1992 blocking of a proposed highway through the middle of Puerto Rico's El Yunque rainforest, a project that would have destroyed fragile ecosystems and was prevented when a court found the Federal Highway Administration had to account for its environmental consequences.<sup>204</sup> Where harmful projects depend on quick and uncontroversial approval, interruptions of the process are almost always useful for environmental advocates.

Often, however, delay is the preferred tool of anti-environmentalists, for the simple reason that development—with its concomitant permits, procedures, and processes—may further environmentalists' goals. The most striking recent example of this strategy is the effort to prevent the Cape Wind turbine project off the coast of Cape Cod, which is opposed by local landowners and opponents of renewable energy.<sup>205</sup> After a decade of effort, lawsuits, political pressure, and financing difficulties led to the termination of contracts for the proposed energy project in 2015.<sup>206</sup> Oil billionaire Bill Koch, a prominent opponent of the project, made the overarching strategy clear in a 2013 interview: “delay, delay, delay.”<sup>207</sup>

Given this mixed history of the tactic of delay for environmentalists, it is certainly no magic bullet for advancing the agenda of climate activists. It works when construction of fossil-fuel infrastructure is presumptively guaranteed and its opponents need time to change public opinion and increase political pressure; it is harmful when protective measures or pro-climate development needs to be implemented, often with the support of a

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203. Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NAT'L RESOURCES DEF. COUNCIL (Feb. 1, 2015), <https://perma.cc/J3JM-NG3H>.

204. *Id.*

205. Jim O'Sullivan, *Two Utilities Opt out of Cape Wind*, BOS. GLOBE (Jan. 7, 2015), <https://perma.cc/NZ5U-FPAT>.

206. *Id.*

207. Bruce Mohl, *William Koch: Delay, Delay, Delay*, COMMONWEALTH (Apr. 9, 2013), <https://perma.cc/THE5-AN6P>.

government agency. In other words, much depends on who is seen to be taking action and what this action will accomplish. The context of this (in)action and the wisdom of delay, turns on how certainty and uncertainty are allocated among the various policy options.

The significant lessons of the legal struggles over the KXL thus have less to do with whether delay is a useful tactic—in this particular instance, it clearly was—than with how advocates may navigate and exploit discussions over and perceptions of (in)action and (un)certainty. As seen in the discussion above, the judiciary’s direct encounters with climate change have been typified by a fear of uncertainty and a preference for inaction. Therefore, KXL legal action that avoided direct engagement with climate change proved most successful in advancing movement goals. On the other hand, legal efforts that dealt directly with global warming—bringing the pipeline into the climate core—had more mixed results and thus serve as a valuable starting point for comparison of core and periphery strategies.

### *C. Administrative Review of the KXL’s Climate Consequences*

Legal action that directly confronted the global warming effects of the proposed pipeline took the form of challenges to the State Department’s findings of environmental impacts under NEPA.<sup>208</sup> As discussed above,<sup>209</sup> since 1990, federal courts have recognized that NEPA may require consideration of the climate-change implications of agency action,<sup>210</sup> including indirect emissions resulting from the availability of more fuels.<sup>211</sup> But, whether NEPA even applied to the State Department’s discretionary review of the KXL permit application remains a matter of debate. Throughout the process, the State Department maintained that “presidential” review of the project made the statute inapplicable, even though the Department decided to release NEPA EISs as a matter of policy.<sup>212</sup> Observers and climate advocates disagreed, maintaining that NEPA analysis was required by law.<sup>213</sup>

The Southern District of California had previously found NEPA applicable to a cross-boundary power line project, but the agency action

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208. See, e.g., *Nat’l Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 106 (D.D.C. 2009) (discussing whether the government violated NEPA when it issued a permit for the Keystone XL pipeline without adequately assessing the pipeline’s environmental impacts).

209. See *supra* Part I.A.2.

210. See *City of L.A. v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d at 482 (stating that petitioners have standing under NEPA to challenge agency action “on global warming grounds”).

211. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d at 549.

212. NID, *supra* note 162, at 3.

213. *Nat’l Res. Def. Council*, 658 F. Supp. 2d at 107.

under review there involved traditional Department of Energy and Bureau of Land Management permitting rather than a discretionary State Department NID.<sup>214</sup> In 2008, the National Resources Defense Council sued the Bush-era State Department over its NEPA review of the previous, more minor Keystone pipeline, claiming that the Department's decision to not even consider the pipeline's global-warming consequences was a NEPA violation.<sup>215</sup> The District Court of the District of Columbia disagreed, finding that the State Department was "acting solely on behalf of the President" and therefore, was not answerable to congressional requirements of environmental review.<sup>216</sup> A similar lawsuit filed by the Sisseton-Wahpeton Oyate and other tribes—which also made treaty claims<sup>217</sup>—was dismissed on identical grounds by the federal District Court of South Dakota.<sup>218</sup>

Despite the uncertainty, the State Department continued to act under NEPA in reviewing the KXL. This decision was intended to allay public concern by making the Department's decision-making process more transparent; although climate-based challenges to the process were unsuccessful, the fact that the State Department imposed upon itself two cycles of project review—NEPA and the NID—extended the project's delay and gave the climate movement more time to muster opposition. The Department released its first Draft EIS (DEIS) in 2010.<sup>219</sup> Completed after consultation with ten federal agencies, including the EPA and the Montana Department of Environmental Quality, and after 20 public scoping meetings along the pipeline route and review of submitted comments, the DEIS found that the KXL would have "limited adverse environmental impacts during both construction and operation."<sup>220</sup> In a very brief review of the climate-change effects of the project, including emissions from construction and the crude oil supplied by the pipeline, the DEIS concluded: "Assuming constant demand for refined oil products, the incremental impact of the Project on GHG emissions would be minor."<sup>221</sup>

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214. *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1006, 1017 (S.D.C.A. 2003).

215. Complaint at 1–2, *Nat'l Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) (No. 1:08-cv-01363 (R.JL)).

216. *Nat'l Res. Def. Council*, 658 F. Supp. 2d at 109.

217. *See infra* Part II.E.

218. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1071–72 (D.S.D. 2009).

219. U.S. DEP'T OF STATE, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, EXECUTIVE SUMMARY (2010), <https://perma.cc/JE2S-9EN5>.

220. *Id.* at 22.

221. *Id.* at 21.

The Department received over 1,500 comments on the DEIS, mostly negative;<sup>222</sup> a public letter from the EPA was particularly damning, pointing out that the Department had failed to consider whether the KXL would encourage increased extraction of emissions-heavy tar sands oil.<sup>223</sup> In response, the Department released a supplemental DEIS, which again failed to consider the pipeline's effect on increased extraction; this statement received more than 280,000 comments,<sup>224</sup> including another EPA letter that objected to the Department's reliance on the fact that global warming would continue regardless of the KXL and its failure to "discuss opportunities to mitigate the entire suite of GHG emissions associated with constructing the proposed Project."<sup>225</sup> Shortly thereafter, the Department released its Final EIS on the initially proposed pipeline, again finding that "even if the proposed action does not proceed, production from the oil sands in Canada would likely continue at a similar rate."<sup>226</sup>

Pipeline opponents did not have much time to file legal challenges to these statements.<sup>227</sup> In response to local opposition, the Department decided in November of 2011 to review alternative pipeline routes around the Nebraska Sand Hills, a process to which TransCanada assented.<sup>228</sup> Shortly thereafter, the permit was denied in response to Congress's attempt to immediately force approval, and TransCanada decided to split the project into the northern KXL and southern Gulf Coast pipelines.<sup>229</sup> The existing EISs were thus out of date, and the NEPA process began afresh, this time for the much shorter northern segment only. In 2013, the State Department again concluded, "approval or denial of the proposed Project is unlikely to have a substantial impact on the rate of development in the oil sands, or on

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222. Elizabeth Brown, *The Rights to Public Participation and Access to Information: The Keystone XL Oil Sands Pipeline and Global Climate Change Under the National Environmental Policy Act*, 27 J. ENVTL. L. & LITIG. 499, 517–18 (2012).

223. Letter from Cynthia Giles, Assistant Adm'r, Env'tl. Prot. Agency Office of Enf't & Compliance Assurance, to Jose Fernandez, Assistant Sec'y, Econ., Energy, & Bus. Affairs, U.S. Dep't of State and Kerri-Ann Jones, Assistant Sec'y, Oceans & Int'l Env'tl. & Sci. Affairs, U.S. Dep't. of State (July 16, 2010), <https://perma.cc/AA9R-YFHP>.

224. Brown, *supra* note 222, at 519.

225. Letter from Cynthia Giles, Assistant Adm'r, Env'tl. Prot. Agency Office of Enf't & Compliance Assurance, to Jose W. Fernandez and Kerri-Ann Jones, U.S. Dep't of State 6 (June 6, 2011).

226. U.S. DEP'T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEystone XL PROJECT, CUMULATIVE IMPACTS 3.14 62 (2011).

227. Complaint ¶ 1, *Ctr. for Biological Diversity v. U.S. Dep't of State*, No. 11-cv-345 (D. Neb. Oct. 25, 2011), 2011 WL 5077848.

228. PARFOMAK ET AL., *supra* note 143, at 12.

229. *Id.* at 1.

the amount of heavy crude oil refined in the Gulf Coast area.”<sup>230</sup> The final NEPA analysis of the KXL was released in 2014—six years after the initial permit application—and, albeit with more thorough consideration, reiterated these conclusions.<sup>231</sup> Again, there was not much time or motivation to file legal challenges; by the time of the final NEPA analysis, rumors were already circulating that the Obama Administration was inclined to reject the project.<sup>232</sup>

The only other significant litigation to challenge administrative approval of the combined pipeline came in *Sierra Club v. Bostick*, where plaintiffs sued the Army Corps of Engineers over its approval of the Gulf Coast project in 2012.<sup>233</sup> The plaintiffs alleged that the Corps had failed to strike the correct balance between development and conservation in granting TransCanada dredge-and-fill permits under the Clean Water Act; the Tenth Circuit ruled in favor of the Corps in 2015, by which time the pipeline was already fully operational.<sup>234</sup> Thus, the strange timing and bifurcation of the pipeline’s disjointed parts, in tandem with judicial reluctance to overturn agency action, worked to prevent much opportunity for pipeline opponents to litigate, much less litigate successfully, the question of the KXL’s climate impacts.

Nonetheless, the initial litigation over the first Keystone pipeline—which likely discouraged further attempts to challenge the State Department’s NID based on NEPA violations, even had there been time to do so<sup>235</sup>—as well as the ample participation of major environmental groups in the NEPA comment process, presented the core question of the KXL’s global-warming impacts to judicial and executive decision-makers. As in the climate cases discussed in Part II, this confrontation provoked a fear of uncertainty and a reliance on inaction as a way to escape the difficult problems posed by climate change.<sup>236</sup> Consistently from its first Draft EIS in 2010 to its NID in 2015, the State Department insisted that, while global

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230. U.S. DEP’T OF STATE, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, EXECUTIVE SUMMARY ES-15 (2013), [HTTPS://PERMA.CC/QK84-FJMF](https://perma.cc/QK84-FJMF).

231. See generally U.S. DEP’T OF STATE, BUREAU OF OCEANS & INT’L ENVTL. & SCI. AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT (Jan. 2014) (discussing the detailed consideration of the conclusion regarding the unlikely potential for a substantial impact on the rate of development in the oil sands or on heavy crude oil refined in the Gulf).

232. See Goodell, *supra* note 153 (stating that two sources in the Obama administration informed Goodell that the president “has all but decided to deny the permit for the pipeline”).

233. *Sierra Club v. Bostick*, 787 F.3d 1043, 1046 (10th Cir. 2015).

234. *Id.* at 1046, 1049.

235. See *Nat’l Res. Def. Council*, 658 F. Supp. 2d at 109; see also *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1071.

236. See *supra* Part II.

warming is real, the KXL had nothing to do with it—business would continue as usual, tar sands oil would be extracted with or without the pipeline, and the Department need not do anything in particular in response to the climate concerns of pipeline opponents.<sup>237</sup> Nothing could be further from Hansen’s “game over for climate” narrative. Crucially, however, the Department’s seeming certainty that the KXL would have no effect on global warming did not lead to approval, as logic would suggest. In this instance, thanks to action on the periphery, the confrontation at the core was not determinative of the final decision. Instead, complaints about climate change served, at best, to sap enthusiasm for the project and at worst, to detract from what turned out to be more promising avenues of resistance. In any event, legal and non-legal recourse to the obvious public law methods of bringing global-warming objections did not produce the direct result desired: rejection based on concern for the climate.

*D. Eminent Domain and the Fight Against Fossil-Fuel Infrastructure*

The State Department retained complete decision-making authority over TransCanada’s right to build its pipeline across the U.S.–Canada border. Once inside the United States, however, the company faced an array of different legal regimes governing pipeline siting.<sup>238</sup> While TransCanada waited for its Presidential Permit, it used these regimes to acquire land along the KXL route.<sup>239</sup> Along the pipeline’s northern segment, the resulting legal battles proved invaluable to delaying approval of the project and to providing cover for its ultimate rejection;<sup>240</sup> along the southern Gulf Coast segment, however, TransCanada was able to successfully acquire the land it needed under favorable laws of eminent domain that granted it “common carrier” status—the ability to seize land for the purported benefit of the public.<sup>241</sup>

In 1906, after years of conflict over oil pipelines in Pennsylvania and Texas, Congress passed the Hepburn Act, which for the first time granted oil pipelines common carrier status (so long as owners sold access to the pipelines on a nondiscriminatory basis) and delegated regulation of rates

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237. NID, *supra* note 162, at 11.

238. Klass & Meinhardt, *supra* note 165, at 976–78.

239. Kate Sheppard, *TransCanada Uses Eminent Domain to Finish Nebraska Land Acquisition*, HUFFINGTON POST (Jan. 20, 2015, 7:18 PM), <https://perma.cc/DJ7W-H9WJ>.

240. Russ Girling, President & Chief Exec. Officer, TransCanada, Statement Regarding KXL Delay (Apr. 21, 2014), <https://perma.cc/M429-UYXV>.

241. *Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P.*, 388 S.W.3d 405, 405 (Tex. Ct. App. 2012).

and shippers to the Interstate Commerce Commission.<sup>242</sup> Eight years later, the Standard Oil monopoly over pipelines was dealt a fatal blow in the “Pipeline Cases,” in which the Supreme Court found that the company had violated its public duties by conditioning use of its pipelines upon sale of the transported oil to Standard.<sup>243</sup> For a brief moment during World War II, the federal government exercised eminent domain power to seize land for oil pipelines in order to replace tanker shipment capacity destroyed by German ships in the Atlantic; since 1943, however, the power to delegate and regulate pipelines’ power of eminent domain has rested with the states.<sup>244</sup> This distinguishes oil from gas pipelines, whose construction and operation (when crossing state lines) is regulated by the Federal Energy Regulatory Commission (FERC).<sup>245</sup> The federal government still exercises some control over oil pipelines’ rates, conditions of services, and safety standards through FERC and the Pipeline and Hazardous Materials Safety Administration;<sup>246</sup> siting, construction, and expansion or abandonment are the purview of the states.<sup>247</sup>

The ability of pipeline owners to acquire the land necessary for their routes depends on whether they can acquire common carrier status and thereby exercise the eminent domain power to seize private land for value. State laws on this front vary widely. For example, Colorado does not grant any eminent domain authority to oil pipelines,<sup>248</sup> Texas, on the other hand, had a system prior to the KXL in which pipeline operators merely had to attest to their common carrier status in order to begin seizing land, with no need for prior approval.<sup>249</sup> The Montana Department of Environmental Quality, which exercises oversight over eminent domain actions, decided to withhold approval of TransCanada’s takings until the State Department had released an NID in favor of the project.<sup>250</sup> In response to the proposed KXL, Nebraska began transitioning from lax regulatory oversight of oil pipelines

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242. Klass & Meinhardt, *supra* note 165, at 960.

243. United States v. Ohio Oil Co. (*Pipeline Cases*), 234 U.S. 548, 562 (1914).

244. Klass & Meinhardt, *supra* note 165, at 963.

245. BRANDON J. MURRILL, CONG. RESEARCH SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 2 (2016).

246. U.S. DEP’T OF STATE & THE BROAD. BD. OF GOVERNORS, OFFICE OF INSPECTOR GEN., SPECIAL REVIEW OF THE KEYSTONE XL PIPELINE PERMIT PROCESS, Report No. AUD/SI-12-28 (2012).

247. Klass & Meinhardt, *supra* note 165, at 981.

248. *Id.* at 1029.

249. *Id.* at 984; *Cf.* Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P., 409 S.W.3d 908, 911 (Tex. App. 2013) (showing how TransCanada’s use of this power was challenged).

250. See O’Rourke, *supra* note 145, at 171–72 (explaining how Montana prevented oil companies from filing eminent domain actions before the Department of Environmental Quality approved of the project, and how the Department of Environmental Quality had to approve TransCanada before it accepted).

to much stricter rules of eminent domain, a battle that was crucial to State Department delay.<sup>251</sup> In each instance, the fight over TransCanada's common carrier status represented a struggle over the rights of corporations to dictate public policy and the social benefits and harms of fossil-fuel infrastructure—some landowners were forced to give up land so that the public could reap the (questionable) rewards of the pipeline.<sup>252</sup> While the struggles were highly relevant to climate politics in that the expansion of fossil-fuel infrastructure is a necessary condition of increased emissions, the legal fight over eminent domain was not ever directly about the KXL's impact on global warming.

As with the reversal of tactics over delay, (un)certainty, and (in)action, the pipeline siting conflict saw pipeline supporters and opponents adopting positions on eminent domain contrary to their expected political alignments. In the years immediately prior to the KXL fight, pro-business conservatives had loudly objected to relaxed eminent domain rules that allowed private companies to seize land for ostensibly public purposes; the perceived excess of the landmark decision in *New London v. Kelo*, which approved seizure of homes by a private developer, became a rallying cry for property-rights activists.<sup>253</sup> Thanks to *Kelo*, conventional wisdom held that TransCanada's seizure of land along the pipeline route would face no serious legal challenges.<sup>254</sup> Ironically, many of the same players who had decried the seizure of private land for a pharmaceutical headquarters in *Kelo* supported seizure of private land for an oil pipeline in the KXL conflict; the Institute for Justice, for example, which had represented Susette Kelo against the City of New London, took no position on the pipeline, while conservative advocacy groups like the Heartland Institute, the Heritage Foundation, and the American Conservative Union—all supported by significant amounts of private oil money—abandoned their prior objections to private eminent domain authority and supported TransCanada's efforts.<sup>255</sup> Similarly, pipeline opponents embraced property rights agendas that were previously viewed as antithetical to effective environmental regulation.<sup>256</sup>

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251. Klass & Meinhardt, *supra* note 165, at 985.

252. *Crawford Family Farm P'ship*, 260 F. Supp. 2d at 912.

253. See *New London v. Kelo*, 545 U.S. 469, 485 (2005) (stating that Congress might conclude that the public need might be better served through a private enterprise than a department of government).

254. O'Rourke, *supra* note 145, at 169–71 n.156.

255. John Israel & Katie Valentine, *TransCanada Is Seizing People's Land to Build Keystone, But Conservatives Have Been Dead Silent*, THINKPROGRESS (Mar. 1, 2015), <https://perma.cc/B5FZ-L7MB>.

256. *Id.*

Of particular interest on this front of the KXL struggle were the battles over eminent domain that raged in Texas and Nebraska. TransCanada began approaching Texan landowners along the original pipeline route shortly after submitting its 2008 permit application, but its efforts accelerated once the Gulf Coast project was split off in 2012.<sup>257</sup> With ostensible common carrier status (gained through attestation), the company negotiated payments with hundreds of landowners and brought eminent domain actions against many who refused payment.<sup>258</sup> By mid-2012, the company had sued over one hundred landowners, nearly 10% of all those in the pipeline's path.<sup>259</sup> Initially, pipeline opponents were emboldened by a legal challenge to a similar pipeline. In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*, the Texas Supreme Court held that merely registering as a common carrier was not sufficient to warrant the exercise of eminent domain authority; the state Railroad Commission, which regulated pipelines, had to exercise at least some review of the pipeline company's applications.<sup>260</sup> In response, the Commission proposed new regulations in 2014 that required significantly more documentation and proof to obtain common carrier status.<sup>261</sup> However, this heightened review proved largely procedural, and TransCanada was easily able to succeed in its efforts to take private land.

In *Bishop v. TransCanada Keystone Pipeline, L.P.*, the company survived several challenges from a landowner who alleged that TransCanada had coerced him into selling his land and that state agencies had violated his property rights in granting the company common carrier status; the landowner's consent, though allegedly coerced, was deemed dispositive.<sup>262</sup> A related battle over the company's attempts to take land from rancher Julia Trigg Crawford inspired years of protests and significant media attention.<sup>263</sup> Relying in part on the *Denbury Green* decision, Crawford fought against TransCanada's condemnation action by alleging that the KXL did not fit the meaning of "public use" required for eminent

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257. Kelly Connelly, *Why Changes to Eminent Domain in Texas May Be Imminent*, STATE IMPACT TEX. (July 25, 2012, 11:43 AM), <https://perma.cc/NBU5-5FXF>.

258. *Id.*

259. POLARIS INST., UNPLUGGING THE DIRTY ENERGY ECONOMY: A CORPORATE PROFILE OF CANADIAN PIPELINE COMPANY TRANSCANADA 23 (2015).

260. *Texas Land Partners, Ltd. v. Denbury Green Pipeline-Texas, L.L.C.*, 363 S.W.3d 192, 195 (Tex. 2012).

261. Jim Malewitz, *Pipeline Proposal Revives Eminent Domain Debate*, TEX. TRIBUNE (Aug. 1, 2014), <https://perma.cc/B3KG-DXUS>.

262. *Bishop v. TransCanada Keystone Pipeline, L.P.*, No. 12-13-00054-CV, 2014 WL 35712 (Tex. App. 2014).

263. *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 922 (Tex. App. 2013).

domain authority.<sup>264</sup> Her argument relied in part on a theme often repeated by opponents of the company's land seizures: TransCanada was a foreign corporation seizing state land merely for the purpose of exporting oil through the state, with no benefits to the Texas public that bore the burden of the pipeline project.<sup>265</sup> The case was closely watched as a barometer of how easily TransCanada would be able to secure eminent domain. Ultimately, a state appeals court found that the state's delegation of eminent domain authority was proper simply because "TransCanada . . . engages in the business of transporting crude petroleum in Texas by a pipeline . . . . Therefore[,] . . . TransCanada is a common carrier."<sup>266</sup> The decision foreclosed any further legal challenges in the state.

While these struggles in Texas maintained resistance to the idea that the KXL was inevitable and served as focal points of movement activism, the land battle in Nebraska proved more significant to the ultimate rejection of TransCanada's permit for the northern segment of the project. Nebraska's deferential process for granting common carrier status and eminent domain authority, which originally resembled the process in Texas, came under attack after the initially proposed pipeline route raised concerns about damage to the Sand Hills and Ogallala Aquifer.<sup>267</sup> In response to this outcry, the Governor called a special session of the legislature in 2011 to rewrite the state's eminent domain laws.<sup>268</sup> The resulting Major Oil Pipeline Siting Act required pipeline owners to apply to and receive approval from the Public Service Commission before construction, while a 2012 amendment, LB 1161, gave the Governor and the state Department of Environmental Quality (DEQ) additional powers of environmental review and ultimate decision-making power over whether to grant eminent domain authority.<sup>269</sup> This legislative victory was largely attributable to the organizing drive of the citizen group, Bold Nebraska, which convinced many landowners to refuse negotiated payments with TransCanada; by 2014, over 100 had declined monetary offers from the company, representing a quarter of all property owners along the route.<sup>270</sup> Nonetheless, the Governor used his new statutory authority to approve a revised pipeline route that avoided the Sand Hills.<sup>271</sup>

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264. *Id.* at 922.

265. *Id.* at 917, 921.

266. *Id.* at 919 (internal citation omitted).

267. Klass & Meinhardt, *supra* note 165, at 977, 985.

268. *Id.* at 985.

269. *Id.*

270. POLARIS INST., *supra* note 259, at 81.

271. Klass & Meinhardt, *supra* note 165, at 985–86.

Meanwhile, a group of landowners challenged LB1161 on the grounds that delegating the authority to determine common carrier status to the Governor and state DEQ violated the state constitution by insulating the decision-making process from judicial review.<sup>272</sup> Although a district court agreed with this assessment in 2014, the case was dismissed by the Nebraska Supreme Court in January of 2015 thanks to a unique state rule requiring a supermajority for constitutional invalidation of legislation.<sup>273</sup> Many of the same litigants immediately refiled, again narrowly focusing their claims on unconstitutional delegation of authority.<sup>274</sup>

It is important to note how distant these legal efforts were from climate change, at least in framing and vocabulary; “global warming” and “climate change” do not appear in the pleadings or opinion, and following the litigants’ lead, the Nebraska Supreme Court noted that “[t]his appeal is not about the wisdom or necessity of constructing an oil pipeline but instead is limited to the issues of great public concern raised here: which entity has constitutional authority to determine a pipeline carrier’s route.”<sup>275</sup> Nonetheless, the Nebraska lawsuits proved essential to the delay strategy of the climate movement. Citing the ongoing litigation in *Thompson*, the State Department suspended interagency comments on its new EIS from April of 2014 until February of 2015.<sup>276</sup> After the district court’s ruling in favor of the landowners, White House spokesman Jay Carney explained that “action by a state court had an impact on the process itself” and that the “route itself may be in doubt because of a state Supreme Court decision.”<sup>277</sup> In its *amicus* brief to the Nebraska Supreme Court, TransCanada stressed the significance of the debate about the company’s common carrier status: “This appeal presents the opportunity for this Court to reestablish the legal certainty that had surrounded the regulation of interstate oil pipelines in Nebraska.”<sup>278</sup> Nonetheless, on September 29, 2015, TransCanada decided to drop its eminent domain actions against Nebraska landowners, instead electing to go through the state Public Service Commission (PSC).<sup>279</sup> This

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272. *Thompson*, 857 N.W.2d at 744.

273. *Id.* at 739 (indicating that three of the court’s seven justices dismissed for lack of standing based on inadequate claims of injury, preventing a supermajority).

274. Complaint for Declaratory Judgment Temporary and Permanent Injunction, *Dunavan v. TransCanada Keystone Pipeline, L.P.*, No. D17CI150000012 (D. Neb. 2015).

275. *Thompson*, 857 N.W.2d at 766.

276. PARFOMAK ET AL., *supra* note 143, at 6.

277. Jay Carney, Press Briefing by the Press Sec’y for the White House (Apr. 21, 2014), <https://perma.cc/NH5L-5C2H>.

278. Brief for TransCanada Keystone Pipeline, LP as Amici Curiae at 3, *Thompson v. Heineman*, 289 Neb. 798 (Neb. 2015) (No. S-14-000158).

279. Associated Press, *Keystone XL Developer Drops Lawsuits*, N.Y. TIMES (Sept. 29, 2015), <https://perma.cc/SL6R-M2X3>.

was the precise, immediate result that the *Thompson* and *Dunovan* litigants had sought, and the company's move was likely a response to both its poor chances in the Nebraska Supreme Court and its fear that a presidential rejection was imminent. Commenting on the decision, TransCanada's CEO stated that "going through the PSC process is the clearest path to achieving route certainty for the Keystone XL Project in Nebraska."<sup>280</sup>

In summary, legal action on the constitutional rights of landowners and the proper delegation of eminent domain authority created an atmosphere of legal and political uncertainty that encouraged continued government inaction on the pipeline. While many of the landowners engaged in the anti-KXL effort may have been motivated in part by concern for the climate, this strategically successful litigation took place on the climate periphery, with government decision-makers commenting only indirectly on the value of the pipeline and not at all on the importance of global warming. While this shift in focus provided a welcome supplement to the more traditional environmental themes of climate resistance, it also introduced a note of the property rights ideology normally associated with anti-regulatory libertarianism—the mirror image of conservatives' reversal on the issue of private eminent domain authority. Though effective in the short run, this shift in emphasis may only have deflected and delayed, rather than avoided, the environmental consequences of the pipeline.

#### *E. Tribal Sovereignty and the Pipeline*

Another front in the resistance to KXL came in native communities. In Alberta and elsewhere in Canada, tar sands extraction and transport, which have caused serious damage to native lands, have provoked confrontations between First Nations and the government,<sup>281</sup> including suits against the company for failure to seek prior consultation.<sup>282</sup> For brevity, this article will not address the important legal and non-legal efforts taking place there. South of the border, the pipeline route crossed lands belonging to the Oglala Sioux, Rosebud Sioux, Cheyenne River Sioux, and many other tribes from South Dakota through Nebraska and Oklahoma.<sup>283</sup> Much of this land contained sensitive sacred sites and burial grounds, while Cushing, Oklahoma, the major refining hub and starting point of the Gulf Coast

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280. *TransCanada Will Apply to Nebraska Public Service Commission to Approve Keystone XL Route*, TRANS CANADA (Sept. 30, 2015), <https://perma.cc/53W9-A9PH>.

281. See, e.g., *Tar Sands and Indigenous Rights*, INDIGENOUS ENVTL. NETWORK (2010), <https://perma.cc/3GNJ-PC5B> (stating that First Nations in Canada are taking the lead to stop tar sands development and that resistance is growing).

282. POLARIS INST., *supra* note 259, at 25.

283. *Id.* at 81.

pipeline, itself lies within the boundaries of the Sac and Fox Nations.<sup>284</sup> TransCanada used two methods to avoid anticipated native resistance: first, the pipeline route was designed to avoid tribal lands, although this proved difficult,<sup>285</sup> second, the company claimed that tribal input on pipeline siting was unnecessary—TransCanada’s Native American liaison announced that “[t]here is no legal obligation to work with the tribes”<sup>286</sup>—and attempted to secure land for the pipeline route by approaching individual landowners rather than tribal governments.<sup>287</sup> The response was a public outcry. The National Congress of American Indians formally opposed the KXL; the Pine Ridge Oglala Sioux banned TransCanada personnel from its reservation; and the president of the Rosebud Sioux declared that State Department permit approval would be tantamount to “an act of war against our people.”<sup>288</sup> Numerous native encampments were established along the pipeline route, including one abutting Rosebud Sioux lands.<sup>289</sup> Memorably, native activists joined with non-native landowners in the “Cowboy and Indian Alliance,” which staged protests along the pipeline route and in Washington, D.C.<sup>290</sup> Tribes were also heavily involved in the EIS comment process.<sup>291</sup> Later, in its NID Record of Decision, the State Department claimed to have contacted 84 tribes, 67 of which indicated that they wanted to have further consultations with the state or were undecided.<sup>292</sup> Interestingly, the state claimed only to have discussed “cultural” issues with the tribes—not environmental or climate-change concerns.<sup>293</sup>

In 2009, four tribes sued the State Department over its approval of the initial Keystone pipeline project.<sup>294</sup> In addition to allegations of NEPA violations, the tribes claimed that they would suffer environmental and cultural injuries from the pipeline and that treaties with the United States government gave them power to independently vet the project.<sup>295</sup> The United States District Court of South Dakota rejected all their claims,

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284. Steven Mufson, *Keystone XL Pipeline Raises Tribal Concerns*, WASH. POST (Sept. 17, 2012), <https://perma.cc/5XE2-JV8P>.

285. *Id.*

286. *Id.*

287. *Id.*

288. POLARIS INST., *supra* note 259, at 81.

289. All Things Considered, *Native Americans, Landowners Protest Keystone XL Pipeline in South Dakota*, NAT’L PUBLIC RADIO (Nov. 21, 2014), <https://perma.cc/EHT6-YWDD>.

290. Kristin Moe, *Cowboys and Indians Stand Together Against Keystone XL*, NAT’L GEOGRAPHIC SOC’Y: VOICES (May 14, 2014),

291. Letter from Nat’l Cong. of Am. Indians to U.S. Dep’t of State (Apr. 22, 2013).

292. NID, *supra* note 162, at 5.

293. *Id.*

294. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1071–72; *see supra* Part II.C (discussing NRDC’s NEPA challenge).

295. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1083.

finding that the Presidential Permit was immune to judicial scrutiny and that, despite the tribes' claim to the contrary, the federal government owed no trust duties to the plaintiffs regarding development on the land under consideration:

The proposed pipeline, although running, in part, through lands previously ceded to the United States will be located exclusively on land that was restored to the public domain. . . . Plaintiffs have not identified any treaty language that imposes, on the government, a specific duty regarding preservation of historic resources.<sup>296</sup>

Legal action related to tribal sovereignty questions was not very successful in impeding TransCanada's plans to build the pipeline across native lands, at least not in the United States. Much more important was organized direct action and media messaging against the KXL's interference with tribal rights. This highly visible resistance, like other grassroots campaigns against the KXL, made pipeline approval a matter of controversy rather than of course and shifted the burden of persuasion onto pipeline opponents. As with other action on the periphery, these efforts, whether legal or not, helped both to buttress the climate goals of the anti-KXL movement and to draw attention to often ignored aspects of the global-warming crisis, including the unequal burden of fossil-fuel infrastructure development that indigenous populations bear and their lack of input on energy policymaking.

A sequel to tribal resistance to the KXL occurred with the Standing Rock Sioux's 2016 campaign against the Dakota Access Pipeline (DAPL). Built by Energy Transfer Partners, the 570,000-barrel-capacity pipeline is intended to run crude oil from the Bakken fields of North Dakota to a transfer point in Illinois, where it could be shipped by rail to the East Coast or by pipeline to the Gulf Coast.<sup>297</sup> In July of 2016, the Standing Rock Sioux, who occupy a reservation in North Dakota, filed suit against the Army Corps for approving pipeline construction without negotiating with the tribe and despite alleged violations of NEPA, the Clean Water Act, and the National Historic Preservation Act.<sup>298</sup> The tribe's specific grievances focused on the pipeline's proposed route beneath the Missouri River, which could pose risks to both the reservation's drinking water supply and to

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296. *Id.*

297. *The Dakota Access Pipeline is the Best Way to Move Bakken Crude Oil to Market*, DAKOTA ACCESS PIPELINE FACTS (2016), <https://perma.cc/BTC8-EZTT>.

298. Complaint at 1–3, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (D.C. Cir. Sept. 9, 2016), 2016 WL 4734356, at \*1.

several sites of historic and religious significance.<sup>299</sup> When litigation did not immediately halt construction near the reservation, the tribe organized a large encampment along the pipeline route, blocking further work.<sup>300</sup>

Throughout the fall, the Standing Rock confrontation turned into one of the largest Native American political mobilizations and the focal point of climate movement organizing.<sup>301</sup> Thousands of people joined the protest encampment, leading to several violent encounters with police.<sup>302</sup> The legacy of the KXL struggle was explicitly invoked,<sup>303</sup> even as tribal sovereignty and water protection tended to take precedence over climate issues. As of the writing of this article, the tribe and its supporters had scored major political victories, first with the federal government's suspension of construction below the Missouri River<sup>304</sup> and then with the Army Corps of Engineers's preliminary denial of Dakota Access's easement to build there, which cited the uncertain risks and consequences of spills.<sup>305</sup> However, the possibility that the Corps might ultimately approve the project after a new round of EISs, the company's ability to seek alternative routes, and uncertainty over how the Trump Administration will handle the controversy make the ultimate outcome unclear.<sup>306</sup>

What *is* clear is that the intersection between tribal sovereignty and the expansion of the fossil-fuel economy remains politically rife and that legal action on the climate periphery remains a key site of political conflict in the controversy. Beyond the regulatory battles over the Corps's pipeline permit,

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299. William Yardley, *With Echoes of Wounded Knee, Tribes Mount Prairie Occupation to Block North Dakota Pipeline*, L.A. TIMES (Aug. 27, 2016), <https://perma.cc/D7DT-96PE>.

300. *Id.*

301. David Treuer, *An Indian Protest for Everyone*, N.Y. TIMES (Nov. 26, 2016), <https://perma.cc/8ZHV-M2BQ>; see also Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <https://perma.cc/Y5X9-B92H> (highlighting the details of the pipeline protests).

302. Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. TIMES (Dec. 2, 2016), <https://perma.cc/H6D7-SSGJ>.

303. Bill McKibben, *Why Dakota Is the New Keystone*, N.Y. TIMES (Oct. 28, 2016), <https://perma.cc/5HES-LGQE>.

304. Press Release, Dep't of Justice, Joint Statement from the Dep't of Justice, the Dep't of the Army, and the Dep't of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://perma.cc/M4VB-8CXD>.

305. Memorandum from Jo-Ellen Darcy, Assistant Sec'y of the Army, U.S. Army Corps of Eng'rs to the Commander, U.S. Army Corps of Eng'rs 3 (Dec. 4, 2016), <https://perma.cc/3226-ZASF>. As in the KXL conflict, anti-DAPL activists took advantage of a special situation that gave a federal decision-maker authority over the future of an oil pipeline: the company's request to build under waterways of the United States, within the jurisdiction of the Army Corps of Engineers. *Id.*

306. See *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTH JUSTICE (Dec. 5, 2016), <https://perma.cc/TN9X-7PBQ> (positing how the Trump Administration may handle the lawsuit).

the criminal defense of protestors<sup>307</sup> and civil rights litigation against state law enforcement officials<sup>308</sup> have been important to sustaining the Standing Rock camp's capacity to interfere with pipeline construction. Repeating the success of the KXL opposition (albeit on a much shorter time scale), the anti-DAPL resistance delayed pipeline progress long enough to provoke regulatory, scientific, and political uncertainty, achieving what direct environmental law challenges could not.

*F. Reaction to Government and Corporation Collusion in the KXL Approval Process*

Peripheral action to prevent the KXL also targeted alleged improprieties in the State Department permit review process. Following a common practice among federal agencies, the State Department hired outside consultants to perform its EISs on the KXL.<sup>309</sup> It quickly became clear that this process was dominated by TransCanada and by contractors with close ties to the fossil-fuel industry. Hillary Clinton, the Secretary of State at the time, had previously employed TransCanada's main American lobbyist as a campaign staffer.<sup>310</sup> TransCanada was allowed to manage the bidding process for the contract to write the first EIS, and it recommended and even paid the bill for the winning contractor, the environmental engineering firm Cardno Entrix.<sup>311</sup> Cardno Entrix listed TransCanada as a "major client" and in the past had conducted environmental reviews for the company,<sup>312</sup> but it failed to mention this relationship on its disclosure statement to the Department.<sup>313</sup> Cardno Entrix was delegated the task of writing the initial EIS and conducted public hearings on the NID in 2011.<sup>314</sup> During the public comment period on the initial DEIS, activists discovered that the Department had based its Cardno-written, global-warming findings—that the KXL would have no impact on climate change—on a single report by the consulting firm, EnSys Energy, which in the past had worked with the Koch brothers, ExxonMobil, and the American Petroleum

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307. See WATER PROTECTOR LEGAL COLLECTIVE (Dec. 11 2016), <https://perma.cc/38GL-BTBD> (providing legal assistance for those resisting the pipeline).

308. Plaintiffs' Memorandum in Support of Temporary Restraining Order and Preliminary Injunction, *Dundon v. Kirchmeier*, No. 1:16-cv-406 (D.N.D. Nov. 28, 2016).

309. U.S. DEP'T OF STATE, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, APPENDIX U 1 (2010), <https://perma.cc/N54W-SFGV>.

310. John M. Broder & Dan Frosch, *Watchdog Clears State Department of Impropriety in Review of Pipeline Project*, N.Y. TIMES (Feb. 9, 2012), <https://perma.cc/7Q9B-KHCN>.

311. Brown, *supra* note 222, at 527; POLARIS INST., *supra* note 259, at 58.

312. Broder & Frosch, *supra* note 310.

313. Brown, *supra* note 222, at 527.

314. *Id.*

Institute.<sup>315</sup> In response to revelations of these ties, a group of Democratic congress-people, led by Senator Bernie Sanders, asked the Office of the Inspector General to investigate.<sup>316</sup> The resulting 2012 report found no conflicts of interest or improper influence, though these conclusions relied heavily on the fact that TransCanada had already withdrawn its permit application—meaning that TransCanada no longer had anything to gain from collusion.<sup>317</sup> However, the report did recommend that the Department redesign its conflict of interest screening procedures.<sup>318</sup> Nonetheless, the State Department’s findings on the pipeline’s climate-change effects were clearly influenced by TransCanada and other fossil-fuel players, demonstrating the extent to which government consideration of the KXL’s climate-change harms was determined by an industry-friendly attitude that considered expansion of infrastructure to be business as usual.

Litigation related to this collusion took the form of Freedom of Information Act requests, filed by Friends of the Earth, the Sierra Club, and others.<sup>319</sup> Although the State Department replaced Cardno Entrix as a consultant during the second series of EISs, conflicts of interest persisted, including the fact that a member of the American Petroleum Institute wrote one of the EISs.<sup>320</sup> Industry interference in environmental regulation is not new, and the corruption evident in the KXL review process forms part of the *status quo* in which approval of such projects is presumed. Even as direct challenges to the Department’s climate-change findings in the form of NEPA lawsuits were rejected, legal efforts that uncovered collusion in the environmental review process led to unwanted media attention and congressional rebukes of a normally unchallenged process,<sup>321</sup> further dampening political enthusiasm for the project. This disruption of a normally frictionless procedure increased uncertainty about the pipeline’s benefits and forced decision-makers to continue grappling with the KXL’s global-warming consequences, even if only tangentially.

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315. *Id.* at 521.

316. *Id.* at 527.

317. U.S. DEP’T OF STATE & THE BROAD. BD. OF GOVERNORS, OFFICE OF INSPECTOR GEN., REPORT NO. AUD/SI-12-, SPECIAL REVIEW OF THE KEYSSTONE XL PIPELINE PERMIT PROCESS 3 (2012).

318. *Id.* at 4.

319. Brown, *supra* note 222, at 532; *Six Years, Eight Months, Twenty Days...*, SIERRA CLUB, <https://perma.cc/5N4W-EG36> (last visited Feb. 8, 2016).

320. *Six Years, Eight Months, Twenty Days...*, *supra* note 319.

321. Brown, *supra* note 222, at 532–33.

*G. Legal Conflicts over Anti-KXL Protests*

A final area of peripheral legal action concerned courtroom battles over the rights of anti-pipeline protesters. Direct action—civil disobedience taking the form of blockades, sit-ins, lockdowns, and other obstructive tactics—against the KXL was conducted on a massive, long-term scale and was likely the most important strategy for delaying State Department permit approval—not least because protesters represented a mostly young, liberal constituency that the Democratic administration was eager not to alienate.<sup>322</sup> There were two main loci of civil disobedience against the KXL: East Texas during construction of the Gulf Coast pipeline from 2012 to 2014 and Washington, D.C. from 2011 to 2015.<sup>323</sup> In East Texas, protesters, often organized under the Tar Sands Blockade umbrella coalition, staged a series of sit-ins, tree sits, and equipment lockdowns to delay and harass TransCanada construction crews.<sup>324</sup> Far from the KXL route, over 1,000 protesters were arrested in front of the White House over the course of two months after the State Department released its initial EIS that found no significant impact on global warming,<sup>325</sup> and protests continued in Washington throughout the conflict.<sup>326</sup> Actions also cropped up elsewhere in the country; in 2013, for example, the Tar Sands Blockade coordinated a nationwide Tar Sands Profiteers Week of Action featuring blockades, occupations, and sit-ins at the offices of KXL investors and beneficiaries like TD Bank, John Hancock, and Valero.<sup>327</sup>

The primary contribution of lawyers on this front was the criminal defense of arrested demonstrators, which both made continued protest feasible and gave anti-KXL activists increased opportunities to share their climate concerns with the public and to build movement solidarity.<sup>328</sup> One case in particular is worth noting for its attempt to bring criminal law into the climate core. In 2013, Alec Johnson was arrested in Tushka, Oklahoma after locking himself to a TransCanada excavator along the Gulf Coast

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322. See, e.g., Elizabeth McGowan, *Enviros Makes Keystone XL a Litmus Test for Obama's Re-election: Will it Work?*, INSIDECLIMATE NEWS (Oct. 14, 2011), <https://perma.cc/88BR-HJZ9> (stating that Obama is concerned about his environmental constituency).

323. Katherine Bagley, *2015: The Year the Environmental Movement Knocked Out the Keystone XL*, INSIDECLIMATE NEWS (Dec. 28, 2015), <https://perma.cc/SX3D-MJCZ>.

324. POLARIS INST., *supra* note 259, at 78.

325. Guarino, *supra* note 156.

326. Goodell, *supra* note 153.

327. *Stop Tar Sands Profiteers Week of Action a Huge Success with 55 Actions Across the Continent!*, TAR SANDS BLOCKADE (Mar. 23, 2013), <https://perma.cc/9Y6F-6CPS>.

328. Jeremy Brecher, *Why Getting Arrested to Resist the Keystone XL Is Legally Justified*, WAGING NONVIOLENCE (Apr. 24, 2014), <https://perma.cc/37B8-4YAU>.

pipeline route.<sup>329</sup> He attempted to bring a “climate necessity” defense, arguing that his trespassing violation was justified given the serious climate-change harms that would result from not breaking the law and allowing pipeline construction to proceed.<sup>330</sup> The judge refused to allow Johnson to present the defense to the jury, however, as in the few other attempts to argue climate necessity, the effort itself garnered significant publicity and helped to dramatize the state’s role in furthering the pipeline.<sup>331</sup>

TransCanada likewise used the courts to resolve protests over pipeline construction. In 2012, it brought a so-called SLAPP (strategic lawsuit against public participation) action in Wood County, Texas against several anti-pipeline organizers and groups, including Tar Sands Blockade and Rising Tide North America, seeking \$5 million in damages for lost profits resulting from construction delays on the Gulf Coast project.<sup>332</sup> The award (and likely the costs of litigation) would have been so great that some of the defendants would have had to sell their homes; in January of 2013, the activists agreed to refrain from further interference with the pipeline and from trespassing on its route in exchange for dismissal of the suit.<sup>333</sup> This was not TransCanada’s only effort to shut down the pipeline resistance. The pipeline company and its contractor, Michels Corporation, hired large numbers of off-duty sheriffs and deputies to patrol the pipeline route in Texas, at one point posting lookouts outside the home of noted activist and litigant, Susan Crawford.<sup>334</sup> TransCanada and the Federal Bureau of Investigation (FBI) also held several meetings at which TransCanada employees suggested possible criminal charges that could be brought against anti-pipeline activists.<sup>335</sup> This strategy bore fruit in 2013, when protesters who had unfurled a banner covered in glitter at the Oklahoma

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329. Michael Sheehan, *The Necessity Defense: On the Trial of Alec Johnson*, TERRAIN.ORG (Mar. 15, 2015), <https://perma.cc/KF4T-CZ2M>.

330. *Id.*

331. See Joseph E. Hamilton, *The Climate Made Me Do It!*, BOS. GLOBE (Aug. 17, 2014), <https://perma.cc/6AJZ-TFSY> (discussing how the necessity defense has heretofore been blocked by judges in climate litigation, but the strategy garners the attention of the media and public).

332. POLARIS INST., *supra* note 259, at 78.

333. *Id.* The SLAPP tactic was revived by Energy Transfer Partners in the conflict over the Dakota Access Pipeline, discussed above at I.E: in response to a campaign of civil disobedience, the pipeline company sued the Standing Rock Sioux tribal chairman and others to prevent further disruption of construction. James MacPherson, *Dakota Access Pipeline Owners Sue North Dakota Protesters*, ASSOCIATED PRESS (Aug. 15, 2016), <https://perma.cc/5ASZ-FLUB>.

334. POLARIS INST., *supra* note 259, at 78–79.

335. *Id.* at 71.

headquarters of TransCanada contractor, Devon Energy, were charged with a “terrorism hoax.”<sup>336</sup>

In 2015, the FBI admitted to breaking its own rules in its tracking of anti-KXL protests, improperly coordinating with local law enforcement and using informants to spy on the movement.<sup>337</sup> In internal documents, the FBI declared that “[t]he Keystone pipeline, as part of the oil and natural gas industry, is vital to the security and economy of the United States.”<sup>338</sup> However, the agency failed to receive proper approval for its investigations from headquarters or its own lawyers and ended up closing the matter with no evidence of “extremist activity.”<sup>339</sup>

While more of a reactive than an affirmative legal strategy, criminal defense of anti-pipeline protesters and legal attention to corporate and federal malfeasance helped to maintain the organizational strength of the resistance and to frame the KXL conflict as a decidedly political confrontation rather than as a scientific or administrative issue. This activity was peripheral in the sense that no resolution of climate-change issues was sought from a judicial or government decision-maker, although Alec Johnson’s attempted climate-necessity defense did seek acquittal based on an evaluation of global-warming consequences. Like the other action on the periphery discussed here, the main contribution of protest-related legal activity was to maintain an atmosphere of uncertainty around the pipeline and to send a message to the Obama Administration that action on the KXL (approval) would be met with aggressive resistance, whereas inaction (rejection) would pacify an important constituency. As with the debates over the pipeline’s security and economic benefits, the struggles over eminent domain and the focused attention on the State Department’s contracting practices, this pressure provoked overreaction from TransCanada and other pipeline supporters. The result was public discussion of the costs of fossil-fuel infrastructure—and a growing lists of excuses by which the President could justify denial of the KXL permit.

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336. Nafeez Ahmen, *Are You Opposed to Fracking? Then You Might Just Be a Terrorist*, THE GUARDIAN (Jan. 21, 2014), <https://perma.cc/4CSK-R7MF>.

337. Adam Federman & Paul Lewis, *Revealed: FBI Violated Its Own Rules While Spying on Keystone XL Opponents*, THE GUARDIAN (May 12, 2015), <https://perma.cc/5ESE-759M>.

338. *Id.*

339. *Id.*

*H. The National Interest Determination and the KXL's Afterlife*

## 1. The National Interest Determination: Credibility over Climate

In June of 2013, shortly after his second inauguration, President Obama gave a speech at Georgetown University in which he announced a newly robust climate policy, including a preview of the Clean Power Plan, and he indicated for the first time that the KXL might be rejected solely due to its effects on global warming: “[O]ur national interest will be served only if this project does not significantly exacerbate the problem of carbon pollution. The net effects of the pipeline’s impact on our climate will be absolutely critical to determining whether this project goes forward.”<sup>340</sup> These remarks were a rare admission that the KXL conflict was essentially about climate change. Even as the EPA continued to press the State Department to adjust its findings on the pipeline’s emissions effects—a June 2015 letter from the EPA Assistant Administrator stressed that “[t]he foundational fact from which all of the other analysis on Keystone XL proceeds is that oil sands crudes have significantly higher lifecycle greenhouse gas emissions than other crudes”<sup>341</sup>—the Department continued to resist pressure to condition pipeline approval on climate-change concerns. In April of 2014, referring to the pipeline’s effects on the environment and the national interest, a State Department spokesman insisted that it is “important to keep these issues separate.”<sup>342</sup> And in the final NID, climate was allowed in only through the guise of international bargaining power and the question of what other countries perceived the United States to be doing about global warming.

The NID’s assessments of the KXL’s climate effects were more qualified than the denials in the EISs. For example, the NID suggested that “the actual increase in GHG emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production.”<sup>343</sup> But, the Department withheld judgment on this crucial question, deciding that the market was too unpredictable to forecast price changes.<sup>344</sup> Instead, it reiterated its prior findings that the KXL was “unlikely to significantly impact the rate of

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340. Obama, *supra* note 201.

341. Letter from Gina McCarthy, Adm’r, Env’tl. Prot. Agency, to John Kerry, U.S. Dep’t of State (Feb. 2, 2015) (on file with journal).

342. U.S. DEP’T OF STATE, BACKGROUND BRIEFING ON THE REVIEW OF THE PRESIDENTIAL PERMIT APPLICATION FOR THE PROPOSED KEystone XL PIPELINE PROJECT (Apr. 18, 2014).

343. NID, *supra* note 162, at 10.

344. *Id.* at 11.

extraction in the oil sands.”<sup>345</sup> The Department noted how important uncertainty was to its decision, finding that “uncertainty underlies a number of key variables critical to projecting Canadian production growth” and that “recent price drops highlight the uncertainty recognized in the Supplemental EIS of the long-term estimates.”<sup>346</sup> This uncertainty was one reason why the NID adopted what the EISs had termed a “No Action Alternative”—permit rejection.<sup>347</sup>

While emphasizing that “[t]his is a critical time for action on climate change,” the Department disavowed any explicit concern for warming in its final, eminently pragmatic reason for rejection:

The decision to approve or deny a Presidential Permit for the proposed Project will be understood by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a broader effort to address climate change. In the judgment of the Secretary of State, the general understanding of the international community is that a decision to approve the proposed Project would precipitate the extraction and increased consumption of GHG-intensive crude oil.<sup>348</sup>

This emphasis on “understanding” and perception is tied closely to uncertainty about the pipeline’s emissions effects. Rather than basing its decision on the unclear environmental or economic effects of the pipeline, the State Department simply relied on what other people thought those effects would be.<sup>349</sup> In a press conference the day that the NID was released, the White House press secretary reiterated that the executive branch still had no official position on the KXL’s direct relationship to climate change:

The one significant impact we know that the project would have is in undermining the ability of the President of the United States and other senior U.S. officials who have enjoyed great success in going around the world and convincing other countries to follow the lead of the United States in making a significant commitment to fight climate change.<sup>350</sup>

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345. *Id.*

346. *Id.* at 11–12.

347. *Id.* at 21.

348. *Id.* at 30–31.

349. *Id.* at 28.

350. Josh Earnest, Press Sec’y, The White House, Press Briefing at James S. Brady Press Briefing Room (Nov. 6, 2015).

With the Paris climate negotiations around the corner, the decision was thus presented as a reasonable way to buttress the country's diplomatic credibility. As the climate movement celebrated, the KXL was rejected—not as a threat to the global environment but as a threat to political standing.

## 2. Post-Rejection Legal Challenges

While the NID was widely acknowledged as the end of the KXL conflict, TransCanada has not yet ended efforts to build the pipeline as of the writing of this article. On January 6, 2016, the company sued the federal government, alleging that the President had interfered with congressional commerce authority by rejecting its permit application.<sup>351</sup> This complaint was accompanied by a notice of intent to seek remedies under the North American Free Trade Agreement (NAFTA), alleging that denial of the permit constituted discrimination under NAFTA given prior approval of similar projects.<sup>352</sup> Accurately describing the *status quo* at the time of the permit application and the State Department's stated reasons for rejection, the company claimed that "there was nothing unusual about the proposed pipeline or the oil it was intended to carry"<sup>353</sup> and that "the Administration concluded multiple times that the pipeline would have no significant impact on climate change. The Administration sought to explain [its] perverse decision by saying that the pipeline was perceived to be bad for the environment."<sup>354</sup> The day prior to these filings, the South Dakota Public Utilities Commission granted TransCanada construction permits for its proposed route through the state, ostensibly keeping administrative channels open should the next administration revive the project.<sup>355</sup> This possibility remained in play as of the writing of this article, President Trump having made a campaign promise to revive the KXL despite several logistical obstacles.<sup>356</sup>

While success in these efforts seems unlikely given past judicial deference to the presidential permitting process, TransCanada's factual allegations are significant for one main reason: their truth. Despite the State

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351. Complaint at 3, 20–21, *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex. Jan. 6, 2016).

352. Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement in *TransCanada Corp. v. United States* (Jan. 6, 2016), <https://perma.cc/7NDC-FXT4>.

353. *Id.* at 3.

354. *Id.* at 1 (emphasis omitted).

355. Press Release, Leah Mohr, Deputy Exec. Dir., S.D. Pub. Utils. Comm'n (Jan. 5, 2016), <https://perma.cc/3KEP-SS8Q>.

356. Marianne Leveille, *Can Trump Revive Keystone XL? Nebraskans Vow to Fight Pipeline Anew*, INSIDECLIMATE NEWS (Dec. 1, 2016), <https://perma.cc/47PX-D54D>.

Department's professions to the contrary, everyone understood the final decision on the pipeline to be determined by an assessment of its climate consequences. In retrospect, the many rounds of environmental review thus appear pointless because nothing in their conclusions could justify rejection of the pipeline. TransCanada's claims center on the precise point that made the anti-KXL's movement of delay and uncertainty-mongering so successful: the government killed a climate-unfavorable project without seriously confronting climate change.

CONCLUSION: THE RISKS AND REWARDS OF ACTION ON THE PERIPHERY

To review: climate legal action at the core, which seeks direct judicial action on the risks and dangers of global warming, has so far proven largely unsuccessful. The experience of the KXL resistance and its various legal fights suggests that action on the periphery—where issues related to fossil-fuel infrastructure take precedence over the direct effects of climate change—may be more helpful in securing political victories for the climate movement. Public environmental law strategies were not able to secure any rulings or decisions that the pipeline was bad for the climate, though they may have contributed to agency delay. Actions challenging TransCanada's eminent domain authority and state grants of common carrier status, however, were effective in casting an air of legal uncertainty over the pipeline siting process. Legal work supplementing tribal resistance to the pipeline highlighted the bad distributive effects of the pipeline. Investigation of government-corporate collusion in the environmental review process contributed to the perception that permit approval would be a conflict of interest and contrary to the best climate science. Finally, criminal defense work helped to maintain movement opposition and to underscore the political consequences that would flow from permit approval. The State Department's NID, in rejecting the pipeline for discretionary political reasons, reflected the success of a strategy that had cultivated uncertainty and encouraged the government to view KXL rejection as inaction against a stable *status quo*.

The extent to which such an approach to climate legal action is warranted outside the KXL context is debatable for two reasons. First, delay is as often harmful as it is useful for environmental and climate advocates.<sup>357</sup> Second, it is still unclear just how beneficial rejection of the pipeline was to the effort to slow climate change with regards to the various

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357. See *supra* Part II.B.

standards of success.<sup>358</sup> Certainly, the KXL conflict was a major success for the climate movement. As a cause with no obvious constituency, no easy targets, and an invisible physical process at its heart, the push to curb global warming has long struggled to maintain momentum and credibility. The KXL fight not only proved that the climate movement could win a long, difficult political battle, it also expanded the movement's ranks dramatically, including among populations such as rural landowners who had previously been indifferent at best. The defeat of the KXL also had a dramatic effect on the "business as usual" of infrastructure development: never before had a major project targeted for its climate impact been defeated. Whatever the real effect of the pipeline's rejection on crude supplies, the conflict has undermined the assumption that available fossil fuels will continue to be mined so long as they remain profitable.<sup>359</sup>

The continued extraction and combustion of tar sands crude is, however, the most immediate problem in any evaluation of the KXL's defeat. Thanks to TransCanada's successful isolation and completion of the Gulf Coast pipeline, 700,000 barrels a day of crude may now be shipped from Cushing to southern refineries.<sup>360</sup> As the NID made clear, plans are in place to develop pipelines to the Pacific to carry more Albertan crude.<sup>361</sup> In total, proposed infrastructure in the Pacific Northwest would allow an additional 540,000 barrels per day of Canadian crude to be shipped by rail to Washington and Oregon, encouraging continued investment in tar sands extraction.<sup>362</sup> Such rail imports began only in 2010, in the middle of the fight over the KXL; shipments reached 140,000 barrels per day in 2014 but have since declined.<sup>363</sup> Crude shipments by rail—often termed "bomb trains" by activists—are notoriously dangerous, with much higher rates of spills, accidents, infrastructure breakdown, and greenhouse-gas emissions

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358. See *supra* Part II.B.

359. Observers have credited the cancellation of several large fossil fuel infrastructure projects (including the Cherry Point coal export terminal in Washington, which was challenged by the Lummi Nation, and a Kinder Morgan gas pipeline to New England) to grass-roots activism, among other factors, and have noted the influence of the anti-KXL effort on these campaigns. Amy Harder & Erin Ailworth, *Fossil Fuels' Unpopularity Leaves a Mark*, WALL STREET J. (June 2, 2016), <https://perma.cc/HH67-AZVW>.

360. Scott Hagget & Nina Williams, *TransCanada Activates Gulf Coast Project Pipeline, Delivering Crude Oil from Oklahoma to Texas*, HUFFINGTON POST (Jan. 22, 2014), <https://perma.cc/K3X4-HKVX>.

361. See NID, *supra* note 162, at 12 (stating that some companies indicated that they plan to move forward with projects under construction).

362. OIL CHANGE INT'L, TRACKING EMISSIONS: THE CLIMATE IMPACT OF THE PROPOSED CRUDE-BY-RAIL TERMINALS IN THE PACIFIC NORTHWEST 3 (2015).

363. Arup Mallik & Michael Yo, *As Total U.S. Crude Imports Fall, Canada's Import Supply Share Rises*, U.S. ENERGY INFO. AGENCY (Nov. 12, 2015), <https://perma.cc/C2AP-FR33>.

than pipelines.<sup>364</sup> The 2013 oil train explosion in Lac-Mégantic, Québec, which killed 47 people, is emblematic of the dangers represented by the 50-fold increase in oil train volume since 2008.<sup>365</sup> However, it remains unclear just how much Canadian crude will be imported into the United States in the absence of the KXL. After \$200 billion of investment in the Alberta oil fields over 15 years, an extended depression in global oil prices (benchmark crude oil dropped from \$98.23 a barrel in January of 2014 to \$38.24 per barrel in August of 2015 and has since recovered somewhat)<sup>366</sup> has hit the province and its industry hard, resulting in layoffs and economic uncertainty.<sup>367</sup> Given the massive investment required for the heavy machinery that extracts tar sands and the resulting multi-decade investment cycle, companies have continued to expand infrastructure and drilling in order to grow their operations, even as these operations post large losses.<sup>368</sup> Whatever the global crude market, then, tar sands oil continues to be extracted for export.

In order to move this oil to market, pipeline operator, Enbridge, has undertaken a cross-border pipeline project that would in many ways replicate the purpose and capacity of the KXL. The so-called Alberta Clipper project was first proposed in 2007 and was initially intended to ship 450,000 barrels per day of tar sands crude across the border, with an ultimate destination of Cushing.<sup>369</sup> The pipeline quickly received a presidential permit with little public reaction, and a Sierra Club NEPA challenge failed based on the District of Minnesota's conclusion that the pipeline would not increase tar sands production or cause greater emissions.<sup>370</sup> Opponents maintained, however, that the Clipper was always intended to carry a greater quantity of oil, and shortly after the initial project became operational, Enbridge secured a permit from the Canadian government to increase its capacity to 800,000 barrels per day.<sup>371</sup> In light of the KXL controversy, Enbridge decided not to seek an additional presidential permit for the new capacity in the United States, instead deciding to channel the oil through Line 3, a smaller cross-border pipeline

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364. See WATERKEEPER ALL. ET AL., *DEADLY CROSSING: NEGLECTED BRIDGES & EXPLODING OIL TRAINS* 4 (2015), <https://perma.cc/49BF-RGE6> (describing the dangers of crude shipments by rail).

365. *Id.*

366. NID, *supra* note 162, at 12.

367. Austen, *supra* note 197.

368. *Id.*

369. Branko Marcetic, *The Other Keystone: The Alberta Clipper, the Pipeline No One Is Talking About*, IN *THESE TIMES* (Jan. 14, 2016), <https://perma.cc/7DA6-T3ER>.

370. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045–46 (D. Minn. 2010).

371. Marcetic, *supra* note 369.

that had received State Department approval in 1968.<sup>372</sup> Capacity improvement at Line 3 was presented as an “update” rather than a new pipeline requiring a permit, and the State Department accepted this approach.<sup>373</sup> A lawsuit by the native White Earth Nation and environmental groups challenged the Department’s cursory NEPA review, but their motion for summary judgment was denied on the same basis as prior challenges to Department pipeline approvals—presidential permits are immune from judicial review—and because the decision not to require a new permit was within the Department’s discretion.<sup>374</sup> Although there has been some activist attention on the Clipper, this pipeline, in conjunction with other Enbridge projects, could allow twice the amount of crude that the KXL would have carried to flow from Alberta to the Gulf by 2017, with nowhere near the amount of resistance faced by TransCanada.<sup>375</sup>

As suggested by the NID, and in light of these ongoing industry efforts, much remains undecided about the future infrastructure development, profitability, and political profile of the Alberta tar sands and other oil fields, making predictions about final greenhouse-gas emissions difficult. It is simply too early to tell whether the KXL defeat will have a net-positive effect on curbing global warming or whether, as the State Department consistently maintained, the oil that would have traveled through the KXL will be burned regardless—or even whether a shift from pipelines to crude will cause greater environmental harms.

Another remaining question from the KXL conflict is whether the diverse coalition of anti-pipeline activists can be organized for future climate struggles. Many of the most important groups in the resistance, like property rights activists, may not find a place in future campaigns for government action on climate. This risk is linked to the nature of action on the periphery; by focusing conflict away from the central issue of global warming, global warming became obscured and may lack motivating force in future fights. Relatedly, with regards to legal action, the KXL conflict produced no significant precedent that climate lawyers might use going forward. If anything, the outcome of anti-pipeline NEPA challenges solidified the judicial trend to accept agency arguments that no individual project can have much impact on global warming on its own.

As discussed above, the Standing Rock resistance to the Dakota Access Pipeline—which would run Bakken oil from North Dakota, rather than tar

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372. Memorandum Opinion and Order at 3, 10, *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB) (D. Minn. Dec. 9, 2015), 2015 WL 8483278.

373. Marcetic, *supra* note 369.

374. Memorandum Opinion and Order, *supra* note 372, at 12, 22–23.

375. Marcetic, *supra* note 369.

sands oil from Alberta—suggests that the anti-KXL coalition has in fact remained strong enough to block further infrastructure projects.<sup>376</sup> Standing Rock’s climate-peripheral focus on Native American rights and clean water underscores the importance of non-core strategies in combating fossil-fuel development, and the successful use of delay once again shows that the creation of uncertainty may be crucial to achieving political success.

Whatever the scattershot approach of peripheral action might lack in terms of identifiable, substantive tools for the next engagement, it makes up for in its disruption of conventional wisdom regarding the nature, causes, and consequences of global warming. One upshot of this disruption has been emphasized: the KXL resistance drew attention to the widespread abuse of eminent domain authority by infrastructure owners, the unequal burden of environmental risks borne by indigenous communities, the whitewashing of agency environmental reviews by corporate contractors, and many other issues not normally defined under the rubric of climate change. What the NID separated into distinct categories—environment, culture, energy security, and foreign policy<sup>377</sup>—the KXL resistance brought together in one campaign.

This article has so far referred to these disparate fields of struggle as the “periphery.” But, in keeping with the spirit of the anti-KXL movement, it is perhaps more appropriate to deny the core–periphery distinction altogether or, at least, to stress the distinction’s artificial character and to seek paths beyond it. After all, in considering the full social consequences of climate change, there is no obvious reason to place greater emphasis on a “core” issue like nationwide, stationary-source, greenhouse-gas emission standards than on a “peripheral” issue like state delegation of eminent domain authority. Working through the structure of laws that implicate global warming, climate legal advocates should not allow that structure to channel their efforts into the existing remedies of environmental law.

This resistance to core–periphery thinking is especially appropriate in the context of climate change. Many scholars have noted that the diffuse, temporally extended, and unpredictable nature of climate change poses special problems to legal and political thought;<sup>378</sup> as this article has tried to demonstrate, these difficulties are especially pronounced in legal practice. Awareness of the multifarious legal implications of global warming and the

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376. See *supra* Part II.E.

377. NID, *supra* note 162, at 5.

378. JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 251 (2015) (“Both the attempt and the failure [to use environmentalist tropes to address global warming] reinforce the thought that climate change ties deed and result together by threads that are too numerous, long, tangled, and obscure to fit familiar ideas of victim, harm, and responsibility that have been central to the ecological era of environmental lawmaking.”).

fossil-fuel economy might lead to legal resistance that more closely resembles the very phenomenon it responds to—disparate, difficult to predict, and defiant of categorization. As the anti-KXL movement demonstrates, this new disposition of climate legal action should seek to remake, rather than accept, the background against which it operates. In a word, it should disrupt.