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Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources

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Great nations, like great men, should keep their word.
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting)

My ancestor . . . who signed the treaty . . . accepted the word of the United States—that this treaty would protect not only the Indian way of life for those living, but also for all generations yet unborn.
Jerry Meninick, Citizen of the Yakama Nation[1]

I. INTRODUCTION

The idiom goes that "Everything old is new again." This Article examines whether the same can be said for federal Indian law. For centuries, tribes have relied on their treaties with the United States to enforce such crucial rights as access to water, fish, and hunting areas. Today, an environmental challenge looms over Indian country—climate change—prompting one to wonder whether such tribally revered text, treaties, can be applied in new ways to provide a legal avenue with the potential to alleviate the impact of climate change.

Climate change threatens the very territorial existence of tribes in the United States.[2] Tribes, who often rely closely on their environments for legal, spiritual, cultural, and subsistential reasons, have been particularly hard hit by the negative impacts of climate change. For example, in its Climate Adaptation Action Plan, the Swinomish Indian Tribal Community[3] details the projected impacts of climate change on its reservation community, explaining that upwards of 15% of its river uplands are subject to potential flooding, 160 residential and 18 non-residential/commercial structures could be inundated, 2,218 acres and over 1,500 properties are at risk for wildfires, vital

1. Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003) (citation omitted).
2. T.M. BULL BENNETT ET AL., *Indigenous Peoples, Land, and Resources*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES 297 (2014), *archived at* http://perma.unl.edu/64FU-BWS4 (detailing the impacts of climate change on indigenous peoples in the United States).
3. *See* OFFICE OF PLANNING & CMTY. DEV., SWINOMISH INDIAN TRIBAL CMTY., SWINOMISH CLIMATE CHANGE INITIATIVE CLIMATE ADAPTATION ACTION PLAN 7 (2010), *archived at* http://perma.unl.edu/UYV4-7RZX [hereinafter SWINOMISH INDIAN TRIBAL CMTY.] ("The Swinomish Indian Reservation is located on the southeastern peninsula of Fidalgo Island, west of the Swinomish Channel and adjacent to low-lying mainland areas of western Skagit County, in western Washington. . . . The Reservation encompasses approximately 7,450 upland acres and approximately 2,900 acres of tidelands for a total of 10,350 acres. Roughly 4,700 acres are forested uplands with interspersed rural development and surrounding urban development. Approximately 7,675 acres are held by the Tribe or Tribal members, with the remaining 2,675 acres held in private non-tribal ownership. . . . There are upwards of 1,300 homes on the Reservation, and total Reservation population is estimated at somewhat over 3,000 (approximately 2,600 as of 2000 census).").

transportation links are at risk for inundation, significant seafood and shellfish areas are at risk of loss, the Tribe's elders face significant risk of heat-related illnesses, and the Tribe may lose sensitive cultural sites and traditional native species.[4] Ultimately, the Tribe concludes that "[t]he principle areas and resources within the Swinomish Indian reservation vulnerable to climate change impacts are shorelines, beaches, low-lying terrain, and forests, along with the assets within those areas."[5]

Similarly, the Nez Perce Tribe also is facing profound impacts from climate change:

> Air temperatures in the region have increased about 1.5 °F during the 20th century and models predict a future increase of +2.0 °F by 2020, +3.2 °F by 2040, and +5.3 °F by 2080 . . . . April 1st snowpack has decreased overall in the Pacific Northwest, with losses . . . earlier in the spring throughout the western United States, leading to reduced summer streamflows, increased competition for water, vulnerability to drought, increases in summer water temperatures and a higher risk of winter flooding. The changes already being seen are substantial, and by the end of the century [the Nez Perce Tribe] will likely be facing unprecedented changes to [its] natural environment and the economies that depend on it.[6]

Unfortunately, climate change exacerbates the environmental degradation already facing many Native communities as a result of environmental pollution, natural resource development, and sacred site destruction.[7] For many tribes, land constitutes more than dirt and plants as, "[f]or Native peoples, land is often constitutive of cultural identity. Many Indian tribes, for example, identify their origin as a distinct people with a particular geographic site."[8] For many tribes, culture and spirituality can be connected to a specific area or piece of land. In some parts of the country, climate change threatens the very land upon which Natives and tribes are located.[9] In this way, climate change threatens not only the territorial sovereignty of Indians and tribes, but also tribal cultural sovereignty as well. Accordingly, the negative impacts of climate change that threaten the very land underlying some Native communities may be particularly hard on Native

4. *Id.* at 26.

5. *Id.*

6. KEN CLARK & JENIFER HARRIS, NEZ PERCE TRIBE WATER RESOURCES DIV., CLEARWATER RIVER SUBBASIN (ID) CLIMATE CHANGE ADAPTATION PLAN 9 (Toby Thaler & Gwen Griffith eds., 2011), *archived at* http://perma.unl.edu/2YA5-5DAQ.

7. *Id.*

8. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1640 (2000).

9. Chris Mooney, *The Remote Alaskan Village that Needs to Be Relocated Due to Climate Change*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/, *archived at* http://perma.unl.edu/4M5U-5ZRG.

communities, where land is the "linchpin" for survival.[10] Land is also of great importance to many tribes because "reservations are sanctuaries where land is not subject to taxation; where individual Indians are free of most taxes; where many state laws do not apply; and where Indian customs and traditions are supreme."[11] Ultimately, land may play a more important role in the lives of individual Indians and tribes than it does for most non-Indians.[12]

Because of the important role that land and natural resources play to many Native communities, advocates looking to protect such resources from the negative impacts of climate change may look to treaties and the federal trust responsibility.[13] For example, in its Climate Adaptation Action Plan, the Swinomish Indian Tribal Community explains its goal to "[p]reserve [the] ability to fully exercise treaty rights and cultural practices and to improve physical and spiritual health."[14] Additionally, the Nez Perce Tribe calls for a discussion of its treaty rights and the resources protected by its treaties with the United States in response to the negative impacts of climate change on those rights.[15]

These references to tribal treaties rights within tribal climate change adaptation planning documents raise the question of whether treaty rights can be used to require the United States to protect important tribal resources threatened by climate change. Given that many treaties protect natural resources that are particularly hard hit by climate change—such as fisheries, animals that are typically hunted for subsistential purposes, and water[16]—enforcing treaty rights may be a helpful legal tool to assist efforts to combat against the negative impacts of climate change. Development of such legal tools may be particularly important because of the value of the environment to many tribal communities and also because tribes may not be otherwise included in state and regional discussions of how to combat climate change.[17] Because of the small size of some tribal communities, non-tribal governments may not focus on tribes and

10. Wood, *supra* note 1, at 356 ("While environmental disease may sooner or later affect everyone in the United States, the impacts on Indian country are magnified, because the land base is the linchpin for tribal survival.").
11. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 604–05 (1975) (citations omitted).
12. *Id.* at 605.
13. *See, e.g.*, Wood, *supra* note 1, at 356 ("The trust responsibility should play a role in protecting tribal lands and resources . . . .").
14. SWINOMISH INDIAN TRIBAL CMTY., *supra* note 3, at 51.
15. CLARK & HARRIS, *supra* note 6, at 55.
16. Wilkinson & Volkman, *supra* note 11, at 618–19.
17. Chairwoman Karen Driver, chairwoman of the Fond du Lac Band of Lake Superior Chippewa in northern Minnesota, provided an example of how tribes were not being included in local and state climate change planning:

Natives[18]—leaving it to the communities themselves to develop their own solutions to climate change. Also, despite the fact that President Obama has acknowledged the profound impacts of climate change on tribal communities,[19] it is highly unlikely that new federal laws will be passed any time soon to assist tribes.[20]

Tribes may therefore want to reexamine existing legal tools, such as treaties, to determine how such past precedent might be creatively applied in the climate change context. To date, little attention has been paid to examine whether treaties may prove effective legal resources for tribes seeking to protect valuable resources from the impacts of climate change. This Article therefore seeks to fill the scholarly void and begin the conversation on the role that treaties may play in providing tribes legal redress for the negative impacts of climate change.

Tribes exercising their treaty rights have found success in the past, such as with the protection of water rights and fishing access, although treaties have not previously been relied upon to protect resources vulnerable to the impacts of climate change. In general, treaties have historically played an important role in many tribes, as they have a profound cultural connection and are "a powerful testament to [tribes'] inherent sovereign authority has separate nations and governments."[21] Accordingly, treaties may be used as expressions of both political and cultural sovereignty because treaties were negotiated between two separate sovereigns, the United States and tribes, and because treaties often protect valuable cultural resources such as tribal resources.[22]

> She recounted how a recent flooding event underscored the feeling that her community is left on its own during disasters. Instead of achieving a greater level of resilience, she said her band is "ghettoized." "Nobody showed up" to help during the flood, Diver said. "I was calling people and saying, 'Hey, I could use some evacuation assistance.' And they're like, 'Well, you're not in our plan.'"

Evan Lehmann, *White House Describes Climate Change Impacts as Symptom of Inequality*, EE NEWS (July 10, 2015), http://www.eenews.net/climatewire/stories/1060021562/print, *archived at* http://perma.unl.edu/XB53-3J82.

18. *Id.* (quoting Chairwoman Karen Diver's explanation that her community may be deemed a "throwaway communit[y]" because it is too small to be included in state and regional climate change planning).
19. Robin Bravender, *Global Warming Threatens Tribes' Survival, Culture—McCarthy*, EE NEWS (Dec. 3, 2014), http://www.eenews.net/eenewspm/stories/1060009881/, *archived at* http://perma.unl.edu/QK6L-737X (quoting U.S. EPA Administrator Gina McCarthy) ("President Obama sees climate as part of the legacy issues that he wants to move forward to address, and he very clearly recognizes that tribal issues are . . . driven in so many ways by the changing climate . . . and the tremendous impacts that that can have on both the ability of tribes to survive, but also to maintain their culture.").
20. *Id.*
21. Tsosie, *supra* note 8, at 1620.
22. *Id.* at 1621.

Given the importance of treaties, this Article considers the enforceability of the treaty rights themselves in the climate change context, as well as how treaties might be utilized by tribes within the federal trust relationship context.[23] Historically, a federal trust responsibility exists between the United States and federally recognized tribes, as tribes surrendered certain rights to the United States in exchange for the federal government's willingness to act in the best interests of tribes. Accordingly, when a tribe believes that the federal government has not acted in its best interest, the tribe may bring a claim based on an alleged breach of the federal trust responsibility. Previously, tribes have successfully claimed a breach of the federal trust responsibility to protect tribal resources, and, moreover, such enforcement is important to the protection of tribal resources. As Professor Mary Christina Wood explained, "Enforcement of the federal trust responsibility is necessary to protect Native America from environmental assault."[24] In the climate change context, turning to the federal government for potential protection against the negative impacts of climate change may be particularly relevant given the pervasive role the federal government plays in Indian country. For example, the federal government owns naked fee title to land held in trust for tribes.[25]

To date, there has been little scholarly attention on whether tribal treaties may be helpful legal tools in efforts to protect tribal natural resources from the negative impacts of climate change. This Article fills the void by more closely examining how treaties may be applied in the climate change context. To do this, the Article starts by examining treaties and how they are interpreted. Part II first focuses on the treaty language of two tribes, the Swinomish Indian Tribal Community and the Nez Perce Tribe, as these two Tribes contemplated the use of their treaties as legal tools to protect their natural resources from the impacts of climate change. Part II then goes on to discuss how treaties are typically interpreted, concluding with a discussion of how the treaties of these two Tribes might be interpreted in relation to protecting certain resources in the climate change era. The Article then turns to an examination of how such treaty claims might be raised in federal courts. Part III takes a close look at the federal trust relationship and how a treaty claim might be used in conjunction with a claim of a breach of the federal trust relationship. Part III examines potential claims under both domestic law and international law. Ulti-

23. Admittedly, tension exists between the concepts of fully expressed tribal sovereignty and the federal trust relationship. However, this antithetical relationship is the cornerstone of the relationship between tribes and the federal government. Accordingly, this Article considers the enforceability of tribal treaties themselves as expressed by the sovereigns that negotiated them, and also within the context of the federal trust relationship.

24. Wood, *supra* note 1, at 355.

25. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

mately, this Article concludes that it may be possible to successfully use certain treaty provisions to require the United States to work to protect tribal resources through enforcement of treaty provisions. By looking back to the historical rights attached to tribal treaties, tribes may be able to apply such protections in a new fashion to combat the negative impacts of climate change.

II. INTERPRETING TREATIES

Tribes have often turned to their treaties with the United States as a way of protecting valuable rights. For example, the Swinomish Indian Tribal Community successfully asserted its treaty rights to fish, a "cultural keystone" for the Tribe, in the 1970s.[26] Before examining whether claims based on tribal treaty provisions might be helpful in protecting tribal resources threatened by climate change, the first section of this Part considers the specific language of two Tribes' treaties: the Swinomish Indian Tribal Community and Nez Perce Tribe. With the actual treaty language in hand, the next section examines how treaty provisions are typically interpreted. Finally, the last section speculates as to how the relevant treaty language might be interpreted by a court examining such language to determine whether the resources mentioned in the treaties that are threatened by climate change are guaranteed by the treaty. Ultimately, this Article concludes that treaty language could exist that would protect such threatened tribal resources in the climate change context.

Admittedly, the Article views treaty rights progressively. This would not be, however, the first time that tribal treaty rights are viewed in such a manner. Historically, federal courts have interpreted treaties in expansive and progressive ways given the time of such decisions. For example, in 1908, the U.S. Supreme Court determined that tribal treaties, which made no explicit mention of water rights, reserved water rights sufficient for the primary purposes of a reservation.[27] Similarly, in 1974, the U.S. District Court for the Western District of Washington determined that tribal treaties reserved the right of tribes to be co-managers of fisheries along with the states, despite the fact that the treaties involved did not explicitly reference such a right to co-management.[28] While these decisions are well-established and respected today, they were groundbreaking and novel in their time. These decisions and others demonstrate the capacity for federal courts to interpret treaties in broadly in order to protect tribal resources, which is consistent with the Indian canons of construction

26. SWINOMISH INDIAN TRIBAL CMTY., *supra* note 3, at 10 (internal quotation marks omitted).

27. Winters v. United States, 207 U.S. 564 (1908).

28. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

discussed below. Moreover, such decisions also demonstrate federal courts' willingness to demand specific action from the federal government on the basis of implicit treaty provisions. It is therefore not outside the realm of possibility that a federal court would decide the same in the context of climate change.

A. What Do the Relevant Treaties Say?

As mentioned above,[29] at least two tribes—the Swinomish Indian Tribal Community and the Nez Perce Tribe—specifically considered their treaty rights within the context of climate change for the purpose of protecting valuable natural resources from its deleterious effects. Accordingly, in order to determine whether the Tribes may be able to rely on their treaties with the United States to protect such resources, it is helpful to first consider the language of these Tribes' treaties.

1. Swinomish Indian Tribal Community

The United States and the Swinomish Indian Tribal Community entered into the Treaty of Point Elliott on January 22, 1855.[30] Article I of the Treaty establishes cessation of lands to the United States.[31] Article II, however, reserves lands "for the present use and occupation of the said tribes and bands . . . ."[32] Article II goes on to specify that:

> All which tracts shall be set apart, and so far as necessary surveyed and marked out for their [tribes'] exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.[33]

This provision is notable for two reasons. First, it is clear that the land was reserved primarily to benefit the tribes, including the Swinomish. Second, despite the fact that the federal government reserved the land for the "exclusive use" of the tribes, the federal government still maintained control over the applicable lands by retaining the right to give permission to non-Natives to settle on the lands and also the right to develop roads, as necessary. As discussed below,[34] federal

29. SWINOMISH INDIAN TRIBAL CMTY., *supra* note 3, at 51; CLARK & HARRIS, *supra* note 6, at 55.
30. Treaty Between the United States and the Dwámish, Suquámish and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 [hereinafter Treaty of Point Elliott]. The United States Senate ratified the treaty on March 8, 1859, and President James Buchanan accepted, ratified, and confirmed the same treaty on April 11, 1859. *Id.*
31. *Id.* at 927–28.
32. *Id.* at 928.
33. *Id.*
34. *See, e.g.*, *infra* subsection III.A.2 & note 147 and accompanying text.

control is one factor courts evaluate when considering whether money damages are available for a breach of a federal trust responsibility.[35]

Article V of the Treaty of Point Elliott is also notable, as it provides that:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed land.[36]

Such language recognizing a tribe's right to take "fish at usual and accustomed grounds and stations" is language commonly found in Stevens treaties; a term often used to refer to treaties negotiated by Isaac Ingalls Stevens, who was the Governor and Superintendent of Indian Affairs in the Washington Territory in the 1850s.[37] The meaning of this language has been the subject of several court decisions, and, ultimately, the United States Supreme Court determined that this treaty language granted the tribes the right to take substantial portions of available fish in common with non-tribal members.[38] Because fish are so important to many tribes, such as the Swinomish, similar provisions to Article V were placed in many treaties in order to ensure tribal access to such a valuable resource.[39] In its Climate Adaptation Action Plan, the Tribe explained the importance of fish and shellfish,

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35. Admittedly, however, the type of federal control discussed in Article II is unlikely to rise to the level of an enforceable trust relationship allowing the Tribe to recover money damages. *See infra* p. subsection III.A.2 and note 147 and accompanying text.

36. Treaty of Point Elliott, *supra* note 30, at 928.

37. The other Stevens treaties include: Treaty between the United States of America and the S'Klallams Indians, Jan. 26, 1855, 12 Stat. 933 [hereinafter Treaty of Point No Point]; Treaty between the United States of America and the Makah Tribe of Indians, U.S.-Makah Tribe, Jan. 31, 1855, 12 Stat. 939 [hereinafter Treaty of Neah Bay]; Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, 12 Stat. 945 [hereinafter Treaty with the Walla-Walla]; Treaty between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951 [hereinafter Treaty with the Yakamas]; Treaty between the United States of America and the Nez Perce Indians, June 11, 1855, 12 Stat. 957 [hereinafter 1855 Treaty with the Nez Perce]; Treaty between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon, June 25, 1855, 12 Stat. 963 [hereinafter Treaty with the Tribes of Middle Oregon]; Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians., July 1, 1855, 12 Stat. 971 [hereinafter Treaty of Olympia]; Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975 [hereinafter Treaty with the Flatheads].

38. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

39. SWINOMISH INDIAN TRIBAL CMTY., *supra* note 3, at 8, 10 ("Established in 1855 by the Treaty of Point Elliott, the Swinomish Indian Reservation brought together several Coast Salish groups who shared a culture centered on fishing, and a ceremonial calendar revolving around cedar longhouses.").

as "[t]raditional foods such as salmon and shellfish are 'cultural keystone' aquatic species to the Tribe; much more than a food source, these foods are a vital contribution to the cultural, spiritual, and social life of tribal members."[40]

Accordingly, Article V of the Treaty of Point Elliott protects a resource of profound importance to the Tribe and contemplates the continued access to this resource. Given that climate change threatens fish and shellfish,[41] the Tribe's ability to access this treaty-protected resource is also threatened. This therefore raises the question of whether the treaty right can become the basis of an enforceable trust claim, as discussed below.[42]

The Treaty of Point Elliott also provides for ongoing federal management of the established reservation. For example, under Article VII the President of the United States possesses the power to remove the Tribe from the established reservation, and the federal government has the authority under the Article to allot the reservation.[43] Further, Article XIV declares that the federal government will establish a school for the reservation and provide certain infrastructure and professionals, such as blacksmiths, carpenters, and teachers.[44] While it is unlikely that these Articles establish a federal trust relationship mandating money damages for its breach, the Articles certainly created a substantial federal presence on the reservation, allowing for federal control over certain key governing functions—such as land distribution. However, as discussed below,[45] once it is determined that a specific law exists wherein the federal government undertook the duty to manage a resource, then courts consider whether the federal government exercises control over that resource.[46] Such treaty provisions, therefore, could be read as providing the federal government control over the tribal resources negatively impacted by the impacts of climate change, such as land.

2. Nez Perce Tribe

Like the Swinomish, the Nez Perce Tribe has also entered into treaties with the United States.[47] Of the several treaties entered into between the United States and the Nez Perce, three are of interest for purposes of this Article. First, as a result of the Walla Walla Council, the Nez Perce entered into a treaty with the federal government on

40. *Id.* at 10 (citation omitted).
41. *See supra* note 5 and accompanying text.
42. *See infra* section III.A.
43. Treaty of Point Elliott, *supra* note 30, at 929.
44. *Id.* at 929–30.
45. *See infra* subsections III.A.2–4.
46. *See, e.g.*, United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224–25 (1983).
47. *See, e.g.*, Treaty with the Blackfoot Indians, Oct. 17, 1855, 11 Stat. 657.

June 11, 1855.[48] Similar to the treaty between the Swinomish and the United States, the 1855 Treaty between the Nez Perce and the United States established a reservation for the "exclusive use and benefit" of the Tribe.[49] Also similar to the Treaty of Point Elliott, "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians."[50] And, furthermore, like the Treaty of Point Elliott, the Nez Perce Treaty provides that the United States shall provide substantial infrastructure development,[51] as well as have control over the survey and allotment of the reservation.[52] Accordingly, the 1855 Treaty between the Nez Perce and the United States is very similar to the Swinomish Treaty.

On June 9, 1863, the Nez Perce and the United States entered into another treaty.[53] The 1863 Treaty uses language somewhat different from the 1855 Treaty. For example, Article II of the Treaty speaks to establishing a "*home* . . . for the sole use and occupation" of the Tribe.[54] Further, Article III of the Treaty provides extensive guidance on how the land shall be allotted and distributed to individual members of the Tribe.[55] Like the 1855 Treaty, Article V states that the federal government shall provide significant infrastructure development, including construction of a school, hospital, blacksmith's shop, houses, and also provide certain professionals to assist on the reservation for a set period of time.[56] Further, Article VIII says that the federal government shall have the right to develop roads, hotels, and stage stands as necessary for the public good.[57] Article VIII also establishes that the ferries and bridges on the reservation "shall be held and managed for the benefit" of the Tribe, and that the "rents, profits, and issues" resulting from federal regulation on the reservation "shall inure to the benefit" of the Tribe.[58] Under Article VIII, the federal

48. 1855 Treaty with the Nez Perce, *supra* note 37. The United States Senate ratified the treaty on March 8, 1859, and President James Buchanan accepted, ratified, and confirmed the treaty on April 29, 1859. *Id.* at 962.
49. *Id.* at 957–58.
50. *Id.* at 958.
51. *Id.* at 959.
52. *Id.*
53. Treaty between the United States of America and the Nez Perce Tribe of Indians, June 9, 1863, 14 Stat. 647 [hereinafter 1867 Treaty with the Nez Perce]. On April 17, 1867, the United States Senate ratified the Treaty, and on April 20, 1867, President Andrew Johnson accepted, ratified, and confirmed the Treaty. *Id.* at 653.
54. *Id.* at 647 (emphasis added). The Treaty does, however, go on to use language similar to the 1855 Treaty when it states that the land is set aside "for the exclusive use and benefit" of the Tribe. *Id.* at 648.
55. *Id.* at 648–49.
56. *Id.* at 650.
57. *Id.* at 651.
58. *Id.*

government possesses the right to use timber on the reservation.[59] The federal government also agreed to reserve "all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished," promising "to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed."[60] Although provisions of 1863 Treaty are similar to the 1855 Treaty, the 1863 Treaty goes much further in describing the responsibilities of the federal government, thus establishing that the federal government possesses significant control over certain aspects of the reservation. It would appear that the federal government played a stronger role on the Nez Perce reservation following the 1863 Treaty than it did under its treaty with the Swinomish.

On August 13, 1868, the Nez Perce and United States entered into another treaty.[61] The 1868 Treaty explicitly amended the 1863 Treaty. For purposes of this Article, two portions of the 1868 Treaty are relevant. First, Article I provides for allotments to individual Indians living outside of the reservation.[62] Second, Article II offers additional information on how the timber resources on the reservation are to be managed.[63] It could be argued that the 1868 Treaty amended the 1863 Treaty in a way that increased the federal role of managing resources both on and off of the reservation.

For purposes of the discussion below regarding an enforceable trust relationship, two overarching points can be taken from the treaties between the Nez Perce and the federal government. First, like the treaty with the Swinomish, the treaties with the Nez Perce specifically contemplate the Tribe having access to certain resources, such as fish—resources that are threatened by the negative impacts of climate change. And, second, that the treaties also make clear that the federal government has a certain amount of management and control over the reservation lands, especially in terms of allotment, timber, and some water resources.

B. Judicial Interpretation of Treaties

Having identified the specific treaty language at issue, it is helpful to now consider how a federal court might interpret such language. Such analysis may aid tribes because of the significance of treaties. Because the rights acknowledged in treaties were supposed to be per-

59. *Id.*
60. *Id.*
61. Amendatory Treaty to the Treaty of June 9, 1863, between the United States of America and the Nez Perce Tribe of Indians, Aug. 13, 1868, 15 Stat. 693 [hereinafter 1868 Amendatory Treaty].
62. *Id.* at 693–94
63. *Id.* at 694.

manent rights,[64] treaties can be particularly powerful tools in protecting natural resources. Treaty rights are, in many cases, intimately connected to the cultural survival of tribes.[65]

The meaning of treaty terms between tribes and the United States is not always clear. A classic example of the confusion such treaty terms can cause is the phrase: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . [,]"[66] which was included in many Steven treaties, including the two discussed above. For these tribes, fishing was "not much less necessary . . . than the atmosphere they breathed."[67] The tribes therefore vigorously negotiated for a term in their treaties with the United States that would ensure their access to their traditional fishing grounds.[68] However, the precise meaning of this phrase that was added to these treaties has been the source of vigorous debate for decades.[69] Similar to the current situation, where the negative impacts of climate change constrain once abundant natural resources, the meaning of these treaty phrases became particularly important when the number and availability of fish dropped.[70]

A treaty between a tribe and the United States "is essentially a contract between two sovereign nations."[71] Such treaties have also been described as "quasi-constitutional" documents.[72] However, despite the similarity to both contracts and perhaps constitutional documents, the United States Supreme Court has developed special Indian canons of construction designed to assist federal courts engaged in treaty or statutory construction.[73] In essence, "The unequal bargain-

64. Wilkinson & Volkman, *supra* note 11, at 602. For example, U.S. Senator Sam Houston described the perpetual nature of treaties in the following way: "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by [the federal government], and never again be removed from your present habitations." *Id.* (quoting CONG. GLOBE, 33d Cong., 1st Sess. 202 (1854)).

65. Tsosie, *supra* note 8, at 1619.

66. Treaty with Nisquallys, art. III, Dec. 26, 1854, 10 Stat. 1132. The same or similar language is used in each of the Stevens treaties. *See supra* note 37 and accompanying text (discussing Stevens and listing all Stevens treaties).

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

68. United States v. Washington, 384 F. Supp. 312, 333 (W.D. Wash. 1974).

69. *See generally* Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 UCLA L. REV. 547 (1995).

70. *Id.* at 549–50.

71. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (citation omitted).

72. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 (1993) (explaining that tribal treaties are similar to constitutions because they are "fundamental, constitutive document[s]").

73. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

ing position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality."[74] Since the Court's decision in *Worcester v. Georgia*[75] in 1832, it has consistently held that treaties between tribes and the federal government should not be interpreted in a way that prejudices tribes.[76]

In *Worcester,* the Court considered whether the State of Georgia could apply its laws to the territory of the Cherokee Nation, then located within the external boundaries of Georgia.[77] In holding that the laws of Georgia did not apply, the Court interpreted the Treaty of Hopewell between the Cherokee Nation and the federal government, and determined that the relationship between the two was like "that of a nation claiming and receiving the protection of one more powerful."[78] Therefore, because of the tribes' dependence on the federal government for protection, the Court explained that "[t]he language used in treaties with the Indians should never be construed to their prejudice."[79] In rationalizing this method of construction,[80] Chief Justice Marshall explained that it was not "reasonable to suppose, that the Indians, who could not write and most probably could not read, who were not critical judges of our language, should distinguish [the legal meaning of specific words used in the treaty]."[81]

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74. Wilkinson & Volkman*, supra* note 11, at 617.
75. 31 U.S. (6 Pet.) 515 (1832).
76. PHILIP P. FRICKEY ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., Lexis Nexis 2012) (1941).
77. *Worcester*, 31 U.S. (6 Pet.) 515.
78. *Id.* at 555. As explained more fully below in the discussion of the federal government's trust relationship to tribes, this is not the first time that the Court discussed the relationship between the federal government and tribes in such terms. In *Cherokee Nation v. Georgia*, the Court considered whether it had original jurisdiction to hear a dispute between the Cherokee Nation and the State of Georgia, and the Court ultimately held that it did not have original jurisdiction because the Cherokee Nation was not a foreign nation for purposes of original jurisdiction. 30 U.S. (5 Pet.) 1 (1831). Although the Nation was "a distinct political society," the Court considered tribes "domestic dependent nations" that "are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.* at 16–17.
79. *Worcester*, 31 U.S. (6 Pet.) at 582.
80. For a more in-depth discussion of the analysis applied in this case, see Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1102–03 (2013).
81. *Worcester*, 31 U.S. (6 Pet.) at 552. Chief Justice Marshall wrote in reference to an argument made by the State of Georgia that the treaty used the term "allotted," which legally generally meant that the land in question had been given to the United States. However, Chief Justice Marshall believed that this language was more consistent with the Tribe's understanding of establishing a boundary between the tribe and the federal government. *Id.* 552–53. Similarly, Justice McLean, in his concurrence, explained that "[t]he language used in treaties with Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Id.* at 582 (McLean, J., concurring); *see*

This rationale is premised on the recognition that most tribal members, at the time, would not have spoken fluent English nor have been familiar with the legal meaning of certain English words.[82] That tribes and the federal negotiators would have different understandings of the terms used in the treaties is therefore likely reasonable. Accordingly, the canons acknowledge that in order to give purpose to the original meaning of the treaty, it may be necessary to view the treaty as the tribe would have viewed it.[83] Such interpretation also helps ensure that the court's interpretation of the treaty reflects the will of the signatories.[84] The *Worcester* decision also stands for the proposition that the federal government plays the primary role in relations with Indian tribes.[85]

Over the ensuing years, the canon favoring Indians has only been strengthened. In fact, the canon first developed in *Worcester* has become a "fundamental principle of federal Indian law."[86] Throughout the nineteenth century, the canon was applied to treaties with Indians, and, eventually, the courts began to apply the canon to statutes applicable to Indians as well.[87] For example, in *Choate v. Trapp*, the Supreme Court considered whether lands that were previously owned by Indians were tax-exempt.[88] The lands in question had previously been allocated to individual Indians on a tax-exempt basis, with the understanding that the lands could not be alienated.[89] Congress subsequently removed the restriction on alienation and Oklahoma attempted to tax the lands, arguing that the removal of the restriction on alienation meant that Congress intended for the lands to now be taxed.[90] The Court rejected Oklahoma's arguments. First, notably, the Court applied the rationale developed in *Worcester* to statutes. Second, the Court elaborated on the method of interpretation first used in *Worcester*, explaining that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor

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also Peter S. Heinecke, Chevron *and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1026 (1993) (explaining Justice McLean's statement is "the classic formulation of the canon").

82. *Indian Canon Originalism*, *supra* note 80, at 1109.

> The fact that Indian treaties were written in English, a language unfamiliar to the tribes, gave the United States significant leverage when negotiating treaty terms. If read according to its plain meaning, the resulting text would often give the federal government an overwhelming advantage in its relationship with the signatory tribe.

Id. at 1118.

83. *Id.* at 1113.
84. *Id.* at 1118.
85. *Worcester*, 31 U.S. (6 Pet.) at 561.
86. *Indian Canon Originalism*, *supra* note 80, at 1103.
87. *Id.*
88. Choate v. Trapp, 224 U.S. 665, 667 (1912).
89. *Id.* at 672.
90. *Id.* at 667–75.

of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."[91]

Ultimately, because of the federal government's "wardship"[92] over tribes, the Court in *Felix v. Patrick* explained that tribes and Indians were "entitled to a special protection in [the federal government's] courts."[93] Although tribes are to receive special protection for these reasons, federal courts still give deference to Congress, as Congress has plenary authority over tribes.[94] In fact, the Supreme Court explained that the Indian canons "are rooted in the unique trust relationship between the United States and the Indians."[95]

Today, the canons of construction of Indian law require that (1) "treaties . . . be liberally construed in favor of the Indians," (2) "all ambiguities . . . be resolved in [Indians'] favor," (3) "treaties . . . be construed as the Indians would have understood them," and (4) "tribal property rights and sovereignty [be] preserved unless Congress's intent to the contract is clear and unambiguous."[96] These canons have been applied by the courts over the ensuing decades to protect tribal rights from infringement by other sovereigns and individuals.[97] Ultimately, the Court has broadly applied the canons of construction, and only declined to apply the canons where such application would be inconsistent with the purposes of the relationship between Congress and the tribe(s) at issue.[98]

One may argue that the Indian canons of construction are no longer applicable given that the conditions that led to their development have changed. However, the Supreme Court continues to justify

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91. *Id.* at 675.
92. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–17 (1831).
93. Felix v. Patrick, 145 U.S. 317, 330 (1892).
94. United States v. Kagama, 118 U.S. 375 (1886).
95. Cty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). For a discussion of the federal trust relationship between tribes and the federal government, see *infra* subsection III.A.1.
96. FRICKEY ET AL., *supra* note 76, at 113–14 (citations omitted). At least one author, however, has suggested that the canons may be condensed into a single rule, as "[i]n practice, the apparent multiplicity of 'Indian canons' is ultimately reducible to the single rule of construction, often emphasized by the Supreme Court, that Indian treaties should be interpreted from the perspective of the signatory tribe." *Indian Canon Originalism*, *supra* note 80, at 1104.
97. Heinecke, *supra* note 81, at 1025–29. The courts have generally declined to apply the canons of construction if it is determined that there would be no benefit to the tribe(s) involved. *Id.* at 1029.
98. *Id.* at 1029. *But cf. Indian Canon Originalism*, *supra* note 80, at 1103 ("Federal courts continue to use the Indian canon today, although some commentators worry that it has 'degraded' from a strong preference in favor of the tribe into 'a weak end-of-the-game tiebreaker.' Indeed, the Supreme Court recently suggested that the Indian canon is not a 'mandatory rule[ ],' but is instead merely a 'guide[ ] that need not be conclusive.'" (citations and internal quotation marks omitted)).

application of the canons for a couple of reasons. First, the Court has explained that continued use of the canons is justified because application protects "the weak and defenseless [Indians] who are the wards of the nation, dependent upon its protection and good faith."[99] Also, the Court has justified such continued use since the canons are protective of tribal "sovereignty and . . . independence."[100] Application of the canons in the context envisioned by this Article is consistent with the Court's second justification. Because climate change has the capacity to interfere with—if not substantially injure, in some instances—the political and cultural sovereignty of tribes,[101] application of the Indian canons of construction to the treaties discussed earlier has the potential to assist in the protection of tribal "sovereignty and independence." One scholar has given another justification for the continued application of the canons, explaining that "[t]he Indian canon rests on far more secure foundations than liberal values or structural inferences—it reflects judicial fidelity to the original meaning of the Indian treaties themselves."[102]

Admittedly, courts' interpretations of treaties have not been uniform nor have they followed one specific test.[103] Nonetheless, treaties still constitute the "supreme Law of the Land,"[104] and they have occasionally been found to provide rights of action for equitable relief against non-contracting parties.[105] Ultimately, some scholars have concluded that "Indians fought hard, bargained extensively, and made major concessions in return for such rights. Treaties can, therefore, properly be regarded as negotiated contracts of a high order."[106] It is therefore appropriate that courts should continue to give such hard-fought-for rights effect.

C. Considering Treaty Language Within a Climate Change Context

As discussed above, climate change threatens the natural resources and infrastructure of many tribal communities, including the

99. McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)) (internal quotation mark omitted). Notably, some scholars have criticized this first justification for application of the canons as "outmoded" given that it treats tribes as disadvantaged minorities. *Indian Canon Originalism*, *supra* note 80, at 1105.
100. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).
101. *See* Tsosie, *supra* note 8.
102. *Indian Canon Originalism*, *supra* note 80, at 1121.
103. Wilkinson & Volkman, *supra* note 11, at 608 (explaining the ad hoc federal precedent on how to interpret treaties).
104. *See* U.S. CONST. amend. VI; Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).
105. *See* United States v. Winans, 198 U.S. 371, 377 (1905).
106. Wilkinson & Volkman, *supra* note 11, at 603.

Swinomish Indian Tribal Community and the Nez Perce Tribe. Given such a profound threat to the tribal environment, the question of whether tribal treaties might be used by tribes to provide some legal shelter to protect threatened resources arises. To answer this question, specific treaty language must be considered. The question of whether treaties can be used by tribes to protect resources threatened by climate change is a highly individualistic question requiring consideration of an individual tribe's treaty. The treaty language of treaties between the United States and two Tribes was examined above, which revealed there are some commonalities between the treaties and some notable differences.

First, both Tribes have treaty language ensuring the Tribes' right to take fish at the usual and accustomed places. Such provisions were important for tribes of the Pacific Northwest given the high value such communities placed on their fisheries, both for subsistential and cultural reasons. Further, federal courts have already acknowledged the importance of such provisions in finding that the relevant tribes did have an enforceable right to fish.[107] Accordingly, based on past court decisions, an enforceable treaty right to fish exists for these tribes.

In the context of climate change, however, the question becomes whether the treaty language requires the federal government to take affirmative action to protect fisheries in the region from the impacts of climate change. The answer to this question is not as clear. As discussed above, treaty provisions are to be interpreted as Indians would have understood them. Based on the importance of fish to many tribes both historically and contemporaneously, it seems reasonable that the tribes negotiating for such provisions would have assumed that fisheries would exist in perpetuity. It also seems reasonable that such tribes would have assumed that the federal government would not interfere with the availability of such fish. Accordingly, should a tribe be able to demonstrate that the federal government's actions or policies are interfering with the availability of its treaty-guaranteed fishing rights then such a tribe might have a potential argument based on the treaty itself.[108]

Next, the Nez Perce Treaties differ from the Swinomish Treaty in that the Nez Perce Treaties provide additional detail on the management of infrastructure and natural resources, such as timber. Specifically, Article VIII of the 1863 Nez Perce Treaty specifies that the

107. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

108. Should a tribe wish to examine the possibility of a breach of federal trust responsibility claim based on its treaty, it is notable that both the treaties between the Swinomish and Nez Perce go on to detail several ways in which the federal government was to have control over the reservation—such as through allotment and the establishment and management of infrastructure for a set period of time.

infrastructure shall be "held and managed" by the federal government.[109] This language is important because it spells out an actual role for the federal government to play in managing infrastructure on the reservation. Accordingly, assuming such infrastructure and federal role exist today, the Tribe may be able to enforce such a treaty right given the specificity of the treaty language. Similarly, the Nez Perce Treaties provide substantial detail regarding the role that the federal government is to play in managing the tribal timber resources. Although these provisions do not use the term "manage" or "control," the Tribe could argue that the federal government is under a duty to manage the timber resources to the benefit of the Tribe. In the context of timber resources, therefore, the Tribe may be able to argue that the treaty requires the federal government to act in its best interest. As a result, in addition to claims related to fish, the Nez Perce's treaty is sufficiently detailed enough to potentially give rise to other claims related to certain infrastructure with the reservation, as well as the Tribe's timber resources. The fact that the Indian canons require ambiguous language to be read in favor of the tribes would support this conclusion.

Ultimately, the answer to this question is that, yes, under certain circumstances, tribes may be able to rely on their treaties to bring claims against the United States requesting action to protect key tribal resources mentioned in treaties.

III. POTENTIAL LEGAL ARGUMENTS BEYOND THE TREATIES THEMSELVES

To fully understand whether this conclusion is viable, however, it is helpful to consider other legal claims tribes may pursue pursuant to their treaty rights. Ultimately, it may be that treaties between the United States and tribes, by virtue of having attributes of both international and domestic law, may be truly sui generis.[110] However, despite their uniqueness, consideration of potential claims based on both domestic law and international law is helpful, as courts in both realms have sought to interpret and apply such treaties.

This Part of the Article explores whether there are potentially enforceable legal arguments that tribes might make in order better protect themselves against the impacts of climate change. Before focusing on what may be legally enforceable arguments, however, it should be noted that there is a moral dimension to such arguments. For many tribes, treaties constitute "'sacred text[s]' that represent[ ] the moral obligations of the United States to racially and culturally distinct groups that have been treated unjustly by the dominant soci-

109. 1867 Treaty with the Nez Perce, *supra* note 53, at 651.
110. Tsosie, *supra* note 8, at 1623.

ety."[111] Accordingly, for tribes turning to their treaty rights, there is a moral, as well as a legal dimension, to their claims.[112] In fact, "Presidents from Washington to Nixon have characterized the Nation's commitments to Indians in moral terms."[113] Some scholars have explained that "[m]orality and good faith are not notions which can be dispensed with lightly, for they have played a major part in the development of our jurisprudence."[114] By focusing on the legal aspects of any potential claim, the Article does not seek to diminish the moral importance of treaties, but rather to explore arguments that might prove to be successful for a tribe in court or at the negotiating table.

A. Domestic Law: The Federal Trust Responsibility

As mentioned above and discussed below, there exists a federal trust relationship between the federal government and federally recognized tribes. Where present, the trust relationship requires the federal government to act in the best interests of tribes. Should the federal government breach this trust responsibility, tribes may bring a claim against the federal government, assuming certain criteria are met. Accordingly, in determining whether treaties are helpful tools for tribes searching to protect their resources from the negative impacts, an examination of the federal trust relationship and its potential application in this context is necessary.

1. Historical Development of the Federal Trust Relationship

Like the canons of construction governing the interpretation of treaty provisions, the federal trust relationship between the federal government and tribes also has its origins in the "ward" relationship between the federal government and tribes.[115] As mentioned above, the Court first styled the relationship between tribes and the federal government as a wardship in *Worcester v. Georgia*.[116] In *United States v. Kagama*, the Court considered whether Congress had the au-

111. *Id*. at 1617.
112. *Id.*
113. Wilkinson & Volkman, *supra* note 11, at 659 (citations omitted).
114. *Id.*
115. Heinecke, *supra* note 1, at 1030. *But cf.* Wood, *supra* note 1, at 359 ("Those who believe that the trust doctrine can be useful today in protecting tribal rights could begin purging the trust responsibility of paternalistic guardian-ward language."). The author acknowledges that the federal trust relationship is premised on paternalistic notions, as indicated by the language used by the courts. However, because this Article seeks to explore the doctrine as applied by the courts, it uses the same terminology used by the courts. It is unlikely that advocates would need to explore the historical origins of the federal trust relationship, and, therefore, modern day advocates may be well-placed to pursue purging this "wardship" language in briefs to courts moving forward.
116. 31 U.S. (6 Pet.) 515 (1832).

thority to enact a statute, the Major Crimes Act, which affected the criminal jurisdiction of tribes.[117] The Court ultimately determined that Congress did have this authority, as tribes were the wards of Congress. The Court explained that "[t]hese Indian tribes are the wards of the nation . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."[118] The Court found that Congress has plenary power as a result of this wardship relationship.[119] In *Lone Wolf v. Hitchcock*, the Court elaborated on Congress's power in Indian country, explaining that Congress was obligated to act in good faith when exercising its plenary authority.[120] Interestingly and certainly relevant to the treaties at issue here, the Court has previously explained that one element of the federal trust relationship was to encourage tribes to "abandon their nomadic habits."[121] Accordingly, interpreting treaties to protect against a loss of land would seem to be consistent with this past precedent, as one of the purposes of the second phase of treaty-making was to encourage the permanent settlement of tribes in particular areas.

In *Seminole Nation v. United States*, the Court considered the responsibility of the executive branch under the trust responsibility.[122] At issue in *Seminole Nation* were the Tribe's efforts to recover funds that were embezzled by tribal employees, and the Tribe argued that the Executive Branch was aware of the embezzlement. The Executive Agency argued that it had fulfilled its duties by merely distributing the money.[123] The Court, however, disagreed, finding that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"[124] and that the Executive Branch's dealings were to be judged by "the most exacting fiduciary standards."[125] It would appear that "the Court has repeatedly struck down Executive actions that infringe on Native American rights or that do not live up to a strict fiduciary standard."[126]

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117. United States v. Kagama, 118 U.S. 375 (1886).

118. *Id.* at 383–84.

119. *Id.* at 384.

120. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903). Overall, "The Court has allowed Congress tremendous latitude in its dealings with Native Americans; nevertheless, once Congress has acted, the Court assumes Congress was acting as a guardian." Heinecke, *supra* note 81, at 1032.

121. Cramer v. United States, 261 U.S. 219, 232 (1923).

122. Seminole Nation v. United States, 316 U.S. 286 (1942).

123. *Id.* at 295.

124. *Id.* at 296.

125. *Id.* at 297; *see also* Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) (holding the Executive Branch to a heightened fiduciary duty).

126. Heinecke, *supra* note 81, at 1032.

2. Contemporary Federal Trust Relationship Decisions Based on the Tucker Act

Today, when considering the federal trust relationship, it is important to distinguish between claims brought on the basis of the Tucker Acts (Indian Tucker Act and Tucker Act) and claims brought on the basis of the Administrative Procedure Act (APA). Both of the Tucker Acts require that a claim be based on an express law.[127] Conversely, the APA is typically used to challenge final agency actions alleged to be arbitrary and capricious.[128] In the context of the federal trust relationship, a tribe would likely utilize the Tucker Acts when seeking monetary damages and the APA when requesting injunctive relief.[129] Accordingly, given the differing requirements and remedies provided by these Acts, it is important to examine cases based on these statutes separately. This Article considers both, starting with claims brought on the basis of the Tucker Acts.

Before examining the this first category of cases—claims based on the Tucker Acts—it should first be acknowledged that a claim based on an enforceable duty under the federal trust relationship must be brought within the applicable statute of limitations.[130] In determining when the claim accrues, a court considers when the tribe "was or should have been aware" of the material facts underlying the claim.[131]

There are generally thought to be three categories of claims based on a breach of the federal trust responsibility that can be brought by Indian tribes against the federal government. These three categories include: (1) general trust claims; (2) bare/limited trust claims; and (3)

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127. The Indian Tucker Act provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, law or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (2013). Similarly, the Tucker Act provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2013).

128. 5 U.S.C. §§ 500–596 (2013).

129. Wood, *supra* note 1, at 363–68.

130. Blackfeet Housing v. United States, 106 Fed. Cl. 142, 145–46 (Fed. Cl. 2012).

131. San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (citation omitted).

full trust claims.[132] Some of the Supreme Court's early Indian law decisions, such as *Cherokee Nation*, *Worcester*, *Kagama* and *Lone Wolf*, may form a claim under the first category of trust responsibility cases, a general trust claim.[133] As discussed above,[134] these early Supreme Court cases reflect the basic understanding at the time that the federal government owed a duty of protection to tribes.[135] In *Seminole Nation v. United States*, the Court described the moral dimensions of the federal government's relationship with tribes, explaining that it is "a humane and self imposed policy . . . [under which the federal government] has charged itself with moral obligations of the highest responsibility and trust," and which should be "judged by the most exacting fiduciary standards."[136] In fact, "The [Supreme] Court has consistently characterized the relationship between Congress and the American Indian as 'solemn,' 'unique,' or 'special,' and 'moral.'"[137]

However, the Court typically rejects such claims if the alleged moral obligation is the sole basis of the claim.[138] Courts have denied such claims because, as a sovereign nation itself, the United States must explicitly accept obligations in order to be legally responsible for such obligations.[139] Accordingly, federal courts generally reject arguments based solely on these early cases because they find that the United States has not accepted any sort of obligation over the trust corpus at issue.

The U.S. Supreme Court, however, has also recognized a second category—a claim for breach of a bare or limited trust responsibility. Notably, both *Mitchell I*[140] and *Mitchell II*,[141] involved claims for

132. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW CASES AND MATERIALS 300 (1st ed. 2002).

133. A "general trust claim" refers to a claim based on the relationship formed between tribal nations and the federal government in part due to the Supreme Court's decisions in *Cherokee Nation*, *Worcester*, *Kagama* and *Lone Wolf*. Taken together, these cases stand for the idea that the federal government has restricted tribal expressions of external sovereignty. Because the federal government has limited the ability of tribal nations to exercise their external sovereignty, the federal government therefore owes a duty of protection to tribal nations and a duty to act in the best interests of tribal nations. Because this duty is not premised on any specific congressional statement or enactment and because such a duty has never been found to be legally enforceable against the United States, it is said to be a general duty or a moral obligation.

134. *See supra* subsection III.A.1.

135. Heinecke, *supra* note 81, at 1030.

136. Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

137. Wilkinson & Volkman, *supra* note 11, at 658 (citations omitted).

138. *See, e.g.*, Blackfeet Housing v. United States, 106 Fed. Cl. 142, 148 (2012) (rejecting the Blackfeet Housing Authority's argument that the U.S. Department of Housing and Urban Development had a "general trust relationship").

139. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011).

140. 445 U.S. 535 (1980).

141. 463 U.S. 206 (1983).

monetary relief based on the Tuckers Acts, and, therefore, these cases should be distinguished from claims requesting injunctive relief under the APA, as discussed below.[142] In 1980, the Supreme Court decided *United States v. Mitchell* (*Mitchell I*).[143] In *Mitchell I*, the Court evaluated Section 5 of the General Allotment Act[144] to determine whether the Secretary of the Interior was liable for an alleged breach of trust related to the management of timber resources and related funds.[145] Although the General Allotment Act included language that land was to be held "in trust," the Court concluded that, because the federal government had not agreed to manage the land, only a bare trust existed.[146] In other words, because the Act did not place any affirmative management duties on the federal government, the Supreme Court held in favor of the Secretary. The Court remanded *Mitchell I* to the Court of Claims for a determination of whether government liability might have existed under other statutes.[147]

In 1983, the Supreme Court considered the matter again in *Mitchell II*.[148] *Mitchell II* differed from *Mitchell I*, because in *Mitchell II* the tribes relied on a variety of statutes related to the management of timber resources, which is an area where the federal government has exercised pretty sizeable control.[149] The Supreme Court agreed with the Indian tribe that the federal government had undertaken substantial control over the trust corpus at issue, finding that the statutes in question "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians."[150] Once the Court determined that the government had agreed to assume control over the trust corpus at issue, it then looked to the common law of private trusts to assess the government's liability.[151] The Supreme Court's decision in *Mitchell II* is an example of the third category of trust cases—a legally enforceable claim.

In 2003, the U.S. Supreme Court continued to develop its jurisprudence on the question of the federal trust relationship based on the Tucker Acts by releasing two decisions. Both claims requested monetary damages, and, again, can be distinguished from claims requesting injunctive relief, as discussed below.[152] The first of these

142. *See infra* subsection III.A.3.
143. 445 U.S. 535.
144. 25 U.S.C. § 348 (2006).
145. *Mitchell I*, 445 U.S. at 534.
146. *Id.* at 544.
147. *Id.* at 546.
148. 463 U.S. 206 (1983).
149. *Id.* at 209.
150. *Id.* at 224.
151. *Id.* at 226.
152. *See infra* subsection III.A.3.

decisions came in *White Mountain Apache Tribe v. United States*.[153] The claim at issue in *White Mountain Apache* was whether the federal government had failed to adequately manage Fort Apache, which was held in trust for the Tribe, and, if as a result of this mismanagement the Indian tribe was entitled to compensation for the upkeep of Fort Apache.[154] The statute at issue directed the federal government to hold Fort Apache in trust for the Tribe and, importantly, gave the federal government "authority to make direct use of portions of the trust corpus."[155] Therefore, because the federal government had the authority to control and manage the trust corpus at issue—Fort Apache—the Court determined that an enforceable trust relationship existed between the federal government and the Tribe, thereby awarding damages to the Tribe.[156]

The Supreme Court decided a second case related to the federal trust relationship on the same day in 2003—*United States v. Navajo Nation*.[157] Here, the Navajo Nation alleged that the Secretary of the Interior acted inappropriately in his role during the negotiation of mineral leases on the Navajo Nation.[158] The Nation argued that the Secretary violated his fiduciary duty to act in the Nation's best interest under the Mineral Leasing Act of 1938 and other related regulations.[159] The case was first heard by the Court of Federal Claims in 2000 on cross-motions for summary judgment.[160] The Supreme Court did not find in favor of the Navajo Nation. Although the Court acknowledged the unprofessional behavior of the Secretary of the Interior, the Court determined that the Nation had failed to establish that the Secretary was under a binding obligation to manage the trust corpus at issue.[161] The Court explained that the Mineral Leasing Act of 1938 gave the Nation the right to negotiate leases and, as a result, the Secretary of the Interior did not have full authority over management of the resources in question.[162]

On remand to determine whether other statutes created an enforceable duty, the U.S. Court of Appeals for the Federal Circuit held that federal common law and other statutes did create an enforceable trust responsibility in the case against the federal government.[163]

153. 537 U.S. 465 (2003).
154. *Id.* at 468.
155. *Id.* at 475.
156. *Id*. at 475–76.
157. 537 U.S. 488 (2003).
158. *Id.* at 500.
159. *Id*.
160. *Navajo Nation*, 46 Fed. Cl. 217 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488.
161. *Navajo Nation*, 537 U.S. at 507–08.
162. *Id*. at 507.
163. *Navajo Nation*, 501 F.3d 1327, 1345–46 (Fed. Cir. 2007), *rev'd*, 556 U.S. 287 (2009).

The Supreme Court reversed, explaining that "[b]ecause the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating."[164]

Based on the Court's analysis in *White Mountain Apache* and *Navajo Nation*, in determining whether there is an enforceable trust relationship that falls into the third category discussed above, the Court focuses its analysis on the amount of control by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, as in *White Mountain Apache*, the Court found in the Tribe's favor. Therefore, scholars have concluded that "[a]fter these cases, finding a 'network' of statutes to base a breach of trust damages claim depends on: (1) express statutory language supporting a fiduciary relationship; and (2) comprehensive control over government property."[165]

On June 13, 2011, the U.S. Supreme Court revisited the question the scope of the federal government's trust relationship in *United States v. Jicarilla Apache Nation*.[166] *Jicarilla Apache Nation* differs procedurally from the previous federal trust relationship decisions in that the appeal to the U.S. Supreme Court came as a writ of mandamus by the United States to vacate an Order requiring the United States to release certain documents in a breach of trust claim brought against the federal government in the Court of Federal Claims. In this regard, the decision differs from those discussed above because it is not necessarily a claim for monetary relief under one of the Tucker Acts. However, the Court applied its precedent from those cases, and, therefore, it is helpful to consider the Court's development of the federal trust relationship jurisprudence in this case.

At issue in the underlying litigation is the federal "[g]overnment's management of the [Nation's] trust accounts from 1972 to 1992."[167] Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation.[168] "The Tribe argues, however, that the common law also recognizes a fiduciary exception to the attorney-cli-

164. *Navajo Nation*, 556 U.S. at 302.

165. DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW, 342 (6th ed. 2011).

166. 131 S. Ct. 2313 (2011). Because the underlying case in this matter involves Indian trust fund management, the Court's decision might properly be limited to such types of cases, which are not the focus of review in this Article. However, given that *Jicarilla Apache Nation* represents the Court's most recent discussion of the federal trust relationship, a review of the Court's analysis is still helpful in understanding the contours of that relationship.

167. *Id.* at 2319.

168. *Id.*

ent privilege and that, by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed."[169]

Accordingly, the U.S. Supreme Court considered whether the common law fiduciary exception to the attorney-client privilege applied to the United States when it acted as trustee for tribal trust assets.[170] The Court held that the exception did not apply, as the federal government acts as a private trustee in very limited circumstances.[171] Notably, the Court described the case as involving a claim to a "general trust relationship,"[172] which, as discussed above, the Court has never found to be enforceable against the federal government. Furthermore, the Court explained that "[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' see, *e.g.*, 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law."[173] In fact, Congress may use the term "trust" in describing its relationship with tribes, but this does not mean that an enforceable trust relationship exists.[174] Rather, in order to be legally liable, the government must consent to be liable.[175] This is because the trust relationship is a sovereign function of Congress,[176] as the trust relationship was designed to benefit both the tribes and the federal government.[177] The Court reasoned that the federal government does not act as a private trustee when it is fulfilling its statutory duties.[178] Ultimately, the Court explicated that while common law principles may "inform our interpretation of statutes and to determine the scope of liability that Congress has imposed . . . the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'"[179]

Despite the Court's determination that the federal trust relationship did not exist in the matter at bar, however, the Court's majority opinion did acknowledge the continued existence of the federal trust relationship, explaining, "We do not question 'the undisputed exis-

169. *Id.* at 2321.
170. *Id.* at 2321–22.
171. *Id.* at 2326.
172. *Id.* at 2318.
173. *Id.* at 2323.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 2327.
178. *Id.* at 2318.
179. *Id.* at 2325 (quoting *Mitchell II*, 463 U.S. 206, 226 (1983)). The Court went on to explain that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id. But cf.* Wood, *supra* note 1, at 361 (explaining that the federal government owes tribes a common law duty of protection).

tence of a general trust relationship between the United States and the Indian people.' . . . Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes."[180] Justice Sotomayor, in her dissent, went on to explain:

> Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. . . . Our decisions over the past century have repeatedly reaffirmed this "distinctive obligation of trust incumbent upon the Government" in its dealings with Indians. . . . Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[181]

Following the Court's decision in *Jicarilla Apache Nation*, the lower federal courts have required that a tribe asserting the federal trust responsibility as the basis of its claim against the federal government must first assert a substantive source of law that requires the federal government to act as a fiduciary or undertake certain obligations.[182] Absent such an explicit requirement neither the government's control nor common law obligations matter in terms of recognizing an enforceable trust relationship against the United States.[183] "Only once a statutory duty has been identified can common law trust principles potentially have relevance in defining the scope of that duty . . . ."[184] Some courts, however, have determined that they may "refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning."[185] But, yet, tribes cannot resort to the common law in order to override the express language of the treaty or statute at issue.[186]

Furthermore, the federal courts have explained that mere federal oversight does not amount to the necessary day-to-day control over operations typically required for a successful claim based on the federal trust relationship.[187] Some courts have spoken of applying the Indian canons of construction to resolve any ambiguities in determining whether or not a trust relationship exists.[188] Also, in determining whether a particular law provides a cause of action, it is not necessary that the law explicitly provide a private right of action.[189] In fact, "All

180. *Jicarilla Apache Nation*, 131 S. Ct. at 2324 (citations omitted).
181. *Id.* at 2334 (Sotomayor, J., dissenting) (citations omitted).
182. *See, e.g.*, Blackfeet Housing v. United States, 106 Fed. Cl. 142, 149 (2012).
183. *Id.*
184. *Id.* at 150.
185. Fletcher v. United States, 730 F.3d 1206, 1210 (10th Cir. 2013).
186. *Id.* at 1208.
187. *See, e.g.*, *Blackfeet Housing*, 106 Fed. Cl. at 151.
188. *Fletcher*, 730 F.3d at 1210–11.
189. *Id.* at 1211.

that's required for a private right of action to exist is a showing the statute at hand 'can fairly be interpreted' to permit it."[190]

A recent federal trust responsibility case that may be similar to claims brought by tribes on the basis of their treaties is *Hopi Tribe v. United States*.[191] Here, the Hopi Tribe brought suit to recover monetary damages for breach of trust, similar to the cases discussed above, alleging that the federal government failed to provide water for the Tribe's reservation that was free from arsenic contamination.[192] The Tribe based its complaint on the Executive Order creating its reservation and a subsequent Act of Congress that incorporated the requirements of that Executive Order by reference.[193] Although treaties and executive orders are different legal instruments, both were used by the federal government to create Indian reservations. "According to plaintiff, by establishing the Reservation and holding the land in trust, the Executive Order of 1882 and the Act of 1958 created a duty on the part of defendant to protect the trust property, including the Reservation's water supply."[194] In response, the United States argued that the Tribe failed to identify a legally enforceable source of law requiring the United States to provide a certain quality of water for the reservation.[195] Although the federal government acknowledged that it held the water in trust for the Tribe, the government argued that the general trust relationship did not create an enforceable duty to provide a certain level of water quality.[196] The Tribe responded by asserting that the federal government played a sufficient role in the management of the Tribe's water resources.[197]

In considering the Tribe's claim, the Court of Federal Claims (CFC) focused on "whether plaintiff has met the jurisdictional test for identifying a money-mandating trust duty."[198] Before reaching the legal question at hand, the CFC first determined that the federal government waived its immunity from suit under the Indian Tucker Act.[199] The CFC then went on to consider the precise trust duty at issue, recognizing that the Supreme Court has "consistently defined trust duties by closely examining the statutes that impose them."[200] The CFC therefore considered the language in the Executive Order and related statute to look for trust language and the specific authority of the fed-

190. *Id.* (citation omitted).
191. 113 Fed. Cl. 43 (2013), *aff'd*, 782 F.3d 662 (Fed. Cir. 2015).
192. *Id.* at 44.
193. *Id.* at 45.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 45–46.
198. *Id.* at 47.
199. *Id.*
200. *Id.* (citations omitted).

eral government.[201] The court explained that, in order to have an enforceable trust relationship, the Tribe must first identify a substantive source of law and then show that the law mandates damages.[202] Ultimately, the CFC determined that the Executive Order and related act do not speak to a duty to protect the reservation's water.[203] The CFC rejected the Tribe's argument that liability existed because of the high degree of control the federal government exercised over the water, explaining that "[t]he Federal Government's liability cannot be premised on control alone."[204] Further, the CFC determined that the federal government must explicitly accept the duty in order to be liable, which the federal government had not done in the case of providing a certain level of water quality for the Tribe's reservation.[205] Therefore, the CFC concluded that the Executive Order and statute cited by the Tribe did not impose a duty on the federal government that amounted to a compensable breach of the federal trust relationship.[206]

The U.S. Court of Appeals for the Federal Circuit upheld the CFC's determination, finding that neither the Executive Order nor the related Act created an enforceable substantive right.[207] In its opinion, the Federal Circuit started by detailing the language of the Executive Order at issue—that the land be "withdrawn from settlement and sale, and set apart for the use and occupancy of the [Hopi] and other such Indians as the Secretary of the Interior may see fit to settle thereon."[208] This language is helpful to the court's analysis, as the language does not specifically contemplate creating an enforceable trust relationship with and against the federal government. The court went on to acknowledge that the Tribe owned four of the public water systems at issue, while the federal government owned and operated one system.[209]

Before discussing its legal conclusions, the court explained that the Tribe needed to demonstrate that the federal government had waived its sovereign immunity. While the Indian Tucker Act can amount to a waiver of sovereign immunity, it does not create any substantive rights.[210] Accordingly, the Tribe must identify a substantive source of law in order to establish the court's subject matter jurisdiction. The court therefore explained that a two-step test existed to establish ju-

201. *Id.* at 48.
202. *Id.* at 48–49.
203. *Id.* at 49.
204. *Id.* (quoting *Navajo Nation II*, 129 S. Ct. 1547 (2009)).
205. *Id.* at 50.
206. *Id.*
207. Hopi Tribe v. United States, 782 F.3d 662, 665 (Fed. Cir. 2015).
208. *Id.* (internal quotation marks omitted) (citing INDIAN AFFAIRS: LAWS AND TREATIES 805 (Charles J. Kappler ed., 1904)).
209. *Id.* at 666.
210. *Id.*

risdiction on the basis of the Indian Tucker Act: "First, the claimant 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.'"[211] Only after this first step is accomplished will the court go on to consider whether the substantive source of law mandates money damages.[212]

In this case, the court never went to the second step of the test, as it determined that the Tribe failed to identify a substantive source of law that created specific fiduciary duties. The court explained that "[t]o establish that the United States has accepted a particular fiduciary duty, an Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and 'bear[ ] the hallmarks of a conventional fiduciary relationship.'"[213] The court therefore examined the statutes and Executive Order relied on by the Tribe to determine whether they established "comprehensive responsibilities" with which the federal government was required to comply. In concluding that "these provisions [asserted by the Tribe] do not establish a fiduciary duty to ensure adequate drinking water,"[214] the court explained that neither the Executive Order nor the statute referred to managing drinking water on the reservation.[215] The Tribe argued that the language at issue should be read in light of the Supreme Court's decision in *Winters v. United States*.[216] While the court recognized that the *Winters* Doctrine may give the federal government the ability to enjoin others from restricting the flow of water into the reservation, the doctrine does not create an affirmative duty on the part of the federal government to ensure water quality.[217] Furthermore, while the Tribe pointed to several other statutes that allegedly demonstrated the federal government has substantial control over water resources on the reservation, the court explained that a court cannot infer that the federal government accepted an affirmative fiduciary duty merely because it exercises substantial control in a certain area.[218] Accordingly, at best, the Tribe only demonstrated the existence of a bare trust, and thus there was no substantive law creating a fiduciary obligation. Therefore, the court never reached the second

211. *Id.* at 667 (quoting *Navajo II*, 556 U.S. at 290 (2009)).
212. *Id.*
213. *Id.* (quoting *Navajo II*, 556 U.S. at 301) (internal quotation marks omitted).
214. *Id.* at 668.
215. *Id.* at 669.
216. *Id.* In *Winters*, the Court held that Congress must have intended to reserve water rights for the Indian reservation, even though Congress did not explicitly mention such rights in setting aside land for the reservation. Winters v. United States, 207 U.S. 564 (1908).
217. *Hopi Tribe*, 782 F.3d at 669 ("[T]he Act still does not impose a fiduciary duty to manage water quality on the Hopi Reservation, absent third-party interference.").
218. *Id.* at 671.

question of whether there is a money-mandating provision of the fiduciary obligation.[219]

3. Contemporary Federal Trust Relationship Decisions Based on the APA

Bringing a money-mandating claim based on one of the Tucker Acts is not the only type of claim available to tribes considering a breach of fiduciary trust claim, however. Tribes may also consider a claim based on the APA. At least one scholar has argued that the federal trust relationship should be examined from a property perspective, as "[i]t is a principle that arises from the native relinquishment of land in reliance on federal assurances that retained lands and resources would be protected for future generations. It bears rough analogy to nuisance and trespass law."[220] By putting the trust relationship within the context of statutes as required by the Tucker Act line of cases discussed above, courts are left to interpret the will of Congress rather than what might be best for tribes.[221] Alternatively, the APA does not require an explicit law in order for enforcement to occur, and therefore, in general, trust enforcement based on the APA tends to be broader than enforcement based on the Tucker Acts.[222] Accordingly, by moving away from statutory interpretation, courts are given more leeway to "formulate legal principles to carry out the intent of the treaties or other agreements."[223]

Another recent federal trust responsibility case that may prove helpful in understanding the likely success of claims based on the APA and treaties is *Lebeau v. United States*.[224] *Lebeau* relates back to the construction of the Oahe Dam in the 1940s, which resulted in the flooding of substantial land holdings of the Cheyenne River Sioux

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219. *Id.*

220. Wood, *supra* note 1, at 358. Professor Wood goes on to explain that "[o]wnership of land carries corollary rights of government protection—the right to seek judicial redress against harm to property. The Indian trust responsibility is protection for property guaranteed on the sovereign level, from the federal government to tribes." *Id.* Professor Wood suggests that this relationship is not based on a wardship, but rather is a sovereign trust model. *Id.* at 359.

221. *Id.* at 362. Professor Wood further explains:

> When judges equate trust standards with statutory standards, they eliminate the role of the trust responsibility in protecting uniquely tribal interests, and Indian law itself moves towards assimilation because the one potentially powerful tool for protecting unique native interests becomes interpreted as merely a majority standard. And more broadly, when courts define common law duties according to statutory standards, they diminish their own role in protecting native rights, and the balance of power shifts toward Congress.

Id. at 363.

222. *Id.* at 365.

223. *Id.* at 361.

224. No. CIV. 14-4056, 2015 WL 846714 (D. S.D. Feb. 26, 2015).

Tribe and its individual members.[225] In 1954, Congress authorized payments to the Tribe and its affected members, and, in 2000, Congress again offered payment under the Cheyenne River Sioux Tribe Equitable Compensation Act (CRSTECA) after it acknowledged that the payment made in 1954 was inadequate for the value of the land flooded.[226] The plaintiffs in *Lebeau* made several arguments, but, of relevance to this Article, they argued that the United States took the land in question in violation of its trust and fiduciary duties. The United States defended against this argument by asserting that there was no waiver of the federal government's sovereign immunity.[227] The plaintiffs argued that sovereign immunity was waived under the APA.[228]

The court began by explaining that, while sovereign immunity is usually an affirmative defense, it becomes a jurisdictional issue in lawsuits against the federal government.[229] The APA has a six-year statute of limitations.[230] The federal government's waiver of sovereign immunity, therefore, only lasted for six years from the time the claim accrued.[231] On the plaintiff's claim that the federal government failed to meet its trust obligation to limit the alienation of the land at issue, they used the 1868 Treaty of Fort Laramie, along with the General Allotment Act and the Act of March 2, 1889, to assert the existence of such a trust obligation.[232] A treaty was therefore central to the plaintiff's claims of an enforceable trust obligation. However, the court rejected the plaintiffs' claim, finding that, even if an enforceable trust relationship existed on the basis of these sources of law, the claim accrued when the land in question was taken via the flooding.[233] Accordingly, the six-year statute of limitations had long since expired.[234] The plaintiffs did make two arguments asserting the extension of the statute of limitations—repudiation and the existence of continuing violations.[235] The court rejected both arguments, however, finding that the repudiation doctrine did not apply because the federal government did not hold any funds in trust for the plaintiffs and that

225. *Id.* at *1.
226. *Id.*
227. *Id.* at *2.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at *3 ("[A] plaintiff's claim 'accrues' for purposes of § 2401(a) when the plaintiff 'either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim.'" (quoting Izaak Walton League of Am., Inc. v. Kimbell, 558 F.3d 751 (8th Cir. 2009))).
232. *Id.* at *4.
233. *Id.*
234. *Id.*
235. *Id.* at *5–*7.

the plaintiffs failed to demonstrate the existence of continuing violations.[236]

The court's analysis is helpful here because it demonstrates reluctance on the part of federal courts to extend the applicable statute of limitations, even in situations such as this case where the court is sympathetic to the claims being brought.[237] Moreover, the court's decision is a reminder that ignorance of potential legal claims is not a defense against the running of a statute of limitations.[238] Accordingly, the case raises the important question of when the statute of limitations began or begins to run on claims related to the negative impacts of climate change.

A more recent case that demonstrates how some courts have conflated claims based on the Tucker Acts and APA is *El Paso Natural Gas Co. v. United States*.[239] In *El Paso Natural Gas*, the El Paso Natural Gas Company brought a complaint against the United States arguing the federal government failed to meet its obligations under certain federal statutes.[240] The Navajo Nation intervened in the case because one of the dumps at issue was located in Tuba City, which is inside the Navajo Nation reservation.[241] The Nation alleged violations of various federal environmental statutes including: the APA, the Indian Agricultural Resources Management Act, the Indian Lands Open Dump Cleanup Act, and also specific Navajo law, including treaty provisions and the related federal trust responsibility.[242] The United States moved for partial dismissal and the court ultimately granted the motion after it determined the Nation failed to identify a specific trust duty in relevant part.[243]

In reaching its decision to grant the federal government's motion for partial dismissal, the court reviewed the Nation's claims. In relevant part, the Nation made arguments based on its 1850 treaty with the United States.[244] This treaty granted the federal government the exclusive right to regulate trade with the Nation, and the federal government promised to "so legislate and act as to secure permanent prosperity and happiness of said [Navajo] Indians."[245] The Nation argued that the federal government failed to fulfill its trust responsibili-

236. *Id.*
237. *Id.* at *9.
238. *Id.* at *4 ("Additionally, ignorance of legal rights is insufficient to toll the statute of limitations." (citing DuMarce v. Scarlett, 446 F.3d 1294 (Fed. Cir. 2006))).
239. 774 F. Supp. 2d 40 (D.D.C. 2011).
240. *Id.* at 43.
241. *Id.*
242. *Id.* at 42–43.
243. *Id.* at 42–44.
244. *Id.*
245. *Id.* at 44 (internal quotation marks omitted).

ties based on both the treaty and federal common law.[246] The Nation, therefore, specifically linked its treaty rights to the federal trust responsibility. Further, the Nation claimed that the federal government's sovereign immunity was waived on the basis of the APA.

The court rejected the Nation's claim. First, the court explained that the APA could not be used as a basis for a waiver of the federal government's immunity in this case because the Nation failed to identify a final agency action.[247] However, despite the fact that the Nation argued for a waiver on the basis of the APA, the court applied Tucker Act cases—such as *Navajo Nation* and *White Mountain Apache*—to determine whether there was a breach of the federal trust relationship.[248] Accordingly, by applying the Tucker Act line of cases, the court determined that the Nation had to identify a specific fiduciary duty.[249] Ultimately, the court concluded, "[W]hile the 1850 Treaty and other federal statutes clearly create a fiduciary relationship between the Tribe and defendant, they do not create an independent cause of action."[250] The court went on to explain that under the treaty, nothing specified that the land in question was under the control of the federal government.[251] Moreover, the court explained that a common law trust obligation did not apply.[252] Instead, the court held that the treaty in question, at best, established a limited trust responsibility and not an enforceable duty.[253]

Accordingly, this case identifies two helpful trends for tribes interested in bringing an APA claim based on breach of federal trust relationship claim and in relation to climate change. First, a tribe considering such a claim must clearly identify the final agency action that allows it to sue under the APA, requiring the waiver of federal sovereign immunity. Second, tribes wishing to utilize the APA are limited to a six-year statute of limitations and therefore should act as soon as the impacts of climate change are identifiable within the tribe's territory.

4. Application of the Federal Trust Relationship Within the Climate Change Context

Having now examined the historical development of the federal trust relationship, in addition to the two lines of cases—Tucker Act- and APA-based cases—we can now turn to a discussion of how the

246. *Id.* at 51.
247. *Id.*
248. *Id.* at 51–53.
249. *Id.* at 51.
250. *Id.* at 52.
251. *Id.*
252. *Id.* at 52–53.
253. *Id.*

federal trust responsibility might be used in conjunction with tribal treaty provisions to provide legal protection against the negative impacts of climate change. Following her review of tribal trust claims based on the APA, Professor Woods concludes that "[t]he successful cases for tribes are those in which the judge clearly identifies the discretion in the statute, understands the Indian interest, and recognizes that the Indian interest demands protection greater than that normally provided by the agency."[254] Importantly, beginning in 1980, federal courts began to conflate APA claims for injunctive relief with claims for money damages under the Tucker Acts.[255] Accordingly, advocates utilizing an APA-based claim would be wise to ensure to the greatest extent possible that the court understands the difference between the two. When the different criteria between the two types of claims are made clear to the court, tribal advocates increase their likelihood of success.[256] If tribes can therefore identify a final federal action related to the impacts of climate change that occurred within six years of the time they desire to bring a claim for a breach of the federal trust relationship, then such tribes might be successful under the more lenient APA-based federal trust relationship precedent. Because the potential final agency action that might trigger such a claim is unknown, this Article cannot speculate as to whether the treaty provisions of the Swinomish and Nez Perce Tribes discussed above[257] would meet the criteria for a successful breach of trust claim with the APA serving to waive federal sovereign immunity.

However, the same is not true for money-mandating claims attempting to use the Tucker Acts for a waiver of federal sovereign immunity. Admittedly, the requirement under the courts' interpretation of the Tucker Acts that a tribe identify a specific statutory duty before a trust claim is actionable for monetary damages can be a significant barrier to tribes seeking to enforce the trust relationship in relation to climate change.[258] Even under the more strict analysis applied for claims based on the Tucker Acts, however, tribes may be able to prevail. To do so, the federal courts generally require that the tribe establish a specific law mandating federal action, and once such a law has been identified the tribe must also demonstrate that the federal government has significant control over the resources at issue.[259]

254. Wood, *supra* note 1, at 362.

255. *Id.* at 365.

256. *Id.* at 368. Professor Wood goes on to explain that "[t]ribal lawyers should clarify that claims brought under the APA may rely on a common law trust duty interjected as an interstitial obligation within a statutory scheme lacking explicit trust language." *Id.*

257. *See supra* section II.A.

258. Wood, *supra* note 1, at 367.

259. *See, e.g.*, White Mountain Apache v. United States, 537 U.S. 465 (2003).

To start the analysis, the language of the Swinomish and Nez Perce treaties should be examined to determine whether there is any specific language creating a trust. As previously explained, both sets of treaties have language indicating the tribes have the right to take fish at the usual and accustomed places. This language is certainly specific and, at the very least, implicitly suggests the federal government undertook an obligation to ensure the tribes had access to fisheries. So, it is possible the treaties establish the specific language required by the precedent discussed above.

However, the Tribes may have difficulty demonstrating that the federal government has extensive control over the fish guaranteed to the Tribes. In general (and certainly relevant to the climate change context), a tribe may be able to argue that the federal government exercises substantial control over the tribal environment. For example, over the past several decades, the federal government has exercised substantial control over the environment through a network of federal environmental statutes,[260] such as the Clean Water Act[261] and Clean Air Act.[262] Most of the federal environmental laws apply, at least in some part, to tribes.[263] Moreover, "Court decisions make clear that the entire federal government is blanketed by the trust responsibility, and that every federal agency, not just the Bureau of Indian Affairs, must fulfill the trust responsibility in implementing statutes."[264] In fact, at least one scholar has written comprehensively about how the EPA might meet its federal trust responsibility to tribes through enforcement of the Clean Water Act.[265] Accordingly, while federal control is not enough in and of itself to amount to an enforceable trust relationship,[266] the combination of this extensive federal control over the tribal environment coupled with the language contained in the treaties may be enough to enable a claim of an enforceable trust relationship.

260. Wood, *supra* note 1, at 360 ("Unlike historical times, there is now a detailed statutory environmental scheme to control actions that harm the environment—a scheme that includes the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, the Endangered Species Act, the National Environmental Policy Act, and more." (citations omitted)).

261. Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251–1388 (2012)).

262. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7431 (2012)).

263. *See Environmental Protection in Indian Country Portal, Tribal Assumption of Federal Laws*, EPA, http://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas (last updated Oct. 28, 2015), *archived at* http://perma.unl.edu/LUR2-6X82.

264. Wood, *supra* note 1, at 360 (citations omitted).

265. *See generally* Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

266. *See supra* notes 34–35, 245 and accompanying text.

Such a general argument in relation to fish is unlikely to be persuasive. Rather, it would seem more likely that a court would treat such an argument from either of the Tribes in a manner similar to the court's decision in *Hopi Tribe v. United States*,[267] as discussed above. There the Tribe argued that the federal government breached its federal trust responsibility to the Tribe by failing to provide a certain standard of water quality. In relevant part, the court recognized that the *Winters* Doctrine may guarantee access to water for the Tribe and even give the federal government authority to enjoin others from taking the water, but that such a doctrine did not require the federal government to provide a certain standard of water.[268] So too here, the treaty provisions guaranteeing the Tribes a right to take fish may allow the federal government to intervene to ensure that others do not interfere with the Tribes' right to fish. However, there is nothing in the Treaties requiring that the federal government maintain a certain quality or quantity of fish. Accordingly, a breach of federal trust relationship claim based on the treaty language specific to the right to fish for the Swinomish and Nez Perce Tribes is unlikely to result in a money-mandating decision from a federal court.

Interestingly, however, the Nez Perce may have a stronger claim related to their infrastructure and timber resources. Article III of the 1863 Treaty between the Nez Perce and the United States provides extensive guidance on how the land shall be allotted and distributed to individual members of the Tribe.[269] Further, Article V of the 1863 Treaty states that the federal government shall provide significant infrastructure development, including construction of a school, hospital, blacksmith's shop, houses, and shall supply certain professionals to assist on the reservation for a set period of time.[270] Article VIII says that the federal government shall have the right to develop roads, hotels, and stage stands as necessary for the public good.[271] Article VIII also says that the ferries and bridges on the reservation "shall be held and managed for the benefit" of the Tribe, and that the "rents, profits, and issues" resulting from federal regulation on the reservation "shall inure to the benefit" of the Tribe.[272] Under Article VIII, the federal government possesses the right to use timber on the reservation.[273] The federal government also agreed to reserve "all springs or fountains not adjacent to, or directly connected with, the streams or rivers

267. 782 F.3d 662 (Fed. Cir. 2015).
268. *Id.* at 669.
269. 1867 Treaty with the Nez Perce, *supra* note 53, at art. III. On April 17, 1867, the United States Senate ratified the Treaty, and on April 20, 1867, President Andrew Johnson accepted, ratified, and confirmed the treaty. *Id.*
270. *Id.* at art. V.
271. *Id.* at art. VIII.
272. *Id.*
273. *Id.*

within the lands hereby relinquished," promising to "keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed."[274] Moreover, on August 13, 1868, the Nez Perce and United States entered into another treaty.[275] The 1868 Treaty amended the 1863 Treaty, and Article I of the 1868 Treaty provides for allotments to individual Indians living outside of the reservation.[276] Second, Article II details how the timber resources on the reservation are to be managed.[277]

The language of the 1863 and 1868 Treaties is important to determining whether the Tribe may have an enforceable breach of trust claim based on the Tucker Acts. The first requirement for a successful claim could arguably be met, as the language of these two Treaties is very specific as to certain items such as infrastructure, springs, and timber. The question then becomes whether the second prong of the test could be met—whether the Tribe could establish that the federal government has extensive control over the resources. And, based on the foregoing provisions, it is possible that a court could be persuaded that the federal government has extensive control over these resources given that the Treaties identify what resources the federal government is to control, and provide some guidance on how the resources in question are to be managed. Accordingly, based on the treaty provisions examined, it would seem the Nez Perce has a potentially stronger claim under the Tucker Act than would the Swinomish Indian Tribal Community.

The Nez Perce would not be the first tribe to use treaty provisions as the basis of a breach of federal trust responsibility claim. Some tribes have previously asserted a breach of federal trust responsibility based on a treaty provision, but these tribes have not been successful. For example, in *Uintah Ute Indians of Utah v. United States*, the Uintah Ute Indians of Utah brought a claim against the United States, which, in relevant part, claimed the federal government had violated its trust relationship to the Tribe when it abandoned its use of the forty-eight acres constituting Fort Douglas and then quitclaimed the property to the University of Utah.[278] In its complaint, the Tribe brought several claims against the United States. However, for purposes of this Article, only one of these claims focused on its treaties with the United States—the Tribe argued that the federal government owed it a trust responsibility to the land at issue surrounding

274. *Id.*

275. 1868 Amendatory Treaty, *supra* note 61.

276. *Id.* at art. I.

277. *Id.* at art. II.

278. Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768 (1993).

Fort Douglas.[279] In considering the Tribe's claim, the court first explained that in order to have a compensable taking the Tribe had to demonstrate that its claim to aboriginal title was recognized by the federal government, which it was not.[280] The court then considered whether the treaty at issue created a trust relationship.[281] Ultimately, the court concluded the treaty did not create a trust relationship because it failed to designate aboriginal territory, but rather indicated that the Tribe's reservation boundaries would be established at another time.[282] Further, the court explained that the treaty only created a general relationship between the Tribe and the federal government.[283]

However, notably, the court did not foreclose the idea that a treaty could be the source of an enforceable trust relationship. The court explained that "[a] trust relationship does not depend for its existence on express language in a treaty or statute."[284] Also, the court opined that a trust relationship could have existed once the boundaries were put in place.[285] Accordingly, even though the Tribe ultimately lost its claim that the treaty established an enforceable trust relationship, the court did not reject out of hand the idea that a treaty may do so.

B. Potential Application of International Law

Having examined the application of the federal trust responsibility under domestic law, it is helpful to now consider whether the application of international law may assist in determining whether treaties can be used as a tool to protect tribal resources threatened by climate change. Some scholars have concluded that consideration of international law is important when determining the scope of treaty rights.[286] As explained below, however, given the sui generis nature

279. *Id.* at 783 ("As part of its breach of trust action, plaintiff [the Tribe] argues that the 1849 treaty recognized Indian title and provided for the permissive occupation by the Government of certain Indian lands on which to build agencies and military outposts. These outposts, plaintiff argues, provided benefits to both settlers and Indians by keeping the peace. Plaintiff posits that the 1849 treaty created a trust relationship between the Government and the Uintahs as to those lands. Plaintiff urges that the treaty also vested in plaintiff a right to that trust protection. In other words, when the Government's permissive use ceased, the land would revert to the Indians.").
280. *Id.* at 785–88.
281. *Id.* at 788.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 789.
286. *See, e.g.*, Tsosie, *supra* note 8, at 1625. *But cf.* Wilkinson & Volkman, *supra* note 11, at 620–23 (arguing tribal treaties are not directly analogous to international treaties because (1) the United States and tribes did not bargain on equal terms in the same way that foreign treaties often are; (2) the federal trust responsibility

of tribal treaties with the United States it is unlikely the international law of treaties would be directly applicable to the interpretation of such tribal treaties. Yet, despite this conclusion, consideration of international norms is helpful as such norms may provide direction on how tribal treaties should be interpreted.

As a starting point, it should be acknowledged that the bedrock of international law is that nation states are bound to keep their word under treaties—*pacta sunt servanda*.[287] The British first extended the international law of treaties to North America through their use of treaties with various tribes.[288] The United States eventually adopted the British practice, using treaties to solidify political relationships and, later, to designate pieces of land for Indian occupation.[289] As President George Washington explained to the Senate in 1789:

> It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians . . . .[290]

Initially, treaties between the United States and tribes were made largely as equals, given that the status of the fledging United States was still uncertain.[291] These treaties were used to form alliances and were subject to ratification by the U.S. Senate.[292] Chief Justice Marshall explained that these initial treaties were "formed, as near as may be, on the model of treaties between the crowned heads of Europe."[293]

After the War of 1812, however, this initial period of treaty making came to a halt.[294] What followed was a second phase of treaty making, which was marked by treaties of removal—where the federal government sought to remove tribes from their traditional homelands or

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is a product of domestic law and not foreign law; and (3) abrogation under international treaties is different under tribal treaties, and, therefore, tribal treaties must be treated differently than international treaties).

287. Josef L. Kunz, *The Meaning and Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180, 197 (1945) ("Treaties must be complied with.").

288. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 570 (1995).

289. *Id*. at 571–72.

290. 1 ANNALS OF CONG. 80–81 (1789) (Joseph Gales ed., 1834).

291. Wiessner, *supra* note 288, at 575–76.

292. *Id.* Interestingly, the Senate concluded that ratification was required, despite the fact that a committee recommended otherwise. *Id.* at 582–83.

293. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 550 (1832).

294. Wiessner, *supra* note 288, at 576–77; Wilkinson & Volkman, *supra* note 11, at 609 ("When the War of 1812 ended and the British withdrew from the Continent, the tribes lost much of their bargaining leverage. The negotiations became increasingly onesided.").

to greatly constrain the size of tribal lands.[295] One scholar explained that "[g]enerally speaking, treaties of removal appear to often have been imposed by force or fraud, tainted by corruption or lack of authority by Indian representatives. Many times they are reported to have been honored but in the breach . . . ."[296] In general, treaty negotiations during the second phase of treaty making suffered from significant language barriers, in addition to many allegations of threats brought by agents of the federal government against tribes.[297] Given this history, a question then arises as to whether such treaties can be interpreted under international law.

It would appear that international law was originally intended to apply, as "[n]ot only the Indian Nations, the Executive and the Legislative Branches of the United States Government conducted themselves in full accordance with the formalities and contents of international and domestic law when entering into and approving those compacts."[298] This conclusion is consistent with Chief Justice Marshall's understanding, as he explained in *Worcester*:

> The [C]onstitution, by declaring treaties already made, as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[299]

Accordingly, it would seem that the intention at the time treaties were entered into in the 18th and 19th centuries was that international law should apply.[300] As Professor Tsosie explained, "[A]s an historical matter, treaties with Indian nations and treaties with foreign nations share a common status: They are negotiated accords be-

295. Wiessner, *supra* note 288, at 577–79.

296. *Id.* at 578–79.

297. Wilkinson & Volkman, *supra* note 11, at 610. Further, the authors go on to explain that "Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." *Id.* at 611 (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–31 (1970)).

298. Wiessner, *supra* note 288, at 582.

299. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832). Professor Wiessner explains that "[l]ater case law and administrative judgment confirmed this understanding." Wiessner, *supra* note 288, at 583 (citation omitted).

300. Notably, Professor Wiessner goes on to explain that treaties between tribes and the federal government may qualify as international contracts of adhesion, in which case the treaties would be outside the Vienna Convention on the Law of Treaties and customary international law would apply. Wiessner, *supra* note 288, at 597–98. This argument is beyond the scope of this Article. *See also* Tsosie, *supra* note 8, at 1621 (discussing the differences between international treaties and treaties between the tribes and the federal government).

tween separate political sovereigns designed to secure the mutual advantage of both parties."[301]

Some contemporary commentators, however, have argued that treaties between tribes and the federal government should be treated differently because Congress has the ability to abrogate treaties with tribes.[302] But the United States can also abrogate international treaties it enters into with subsequent statutes that negate the treaty, as treaties and statutes have the same normative force under federal law.[303] Accordingly, tribal treaties are no different from international treaties in this regard. In fact the U.S. Supreme Court made this point in its decision in *Cherokee Tobacco*, when the Court stated:

> A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them.[304]

Additionally, it may be argued that Congress's plenary power undermines the idea of treaties between the United States and tribes being subject to international law. However, one scholar rejects such assertions because Congress has used its plenary power in a limited fashion and applying international law to treaty interpretation is consistent with self-determination.[305] Federal courts also treat tribal treaties differently from international treaties, as is evident from the development of the Indian canons of construction discussed above.[306]

As a result, it seems reasonable to conclude that international law applies in interpreting treaties entered into between the United States and tribes.[307] Given the unique circumstances that gave rise to the formation of such tribal treaties, the federal courts deemed it necessary to develop a set of rules specifically applicable to the interpretation of such treaties. The development of such rules, combined with their continued usage today, is strong evidence that the international law of treaties does not directly apply to the interpretation of tribal treaties.

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301. Tsosie, *supra* note 8, at 1620.
302. *See*, *e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
303. Wiessner, *supra* note 288, at 584
304. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870).
305. Wiessner, *supra* note 288, at 588–90.
306. For a discussion of the content and origin of the Indian Canons of Construction, see COHEN, *supra* note 76, § 2.02.
307. *But cf.* Wilkinson & Volkman, *supra* note 11 (arguing that tribes may be treated better under domestic law than under international law). However, this discussion of the possible application of international law to tribal treaties is made as an alternative to the application of domestic law. Should a tribe not prevail under domestic law, then it may wish to avail itself of international protections.

It does not, however, mean that international law has no role in interpreting tribal treaties. Accordingly, one may look to human rights for some guidance. Discussion of tribes' treaty rights "intersects with the human rights discourse of international law, which addresses the rights of minority and ethnic groups within the dominant society."[308] In fact, "Indigenous groups in the United States and Canada have begun to use their treaties in international forums as a means to call attention to the human rights abuses they have suffered and also to define their political rights vis-à-vis the nation-states that colonized their lands."[309]

A full discussion of indigenous rights under international law is beyond the scope of this Article. However, as a starting point for how international law views indigenous rights, the United Nations Declaration on the Rights of Indigenous Peoples provides guidance on how international law should apply to indigenous peoples across the globe.[310] Notably, several Articles of the Declaration provide that nation-states must provide mechanisms and recourse for indigenous people seeking to right wrongs. Accordingly, tribes may find the Declaration a useful starting point in determining how their treaty provisions may be applied under international law. Moreover, there is a strong connection between tribes' assertion of treaty rights and the right to self-determination.[311] The ability to exist as a separate entity, and therefore possess the right to self-determination, is intimately connected to a unique physical space. Therefore, if space or land is lost, the right to self-determination may be limited. The Declaration, as well as other international documents, recognizes the indigenous right to self-determination.[312] This may be helpful for tribes looking to effectuate their treaty rights as part of their self-determination. Although not the only relevant international document, the Declaration is a helpful place for tribes to start when determining the scope of their treaty rights under international law.

When considering tribal treaties within the climate change context the question may arise as to whether the doctrine of *rebus sic stantibus* or Article 62 of the Vienna Convention on the Law of Treaties applies. The international law doctrine of *rebus sic stantibus* provides that a party may terminate a treaty due to a fundamental change in circumstances.[313] The Vienna Convention on the Law of Treaties is

308. Tsosie, *supra* note 8, at 1639 (citation omitted).
309. *Id.* at 1649 (citation omitted).
310. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *archived at* http://perma.unl.edu/CW2Z-AHFX.
311. Tsosie, *supra* note 8, at 1645.
312. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 310, at art. 3.
313. Lone Wolf v. Hitchcock, 187 U.S. 533, 566 (1903).

generally deemed to be a codification of this principle of customary international law, and in Article 62, the Convention details when an international treaty may be abrogated on the basis of fundamentally changed circumstances.[314] Within the context of this Article, the fact that an international treaty may be abrogated on the basis of fundamentally changed circumstances then raises two questions: Does the historical development of the relationship between tribes and the federal government constitute fundamentally changed circumstances allowing for the abrogation of treaties? Do the negative consequences of climate change constitute fundamentally changed circumstances allowing for such treaty abrogation?

As to the first question, the answer is likely no. Although federal courts have hinted at the application of *rebus sic stantibus* in prior decisions,[315] no federal court has actually applied the doctrine or the Vienna Convention on the Law of Treaties to interpret a tribal treaty. Furthermore, federal courts have generally been less willing to allow abrogation of tribal treaties than of international treaties.[316] Many federal courts require evidence that Congress explicitly considered the abrogation of the Indian treaty before such courts will find that it occurred.[317] Further, as discussed previously, federal courts developed specific canons of construction to seemingly avoid the abrogation of tribal treaties and ensure that such treaties are given the effect understood by the Indians.[318] Such "increased protection of Indian treaties is reasonable given the complex status and history of the Indians."[319]

Furthermore, the fundamental change in conditions required by both *rebus sic stantibus* and Article 62 of the Vienna Convention on the Law of Treaties is rarely met within the context of Indian treaties. Changing conditions between the tribes and the United States were foreseen, and, in fact, many of the tribal treaties were designed to encourage changed conditions.[320] Further, the doctrine requires that "the effect of the change must be to transform radically the extent of [treaty] obligations," and such a high standard has yet to be met in the tribal treaty context.[321] And, finally, in order to evoke the doctrine to escape its obligations to tribes, the United States must demonstrate

314. Vienna Convention on the Law of Treaties, art. 62, May 23, 1969, 1155 U.N.T.S. 331, *archived at* http://perma.unl.edu/45WE-PC6J.

315. *See, e.g.*, *Lone Wolf*, 187 U.S. 533.

316. Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 798 (1989).

317. *Id.*

318. *Id.*

319. *Id.* at 812.

320. *Id.* at 809–10.

321. *Id.*

that it has "clean hands,"[322] and such a showing may be difficult given the tumultuous historical relationship between the United States and tribes.

The second question that may arise in relation to potential application of this international doctrine is whether the profound negative impacts of climate change might constitute fundamentally changed circumstances allowing for treaty abrogation. Again, the answer is likely "no." In other contexts, international scholars and advocates have determined that major physical changes only impacted the interpretation of the treaty and not the actual validity of the treaty.[323] That is, even in instances where the physical change results in a coastline shift, it is the view that such dramatic shifts do not constitute fundamentally changed circumstances. Moreover, in order for the doctrine to apply in relation to the impacts of climate change, the United States would need to show that the duty that was impacted was fundamental to the consent given.[324] The treaties focused on in this Article were negotiated during the second phase of the treaty-making period; a period when the federal government's focus was on removing Indians from settlement and placing them on designated reservations. Therefore, because even the most significant impacts of climate change will not undo such removal and establishment of reservations, it is unlikely that the United States could claim the change was fundamental to its consent to the treaty.

Ultimately, while international treaty law may not be applied by federal courts to interpret tribal treaties, it may still prove helpful in interpreting the scope of federal duties. Moreover, it is unlikely the international principles allowing for the abrogation of treaties due to fundamentally changed circumstances would preclude application of the treaties discussed above.

IV. CONCLUSION

In the United States, tribes are uniquely threatened by the negative impacts of climate change. Tribes and individual Indians are perhaps more vulnerable to such impacts because of legal, cultural, and spiritual connections to the land. Given such vulnerabilities, tribal advocates are increasingly looking for legal tools that may help diminish the threat to tribal resources from climate change. One potential legal tool may be consideration of a tribe's treaty rights based on treaties with the United States. Historically, such treaty rights proved to

322. *Id.* at 810.
323. *See, e.g.*, Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT'L L. 153, 189 (2012) (discussing how nation-states and international actors viewed Article 62 of the Vienna Convention on the Law of Treaties within the maritime context).
324. *Id.* at 190–91.

be valuable tools for protecting resources such as water rights and usfructuary rights. The Article considered for the first time whether such rights might be equally protective in the climate change context.

Ultimately, this Article concludes that some treaty rights may be more effective tools in easing the negative impacts of climate change than others. In reaching this conclusion, the Article considered the treaties of two tribes, the Swinomish Indian Tribal Community and the Nez Perce. First, the Article analyzed the actual treaty rights themselves, demonstrating how some of the treaty rights were more detailed and perhaps applicable to the climate change context than other provisions.

The Article also examined how such treaty provisions might be viewed under both domestic and international law. Under domestic law, the analysis focused on whether a tribal treaty provision might be persuasive as part of a larger claim based on the federal trust relationship. As with consideration of the treaty rights themselves, it appears likely that some of the more-detailed tribal provisions might serve as the basis of a successful claim based on the federal trust relationship. For example, the treaty between the Nez Perce and the United States contains specific obligations undertaken by the federal government to manage certain infrastructure on the reservation and timber. Such detailed language and management duties may be interpreted by a court to constitute an agreement on the part of the federal government to overtake management and control over the resource at issue. Federal courts previously interpreted this sort of affirmative agreement on the part of the federal government to constitute the basis of an enforceable trust relationship, even under the more onerous standards associated with claims based on the Tucker Acts.

And, finally, brief consideration was given to how such treaty rights might be interpreted under international law. While international treaty law may not be applicable to the interpretation of tribal treaty rights, an understanding of such law may still prove helpful in determining rights based on application of human rights law.

Using tribal treaty rights to push for assistance from the federal government to alleviate the negative impacts of climate change may not be viable for all tribes, but it is a legal tool that tribes may want to explore. Ultimately, use of tribal treaties within the context of climate change may be a legal example of the idiom, "Everything old is new again."