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Treaty-based Climate Change Claims: Litigation Pathways in the Face of Cultural Devastation

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TREATY-BASED CLIMATE CHANGE CLAIMS: LITIGATION PATHWAYS IN THE FACE OF CULTURAL DEVASTATION

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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 then living, but also for all generations yet unborn.

—Jerry Meninick, Citizen of the Yakama Nation[1]

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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).

I. INTRODUCTION

Climate change is an existential threat facing all of humanity[2] that disproportionately threatens the very existence of American Indian tribes.[3] In the United States, 574 federally recognized American Indian and Alaska Native tribes,[4] as well as state-recognized tribes, Native Hawaiian peoples, unrecognized tribes, and Indigenous peoples of U.S.-affiliated territories live on and off reservations, in remote, rural, and urban communities.[5] Regardless of federal recognition, a reservation's size and location, or whether tribal members live on- or off-reservation, climate change jeopardizes Indigenous communities' culture, sovereignty, health, economies, and lifeways.[6]

Around the globe, citizens, states, municipalities, and non-governmental organizations are suing to hold the federal government

2. UN News, *Climate Change: An 'Existential Threat' to Humanity, UN Chief Warns Global Summit*, UNITED NATIONS (May 15, 2018), https://news.un.org/en/story/2018/05/1009782 [https://perma.cc/5XJC-NJL7]; T.M. BULL BENNETT ET AL., CLIMATE CHANGE IMPACTS IN THE UNITED STATES ch. 12, 298 (2014).

3. Throughout this article, the terms "American Indians," "Indian tribes," "tribes," and "Indigenous" are used to refer to the groups and individuals described by federal law as "Indian tribes" and "Indians" respectively.

4. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).

5. Kathryn Norton-Smith et al., *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences*, U.S. DEP'T OF AGRIC. 2 (October 2016), https://www.fs.fed.us/pnw/pubs/pnw_gtr944.pdf [https://perma.cc/U8D3-P9QS].

6. *Id*. at 7.

accountable for climate-related commitments and climate change harms.[7] Litigation can be an important tool to push governments and corporations to develop and implement effective means of climate change mitigation and adaption.[8] Parties have brought hundreds of climate lawsuits in the U.S. since the 1990s, but few have been successful beyond influencing public policy perceptions and contributing to a cultural shift in society's collective conscious.[9]

Indian tribes in the U.S. have brought climate change-related claims to the United Nations,[10] but to date, no tribe has directly leveraged its trust relationship, nor treaty rights, to hold the federal government accountable for climate change harms to land, water, wildlife habitat, or

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7. Michael Burger & Justin Gundlach, *The Status of Climate Change Litigation: A Global Review*, UNITED NATIONS ENV'T PROGRAMME & SABIN CTR. FOR CLIMATE CHANGE LAW 14 (May 2017), http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf [https://perma.cc/VW6K-HZJ7] ("Government defendants have been called upon to justify decisions large and small. On the large end of the spectrum are cases like *Massachusetts v. U.S. Environmental Protection Agency* and *Urgenda Foundation v. Kingdom of the Netherlands*, which push for more aggressive national climate change mitigation policies, and *Coalition for Responsible Regulation v. U.S. Environmental Protection Agency* and *West Virginia v. U.S. Environmental Protection Agency*, which challenge the legal bases for U.S. mitigation policy. On the small end of the spectrum are cases focused on particular projects, ranging from the expansion of airports and coal mines, to the development of renewable energy generation facilities, to the construction of structures on eroding coast lines. Whereas the cases aimed at large targets tend to focus their arguments on nationally applicable laws governing energy policy and air pollution, the cases aimed at smaller targets—which make up the clear majority of non-U.S. cases—tend to focus on environmental impact assessments and other planning requirements.").

8. *Id*. at 8.

9. Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, LONDON SCH. OF ECON. AND POLITICAL SCI. 2, 4 (July 2019), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf [https://perma.cc/NM34-2DFM].

10. Sabin Ctr. for Climate Change Law, *Tribes Claim U.S. Government Violates Human Rights by Failing to Address Climate-Forced Displacement*, COLUMBIA CLIMATE SCH. (Mar. 3, 2020), https://news.climate.columbia.edu/2020/03/03/tribes-climate-forced-displacement/#:~:text=This%20January%2C%20five%20U.S.%20tribes,that%20result%20in%20forced%20displacement [https://perma.cc/9LSH-EV6R]; Richard Arlin Walker, *Feeling the Heat of Climate Change*, INDIAN COUNTRY TODAY (Mar. 12, 2021), https://indiancountrytoday.com/news/feeling-the-heat-of-climate-change [https://perma.cc/9L24-YKAJ] ("The United Nations has not yet responded to the complaint filed by Kivalina and the Louisiana bands, but a UN council on Indigenous rights documented the impact of climate change on Native people elsewhere in the world.").

cultural resources.[11] Yet, tribes are uniquely situated to do so. Unlike other plaintiffs, tribes have, since time immemorial, occupied lands and relied on natural resources that in part form the basis of tribal sovereignty. These resources are now threatened by climate change.[12] Further, the relationship between the U.S. and tribal governments gives rise to fiduciary obligations on the part of the federal government to protect Indian trust resources.[13]

In other words, tribes have unique standing, rights, and injuries resulting from climate change that may lay the foundation of successful climate action where other plaintiffs have failed. Tribes have relied on treaties with the U.S. to enforce valuable rights such as access to water, fish, and hunting areas for centuries, and have successfully brought breach of trust claims when the federal government has mismanaged natural resources.[14] Based on the legal status of tribes, the trust relationship between the federal government and tribes, and specific treaty-reserved rights, Indian tribes in the U.S. may be the best situated plaintiffs to successfully bring a climate change claim.[15] Nevertheless, tribal plaintiffs are likely to face some of the same challenges associated with causation and traceability as non-tribal plaintiffs and may, therefore, seek alternative means to protect climate change-threatened natural and cultural resources.

This article posits that tribes, because of their unique position, may be able to open up legal avenues to alleviate climate change harms and force the federal government to implement mitigation and adaptation measures. Section II provides a broad overview of American Indian and Alaska Native connections to the land, the unique threats tribes experience in the face of climate change, and limitations on tribal mitigation and adaptation measures. Section III lays the legal foundations of several distinct tribal climate change claims based on foundational principles of federal Indian law. Section IV compares *Juliana v. United States*[16] and *United States v. Washington*[17] to reveal the different strengths and

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11. Anna V. Smith, *How Do Tribal Nations' Treaties Figure Into Climate Change?*, HIGH COUNTRY NEWS (May 14, 2019), https://www.hcn.org/articles/tribal-affairs-how-do-tribal-nations-treaties-figure-into-climate-change [https://perma.cc/DXY5-ZWB2].

12. Norton-Smith, *supra* note 5, at 2.

13. United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]; United States v. Mitchell, 463 U.S. 206, 224 (1983) [hereinafter *Mitchell II*].

14. Elizabeth Ann Kronk Warner, *Everything Old is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 917 (2016).

15. *Id*. at 962.

16. 947 F.3d 1159 (9th Cir. 2020).

17. 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018).

weaknesses of the youth plaintiffs' and tribal plaintiffs' claims. Section V explores the possibilities of developing climate change claims based on tribal treaty rights and the federal trust responsibility. Finally, Section VI addresses specific tribal considerations, as well as remaining challenges in bringing such claims.

II. CLIMATE CHANGE: TRIBES' UNIQUE STANDING INCLUDES THREATS, CONNECTIONS, AND LIMITATIONS

The disparate impacts of an increasingly warming planet on American Indians are well documented.[18] Indigenous communities have been, and will continue to be, particularly hard-hit by climate disruption and the myriad of changes it brings.[19] In some parts of the country, climate change threatens the very land upon which tribes are located.[20] Yet, climate change threatens not only territorial sovereignty, but cultural sovereignty as well.[21] Accordingly, American Indian communities' claims differ from many other claims for environmental threats because Indigenous cultures and traditions are tied to the natural world in a manner that fundamentally differs from that of dominant society, and tribes have unique political and legally-binding relationships with the U.S. compared to non-tribal plaintiffs.[22]

Indigenous peoples have a long history of adaptation to climate variability grounded in their dynamic relationships to the natural environment.[23] In the U.S., increasingly more tribal governments and intertribal organizations are developing climate adaptation plans, with

18. *See* Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 2–4, 25, 33 (2008).

19. Inst. for Tribal Env't Professionals, *Tribes & Climate Change: Tribal Profiles*, N. ARIZ. UNIV., https://www7.nau.edu/itep/main/tcc/Tribes/ [https://perma.cc/4Z68-7354] (last visited Apr. 4, 2022).

20. Adam Wernick & Annie Minoff, *Will These Alaska Villagers be America's First Climate Change Refugees*, THE WORLD (Aug. 9, 2015), https://theworld.org/stories/2015-08-09/will-residents-kivalina-alaska-be-first-climate-change-refugees-us [https://perma.cc/FLG3-HQUU].

21. Kronk Warner, *supra* note 14, at 918.

22. Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343, 345 (2017).

23. 2 LESLEY JANTARASAMI ET AL., *FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS AND ADAPTATION IN THE UNITED STATES* ch. 15, 583 (2018).

some in the early stages of implementation.[24] However, a tribes' ability to anticipate and respond to climate change is affected by economic, social, political, and legal considerations that severely constrain their ability to respond to rapid ecological shifts and chart self-determined futures.[25]

A. Connections and Threats

Indigenous understanding of the relationships between humans and the natural environment is radically different from the Western understanding of such relationships.[26] Many Indigenous peoples have lived in particular areas for hundreds if not thousands of years, and their cultures, spiritual practices, and economies have evolved to adapt to seasonal and interannual environmental changes.[27]

Although there is a wide spectrum of beliefs and disparate cultural-religious practices, there are some common elements found broadly and predominantly among Indigenous peoples and tribes in the U.S.[28] Beyond subsistence, land is inherent to Indigenous peoples; they often cannot conceive of life without it. One commonly found cultural value is a sense of place and belonging as a fundamental element of Indigenous identity. And, for Indigenous peoples, "land is often constitutive of cultural identity."[29] For example, Indian tribes identify their origin as a distinct people with a particular geographic site.[30] The spiritual connection between American Indians and their surrounding environment is crucial to these communities' self-determination.[31] Particular locations—sacred sites—are integral to Indigenous spirituality.[32] And yet, it is still not accurate to say that only specific sites are regarded as sacred. Rather, for many American Indians, "they are people *of* a particular place,

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24. *See* Tribal Climate Change Project, *Tribal Profiles*, UNIV. OF OR., https://tribalclimate.uoregon.edu/tribal-profiles/ [https://perma.cc/BSC5-CSYM] (last visited Apr. 4, 2022).

25. JANTARASAMI, *supra* note 23, at 574, 585–86.

26. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 268 (1996).

27. JANTARASAMI, *supra* note 23, at 574, 585–86.

28. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 145 HARV. L. REV. 1294, 1304 (2021).

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

30. *Id*.

31. *Id*.

32. Barclay & Steele, *supra* note 28, at 1304.

and their particular homelands and landscapes are inextricably tied to their identity as peoples."[33]

Each American Indian tribe has a unique history and connection to a geographic location or region.[34] Similarly, climate change effects are unique and differ greatly from region to region due to various geographic, hydrologic, and other factors.[35] Tribes' vulnerability and resilience to climate change threats are based on their distinct cultural practices and economies, and the vulnerability of Indigenous sociopolitical, economic, and ecocultural systems may vary by geography and climate regime.[36] As a result, each tribe experiences climate change differently.[37]

Tribes' vulnerability in the face of climate change is the product of systems of inequality, which can be traced back to the Indian Removal Era of 1820 to 1850. A novel study published in 2021 demonstrates that the forced relocation of American Indians has increased their vulnerability to climate change-related risks and threats.[38] The study concluded that "tribes' present-day lands are on average more exposed to climate change risks and hazards, including more extreme heat and less precipitation" with approximately half of all tribes experiencing heightened wildfire exposure.[39] The U.S. legacy of Indigenous land dispossession and the suppression of American Indian territorial governance is the foundation of Indigenous peoples' and tribes' disproportionate vulnerability to climate change impacts.[40]

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33. *Id*. (emphasis added).

34. Jonathan M. Hanna, *Native Communities and Climate Change: Protecting Tribal Resources as Part of National Climate Policy Report*, UNIV. OF COLO. NAT. RES. LAW CTR. 6 (2007), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1014&context=books_reports_studies [https://perma.cc/H9LH-W3K7].

35. *Id*.

36. Norton-Smith, *supra* note 5, at 2.

37. *Id*.

38. E360 Digest, *Forced Relocation Made Native Americans More Vulnerable to Climate Change, Study Shows*, YALE ENV'T 360 (Oct. 29, 2021), https://e360.yale.edu/digest/forced-relocation-made-native-americans-more-vulnerable-to-climate-change-study-shows [https://perma.cc/XZC6-LHCR].

39. Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 375 SCI. 578, 578 (2021).

40. E360 Digest, *supra* note 38.

Climate change undercuts tribes' ability to effectively and fully exercise their inherent sovereignty.[41] To be clear, climate change threats do not erode tribes' inherent sovereignty. Politically, tribes exist as distinct political entities within the U.S. federal system. Economically and culturally, tribes exercise their sovereign authority to develop American Indian institutions and practices in their communities that protect and advance tribal members' interests and wellbeing.[42] However, climate change threatens tribal access to, as well as the quantity and quality of, valued resources such as water, minerals, plants, animals, and fungi, which tribes rely on to maintain their cultures and livelihoods.[43] Such resources are "invaluable to cultural, economic, medicinal, and community health for countless generations."[44] With these resources imperiled—and where climate-threatened tribal homelands and reservations require infrastructure and community relocation efforts—tribes are likely to face increased challenges to continue to protect and promote their communities' interests, safety, stability, culture, and traditional ways of life.[45]

Observed and projected changes of increased wildfire, diminished snowpack, pervasive drought, flooding, ocean acidification, and sea level rise threaten the viability of Indigenous peoples' traditional subsistence and commercial activities, including agriculture, hunting and gathering, fisheries, forestry, energy, recreation, and tourism enterprises.[46] Communities relying on the natural environment for their sustenance and livelihoods are at increased risk for adverse mental health outcomes related to climate change. Indigenous health is based on interconnected social and ecological systems, and climate disruption to lands, waters,

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41. Tribal sovereignty is also essential to addressing climate change, as National Congress of American Indians President Fawn Sharp discusses in this interview. Jeremy Deaton, *Why Protecting Tribal Rights Is Key to Fighting Climate Change*, YALE ENV'T 360 (Oct. 27, 2021), https://e360.yale.edu/features/why-protecting-tribal-rights-is-key-to-fighting-climate-change [https://perma.cc/87WB-SWA9].

42. JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 4 (2004).

43. Voggesser et al., *Cultural Impacts to Tribes from Climate Change Influences on Forests*, U.S. DEP'T AGRICULTURE 616 (Mar. 2013), https://www.fs.fed.us/pnw/pubs/journals/pnw_2014_voggesser.pdf [https://perma.cc/ANR8-8YKN].

44. *Id*.

45. Hope M. Babcock, *Here Today, Gone Tomorrow—Is Global Climate Change Another White Man's Trick to Get Indian Land? The Role of Treaties in Protecting Tribes as They Adapt to Climate Change*, 2017 MICH. ST. L. REV. 371, 379 (2017).

46. JANTARASAMI, *supra* note 23, at 574.

natural cycles, and plant and animal species undermine these relationships, thereby impacting place-based cultural heritages and identities.[47] Climate change also threatens sites, practices, and relationships with cultural, spiritual, or ceremonial importance that are foundational to Indigenous peoples' cultural heritages, identities, and physical and mental health.[48]

Examples of climate change impacts to different regions throughout Indian Country[49] demonstrate how these impacts threaten land and water resources, as well as wildlife and cultural resources, both on- and off-reservation. In Alaska and across the Arctic region, climate change is transforming habitats for animals, vegetation, and humans, which significantly impacts Alaska Natives' economic and cultural reliance on subsistence activities.[50] Important mammal populations such as walrus, polar bear, and seals are likely to decline.[51] Meanwhile, other species' migration routes and ranges are shifting, which may affect game animal availability for Alaska Natives.[52] Beyond affecting subsistence hunting and fishing, warming temperatures in the Arctic region cause sea level rise, flooding, and erosion that diminishes coastal communities' territorial homelands.[53] The Alaska Native communities of Akiak, Kivalina, and Shishmaref are currently relocating homes away from eroding coastlines and riverbanks.[54] Additionally, increased marine access for fishing and offshore oil development due to sea ice melt may impose compounding harmful impacts on Alaska Natives' cultures and economies.[55]

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47. *Id*. at 574, 581; Norton-Smith, *supra* note 5, at 23.

48. JANTARASAMI, *supra* note 23, at 581.

49. Indian Country is a statutorily defined term and legal term of art. Indian Country includes all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Consistent with the statutory definition of Indian Country, as well as federal case law interpreting this statutory language, lands held by the federal government in trust for Indian tribes that exist outside of formal reservations are informal reservations and, thus, are Indian Country. 18 U.S.C. § 1151 (1913); 40 C.F.R. § 171.3 (2018).

50. Hanna, *supra* note 34, at 11–14.

51. *Id*. at 12.

52. *Id*. at 11–14.

53. *Id*. at 13; Walker, *supra* note 10.

54. Walker, *supra* note 10.

55. Hanna, *supra* note 34, at 14–15.

The arid Southwest is home to 182 federally recognized American Indian tribes.[56] Their reservations were established in regions where the sustainability of acceptable living conditions was already challenging due to extreme temperatures, limited rainfall, and low-quality water sources.[57] Climate change adds to this challenge, impacting water availability, seasonal flow regimes, ecosystem health, and water quality.[58] Recently, Navajo elders reported declining snowfall, surface water features, and water availability, as well as the disappearance of native plants and animals found near water sources or in high elevations.[59] Climate change also threatens tribal traditions and cultural practices in the Southwest. For example, increased temperatures and decreased rainfall have limited the ability to grow corn, which is central to Navajo and Puebloan cultural practices.[60]

In the Pacific Northwest, harvesting salmon is the "cultural lifeblood" of numerous regional tribes, but the salmon population has declined as much as 90% over the past few decades.[61] Pacific Northwest Native American tribes have witnessed how climate change-induced habitat loss, changes to the aquatic ecosystems, region-wide warming of rivers and disruptive changes to the hydrologic cycle, and commercial fishing are pushing salmon populations to the brink of extinction.[62] Salmon have held a central role in cultural, social, economic, and spiritual life for the Indian tribes of the Pacific Northwest since time immemorial, and treaty fishing rights were reserved to protect Indigenous ways of life.[63] However, changes in rainfall, river temperatures, and streamflow patterns further stress already declining salmon populations.[64]

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56. M.H. REDSTEER ET AL., UNIQUE CHALLENGES FACING SOUTHWESTERN TRIBES, in ASSESSMENT OF CLIMATE CHANGE IN THE SOUTHWEST UNITED STATES: A REPORT PREPARED FOR THE NATIONAL CLIMATE ASSESSMENT, 385, 385–404, 386 (Greg Garfin et al. eds., 2013).

57. *Id*. at 389.

58. *Id*. at 389–93.

59. *Id*.

60. *Id*. at 391.

61. Inst. for Tribal Env't Professionals, *Tribes & Climate Change: Pacific Northwest Fisheries Impact*, N. ARIZ. UNIV., https://www7.nau.edu/itep/main/tcc/Tribes/pn_fisheries [https://perma.cc/K6JX-SJHS] (last visited Apr. 2, 2022).

62. Hanna, *supra* note 34, at 6–8.

63. *Tribal Salmon Culture*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://www.critfc.org/salmon-culture/tribal-salmon-culture/ [https://perma.cc/T956-HC9G] (last visited Apr. 2, 2022).

64. Norton-Smith, *supra* note 5, at 8.

Tribal governments are charting their own paths to mitigate and adapt to climate change threats, with the federal government providing support through the Tribal Climate Resilience Program.[65] Most recently, the Biden Administration provided notice for tribal listening sessions on climate change and its discretionary grant program to support initiatives addressing climate adaptation planning in Indian Country and Alaska Native Villages.[66] Nonetheless, due to federally-imposed limitations, tribes face unique challenges to more efficiently and effectively adapt to the warming world.

B. Limitations on Tribal Adaptation and Mitigation

Tribes respond to climate change within a broader context in which Indigenous peoples are continuing to seek and exercise self-determination to more clearly define their own political status and pursue economic, social, and cultural development.[67] As a result of European and American colonialism, many of the traditional adaptation practices Indigenous communities employed to survive environmental changes are no longer feasible. For example, "increased sedentarization (loss of mobility), contact and compliance with the Western market economy, and creation and enforcement of governmental subsistence harvesting regulations" have contributed to tribes' vulnerability by reducing tribal communities' means to adapt to ecological change.[68] Furthermore, many Indigenous communities in the U.S. face extreme poverty, as well as inadequate housing, infrastructure, and health and educational services that compound the harmful impacts of climate change.[69]

The U.S. has a general trust responsibility to federally-recognized Indian tribes by which the federal government has a legal and fiduciary obligation to honor tribal treaty rights and support tribal self-determination.[70] The trust relationship was first articulated by Chief Justice Marshall of the U.S. Supreme Court in *Cherokee Nation v.*

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65. *Tribal Climate Resilience Program*, U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/bia/ots/tribal-climate-resilience-program [https://perma.cc/4UND-ZVAE] (last visited Apr. 2, 2022).

66. Tribal Listening Sessions on Climate Change and Discretionary Grants, 86 Fed. Reg. 55,632, 55,632 (Oct. 6, 2021).

67. JANTARASAMI, *supra* note 23, at 585–86.

68. Norton-Smith, *supra* note 5, at 3–4.

69. *Id*. at 2.

70. Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

Georgia,[71] in which the Court declared that the Cherokee Nation was a "domestic dependent nation" and the tribes' "relations to the United States resemble that of a ward to his guardian."[72] This ruling proved the Court recognizes tribes as sovereigns possessing a government-to-government relationship with the U.S., and the ability to develop laws governing their lands, resources, and members.[73] The Marshall Trilogy cases[74] were fundamentally "grounded in paternalistic and racist attitudes toward Indigenous peoples and informed by unsavory historical attitudes"[75] and even revisionist history.[76] Nevertheless, the rules themselves remain sound because they are grounded in the trust relationship and conceptions of sovereignty, rather than characteristics of Indians as racial or political minorities.[77]

The trust responsibility is meant to include financial support and the provision of essential services, such as education, health, public safety, and environmental protection.[78] The trust responsibility also authorizes the federal government to manage tribal lands and the revenues generated from these lands.[79] This relationship, however, significantly limits tribal

71. 30 U.S. (5 Pet.) 1 (1831).

72. *Id*. at 13, 11.

73. *Id*. at 10; Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. L. ENV'T L.J. 239, 239 (2013).

74. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation*, 30 U.S. (5 Pet.) at 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

75. Confederated Salish and Kootenai Tribes v. Lake Cty. Bd. of Comm'rs, 454 F. Supp. 3d 957, 971 n.7 (D. Mont. 2020).

76. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 396 (1993).

77. *Id*. at 424–25.

78. Tribes recognized by treaty, statute, administrative process, or other intercourse with the United States are known as federally recognized tribes. Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society and institutionalizing the government-to-government relationship between the tribe and the federal government. The designation as a recognized or non-recognized tribe carries broad legal and political implications since "it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." H.R. Rep. 103-781, 103rd Congress § 2 (2d Sess. 1994). Recognition is also a constitutive act: "[I]t institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02 (Nell Jessup Newton ed. 2012).

79. JANTARASAMI, *supra* note 23, at 576.

authority to manage lands and resources.[80] The Bureau of Indian Affairs and other agencies that control federal land and other natural resources must protect applicable tribal rights, including water, fish, wildlife, and cultural resources.[81] Tribes cannot unilaterally dispense of or use lands and resources without prior approval by the federal government.[82] Moreover, when the federal government's management of tribes' trust assets lacks accountability or does not adequately fulfill the federal policy requirement of tribal consultation on a government-to-government basis, it further limits tribal self-determination.[83]

Tribal initiatives to confront climate change are also limited because tribal perspectives are underrepresented in federal climate change programs and initiatives.[84] Federal climate change committees, working groups, and initiatives have not historically invited tribal perspectives and concerns.[85] This notable absence disadvantages both tribal and federal climate change efforts because tribes and Indigenous peoples have valuable knowledge crucial to develop effective solutions.[86]

A number of tribal adaptation plans focus on subsistence and commercial economic activities, while others focus on mitigation actions through developing renewable energy on tribal lands. Other tribes are considering or actively pursuing relocation as an adaptation strategy.[87] Communities in Isle de Jean Charles, Louisiana and Kivalina, Alaska may need to entirely relocate because of sea level rise and coastal inundation.[88]

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80. ERIKA ALLEN WOLTERS & BRENT S. STEEL, THE ENVIRONMENTAL POLITICS AND POLICY OF WESTERN PUBLIC LANDS ch. 14, 241 (2021).

81. Norton-Smith, *supra* note 5, at 5.

82. WOLTERS & STEEL, *supra* note 80, at 241.

83. JANTARASAMI, *supra* note 23, at 576.

84. Norton-Smith, *supra* note 5, at 94.

85. *See* JANTARASAMI, *supra* note 23, at 576.

86. *Id*.

87. *See, e.g.*, Walker, *supra* note 10.

88. JANTARASAMI, *supra* note 23, at 586; Michael Burger & Daniel J. Metzger, *Global Climate Litigation Report 2020 Status Review*, UNITED NATIONS ENV'T PROGRAMME & SABIN CTR. FOR CLIMATE CHANGE LAW 15 (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y [https://perma.cc/28P7-7UPB] ("In January 2020, five U.S. tribes in Alaska and Louisiana submitted a complaint to 10 U.N. Special Rapporteurs claiming that the U.S. government and state governments are violating the tribes' fundamental rights. The tribes argue that . . . they are being forcibly displaced from their ancestral lands as a result of climate change, and that the U.S. government has failed to engage, consult, acknowledge, and promote the self-determination of the tribes as they develop adaptation strategies, including resettlement, in violation of the tribes' rights to, among others, life, health, housing, water, sanitation, a healthy environment, and food.").

Presently, however, the federal government is ill-equipped to deal with the realities of climate-induced relocation because it lacks policy directives or an institutional framework to relocate Indigenous communities.[89] No comprehensive federal program exists to assist tribes with relocation efforts.[90] Therefore, tribes must rely on project-specific funding streams that are not designed for relocation initiatives and that often have conflicting requirements and priorities.[91] In addition, tribal governments do not have the legal authority and often lack the technical, organizational, or financial abilities to independently implement relocation programs.[92]

Even if relocation is possible, tribes risk losing irreplaceable ties to their homelands and place-based cultural institutions.[93] Communities that decide to relocate are often not equipped with the funding and support required for relocation and may be excluded from funding for existing infrastructure in their current location.[94] For example, once they decided to relocate, the Alaska Native Villages of Newtok and Shishmaref were cut off from state and federal infrastructure funding.[95]

III. LEGAL FOUNDATIONS

In the U.S., Indian tribes possess inherent sovereignty and the ability to develop laws governing their lands, resources, and members according to their own practices and traditions.[96] In the face of climate change, according to Professor Rebecca Tsosie, this "domestic dependent nations" framework is "inadequate to address the challenges confronting [I]ndigenous communities because tribal jurisdiction is largely

89. U.S. Gov't Accountability Office, *Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion* 36–41, GAO (June 2009), https://www.gao.gov/assets/gao-09-551.pdf [https://perma.cc/BS2G-R3LA].

90. JANTARASAMI, *supra* note 23, at 586.

91. *Id*.

92. Norton-Smith, *supra* note 5, at 9.

93. JANTARASAMI, *supra* note 23, at 585–86.

94. Norton-Smith, *supra* note 5, at 9.

95. *Id*. All of these complex limitations and barriers for tribes to proactively develop or implement mitigation and adaptation plans become even more challenging when tribes lack federal recognition. Though non-federally recognized Indian tribes and Native Hawaiians also have certain limited rights to self-determination to protect their traditional knowledge, cultures, and ancestral lands, these tribes do not have reservation lands, treaty rights, and federal provision of essential services to which federally-recognized tribes can appeal. JANTARASAMI, *supra* note 23, at 577.

96. Tsosie, *supra* note 73, at 239.

circumscribed by boundaries of reservation and membership."[97] As discussed above, tribal governments face unique barriers and limitations to developing adaptation and mitigation plans for their communities. Even so, tribes can leverage the trust relationship, as well as treaty-reserved rights and protected resources, in fundamentally different ways than non-tribal plaintiffs in order to protect climate change-threatened resources.

A. Federal Recognition and the Trust Relationship

The federal government has a general trust responsibility to Indian tribes, which is a legal and fiduciary obligation to honor tribal treaty rights and support tribal self-determination.[98] The U.S. Supreme Court is continuously defining the contours of the federal government's trust responsibility to federally-recognized tribes through a series of important cases. In *Seminole Nation v. United States*,[99] the Court ruled that the federal government "has charged itself with moral obligations of the highest responsibility and trust" and "should therefore be judged by the most exacting fiduciary standards."[100]

When a tribe brings a claim for breach of trust for specific relief or money damages, the Court has determined that applicable statutes, regulations, treaties, and executive orders "define the contours of the United States' fiduciary responsibilities."[101] In *United States v. Mitchell*[102] ("*Mitchell I*") and *United States v. Mitchell*[103] ("*Mitchell II*"), the Court differentiated between a bare trust and an enforceable, compensable fiduciary duty. In *Mitchell I*, the Court ruled that the Quinault Indian Nation's claim for money damages, which resulted from the federal government's mismanagement of timber on the Quinault's allotments, was not a breach of trust because the statutory language and legislative history of the General Allotment Act ("GAA") did not demonstrate the federal government's authority to manage the land.[104] Since the GAA did not expressly or implicitly place a duty on the federal government to manage the allotted land, the Court ruled that the government's mismanagement of timber resources upon the land was not a compensatory breach.[105]

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97. *Id*. at 240.
98. Seminole Nation v. United States, 316 U.S. 286, 298 (1942).
99. *Id*. at 297.
100. *Id*.
101. *Mitchell II*, 463 U.S. 206, 224 (1983).
102. *Mitchell I*, 445 U.S. 535 (1980).
103. *Mitchell II*, 463 U.S. at 206.
104. *Mitchell I*, 445 U.S. at 542.
105. *Id*.

According to the Court, the GAA created only a "bare or limited trust" with no fiduciary duty on behalf of the federal government or actional cause to claim liability.[106] In contrast, the Court held in *Mitchell II* that timber management statutes and regulations created a full responsibility for the federal government to manage Indian resources and land for the benefit of the Quinault because the web of statutes and regulations gave the Secretary of Interior a "pervasive role" in the timber and trust fund management.[107]

To successfully bring a claim, *Mitchell I* and *Mitchell II* instruct that a tribe must identify a substantive source of law establishing specific fiduciary or other duties, and allege that the federal government failed to faithfully perform those duties.[108] A statute containing a limited trust may give rise to a claim for equitable relief, but it is not sufficient to impose any duties not explicitly outlined within the limits of the trust responsibility.[109] Only a relationship created by the federal government containing "full fiduciary responsibilities" may give rise to both monetary and equitable relief.[110]

Subsequently, in *United States v. Navajo Nation*,[111] the Court added an additional wrinkle to prove a fiduciary responsibility. The Court ruled that neither the Indian Mineral Leasing Act ("IMLA") nor any of its regulations established more than a bare minimum royalty for mineral leasing.[112] Thus, when the Navajo Nation brought an action for damages against the U.S., alleging that the Secretary of Interior's approval of the coal lease amendments constituted a breach of trust, the Court ruled that the IMLA and its regulations did not provide the requisite "substantive law" requiring the federal government to compensate the tribe.[113] Since the IMLA simply required secretarial approval before coal mining leases negotiated between tribes and third parties became effective, the Court could not identify any obligations resembling the detailed fiduciary responsibilities in *Mitchell II* to support a money damages claim.[114]

Tribes have successfully brought claims for breach of trust seeking damages for a wide range of treaty-protected natural resources and

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106. *See Mitchell II*, 463 U.S. at 224 (interpreting 25 U.S.C. § 348 as creating only a limited trust).

107. *Mitchell II*, 463 U.S. at 219–20.

108. *See* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313, 339 (2003).

109. *Id*.

110. *Id*. at 327, 339.

111. 537 U.S. 488, 520–21 (2003).

112. *Id*. at 492.

113. *Id*. at 489–90.

114. *Id*.

infrastructure, including but not limited to the management of timber resources,[115] oil and gas leasing,[116] long-term surface leasing,[117] and neglect of federal buildings on tribal land.[118]

Overall, in order to prove a fully enforceable, compensable trust duty, tribes must demonstrate that applicable statutes and regulations, read together, collectively impose a fiduciary duty on the U.S. to manage the resource for the benefit of Indian tribes or individual tribal members.[119] The courts look for language indicating that the property is administered for the benefit of a tribe or individual tribal members, and whether the Secretary of Interior's control over a given resource or management activity is "pervasive."[120] And, to the extent the government has taken control of the property, the exercise of that control may create a fiduciary relationship.[121]

B. Indian Treaties: Canons of Construction and Reserved Rights Doctrine

The U.S. Constitution vests the federal government with exclusive authority over relations with Indian tribes.[122] Chief Justice Marshall wrote

115. *Mitchell II*, 463 U.S. 206, 224 (1983).

116. *See, e.g.*, Shoshone Indian Tribe of the Wind River Reservation v. United States, 56 Fed. Cl. 639, 646 (Fed. Cl. 2003).

117. Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996) (statutes authorizing active management of Indian long-term leases, actual control of leasing, and regulations implementing the Indian Long-Term Leasing Act, 25 U.S.C. § 415, which require the Secretary of Interior to seek highest economic return, create an enforceable trust relationship despite the lack of statutory language referring to fiduciary duties).

118. United States v. White Mountain Apache Tribe, 537 U.S. 465, 475–76 (2003).

119. United States v. Jicarilla Apache Nation, 564 U.S. 162, 176–78 (2011); in *Cobell v. Norton*, the D.C. Circuit Court of Appeals concluded that "the general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law." 240 F.3d 1081, 1101 (D.C. Cir. 2001).

120. *See, e.g.*, *White Mountain Apache Tribe*, 537 U.S. at 480 (Ginsburg, J., concurring) (stressing that the statute at issue "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations."); *Mitchell II*, 463 U.S. at 224 (citing 25 U.S.C. § 406(a)) ("[N]eeds and best interests of the Indian owner and his heirs" and similar trust language requiring the government to act for the benefit of the Indian allottees); Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1350 (Fed. Cir. 2004).

121. *Mitchell II*, 463 U.S. at 225 (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980)).

122. U.S. CONST. art. I, § 8, cl. 3.

that Indian treaties, ratified by the U.S. Senate, acknowledge that tribes are sovereign nations with the right to "govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states."[123] Indian treaties, therefore, are contracts between sovereigns.[124] Treaty rights and related federal obligations exist unless Congress expressly abrogates the rights, or the treaty signatories agree to amend the treaty.[125] Treaties with federally-recognized Indian tribes constitute federal law that generally preempts conflicting state law as applied to both on- and off-reservation Indian activities.[126]

Courts have typically followed specific canons of Indian treaty interpretation because the U.S. representatives to treaty negotiations substantially and purposefully negotiated from a position of unequal leverage.[127] Treaty negotiations often involved duress, coercion, and fraud by the federal government.[128] Therefore, courts construe treaties according to established Indian law principles to account for the unequal bargaining power and language barriers that existed at the time of negotiations, and to acknowledge the trust relationship between the U.S., Indian tribes, and individual Indians.[129] The canons protect important structural features of our system of governance, and they are intended for the courts to treat tribes as sovereigns, not as "disadvantaged groups."[130]

First, treaty language must be liberally construed in favor of the Indians or tribes in question.[131] Second, courts must resolve ambiguities in favor of the tribe's understanding.[132] Third, courts must interpret a treaty as the tribal representatives at the time of negotiations and signing would have understood the terms.[133] Treaty provisions that are not clear on their

123. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 540 (1832).

124. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

125. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968).

126. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.03 (Nell Jessup Newton ed. 2012).

127. Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed. 2012).

128. *Id*.

129. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174 (1973); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

130. Frickey, *supra* note 76, at 389, 424.

131. *Mille Lacs*, 526 U.S. at 196.

132. *Id*. at 196, 200.

133. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1999); United States v. Winans, 198 U.S. 371, 380–81 (1905).

face may be interpreted from the surrounding circumstances and history, and the Court has long taken historical circumstances into consideration when interpreting Indian treaty language.[134]

Finally, a treaty reserves rights—it does not grant rights—to a tribe.[135] Under Chief Justice Marshall, the Court conceptualized an Indian treaty as a grant of rights from a tribe to the federal government. This understanding provided the basis for later cases squarely recognizing the "reserved rights doctrine."[136] Far from being based on the helplessness of American Indians, the reserved rights doctrine is based on the status of tribes as preexisting sovereigns entering into a government-to-government relationship with the U.S.[137] Decided by the Court over 100 years ago, *United States v. Winans*[138] first articulated the reserved rights doctrine, which holds that Indian treaties are "not a grant of rights to the Indians but a grant of rights from them." These reserved rights remain unless explicitly abrogated by Congress.[139] When a treaty does not explicitly delineate powers between the U.S. and a tribe, it does not mean that a tribe's powers have been divested.[140] *Winans* also reaffirmed the canons of Indian treaty interpretation—that Indian treaties should be interpreted as the Indians would have understood the treaty terms.[141] Reserved rights can include water access and use, as well as other usufructuary rights like hunting, fishing, and gathering.[142] As recognized aboriginal rights, they are "prior and paramount,"[143] defeating competing, non-Indian resource claims.[144] The Indian canons of construction and the doctrine of reserved rights are

134. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

135. *Winans*, 198 U.S. at 381.

136. *Id*. at 380–81.

137. *See* Connecticut *ex rel*. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 92–93 (2d Cir. 2000) (rejecting the notion that Indian law canons apply only when tribes are at legal or economic disadvantage).

138. 198 U.S. at 381.

139. Herrera v. Wyoming, 139 S. Ct. 1686, 1698 (2019).

140. *Winans*, 198 U.S. at 381; *Mille Lacs*, 526 U.S. at 203.

141. *Id*. at 380–81; Michael C. Blumm & James Brunberg, "*Not Much Less Necessary Than the Atmosphere They Breathed": Salmon Indian Treaties and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 490 (2006).

142. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1999); *Winans*, 198 U.S. at 380–81.

143. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.01[1] (Nell Jessup Newton ed. 2012).

144. Blumm & Brunberg, *supra* note 141, at 538.

essential tools for courts interpreting treaties because they account for the relevant historical context in which these transactions took place.[145]

Federal courts have interpreted treaties pursuant to the canons in "expansive and progressive ways" that were groundbreaking for their time.[146] For example, the Court determined that tribal treaties reserved water rights sufficient for a reservation's primary purposes in *Winters v. United States*,[147] despite the treaty text not explicitly mentioning water rights. Additionally, the U.S. District Court for the Western District of Washington determined that treaties reserved tribal rights to co-manage fisheries with the states, even though the treaties did not explicitly reference a right to co-management.[148] Recently, in *Washington State Department of Licensing v. Cougar Den, Inc.*,[149] the Court held that the 1855 Treaty between the U.S. and the Yakama Nation reserved the tribally-owned fuel import company's right to travel the state highways without the burden of state taxation off-reservation. These decisions demonstrate the Courts' capacity to interpret treaties broadly, within the appropriate historical context, and pursuant to the canons of construction to protect treaty rights and resources.[150]

IV. PRECEDENT TO BUILD ON

In the U.S., young people who cannot yet vote have recently begun to bring climate change accountability claims against their federal and state governments so that they might have a livable future in a stable climate system.[151] Comparatively, Indian tribes, over the course of two centuries, have brought and continue to bring claims to protect treaty-reserved rights and resources, as well as to compel the U.S. to uphold its trust responsibility and fiduciary duties. This section reviews and compares two well-known decisions that provide instructive precedent for tribes that may bring treaty-based climate change claims: *Juliana v. United States* and *United States v. Washington*.

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145. The Northwest Coast Indian fishing rights cases illustrate this point. *See, e.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

146. Kronk Warner, *supra* note 14, at 922.

147. 207 U.S. 564, 576–77 (1908).

148. United States v. Washington, 384 F. Supp. 312, 340 (W.D. Wash. 1974).

149. 139 S. Ct. 1000, 1015–16 (2019).

150. Kronk Warner, *supra* note 14, at 922.

151. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020); *State Legal Actions*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/7M9W-KUW7] (last visited Apr. 3, 2022).

A. Public Trust Claims: Youth Plaintiffs

For non-tribal plaintiffs, the public trust doctrine is a widely recognized common law duty on the sovereign of a given jurisdiction to act as trustee for present and future generations by maintaining the integrity of public trust resources, such as public water and lands.[152] In *Juliana,* 21 young people sued the U.S. in 2015 to assert their right to a "climate system capable of sustaining human life."[153] The youth plaintiffs argued that the U.S. failed in its responsibility to them under the public trust doctrine to manage coastal areas and the atmosphere and violated their right to a stable climate.[154]

Despite recognizing that "plaintiffs in this case have presented compelling evidence . . . . A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse,"[155] a divided panel of the Ninth Circuit Court of Appeals ultimately ruled that it would not address the youth plaintiffs' claims involving a violation of a regulation or statute, a procedural right, or the Federal Tort Claims Act.[156] The Ninth Circuit held that the youth plaintiffs failed to prove redressability, deciding that the specific relief they sought is not within an Article III court's power.[157]

There is general consensus among courts that the public trust doctrine applies only to state governments.[158] Courts disagree whether the public trust doctrine exists in federal law at all, whether the public trust doctrine extends to the atmosphere, and—assuming the doctrine does apply to climate change—what the courts' proper role is relative to the legislative and executive branches.[159] According to the Ninth Circuit, the

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152. Samuel Ruddy, *Finding a Constitutional Home for the Public Trust Doctrine*, 43 ENVIRONS 139, 142–43 (2020).

153. 947 F.3d at 1164–65.

154. *Id.*; *see* Nina A. Mendelson, *Tribes, Cities, and Children: Emerging Voices in Environmental Litigation*, 34 J. LAND USE & ENV'T L. 237, 245 (2019).

155. *Juliana*, 947 F.3d at 1164.

156. Thomas Sprankling et al., *Climate Ruling May Help Future Plaintiffs Establish Causation*, LAW 360 (Feb. 21, 2020), https://www.law360.com/articles/1246009/climate-ruling-may-help-future-plaintiffs-establish-causation [https://perma.cc/M36U-VYHB].

157. *Juliana*, 947 F.3d at 1171.

158. *Id*.

159. Burger & Gundlach, *supra* note 7, at 24–25.

youth plaintiffs could seek remedies from the other two branches of government: Congress and the President.[160]

The youth plaintiffs changed their tactics in June 2021 when they altered their demands in response to the Ninth Circuit's ruling.[161] Instead of appealing, the youth plaintiffs requested to amend their complaint to fix the standing problems that the split Ninth Circuit three-judge panel identified.[162] The youth plaintiffs struck their request that the Ninth Circuit order the government to prepare a remedial plan to phase out fossil fuel emissions, and instead sought a declaration that the country's current national energy system violates their constitutional rights by disrupting the climate.[163] In November 2021, the five-month settlement negotiations between the youth plaintiffs and the U.S. Department of Justice ended without a resolution. As of February 2022, the youth plaintiffs are awaiting a ruling on their motion for leave to file a second amended complaint and motion to intervene.[164]

As the Ninth Circuit demonstrated in *Juliana*, the door to climate change litigation is not entirely foreclosed; however, the majority opinion made clear that courts cannot dictate affirmative policy decisions of the executive and legislative branches, which necessarily would entail a broad range of policymaking.[165] Essentially, the Ninth Circuit ruled that the relief sought by the *Juliana* plaintiffs was not the type the judicial branch can award. Yet, an award of damages for property damaged due to climate change-caused sea level rise, for example, would not raise the same concern. A plaintiff might sue the federal government for contributing to rising sea levels and seek compensation for the loss of their home. Courts may be amenable to this approach—if the plaintiff can first establish causation—because awarding damages in such a situation would provide relief without requiring courts to engage in climate change mitigation policy, and therefore, routinely monitor the day-to-day work of the political branches.[166]

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160. *Id*.

161. Juan Carlos Rodriguez, *Climate Youths Pivot Strategy After 9th Circ. Setback*, LAW 360 (Mar. 9, 2021), https://www.law360.com/articles/1362467/climate-youths-pivot-strategy-after-9th-circ-setback [https://perma.cc/8CXF-7WST].

162. *Id*.

163. *Id*.

164. Juliana v. United States *Timeline*, OUR CHILDREN'S TR. https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/H3AU-XWAU] (last visited Apr. 3, 2022).

165. 947 F.3d 1159, 1175 (9th Cir. 2020); *see* Sprankling et al., *supra* note 156.

166. *See* Sprankling et al., *supra* note 156.

B. Treaty-Based Claims: Tribal Plaintiffs

For centuries, tribes have brought suits against the U.S. to enforce treaty rights to successfully protect crucial rights as well as natural and cultural resources. In *United States v. Washington*, 21 Pacific Northwest Tribes[167] established the state government's duty to protect fishery habitat as a component of their treaty fishing rights. Washington State's duty not to interfere with the Pacific Northwest Tribes' treaty fishing rights was affirmed by an equally divided U.S. Supreme Court decision, cementing the Ninth Circuit's decision in favor of the tribes.[168]

The tribal fishing rights at issue in this case were recognized in two Stevens Treaties signed in 1854 and 1855.[169] In a series of eight treaties signed throughout the 1850s, Isaac Stevens, the Washington Territorial Governor and Superintendent of Indian Affairs, negotiated with tribes across the Pacific Northwest for the cession of lands, surface waters, and marine areas they controlled in exchange for the small tracts of land that comprised their reservations and their "right of taking fish, at all usual and accustomed grounds and stations," as well as the right to "hunt[], gather[] roots and berries, and pastur[e] their horses" on open and unclaimed lands.[170] Ever since, the tribes have sought to clarify and exercise their treaty-based rights to fish.[171] The Ninth Circuit's *United States v. Washington* decision set new precedent. It recognized the Pacific Northwest Tribes' right to enforce an explicit duty, with an additional implied duty, on the state and federal government to refrain from damaging natural habitats that support the tribes' treaty protected resources.[172]

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167. 853 F.3d 946 (9th Cir. 2017) (Indian tribes party to the litigation included: Suquamish Indian Tribe; Sauk-Suiattle Tribe; Stillaguamish Tribe; Hoh Tribe; Jamestown S'Klallam Tribe; Lower Elwha Band of Klallams; Port Gamble Band Clallam; Nisqually Indian Tribe; Nooksack Indian Tribe; Skokomish Indian Tribe; Squaxin Island Tribe; Upper Skagit Indian Tribe; Tulalip Tribes; Lummi Indian Nation; Quinault Indian Nation; Puyallup Tribe; Confederated Tribes and Bands of the Yakama Indian Nation; Quileute Indian Tribe; Makah Indian Tribe; Swinomish Indian Tribal Community; and Muckleshoot Indian Tribe).

168. Washington v. United States, 138 S. Ct. 1832 (2018).

169. *Washington*, 853 F.3d at 953–54; Nw. Indian Fisheries Comm'n, *Treaties*, NWIFC, https://nwifc.org/member-tribes/treaties/ [https://perma.cc/96HU-PFKR] (last visited Apr. 3, 2022).

170. *Washington*, 853 F.3d at 954; Kronk Warner, *supra* note 14, at 924 n. 37.

171. Richard Du Bey et al., *Tribal Treaty Rights and Natural Resource Protection: The Next Chapter* United States v. Washington – *The Culverts Case*, 7 AM. INDIAN L. J. 54, 57–63 (2019).

172. *Washington*, 853 F.3d at 964–65.

The Court's subsequent split 4–4 vote was sufficient to affirm the Ninth Circuit's ruling, but it does not mean that the lower court's decision has become the law of the land.[173] The Court's split decision "essentially binds only the particular parties in the case to obey what the lower court ruled."[174] Scholars surmise that if the Court is to hear a similar case in the future, the decision will be significantly influenced by changes to the bench since 2018.[175]

Nonetheless, a non-tribal plaintiff could not have brought this case as successfully as the Pacific Northwest Tribes did because of their distinctly tribal claims, which may bear significance for future treaty-based climate change claims. First, the Pacific Northwest Tribes brought this suit based on treaty-reserved rights established in the Stevens Treaties to fish at all usual and accustomed places, including off-reservation.[176] The Stevens Treaties' right to fish provision guarantees the tribal signatory up to 50% of the fish available for harvest.[177] The Ninth Circuit applied the canons of construction faithfully, taking into account the historical records and context during which the agreement was made.[178] Also, the Ninth Circuit specifically focused on salmon's significance to the Pacific Northwest Tribes.[179] Salmon were—in the words of the 1905 U.S. Supreme Court—"not much less necessary to the existence of the [tribes] than the atmosphere they breathed."[180]

In deciding *United States v. Washington*, the Ninth Circuit relied on two landmark cases that found implied tribal rights: *Winters v. United States*[181] and *United States v. Adair*.[182] The former applied reserved rights to water, because an Indian reservation's purpose—to make the tribes "pastoral and civilized"[183]—could not be achieved without an implied right to water for agricultural irrigation.[184] The latter inferred a water right for the Klamath Tribe's reservation to sustain treaty-reserved hunting and fishing rights in Klamath Marsh.[185] Notably, the Ninth Circuit found that

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173. Du Bey et al., *supra* note 171, at 63.
174. *Id*. at 64.
175. *Id*.
176. *Washington*, 853 F.3d at 962 (established in Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1999)).
177. *Id*.
178. *Id*. at 963.
179. *Id*. at 964.
180. United States v. Winans, 198 U.S. 371, 381 (1905).
181. Winters v. United States, 207 U.S. 564, 576–77 (1908).
182. United States v. Adair, 723 F.2d 1394, 1412, 1420 (9th Cir. 1983).
183. *Winters*, 207 U.S. at 576.
184. *Id*. at 576–77.
185. *Adair*, 723 F.2d at 1408–09.

the Pacific Northwest Tribes "did not understand the [t]reaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs."[186] The Ninth Circuit reasoned that even if Governor Stevens had not explicitly promised that "'this paper secures your fish,' and that there would be food 'forever,'" it would nonetheless infer such a promise.[187] Accordingly, the Ninth Circuit held that "the [t]ribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."[188] Overall, the Indian canons of construction were crucial to the lower court's and the Ninth Circuit's decisions, which emphasized the Pacific Northwest Tribes' understanding of the treaty terms at the time of signing.[189]

In the context of climate change treaty-based claims, the Ninth Circuit's most significant analysis in *United States v. Washington* was based on the previous Ninth Circuit case, *United States v. Washington*[190] ("*Washington III*"). In *Washington III*, the Ninth Circuit ruled that Washington State was bound by the U.S. treaty obligations, and therefore violated the treaty terms, even if Washington did not have the "primary purpose or object" to affect the fish supply.[191] The "measure of the [s]tate's obligation," the Ninth Circuit ruled, depends "on all the facts presented" in the "particular dispute."[192] Implementing this ruling from *Washington III*, and turning to the particular facts of *United States v. Washington*, the Ninth Circuit found that the state acted affirmatively to build and maintain barrier culverts under its roads that

> block approximately 1,000 linear miles of streams suitable for salmon habitat . . . . If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Pacific Northwest Tribes for harvest.[193]

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186. United States v. Washington, 853 F.3d 946, 964 (9th Cir. 2017).

187. *Id*. at 964–65.

188. *Id*. at 965.

189. Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 33 (2017).

190. United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) [hereinafter *Washington III*].

191. *Id*.

192. *Id*.

193. *Washington*, 853 F.3d at 966.

The Ninth Circuit found that the state's building and maintenance of culverts caused the level of available salmon to be below the "moderate living" standard articulated in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*[194] as well as cultural, social, and economic harm. Therefore, the Ninth Circuit ruled that Washington violated the two Stevens Treaties at issue.[195] Importantly for climate change treaty-based claims moving forward, under the Ninth Circuit's reasoning from this line of cases, a court must make a factual determination whether there is an affirmative action adversely affecting treaty protected rights and resources.[196]

Finally, related to the permanent injunction that the Ninth Circuit ordered in *United States v. Washington*, the state asserted that the court-ordered correction of its barrier culverts was excessive.[197] Yet, based on the state's slow rate of work to fix the barriers, the Ninth Circuit concluded that "under the current [s]tate approach, the problem of . . . the culverts in the Case Area will never be solved."[198] Then, the Ninth Circuit ordered Washington to comply with dedicating state-estimated costs of $100 million per year to fund the culvert repairs.[199]

This is an extraordinary ruling because the Ninth Circuit extended the Pacific Northwest Tribes' treaty right to fish to include a limited duty of habitat protection. To reiterate, a non-tribal plaintiff could not have demonstrated the equivalent standing and injury to bring a claim or have successfully established such important protections for salmon fisheries. Some scholars suggest that *United States v. Washington* has far-reaching implications for Indian treaty rights and tribes' ability to protect not only direct rights, such as reserved rights to hunt, fish, and gather, but also indirect rights to resources, such as the protection of ecosystems that sustain resources to ensure continued, sustained access to that right.[200]

V. BRINGING A TREATY-BASED CLIMATE CHANGE CLAIM

In part because of the absence of federal legislation to regulate greenhouse gases contributing to dangerously rising global temperatures, parties are bringing an increasing number of cases in U.S. federal courts,

194. 443 U.S. 658, 686 (1979).
195. *Washington*, 853 F.3d at 966.
196. *See* Blumm, *supra* note 189, at 31 (discussing this line of cases).
197. *Washington*, 853 F.3d at 978.
198. *Id*.
199. *Id*. at 970–71, 978; Blumm, *supra* note 189, at 26.
200. Du Bey, *supra* note 171, at 67.

as well as courts around the world.[201] Between 2017 and 2020, 1,200 climate change cases were filed.[202] Most plaintiffs in the U.S. have faced basic justiciability barriers, such as "whether a court has the power to resolve the dispute, identifying the source of an enforceable climate related right or obligation, crafting a remedy that will lessen the plaintiffs' injuries, and marshalling the science of climate change"[203]—just as the youth plaintiffs in *Juliana* experienced.

Tribes in the U.S. have brought claims to the United Nations, but to date, no tribe has directly leveraged the trust relationship, nor treaty rights, to hold the federal government accountable for climate change.[204] However, there may be opportunities to do so if tribes can successfully link a treaty-reserved right to hunt and fish, for example, with both habitat protection and climate change effects.[205] Tribes have unique standing, rights, and injuries resulting from climate change. Since many treaties reserve rights to access and use natural resources that are particularly susceptible to climate change—such as fisheries, animals that are typically hunted for subsistence purposes, and water—these rights may form the basis of a successful climate action where other non-tribal plaintiffs have failed.[206]

The public trust doctrine may not require a fiduciary duty on behalf of the federal government, or at least *not yet*.[207] Treaty rights and the federal trust responsibility, on the other hand, do obligate the U.S. to certain protections and duties for tribal nations.[208] One of the biggest challenges in climate litigation is identifying who should be held accountable for the costs and causes of climate change. Treaty-based claims place the duty squarely on federal or state governments, as in *United States v. Washington*, through the trust relationship to protect and enforce treaty-reserved rights. Rights to land, water, fish, and wildlife guaranteed by treaties impose a clearer duty on the federal government than the public trust doctrine as applied to the atmosphere.[209]

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201. Burger & Metzger, *supra* note 88, at 6, 13. In 2017, advocates brought 884 cases in 24 countries. As of July 1, 2020, the number of cases has nearly doubled with at least 1,550 climate change cases filed in 38 countries. *Id*. at 13.

202. *Id*. at 13.

203. *Id*. at 4.

204. Smith, *supra* note 11.

205. Kronk Warner, *supra* note 14, at 933–34.

206. *Id*. at 919.

207. *See* Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

208. United States v. Washington, 853 F.3d 946, 967 (9th Cir. 2017).

209. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 340–41 (1983); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979); United States v. Winans, 198 U.S. 371, 381 (1905).

Based on the unique legal status of tribes, the trust relationship between the federal government and tribes, and specific treaty-reserved rights, Indian tribes as climate change-threatened plaintiffs can identify the U.S. as the trustee in the fiduciary relationship. Thus, depending on the treaty's language, tribes can either bring a claim for a treaty violation or for a breach of trust claim informed by the treaty-protected rights as a basis to demonstrate the federal government's fiduciary duty—or, potentially, tribes could bring both.

A. Tribal Treaty Resources Threatened by Climate Change

Whether Indian tribes can leverage a treaty to protect resources threatened by climate change is a highly fact-specific question and depends on the treaty's individual language and circumstances.[210] In order to determine whether tribes may rely on their treaties with the U.S. to protect such resources, it is helpful to first consider the provisions of various treaties.[211]

1. Treaties

Treaties vary greatly, but often include terms to reserve homelands, travel and trade routes, water, hunting, gathering, and fishing rights.[212] Still, other treaties include promises for building schools, hospitals, and other infrastructure, as well as providing adequate services and personnel to teach and provide health care services. Some treaties even promise to provide blacksmiths, carpenters, and farmers to teach Indians how to take on these trades.[213]

Treaties were primarily a means for the U.S. to secure the tribes' pledge to not make war on other tribes or non-Indians; in exchange, the U.S. often promised homelands for tribes by creating reservations where tribal communities were relocated.[214] Many treaties—but not all—included language about the tribes' exclusive use of their reservation

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210. Kronk Warner, *supra* note 14, at 933.

211. *Id*.

212. *See, e.g.*, Treaty Between the United States and the Yakama Nation of Indians, art. 3, U.S.-Yakama June 9, 1855, 12 Stat. 951; Treaty Between the United States and the Dwámish, Suquámish and Other Allied and Subordinate Tribes of Indians in Washington Territory art. V, Jan. 22, 1855, 12 Stat. 927; Treaty with the Blackfoot Indians, art. 3, 6, U.S.-Blackfoot, Oct. 17, 1855, 11 Stat. 657; Treaty of Fort Laramie with Sioux, art. 5, U.S.-Sioux, Sept. 17, 1851, 11 Stat. 749.

213. Treaty with the Quinault Tribe et al. (Treaty of Olympia) art. 10, Jan. 25, 1856, 12 Stat. 971.

214. Kronk Warner, *supra* note 14, at 956–57.

lands. To illustrate, the Treaty of Point Elliot signed by the Swinomish Indian Tribal Community in 1855 reserved the lands for the "exclusive use" of the tribe, while also granting the federal government control over certain lands, which allowed the government to give non-Indians permission to settle on and develop roads as needed.[215] The Nez Perce entered into the 1863 Treaty, which also refers to the tribe's homeland, establishing a "home . . . for the sole use and occupation" of the tribe.[216] The Fort Laramie Treaties of 1851 and 1868 designated different tribes to specific tracts of land across the Northwest region of the U.S. territories, describing in some detail the boundaries of each reservation based on mountains, rivers, and roads.[217]

Regarding tribal hunting and fishing rights, the series of Stevens Treaties commonly include language recognizing a tribe's right to take "fish at usual and accustomed grounds and stations."[218] The language in the Stevens Treaties regarding the right to fish is quite short, and its meaning murky at best.[219] As previously described, to interpret the meaning of the right to fish provision, courts have applied the canons of interpretation, relied on historical context, looked to Governor Stevens' recorded pronouncements about dealings with the tribes.[220] Today, as demonstrated by the Ninth Circuit's opinion in *United States v. Washington*, the right to fish provision has been interpreted and extrapolated to provide substantial fishing rights and a certain level of habitat protection for the Pacific Northwest Tribes.[221]

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215. Treaty Between the United States and the Dwámish, Suquámish and Other Allied and Subordinate Tribes of Indians in Washington Territory, *supra* note 212, at art. I, II.

216. Treaty Between the United States of America and the Nez Perce Tribe of Indians, art. 1, U.S.-Nez Perce, June 9, 1863, 14 Stat. 647; Kronk Warner, *supra* note 14, at 926.

217. Treaty of Fort Laramie with Sioux, *supra* note 212, at art. 5. Treaty with the Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, San Arcs, and Santee-and Arapaho, May 29, 1868, 15 Stat. 635.

218. Treaty Between the United States and the Dwámish, Suquámish and Other Allied and Subordinate Tribes of Indians in Washington Territory, *supra* note 212, at art. V.

219. Diarmuid O'Scannlain, *19th Century Indian Treaties and 21st Century Environmental and Natural Resources Issues: Is There a Connection?*, 49 ENV'T 837, 842 (2019).

220. *Id*.

221. United States v. Washington, 853 F.3d 946, 964–65 (9th Cir. 2017).

2. Treaty Claims

To prove a treaty violation, a tribe must demonstrate that a given provision protects certain resources or establishes certain rights. Next, the tribe must show that the government or other actor has taken affirmative action or inaction that adversely affects the treaty right.[222] Where Indigenous homelands and reservation lands are threatened by climate-induced extreme weather events or flooding due to rising ocean levels, tribes may be able to leverage the U.S.'s treaty promises that secured their tribal lands.

As one example, the Quinault Indian Nation signed the Treaty of Olympia in 1856. This treaty promised the Quinault Indian Nation a reservation for agricultural purposes as selected by the President for the tribe's "exclusive use."[223] Article VI provides that the federal government can also remove the tribes from the reservation as "interests of the Territory shall require" and if the Indians' welfare will be promoted by removal.[224] The President can then select "such other suitable place or places within said Territory as he may deem fit."[225] Considering that sea level rise, increasing storm surges, and eroding coastlines are now threatening the Quinault's reservation community and infrastructure, this treaty language is particularly relevant today.[226]

In this instance, the Quinault Indian Nation might be able to successfully bring a claim that the federal government has violated its treaty promises if the U.S. does not aid in the tribe's safe removal and re-establishment of a new reservation. Here, the "affirmative action" that adversely affects the treaty right would be the U.S.'s failure to relocate the Quinault Indian Nation in the face of climate change-based weather disruption jeopardizing tribal members' welfare. Though a court may not consider this *failure to act* as an affirmative action along the same line of reasoning as the Ninth Circuit's *United States v. Washington* decision, the Treaty of Olympia explicitly recognizes the government's affirmative duty to act on behalf of the tribe. Therefore, the U.S.'s lack of response or aid could be interpreted as a treaty violation.

First, the Quinault Indian Nation can show that the federal government created a reservation for its exclusive use when it established a new homeland for the Quinault tribal members in the Treaty of

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222. *See supra* Section IV.B.
223. Treaty of Olympia, *supra* note 213, at art. 2.
224. *Id*. at art. 6.
225. *Id*.
226. Walker, *supra* note 10.

Olympia.[227] Next, the Quinault would need to demonstrate actual need to relocate and submit that request to the federal government. Then, if the U.S. fails to aid the Quinault's relocation to safer grounds sufficiently beyond the rising sea levels, and the tribe can prove that its members' welfare is threatened based on their reservation's location and proximity to the ocean, or that the agricultural purposes for establishing the reservation are no longer feasible, then the Quinault Indian Nation can likely demonstrate that the federal government violated its treaty promise.

Based on a reading of Articles V and VI of the Treaty of Olympia pursuant to the canons of construction, the U.S. would be required to pay for the Quinault Indian Nation's relocation.[228] And, if the Quinault were "compelled to abandon" their reservation, then the U.S. is required to value "any substantial improvements" made by the tribe and compensate the tribe at the discretion of the President.[229] The treaty text does not provide examples or sufficient context of what might compel the Quinault to abandon their reservation. However, if a court were to interpret the Treaty of Olympia's ambiguities in the Quinault's favor, the court should look to the relevant historical context to understand what factors would have conceivably compelled the Quinault to relocate. Even without the historical record, one can assume that inhospitable climatic conditions and a physical loss of habitable territory within the reservation boundaries qualify as sufficient factors. Since the U.S. compensated the Quinault Indian Nation to establish the reservation in the 1860s and pledged to compensate the tribe if relocation was necessary, the Treaty of Olympia's text can also be reasonably read to mean that the federal government must provide financial aid and assistance to relocate the Quinault.

To note, the treaty language is discretionary—it does not place a mandatory duty on the U.S. regarding the President's ability to relocate the Quinault. Nonetheless, the treaty established the Quinault's new homeland in creating a reservation. The reservation was established to convert the tribe to agriculturalists and to cultivate the land.[230] If and when rising seas and storm surges prevent the Quinault from pursuing an

227. Treaty of Olympia, *supra* note 213, at art. 2.

228. *Id*. at art. 5, 6.

229. "To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars." *Id*. at art. 5; "Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor." *Id*. at art. 6.

230. *Id*. at art. 2, 5.

agrarian lifestyle and threaten tribal members' welfare, the U.S. may be liable for violating the Treaty of Olympia.

Beyond reservation lands and homelands, as noted in a 2016 U.S. Department of Agriculture report, as climate change alters ecosystems, "the habitat for treaty-protected species may shift outside boundaries or disappear, negatively affecting tribal treaty rights and subsistence, cultural, and economic practices."[231] Given that climate change also threatens ocean wildlife such as fish and shellfish, a tribe's ability to access the treaty-protected resource is also threatened. As previously mentioned, Pacific Northwest Tribes' fishing rights and cultural traditions are jeopardized due to warming waters, which is projected to cause mass species shifts. One study shows that salmon shifting north to colder waters means tribal fisheries along the Pacific Northwest coast could decline by almost 50% by 2050.[232] If, as projected, the Pacific Ocean salmon population migrates beyond the geographic region established by interpreted Stevens Treaties as the "usual and accustomed" places for tribes to exercise treaty-reserved rights to fish, a tribe in the Pacific Northwest that is a signatory to a Stevens Treaty would very likely be able to demonstrate, first, that tribal members have a right to take fish, and second, that tribal members can no longer access the salmon.

The remaining hurdle in bringing this treaty-based claim is establishing that the U.S. or other actor has taken affirmative action adversely affecting the tribe's right to fish at usual and accustomed places.[233] Although environmental groups celebrate *United States v. Washington* as construing the express right to fish language in the Stevens Treaties to also include salmon habitat protection, the ruling did not establish wholesale habitat protection. Rather, the Ninth Circuit recognized the Pacific Northwest Tribes' right to enforce an implied duty on the part of the state and federal governments—but only so far as to *refrain* from damaging natural habitats by removing culverts that supported the tribal treaty protected resources, including fish, water, and game.[234]

Climate change is undoubtedly contributing to salmon habitat degradation, but proving the causal link, or traceability, of who is

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231. Norton-Smith, *supra* note 5, at 7.

232. Smith, *supra* note 11.

233. According to Professor Elizabeth Ann Kronk Warner, "[I]t is not clear that the Stevens Treaties requires the federal government to take affirmative action to protect fisheries in the region from the impacts of climate change." Kronk Warner, *supra* note 14, at 933.

234. United States v. Washington, 853 F.3d 946, 961 (9th Cir. 2017); *see also Washington III*, 759 F.2d 1353, 1355 (9th Cir. 1985).

responsible for the alleged treaty violation will be challenging.[235] Building culverts that physically prevent salmon from spawning, and that substantially reduce the fish populations, presents a far shorter and clearer causal link for courts. Similarly, other forms of habitat degradation, such as dams, water diversions, and sedimentation in streams are relatively easy to demonstrate.[236] On the other hand, in order to successfully bring a treaty-violation claim focused on the effects of climate change—rather than a tangible culvert—on salmon populations, a tribe must establish several causal steps. First, a tribe must establish the traceability between the policies and practices of the government or private actors that contributed to climate change, as well as the specific chain of causation showing that climate change has warmed the streams, rivers, and ocean waters that salmon and other fish species rely on. Then, a tribe must prove that those affirmative actions increased temperatures in the waters, damaging salmon habitat and causing the fish the migrate to colder waters.[237] Because a court would likely struggle to identify any one affirmative action among the myriad of reasons for a warming ocean (consider greenhouse gas emissions from fossil fuel development, agricultural practices, fossil fuel combustion, etc.) that is causing salmon populations to migrate beyond the tribe's usual and accustomed places established by treaty, it is difficult to imagine how a court would apply—or how tribes would argue—the habitat protection rule from *United States v. Washington* in the context of warming ocean waters due to climate change.

The federal trustee's role in the culverts case was remarkable. The U.S., as trustee, "never wavered as the nearly half-century-old litigation proceeded from securing a harvest share, including hatchery fish in that share, and implying a right of habitat protection."[238] However, the U.S. also played—and continues to play—a significant role in adversely affecting salmon populations, particularly in the Columbia River Basin, where large hydroelectric power dams impede salmon migration and spawning.[239] The Ninth Circuit seemed to suggest that the tribes could successfully sue the federal government, too.[240] Yet, if the tribes cannot prove that a government's or private entity's affirmative actions have contributed to the treaty violation, tribes are still unlikely to bring a

235. Blumm, *supra* note 189, at 30–31.
236. *Id*.
237. *Id*.
238. *Id*. at 35.
239. *Id*. at 35–36.
240. *Id*. at 28.

successful claim against the U.S.[241] Moreover, rather than filing suit, tribes may wish to file a rulemaking petition with federal agencies requesting that the U.S. take action to list salmon as a threatened or endangered species, and to develop an agreement that tribal members are able to fish again based on the relative success of reviving or reintroducing that fish species population.

Unlike the previously discussed treaty claim to protect a tribal homeland or reservation where the federal government could take action to relocate a tribe without admitting liability for contributing to climate change, this treaty-based claim necessarily obligates the U.S. to take action to address or limit the factors contributing to climate change. The federal government cannot simply relocate millions of salmon back to the tribe's usual and accustomed fishing places. This redressability issue will likely prevent a court from ruling in the tribe's favor, especially considering the attenuated causal link and difficulty in proving concrete traceability between government action, climate change, warming ocean temperatures, and salmon migration.

Ultimately, a court's decision on a treaty violation claim like those outlined above rests on whether the court finds that the federal government's *failure to act* constitutes an affirmative action adversely affecting the treaty-promised right or resource. Comparing the two examples of a distinctly tribal climate change legal claim to protect treaty-based resources and rights reveals different strategies based on the right or resource threatened. In reference to bringing a treaty violation claim to preserve fishing rights, tribes likely face significant causation issues because of the difficulties associated with identifying a specific, affirmative action causing or significantly contributing to warming, and therefore degrading, the waters on which the salmon rely. Given these hurdles, tribes may be best served by identifying specific, affirmative actions that interfere with salmon migration and habitat. Under the present-day legal framework, even with the extended habitat protections read into the series of Stevens Treaties, there is no clear path for tribes to bring a treaty-based claim to protect their fishing rights from the threat of globally warming waters.

Perhaps most realistically, the Pacific Northwest Tribes may be able to show in the future that the available salmon are insufficient to meet the "moderate living" standard articulated in *Fishing Vessel* because of climate change-based impacts to salmon habitat,[242] which causes the Tribe

241. *Id.*

242. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979).

cultural, social, and economic harm.[243] If the Pacific Northwest Tribes can make this showing, a court may then be able to address the allocation of fish between tribal and non-tribal members in order to meet the moderate living standard. This outcome is, unfortunately, a short-term solution that does not address the root causes of salmon habitat degradation, nor long-term impacts on the physical, cultural, and spiritual health of the tribes who rely upon salmon.[244]

In bringing a treaty violation claim to preserve a reservation or homelands—or to relocate that reservation—the tribe does not face the same causation issues identified in the claim to protect treaty fishing rights. If a court were to rule in favor of the tribe bringing a treaty violation claim to protect their reservation or to relocate, the ruling does not hold the federal government, or any entity for that matter, responsible for contributing to increased greenhouse gases that have caused the climate crisis. This strategy, therefore, is distinct from past and current non-tribal climate change claims based on constitutional rights, the public trust doctrine, or federal statutes, which seek to identify *who* is responsible for causing climate change-based threats to certain communities and *how* the responsible entity should be held accountable. Here, instead, a tribal treaty-based claim to protect climate change-threatened resources can succeed without necessarily identifying the culprit, whether it be a fossil fuel corporation or the federal government.

On one hand, this aspect of a tribal treaty-based claim may be a strength of this litigation strategy. Non-tribal plaintiffs might sue the federal government for contributing to rising sea levels due to a lack of greenhouse gas regulation and seek compensation for the loss of their homes. Though to prevail, that non-tribal plaintiff must first establish causation between the U.S. fossil fuel development and greenhouse gas emissions with rising sea levels or increased storm surges, which then results in personal property damage.[245] Here, however, tribal plaintiffs can leverage their sovereign status and treaty rights to seek a remedy without proving causation and sole responsibility. On the other hand, given the long-term projected impacts of climate change that will likely have irreversible effects for decades to come, this litigation approach may be short-sighted if it is intended to address broader questions of climate change accountability.

243. United States v. Washington, 853 F.3d 946, 966 (9th Cir. 2017).
244. And this outcome may be limited by conservation necessity.
245. Sprankling et al., *supra* note 156.

B. Breach of Trust Claims

When tribal rights are threatened by climate change, the federal trust responsibility may create a legally-binding obligation for the U.S. to act.[246] Tribes can bring claims for a breach of the federal trust relationship based on the Indian Tucker Act and Tucker Act.[247]

Tribes have previously been successful in bringing breach of trust claims to protect tribal resources, though not based primarily or exclusively on treaty language.[248] The U.S. owes federally-recognized tribes fiduciary duties related to the management of tribal trust lands and resources, and a duty to ensure that these resources are sustained.[249] Given the federal government's "pervasive role" in Indian Country, turning to the U.S. to uphold its fiduciary duty for potential protection against the negative impacts of climate change may be particularly relevant.[250]

To prove a breach of trust, a tribe must point to express statutory language supporting a fiduciary relationship or show that the treaty places a specific statutory duty on the U.S., and then demonstrate that the U.S. has significant control over the resources or property at issue.[251] Federal courts have ruled that "mere federal oversight does not amount to the necessary day-to-day control" required to successfully support a breach of trust claim.[252] A treaty claim could be used in conjunction with a claim of a breach of the federal trust relationship if the treaty language is sufficient to create or require an enforceable trust claim based on the Tucker Acts.

Allowing entire tribal communities to disappear due to thawing tundra, eroding coastal areas, or rising seas would clearly violate the federal trust responsibility.[253] Relocation as an adaptation strategy will be necessary in the future if a tribe is willing to relocate, leaving their reservation and homelands, and if the government is willing to dedicate

246. Hanna, *supra* note 34, at 29.

247. Indian Tucker Act, 28 U.S.C. § 1505 (2021); Tucker Act, 28 U.S.C. § 1491 (2021); Kronk Warner, *supra* note 14, at 937.

248. Kronk Warner, *supra* note 14, at 921.

249. *Mitchell II*, 463 U.S. 206, 220–22 (1983); *see also* Kronk Warner, *supra* note 14, at 921, 935.

250. *Id*. at 921.

251. United States v. Navajo Nation, 537 U.S. 488, 489 (2003); United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003).

252. Kronk Warner, *supra* note 14, at 943.

253. WOLTERS & STEEL, *supra* note 80, at 247.

financial resources to secure an alternative land base.[254] Yet, the moral dimensions of the trust responsibility as expressed in *Seminole Nation* are likely insufficient for a court to find a fiduciary duty because federal courts typically reject claims made solely on the basis of this general trust responsibility.[255]

Though not related to climate change or natural resources, *Rosebud Sioux v. United States*,[256] decided by the United States District Court for the District of South Dakota, provides insight into how a federal court might rule on a tribal treaty-based breach of trust claim. In this case, the Rosebud Sioux Tribe sought equitable relief in the form of a declaratory judgment that the "'[g]overnment is not fulfilling its treaty and statutory obligations to provide the quantity and quality of health care that will raise the health of tribal members to the highest level, and eliminate health disparities suffered by the Tribe'" when the Indian Health Services ("IHS") closed the Rosebud IHS Emergency Department.[257] The Rosebud Sioux Tribe identified language in the 1868 Treaty of Fort Laramie, the Snyder Act of 1921, and the Indian Health Care Improvement Act ("IHCIA") as substantive sources of law imposing a duty on the federal government to provide the Rosebud Sioux with adequate health care.[258] The district court, after analyzing these three different sources of law and applying the canons of construction, held that the U.S. Department of Health and Human Services owed at minimum "competent physician-led health care" to the Rosebud Sioux Tribe based on the Fort Laramie Treaty of 1868, but it rejected the Tribe's claim based on the highest standard of care among the sources cited.[259] The district court found that the Rosebud Sioux Tribe "overstate[d] the [g]overnment's duty" by alleging that the IHS should be held to a higher, "more stringent duty contained in statute," and therefore denied the claim to that extent.[260] Though the district court did not reject the Rosebud Sioux's argument that the federal government

254. *Id*. at 246–47. Relocation efforts are a deeply political and cultural issue because of the Indian Removal period legacy during which the U.S. federal government forcibly removed American Indians from their homelands to be resettled on reservations. Jamie Kay Ford & Erik Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WILLIAM MITCHELL L. REV. 2, 530 (2015).

255. Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (holding that the existence of a general trust relationship between the U.S. and Indian tribes and members).

256. 450 F. Supp. 3d 986, 1005 (D.S.D. 2020).

257. *Id*. at 996.

258. *Id*. at 955–96.

259. *Id*. at 1000, 1002.

260. *Id*. at 1002–03.

had "some duty to provide health care to its members," it ultimately ruled that the judicially enforceable fiduciary duty was merely competent physician-led health care based on the construction of the 1868 Treaty of Fort Laramie.[261]

This decision can be read several different ways as applied to a tribal treaty-based breach of trust claim. On one hand, *Rosebud Sioux* may open the door to future federal breach of trust claims informed by treaty language because the district court relied on the 1868 Treaty of Fort Laramie as the primary source of law imposing a duty on the federal government. On the other hand, this decision does not spark strong confidence in presenting a treaty provision as a source of substantive law to enforce a fiduciary duty because the district court's reasoning appears to apply a "bare minimum" standard. In the field of health care services, this bare minimum of "competent physician-led health care" may, in reality, be insufficient to meet the Rosebud Sioux Tribe's community needs. The *Rosebud Sioux* ruling could, therefore, limit how future courts analyze the extent of the government's duty in a treaty-based breach of trust claim.

In the realm of protecting tribal communities from climate change-based threats to their economies, cultures, homelands, rights, and natural resources, the district court's approach may also be insufficient. To illustrate, the Treaty of Olympia's language does not place a mandatory duty on the federal government to relocate the Quinault Indian Nation for the tribe's welfare.[262] If and when rising seas and storm surges prevent the Quinault from pursuing an agrarian lifestyle and threaten tribal members' welfare, the U.S. may be liable for violating the Treaty of Olympia. However, it is unlikely a court would identify an enforceable breach of trust. A court is more likely to rule that the U.S. has only a bare duty. If the federal government does take affirmative action on behalf of the Quinault Indian Nation by building storm walls, for example, a court might consider this action sufficient to protect the tribe's welfare because it meets the *bare minimum* expectation of the Treaty of Olympia. These kinds of measures are important in the short-term, but do not provide sufficient long-term protection for the tribe's welfare. Based on the *Rosebud Sioux* decision, it is unlikely that a court would place a higher, more stringent fiduciary duty on the federal government beyond the minimum level articulated in the treaty to protect tribal rights and resources jeopardized by climate change.

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261. *Id*. at 1001, 1005.

262. Treaty of Olympia, *supra* note 213, at art. V, VI.

Despite the district court's bare minimum reading of the fiduciary responsibility in the treaty text, the trust responsibility should encourage federal agencies to interpret and apply statutory and administrative climate change policies for the benefit of American Indian communities.[263] Further, judicial caution in enforcing the trust obligation does not lessen the federal government's legal and moral responsibility to take action when tribal land and resources face threats as serious as those from climate change.[264]

VI. REMAINING CHALLENGES

Overall, based on the unique legal status of tribes, the trust relationship between the federal government and tribes, and specific treaty-reserved rights, Indian tribes in the U.S. may be the best situated plaintiffs to successfully bring a climate change claim in this country. And yet, considerable challenges still exist. Bringing a claim based on a treaty violation or breach of trust in this context is far from a certain legal victory.

Tribes must balance several additional considerations and challenges compared to non-tribal plaintiffs, and ultimately may not want to pursue a treaty-based climate change claim. From a practical standpoint, tribes must consider how they want to dedicate often limited resources. If tribal governments need to prioritize resources toward protecting climate change-threatened natural and cultural resources, or their ancestral homelands, they may prefer to dedicate energy and expertise toward climate change adaptation and mitigation plans rather than litigation, which can be expensive, lengthy, and ultimately unsuccessful. As an additional concern, tribal governments may be hesitant to bring a claim based on specific treaty language that has not yet been interpreted by a court because there is a risk of unfavorable interpretation and the diminishment of treaty rights.[265]

Further, tribes may be wary of environmental organizations eager to litigate climate change issues that seek to co-opt or take advantage of tribal plaintiffs' sovereignty, and thus, their unique standing, injury, and redressability. A tribal government or entity may seek to protect their tribal sovereignty and treaty-protected rights and resources from being leveraged by outside interests that could act to the detriment of the tribe and future tribal members. And, finally, potentially the most important consideration is what judicial relief a given tribe would seek and find sufficient. For example, certain tribes may not want to legally bind the

263. Hanna, *supra* note 34, at 29.
264. *Id*.
265. Smith, *supra* note 11.

U.S. to relocate them to a different land base because leaving their aboriginal homelands would be culturally devastating. On the other hand, tribes may request monetary damages. And some tribes may ultimately decide that relocation or damages are insufficient remedies.

Another consideration is the issue of causation, or connecting an affirmative, discrete state or federal action to actually *causing* climate change that is threatening tribal resources and rights. Causation, or responsibility, has been a central issue of other climate change-based claims and will likely also prove challenging for tribal plaintiffs depending on the specifics of the treaty terms and injuries alleged.[266] Tribes alleging that climate change jeopardizes their treaty-reserved homelands or treaty-protected fishing rights may be able to demonstrate that sea levels are rising, eroding their territorial region, and threatening their infrastructure, or that warming waters have disrupted the salmon life cycle and habitat, causing salmon populations to move to colder waters beyond the boundaries of "usual and accustomed" locations. Although, proving this link will require significant time and scientific resources. While the causal links in *United States v. Washington* are more tangible, it nonetheless took considerable resources, and several decades, to marshal the data required to prove the link between culverts and substantial harm to the salmon population that culminated in the Pacific Northwest Tribes' legal victory. The causation issue depends on which treaty rights and resources are at stake and begs the question: who specifically caused the sea levels to rise, or the ocean waters to warm?

Thus far, courts have been wary of ordering the U.S. to undertake any kind of proactive or reactive climate change policymaking, such as preparing a remedial plan to phase out fossil fuel emissions or funding and implementing climate change mitigation and adaptation plans specifically with tribal governments.[267] Yet, as demonstrated by the Ninth Circuit's *Juliana v. United States* decision, federal courts do recognize that "it will be increasingly difficult . . . for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions."[268] And, courts wield extraordinary power, as the Ninth Circuit's order in *United States v. Washington* revealed. The Ninth Circuit ordered a permanent injunction and required that Washington fix the barrier culverts, mandating that the state fund culvert repairs until the problem

266. Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 847–48 (2018).

267. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

268. *Id*. at 1175.

was solved.[269] If tribal plaintiffs could successfully bring a treaty-based claim resulting in a court order mandating that the federal government promptly address the climate change problem because, "under the current [government's] approach, the problem . . . will never be solved,"[270] imagine the enormous amount of potential to protect tribal sovereignty and change the world.

VII. CONCLUSION

In the face of the existential threat of a warming planet, Indian tribes could leverage treaties in new ways that potentially open up legal avenues to alleviate climate change harms and compel the federal government to implement both proactive and reactive mitigation and adaptation measures.[271] In bringing these claims to protect their lands and natural resources from climate change threats, tribes can protect the very foundations of their tribal sovereignty, as well as build strategic opportunities to hold the federal government accountable to curb greenhouse gas emissions and support the most vulnerable communities. If tribes can bring these claims successfully, it would be a victory with benefits that extend far beyond any given tribe, reservation, or community.

In the end, what do tribes have to lose? Everything.

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269. United States v. Washington, 853 F.3d 946, 970–71, 980 (9th Cir. 2017); Alex Brown, *Salmon to Swim Free as Infrastructure Money Flows*, THE PEW CHARITABLE TRUSTS (Nov. 19, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/19/salmon-to-swim-free-as-infrastructure-money-flows [https://perma.cc/HM4A-76XW] (explaining that over the last several years, Washington has been unable to fund culvert removal at the scale and pace that the court prescribed; the federal government has stepped in with a long-awaited infrastructure package, providing $1 billion specifically for culvert removal in Washington and upwards of $11 billion for road infrastructure that will improve salmon habitat).

270. *Washington*, 853 F.3d at 978 (quoting the district court's reasoning that the state's current response to the culvert issue was inadequate).

271. Kronk Warner, *supra* note 14, at 917.