NOTE

A GREAT NATION KEEPING ITS WORD: THE ROLE OF TRIBAL TREATY RIGHTS IN CLIMATE CHANGE LITIGATION

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INTRODUCTION

This Note explores how the encounter between two cataclysms may provide an avenue to mitigate national and global catastrophe.

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The first of these upheavals is the arrival of settlers to North America.[1] The second is the snowballing alteration to our global climate system from anthropogenic sources, known as climate change.[2] Both of these disruptions have prompted massive social, economic, and ecological changes and exacted a large cost from Indian tribes.[3] As a result of the first upheaval, European powers—and later the United States—entered into treaties with Indian tribes and an entire body of federal Indian law emerged from their interaction.[4] These treaties often guaranteed the continued exercise of certain rights for Indian tribes—including the right to enjoy and use essential natural resources. As this Note will explore, the resource rights reserved in these treaties and the principles that have emerged in the unique sphere of federal Indian law may provide a means to address the failure of state and federal governments to act

[1] On the use of "settler" to denote a specific form of colonialism, *see* Alicia Cox, *Settler Colonialism*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780190221911/obo-9780190221911-0029.xml

[2] *See generally* DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH (2019).

[3] *See, e.g.*, Alexander Koch et al., *Earth System Impacts of the European Arrival and Great Dying in the Americas After 1492*, 207 QUATERNARY SCI. REVS. 13 (2019) (reviewing the literature on pre-Columbian land use and demographics throughout the Americas and the massive alterations due to the impacts of epidemics, warfare, enslavement, and famine following European contact); Heather Trigg, *Food Choice and Social Identity in Early Colonial New Mexico*, 46 J. SW. 223, 224 (2004) (discussing how Spanish colonialists sought to "incorporate the Pueblo peoples into their social and economic systems" and subsequent changes to Pueblo culture); Diane Wallman, E. Christian Wells & Isabel C. Rivera-Collazo, *The Environmental Legacies of Colonialism in the Northern Neotropics: Introduction to the Special Issue*, 23 ENV'T ARCHAEOLOGY 1 (2018) (introducing the journal's issue on settler environmental impacts in Florida, the Caribbean, and Mexico). *See generally* WILLIAM CRONON, CHANGES IN THE LAND (1983) (discussing the economic and ecological changes wrought by European settlers in New England).

[4] See, for instance, the discussion of Indian treaties and their implications in the so-called "trilogy" of cases decided by Chief Justice Marshall. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) (holding that "discovery" and conquest gave the United States absolute title to the land which Indians occupied and that Indians could only transfer title to the federal government); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (finding that Indian tribes were "domestic dependent nations" rather than "foreign nations," and subject to the wardship of the federal government); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515, 561 (1832) (finding that the state of Georgia could not change the rights afforded to Indian nations under a treaty between the Cherokee and the federal government); *see also* discussion *infra* note 51.

on climate change. Such lawsuits could serve to address the specific effects of climate change on tribes whose treaty rights are increasingly under threat. At the same time, these lawsuits would have the potential to spur more general governmental action to mitigate or adapt to the impacts of climate change and to pay for its harmful consequences, with profound impacts for the rest of the world.

The question of whether treaty-based suits will be successful, or even more robust than suits by non-Indians based in tort or public trust theories, remains to be tested. Climate change lawsuits are relatively new, and the development and extension of legal doctrines to apply to climate change is slow, perhaps given the inertia and conservative nature of the law. However, tribal claims may have several advantages over those of non-Indians for establishing certain elements of standing—whose three prongs are injury in fact, traceability, and redressability[5]—and for finding an affirmative government duty to act on climate change.

Treaties provide unique avenues of litigation that are unavailable to non-Indian plaintiffs. For one, they guarantee that tribes have access to certain resources. The increasing threat to these resources posed by a changing climate could violate a tribe's treaty rights.[6] And although tribes will have to contend with difficulties in establishing traceability to climate defendants' actions, tribal treaty rights claims may face fewer issues related to redressability, such as manageable standards of judicial review and concerns about the political question doctrine,[7] as compared to other climate change suits. Certain tribes enjoy the exercise of substantive resource rights that must be protected by federal and state governments from both governmental and third-party interference. Tribes also have a unique trust relationship with the federal government which, while often paid mere lip service, should entail specific limitations and

[5] *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)) ("[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

[6] In this Note, I refer to the resources guaranteed by treaty as "treaty resources."

[7] *See* discussion *infra* Part III.A.

obligations on the part of the federal government in actions—such as granting fossil fuel exploration permits—that may affect tribes.

To explain why climate change litigation brought by tribes has the potential to be truly groundbreaking, I will first discuss the recent trends in climate change litigation in Part I. These trends include the development of innovative legal strategies that aim to help plaintiffs meet the elements of standing and establish government duties to act on climate change. I provide further detail on one such strategy, the coordinated use of the public trust doctrine in state and federal litigation, as it provides a helpful point of comparison for tribal litigation strategies. This preliminary background will help explain why tribes may more effectively overcome the procedural hurdles of climate change litigation.

In Part II, I provide a brief overview of Indian treaty rights, with a focus on treaty resource guarantees such as hunting, fishing, and water rights. This section explains how federal and state governmental obligations to Indian tribes developed. I discuss how these obligations emerge in part from the unique trust relationship between the federal government and Indian tribes, and then describe how such obligations relate to climate change mitigation and adaptation and why these appeals may prove more successful than appeals to the public trust doctrine.

Parts III and IV outline some potential avenues for tribes to sue state and federal governments, respectively. These sections acknowledge the barriers faced both in climate change litigation and in litigation against government entities, more generally, while arguing that tribes may have specific advantages in surmounting these challenges. It is important to note that the discussions in these last two Parts are necessarily broad and exploratory, given the relative legal novelty of the climate challenge, as well as the untested role of tribal treaty rights in confronting it. A great deal more scholarship and litigation are necessary. Yet even now it appears the confluence of Indian treaty rights and climate change litigation may engender legal breakthroughs to help tribes protect their resources and ways of life. Such developments may also help other groups mount more successful legal battles to prompt climate action.

I. TRENDS IN CLIMATE LITIGATION

Climate change is a hot topic, and for good reason. It is an enormous global challenge in scope and scale, triggering more severe and frequent weather events and erratic changes in what were previously predictable weather patterns. These alterations are causing loss of life, agricultural disasters, and property damage.[8] Things are only predicted to get worse.[9] Reducing greenhouse gas emissions to mitigate climate change is crucial if we are to stay in the least catastrophic of all possible worlds,[10] yet policy responses have so far been insufficient. Proposed regulatory solutions through the Clean Air Act (CAA) may not be wide-reaching enough to mitigate greenhouse gas (GHG) pollution to the extent necessary.[11] The Clean Water Act is hardly capable of addressing current water pollution, let alone future water-related climate impacts.[12] To make matters worse, the Trump Administration has supported high-emission industries, such as fossil fuels, and weakened efforts to

[8] *See* IPCC, *Summary for Policymakers*, *in* CLIMATE CHANGE 2014: SYNTHESIS REPORT 2 (Rajendra K. Pachauri and Leo A. Meyer eds., 2015); *see also Explaining Extreme Events from a Climate Perspective*, AM. METEOROLOGICAL SOC'Y, https://www.ametsoc.org/ams/index.cfm/publications/bulletin-of-the-american-meteorological-society-bams/explaining-extreme-events-from-a-climate-perspective/ (last visited May 1, 2020) [hereinafter *Explaining Extreme Events*].

[9] *See generally* WALLACE-WELLS, *supra* note 2.

[10] *See id.* at 16–17 (discussing the enormous differences in predicted impacts for each 0.5 degrees Celsius of warming).

[11] The Supreme Court did find that the CAA requires the EPA to regulate GHGs in *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). However, the Court sharply curtailed how far such regulation might go in *Utility Air Regulatory Group v. EPA*, by interpreting that CAA definitions of "pollutant" subjected only carbon dioxide emitters that were *already* regulated due to their emissions of other conventional pollutants to GHG regulation. *Util. Air Reg. Grp. v. EPA* 573 U.S. 302, 331–32 (2014). The Court reasoned that otherwise too many small sources would be burdened with regulation and Congress could not have intended such a result when it created the Act. *See id.* at 322.

[12] For instance, the Clean Water Act has not successfully addressed nonpoint source pollution, such as agricultural runoff. *See* Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1035 (2013). The Act may not be equipped to handle climate-related issues, such as ocean acidification. *See* Eric V. Hull, *Ocean Acidification: Legal and Policy Responses to Address Climate Change's Evil Twin*, 6 WASH. J. ENV'T L. & POL'Y 348, 369 (2016).

reduce emissions, including by repealing the Obama-era Clean Power Plan[13] and withdrawing from the Paris Agreement.[14]

Unfortunately, as Rodgers and Rodgers point out, "[w]hile the science of climate change has raced and the politics stalled, the law has been strangely inept."[15] In an attempt to pursue climate action, environmental groups have sought alternative approaches. Since 2011, the organization Our Children's Trust (OCT) has brought legal challenges at both the state and federal levels on behalf of youth plaintiffs seeking climate change mitigation and adaptation.[16] These cases develop several legal theories regarding the rights of individuals and future generations to a stable climate, as well as the obligations of governments to engage in mitigation and adaptation efforts.[17] The majority of OCT suits are still pending, meaning the applicability and success of the theories underlying these cases are still unresolved.

The OCT cases, in part, aim to expand the public trust doctrine to obligate governments to protect natural resources from climate change harms.[18] In brief, the public trust theory has emerged from the notion that certain resources, such as navigable waters, have a long-held or special value for the public such that they must remain accessible by the public and any governmental activity related to those resources must be conducted on behalf of the public.[19] Based

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[13] *See* Rebecca Beitsch, *More Than 70 Lawmakers Join Suit Challenging Trump Power Plant Rollbacks*, THE HILL (Apr. 27, 2020, 11:07 AM), https://thehill.com/policy/energy-environment/494803-more-than-70-lawmakers-join-suit-challenging-trump-power-plant.

[14] *See* Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html.

[15] William H. Rodgers, Jr. & Andrea K. Rodgers, *The Revival of Climate Change Science in U.S. Courts*, 6 WASH. J. ENV'T L. & POL'Y 533, 535 (2016).

[16] OCT has brought cases in virtually every state, as well as against the federal government in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), *petition for rehearing en banc filed*, No. 18-36082 (9th Cir. Mar. 2, 2020). More information on the strategy for each case, as well as their current status, can be found at www.ourchildrenstrust.org.

[17] *See id.*

[18] *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 93–94, Juliana v. United States, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015) [hereinafter *Juliana* Complaint].

[19] *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 267–69 (3rd ed. 2017); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970)

on the idea that the government acts "as a trustee of certain public resources,"[20] OCT argues that the government must address climate change because the resulting impacts on public resources will harm current and future generations.[21] The OCT cases seek to establish not only that traditional public trust resources, like water, must be protected from climate change impacts, but also that the atmosphere is a public trust resource.[22] As will be discussed in more detail later in this Note, interpretations of the public trust doctrine vary between the federal and state level and amongst different states,[23] but speaking generally, the doctrine may provide one fruitful avenue to address climate change by expanding rights to a healthy environment and a livable climate.[24]

It is important to distinguish the public trust doctrine from the federal government's trust relationship with Indian tribes. I will define the Indian trust below but, as I will discuss, it may apply to a broader range of resources and place more limits on harmful government action, as compared to the public trust doctrine. Thus, the Indian trust, in combination with other characteristics unique to federal Indian law, may provide a more robust basis for protection of treaty resources endangered by climate change.

A. *Obstacles to Climate Change Litigation*

Some of the major hurdles that plaintiffs have encountered, common to virtually all climate-related suits, include proving causation, liability, and in some instances—such as public trust

(seminal article applying the public trust doctrine to natural resource protection); *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (finding that the Illinois state legislature could not transfer public trust property out of its ownership except in limited instances when doing so would serve the public interest).

[20] *Id.* at 478.

[21] *See Juliana* Complaint, *supra* note 18, at 93–94.

[22] *See id.* at 82.

[23] *See generally* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PA. ST. ENV'T. L. REV. 1 (2007); Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53 (2010).

[24] *See* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43, 45 (2009) (arguing the public trust doctrine provides "the most compelling beacon for a fundamental and rapid paradigm shift towards sustainability").

cases—proving affirmative government duties. In order to bring a successful climate change suit, plaintiffs must demonstrate a causal link between defendants' action or inaction and the plaintiffs' harm.[25] Establishing causation poses a challenge due to the complexity of attributing increasing GHG emissions to climatological shifts and thereby to specific weather events, such as a drought.[26] Plaintiffs also must make the case that the particular defendant governments have contributed to climate change sufficiently to be found culpable in a lawsuit—directly through actions such as opening land to fossil fuel exploitation, or indirectly by, for instance, failing to more strictly regulate emissions—even though everyone on the planet emits GHGs and these pollutants have global, rather than local, impacts.[27] Finally, in public trust cases, plaintiffs must show that the government has a legal, not merely a moral, obligation to address emissions within its jurisdiction.[28] Outside of the United States, these obstacles are slowly but surely being addressed through improved scientific data and attribution capabilities,[29] the development of legal theories of liability better-suited to comprehend such large-scale harms,[30] and

[25] *See* Geetanjali Ganguly, Joana Setzer, & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 849 (2018).

[26] *See id.* at 847 (discussing causation issues in climate change litigation). *See generally* Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?*, 36 J. ENERGY & NAT. RES. L. 265 (2018).

[27] *See* Robin Kundis Craig, *California Climate Change Lawsuits: Can the Courts Help with Sea-Level Rise, and Who Knew What When*, 3 ASIA-PAC. J. OCEAN L. POL'Y 306, 309 (2018).

[28] Compare the Hague Court of Appeal's finding that "the state has a duty to protect against this genuine threat" in the 2018 *Urgenda* case, HR 20 december 2019, NJ 2020, 19/00135 m.nt van J. Spier (Stichting Urgenda/De Staat Der Nederlanden) ¶ 2.3.2 (Neth.) [hereinafter *Urgenda*], with a Ninth Circuit panel's opinion that the federal government's active involvement in fossil fuel exploitation and failure to curb emissions is more likely a moral question that is not redressable by courts. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

[29] *See* Marjanac & Patton, *supra* note 26 at 266–70 (2018).

[30] For example, the Human Rights Commission of the Philippines in December 2019 concluded its investigation following a complaint from Greenpeace South Asia alleging that the contribution to climate change by the highest-emitting forty-seven fossil fuel and cement companies (collectively known as "Carbon Majors") violates basic human rights to life, water, food, sanitation, housing, and self-determination. *See* Memorandum for Petitioners at 6, In Re: National Inquiry on the Impact of Climate Change on the Human Rights of

changes in how courts establish government duties to address both government emissions and those of third parties within their jurisdiction.[31] There are indications that such changes will also occur within the United States.

First, improvements in attribution science for weather events within the country may help litigants establish causation.[32] For example, the Bulletin of the American Meteorological Society has been publishing an annual supplement since 2012, which compiles attribution studies for specific weather events with ever-increasing degrees of certainty.[33] These include attributions regarding a 2016 heatwave impacting coastal waters from Alaska to California,[34] the

the Filipino People and the Responsibility therefor, if any, of the Carbon Majors, CHR-NI-2016-0001 (filed Sep. 19, 2019). The Court noted that law in the Philippines could provide a basis for civil suits against such companies, as well as potential criminal suits if the Carbon Majors were found to have misled the public about the dangers of their product and of climate change. *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, CTR. FOR INT'L ENV'T L. (Dec. 9, 2019), https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/. Furthermore, the Commission found that Filipinos whose rights are harmed must have access to adequate remedies. *See id.* Though the Commission's official decision has not yet been published, the petition and responses are available at *In re Greenpeace Southeast Asia and Others*, SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/ (last visited May 20, 2020).

[31] *See, e.g.*, *Urgenda* (upholding a tort case against the Dutch government for failing to have an adequate emissions reduction goal and requiring the government to establish one in line with its fair share of the European commitments under the Paris Agreement).

[32] *See* Ganguly, Setzer, & Heyvaert, *supra* note 25 at 850–51. "[A]ttribution science studies the way people experience climate change. The technical definition of attribution is 'the process of evaluating the relative contributions of multiple causal factors to a change or event with an assignment of statistical confidence.' Accordingly, both weather-related events (such as short-term heavy precipitation) or climate-related events (such as a high mean summer temperature) in a particular region could be the subject of an attribution study." Marjanac & Patton, *supra* note 26, at 268 (quoting Peter A. Stott et al., *Attribution of Extreme Weather and Climate-Related Events*, 7 WIREs CLIMATE CHANGE 23 (2016)).

[33] *See Explaining Extreme Events*, *supra* note 8.

[34] *See* AM. METEOROLOGICAL SOC'Y, EXPLAINING EXTREME EVENTS OF 2016 FROM A CLIMATE PERSPECTIVE, at S27, S39 (Stephanie C. Herring et al. eds., 2018), https://journals.ametsoc.org/doi/pdf/10.1175/BAMS-ExplainingExtremeEvents2016.1.

"extreme 2018 Northern California fire season,"[35] and the "exceptional drought" of 2018 in the Four Corners region.[36] Indeed, the Ninth Circuit in *Juliana* made the unprecedented finding that traceability of climate change to government actions could potentially be found if the case proceeded to trial.[37]

Second, to establish liability, litigants and the courts will need to develop theories that better address the complexity and multi-causal nature of climate change impacts. For instance, they will need to be able to assess what proportion of emissions should be ascribed to direct government action, indirect government action—through leasing public land to companies, for instance—and third parties, such as the recipients of such leases. Some of that theoretical development likely will occur as a result of the slew of suits filed by states and municipalities against fossil fuel companies since 2018.[38] These suits raise questions such as how to determine the scope and scale of defendants' responsibility. For instance, one could apply market share liability,[39] or determine culpability based on the companies' knowledge of the impacts of GHG emissions and their

[35] AM. METEOROLOGICAL SOC'Y, EXPLAINING EXTREME EVENTS OF 2018 FROM A CLIMATE PERSPECTIVE, at S1–S4 (Stephanie C. Herring et al. eds., 2020), https://journals.ametsoc.org/doi/pdf/10.1175/BAMS-ExplainingExtreme Events2018.1.

[36] *Id.* at S11–S15.

[37] *See* Juliana v. United States, 947 F.3d 1159, 1169 (9th Cir. 2020). However, as I discuss below, the panel found issue with the redressability prong of standing. *See id.* at 1171.

[38] *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal filed*, No. 18-2188 (2d Cir. Nov. 9, 2018); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019), *appeal filed*, No. 19-1818 (1st Cir. Nov. 20, 2019); King County. v. BP P.L.C., No. C18-758-RSL, 2018 U.S. Dist. LEXIS 178873 (W.D. Wash. Oct. 17, 2018); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated and remanded*, 969 F.3d 895 (9th Cir. 2020). In these and other similar cases, courts have differed on whether jurisdiction is properly in federal or state courts, and whether such cases can be heard. As of this writing, all such cases are either pending decision or have been stayed by courts seeking guidance once the Ninth Circuit reaches a jurisdictional decision in *City of Oakland*. In at least one instance, a commercial organization has filed suit against fossil fuel companies. Pac. Coast Fed'n of Fishermen's Ass'ns v. Chevron Corp., No. CGC-18-571285 (Cal. Super. Ct. Nov. 14, 2018).

[39] For more on using market share liability in public nuisance suits against major GHG emitters, *see generally* Samantha Lawson, Note, *The Conundrum of Climate Change Causation: Using Market Share Liability to Satisfy the Identification Requirement in* Native Village of Kivalina v. ExxonMobil Co., 22 FORDHAM ENV'T L. REV. 433 (2011).

misleading the public about the dangers of climate change in order to push for further production and consumption of fossil fuel products.[40]

Third, in this profusion of suits, states and OCT-supported plaintiffs are also seeking to establish that the government has a legal duty to address climate change.[41] For instance, in *Juliana*, plaintiffs argued that the federal government is the trustee of the nation's natural resources, including the atmosphere.[42] Yet due to its role in "permit[ting], authoriz[ing], and subsidiz[ing] fossil fuel extraction, development, consumption and exportation," the federal government "is more responsible than any other individual, entity, or country for exposing Plaintiffs to the present dangerous atmospheric CO_2 concentration."[43] Thus, the government has "failed in its duty of care to protect both Plaintiffs' fundamental constitutional rights and their interests in these essential trust resources,"[44] such that it should be required to make rapid cuts in

[40] This approach was previously unsuccessful, generally for procedural reasons. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854 (9th Cir. 2012) (dismissing for lack of subject matter jurisdiction Kivalina's claim that the GHG emissions of several major energy producers constituted "substantial and unreasonable interference with public rights," including property rights, and that these producers conspired to "mislead the public about the science of global warming"). With that said, recent complaints have also alleged public deception and misinformation. *E.g.*, District of Columbia v. ExxonMobil Corp., No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020), *removed to federal court*, No. 1:20-cv-01932 (D.D.C. July 17, 2020) (alleging defendants engaged in a long-term strategy to undermine climate change science and to mislead the public about the environmental harm caused by fossil fuel consumption).

[41] *See, e.g.*, *Juliana* Complaint, *supra* note 18, at 87–88 ("By exercising sovereignty over the air space and the federal public domain, by assuming authority and regulatory responsibility over fossil fuels, and by allowing and permitting fossil fuel production, consumption, and its associated CO2 pollution, Defendants have also assumed custodial responsibilities over the climate system within its jurisdiction and influence."), *see also id.* at 42, 46, 49 (alleging duties of different governmental agencies to address GHG emissions and climate change impacts).

[42] *See id*. at 38; *see also id.* at 82 ("[T]he Federal Government has an obligation to 'fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.'") (quoting 42 U.S.C. § 4331(b)(1)). Plaintiffs assert that NOAA has "affirmed that the air is a natural resource under the public trust doctrine." *Id.* at 83.

[43] *Juliana* Complaint, *supra* note 18, at 5.

[44] *Id.* at 38; *see also id.* at 87 (further elaborating the duty of care argument); *id.* at 93–94 (articulating governmental duties under the public trust). Plaintiffs also described the relevant duties of other defendants (as agency representatives)

GHG emissions and implement a national plan in order to mitigate climate change and stabilize the climate.[45] Yet a Ninth Circuit panel did not explicitly pass on the question of affirmative government duties, instead finding that addressing GHG emissions was a matter of policy unsuited for judicial review—implying that government choices about the extent of climate change mitigation are wholly discretionary.[46] As I will develop below, while affirmative government duties may still be challenging to prove in other climate suits relying on theories such as the public trust, such duties might more easily be demonstrated in the Indian trust context. With that, I turn now to Indian law and its potential advantages in climate suits.

B. *The Potential of Indian Law to Surmount These Litigation Obstacles*

Indian tribes, like many Indigenous Peoples[47] around the world, are part of the population most disproportionately affected by climate change.[48] This vulnerability is due to various factors; key

in the case; for instance, the Department of Energy has the mission to advance energy security while protecting the environment and improving quality of life through scientific innovation, *see id.* at 40–42, and the Department of Interior's mission is to protect natural resources through the proper management of federal public lands, as well as to "honor . . . tribal communities," *id.* at 42–43.

[45] *See id.* at 7.

[46] *See* Juliana v. United States, 947 F.3d 1159, 1171–73 (9th Cir. 2020) ("Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary.").

[47] The term "Indigenous Peoples" is capitalized when describing Indigenous groups in recognition of the "cultural heterogeneity and political sovereignty of these groups," Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 American Indian Quarterly 2 (1999). "People" is written in lower case "when describing persons who are Indigenous," *see* https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/racial-ethnic-minorities. *See also* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES 77–78 (Edmonton, Alberta: Brush Education, 2018).

[48] *See* ILO, INDIGENOUS PEOPLES AND CLIMATE CHANGE 20 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_551189.pdf. The United States federal government itself has recognized the disproportionate impact of climate change on Indigenous Peoples. *See* KATHRYN NORTON-SMITH, ET AL., CLIMATE CHANGE AND INDIGENOUS PEOPLES: A SYNTHESIS OF CURRENT IMPACTS AND EXPERIENCES 4 (2016), U.S. FDA, https://www.fs.fed.us/pnw/pubs/pnw_gtr944.pdf; 2 U.S. GLOB. CHANGE RES. PROGRAM, FOURTH NAT'L CLIMATE ASSESSMENT 28 (2018),

among them is that the ecosystem services and natural resources directly affected by climate change are central to Indigenous livelihoods as a means of subsistence or supplementation of meager resources, particularly in situations of poverty, marginalization, and high unemployment.[49] So, too, are many Indigenous Peoples' cultures intimately linked to the land, water, and resources upon which they depend.[50]

At the same time, tribes are uniquely placed to surmount the current hurdles in climate change litigation and thereby have the potential to make a significant impact upon government action. First, a type of trust is already embedded in federal Indian law. The Supreme Court initially articulated the trust doctrine in the early 1830s with *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, declaring that the federal government acts as a trustee on behalf of tribes with regards to their land and their resources.[51] Tribes can stop

https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf ("Many Indigenous peoples are reliant on natural resources for their economic, cultural, and physical well-being and are often uniquely affected by climate change. The impacts of climate change on water, land, coastal areas, and other natural resources, as well as infrastructure and related services, are expected to increasingly disrupt Indigenous peoples' livelihoods and economies.").

[49] *See id.* In light of the current impact of the coronavirus pandemic on food security, and the likelihood of increased disease outbreaks in future years due to climate change, subsistence activities have proven immensely important and yet are increasingly under threat. *See* Nick Bowlin, *Hunting and Fishing Provide Food in the Time of COVID-19*, HIGH COUNTRY NEWS (Apr. 29, 2020), https://www.hcn.org/articles/covid19-hunting-and-fishing-provide-food-security-in-the-time-of-covid-19.

[50] *See* Brief for Sauk-Suiattle Indian Tribe as Amici Curiae Seeking Reversal in Support of Appellants at 3, Aji P. v. Washington, No. 18-2-04448-1 SEA (Wash. Filed Apr. 11, 2019) (No. 96316-9) [hereinafter Sauk-Suiattle Brief] ("Very little attention has been given to the effect [of climate change] upon resources relied upon by the first inhabitants of this region for their very existence and culture.").

[51] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (finding that Indian tribes' "relation to the United States resembles that of a ward to his guardian" and the federal government has the exclusive right of regulating trade with them and managing their affairs). The Treaty of Hopewell with the Cherokees, which contains language that is common to many Indian treaties, places the Cherokee under the protection of the United States. This in turn imposes limits on federal actions that concern Indians, such as "[p]rotection does not imply the destruction of the protected." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832). Consider also President Nixon's famous address on "self-determination without termination." Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 565–66 (July 8, 1970) (asserting the federal government's trust duties

or demand action from the federal government based on such pre-existing duties.[52] They can also require the federal government to take action on their behalf against state governments or third parties.[53]

Second, certain Indian treaties contain explicit and implicit rights that are judicially enforceable, including rights which might be considered "environmental" in nature, such as resource rights.[54] As I will discuss in Part II, the combination of Indian trust and treaty resource rights means that tribal claims can apply to a broader range of resources than public trust resources, and may require government action in instances where the public trust doctrine might not.

Third, tribal claims would be bolstered by the "Indian canons" of interpretation which, like other interpretive canons, guide courts in construing statutes and treaties. The Indian canons require ambiguities in legislation to be interpreted in favor of tribes, ensure the non-derogation of Indian rights unless through a clear statement of Congress, and guide the interpretation of treaties in a manner consistent with how Indians would have understood them at the time

are moral *and legal* obligations unto Indians that arise from treaties in which Indians ceded land and gave peace in exchange for services presumably intended to ensure an adequate standard of living on par with other Americans).

[52] *See* Secretary of the Interior, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, Order No. 3335, at 4 (Aug. 20, 2014), https://www.doi.gov/sites/doi.gov/files/elips/documents/3335_-_reaffirmation_of_federal_trust_responsibility_to_federally_recognized_indian_tribes_and_individual_indian_beneficiaries.pdf (reaffirming the 1978 legal opinion of Department of Interior Solicitor Krulitz that "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property."); Confederated Tribes of the Umatilla Indian Rsrv. v. Alexander, 440 F. Supp. 553, 556 (D. Or. 1977) (holding Army Corps of Engineers could not construct a dam that "would take treaty rights without proper authorization"); Nw. Sea Farms, Inc., v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (holding Army Corps of Engineers had a duty to consider treaty rights because of trust relationship's "fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration").

[53] *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (suggesting a trust relationship supports tribe's claim to have the federal government intervene on their behalf against state party); *see also United States v. Winans* and the Washington line of cases, discussed *infra* notes 74–84.

[54] *See infra* Part II.

they were made.[55] This last canon requires courts to look at the historical and cultural context of the relevant agreements, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties"[56] in order to understand how Indian tribal signatories would have understood the agreement.[57] As a result, these canons can read ambiguity and uncertainty to favor tribal litigants' claims, where non-Indian litigants may have been disfavored.

Thus, the unique legal positioning of Indian tribes, as well as their interest in adequately addressing environmental harms and the climate crisis, may provide more robust bases to confront the legal hurdles facing climate change litigants. Most litigants face an uphill battle in convincing courts both that they have a right to healthy natural resources and that governments have a duty to protect such resources or otherwise compensate for their loss. But, because of the trust relationship, Indian tribes may more easily establish both of these prongs. Tribal suits may thereby provide the key to break through our current political gridlock and judicial hesitation to act on the climate crisis. To explore this unmapped trajectory, I will first describe some of the treaty rights that lay the foundations for such claims and then consider the viability of suits against states and the federal government.

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[55] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2017).

[56] Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).

[57] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999). The Court in this case found that a sale of land to the federal government that extinguished Chippewa title did not terminate their usufructuary rights. *See id.* The Court explained that, though the relevant treaty was silent with respect to the issue, the historical record demonstrates the Tribe only intended to sell the land. *See id.* at 198. "This silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties. It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment." *See id. See also* Herrera v. Wyoming, 139 S. Ct. 1686, 1701 (2019) (finding that the creation of a National Forest did not bar Crow Tribe's rights to hunt in the area because, under treaty preserving hunting rights in "unoccupied" areas, "it is clear that the Crow Tribe would have understood the word 'unoccupied' to denote an area free of residence or settlement by non-Indians").

II. INDIAN TREATY RIGHTS

A. *Background on Indian Treaties and Resource Rights*

As Britain—and later the United States—sought to expand their territory in North America, they entered into various treaties with tribes who had long inhabited the land. Though in many cases the negotiations were one-sided, coercive, or fraudulent, these treaties are generally regarded as establishing the baseline for relations between the United States and the tribes.[58] Importantly, courts have viewed the treaties as contract-like agreements with enforceable rights and obligations based on the interests of both parties. Courts have interpreted the context of treaties as one where American settlers sought land and peace in order to continue settlement and the tribes sought to ensure they could still occupy certain lands and retain specific resource rights to sustain their livelihoods.[59] Notably, treaties did not grant new rights to the tribes,

[58] Though beyond the scope of this Note, there has been debate about whether such treaties should be interpreted, in part, through the lens of international law. Justice Marshall found that Indian tribes were not foreign states for the purposes of the Court's jurisdiction in a controversy between a tribe and a state, but rather "domestic dependent nations" in a state of pupilage. *Cherokee Nation*, 30 U.S. at 17. Yet he also held that

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

Worcester, 31 U.S. at 559–60. If Indian treaties are thus creations of international law, a much more robust framework of Indigenous peoples' rights should be applied to their interpretation. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 75–80 (1996). *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004) (surveying the development of international indigenous rights, by former UN Special Rapporteur on Indigenous Peoples).

[59] This is the position of the federal government, not merely tribal rights advocates. *See* BUREAU OF INDIAN AFFS., *Frequently Asked Questions*, https://www.bia.gov/frequently-asked-questions (last visited May 20, 2020) ("These 'contracts among nations' recognized and established unique sets of rights, benefits, and conditions for the treaty-making tribes who agreed to cede of millions of acres of their homelands to the United States and accept its protection.

but were instead a "reservation" of existing rights that tribes held when they still possessed the full trappings of sovereignty.[60] Such treaties are among the supreme laws of the land,[61] and the United States can abrogate them only with an explicit act of Congress.[62]

These treaties did not solely concern themselves with the cession of lands and delimitation of the boundaries of tribal reservations. Many of them also included the reservation of other rights to resources and practices put at risk by encroaching settlers. Courts analyzing whether a treaty has reserved a right look to see if it is reserved explicitly by the document's text and, if it is not, whether the language and context of negotiations *imply* the reservation of specific rights.[63] One such implied right is access to water on tribal reservations. Some tribes have successfully litigated to gain recognition of a reserved right to water on their land because it is essential to the purpose of their tribal reservation.[64] Other treaties guaranteed fishing, hunting, and gathering rights.

Of such treaties, the so-called "Stevens Treaties" are among the most litigated. The treaties were named after the first governor of

Like other treaty obligations of the United States, Indian treaties are considered to be 'the supreme law of the land,' and they are the foundation upon which federal Indian law and the federal Indian trust relationship is based.").

[60] *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."); *see also* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680 (1979).

[61] *See* U.S. CONST. art. VI; *see also Worcester*, 31 U.S. at 559–61 (reasoning that because United States' treaties with Indian tribes form part of the supreme law of the land, state law in contravention of such treaties is unconstitutional).

[62] *See* United States v. Dion, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain.").

[63] *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968) (finding that treaty establishing a reservation "'to be held as Indian lands are held' includes the right to fish and to hunt," in part because such lands were chosen precisely due to their abundance of fish and game).

[64] *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1412–14, 1419 (9th Cir. 1983) ("[W]here, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use."); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256–57 (D.D.C. 1973) (finding that diversion of water towards irrigation projects and away from a reservation's lake violated the tribe's implied water rights and subsistence fishing rights).

the newly-minted Washington Territory, Isaac Stevens, who negotiated these treaties in the 1850s.[65] The Stevens Treaties contained language related to fishing and gathering rights. One example, the Treaty with the Yakama, guarantees "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries . . . upon open and unclaimed land."[66] Another Stevens Treaty adds to the right of taking fish the right "of whaling or sealing at usual and accustomed grounds."[67] Such language is not unique to the Stevens Treaties. Some Great Lakes Tribes, such as the Lake Superior Chippewa, have treaties that include language guaranteeing "such of them as reside in the territory hereby ceded, . . . the right to hunt and fish therein, until otherwise ordered by the President."[68] Those resource rights, like water rights, are considered property rights.[69]

Given both the text, as well as the context of such resources being necessary for tribal subsistence and a central part of their

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[65] *See* Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 924 (2016).

[66] Treaty between the United States and the Yakama Nation of Indians, art. III, June 9, 1855, 12 Stat. 951 [hereinafter Treaty with the Yakama] (author's note: the preferred spelling "Yakama" and the alternative spelling Yakima refer to the same Nation). The other Stevens treaties have substantially similar language, such as the Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, art. III, July 1, 1855, 12 Stat. 971 (Treaty of Olympia); Treaty with Nisquallys, art. III, Dec. 26, 1854, 10 Stat. 1132 (Treaty of Medicine Creek); Treaty between the United States and the Dwamish, Suquamish and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927 (Treaty of Point Elliott); Treaty between the United States of America and the S'Klallams Indians, art. IV, Jan. 26, 1855, 12 Stat. 933 (Treaty of Point No Point), Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, June 9, 1855, 12 Stat. 945 (Treaty with the Walla-Walla).

[67] Treaty between the United States of America and the Makah Tribe of Indians, art. IV, Jan. 31, 1855, 12 Stat. 939 (Treaty of Neah Bay).

[68] Treaty with the Chippewa, art. XI, Sept. 30, 1854, 10 Stat. 1109.

[69] *See* Mary C. Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2003) ("The Indian trust responsibility is protection for property guaranteed on the sovereign level, from the federal government to tribes."); *see also* Winters v. United States, 143 F. 740, 747 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908) (treating water rights as protectible property rights).

culture,[70] courts have upheld these essential rights to fish and gather over the course of the twentieth century in the face of governmental and private party interference.[71] *United States v. Winans* demonstrated that these treaty rights create an obligation on third parties.[72] Defendants—a private firm—placed a "fish wheel in the Columbia River," to harvest large quantities of salmon.[73] The wheel completely blocked access to the river, which effectively prevented the Yakama Tribe from accessing their usual fishing grounds in line with their treaty fishing rights.[74] The Court held that the fish wheels could not be used in a manner that amounted to "exclusive possession of fishing places," to the detriment of the Yakama.[75] The Court also made clear that the tribe's rights extended off-reservation to "usual and accustomed grounds," rather than merely on non-ceded land.[76]

Despite early recognition of the reserved rights under the Stevens Treaties and the corresponding responsibilities they created on both governments and third parties, states such as Washington and Oregon consistently enacted regulations or conducted policing

[70] *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.").

[71] *See, e.g.*, Seufert Bros. v. United States, 249 U.S. 194, 198–99 (1919) (affirming Yakama off-reservation fishing rights in Oregon); United States v. Washington (*Washington Phase I*), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[72] *See Winans*, 198 U.S. at 381–82 ("The contingency of the future ownership of the lands, therefore, was foreseen and provided for . . . [the treaty] right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.").

[73] *Id.* at 384.

[74] *See id.*

[75] *Id.*

[76] *Id*. The same has been found for hunting rights. *See e.g.* State v. Buchanan, 978 P.2d 1070, 1073 (Wash. 1999) (holding that the treaty hunting right extends off-reservation, including to lands not explicitly ceded in the relevant treaty, thus preempting state regulation that prohibited hunting in a specific area absent the state proving conservation necessity); *see also* Herrera v. Wyoming, 139 S. Ct. 1686, 1691–92 (2019) (holding such treaty rights survive the creation of a new state and the creation of a protected forest area).

that interfered with treaty fishing rights.[77] This behavior resulted in a series of tribal lawsuits which further cemented such rights, beginning in the 1970s. In the first phase of *United States v. Washington*, a long and embittered legal battle, tribes won the recognition of a right to a fair share of harvestable fish.[78] The Ninth Circuit affirmed that it was not enough for the State to simply ensure physical access to fishing sites, rather, the State was obligated to co-manage the fisheries alongside the tribe and ensure the tribe could enjoy fifty percent of the harvest.[79] In the second phase of the litigation, the district court held—and the Ninth Circuit again affirmed—that tribes had a right to harvest hatchery fish introduced into waterways by state agencies.[80] The court reasoned that the tribes' fishing rights were not past rights to past harvests, but were ongoing rights to future harvests, given the activity's centrality to the tribes' economic livelihoods and cultural practices.[81] The court further required the State to respond to the depletion of fish stocks, which were caused primarily by non-Indian activities and which impinged on Indian livelihoods.[82]

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[77] *See* Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 7, 11 (2017).

[78] *See* United States v. Washington (*Washington Phase I*), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[79] *See id*. at 403; *see also* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) ("In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas.").

[80] *See* United States v. Washington (*Washington Phase II*), 506 F. Supp. 187, 202 (W.D. Wash. 1980), *aff'd en banc*, 759 F.2d 1353, 1355 (9th Cir. 1985).

[81] *See id*. at 198–99.

[82] *See id.* at 208. "[N]atural fish have become relatively scarce, due at least in part to the commercialization of the fishing industry and the degradation of the fishing habitat c*aused primarily by non-Indian activity* in the case area." *Id*. at 198 (emphasis added). Because hatchery fish are intended to replenish wild populations, Indians cannot be excluded from harvesting them, otherwise their "treaty-secured right to an adequate supply of fish—the right for which they traded millions of acres of valuable land and resources—would be placed in jeopardy." *Id*. at 198–99. On appeal, the Ninth Circuit agreed with the district court's findings on hatchery fish. *See* United States v. Washington (*Washington Phase II*), 759 F.2d 1353, 1359 (9th Cir. 1985) ("The Indians are entitled to participate equitably in the increased supply of fish even if made possible solely through the efforts of the State."). However, it vacated the district court's declaratory judgment related to habitat preservation because such a claim was too broad and not based upon concrete facts presented by the case. *See id.* at 1357.

In both of these cases, the Ninth Circuit avoided addressing whether treaty rights to fish could entail broader responsibilities for government and private parties to protect fish habitats in order to ensure adequate fish populations.[83] Eventually, in 2007, in the third phase of litigation, a Washington district court touched on this habitat question by issuing a declaratory judgment that highway culverts that blocked salmon movement violated the treaties.[84] Washington—with Idaho and Montana as *amici*—argued that rights in Indian treaties are to be protected only where "absolutely necessary," such as to preserve the purposes of a reservation.[85] The court disagreed, finding that the treaty rights are protectable when a clear "factual basis" demonstrates that they have been infringed upon significantly.[86] In 2013, the same court issued an injunction requiring the State to remove culverts that completely blocked salmon migration—known as "barrier culverts"—by 2030.[87] As will be discussed further below, this line of cases has important implications for resolving conflicts over resource and habitat protection. Just as importantly, these cases have suggested a role for the judiciary in rendering decisions and supervising their enforcement in issues involving widespread, long-term harms to treaty-protected resources.

Treaty rights can therefore be a potent tool for tribes. Courts have found enforceable rights where there is explicit resource-protecting language, as in the treaties mentioned above, or where the treaties' context implies that a resource is essential to the tribe. As demonstrated in the *Washington* line of cases, injury above a *de*

[83] *See id.*; *see also* Blumm, *supra* note 77, at 14–17.

[84] *See* United States v. Washington (*Washington Phase III*), 20 F. Supp. 3d 828, 899 (W.D. Wash. 2007), *aff'd*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018).

[85] *See* Brief for States of Idaho and Montana as Amici Curiae Supporting Appellant's Petition for Rehearing/Rehearing *En Banc* at 3–4, United States v. Washington, 853 F.3d 946 (9th Cir. 2016) (No. CV 70-9213) (amici further arguing that treaties do not create broad affirmative duties for non-parties which, in this case, include state governments).

[86] *See Washington Phase III*, 20 F. Supp. 3d 828, 894; *see also* Blumm, *supra* note 77, at 31–32 (explaining that in this factual analysis, courts will look at "whether there is an affirmative action adversely affecting fish subject to the treaties," and that "the action must proximately cause significant damage; *de minimis* harms do not apparently violate the treaties.").

[87] *See* United States v. Washington, 20 F. Supp. 3d 986, 1023 (W.D. Wash. 2013), *aff'd*, 827 F.3d 836 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018).

minimis threshold is actionable.[88] Even in pursuit of goals ostensibly oriented toward the public welfare, such as species conservation, states cannot take action that would infringe upon treaty resource rights, except in highly limited circumstances.[89] Thus, in contrast to claims based on public trust or public nuisance claims in which courts balance the protected interests with the social utility of a state's regulatory goals, claims based on Indian treaty resource rights are far stronger.[90] Tribal claims are further assisted by the Indian canons of favorable interpretation and interpretation of treaties as tribes would have understood them at the time, which would further support claims for resource protection in perpetuity.[91] For these reasons, explicit and implied treaty rights can play an

[88] *See Washington Phase III*, 20 F. Supp. 3d 828, 894; *see also* Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers, 931 F. Supp. 1515, 1522 (W.D. Wash. 1996). For more on the *de minimis* standard, *see* Mary Christina Wood, Anna Elza Brady & Brendan Keenan Jr., *Tribal Tools & Legal Levers for Halting Fossil Fuel Transport & Exports Through the Pacific Northwest*, 7 AM. INDIAN L.J. 249, 326 (2018); Michael C. Blumm & Jeffrey B. Litwak, *Democratizing Treaty Fishing Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 COLO. NAT. RES., ENERGY & ENV'T. L. REV. 1, 19 n. 102 (2019).

[89] Consider the *Puyallup* line of cases and *Maison v. Confederated Tribes of Umatilla*, which demonstrate that a state has a heightened burden when defending conservation regulations that affect Indian treaty rights. *See generally* Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup III*), 433 U.S. 165 (1977); Maison v. Confederated Tribes of the Umatilla Indian Rsrv., 314 F.2d 169 (9th Cir. 1963). *See also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987) (finding that the state can regulate treaty resource rights only for purposes of conservation or to address a "substantial" and "imminent" threat to public health and safety, and state regulations must be necessary, reasonable, and non-discriminatory).

[90] *See supra* note 46 and accompanying text (discussing the regulatory balancing in the context of a public trust suit); Blumm, *supra* note 77, at 38 (for comparison to public nuisance suits).

[91] "Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets in to the territorial waters." *See* United States v. Washington, 20 F. Supp. 3d 828, 896 (W.D. Wash. 2007) (quoting Washington v. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678–79). Governor Stevens assured, "'*I want that you shall not have simply food and drink now but that you may have them forever.*' The negotiators uniformly agreed on the abundance of the fisheries, the dependence of the Indians upon them, their commercial possibilities, and their future 'inexhaustibility.'" *Id.* at 898 (emphasis in original).

important role in resource protection, and thus climate change litigation, going forward.[92] This claim will be further developed in Parts III and IV, but first, it is important to understand the devastating impacts that climate change may have on treaty resources.

B. *The Impact of Climate Change on Treaty Resource Rights*

Climate change threatens treaty rights in myriad ways, allowing for the possibility of treaty resource-based litigation. Already in 2009, the National Tribal Air Association reported the impacts of climate change on Indian tribes, including

> 1) ocean acidification threatening shellfish; 2) shorter growing seasons; 3) changes in forest composition; 4) threats to fresh water fish; 5) decreased lake levels; 6) extreme weather events; 7) decreased availability of drinking water; 8) drought; 9) invasive species, and, relatedly a loss of traditional plants and animals; 10) increased water temperatures which negatively impact fisheries; 11) increased air quality problems; and 12) increased incidents of wildfires.[93]

These impacts all clearly implicate tribes' ability to exercise fishing, hunting, and gathering rights. Moreover, the decreased availability of water—which in some cases has forced individuals to leave their reservations—is arguably a violation of the implied water rights of reservations.[94]

Amicus briefs in the OCT cases, which I discussed in Part I, provide specific examples of harms to treaty resources due to climate change. For instance, the Swinomish, Suquamish, and Quinault tribes detailed some of the climate change impacts they have already experienced in an amicus brief supporting an OCT case

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[92] *E.g.*, United States v. Washington, 853 F.3d 946, 965 (9th Cir. 2017) ("Even if Governor Stevens had not explicitly promised that 'this paper secures your fish,' and that there would be food 'forever,' we would infer such a promise. . . . That is, even in the absence of explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes.").

[93] Brief for Nat'l Cong. of Am, Indians, et al. as Amici Curiae Supporting Plaintiffs-Appellants Seeking Reversal at 13, Alec L. v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (No. 13-5192).

[94] *See id.*

in Washington state, *Aji P. v. Washington*.[95] Each tribe has undertaken investigations confirming changes across their respective landscapes: the Swinomish through their Climate Change Initiative, the Suquamish through a study on ocean acidification and Chico Creek stream flows and water quality, and the Quinault in a joint study with Oregon State University.[96]

The impacts appear overwhelming. First, changes in water ecology will "cause increased fish mortality, render certain sub-basins inhospitable as habitat, and decrease reproductive success,"[97] endangering the tribes' ability to harvest fish according to their treaty fishing rights. The Suquamish, for instance, are dependent on the hydrology of the Kitsap Peninsula, which mainly consists of rain-fed streams that are vulnerable to climatic change. Longer and hotter summers will cause dangerously low flows for fish, while increasingly intense rainstorms in fall and winter will generate substantial stream flows that destroy salmon eggs.[98] The Quinault have witnessed the complete disappearance of the Anderson Glacier, which had fed streams with the cold water essential for healthy fish populations.[99] Indeed, the Quinault had to close the 2019 sockeye fishery season after "historically low return runs" due to successive climate change-associated heat waves.[100] The future looks even more grim for tribes that rely on these important species for food. EPA has predicted the loss of more than half of salmon and trout habitats in the next forty to eighty years due to impacts from climate change.[101]

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[95] *See* Brief for Swinomish Indian Tribal Cmty. et al. as Amici Curiae Supporting Plaintiffs at 6–10, Aji P. v. Washington, No. 18-2-04448-1 SEA (Wash. Ct. App. filed July 12, 2019) (No. 80007-8) [hereinafter Swinomish Brief].

[96] *See id*. at 5–6.

[97] *Id.* at 8.

[98] *See id.* at 8–9.

[99] *See* Fawn Sharp, *Tribes Have Up Close Perspective on Climate Change*, SEATTLE TIMES (Apr. 23, 2016, 4:01 PM), https://www.seattletimes.com/opinion/tribes-have-up-close-perspective-on-climate-change/ ("Unless far more determined action is taken in response to climate change now, our children will witness the end of salmon, shellfish, whales and much more in their lifetime.").

[100] *Id.* at 9. Already in 2015, water temperatures two to four degrees Celsius higher than average led to massive die-offs for cold-water species, wiping out over 50 percent of sockeye salmon in the Columbia River that season. *See In Hot Water: Columbia's Sockeye Salmon Face Mass Die-Off*, AL JAZEERA (July 27, 2015 3:51 PM), http://america.aljazeera.com/articles/2015/7/27/half-of-columbia-rivers-sockeye-salmon-dying-due-to-heat.html.

[101] *See id.*

Second, all three tribes' reservations adjoin marine areas, meaning they are exposed to damage from rising sea levels and more severe weather events, which cause damage to infrastructure, housing, and fish and plant habitats.[102] The Swinomish studies have established that climate change has contributed to "tidal surges several feet above normal, devastating winter storms, and an unprecedented heat wave," damage to harvests, public health issues, and predicted future flooding of over 1,100 acres of the Swinomish Reservation.[103] They estimate that the impacts experienced up to this point entail response costs of over $700 million.[104]

Finally, geographical changes associated with climate change raise the specter of mass displacement, threatening to turn tribes into climate refugees. For example, more severe and frequent storms have damaged the sea wall and caused frequent flooding of one of the most populated Quinault villages.[105] The cost of inevitable relocation is estimated to exceed $50 million.[106] In a subsequent amicus brief submitted by the Sauk-Suiattle Tribe in the *Aji P.* appeal to the Washington Supreme Court, the Tribe noted that, in Washington alone, fifteen tribal reservations are adjacent to marine waters, entailing enormous current harms and future relocation costs.[107]

As discussed in Part II.A, many tribes enjoy substantive rights to resources which are enshrined in treaties. Tribes' struggles to protect and access such resources have resulted in case law that enjoins governments and private entities from injuring such rights and, in certain instances, requires them to act affirmatively to protect resources. This Part highlighted the extent of climate change's current and future impact on those resources. Because of both the rights discussed above and the effects highlighted here, tribes have powerful and unique bases upon which to initiate litigation in the defense of their treaty resources. How such suits might proceed against states and federal governments will be explored in subsequent Parts.

102 *See id*. at 1.
103 *Id.* at 7.
104 *See id.* (in 2019 dollars)
105 *See* Swinomish Brief, *supra* note 95, at 9–10.
106 *See id.* at 12.
107 *See* Sauk-Suiattle Brief, *supra* note 50, at 2.

III. SUITS AGAINST STATES

Because climate change infringes on tribes' ability to protect and access treaty resources and because the treaty rights are judicially enforceable and require states to ensure that their own activities and those of third parties do not infringe on treaty rights, the remaining question is how to connect resource-depletion from climate change with these judicially enforceable treaty rights. One potential option could be to challenge state governments for their failure to mitigate in-state emissions, either because of a lack of emissions regulation or because of affirmative state actions, such as leasing lands for a coal mine. Other claims might focus on climate adaptation, challenging governments for failing to enact policies and build infrastructure that would remediate the damage to tribal resources caused by climate change. These would be logical extensions of the *United States v. Washington* line of cases, which found that state governments had not only duties to avoid harming tribal fishing rights, but also *affirmative* duties to ensure that the tribes could enjoy such rights in perpetuity.[108] Because of the unique characteristics of federal Indian law and treaty rights, Indian tribes may possess certain advantages in climate change litigation.

A. *Advantages for Tribal Claims*

It is helpful to briefly return to the OCT public trust-based suits that were brought against states and filed in state courts, to provide a point of comparison and help demonstrate the potential for successful tribal lawsuits. The OCT suits were all grounded in the same theory of public trust duties, with variations based on relevant state constitutions and statutes. Some of these cases are still pending at early stages of litigation.[109] Of those which have been decided, results have widely differed: some claims have been dismissed,[110]

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[108] *See* cases cited *supra* note 79–86 and accompanying text. *See generally supra* Part II.A.

[109] *E.g.*, Complaint, Held v. Montana, No. ___ (Lewis & Clark Cty. Ct. filed Mar. 13, 2020), available online at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200313_docket-na_complaint.pdf; Complaint, Reynolds v. Florida, No. 37 2018 CA 000819 (Fla. Cir. Ct. filed Apr. 16, 2018).

[110] In a claim seeking *mandamus* for governor and state environmental agency to regulate GHG emissions, the court did not reach the public trust issue. It found that a ten-year-old citizen suffering from asthma had standing; however, relevant

while others have successfully established states' trust duties, although they have not yet sparked political change.[111] Still other cases have led to improved climate policy.[112] The majority of these decisions seem to show that state courts are at least willing to entertain climate change cases, but the viability of such suits is unclear and highly variable.

Pennsylvania environmental law did not authorize executive action. *See* Funk v. Wolf, 144 A.3d 228, 249 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017).

[111] For example, in *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015), the New Mexico Court of Appeals held that the atmosphere is a resource protected by the state's constitutional provision regarding the public trust. However, it also held that such trust obligations had been implemented in state legislation and procedures and thus plaintiffs must resort to challenges under existing laws or under the state's constitution in future litigation. The court concluded that plaintiffs had not fully proved that the state's existing Air Quality and Control Act was inconsistent with its public trust responsibility, and thus plaintiffs would have to prove the Act was unconstitutional or attempt rulemaking and return to the court if adequate rulemaking failed. *See id.* at 1225–27. However, the Environmental Improvement Board rejected a hearing on such a proposed rule in 2017. Laura Paskus, *State Board Rejects Petition to Regulate Greenhouse Gases*, NM POL. REP. (Aug. 30, 2017), https://nmpoliticalreport.com/2017/08/30/state-board-rejects-petition-to-regulate-greenhouse-gases/.
This creates the opportunity for another challenge in New Mexico.

[112] In an OCT suit brought in Colorado, the district court first allowed the youth plaintiffs to reach the trial stage, but then denied their anti-hydraulic fracturing petition given the need to balance the interests of economic development with public health and the environment. The Colorado Court of Appeals reversed, finding that state law required development be "consistent with"—understood as "subject to"—protecting public safety, health, and welfare, including environmental protection. *See* Martinez v. Colo. Oil & Gas Conservation Comm'n, 434 P.3d 689, 690–94 (Colo. App. 2017). Unfortunately, the Colorado Supreme Court reversed. *See* Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22 (Colo. 2019). However, the court proceedings were tainted by suggestions of racism and misconduct by one of the judges, and plaintiffs requested review. *See generally* Respondents' Motion to Vacate the Dissenting Opinion of Judge Laurie Booras and Vacate this Court's Orders in *Martinez*, or at a Minimum, Reconsider and Modify this Court's Opinion in Light of the Vacated Dissent, Martinez v. Colo. Oil & Gas Conservation Comm'n, No. 2017 SC 297 (Colo. App. Jan. 24, 2019) https://static1.squarespace.com/static/571d109b04426270152febe0/t/5c4b648088251b842096dc1d/1548444801308/2019.01.24.Motion+to+vacate+and+modify+opinion.pdf. Though the state's supreme court denied review, Colorado ultimately responded to the attention given to the case by enacting a law that requires the Commission to protect public health and the environment in a way that cements the Court of Appeal's interpretation. *See generally Colorado*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/colorado/ (last accessed May 15, 2020).

A central issue in public trust suits is that it is a common law doctrine, conceptualized differently depending on the state. The kinds of resources encapsulated in the public trust vary widely, as do the government's duties regarding those resources.[113] Consider the neighboring states of Oregon and Washington. In Oregon, a trial court in an OCT case found that the public trust encompasses only submerged or submersible lands, and does not include navigable waters, beaches and shorelands, fish and wildlife, or the atmosphere.[114] On appeal, the court did not reach the issue of what resources are encompassed by Oregon's public trust doctrine. Instead, it decided the case by finding that under Oregon's version of the doctrine, the "state is *restrained* from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources," but there is no fiduciary duty to protect such resources through *affirmative* action by the State.[115] By contrast, in a Washington OCT case, the trial court found that:

> current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering the bounty of our navigable waters. . . . The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust.[116]

In other words, the Washington court found that under its public trust doctrine, the government not only has a duty to avoid harming resources, but also an affirmative duty to protect them.[117] The court also found that the atmosphere is an inextricable part of the natural resources held in trust for its citizens.[118]

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[113] For an incredibly thorough review of the public trust doctrine in each state, *see* sources cited *supra* note 23.

[114] *See* Chernaik v. Brown, 436 P.3d 26, 28–30 (Or. Ct. App. 2019) (discussing the district level case history).

[115] *Id.* at 35. Note that the Oregon Supreme Court has accepted a petition for review. Chernaik v. Brown, 442 P.3d 1119 (Or. 2019).

[116] Foster v. Wash. Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362, at *4 (Wash. Super. Ct. 2015).

[117] *See id.* at *3.

[118] *See id.* at *4.

In contrast to the public trust suits brought by OCT, there is good reason to believe that tribes would be able to achieve more favorable rulings when treaty resources are imperiled. This is because the protection afforded treaty resources is more like Washington State's public trust theory than Oregon's; Indian tribes possess clearly-established resource rights, even as against state governments, and they can demand affirmative protection for such resources. As discussed above, the Ninth Circuit determined in the hatchery and culverts portions of the *United States v. Washington* litigation that states cannot even take actions that *indirectly* destroy or significantly harm the fish runs and must take remedial action to ensure the maintenance of the tribes' harvests. The court reasoned that, at the time the treaty was written, "[t]he Indians did not understand . . . 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. Governor Stevens did not make . . . such a cynical and disingenuous promise."[119] This holding is not limited only to Washington's duties vis-à-vis Indian trust resources, because while a state's public trust theory might define its duties unto its non-Indian citizens more broadly or narrowly, Indian treaty rights are not dependent on state law.[120] Therefore, treaty rights held by all Stevens Treaties tribes, and arguably any tribe with provable treaty rights to resources, might provide the basis for tribal claims demanding state action on climate change.

Professor Michael C. Blumm has written about these affirmative duties to protect treaty resources, arguing that the language of the Ninth Circuit culverts decision might have implications for cases regarding other habitat-damaging activities.[121] Activities such as dam-building, timber harvesting, grazing practices, and large-scale construction projects can all affect water quality and flow, with significant impacts on salmon runs.[122] Therefore, tribes might be able to instigate actions to enjoin or modify such activities. Similarly, water diversions that cause an increase in water temperature, causing harm to salmon and similar

119 United States v. Washington, 827 F.3d 836, 851 (9th Cir. 2016).
120 *See* sources cited *supra* note 61.
121 *See* Blumm, *supra* note 77, at 29–31.
122 *See id.*

fish, might be actionable.[123] The Sauk-Suiattle Tribe has already used this reasoning in litigation, stating in its amicus brief for the *Aji P.* case that Washington State violated tribal resource rights by failing to manage resources in such a way as to reduce further habitat damage.[124] The Tribe argued that the State's management regime permits clearcutting of timber that results in worsened flooding and disrupts water flows.[125] Although claims like these are factual determinations for courts to make, there is strong scientific evidence linking such practices to significant impacts on treaty resources, which may facilitate the causal finding in litigation.[126] If this causal chain is completed, a court may find that the state's affirmative duties to protect the resource have been triggered.

Blumm analyzed activities, such as dam-building, that have a clearer and more local nexus to harmful impacts than climate change does. The unanswered question is whether the *Washington* line of cases provides a foundation for courts to find state duties regarding climate change mitigation or adaptation, such as implementing emissions reduction policies. Arguably they should so find. As discussed above, climate change has tangible and traceable impacts on treaty-protected resources. Though the causation chain may be more attenuated,[127] the trust duty and resource rights that tribes enjoy should logically entail an obligation upon states to take at least *some* action to mitigate the catastrophic harm that is occurring.[128]

As further support for state obligations under tribal treaties, the court in *Washington Passenger Fishing Vessel* interpreted its precedent in a fashion that limits the defenses a state can bring for treaty rights violations.[129] Justice Stevens noted in his opinion that precedent "clearly establish[es] the principle that neither party to the

123 *See id.* at 30.

124 *See* Sauk-Suiattle Brief, *supra* note 50, at 5.

125 *See id.*

126 For example, clearcutting timber has been associated with substantial decreases in fish stocks. In fact, researchers have found that "every level of the food chain" benefits from terrestrial food sources. *See, e.g.*, Renee Lewis, *Report: Forest Loss Starves Fish*, AL JAZEERA (June 11, 2014, 5:27 PM), http://america.aljazeera.com/articles/2014/6/11/forest-degradationfish.html.

127 For this reason, it is important to track developments in the theories of causation that are currently being tested in suits by states against fossil fuel companies, *see supra* note 38, as well as in cases around the world.

128 *See infra* Part II.A (discussing the duties arising from resource rights).

129 *See* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979).

treaties may rely on the State's *regulatory powers* or on *property law concepts* to defeat the other's right to a 'fairly apportioned' share of each covered run of harvestable anadromous fish."[130] Thus, a state cannot rely on its powers under, for instance, a state economic regulation to claim it has unlimited authority to license activities, such as coal mining, that directly impact treaty fishing rights. A state also cannot claim that existing property rights—such as those belonging to an already-permitted hypothetical coal mine––can trump a tribe's interest in maintaining adequate fish harvests. Similarly, because these treaty rights claims are not public nuisance claims, it would not be enough for a state to argue that it is appropriately balancing social utility with treaty rights.[131] Each of these examples would violate Justice Stevens' pronouncement.

Indeed, states have already begun denying fossil fuel projects on the grounds that approval would violate affirmative duties owed to tribes based on treaties.[132] This includes Washington, which had long resisted recognition of such rights. For instance, in 2018, the state denied building permits for the Tesoro Pacific Oil Terminal in the Port of Vancouver, given the project's unmitigable effect on salmon and tribal access to fishing sites.[133] For similar reasons, the Washington Department of Ecology denied the Millennium Coal Terminal a water quality certification required under Section 401 of

[130] *Id.* (emphasis added). This limitation extends even to state environmental conservation goals: states can only impose such *nondiscriminatory* regulation as is necessary to ensure the conservation of the resource. *See* cases cited *supra* note 89. In Oregon, a similar line of cases emerged, propelled by the Ninth Circuit, requiring that states respect treaty fishing rights and regulate in a non-discriminatory manner. *See* Maison v. Confederated Tribes of the Umatilla Indian Rsrv., 314 F.2d 169, 173 (9th Cir. 1963) (holding that in order to regulate Indian fishing in a manner that might contravene treaty rights, Oregon must prove both the need for restricting harvests and that the restriction that affected the tribes in question was "indispensable" for the conservation goals); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969) (finding that the treaty right of taking fish must be treated as "co-equal" to conservation goals).

[131] *See* Blumm, *supra* note 77 and accompanying text.

[132] For instance, Oregon denied a permit for the Coyote Island Terminal coal export project, referencing its potential impacts on tribal fishing activities. *See* Wood, Brady & Keenan Jr., *supra* note 87, at 330–31.

[133] *See* Blumm & Litwak, *supra* note 88, at 7–8. Hearkening to the intergenerational rights put forward in *Juliana*, decisionmakers also claimed that such actions conflicted with state obligations to act as a trustee for future generations under the state's Environmental Policy Act. *See id.* at 9.

the Clean Water Act.[134] The Department found that traffic and pollution from increased boat transport activity, along with the pollution from coal dust particles, would harm fish populations, that noise pollution would disrupt fish habits, and that the physical blockage of certain areas would impact tribal fishers' ability to access certain fishing sites.[135] In the Tesoro Pacific Oil Terminal project, the Energy Facility Site Evaluation Council advised the Department of Ecology that the project risked damage to "hundreds of irreplaceable cultural resources and sacred sites" of "priceless" value.[136]

This reasoning aligns with Blumm's, in that activities which directly or indirectly impact treaty resources—such as through habitat loss—would violate treaty rights. Crucially, the overall damage caused by climate change would dwarf the magnitude of the losses occasioned by the Tesoro or Millennium projects. Therefore, it is logical to extend the argument and find that climate change impacts also violate treaty resource rights and that states must make decisions to minimize that harm. Thus, through the Tesoro and Millennium decisions, Washington's own agencies are providing not only the ecological, cultural, economic, and treaty-based rationales for blocking fossil fuel infrastructure, but also a more general template for using these tools to aggressively address climate change.

B. *Redress for Climate Change Harms to Treaty Resources*

Assuming that procedural obstacles such as standing[137] and sovereign immunity[138] are surmounted, tribes must strategically

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[134] *See id.* at 9–11; WASH. DEP'T OF ECOLOGY, ORDER #15417, IN THE MATTER OF DENYING SECTION 401 WATER QUALITY CERTIFICATION TO MILLENNIUM BULK TERMINALS-LONGVIEW, LLC at 12–13 (Sept. 26, 2017), https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf.

[135] *See* WASH. DEP'T OF ECOLOGY, ORDER #15417, *supra* note 134.This decision was affirmed by the court in *Northwest Alloys, Inc. v. State of Washington Department of Natural Resources*, 447 P.3d 620 (Wash. Ct. App. 2019), *review denied*, 455 P.3d 138 (Wash. 2020).

[136] *See* WASH. ENERGY FACILITY SITING EVALUATION COUNCIL, REPORT TO THE GOVERNOR ON APPLICATION NO. 2013-01, at 83–84 (2017), https://earthjustice.org/sites/default/files/files/VEDT-Rept-to-Governor_12.19.17s.pdf.

[137] *See* discussion *supra* note 5 and accompanying text.

[138] Though beyond the scope of this article, tribal suits will need to consider the obstacles posed by sovereign immunity. States enjoy broad sovereign immunity

consider the forms of redress they demand. This is a tricky decision given, on one hand, the need for tribes to ensure resource protection or, at least, compensation for injury and, on the other hand, the concern that courts will see such demands as encroaching on governmental functions. The Ninth Circuit in *Juliana*, for example, was troubled that mandating the creation of legislation needed to combat climate change might ultimately infringe on a political question better suited for the other branches of government, and further, that courts would be ill-equipped to define manageable standards to monitor and enforce their decisions.[139] As a result,

unless they consent to suit directly or through waiver provided for in statutes. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Furthermore, unless a state has consented or Congress has legitimately permitted, tribes generally cannot sue a state in federal court because of Eleventh Amendment protections. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). In such cases, suits must be brought on behalf of tribes by the federal government (as was the case in the *United States v. Washington* line of cases). *See* Blumm, *supra* note 77, at 29 n.166. It is unclear to what extent tribes can pressure the federal government to bring suit on their behalf, since courts have allowed the federal government to exercise discretion in this respect. *See, e.g.*, Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480–81 (D.C. Cir. 1995) (finding that the federal government did not violate its trust duties when exercising its discretion and choosing to not bring a water rights claim on behalf of one tribe, even though it brought such a claim on behalf of another tribe). *But c.f.* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (finding that the government could not decline to sue on behalf of the Passamaquoddy Tribe with regards to a Nonintercourse Act claim). Otherwise, tribes may seek to bring a suit falling under the *Ex parte Young* exception, in which the defendant is a state official who, acting in their official capacity, violates the laws or Constitution of the United States. *Ex parte* Young, 209 U.S. 123, 159–60 (1908). Furthermore, while injunctions might be possible in either case, damages may be harder to obtain since, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Edelman v. Jordan, 415 U.S. 651, 663 (1974) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)).

[139] *See* Juliana v. United States, 947 F.3d 1159, 1173 (9th Cir. 2020), *petition for rehearing en banc filed*, No. 18-36082 (9th Cir. Mar. 2, 2020) (stating that effective redress for plaintiffs would violate the political question doctrine because the court would be forcing the government to create climate change policy). To determine whether deference to political branches is due, courts apply a multifactor test asking whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or

actions for declaratory relief might be the easiest to pursue because they merely require courts to declare that a right has been violated, whereas injunctive relief requires a state to take action or create legislation. However, the unique characteristics of Indian resource rights and the trust relationship may still facilitate a claim for any form of redress. The three primary forms of relief—declaratory judgment, injunction or mandamus, and award of damages—have pros and cons. Each will be discussed in turn, starting with declaratory relief.

A recent OCT case illustrates the potential for climate litigants, not just Indian tribes, to successfully seek declaratory relief. In *Chernaik v. Brown,* the Oregon Court of Appeals appeared wary that a suit for injunctive relief might involve political questions, but did not express the same concern for declaratory relief.[140] The court found that it was empowered to determine whether resources—such as the atmosphere—were trust resources that the State was obligated to protect, as well as what obligations were owed under the trust doctrine.[141] Therefore, the court of appeals reversed the lower court's dismissal of the lawsuit, which had been motivated in part by concerns about the political question.[142] This decision demonstrates that courts might be appropriate venues for determining the scope of protection of trust resources in the context of climate change. Tribal plaintiffs, therefore, could seek a

an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962). In *Juliana*, dissenting Judge Staton vehemently disagreed with the majority, finding that none of the *Baker* factors were met and that plaintiffs' claims might concern enormous issues, but not nonjusticiable political ones. *See Juliana*, 947 F.3d at 1186–87 (Staton, J., dissenting). The judge argued, "the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes 'the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm.'" *Id.* at 1184 (quoting *Lewis v. Casey*, 518 U.S. 343 (1996)). See a further discussion regarding redressability and political question concerns in Part IV.C.

[140] *See* Chernaik v. Kitzhaber, 328 P.3d 799, 804 (Or. Ct. App. 2014), *dismissed sub nom.* Chernaik v. Brown, 436 P.3d 26 (Or. Ct. App. 2019), *petition for review granted*, Chernaik v. Brown, 442 P.3d 1119 (Or. 2019).

[141] *See Kitzhaber*, 328 P.3d at 804.

[142] *See id.* at 803. For more on the political question doctrine, see *supra* note 139.

declaration from courts that states have violated Indian treaty rights by acting in ways that endanger essential resources and tribal access to such resources. For treaties containing resource rights, it should be relatively straightforward to conduct a fact-based assessment of whether the government violated them through its action or inaction. Such a finding would help clarify the rights and obligations of parties with regard to climate change impacts, while leaving it up to parties to determine the steps required to resolve the issue.[143]

The concerns of the court in *Chernaik* regarding remedies beyond a declaratory judgment reflect some continuing obstacles in climate change litigation, while highlighting the potential for Indian resource claims to surmount them. Washington State once again provides an illustrative example. While it might appear that Washington would be a particularly fruitful state in which to pursue a public trust claim because of its extremely protective State Environmental Protection Act and its recent actions to block fossil fuel infrastructure development,[144] the OCT trust case in the state has been unsuccessful so far. In *Aji P. v. Washington*, youth plaintiffs sought declaratory relief against allegedly inadequate GHG emissions reduction targets, as well as injunctive relief that would require the State to account for its emissions and to establish an "enforceable state climate recovery plan."[145] The court found that there was no penumbral right to a healthy environment in the state's constitution and, therefore, no basis upon which to rest the claim. Without such a foundation to even declare the existence of such a right or its violation, the request to enact complex regulations would raise a nonjusticiable political question.[146]

However, tribal treaty rights could provide this missing foundation. Tribal treaty rights would provide a legal basis upon which to rest a claim for state action, necessarily altering the court's

143 *See infra* notes 221-225 and accompanying text.

144 *See* Blumm & Litwak, *supra* note 88, at 29.

145 Complaint at 70–72, Aji P. v. Washington, No. 18-2-04448-1 SEA (Wash. Super. Ct. 2018).

146 Aji P. v. Washington, No. 18-2-04448-1 SEA at 6–7 (Wash. Super. Ct. 2018). The case is currently on appeal to the Washington Supreme Court. *See* Appellants' Opening Brief, Aji P. v. Washington, No. 96316-9 (Wash. filed Jan. 22, 2019). Quite similarly, the Ninth Circuit panel in *Juliana* noted that there was, as yet, no clear right upon which plaintiffs could base their claim at the federal level, despite the recognized peril posed by climate change. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020), *petition for rehearing en banc filed*, No. 18-36082 (9th Cir. Mar. 2, 2020).

assessment of the issue. Rather than an implied right to a healthy environment, tribes have explicit treaty-based rights to specific resources in perpetuity. Therefore, cases seeking state action to avoid severe and permanent damage to treaty rights arguably no longer present nonjusticiable questions, and courts might grant an injunction—for instance, on timber or coal leases—or mandamus—for example, requiring the state to implement climate change mitigation and adaptation legislation.

Finally, a suit for damages may be the most complicated to pursue because of factual questions and the unresolved issue of apportioning culpability for climate harms. It is challenging to predict which state court would be most open to hearing cases that consider attribution of specific on-the-ground harms to climate change, complex causal chains, and multi-source contributions to an injury.[147] Still, tribes have successfully sued for damages to their treaty-based property rights. For instance, in *County of Oneida v. Oneida Indian Nation*, a tribe successfully recovered damages for land unlawfully taken one hundred and fifty years prior.[148] The Supreme Court held that this damages claim was justiciable and not barred by the political question doctrine.[149] Given that treaty resource rights are property rights, the ability to sue for damages should logically extend to cases in which those rights are harmed by climate change.[150] Of course, climate harms may entail much larger questions about government policy than an illegal land conveyance case. That said, assessing damages for injury to resources without requiring specific action from governments may be less likely to run afoul of the political question doctrine than injunctive relief, because it requires compensation for harm rather than, for example, the passage of legislation.

In sum, because tribal resource rights arguably enjoy even more protection than similar trust-based resource protection claims, and

147 *See supra* Part I.A (discussing these challenges and evolving theories to address them).

148 *See* City of Oneida v. Oneida Indian Nation, 470 U.S. 226, 230 (1985). The Court also reaffirmed that "Indians have a common-law right of action for an accounting of 'all rents, issues and profits' against trespassers on their land." *Id.* at 235–36 (citing United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941)).

149 *See id.* at 249–50.

150 For this argument, see Wood, *supra* note 69 ("The Indian trust responsibility is protection for property guaranteed on the sovereign level, from the federal government to tribes.").

because states have affirmative duties to respect such treaty rights, litigation would present an exciting avenue to test whether treaty resources are protected from harm caused by climate change. Some states seem to be taking legislative and regulatory decisions regarding fossil fuel development with tribal treaty rights in mind; the next step is whether tribal treaty claims can move a hesitant judiciary to require climate action. The upshot of successful tribal suits would not only be the protection of treaty resources and tribal welfare, but the stimulation of state climate action more generally.

IV. SUITS AGAINST THE FEDERAL GOVERNMENT

Tribal suits against the federal government based on treaty rights, like those against states, will trigger substantive inquiries into questions of the scope of treaty resource rights, the extent of government duties owed to tribes, and more general issues in climate litigation such as causation and liability. Indian tribes may face similar difficulties as non-Indian litigants in their suits, but they may also possess certain advantages, as will be discussed below.

In order to bring cases against the federal government, tribes may base a claim in federal common law, as they did in the *Washington* line of treaty cases.[151] Instead of analyzing the substance of their potential claims, however, I will focus in this section on two major avenues through which the federal government has allowed itself to be sued. The first is to pursue injunctive relief by challenging a governmental action as "arbitrary and capricious" under the Administrative Procedure Act (APA),[152] and the second is to pursue claims of damages under 28 U.S.C. § 1505, otherwise known as the Indian Tucker Act. Tribal claims under each would

[151] *See id.* at 361. Though beyond the scope of this Note, it will be important to consider how tribes should frame their common law claim. For instance, it is unclear if the Clean Air Act preempts tribal claims related to climate change harms brought under federal common law. Likely it does not, since the Supreme Court so far has only ruled that the Act displaces federal *public nuisance* suits seeking to mitigate GHG emissions. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011) (CAA displaces federal public nuisance claims related to climate change); *see also* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 300 (2014) (arguing that federal public trust actions are neither displaced by statute nor barred by the political question doctrine). Tribal claims would be treaty-based suits rather than public nuisance suits, and might not solely seek to address GHG emissions, but also impacts on resources, and perhaps raise claims for adaptation.

[152] *See* 5 U.S.C. §§ 551–596, 701–706 (2018).

play different roles—APA claims may seek a particular government action, while Indian Tucker Act claims may seek compensation for injury—and face distinct challenges.[153] Subsequently, I will return to the issue of redressability, specifically in the context of federal government action, and discuss why tribal claims may be better suited to address this concern than non-tribal claims.

A. *Suits Under the Administrative Procedure Act*

The APA provides a means to review whether agency action conforms with the agency's powers, its mandate, and other required considerations.[154] For our purposes, these "other" considerations would be treaty rights, providing tribes with a unique hook that non-Indian claimants do not possess. The APA is a broad instrument for tribes to challenge agency violations of tribal treaty rights under the Indian trust theory.[155] Wesley Furlong—a staff attorney at the Native American Rights Fund—suggests that a successful APA claim would require a tribe to establish: (1) that its respective treaty "implies a broader right to habitat protection . . . based in precedent";[156] (2) a "practical and theoretical need for the implied right"; (3) a workable standard of liability (even if complex); and (4) that the "effects of the implied right are not disproportionately disruptive to the economy and to the State."[157] These elements will be discussed in turn.

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[153] For a deeper discussion of APA and Indian Tucker Act claims, beyond the scope of this Note, *see* Warner, *supra* note 65, which provides a thorough and illuminating analysis.

[154] The APA has a six-year statute of limitations that begins to run when a "final agency action" occurs which results in an alleged violation. *See* Warner, *supra* note 65, at 948 (discussing use of the APA in the context of the federal-tribal trust relationship).

[155] *See id.* at 947.

[156] That is to say, the treaty would not merely reserve to the right to fish salmon, but rather implies a duty to protect salmon habitat to maintain an adequate population. See Blumm's arguments, discussed *supra*, notes 121–123 and accompanying text.

[157] Wesley J. Furlong, *"Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, 37 PUB. LAND & RES. L. REV. 113, 134 (2016) (arguing these four prongs would help overcome the Ninth Circuit's apprehensions about finding broader rights to habitat protection in the culverts-related *Washington* cases). While Furlong's argument is made in the context of challenging state actions, it can be extended to federal actions—as I proceed to demonstrate below.

As discussed above, the *United States v. Washington* line of cases provides a good example of the interrelation between treaty resource rights and habitat protection, recognized when the district court and appellate court granted declaratory relief and issued an injunction to remove salmon-blocking culverts.[158] Additionally, precedent where federal agencies have denied project permits based on treaty rights demonstrates that Indian tribes can demand their treaty rights be protected through resource and habitat protection, handily meeting the first prong of Furlong's argument.[159] For instance, in *Northwest Sea Farms v. United States Army Corps of Engineers*, the court affirmed the denial of plaintiff's aquaculture farm permit in the Lummi tribe's traditional fishing areas because the federal government "owes a fiduciary duty to ensure that the Lummi Nation's treaty rights are not abrogated or impinged."[160] The Ninth Circuit has reiterated that the federal government's fiduciary duty involves a duty to "maintain" treaty resources;[161] accordingly, courts have not only upheld federal decisions to protect treaty rights, but in certain instances have even compelled federal government bodies to do so. For example, in a case brought by the Umatilla Indian Reservation, the U.S. District Court for the District of Oregon found that, absent explicit Congressional authorization to the contrary, the Army Corps could not operate a power plant or fill a dam if it would impair or destroy Indian treaty rights.[162] Similarly, the U.S. District Court for the Western District of Washington granted a preliminary injunction to halt the construction of an Army Corps-permitted marina that would destroy a recognized tribal fishing ground.[163]

Furlong's second factor requires "a practical and theoretical need for the implied right."[164] Furlong argues that the theoretical need for the right is evident, particularly because non-Indian

158 *See* discussion *supra*, Parts II.A and III.A.

159 For more in-depth discussion, *see* Furlong, *supra* note 157, at 134–40.

160 Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

161 *See* Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1086 (9th Cir. 2005).

162 *See* Confederated Tribes of Umatilla Reservation v. Alexander, 440 F. Supp. 553, 555–56 (D. Or. 1977); *see also* Furlong, *supra* note 157, at 135–36.

163 *See* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988).

164 Furlong, *supra* note 157, at 141–43.

governmental interests in preserving fisheries are not "co-extensive" with tribal interests.[165] For example, government agencies are not necessarily seeking to protect the fishing areas that tribes use, taking into account the methods of different tribes; furthermore, the government does not ascribe the same cultural and existential significance to fishing as tribes might.[166] In addition, scientific research has cemented the practical necessity of habitat protection in the face of climate change. Recall from Part II.B the significant current impacts of climate change on the exercise of tribal resource rights, as well as the predicted future impacts.[167] These massive ecological changes would spell the precipitous decline of opportunities for fishing, hunting, and gathering—not to mention the potential for displacement of Peoples from their treaty lands.[168] Therefore, the Ninth Circuit's question about whether this prong could be met when it issued its decision in the mid-1980s is now clearly answered: tribes may witness the disappearance of the resources they were guaranteed by treaty, and to protect those resources requires specific recognition of the habitat protection right implicit in tribal resource rights.

Furlong's third consideration, regarding a workable standard of liability to address actions harming treaty resources through complex chains of causation, is still unresolved in American courts.[169] However, as Furlong argues, "[t]he complexity of litigation … is not a bar to justice."[170] As discussed in Part I.A, improvements in climate science and attribution, the increasing prominence of climate change in legal and political discourse, and trends in international jurisprudence regarding state obligations to mitigate emissions within their jurisdiction[171] illuminate possible avenues that a progressive court in the United States might take to

165 *Id.* at 143.

166 *See id.*

167 *See id.* at 141–42.

168 *See supra* notes 95–107 and accompanying text.

169 *See* Furlong, *supra* note 157, at 144–47; *see also* discussion *supra* Part I.A. One useful point of comparison might be toxic torts suits, in which courts must grapple with highly complex and uncertain causal chains and *scientific* evidence in order to determine whether plaintiffs have a claim at law against defendant chemical companies. *See generally* Megan Edwards, Katrina Fischer Kuh, & Frederick A. McDonald, *Scientific Gerrymandering & Bifurcation*, 29 N.Y.U. ENV'T L.J. (forthcoming 2021).

170 Furlong, *supra* note 157, at 147.

171 *See, e.g.*, *Urgenda*, *supra* note 28.

eventually develop a workable standard of liability for actions that contribute to climate change.[172]

Finally, the last prong of the analysis asks whether the effects of recognizing the treaty right would be "disproportionately disruptive" to the economy.[173] This prong should not be given undue weight in order to completely discount tribal claims. As previously stated, treaty rights are not subject to a nuisance-like social utility balancing test.[174] A *de minimis* harm is actionable, and it is up to courts and parties to assess appropriate remedies. Furthermore, because treaties are the supreme law of the land, treaty rights cannot be abrogated through incidental impacts of government policy—for example, emissions from the leasing of lands for fossil fuel exploitation—without a clear statement from Congress.[175] Unless Congress explicitly revokes treaty-based resource rights, the federal government continues to have a duty to address the harm to those resources occasioned by its actions.

While tribes may be able to challenge agency action under the APA, the standards to bring a claim have become somewhat more stringent. As Professor Mary Wood notes, in recent years some decisions by district and circuit courts have limited a tribe's access to injunctive relief under the APA by mistakenly applying more stringent requirements upon plaintiff tribes that, in fact, should apply only in Indian Tucker Act cases (meant for monetary claims, discussed below).[176] These courts have required that tribes demonstrate the existence of an explicit and specific trust duty owed to them under a particular law, where in reality the trust relationship owed to them and their treaty rights should be sufficient for the APA

[172] For this argument, *see* Brief for International Organizations and Lawyers as Amici Curiae Supporting Plaintiffs'-Appellees' Petition for Rehearing *En Banc*, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

[173] Furlong, *supra* note 157, at 134, 147–153.

[174] *See* Blumm, *supra* note 77, at 38. *See also* Furlong, *supra* note 157, at 148 ("[T]reaties impose binding obligations on the State regardless of the hardships imposed, and … the State is already engaged in extensive habitat protection and restoration, disproving the argument that a treaty-based obligation to do so would be overly burdensome.").

[175] *See* COHEN'S HANDBOOK, *supra* note 55.

[176] *See* Wood, *supra* note 69, at 366. This confusion arises from a case, *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), which applied the rationale in a Tucker Act case, *United States v. Mitchell*, 445 U.S. 535 (1980), to an APA claim. This inaccuracy has creeped into Ninth Circuit case law and government documents. *See* Wood, *supra* note 69, at 365–66.

claim.[177] Yet even this overly-narrow interpretation of the APA should not pose too much difficulty for tribes, given both tribes' clear and often already-adjudicated treaty resource rights, as well as the existence of precedent affirming the ability of tribes to enforce such rights through the APA.[178]

B. *Suits Under the Indian Tucker Act*

While tribal litigants may have a treaty-based "hook" for an APA claim, the Indian Tucker Act explicitly enables tribal claims for monetary damages against the federal government. The Act stipulates:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.[179]

Courts have found that although the Indian Tucker Act provides a waiver of the federal government's sovereign immunity, it does not itself establish a cause of action.[180] Instead, two criteria must be satisfied in order to successfully plead a cause of action. First, claimants must identify a source of substantive law that creates specific fiduciary or other duties which the government has failed to perform.[181] Courts have generally required some explicit statement in the relevant law or proof of comprehensive regulation of a trust resource by the federal government, such that a failure to protect the resource would require compensation for the federal

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177 *See* Wood, *supra* note 69, at 365–66.

178 For further discussion of this line of cases, see *id.* at 364–65 ("The *Pyramid Lake*, *Northern Cheyenne*, *Northwest Sea Farms*, *Klamath*, and *Parravano* cases form one clear prong of the trust doctrine and accept broad common law assertions of the trust responsibility within the context of claims for injunctive relief under the APA.").

179 28 U.S.C. § 1505 (2018).

180 *See* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313, 316–17 (2003).

181 *See* United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 290 (2009).

government's breach.[182] In the Indian trust context, courts have allowed implicit grants of a private right of action to satisfy this criterion.[183] Second, the claimant must demonstrate that the source of law can be construed to permit money damages.[184] For instance, if a statute includes language that the government can be "called to account," courts may interpret this to permit a tribe to require an accounting of a trust account, creating an avenue for damages if the tribe can prove that the government has breached its fiduciary duty.[185]

In suits alleging a violation of treaty resource rights due to the federal government's contributions to climate change, tribes can point to the treaty as establishing substantive rights that create government obligations.[186] Violation of these rights might then require monetary redress. Indeed, when it comes to land taken from Indian reservations, the Supreme Court of the United States has

[182] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 226 (1983); United States v. White Mountain Apache Tribe, 537 U.S. 465, 478 (2003). *But see* United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 506 (2003) (finding that comprehensive control alone is not enough and there must also be "specific rights-creating or duty-imposing statutory or regulatory prescriptions," concluding there is no requirement for damages under the Indian Mineral Leasing Act), *aff'd*, *Navajo II*, 556 U.S. 287 (2009).

[183] *See Navajo II*, 556 U.S. at 290; *see also* Sisk, *supra* note 180, at 317 ("The third of these core doctrines of Indian law—the trust doctrine—may give substance to a Tucker Act claim.").

[184] *See Navajo II*, 556 U.S. at 290–91. For a more detailed discussion, see Warner, *supra* note 65, at 937–47.

[185] *See* Fletcher v. United States, 730 F.3d 1206, 1210, 1215 (10th Cir. 2013) (noting that "when Congress says the government may be called to account, we have some reason to think it means to allow the relevant Native American beneficiaries to sue for an accounting, just as traditional trust beneficiaries are permitted to do," but also finding that in "any subsequent litigation it will be [the plaintiff's] burden to prove a breach of trust, not the government's burden to disprove it").

[186] Notably, two relevant Executive Orders assert that the government must respect the government-to-government relationship with tribes. Executive Order 13,175 of November 6, 2000, establishes an obligation to consult with tribal representatives in decisions that would impact tribes, including with regards to their treaty rights. *See* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). Executive Order 13,647 of June 26, 2013, states that "protecting tribal lands, environments, and natural resources, and promoting respect for tribal cultures" is an important government policy. Exec. Order No. 13,647, 78 Fed. Reg. 39,539, 39,540 (July 1, 2013). Unfortunately, both of these orders explicitly state in their final paragraphs that they do not provide a justiciable right against the United States. *See, e.g.*, *id*. at 39,542.

found a requirement to compensate for such a taking.[187] Since treaty resource rights are property rights, they should arguably be subject to similar logic and therefore tribes should be compensated when such resources are damaged or wholly destroyed.[188] Tribes aiming to establish a taking may not necessarily need to prove that the resource has been completely destroyed—although some resources are on their way to complete extermination—but rather that the resource has reached a quantity that falls below the tribes' adjudicated "fair share."[189] As one example, the Gila River Pima-Maricopa Indian Community's successful suit against the federal government provides support for a compensation claim.[190] The court found that the federal government had a duty to ensure sufficient water reached the community in Arizona, and a failure to do so resulted in harm to the community's treaty-based water rights. Thus, the tribe could assert a claim for damages caused by governmental water diversions that impacted the community's agricultural activities.[191]

Another difficulty arises in considering how to apply the statute of limitations to climate change claims under the Indian Tucker Act. The Indian Tucker Act has a strict six-year statute of limitations[192] that cannot be waived or tolled for reasons of equity.[193] This statute

187 *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 386 (1980).

188 For instance, if taken for a public use under the Fifth Amendment. *See* U.S. CONST. amend. V.

189 *See* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684–85 (1979) (finding that "both sides have a right, secured by treaty, to take a fair share of the available fish," and governments have a duty to ensure that "Indians' reasonable livelihood needs would be met").

190 *See* Gila River Pima-Maricopa Indian Cmty. v. United States, 231 Ct. Cl. 193 (Ct. Cl. 1982).

191 *See id.* at 194, 214–15 (finding that the federal government may be liable for monetary damages for diverting water from the Gila River, and remanding to the Trial Division to determine the amount owed). This case can be distinguished from *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015), in which the court dismissed a monetary claim based on a failure of the federal government to provide potable water to the reservation. In the case of the Hopi, the Executive Order and the ratifying Act establishing the reservation only alluded to a "bare trust" relationship with the federal government regarding the land and not the water. Thus, the court found the language was only sufficient to enable the government to enjoin third party interference with tribal resources, but it generated no affirmative duties for the federal government to provide water. *See id.* at 669.

192 *See* 28 U.S.C. § 2501 (2018).

193 *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008).

begins running when the "claim first accrues."[194] Accrual of a claim occurs when the relevant facts exist and are objectively knowable.[195] Unless the government has concealed its activities, claimants are considered on notice and it is their responsibility to inquire as to relevant facts and the basis of a claim.[196] Because of the cumulative, long-term, and delayed impacts of emitting enormous quantities of GHGs into the atmosphere, it is unclear at what point the statute of limitations for a claim based on those emissions would begin running. Even if the statute were to begin when impacts are first experienced, that indeed may have started over six years ago.[197] A tribe could argue that the accrual of the claim could only reasonably begin when our scientific understanding had developed enough to confidently associate certain climate harms with impacts on the ground. Even if this were the case, Indian tribes may be unfairly required to rush to litigate their claims before they have a better understanding of the real costs of climate impacts on their treaty rights.

Suing under these circumstances could mean systematic under-compensation, unless the "continuing claim doctrine" can be applied to climate change impacts. Under this doctrine, "the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages."[198] Continuing claims cannot simply be based on continuing harms from one discrete wrong that occurred long ago.[199] The Quinault Tribe successfully used the continuing claim doctrine in their suit against the Bureau

[194] 28 U.S.C. § 2501 (2018). For the Department of Justice's perspective on the statute of limitations under the Indian Tucker Act, see *Statute of Limitations*, DEP'T OF JUST. (May 12, 2015), https://www.justice.gov/enrd/statute-limitations.

[195] *See* Menominee Tribe of Indians v. United States, 726 F.2d 718, 720–22 (Fed. Cir. 1984).

[196] *See* Coastal Petroleum Corp. v. United States, 228 Ct. Cl. 864, 867 (Ct. Cl. 1981); *see also* Menominee Tribe v. United States, 726 F.2d at 720.

[197] *See*, *e.g.*, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854, 868 (9th Cir. 2012) (Pro, J., concurring) (agreeing with majority to dismiss claim of native Alaskan tribe alleging that fossil fuel companies contributed to global warming, which severely eroded natural protections against winter storms and required the village's relocation, and also noting that the "vast time frame" of climate change rendered plaintiffs' standing problematic on the traceability prong).

[198] Brown Parks Ests.-Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed. Cir. 1997).

[199] *See id.*

of Indian Affairs, with a court finding that the Bureau had violated an ongoing trust obligation to manage commercial timber via sustainable yield requirements.[200] In the climate change context, the continuing claim doctrine might allow plaintiffs to seek compensation for damage caused by events attributable to climate change that have still occurred within the period of the statute of limitations, such as a glacier melt or a severe drought, even if prior climate change-related harms had occurred. Note that, if applied, this doctrine allows recovery only for harms that have occurred within the statute of limitations period, not harms extending further back in time.[201] However, it may help alleviate some under-compensation concerns and thereby present an option for at least partial recovery for tribes seeking to accurately account for resource damages caused by climate change.

Even if the court finds a substantive basis in law, no time-barring from the statute of limitations, and an identifiable and compensable harm, it would still be left with the question of how to determine the compensation *amount*. As with state suits, suits attempting to extract damages from the federal government may be difficult because of the need to establish quantifiable damages that can be fairly attributed to the government's action or inaction. Such quantification is not outside the realm of possibility, however. For instance, the National Environmental Protection Act requires extensive environmental impact assessments for federal agency actions that may cause major environmental impacts.[202] These assessments now include GHG emission projections, facilitating the work of courts in understanding just how much governmental action contributes to overall emissions and thus to climate change.[203] It is up to courts and juries, in considering the facts and parties' pleadings, to determine how much of a project's GHG emissions

200 *See* Mitchell v. United States, 10 Cl. Ct. 787, 789 (Ct. Cl. 1986).

201 *See id.*

202 *See* 42 U.S.C. §§ 4321–4370.

203 *See* Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097 (June 26, 2019). *See also, e.g.*, Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198 (9th Cir. 2008) (invalidating NHTSA rule in part for failure to include benefits of carbon emission reduction in the environmental impact statement's cost-benefit analysis); *see also* Sierra Club v. FERC, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (finding environmental impact statement deficient in part for failure to consider "reasonably foreseeable effects" including carbon emissions and climate change impacts).

can be fairly attributed to the federal government, versus third parties, for harm-causing activities.[204] A benefit of monetary claims, besides sidestepping the political question issue,[205] is that successful claims may prompt agencies and policymakers to seriously consider the financial implications of failing to respect tribal treaty rights. This, in turn, might provide another incentive to direct federal action toward mitigation and adaptation.

C. *Tribal Claims May Better Address Redressability Concerns*

Unlike monetary claims, suits seeking declaratory or injunctive relief raise one last hurdle: redressability. As discussed above in the context of state suits and the political question doctrine, redressability has bedeviled recent climate change cases.[206] The Ninth Circuit in *Juliana* found that plaintiffs could likely establish injury in fact and traceability, the first two prongs of standing, but that the third prong—redressability—was not met.[207]

Redressability requires plaintiffs to "show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award."[208] The Ninth Circuit panel in *Juliana* was skeptical that the first prong was met, though it did not ultimately decide that question. It argued that a declaration that plaintiffs' constitutional rights were violated would probably do no better than provide "psychic satisfaction," which is not redress.[209] The panel majority was further skeptical that an injunction would provide redress, given that it would not solve climate change.[210]

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[204] Note that claims under the Indian Tucker Act may be subject to different accounting approaches. For instance, in an action brought by the Gila River Pima-Maricopa Indian Community for damage to land the federal government had used for a JapaneseAmerican detention camp, the court awarded the diminution of fair market value of the lands, rather than the costs of restoration. *See* Gila River Pima-Maricopa Indian Comty. v. United States, 467 F.2d 1351 (Ct. Cl. 1972). If required to calculate treaty resource losses due to climate change in terms of market value diminution, courts will encounter further complex questions, such as whether to solely calculate the market value of the fish lost, or also to consider the ecosystem services lost by resource degradation.

[205] *See supra* note 139 and accompanying text; *see also* discussion *infra* Part IV.0.

[206] *See* discussion *supra* Part III.A.

[207] *See* Juliana v. United States*,* 947 F.3d 1159, 1168–69, 1171 (9th Cir. 2020).

[208] *Id.* at 1170.

[209] *Id.*

[210] *See id.* at 1170–71.

More importantly, however, the panel found that what would truly be required for redress—ordering the adoption of a comprehensive climate change scheme—was a policy matter "entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[211] In other words, this would be a political question and an issue of separation of powers.[212]

The political question doctrine "counsels judicial deference where there is "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it."[213] The panel majority argued that even an order requiring the government to make policy, while leaving the details up to the government's discretion, would itself "entail a broad range of policymaking" inappropriate for courts[214]—though it is unclear what the panel meant by the "policymaking" it might be required to undertake.[215] Furthermore, the court was concerned that because of the "complexity and long-lasting nature of global climate change," the court would be beset by many issues: first, the court would "be required to supervise the government's compliance with any suggested plan for many decades";[216] second, it would find itself substituting its own judgment for that the elected bodies;[217] and third, there would be no manageable standards to guide the exercise of its authority.[218] For these reasons, the panel found that the second prong of the redressability analysis was not met.

The Ninth Circuit panel's determination resulted in vehement disagreement, not only from the dissenting judge, but also from dozens of amici. As to the first redressability question about whether a court would be likely to substantially redress the issue, Judge Staton argued that any "meaningful" mitigation of climate change

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211 *Id.* at 1171–72.

212 Notably, the majority claimed that the analysis rested solely on redressability rather than upon a political question analysis. *See id.* at 1174, n.9. However, as the dissent points out, the majority's analysis tracks on to the political question inquiry. *See id.* at 1185, n.10 (Staton, J., dissenting).

213 Baker v. Carr, 369 U.S. 186, 217 (1962) (enumerating several other factors to consider as well).

214 *Juliana*, 947 F.3d. at 1172.

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.* at 1173.

would represent such redress.[219] Indeed, in the seminal case requiring the EPA to consider GHG regulation, *Massachusetts v. EPA*, the court held that despite the global and multifactorial nature of the issue of climate change, the EPA had the duty to at least "slow or reduce" the problem.[220]

Regarding the second prong of the redressability inquiry, dissenting Judge Staton, along with environmental organizations, argued that it is, in fact, the appropriate role of courts to determine whether the government is violating the Constitution.[221] Such a declaration does not violate the separation of powers and is a form of effective relief because "courts are to presume that the executive branch will 'abide by an authoritative interpretation of the constitution' through a declaratory judgment."[222] In another amicus brief supporting the *Juliana* plaintiffs, twenty-three members of Congress urged that it is the appropriate role of the court to "say what the law is" and to do so especially in cases which allege "systemic constitutional deprivations" resulting from large imbalances of power.[223] Even a court order requiring governmental action should not fall afoul of the political question doctrine. In the same environmental organizations' brief, as well as in a separate submission by international law organizations, amici argued that requiring the government to develop a GHG emission mitigation plan leaves an acceptable window of discretion to the government to formulate legislation while ensuring its compliance with citizens'

219 *Id.* at 1182 (Staton, J., dissenting).

220 Massachusetts v. EPA, 549 U.S. 497, 525 (2007). Notably, the *Juliana* panel majority finds *Massachusetts v. EPA* unpersuasive because Massachusetts as a sovereign was given "special solicitude" in standing, and it was claiming a procedural right rather than a substantive one. *See Juliana*, 947 F.3d at 1171. However, Judge Staton found this distinction unpersuasive, given that the posture of claiming a procedural right informs the first and second prongs of standing, while the question of effective redress could quite well remain relevant even when claiming a substantive right. *See id.* at 1182–83 (Staton, J., dissenting).

221 *See id.* at 1184 (Staton, J., dissenting); Brief for Environmental Organizations as Amici Curiae Supporting Plaintiffs-Appellees Petition for Rehearing *En Banc*, *Juliana*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

222 *Id.* at 11 (quoting Franklin v. Massachusetts, 505 U.S. 788, 803 (1992)).

223 Brief for Sen. Jeff Merkley, et al. as Amici Curiae Supporting Plaintiffs-Appellees at 4, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082) (citing Marbury v. Madison, 5. U.S. (1 Cranch) 137, 177 (1803)). They reference, for example, *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

constitutional rights.[224] Judge Staton persuasively pointed to desegregation cases and prison reform cases to demonstrate that "our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution" and to courts' willingness to grapple with the complexity of guaranteeing fundamental rights.[225] Finally, both Judge Staton, in her dissent,[226] and McKinstry and Dernbach, in their article, make compelling arguments that "manageable standards" to engage with complex scientific and policy questions can be established.[227] Thus, while the Ninth Circuit panel in *Juliana* held that a lawsuit asking for recognition of environmental rights and for governmental action to protect those rights was not effectively redressable, there is ample support for the alternative conclusion that redressability can be satisfied.

In the context of tribal litigants, there are particular aspects of Indian law that clarify that courts have the power—and obligation—to adjudicate tribal rights and cannot dismiss such cases as non-redressable due to limits on the court's authority. Additionally, as discussed above, the entire *United States v. Washington* line of cases, spanning over thirty years, further demonstrates that courts can engage in the type of fact-finding and judicial supervision needed to decide complex questions about resource rights and government duties.[228] Indeed, in *Sioux Nation*, the Court explicitly rejected the notion that it was not the appropriate venue to consider alleged Indian treaty abrogation and property takings.[229]

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[224] *See id.*; *see also* Brief for International Organizations and Lawyers as Amici Curiae Supporting Plaintiffs'-Appellees' Petition for Rehearing *En Banc* at 5–6, *Juliana*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082); *see also* LaDuke v. Nelson, 762 F.2d 1318, 1325 (9th Cir. 1985) (finding that "the executive branch has no discretion with which to violate constitutional rights").

[225] Juliana at 1188–89 (Staton, J., dissenting) (discussing prison reform in *Brown v. Plata*, 563 U.S. 493 (2011) and desegregation ordered under *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

[226] Juliana at 1187.

[227] For instance, findings could be based on the United Nations Framework Convention on Climate Change, or on a balancing test achieved by using the social cost of carbon. *See* Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 MICH. J. ENV'T & ADMIN. L. 49, 78–89 (2018).

[228] *See supra* Part II.A.

[229] *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980) (quoting Three Affiliated Tribes of Fort Berthold Reservation v. United States,

Furthermore, it expressly disavowed the notion that the relations between the federal government and tribes are purely political.[230] *Sioux Nation* clarifies that there is a limit to government action, even congressional action, when it imperils Indian property rights.[231] It is not sufficient for the government to argue that it can violate property rights given its other competing governmental interests. In fact, during Nixon's era of "self-determination without termination," he sought to ensure that the federal government would properly act as a trustee of tribes, even when doing so represents a conflict of interest within the government.[232] It is not enough for the government to simply consult tribes while actively making decisions that harm them;[233] the government must protect tribal treaty resources and be brought to account if it does not.

Overall, while actions against the federal government may present various challenges, Indian tribes possess some of the same potential opportunities as they do in state claims. Tribes can point to their right to resources based in treaties, and to the government's duty to ensure tribes continue to enjoy these resource rights. Claims

390 F.2d 686, 691 (1968)) ("It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution.").

230 *See id*. at 413 ("That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977).").

231 *See id.* at 415 (internal citations and alterations omitted) ("In every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that this power to control and manage is not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it is subject to limitations inhering in a guardianship and to pertinent constitutional restrictions.").

232 This speech referred to the end of an era of federal government policy that "terminated" the special status of Indian tribes. Depending on who one asked, the goals of such a policy ranged from fostering self-dependence for Indian individuals to forced assimilation. The negative socioeconomic and cultural impacts of the policy were eventually considered untenable, and government policy shifted towards encouraging tribal self-determination. *See* Reid Peyton Chambers, *Implementing the Federal Trust Responsibility to Indians After President Nixon's 1970 Message to Congress on Indian Affairs*, 53 TULSA L. REV. 395, 400 (2018).

233 Tribal consultation is required in the majority of agency decisions. *See, e.g.*, 40 C.F.R. § 1501.7 (2020) (requiring an agency to invite the consultation of tribes when considering an action).

at the federal level may also look to specific statutes, namely the APA and the Indian Tucker Act. Indian tribes may have certain advantages over non-Indian claimants seeking an injunction under the APA, for example with regards to GHG emissions. Unlike non-Indian claimants, tribes also have a unique instrument in the Indian Tucker Act for seeking damages. Claims for declaratory and injunctive relief for climate change harms should be justiciable, especially in the context of tribal resource claims, and may successfully prompt government action. Otherwise, monetary claims may indirectly prompt climate action by ensuring that treaty resource rights violations have enormous financial implications.

CONCLUSION

Climate change litigation both around the world and within the United States has exploded in the past decade.[234] It is an uncharted area of law, and many crucial elements necessary for courts to enjoin actions or grant damages remain unresolved. While the area of federal Indian law can be somewhat inconsistent and highly complex, I have shown that tribal claims may have several advantages over non-tribal claims. Because certain treaties grant substantive and justiciable rights to tribes, tribes enjoy a special form of trust relationship that limits both federal and state government action. Tribes also experience disproportionately severe impacts from climate change, in a manner that endangers their cultures and livelihoods, as well as their access to treaty resources. Because of these factors, tribes may be able to successfully surmount hurdles of standing and lead state and federal courts to make groundbreaking findings regarding governmental duties to mitigate and adapt to climate change.

Combined with shifts in public opinion regarding the urgency of climate change[235] and pockets of advancements in climate change

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[234] *See* UNITED NATIONS ENV'T PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOB. REV. 11 (2017); *see also* JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION xi (2015) (referring to an "explosion" in climate change litigation since 2015).

[235] *See* Matthew Taylor, *Climate Crisis Seen as 'Most Important Issue' by Public, Poll Shows*, GUARDIAN (Sept. 18, 2019, 11:00 PM), https://www.theguardian.com/environment/2019/sep/18/climate-crisis-seen-as-most-important-issue-by-public-poll-shows (describing the "growing numbers of people striking for climate action").

case law on the international stage,[236] such results are within the realm of possibility. The treaty rights approach requires test cases in strategic venues where Indian claims are likely to be the most thoroughly and fairly adjudicated. It is possible that courts will embrace the notion, expressed by Justice Black, that "[g]reat nations, like great men, should keep their word."[237] At this point, everyone—not just young people or Indigenous Peoples—needs to work strategically to ensure the existing legal gaps stymying successful climate litigation are resolved. There is very little time left to deliberate about future pathways to avert catastrophe.[238] The welfare and survival of Indigenous Peoples, future generations, and the entire planet is on the line.

[236] For instance, in the Netherlands and Australia, *see* Don C. Smith, *Landmark Climate Change-Related Judicial Decisions Handed Down in the Netherlands and Australia: A Preview of What's to Come?*, 37 J. ENERGY & NAT. RES. L. 145 (2019), or in Pakistan and India, *see* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L J. ENV'T L. 37, 62 (2017).

[237] Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

[238] United Nations Secretary General Antonio Guterres stated, "[t]ime is fast running out for us to avert the worst impacts of climate disruption and protect our societies from the inevitable impacts to come." WORLD METEOROLOGICAL ORG., WMO STATEMENT ON THE STATE OF THE GLOB. CLIMATE IN 2019 4 (2020).