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Litigating for the Homeland: An Indian Treaty Framework to Climate Litigation in the Wake of *Juliana*

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LITIGATING FOR THE HOMELAND: AN INDIAN TREATY FRAMEWORK TO CLIMATE LITIGATION IN THE WAKE OF *JULIANA*

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Climate change is an increasingly pressing issue on the world stage. The federal government, however, has largely declined to address any problems stemming from the effects of climate change, and litigation attempting to force the federal government to take action, as highlighted by Juliana v. United States*, has largely failed. This Note presents the case for a class of plaintiffs more likely to succeed than youth plaintiffs in Juliana—federally recognized Indian tribes. Treaties between the United States and Indian nations are independent substantive sources of law that create enforceable obligations on the federal government. The United States maintains a trust relationship with federal Indian tribes, and that relationship obliges a duty of protection upon the federal government. This Note argues that those obligations may support climate change claims under the theory that the government, by failing to address climate change, has failed its duty of protection under its treaties.*

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INTRODUCTION

Scientists from around the world have declared that Earth "clearly and unequivocally faces a climate emergency."[1] Studies have suggested that anthropogenic climate change may lead to roughly 150 million people losing their homes, strong hurricanes obliterating coastal communities, and wildfires sweeping through large regions, and many other unthinkable tragedies.[2]

Despite the enormity of the emergency, the United States government has declined to take any action on climate change. The government, particularly the Trump Administration, has instead opted to ignore climate change and even deny that it is a problem.[3] Typically, the role of regulating climate change-inducing greenhouse gases would fall to the Environmental Protection Agency ("EPA"), which possesses federal authority to regulate those gases under the Clean Air Act.[4] As the democratic process has broken down and failed to address climate change, some members of the public have taken to the courts in an attempt to spur federal

1. Andrew Freedman, *More than 11,000 scientists from around the world declare a 'climate emergency*,' WASH. POST (Nov. 5, 2019, 10:18 AM), https://www.washingtonpost.com/science/2019/11/05/more-than-scientists-around-world-declare-climate-emergency/?wpisrc=nl_todayworld&wpmm=1.

2. *See* Denise Lu & Christopher Flavelle, *Rising Seas Will Erase More Cities by 2050, New Research Shows*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/interactive/2019/10/29/climate/coastal-cities-underwater.html?wpisrc=nl_todayworld&wpmm=1; *see also The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects/.

3. For example, President Trump announced he would withdraw the United States from the Paris Agreement, a major international climate change agreement. *See* Brady Daniels, *Trump Makes it Official: U.S. Will Withdraw from the Paris Climate Accord,* WASH. POST (Nov. 4, 2019, 7:17 PM) https://www.washingtonpost.com/climate-environment/2019/11/04/trump-makes-it-official-us-will-withdraw-paris-climate-accord/?wpisrc=nl_todayworld&wpmm=1 (The Paris agreement set a global goal to limit the planet's temperature rise to 2 degrees Celsius total.).

4. The Clean Air Act, 42 U.S.C. §§ 7401, et seq.

action. In a particularly notable case, *Juliana v. United States*,[5] a group of young plaintiffs sued the federal government, alleging that the government was actively violating their rights under both the Fifth Amendment to the United States Constitution and the public trust doctrine.[6] *Juliana* is perhaps the most famous example of plaintiffs using litigation to provoke a response to climate change. The case drew national attention[7] but was subsequently dismissed by the Ninth Circuit on the grounds that the court lacked authority under the Constitution to prompt the federal government to take action.[8] The legislature, not the judiciary, the court reasoned, is the proper forum in which to address climate change.[9]

Though *Juliana* may have been dismissed, climate litigation is far from over. Where the *Juliana* plaintiffs failed, Indian tribes may be able to succeed.[10] Substantial precedent under Indian treaties and the Indian Trust Doctrine suggests that Indian tribes *can* demand action from the federal government. When Indian tribes agreed to the treaties that resulted in the creation of their reservations, they were negotiating for a homeland. The federal government regularly promised to hold that homeland in trust and ensure it had the qualities to make it a livable place to call home.[11] As climate change continues to affect the world around us, tribal land—and importantly, water—will be affected. If the federal government unrelentingly ignores climate change and discourages remediation efforts, it will diminish the livability of tribal reservations in violation of its treaties with many tribes.

Precisely because they can compel government action through treaty obligations, Indian tribes are best situated to be the leading plaintiffs in the next stage of climate litigation. Even though tribal plaintiffs represent an untested strategy, the potential social impact of such litigation should not be understated. Climate lawsuits against the federal government brought by indigenous communities

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5. Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018), *mandamus denied,* 140 S. Ct. 16 (2019) [hereinafter *Juliana II*].

6. *Id.*

7. *See, e.g.*, Steve Kroft, *The Climate Change Lawsuit That Could Stop the U.S. Government from Supporting Fossil Fuels*, CBS NEWS (June 23, 2019), https://www.cbsnews.com/news/juliana-versus-united-states-the-climate-change-lawsuit-that-could-stop-the-u-s-government-from-supporting-fossil-fuels-60-minutes/.

8. Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020) [hereinafter *Juliana III*].

9. *Id.* at 1165 ("[T]he plaintiffs' impressive case for redress must be presented to the political branches of government.").

10. Throughout this Note, I refer to Native American tribes as "Indian" tribes since that is the term the U.S. Constitution and federal statutes employ. I do, however, recognize the historical inaccuracy of the term and recognize that Indian tribes are not a homogenous group and have a remarkably diverse range of cultures, languages, and ideologies.

11. *See, e.g.*, Winters v. United States, 207 U.S. 564, 565 (1908) (stating that the purpose of an Indian reservation is "to provide the Indians with a permanent home and abiding place").

would, at the very least, help bring attention to and advance the discussion around climate policy.

This Note argues that federally recognized Indian tribes are underappreciated environmental plaintiffs who are best situated to spur climate action from the federal government due to the obligation the federal government owes tribes under the duty of protection. Part I explores the Indian Trust Doctrine as it relates to treaty rights to explain that the federal government has an obligation to preserve the homelands Indian tribes duly bargained for. Part II surveys the current scope of climate change litigation, using *Juliana* to demonstrate that current litigation strategies are inadequate largely due to a lack of enforcement mechanisms. Part III suggests that the government's affirmative treaty obligations to Indian Tribes present a better opportunity for climate change litigation, arguing that courts should construe treaty rights broadly to encompass the duty to protect ecosystems and environmental resources on tribal reservations. That treaty-based framework, this Note contends, is a compelling legal strategy to move climate litigation forward.

I. TREATIES AND TRUST

A. Establishment of the Indian Trust Doctrine

Tribal sovereignty has existed since long before the founding of the United States.[12] Much of the Indian sovereignty jurisprudence was framed by Chief Justice John Marshall in the early nineteenth century in a series of cases known as the "Marshall Trilogy." Marshall authored three opinions[13] that have served as the foundation of federal Indian law and policy throughout the history of the United States and continue to be good law today. [14]

The single most important case for the recognition of tribal sovereignty is *Johnson v. M'Intosh*.[15] In *M'Intosh*, Justice Marshall outlined what has come to be known as the "doctrine of discovery," which stated that conquering European nations "had the sole right of acquiring soil from the natives."[16] While acknowledging that the sovereign rights of Indians were still extant, Justice Marshall reasoned that "their rights to *complete* sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title

12. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 3 (1831).

13. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

14. *See* Mathew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627-28 (2006).

15. *See Johnson*, 21 U.S. (8 Wheat) 543 (1823).

16. *Id.* at 573.

to those who made it."[17] Some of the European powers who "discovered" the tribes recognized the tribes' inherent sovereignty by negotiating treaties with them.[18]

Seven years after *M'Intosh,* Justice Marshall addressed whether Indian tribes were "foreign States" under the Constitution.[19] Justice Marshall reasoned that tribes were neither "foreign states" nor among the "Several States" of the Union; indeed, they were something different altogether: "domestic dependent nations."[20] As such, Indian tribes were sovereign, existing within the external boundaries of the United States yet dependent upon the federal government. They could be appropriately defined as "states," however, since "[t]he numerous treaties made with them by the United States recognize[d] them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community."[21] Stressing their dependence on the United States for certain needs, Justice Marshall argued that the tribes' relation to the United States "resemble[d] that of a ward to his guardian."[22] This legal rationale is the framework upon which federal Indian law is still based. Notably, these cases established the principles of the trust relationship between the federal government and tribes.[23]

The Indian Trust Doctrine has been described by Professor Mary C. Wood as "the purest moral foundation of the trust: the sacred promise, made to induce massive land cessions, that the retained homelands would be protected to support tribal lifeways and generations into the future."[24] In *Seminole Nation v. United States,* the Supreme Court articulated the duties of the United States to "charge[] itself with moral obligations of the highest responsibility and trust … Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians," the Court specified, "should therefore be judged by the most exacting fiduciary standards."[25] The trust

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17. *Id.* at 574 (emphasis added).

18. *See* Hope M. Babcock, *A Civic-Republican Vision of 'Domestic Dependent Nations' in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, UTAH L. REV. 443, 457-58 (2005).

19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

20. *Id.* at 17.

21. *Id.* at 16.

22. *Id.* at 17.

23. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3) (Nell Jessup Newton ed., 2012).

24. Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003).

25. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

relationship's most important and substantive effect arises from treaties made with tribes under Article II of the Constitution.

B. Treaties and the Duty of Protection

When the original European conquerors and later American settlers made treaties with Indian tribes to take their land, tribes were negotiating for a homeland. In *United States v. Winans*, a staple of Indian treaty rights law, the Supreme Court explained that Indian reservations were created, at least in part, to reserve the right of Indians to hunt and fish.[26] During negotiations for the Point–No–Point Treaty with the S'Klallam, the Chimakum, and the Skokomish tribes in Washington in the 1850s, Governor Isaac Stevens told the tribes: "This paper [the treaty] is such as a man would give to his children and I will tell you why. This paper gives you a *home*. Does not a father give his children a home?"[27] Employing the Indian Canon of Construction compelling courts to construe Indian Treaties liberally in favor of the tribes,[28] the Ninth Circuit in *United States v. Washington* determined that the tribe was indeed bargaining for a place to live—a home.[29]

Although the precise word "home" is not found in most treaties, it can be found in case law. The Ninth Circuit has noted that the "specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed."[30] This idea has deep, and enduring, roots. As early as 1908, the Supreme Court observed that the true purpose of an Indian reservation is "to provide the Indians with a permanent home and abiding place."[31]

Indian reservations are those lands carved out specifically for tribes as their homeland; they are places where they may retain their culture and resources.[32] Indian tribes and the United States bargained for concessions later memorialized in

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26. United States v. Winans, 198 U.S. 371, 378-89 (1905).

27. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (emphasis added).

28. *See* Antoine v. Washington, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832)); Tulee v. Washington, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the [Indian] interests . . . .").

29. United States v. Washington, 827 F.3d 836, 851 (9th Cir. 2016), *amended and superseded*, 853 F.3d 946 (9th Cir. 2017).

30. Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

31. Winters v. United States, 207 U.S. 564, 565 (1908).

32. *See* Wood, *supra* note 24.

treaties.[33] These treaty negotiations often involved unequal bargaining power and considerable language barriers, with the United States holding far more power than the tribes.[34] When tribes conceded or lost their lands, they received some consideration in return: a promise to protect those lands.[35] This treaty relationship created the so-called "duty of protection" under the trust relationship.[36] Felix Cohen, the father of modern Federal Indian law, wrote: "[t]he promise of such protection for lands retained by the Indian tribes was an important quid pro quo in the process of treaty-making by which the United States acquired a vast public domain."[37] That duty is an essential part of the Indian Trust Doctrine and critical to this Note's proposed litigation strategy. Treaty-based claims, bolstered by the Trust Doctrine, would support tribal climate litigation.

The federal government recently reaffirmed its commitment to the duty of protection. In the Indian Trust Asset Reform Act of 2016,[38] Congress found that "historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and *enforceable* Federal obligations to which the national honor has been committed."[39] Congress also acknowledged in the Indian Trust Asset Reform Act that "the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians."[40] That Act further asserts that "the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties . . . which provided legal consideration for permanent, ongoing performance of Federal trust duties…and have established enduring and enforceable Federal obligations."[41]

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33. *See, e.g.*, Treaty with the Navajo Tribe of Indians, 15 Stat. 667 (1868).

34. *See* United States v. Winans, 198 U.S. 371, 380 (1905) (justifying interpretation of treaty terms in favor of Indian tribes based on unequal bargaining power).

35. *See* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 (1979), *modified sub nom,* Washington v. United States, 444 U.S. 816 (1979) ("[T]he Indians relinquished their interest in most of the Territory in exchange for monetary payments, certain relatively small parcels of land reserved for their exclusive use, and other guarantees, including protection of their 'right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.'").

36. *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224-27 (1975) (arguing that courts improperly treat the trust duty as "a moral obligation, without justiciable standards for its enforcement").

37. Nathan R. Margold, *Introduction* to FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW vii, xii (1942).

38. Pub. L. No. 114-178, 130 Stat. 432 (2016).

39. 25 U.S.C. § 5601(5) (emphasis added).

40. § 5601(3).

41. §§ 5601(4)-(5).

The Department of the Interior, the federal agency charged with the responsibility of Indian affairs, since at least 1978 has maintained the official position that the United States owes a fiduciary duty to Indian tribes "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."[42] Moreover, the Environmental Protection Agency ("EPA") has acknowledged its trust responsibility in official policy statements: the "EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes . . . . In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations."[43] The Act's language and the official policy stances of the federal agencies with direct responsibilities over tribal welfare reflect the federal government's understanding that its duty to tribes is a long-standing doctrine with affirmative obligations.

The Supreme Court held in *Washington v. Washington State* that Indian nations negotiated for the federal government to act in "good faith" to effectuate the duty of protection.[44] In dicta, the Court reasoned that "[i]t is perfectly clear, however, that the Indians were vitally interested in protecting their [resources] . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right."[45] Treaties were the primary mechanism by which tribes bargained for that duty of protection in exchange for diminishing their lands for white settlement.

Unfortunately for Indian tribes, the duty of protection has, until recently, been largely thrown by the wayside. Scholars have noted the duty has historically been treated as "essentially just a mere platitude"[46] with limited, if any, enforceable legal power. The government's ability to ignore its moral and legal obligations grew as the Supreme Court regularly deferred to the discretion of the federal government in deciding how to implement the duty of protection. In 1903, for instance, the Court held in *Lone Wolf v. Hitchcock* that the Court would stay out of Indian affairs, reasoning (perhaps naïvely) that the United States would act in "good faith" to

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42. Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice 2 (Nov. 21, 1978).

43. William D. Ruckelshaus, EPA Policy for the Administration of Environmental Programs on Indian Reservations 3 (Nov. 8, 1984), https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.

44. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n., 443 U.S. 658, 667 (1979).

45. *Id.*

46 Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, "*We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T. & ADMIN. L. 397, 399 (2017).

effectuate its duty of protection and trust vis-à-vis Indian tribes.[47] Today, courts remain hesitant to interfere with judgments of Congress which "can be tied rationally to the fulfillment of the obligation toward the Indians."[48] This discarding of the duty of protection has been disastrous for Indian tribes. Through most of the twentieth century, the federal government often eliminated tribal lands without tribal consent and eliminated other aspects of tribal sovereignty, [49] such as the right to remain immune from public takings without just compensation.[50]

While the historical realities would seem to make any climate change claim against the federal government fruitless, more recent trends should give tribes, and those looking for opportunities for environmental litigation, a sense of hope.[51] Though courts may still be reluctant to review government action, modern Supreme Court jurisprudence has suggested that courts should more carefully scrutinize legislative and federal administrative actions vis-à-vis tribes. For example, in *United States v. Sioux Nation*, the Court rejected *Lone Wolf*'s unquestioned "presumption of congressional good faith" and held that:

> [I]n 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.[52]

In other words, a reviewing court will not simply defer to the judgment of Congress in treaty disputes concerning property or diminishment of resources. A treaty-based climate change claim would encounter a similar lack of Congressional deference, as it would involve the diminishment of resources. Similarly, the Court today acknowledges "the undisputed existence of a general trust relationship between the

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47. Lone Wolf v. Hitchcock, 187 U.S. 553, 565-68 (1903).

48. Morton v. Mancari, 417 U.S. 535, 555 (1974).

49. See Rey-Bear & Fletcher, supra note 46, at 368-69.

50 . Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955) (holding that a tribe was not entitled to compensation for the taking by the federal government of tribal resources under the Fifth Amendment because the tribe did not own those resources).

51. *See, e.g.,* Indian Trust Asset Reform Act, 25 U.S.C. § 5601(3) ("Congress finds that . . . through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians. . . .").

52. United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980) (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)).

United States and the Indian people."[53] A reviewing court should, in a treaty-rights claim, scrutinize federal action (or lack thereof) affecting treaty rights. These treaty rights directly give rise to the duty of protection under the Trust Doctrine.

The United States' duty of protection towards Indian tribes is in fact enforceable.[54] The Eighth Circuit, for example, held that the Bureau of Indian Affairs and Indian Health Service has a duty to clean up dumps on Indian land, which is "buttressed by the existence of the general trust relationship between these agencies and the Tribe."[55] The Ninth Circuit also concluded that the federal government has a fiduciary relationship in the management of tribal mineral resources by "taking into account these specific, congressionally-imposed duties, and the long-standing, general trust relationship between the government and the Indians."[56] And, in a ruling with particularly important implications for treaty suits, the District Court for the Western District of Washington held that the federal government's "fiduciary duty, rather than any express regulatory provision . . . mandates that the [Army Corps of Engineers] take treaty rights into consideration."[57]

Similarly, federal courts have relied on statutory and general trust duties (largely arising from treaties) to order the federal government to affirmatively act to fulfil its duty of protection to the land, resources, and water of Indian tribes. This is particularly important if tribes go to court to enforce duties to protect against climate change, as climate change will most obviously affect land, resources, and water. In 1973, for instance, the District Court for the District of Columbia heard a challenge from the Pyramid Lake Paiute Tribe of Indians against a regulation promulgated by the Secretary of the Interior.[58] The Tribe argued the regulation would negatively impact their water supply and therefore violate the duty of protection stemming from

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53. United States v. Mitchell, 463 U.S. 206, 225 (1983) [hereinafter *Mitchell II*]; *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) ("We do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'") (quoting *Mitchell II*, 463 U.S. at 225); United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 n.3 (2003) ("We have recognized a general trust relationship since 1831.").

54. *See, e.g.*, Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 738 (2011) ("[The United States] would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation."); *White Mountain Apache Tribe*, 537 U.S. at 475-76 (affirming implied trust duty); Rosebud Sioux Tribe v. Trump, 428 F. Supp. 3d 282, 294 (D. Montana 2019) ("The trust relationship between the United States and the Indian people imposes a fiduciary duty on the government when it conducts 'any Federal government action which relates to Indian Tribes.'") (quoting Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996)).

55. Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094, 1100 (8th Cir. 1989).

56. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of Montana, 792 F.2d 782, 794 (9th Cir. 1986).

57. *Nw. Sea Farms, Inc.*, 931 F. Supp. at 1520.

58. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

its treaty with the United States.[59] In ruling for the Tribe, the court held that the federal government, through the Secretary of the Interior, was "obliged to formulate a closely tailored regulation that would preserve water for the Tribe."[60] The court also found "the Secretary's action . . . defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe."[61] A tribe suing for a failure to protect against an effect of climate change, then, could feasibly model their case after *Pyramid Lake* and produce evidence that some regulation (or lack thereof) contributed to water degradation from climate change.

The Ninth Circuit further noted in 2005 that it reads the trust obligation "to extend to any federal government action," and that the United States must "honor its trust obligation to Indians."[62] While not specifically environmental in nature, these cases demonstrate that federal courts are willing to compel the federal government to enforce affirmative obligations vis-à-vis tribes on the basis of treaty rights.

C. Water, Winters, Winans, and Washington

Perhaps the most pertinent trust obligation the United States has with Indian tribes concerns water rights. For its part, the federal government acknowledges it holds water rights in trust for tribes.[63] And since the early 1900s, the Supreme Court has acknowledged and defended tribal rights to water based on express *and implied* treaty rights.[64]

The seminal case addressing Indian water rights, *United States v. Winans*,[65] establishes the framework for an environmental suit arising under a treaty. In the early 1900s, the Winans brothers operated state-licensed fish wheels, designed to scoop as many fish as possible, on the Columbia River in Washington.[66] The wheel disturbed the Yakima Tribe's ancestral fishing territory by systematically capturing

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59. *Id.*

60. *Id.* at 256.

61. *Id.* at 256-57.

62. Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986, 993 (9th Cir. 2005) (quoting Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990)) (internal quotation marks omitted).

63. *See, e.g.*, Federal Criteria and Procedures for Indian Water Rights Settlements, 55 Fed. Reg. 9,223 (Mar. 12, 1990).

64. *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908); Winans v. United States, 198 U.S. 371 (1905).

65. 198 U.S. 371 (1905).

66. United States v. Winans, 73 F. 72 (D. Wash. 1896).

huge quantities of fish and occupying significant land.[67] Further, the Winans brothers prohibited the Yakima tribe from crossing their land, thus preventing the tribe from accessing traditional fishing places[68] in violation of tribal treaty guarantees to "the exclusive right of taking fish . . . at all usual and accustomed places."[69]

The United States government brought suit on behalf of the tribe. On appeal, the Supreme Court issued a statement now central to federal Indian law: "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those [rights] not granted."[70] This established the "reserved rights doctrine," under which tribes retain their original sovereign title until tribes affirmatively surrender them. As stipulated by their treaty, "the Indians were given a right in the land" and could use their traditional fishing spots since the land was granted to them.[71] Importantly, the Court held that those rights date from "time immemorial."[72]

Three years later, the Supreme Court decided *Winters v. United States*.[73] Leading up to Winters, the Fort Belknap reservation in Montana's territory had been gradually diminished by successive treaties throughout the late 1800s, until ultimately the 1888 Desert Land Act confined the reservation to just 1400 square miles.[74] After Montana achieved statehood, the white defendants built dams on the channel and diverted water resources from the reservation.[75] In response, the federal government then filed suit on behalf of the tribe.[76] The Supreme Court decided that even though the Desert Land Act did not lay it out in explicit terms, the statute *implicitly* protected water in the Milk River for the tribe.[77] Using similar reasoning as it did in developing the *Winans* Reserved Rights doctrine, the Court explained that

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67. *Winans*, 198 U.S. at 380.

68. *Id.*

69. *Id.* at 378.

70. *Id.* at 381.

71. *Id.*

72. *Id.* at 374.

73. 207 U.S. 564 (1908).

74. Winters v. United States, 143 F. 740, 741-42 (9th Cir. 1906).

75. *Winters v. United States*, 207 U.S. at 564, 567 (1908) ("It is alleged that . . . the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and, by means of canals and ditches and waterways, have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof.").

76. *Id.* at 565.

77. *See id.*

"the power of the Government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be . . . . That the Government did reserve them we have decided, and for a use that would necessarily continue through the years."[78]

The *Winters* decision recognized *implied* water rights, based on the idea that treaties implicitly contain the right to enough water to satisfy the purpose of the reservation. *Winters* rights apply federally and preempt state law. *Winters* rights are critically important to tribes, particularly in the West, where prior appropriation doctrine applies.[79] In the West, the allocation of water rights largely depend on the priority date a given entity has. When determining priority, *Winters* rights derive from the date on which the reservation was created.[80] Most importantly, this implied right to water could play a key role in climate change litigation as the changing climate affects the availability of water enough to affect the "purposes of the reservation," including having a stable enough ecosystem to sustain fishing and hunting. This will be further analyzed in Part III.

Courts have broadly construed their powers to enact remedies stemming from these implied water rights, including recently in *United States v. Washington* ("The Culvert Case").[81] Lower courts had found that numerous road culverts, small tunnels underneath roadways that divert water through the road's foundation, had blocked salmon access to their habitat in violation of Indian treaties. In 2017, the Ninth Circuit affirmed a district court injunction requiring Washington to repair and replace culverts restricting the passage of fish.[82] The court interpreted the plaintiff tribes' treaty right to "take fish" to include protection of fishery habitat from man-made alterations.[83] In construing the treaty in favor of the Indian tribes, the Ninth Circuit held that the tribes' primary purpose for entering the treaties "was to secure a means of supporting themselves once the Treaties took effect."[84] Finding that the culverts disrupted the tribes' ability to support themselves through fishing, the court held that the state "has violated, and is continuing to violate, its obligation to the

78. *Id.* at 577.

79. *See, e.g.*, Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RES. J. 399, 409-10 (2006). In the West, rights to water largely depend on the priority date a given entity has. For tribes, the priority date depends on whether the tribe was using the water before the reservation was created or was contemplated by the creation of the reservation. For *Winters* rights the priority date is the date on which the reservation was created. *Winans* rights date from "time immemorial," giving that reservation first priority. *Id.* at 412-13.

80. *See id.* at 412-14.

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

82. United States v. Washington, 853 F.3d 946, 980 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 735 (2018), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

83. *Washington*, 853 F.3d at 954.

84. *Id.* at 963-64.

Tribes under the Treaties."[85] Though the state was not a party to the original treaty, the court still found it had violated tribal rights.

The Supreme Court affirmed without an opinion, leaving in place the order directing the State of Washington to replace state-owned culverts.[86] The Ninth Circuit compelled the state to take costly action to remedy an environmental-based harm, something the same circuit court refused to do in *Juliana*.[87] Ultimately, the tribes' Article II treaties created an unalienable right to sufficient water, enforceable by a cause of action against the state government. *Washington* reaffirmed a Supreme Court holding nearly 40 years earlier that water rights are "implicitly secured to the Indians by treaties reserving land" and that these implicit rights could require "an apportionment to the Indians of enough water to meet their subsistence and cultivation needs.[88] In line with *Washington*, the EPA updated its Human Health Water Quality Standards in 2016 to support "the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."[89]

These decisions confirm that treaty rights are an independent source of law that create environmental rights for Indian tribes and impose enforceable obligations on state and federal actors to protect those rights. Government agents negotiated Article II treaties with Indian tribes to cede land to the United States while also carving out a livable homeland for tribes. That right to a homeland is an independent substantive source of law, enforceable against the government under the Trust Doctrine. As Part III will explore, these rights suggest that Indian tribes may be the ideal candidates to advance climate litigation and demand accountability from the federal government, even where other plaintiffs have failed.

II. THE PROBLEM WITH CURRENT CLIMATE LITIGATION

Plaintiffs seeking to hold the federal government accountable have unsuccessfully tried multiple approaches. This section summarizes the various attempts, discusses why they failed, and demonstrates why Indian tribes do not face the same roadblocks.

A. The Death of Atmospheric Trust Litigation

Current climate change litigation is inadequate to meet the urgency of the problem. The most high-profile case concerning climate litigation, *Juliana v. United*

85. *Id.* at 966.

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

87. *See infra* Part II.

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

89. Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417, 85,423 n.39 (Nov. 28, 2016).

States, was dismissed by the Ninth Circuit in 2020.[90] Utilizing "atmospheric trust litigation," a group of young plaintiffs aged eight to nineteen alleged that the federal government was violating their Fifth Amendment substantive due process rights. [91] The plaintiffs asserted that the federal government, "[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric [carbon dioxide] concentrations to escalate to levels unprecedented in human history[.]"[92]

The plaintiffs sought injunctive relief ordering the federal government to cease permitting, authorizing, and subsidizing fossil fuels and instead move swiftly to phase out carbon dioxide emissions.[93] They also asked the court to order the government to take such action as necessary to ensure that atmospheric CO_2 is no more concentrated than 350 ppm by 2100, "including to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system."[94] These bold requests reflect the urgency the litigants felt was needed to address climate change since government gridlock impeded the action necessary to protect their rights.[95]

While District Judge Aiken initially refused to dismiss the suit in an apparent win for the "atmospheric trust" litigants, the Ninth Circuit overturned her ruling.[96] The Ninth Circuit "reluctantly" concluded that the relief plaintiffs sought was "beyond [their] constitutional power."[97] Although the majority agreed that "[t]he record left little basis for denying that climate change is occurring at an increasingly rapid pace,"[98] the court ultimately determined that the case was not justiciable.[99] Central to their determination was that Article III courts are not the proper place to

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90. *Juliana III*, 947 F.3d 1159 (9th Cir. 2020).

91. *Id.* at 1164.

92. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016) [hereinafter *Juliana I*].

93. *Id.* at 1247-48. Carbon dioxide is widely considered to be one of the chief greenhouse gases responsible for climate change.

94. *Id.* at 1248.

95. *Juliana III*, 947 F.3d at 1175 (Staton, J., dissenting).

96. *Id.*

97. *Id.* at 1165.

98. *Id.* at 1166.

99. *Id.* at 1175 ("We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.").

adjudicate climate change.[100] Because the court determined that neither the Constitution nor the Administrative Procedure Act provided grounds for redress, it held that there was no source of law to support the plaintiffs' claim.[101]

Atmospheric trust suits like *Juliana* have so far failed.[102] Even *Juliana*, the most well-known of these suits, only achieved short-lived success.[103] Federal courts have, on the whole, been unwilling to take sweeping steps to create new substantive rights to a healthy environment under the Constitution. The Third Circuit has held that "there is no constitutional right to a pollution-free environment."[104] The Fourth Circuit, similarly, has held that there is no constitutional right to a healthy environment,[105] and the District Court for the Northern District of California ruled that there is no fundamental right to be free from climate change pollution.[106]

B. Current Inadequacies Under the Clean Air Act

The Clean Air Act[107] establishes a framework of cooperative federalism to regulate air quality. The Act grants states primary responsibility to ensure that they meet National Ambient Air Quality Standards ("NAAQS").[108] In the traditional cooperative federalism model, states must submit state implementation plans ("SIPs") that outline how they plan to implement, maintain, and enforce the NAAQS.[109] While this grants states a fair bit of power in environmental regulation, the SIPs must be approved by the Environmental Protection Agency ("EPA") before they may be federally enforced.[110] 1990 amendments to the Clean Air Act extended to Indian tribes for the first time the authority previously granted only to states.[111]

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100. *Id.*

101. *Id.* at 1167, 1175.

102. *See, e.g.*, Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1238 (3d Cir. 1980), *vacated on other grounds sub nom.* Clean Air Council v. United States, 362 F. Supp. 3d 237 (E.D. Pa. 2019).

103. *See Juliana III*, 947 F.3d 1159 (9th Cir. 2020).

104. *Nat'l Sea Clammers Ass'n*, 616 F.2d at 1238.

105. Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

106. S.F. Chapter of A. Philip Randolph Inst. v. EPA, No. C-07-4936-CRB, 2008 WL 859985, at *6 (N.D. Cal. Mar. 28, 2008).

107. The Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.

108. *See* § 7407(a).

109. *See* § 7410(a)(1).

110. § 7410(k).

111. § 7410(o).

Those amendments specified that Indian nations may submit tribal implementation plans ("TIPs") "applicable to all areas . . . located within the exterior boundaries of the reservation."[112] The Act granted EPA the authority to "treat Indian tribes as States" if they meet certain enumerated criteria.[113] The Clean Air Act continues to be the only federal statute courts recognize as addressing air pollution.[114]

Like states, tribes have been divested of significant authority under the EPA to regulate greenhouse gas emissions, largely sacrificing that power to the federal government.[115] The Clean Air Act, however, grants tribes and states certain avenues to opt to regulate their air more stringently than the statute requires. For example, EPA regulations allow both tribes and states to re-designate their territory into a more protective category under the Act to improve air quality.[116] The EPA maintains a trust responsibility to "ensure the protection of air quality throughout the nation, including throughout Indian country."[117] Tribes are still heavily reliant on federal regulation for their welfare, though. The TIPs, while created by the tribes themselves, are still subject to EPA approval.[118]

The Clean Air Act's overall failure to address climate change is the primary driver of most climate litigation; interestingly, the Clean Air Act itself has been the death blow to those suits. An example of this tension is the 2011 Supreme Court decision *American Electric Power Company v. Connecticut* ("*AEP*"). In that case the plaintiffs argued that AEP contributed to global warming by emitting CO2 and therefore substantially and unreasonably interfered with public rights in violation of the federal common law of interstate nuisance.[119] The Court ruled for the defendants, holding that the Clean Air Act displaced any federal common law claims seeking

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112. *Id.*

113. §§ 7601(d)(1), (d)(2)(A)-(C) ("(A) [T]he Indian tribe has a governing body carrying out substantial governmental duties and powers; (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.").

114. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

115. *See* Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After* Massachusetts v. EPA, 29 STAN. ENV'T. L. J. 130, 145 (2010).

116. 42 U.S.C. § 7474. As of 2006, tribes had exercised this right on at least six occasions. *See* Sarah B. Van de Wetering & Matthew McKinney, *The Role of Mandatory Dispute Resolution in Federal Environmental Law: Lessons from the Clean Air Act*, 21 J. ENV'T. L. & LITIG. 1, 3-4 (2006).

117. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7265 (Feb. 12, 1998).

118. 42 U.S.C. § 7410(o).

119. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011).

injunctions against emissions of carbon dioxide since the Act was the exclusive federal law governing air pollution.[120]

The Ninth Circuit extended *AEP*'s reasoning to damages claims in 2012, holding that a small Alaskan tribe could not sue ExxonMobil, a fossil fuel producer, for monetary damages under a federal common law public nuisance claim stemming from the effects of climate change.[121] The plaintiff in that case, the Native Village of Kivalina, sought monetary damages rather than injunctive relief against private defendants.[122] Kivalina is located on the tip of a barrier reef on the northwest coast of Alaska.[123] The city has long been home to members of the Village of Kivalina, a self-governing, federally recognized tribe of Inupiat Native Alaskans.[124] Storms, rising sea levels and the deterioration of ice walls resulting from climate change have threatened the very existence of the city, and the tribe is seeking to relocate its village as a result.[125] The tribe attempted to sue under a federal public nuisance theory, only to have that theory be displaced by the Clean Air Act.[126] While some authority suggests that plaintiffs may have cognizable air pollution claims under state law,[127] tribes are more limited to federal remedies since state law typically has no force in Indian country, barring an express Congressional exception.[128]

Climate litigation has, on the whole, been unsuccessful for plaintiffs seeking redress against the federal government or greenhouse gas producers for the effects of climate change.[129]

Indian tribes do not face these same problems. Treaties arise under Article II of the Constitution and, bolstered by the Supremacy Clause, are the "supreme Law

120. *Id.*

121. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

122. *Id.*

123. *Id.* at 853.

124. *Id.*

125. *Kivalina*, NORTHWEST ARCTIC BOROUGH, https://www.nwabor.org/village/kivalina/ (last visited Nov. 4, 2020).

126. *Kivalina*, 696 F.3d at 858.

127. *See, e.g.*, Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013); *see also* Freeman v. Grain Processing Corp., 848 N.W.2d 58, 74 (Iowa 2014).

128. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 559 (1832); *see also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177 (1973) (noting that Public Law 83-280, 18 U.S.C. § 1162, establishes "a method whereby States may assume jurisdiction over reservation Indians").

129. *But see* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) (holding that if the EPA wishes to continue its inaction on carbon regulation, it is required by the Act to base the decision on a consideration of "whether greenhouse gas emissions contribute to climate change").

of the Land."[130] Treaties are independent sources of law and contain explicit and implied rights to protect the bargained-for homeland.[131] Tribes suing under treaty rights would not have to identify an independent Constitutional or APA claim against the government, as the Juliana plaintiffs tried and failed to do.[132] Tribes would not need to go to court and request the creation of an additional constitutional right or proceed under a unique public trust theory. Article III courts have determined treaty rights concerning environmental rights to be justiciable in the past.[133] Thus, tribes are uniquely situated to engage in impact climate litigation.

III. A TREATY-BASED REFORM

Winters and *Winans* establish a tribal right to a homeland. These homelands, however, are becoming less livable because of climate change: tributaries in the West are drying up and wild fires are spreading.[134] The Intergovernmental Panel on Climate Change found that American Indian Tribes are disproportionately vulnerable to climate change.[135] That report concluded that "[i]ndigenous peoples are among the first to face the direct consequences of climate change, owing to their dependence upon, and close relationship with the environment and its resources."[136] Indeed, tribes have already felt the effects of climate change and may be inclined to pursue a climate litigation strategy. Take the Native Village of Kivalina, for instance. Their home is directly under threat from climate change.[137] As the United Nations reports suggest, there will likely be other tribes faced with similar challenges, making litigation a near necessity for many tribes living under a dismissive federal regime. Although tribes may be reluctant to go to court and risk setting bad precedent, the urgency of the issue for tribes and the global population at large coupled with the existence of favorable precedent and the potential for social impact may offset such concerns.

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130. U.S. CONST. art. VI, cl. 2.

131. *See, e.g.*, United States v. Washington, 853 F.3d 946, 959 (9th Cir. 2017), *aff'd*, 138 S. Ct. 1832 (2018).

132. *Id.* (tribes can sue under a treaty obligation).

133. *Id.* at 959.

134. Kevin Taylor, *Drought hits harder in already parched Indian Country*, ALJAZEERA AM. (Mar. 19, 2014 5:00 AM), http://america.aljazeera.com/articles/2014/3/19/drought-is-nothingnewinindiancountry.html.

135. *Climate Change and Indigenous Peoples*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, https://www.un.org/en/events/indigenousday/pdf/Backgrounder_ClimateChange_FINAL.pdf (last visited Nov. 4, 2020).

136. *Id.*

137. *See Kivalina*, NORTHWEST ARCTIC BOROUGH, https://www.nwabor.org/village/kivalina/ (last visited Nov. 4, 2020).

Treaty cases are best read to suggest that treaties include an implied right to preserved aquatic ecosystems (at least enough to maintain the purposes of the reservation) and to compel government action to protect them, as well as act on the effects of climate change.[138]

Treaty rights expressly and impliedly include rights to a home and resources. These treaties have compelled government action before and should do so again in the climate change context. In *United States v. Adair*, the Ninth Circuit found two primary purposes for establishing the reservation: the promise of a homeland to maintain an agrarian society and the preservation of the tribe's access to fishing grounds.[139] The Wyoming Supreme Court held that the purpose of the Wind River Reservation in its state was to create a permanent homeland for the Indian nation, which included an intent to reserve water.[140] In the Culvert Case, the Ninth Circuit—affirmed by the Supreme Court—ordered a government actor to spend *billions* of dollars to preserve a tribe's rights to fish, which included a right to enough unobstructed water to maintain a salmon habitat.[141]

Winters and subsequent cases have held that reservations for Indian tribes reserved rights to enough water to make those lands productive. As climate change continues to dry up rivers and affect water levels, Indian tribes may have claims against the federal government for failing to meet its treaty obligations. The treaties create a duty of protection, and tribes may argue the government has failed to uphold that duty in declining to act and instead willfully ignoring the effects of climate change. If a court could order an injunction against the state of Washington for interfering with a tribe's access to its treaty-guaranteed water right, why could a court not order the federal (or state) government to take action against proven effects of climate change that interfere with a tribe's right to water? It is not difficult to imagine that a tribe might show that climate change has, for example, dried up a river affecting salmon migration. Indeed, studies have already suggested that climate change is

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138. *See e.g.,* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 693-96 (1979) (holding that the Washington State Department of Fisheries and Fisheries Department could be compelled to act in accordance with the court's interpretation of Indian fishing rights under treaties, and that federal courts have power to displace local enforcement efforts if necessary to remedy violations of Indian treaty rights); United States v. Washington, 853 F.3d 946, 965-66, 975 (9th Cir. 2017) (holding that, although Washington state made no explicit promise, the court would infer a promise under the tribes' treaties that fish stock would always be sufficient to provide a "moderate living" to the tribes and holding that the breadth of an injunction requiring the state to act in accordance with the implied promise was appropriate); United States v. Michigan, 471 F. Supp. 192, 257-58 (W.D. Mich. 1979) (holding that the Ottawa and Chippewa tribes retained an implied right to fish, although not explicitly conveyed in their 1836 treaty with the United States government).

139. *See* United States v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1983).

140. *In re* Rights to Use Water in Big Horn River, 753 P.2d 76, 85 (Wyo. 1988), *aff'd by an equally divided court sub nom*. Wyoming v. United States, 492 U.S. 406 (1989).

141. United States v. Washington, 853 F.3d 946, 963-64, 967, 979 (9th Cir. 2017), *aff'd*, Washington v. United States, 138 S. Ct. 1832 (2018).

negatively impacting salmon habitats.[142] In *Juliana* the Ninth Circuit accepted that climate change was a real phenomenon, stating "[t]he record leaves little basis for denying that climate change is occurring at an increasingly rapid pace . . . The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions."[143] With that factual background accepted by the court, *Juliana* may have paved the way for Indian tribes, particularly those located in the Ninth Circuit's geographic region, to bring climate claims under treaty rights.

At least one federal court has stated that "[t]he trust relationship between the United States and the Indian people imposes a fiduciary duty on the government when it conducts 'any Federal government action which relates to Indian Tribes.'"[144] It is important to note, however, that the trust obligation by itself is not universally viewed as possessing such great power. Treaties, on the other hand, should impose affirmative obligations on federal agencies when treaty rights are implicated. If the federal government interferes with a tribe's treaty rights and fails in its attendant duty of protection, the tribe may have a cognizable claim to force the federal government to take action to mitigate its treaty violation.

Justice Gorsuch, writing for the majority in the recent case of *McGirt v. Oklahoma*, recognized the importance of treaties for providing "a permanent home" to the Creek Nation and "hold[ing] the government to its word."[145] In that case, the Court suggested that governments may not simply cite that "the price is too great" for courts to enforce treaty obligations.[146] In declaring that most of Eastern Oklahoma is in fact an Indian Reservation, the Court importantly demonstrated its willingness to make consequential decisions in Indian law that could force massive systemic changes.[147] This may indicate that the modern Supreme Court has at least

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142. LISA CROZIER, NAT'L OCEANIC & ATMOSPHERIC ADMIN., IMPACTS OF CLIMATE CHANGE ON COLUMBIA RIVER SALMON 12-29 (2015), https://www.webapps.nwfsc.noaa.gov/assets/11/8473_07312017_171438_Crozier.2015-BiOp-Lit-Rev-Salmon-Climate-2014.pdf.

143. *Juliana III*, 947 F.3d at 1166.

144. Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996).

145. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

146. *Id.* at 2482 ("Many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking.").

147. *See id.* at 2479 ("Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.").

one justice—a notably conservative one at that—willing to interpret treaties liberally in climate change litigation.[148]

Litigants should argue that the duty of protection arising from treaty rights encompasses the duty to protect ecosystems and environmental resources. Indian reservations are those lands carved out specifically for tribes as their homeland. They are places where they may retain their culture and resources—including water, air, and land. Tribal members often express a particular affinity for environmental stewardship representing their culturally-embedded relationship with the land.[149] Many tribes believe they were spiritually appointed as stewards of the world.[150] Tribes have fought for the right to protect their homelands, however small a piece they could wrangle from the federal government's grasp. Those homelands are often held by the government in trust, with a fiduciary duty to protect and maintain them for the benefit of the tribe. As *Winters*, *Winans*, *Washington* and other cases suggest, treaties impose a general duty of protection on the United States to preserve the reservation ecosystem bargained for by tribes. Climate change is profoundly compromising that ecosystem. Litigants should argue that courts must construe Indian treaties liberally (as the Indian Canons of Construction already require) to include an implied right to a stable ecosystem beyond the previously recognized right to appropriate water resources. [151] Indeed, the Indian Canons of Construction compel courts to read treaties to "see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the [Indian] interests."[152] Treaties already protect water on reservations, and as that water becomes affected by climate change, resulting in excess flooding and droughts, courts should use Indian treaties as substantive sources of law to hold the United States accountable for its end of those agreements.

Take the Stevens treaty at issue in *United States v. Washington*. That treaty protects the right to enough water to preserve the purposes of the reservation. If rivers and tributaries were to dry up as a result of climate change (and the tribe could prove it), they could arguably sue the federal government. The tribe would argue

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148. *See* Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016-21 (2019) (Gorsuch, J., concurring).

149. While this is a broad generalization, many commentators have noted this affinity. *See, e.g.*, Fromherz & Mead, *supra* note 115, at 173-74; *see* Mary Christine Wood & Zachary Welker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 33 HARV. ENV'T. L. REV. 373, 385 (2008).

150. *See* Wood & Welker, *supra* note 149, at 385.

151. *See* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684 (1979).

152. Tulee v. Washington, 315 U.S. 681, 684-85 (1942); *see also* Antoine v. Washington, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.").

that they signed a treaty with the intent to preserve enough water to sustain their homeland, and the federal government, by failing to take action to address climate change, violated that treaty. The claim would give rise to potential injunctions, like in *Washington*, that could require the government to implement environmental impact reviews or divert more water to tribal land. While a claim could not realistically force the government to establish a nationwide climate change response plan, it could require the government to take particular, discrete actions to assess climate impact on the plaintiff tribes' reservation and, at the very least, provide the tribe with more resources to mitigate the impact.

While it may seem a stretch to go from fishing rights in a treaty to forcing the federal government to take action to address a global problem, a suit of this nature could have a profound social impact. Litigation designed to advance social awareness—impact litigation—has benefits even if the merits of the lawsuit are uncertain. Just like Juliana enhanced social awareness of climate change,[153] a treaty-based claim from an Indian tribe would similarly build momentum for change in the courts and in federal policy circles more generally. Whether or not they ultimately succeed on the merits, such lawsuits are at the very least tools of impact litigation that could help mobilize social consciousness surrounding climate change.

A. Counterarguments

The primary obstacle in trust claims stemming from treaties is likely the lack of express statutory obligations imposed on the federal government. The holdings in two Supreme Court cases, *United States v. Mitchell* ("*Mitchell I*")[154] and its successor, *United States v. Mitchell* ("*Mitchell II*"),[155] present obstacles to tribes seeking to sue under common law claims arising from treaty obligations. Nonetheless, these cases are not dispositive. The two *Mitchell* cases have been described by the Supreme Court as "pathmarking precedents on the question whether a statute or regulation (or combination thereof) can fairly be interpreted as mandating compensation by the Federal Government."[156] The cases concern the Indian Tucker Act, a jurisdictional statute dictating how Indian tribes may sue the federal government for money damages.[157] The *Mitchell* cases hold that, to receive such compensation, a tribe must

153. *See, e.g.*, Steve Kroft, *The climate change lawsuit that could stop the U.S. government from supporting fossil fuels*, CBS NEWS (Mar. 3, 2019), https://www.cbsnews.com/news/juliana-versus-united-states-the-climate-change-lawsuit-that-could-stop-the-u-s-government-from-supporting-fossil-fuels-60-minutes/.

154. United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter *Mitchell I*].

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

156. United States v. Navajo Nation, 537 U.S. 488, 489 (2002) [hereinafter *Navajo I*] (quoting *Mitchell II*, 463 U.S. at 218).

157. 28 U.S.C. § 1505 (addressing monetary compensation damages, but not other remedies such as declaratory or injunctive relief).

identify a substantive source of law that establishes specific duties, and allege that the federal government has failed to faithfully perform those duties.[158] Typically, that would include locating a specific statutory provision that the government is alleged to have violated.[159]

However, *Mitchell* and its progeny do not address whether an Indian tribe can state a claim for breach of trust related to treaty obligations. Substantive rights can be "found in some other source of law, such as the Constitution, or any Act of Congress, or any regulation of an executive department."[160] Treaties, as "acts of Congress," fit into that description. Under the Constitution's Article II Treaty Clause[161] and the Supremacy Clause,[162] treaties are particularly powerful sources of law—indeed, the "supreme law of the land."[163] As Justice Sotomayor has noted, the Supreme Court "[has] never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation."[164] Instead, the Court has "settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes."[165]

Moreover, the *Mitchell* line of cases has even less relevance to treaty claims that are not seeking money damages but instead just declaratory and injunctive relief. The Indian Tucker Act is merely a jurisdictional provision that operates to waive sovereign immunity for claims premised upon other sources of law.[166] It does *not* govern suits alleging treaty violations. Treaties are independent and enforceable sources of law that reserve rights, even when they are implied,[167] and demand the duty of protection. That there is no specific statutory mandate obligating the federal government to maintain an Indian tribe's ecosystem should not bar litigation by Indian tribes. Tribal treaties carry their own force of law and can obligate the federal government to act under the duty of protection.

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158. *Navajo I*, 537 U.S. at 490.

159. *Id.*

160. *Mitchell II*, 463 U.S. at 216.

161. U.S. CONST. art. II, § 2, cl. 2.

162. U.S. CONST. art. VI, cl. 2.

163. *Id.* ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

164. United States v. Jicarilla Apache Nation, 564 U.S. 162, 202 (2011) (Sotomayor, J., dissenting).

165. *Id.* at 188.

166. United States v. Navajo Nation, 556 U.S. 287, 290 (2009).

167. *See supra* Part I.C.

Conclusion

Climate litigation on the whole has been unsatisfactory for environmental plaintiffs. Courts have been reluctant to order the federal government to take action. Indian tribes often have Article II treaties, cognizable under the Constitution, as independent sources of law compelling a duty of protection upon the federal government. Federal Indian law already establishes that treaties create implied rights to water and fishing spots on reservations, and federal courts have used those rights to enforce affirmative obligations on government actors. As climate change litigation presses forward, Indian tribes are ideal plaintiffs to sue under a treaty-based framework to demand accountability from the federal government. In turn, courts should liberally construe treaties to include a duty of protection from the government obliging it to preserve a reservation's water and ecosystem—including ameliorating deterioration from climate change.