

Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement

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According to most estimates, more than one hundred million people will be permanently displaced by climate change by 2050. Among the people most at risk of displacement are American Indians. If the government does nothing, or simply does not do enough, hundreds of Indian communities across the United States will be destroyed, the members of these communities devastated, endangered, and displaced.

This Article argues, for the first time, that the Indigenous peoples of the United States have an enforceable right to resettlement derived from the federal trust duty toward American Indians. Long a subject of scholarly debate, unrealized potential, and crushed hopes, the trust duty provides a cause of action for Indians to compel the federal government to relocate them to higher ground, to areas where the effects of climate change will no longer threaten their lives and livelihoods. Indeed, the trust duty does not merely guarantee individual Indians federally funded relocation, if they desire it. It guarantees Indian communities relocation as communities.

Emerging from treaty obligations and the foundational Indian law cases of the 1830s, the federal trust duty today obligates the federal government to provide educational services, healthcare services, adequate housing, and public safety to Indians. Courts have held that the trust duty requires the federal government to protect their water supplies and their lands, safeguard their wildlife resources, and to clean up hazardous waste. In the last thirty years, most of the litigation around the trust duty has focused on when federal

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mismanagement of tribal resources is compensable; in these cases, the tribes were seeking monetary damages, not declaratory or injunctive relief. These cases have yielded a confusing, apparently contradictory line of decisions. But they have also left an opening for a more radical interpretation of the trust duty. Unlike cases involving Indians seeking monetary damages, cases involving Indians seeking declaratory or injunctive relief allow courts to infer the existence of enforceable trust duties beyond those explicitly set out in federal law; such broader duties can—and have been—inferred from statutes, treaties, and the nature of the relationship between the government and Indians.

This Article shows that history, treaty language, statutory provisions, and the common law have given rise to a federal trust duty to protect Indian land, resources, homes, and lives from the effects of climate change, and to relocate Indians when this becomes the only way to maintain that protection. This trust duty is so far-reaching that it effectively guarantees a right to resettlement.

Such an argument may sound radical. It is not. It is founded in a common sense reading of case law, statutes, treaties, and common law trust principles. What is radical, on the other hand, is abandoning Indian communities that are facing climate annihilation. Compared to calls for new international agreements, bodies, frameworks, and funding to assist those whose homes will soon flood, melt, or otherwise become unlivable, the approach advocated here is quite modest. This Article seeks only to present a doctrinal argument that the federal government has a legal responsibility to relocate the hundreds of Indian communities facing imminent risks from climate change, if these communities assert this right.

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INTRODUCTION

Just past a freezing inlet, on a tiny barrier island off the northwestern coast of Alaska, is the village of Shishmaref—for now, at least. Home to a couple hundred Iñupiaq—an Indigenous people of Alaska, Canada, and Greenland¹—Shishmaref is one of the most precariously located communities in the world, a small fishing village known for whalebone carvings, midnight summer sunsets, and such rapid erosion that the island is essentially melting into the sea.² For millennia, Shishmaref was protected from waves and winds by a buffer of sea ice, but climate change has increased the temperatures in northwestern Alaska. And now there is less ice. “That means the fierce winter waves that used to break on the ice far away from shore now slam directly into the island,” wrote the journalist Amy Martin.³ Meanwhile, the town’s very foundations are weakening as the permafrost beneath it thaws.⁴

Houses are literally falling into the sea.⁵ Nearly seventy yards of shore have disappeared in the last fifty years, with another three to ten yards eroding away each year—and this, from an island just a quarter-mile wide.⁶ So the residents of Shishmaref have decided to leave. In 1973, following particularly destructive storms,⁷ the village’s governing body voted to relocate.⁸ Yet many residents did not want to abandon their ancestral homeland, and no government money or concrete plans were forthcoming, so relocation stalled for two decades.⁹ The storms continued: There was a concrete-busting tempest in 1982, massive flooding in 1988, a federal state of disaster in 1997, and a storm in 2001 that led Alaska’s governor to declare that “not doing anything would pose an imminent

1. See ERNEST S. BURCH JR., *SOCIAL LIFE IN NORTHWEST ALASKA: THE STRUCTURE OF IÑUPIAQ ESKIMO NATIONS* (2006).

2. *Id.*

3. Amy Martin, *An Alaskan Village Is Falling into the Sea. Washington Is Looking the Other Way*, PUB. RADIO INT’L (Oct. 22, 2018, 12:15 PM), <https://www.pri.org/stories/2018-10-22/alaskan-village-falling-sea-washington-looking-other-way>.

4. *Id.*

5. Pam Wright, *Kids Sue Alaska Government, Alleging State Isn’t Taking Enough Responsibility for Climate Change*, WEATHER CHANNEL (Nov. 8, 2017, 5:30 AM), <https://weather.com/science/environment/news/2017-11-07-alaska-kids-sue-government-governor-climate-change>.

6. *Id.*

7. ELIZABETH K. MARINO, *FIERCE CLIMATE, SACRED GROUND: AN ETHNOGRAPHY OF CLIMATE CHANGE IN SHISHMAREF, ALASKA* 56, 61 (2015).

8. NATURAL RESOURCES CONSERVATION SERVICE, *SHISHMAREF SITE ANALYSIS FOR POTENTIAL EMERGENCY EVACUATION AND PERMANENT RELOCATION SITES I* (2003).

9. MARINO, *supra* note 7, at 62.

and continuing threat.”¹⁰ In 2002, the village’s residents voted to relocate.¹¹ There followed more planning, more delays, more storms, but neither the federal nor the state government was willing to provide the immense funding needed for the move.¹² In 2016, the village voted yet again, 89 to 78, to relocate.¹³ “There is no cohesive planning, and, as new iterations of help and strategizing committees arrive, the community and planning phases have to start all over again,” wrote the ethnographer Elizabeth K. Marino.¹⁴ “This is often discussed in Shishmaref as ‘another study being done.’”¹⁵

In 2017, sixteen Alaskan youths—ranging in age from five to twenty—filed suit against the state of Alaska for violating state constitutional guarantees and their rights to due process and equal protection.¹⁶ The group alleged that the state had “contributed to climate change through its actions with respect to fossil fuels and carbon emissions.”¹⁷ The group sought “injunctive relief to order the state to prepare an accounting of carbon emissions and to create a climate recovery plan,” as well as “declaratory relief that the state’s actions have violated their fundamental rights to a stable climate system.”¹⁸ The named plaintiff was Esau Sinnok, a twenty-year-old Indigenous climate activist and native of Shishmaref. “Climate change is already harming, and threatens the very existence of Esau’s home village and native culture,” read the plaintiffs’ complaint.¹⁹ “The community has voted to relocate to safer ground three times, most recently in 2016. However, Shishmaref does not have the resources to fund relocation. As climate impacts worsen, Esau’s home will also become uninhabitable.”²⁰ On October 30, 2018, an Alaska superior court judge dismissed the case.²¹

The state and federal governments have failed to get their acts together and relocate Shishmaref. The Alaska courts have likewise failed to provide the people of Shishmaref any relief. This Article argues that there is another way out for the Iñupiaq—and, indeed, for the thousands of other Indigenous peoples of the United States whose homes are or will be threatened by climate change. This Article argues that the Indigenous peoples of the United States have a right to

10. *Id.*

11. Ada Carr, *Alaskan Village Threatened by Climate Change Votes to Relocate Due to Erosion, Rising Sea Levels*, WEATHER CHANNEL (Aug. 19, 2016, 12:00 AM), <https://weather.com/science/environment/news/shishmaref-alaska-village-climate-change-erosion-vote-relocation>.

12. MARINO, *supra* note 7, at 62.

13. Carr, *supra* note 11.

14. MARINO, *supra* note 7, at 66.

15. *Id.*

16. See Amended Complaint for Declaratory and Equitable Relief, *Sinnok v. Alaska*, No. 3AN-17-09910 CI, 2018 WL 7458981 (Alaska Super. Ct. Aug. 24, 2018) [hereinafter Amended Complaint].

17. *Sinnok v. Alaska*, No. 3AN-17-09910 CI, 2018 WL 7501030, at *1 (Alaska Super. Ct. Oct. 30, 2018).

18. *Id.*

19. Amended Complaint, *supra* note 16, at 6.

20. *Id.* at 7.

21. *Sinnok*, 2018 WL 7501030, at *14 (ruling that the complaint raised nonjusticiable political questions).

resettlement—a right that can and should be enforced against the federal government. This right is found in the federal trust duty toward American Indians.²² Long a subject of scholarly debate, unrealized potential, and crushed hopes,²³ the trust duty provides a cause of action for Indians to compel the federal government to relocate them to areas where the effects of climate change will no longer threaten their lives and livelihoods.

Indeed, this Article argues, the trust duty does not merely guarantee individual Indians federally funded relocation. It guarantees Indian communities relocation *as communities*. Historically, many community relocations consisted of individual buyouts, with residents taking lump-sum payments and leaving on their own. This model has led to community disintegration.²⁴ For Indian communities—whose cultures are predicated on close-knit community and kinship ties—this would be especially devastating. As Sinnok’s complaint noted, “Without the resources necessary to relocate the village, Shishmaref could be forced to disband and Esau’s traditions and culture could be lost in their current form. The language of the village, its unique carving and sewing practices, and the stories and traditions of Shishmaref could be forgotten.”²⁵ This Article argues that the trust duty demands that the federal government protect Shishmaref and other Indian communities from this existential threat.

For nearly half a century, Indian law scholars have urged advocates to make more creative use of the trust duty to compel the federal government to safeguard Indian lands and resources.²⁶ “The Indian trust doctrine is perhaps the only source of law that can protect the natural landscapes, animals, and waters that sustain tribalism,” Mary Christina Wood, one of the founding parents of modern climate litigation, wrote more than fifteen years ago.²⁷

Tribal lawyers carrying the message of the sovereign trust to judges, agency officials, and the public should have as their guiding compass 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. This fundamental promise of sovereign trust should be a focal point for courts hearing claims for

22. In the following, I will primarily use the term “Indian” to refer to the descendants of the Indigenous inhabitants of the land that became the United States, largely because the term seems to me to be most common in federal law and federal Indian law scholarship. This usage is also in keeping with the recommendations of the Native American Journalists Association. See *Reporting and Indigenous Terminology*, NATIVE AM. JOURNALISTS ASS’N (2018), https://najanewsroom.com/wp-content/uploads/2018/11/NAJA_Reporting_and_Indigenous_Terminology_Guide.pdf. I use this term regardless of whether the people it is describing are enrolled members of federally recognized tribes. In contrast, I will use the term “Indigenous” generally to refer to the descendants of the earliest known inhabitants of any country or region, not just the United States (although I will sometimes use it to describe Indians, as well). My thanks to Gerald Torres for talking through the matter of terminology with me.

23. See *infra* Subpart III.A.

24. See *infra* notes 440–441 and accompanying text.

25. Amended Complaint, *supra* note 16, at 10.

26. See *infra* notes 359–361 and accompanying text.

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

injunctive relief to protect tribal lands and resources. Courts should invoke their equitable authority to restrain the majority of society and its industry from bringing to ruin the natural systems sustaining Native America.²⁸

This Article builds on the work of these scholars. While some have argued that the trust duty obliges the government to combat ocean acidification, protect Indian children, preserve sacred sites, and safeguard Indian cultural vitality,²⁹ no one has yet argued that the trust duty compels the government to relocate Indian communities facing climate annihilation. This Article is the first to assert that the trust duty requires this—indeed, that the trust duty effectively creates a right to resettlement for Indian communities.

This argument may sound radical. It is not. It is founded in a common sense reading of case law, statutes, treaties, and common law trust principles. What is radical, on the other hand, is leaving Indian communities to their destruction. If the government does nothing, or simply doesn't do enough, hundreds of Indian communities across the United States will be destroyed, the members of these communities devastated, endangered, and displaced.³⁰

For this very reason, the argument put forward by this Article is woefully inadequate to address the apocalyptic problem of displacement caused by climate change. Many have called for new international agreements, bodies, frameworks, and funding to assist those whose homes will soon flood, melt, or otherwise become unlivable.³¹ Such approaches are vitally important. The approach presented in this Article is more modest. It would affect only American Indians, and it would afford them protection only from displacement, not from the other devastation climate change is sure to wreak.

Part I of this Article surveys the impacts of climate change-induced displacement—first on people around the world and then on Indians in particular. Indians, along with millions of other Indigenous peoples, will be disproportionately harmed by climate change, and disproportionately subject to displacement. This displacement threatens not only their lands, lives, and livelihoods, but also their cultures—their very way of life. Part II considers the existing legal strategies for Indian communities facing displacement. It analyzes avenues for redress under international law, U.S. federal law, state law, through climate change litigation in U.S. courts, through the private sector, and through more creative sources, such as transitional international adjudicatory bodies, new international guiding principles, amendments to American statutes, and even a new conception of rights. It thus serves as a fairly comprehensive literature review of existing scholarship. This Part concludes that, vital though these strategies are, none provides the potential for relief as immediate or powerful for Indian communities as a strategy grounded in the federal trust duty.

28. *Id.*

29. *See infra* notes 310–312 and accompanying text.

30. *See infra* Subpart I.B.

31. *See infra* Subpart II.F.

Part III explains why. It first surveys the history of the trust duty, showing how it emerged from the federal seizure of Indian lands and resources and how this seizure led to a federal obligation—often, though not necessarily, codified in treaties and statutes—to protect Indian lives and livelihoods. Then it surveys the scope of the trust duty, demonstrating how broad it is, how much broader it should be, and how it likely includes the Natives of Alaska and Hawai’i, as well as Indians living in the continental United States. It further argues that the trust duty creates a right to resettlement for Indian communities, a right these communities can enforce in actions for declaratory and injunctive relief. Decades ago, the federal government forced many Indian communities to relocate to lands that are highly vulnerable to climate impacts; the federal government now has a duty to relocate them away from these lands, if these communities so choose. The federal government enacted statutes implying that the trust duty included an obligation to relocate Indians facing external threats—statutes that, according to settled principles of law, must be liberally construed in favor of Indian interests. The federal government signed treaties that included assurances that it would “protect” Indians—treaties that cannot be voided without just compensation. All of this gives rise to a right to resettlement.

Finally, Part IV argues that this right to resettlement must be a right to *community* resettlement. Indian cultures are uniquely predicated on community ties; to disperse an Indian community in the midst of relocation would be to destroy that community. Once again, statutes, treaties, and history imply a trust duty that compels the government to protect Indian cultures, even (and especially) if that protection entails relocating whole communities.

Not long before Esau Sinnok and the other youth of Alaska filed suit, Sinnok’s uncle fell through thin sea ice and died. He had been returning from hunting duck and geese, “travelling in an area where the ice was historically thick and safe for travel at that time of year.”³² This is intolerable. The time has come for action. The federal government has a duty to relocate Shishmaref and the hundreds of other Indian communities facing imminent risks from climate change.

I. CLIMATE CHANGE AND INDIAN COMMUNITIES

The science is settled. There is no debate. Climate change is already rendering hundreds of Indian communities unlivable, and it will displace hundreds of millions worldwide within Esau Sinnok’s lifetime. This Part first describes the scale and impact of climate change-induced displacement around the world, and then it focuses on the unique impacts this displacement will have on Indian communities.

32. Amended Complaint, *supra* note 16, at 8.

A. *Displacement Induced by Climate Change*

According to the Intergovernmental Panel on Climate Change (IPCC), the warming of the climate “is unequivocal,”³³ and it is “extremely likely”—95 to 100 percent certain—that human behavior has been warming’s main modern cause.³⁴ In a more recent report, the IPCC warned that catastrophically extreme climate events were likely as soon as 2040,³⁵ unless the entire world economy is transformed at a scale that has “no documented historic precedent.”³⁶ This means far more, and far more intense, droughts, hurricanes, fires, floods, and mass extinction events, as well as inexorably rising seas.³⁷ “It is worse, much worse, than you think,” the journalist David Wallace-Wells began his monumentally disturbing 2019 book, *The Uninhabitable Earth*.³⁸

Perhaps the most devastating human cost of climate change will be displacement. Unthinkable numbers of humans will be forced to flee their homes. A landmark 700-page report released in 2006 by the government of the United Kingdom estimated that 150 to 200 million people may be permanently displaced by climate change by 2050.³⁹ Others have reached similar estimates.⁴⁰ To put this in perspective, the modern Syrian refugee crisis has seen roughly one million people displaced by violence (which, itself, was exacerbated by climate change).⁴¹ The bloodshed, warfare, and political and economic disruptions that will result from such displacement will, again, be simply unthinkable. Recent

33. IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. WORKING GROUP I CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE IPCC, at v (2013).

34. IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE IPCC 2–4 (2014).

35. IPCC, GLOBAL WARMING OF 1.5 C: SUMMARY FOR POLICYMAKERS 9–12 (2018).

36. *Id.* at 17.

37. See generally DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH: LIFE AFTER WARMING (2019) (synthesizing climate change estimates and projected effects).

38. *Id.* at 1.

39. NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW 77 (2006).

40. See Groundswell *Preparing for Internal Climate Migration*, WORLD BANK (Mar. 19, 2018), <https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell—preparing-for-internal-climate-migration>; United Nations High Comm’r for Refugees, *Forced Displacement in the Context of Climate Change Challenges for States Under International Law* 3 (2009); Norman Myers, *Environmental Refugees in a Globally Warmed World*, 43 BIOSCIENCE 752, 757 (1993). But see Francois Gemenne, *How They Became the Face of Climate Change. Research and Policy Interactions in the Birth of the ‘Environmental Migration’ Concept*, in MIGRATION AND CLIMATE CHANGE 234 (Etienne Piguet et al. eds., 2011) (stating “[t]hrough frequent repetitions, this latest figure [200 million], though highly speculative and questionable, has become taken as empirical evidence, and has been frequently cited in media reports and other studies, most notably in the Stern review on the economics of climate change.”).

41. WALLACE-WELLS, *supra* note 38, at 7. As Wallace-Wells dryly noted, “[c]limatologists are very careful when talking about Syria. They want you to know that while climate change did produce a drought that contributed to the country’s civil war, it is not exactly fair to say that the conflict is the result of warming But wars are not caused by climate change only in the same way that hurricanes are not caused by climate change, which is to say they are made more likely, which is to say the distinction is semantic.” *Id.* at 124.

research has suggested that displacement induced by climate change increases the likelihood of genocide.⁴²

This displacement will take many forms and have many immediate triggers.⁴³ A 2012 study commissioned by the United Nations High Commissioner for Refugees identified five scenarios “possibly related to climate change that have the potential of triggering the movement of persons”: (1) sudden-onset disasters, such as flooding, windstorms (hurricanes/typhoons/cyclones), or mudslides caused by heavy rainfalls; (2) slow-onset environmental degradation caused by rising sea levels, increased salinization of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification or other forms of reduced water resources; (3) slow-onset disasters, specifically the inundation of low-lying small island states vulnerable to rising sea levels; (4) governmental prohibition on human habitation in high-risk areas; and (5) unrest seriously disturbing public order, violence, or even armed conflict triggered, at least partially, by a decrease in essential resources due to climate change (especially water).⁴⁴ In spite of the differences, all of this displacement will be caused, to some extent, by climate change.⁴⁵

Though the issue of environmental refugees was discussed as early as 1948,⁴⁶ it emerged as a major area of study in the 1980s.⁴⁷ Papers warning of a flood of “environmental refugees” were dismissed as “unserious” in spite of their “short-lived shock-effect.”⁴⁸ But soon these warnings became harder to ignore; empirical evidence emerged from Bangladesh and other places wracked by warming and war.⁴⁹ In its first report, in 1990, the IPCC wrote, “The gravest effects of climate change may be those on human migration as millions are displaced by shoreline erosion, coastal flooding, and severe drought.”⁵⁰ The warnings continued. As the scholar Francois Gemenne recounted:

42. Jürgen Zimmerer, *Climate Change, Environmental Violence and Genocide*, 18 INT’L J. HUMAN RTS. 265 (2014). At the same time, some scholars remain skeptical about “predicting the social repercussions and responses to such climate impacts,” worried that apocalyptic predictions “may contribute to self-fulfilling prophecies.” Lennart Olsson, *Climate Migration and Conflicts: A Self-Fulfilling Prophecy?*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 117 (Dimitra Manou et al. eds., 2017).

43. See INT’L ORG. MIGRATION, MIGRATION, ENVIRONMENT, AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 9 (Frank Laczko & Christine Aghazarm eds., 2009).

44. Walter Kälin & Nina Schrepfer, U.N. High Comm’r for Refugees, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* 13–17 (2012); see also Donald J. Wuebbles et al., *Climate Science Special Report: Fourth National Climate Assessment*, U.S. GLOB. CHANGE RES. PROGRAM 10–14 (2017), https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf; Calvin Bryne, *Climate Change and Human Migration*, 8 U.C. IRVINE L. REV. 761, 767–73 (2018).

45. See Richard E. Zeebe et al., *Anthropogenic Carbon Release Rate Unprecedented During the Past 66 Million Years*, 9 NATURE GEOSCIENCE 325, 325 (2016).

46. Gemenne, *supra* note 40, at 227.

47. *Id.* at 228.

48. *Id.*

49. *Id.* at 231.

50. IPCC, CLIMATE CHANGE: THE 1990 AND 1992 IPCC ASSESSMENTS 103 (1990).

From the mid-2000s onwards, different governments commissioned or were recipients of reports warning of the threat that climate change posed to national or international security. The first report of this kind—and the one portraying the most doom and gloom-laden scenario—was commissioned by the U.S. Department of Defense, and reportedly censored by the White House. The report evokes apocalyptic scenario in which brutal change of weather conditions, induced by the crossing of a climate threshold, triggers massive flows of migrants worldwide, who compete for resources and ultimately threaten U.S. and international security.⁵¹

Gemenne dryly noted that the report urged the U.S. government—“which, notoriously, did not ratify the Kyoto Protocol—to take climate change more seriously.”⁵² In short, political leaders have had decades to meaningfully alter behavior in order to prevent the terrors of climate change displacement. They have not.

It is crucial to note that those displaced by climate change will be disproportionately poor and vulnerable—people who, in the words of medical scholar Seiji Yamada and her coauthors, bear “little responsibility for industrial capitalism,” which hastened climate change.⁵³ Reviewing numerous studies from the United Nations (UN) and elsewhere, human rights scholar Ezekiel Simperingham wrote,

In all countries it is the poor and marginalized who suffer disproportionately from climate displacement. They are the most exposed to climate hazards and have the least capability to adapt to the effects of climate change. Sick and wounded people, children, women, people with disabilities, older people, migrants, indigenous peoples and those who do not fully enjoy (housing, land, and property) rights are often among the most seriously affected by climate hazards and displacement.⁵⁴

Following displacement, Simperingham continued, “vulnerability often increases.”⁵⁵ Climate migrants are at greater risk for “impoverishment and discrimination; livelihood insecurity; economic, social and psychological marginalization; food and water insecurity; and increased morbidity and mortality through trauma and vulnerability to insanitary conditions.”⁵⁶

51. Gemenne, *supra* note 40, at 232. *But see* KÄLIN & SCHREPFER, *supra* note 44, at 22 (noting that most climate migrants will be internally displaced, not forced to cross borders).

52. Gemenne, *supra* note 40, at 232.

53. Seiji Yamada et al., *Sea-Level Rise and the Marshallese Diaspora*, 10 ENVTL. JUST. 93, 93 (2017). As the legal scholar Maxine Burkett noted, “Growing evidence reveals that climate change will hit two specific groups ‘disproportionately and unfairly’: the poor and those living in island states.” Maxine Burkett, *Behind the Veil Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. REV. 445, 447 (2018).

54. Ezekiel Simperingham, *State Responsibility to Prevent Climate Displacement The Importance of Housing, Land and Property Rights*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 88 (Dimitra Manou et al. eds., 2017).

55. *Id.*

56. *Id.*; see also Craig A. Johnson, *Governing Climate Displacement The Ethics and Politics of Human Resettlement*, 21 ENVTL. POLS. 308, 313 (2012).

Displacement as a result of climate change also threatens millions living in wealthy and developed countries—including the United States.⁵⁷ A 2015 study found that twenty million Americans are at risk of displacement caused by climate change in this century.⁵⁸ However, the authors continued, with aggressive carbon cuts, the homes of more than half of these twenty million could be spared.⁵⁹ Another study from 2017 found that, presuming intermediate-high and highest sea level rise scenarios, between 489 and 668 communities in the United States would face “effective inundation” by 2100, a disproportionate number of which are areas of high socioeconomic vulnerability.⁶⁰ Once again, however, the authors emphasized that mitigation strategies could spare the residents of hundreds of these communities.⁶¹

B. Indian Climate Refugees

For American Indians, the threats are two-fold: First, they will be displaced by climate change, which will put them at increased risk of violence, impoverishment, and immiseration; second, this displacement threatens to harm their very cultures, by dismantling the close-knit communities on which so many Indian cultures depend. Hundreds of Indian communities are at risk of climate change-induced displacement in the near future. The following Subparts chart first the physical risks they face and then the cultural ones.

1. Physical Danger

Indigenous people around the world—from the Yanomami in the Amazon, to the Inuit in the Arctic, to the Saami in Scandinavia—are among those most likely to be displaced by climate change.⁶² The specific instigators of such displacements vary—from drought in South America to insect infestation in Canada to increased winds in southern Africa to rising seas and coral bleaching in the Pacific—but all have the same root cause: climate change.⁶³ “Unlike other populations, Indigenous peoples have a tendency to be located in vulnerable locations throughout the world,” wrote the scholars Randall S. Abate and

57. Benjamin H. Strauss et al., *Carbon Choices Determine US Cities Committed to Future Below Sea Level*, 112 PROCEEDINGS NAT’L ACAD. SCI. 13508 (2015).

58. *Id.*

59. *Id.*

60. Kristina A. Dahl et al., *Effective Inundation of Continental United States Communities with 21st Century Sea Level Rise*, 5 ELEMENTA: SCI. ANTHROPOCENE 37, 37 (2017).

61. *Id.*

62. See SURVIVAL INT’L, *THE MOST INCONVENIENT TRUTH OF ALL: CLIMATE CHANGE AND INDIGENOUS PEOPLE 1* (2009).

63. Randall S. Abate & Elizabeth A. Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, 26 TULANE ENVTL. L.J. 179, 182–84 (2013).

Elizabeth Ann Kronk, in their study of the commonalities of Indigenous peoples facing climate harm.⁶⁴

In the United States, this vulnerable geography is often the result of government action. As the anthropologist Julie Koppel Maldonado and her coauthors noted in 2013, “For indigenous communities, climate-induced relocation cannot be separated from the sensitive history of government-mandated tribal relocations that occurred throughout the United States from the late 1700s well into the 20th century.”⁶⁵ From the 1830 Indian Removal Act, which relocated Indians living east of the Mississippi River, to the infamous “Trail of Tears,” dislocation has been a constant for Indian communities, and often has forced them into precarious places.⁶⁶ In Wisconsin, for instance, the village of Odanah, home of the Bad River Band of the Lake Superior Chippewa Tribe, has had to entirely relocate because of increased flooding.⁶⁷ Writing about Odanah, the journalist Rebecca Hersher noted that the Chippewa were only near the flood-prone Bad River in the first place because of earlier forced displacement by colonizers.⁶⁸ “Native communities are disproportionately affected by climate-related flooding, in part because of that very same history of pushing Native peoples onto marginal land,” wrote Hersher.⁶⁹ These relocations, Maldonado and her colleagues continued, have also “limited the ability of tribes to draw upon their traditional knowledge in adapting to a rapidly changing environment.”⁷⁰

64. *Id.* at 182.

65. Julie K. Maldonado et al., *The Impact of Climate Change on Tribal Communities in the US Displacement, Relocation, and Human Rights*, 120 CLIMATE CHANGE 601, 603 (2013).

66. *Id.*

67. Rebecca Hersher, *Wisconsin Reservation Offers a Climate Success Story and a Warning*, NAT'L PUB. RADIO (Aug. 15, 2018, 11:07 AM), <https://www.npr.org/2018/08/15/632335735/wisconsin-reservation-offers-a-climate-success-story-and-a-warning>.

68. *Id.*

69. *Id.* For more on the connections between climate displacement and colonial displacement, see Jane McAdam, *Relocation and Resettlement from Colonization to Climate Change: The Perennial Solution to “Danger Zones”*, 3 LONDON REV. INT'L L. 93 (2015).

70. Maldonado, *supra* note 66, at 603.

Scholars have illustrated the disproportionate impacts climate change will likely have on American Indian food,⁷¹ health,⁷² wealth,⁷³ fishing,⁷⁴ timber,⁷⁵ and water resources.⁷⁶ These impacts, along with sea level rise, permafrost melting, and erosion, will lead to the displacement of untold thousands of Indians. Hundreds of Indigenous communities in Alaska,⁷⁷ Florida,⁷⁸ Hawai'i,⁷⁹ Louisiana,⁸⁰ South Dakota,⁸¹ and Washington⁸² are at risk of being made uninhabitable by climate change. The Biloxi-Chitimacha-Choctaw tribe of Isle de Jean Charles, Louisiana, which is actively planning the relocation of its entire

71. Kathy Lynn et al., *The Impacts of Climate Change on Tribal Traditional Foods*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS 37 (Julie Koppel Maldonado et al., eds. 2014).

72. John T. Doyle et al., *Exploring Effects of Climate Change on Northern Plains American Indian Health*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 135 (Dimitra Manou et al. eds., 2017).

73. Mahesh R. Gautam et al., *Climate Change in Arid Lands and Native American Socioeconomic Vulnerability: The Case of the Pyramid Lake Paiute Tribe*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 77 (Dimitra Manou et al. eds., 2017).

74. Kyle Dittmer, *Changing Streamflow on Columbia Basin Tribal Lands—Climate Change and Salmon*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 119 (Dimitra Manou et al. eds., 2017); Oliver Grah & Jezra Beaulieu, *The Effect of Climate Change on Glacier Ablation and Baseflow Support in the Nooksack River Basin and Implications on Pacific Salmonid Species Protection and Recovery*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 149 (Dimitra Manou et al. eds., 2017).

75. Garrit Voggeser et al., *Cultural Impacts to Tribes from Climate Change Influences on Forests*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 107 (Dimitra Manou et al. eds., 2017).

76. K. Cozzetto et al., *Climate Change Impacts on the Water Resources of American Indians and Alaska Natives in the U.S.*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 61 (Dimitra Manou et al. eds., 2017).

77. Robin Bronen, *Forced Migration of Alaskan Indigenous Communities Due to Climate Change: Creating a Human Rights Response* (2009) (unpublished paper) (on file with the University of Alaska, Resilience and Adaptation Program); MAXINE BURKETT ET AL., CTR. FOR PROGRESSIVE REFORM, REACHING HIGHER GROUND: AVENUES TO SECURE AND MANAGE NEW LAND FOR COMMUNITIES DISPLACED BY CLIMATE CHANGE 13 (2017).

78. T.M.B. Bennett et al., *Indigenous Peoples, Lands, and Resources*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 307 (J.M. Melillo et al. eds., 2014); JONATHAN M. HANNA, NATIVE COMMUNITIES AND CLIMATE CHANGE: PROTECTING TRIBAL RESOURCES AS PART OF NATIONAL CLIMATE POLICY: REPORT 25–28 (2007).

79. Bennett, *supra* note 78, at 307.

80. Michael Isaac Stein, *Climate Change is Forcing the Government to Relocate This Entire Louisiana Town*, MOTHER JONES (Jan. 25, 2018), <https://www.motherjones.com/environment/2018/01/climate-change-is-forcing-the-government-to-relocate-this-entire-louisiana-town/>; Anthony Oliver-Smith, *Sea Level Rise, Local Vulnerability, and Involuntary Migration*, in MIGRATION AND CLIMATE CHANGE 176 (Etienne Piguet et al. eds., 2011).

81. Eoin Higgins, *State of Emergency' Pine Ridge Reservation Flooding Exposes Racial Divide in Climate Crisis*, COMMON DREAMS (Mar. 25, 2019), <https://www.commondreams.org/news/2019/03/25/state-emergency-pine-ridge-reservation-flooding-exposes-racial-divide-climate-crisis>.

82. BURKETT, *supra* note 77, at 16; *Quinault Indian Nation Plans for Village Relocation*, U.S. Climate Resilience Toolkit (Jan. 17, 2017), <https://toolkit.climate.gov/case-studies/quinault-indian-nation-plans-village-relocation>.

community, has been called “the First American ‘Climate Refugees.’”⁸³ Further, many communities not faced with looming melting or flooding are nonetheless going to slowly become less livable. For instance, in Arizona, many tribes will have to deal with scarcer water, shifts in river flows, diminishing water quality, and hotter and drier agricultural conditions.⁸⁴ In Maine, Indians are facing an increase in the tick population that will likely affect the practically and culturally significant moose population.⁸⁵

In 2014, a group of experts wrote in the United States’ Third National Climate Assessment that the impacts of climate change would be “especially severe” for American Indians.⁸⁶

Now, many Native peoples in Alaska and other parts of the coastal United States, such as the Southeast and Pacific Northwest, are facing relocation as a consequence of climate change and additional stressors, such as food insecurity and unsustainable development and extractive practices on or near Native lands; such forms of displacement are leading to severe livelihood, health, and socio-cultural impacts on the communities.⁸⁷

The situation is especially dire in Alaska. A U.S. Government Accountability Office (GAO) study from 2003 found that 184 out of 213 Indigenous communities in Alaska were at risk from flooding and erosion (both of which are exacerbated by climate change).⁸⁸ Four Indigenous villages in particular—Kivalina, Koyukuk, Newtok, and Shishmaref—were “in imminent danger from flooding and erosion and are planning to relocate.”⁸⁹ Another GAO study from 2009, however, noted, “Of the 12 villages exploring relocation options, only Newtok has made significant progress among the 4 villages that will likely need to relocate all at once.”⁹⁰ Newtok, a Yupik village of about 350 people located on Alaska’s Ninglick River, has been eroding since the 1950s and is currently losing about seventy feet of land each year because of coastal erosion; only in 2018 did Newtok secure \$15 million in federal funding to partially implement the relocation plan that had been in the works since 2000.⁹¹

83. Coral Davenport & Campbell Robertson, *Resettling the First American Climate Refugees*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html>.

84. HANNA, *supra* note 78, at 20–23.

85. John Daigle & David Putnam, *Indigenous Peoples, in MAINE’S CLIMATE FUTURE: AN INITIAL ASSESSMENT* 38 (George L. Jacobson et al. eds., 2009).

86. Bennett, *supra* note 78, at 298.

87. *Id.* at 307.

88. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-142, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION BUT FEW QUALIFY FOR FEDERAL ASSISTANCE app. 3 (2003).

89. *Id.* at 4.

90. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 27 (2009).

91. Kyla Mandel, *In Alaska, A Town Threatened by Climate Change Gets Federal Funding to Relocate*, THINKPROGRESS (Mar. 23, 2018), <https://thinkprogress.org/newtok-alaska-gets-relocation-funding-35b4434242a6/>.

Still, journalist Kyla Mandel noted that the \$15 million is not nearly enough: “Previous estimates by the Army Corps of Engineers has put the total cost of relocation at as much as \$130 million.”⁹² The residents hope the federal funding will enable them to secure half of the needed housing; they are planning on barging in military barracks from Anchorage and converting those into housing to save money.⁹³

2. *Cultural Loss*

Climate change also threatens the destruction of Native cultures. As Maldonado and a multi-disciplinary group of scholars wrote, “Climate-induced displacement does not only sever the physical ties and rights indigenous peoples have to their land and resources, but also the spiritual relationship they have with their traditionally-occupied places.”⁹⁴ Displacement is particularly harmful because of this unique relationship between peoples and landscapes, noted the legal scholar Rebecca Tsosie:⁹⁵

The very identity of many Native peoples is circumscribed by particular landforms and waterways. For example, in the Southwest, the Navajo people perceive their world to be bounded by four sacred mountains, as do the Tewa people. In the Pacific Northwest, the Native people are tied to a landscape that reflects the importance of the oceans (for example, the Salish Coastal Sea) and inland waterways (such as the Columbia River and Snake River). Many species of plants and animals provide the foods and medicines for these peoples and they are treated with reverence and respect. Indigenous languages and ceremonies reflect these lifeways, and, thus, they represent the core of indigenous self-determination.⁹⁶

Thus, climate change threatens to eradicate not merely entire communities, but entire ways of life.

Many residents of Indian communities facing climate displacement have made comments that demonstrate their belief that their cultures are in mortal danger. “We’re going to lose all our heritage, all our culture,” Chief Albert Naquin of the Biloxi-Chitimacha-Choctaw told the *New York Times* in 2016. “It’s all going to be history.”⁹⁷ The National Congress of American Indians concurred: “The large role of climate change in separating tribal people from their natural resources poses a threat to Indigenous identity.”⁹⁸ Observers too

92. *Id.*

93. *Id.* For more on the Newtok relocation, see Robin Bronen, *The Human Rights of Climate-Induced Community Relocation*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS (Dimitra Manou et al. eds., 2017).

94. Maldonado, *supra* note 66, at 602.

95. Rebecca Tsosie, *Climate Change and Indigenous Peoples Comparative Models of Sovereignty*, 26 TULANE ENVTL. L.J. 179, 245–46 (2013).

96. *Id.*

97. Davenport & Robertson, *supra* note 83.

98. *Climate Change*, NAT’L CONG. AM. INDIANS (2019), <http://www.ncai.org/policy-issues/land-natural-resources/climate-change>.

have noted this danger. Former Department of Interior (DOI) scientist Joel Clement, an advocate for the Indigenous peoples of Alaska, remarked in 2018, “Each one of these [Alaskan] villages is its own distinct culture, [they have] their own distinct dialect. To ask them to just assimilate into another village somewhere is to ask them to let go of their culture entirely, which I think is just a horrible thought.”⁹⁹

This threat to culture and community exists for non-Indian communities as well. After residents of the historically black community of Diamond, in Louisiana’s Cancer Alley—rendered unlivable by decades of chemical leaks and explosions—secured individual buyouts to relocate, the community “shriveled away,” wrote the journalist Michael Isaac Stein.¹⁰⁰

Residents scattered, churches folded, and people fell out of touch. ‘The residents say they see each other at funerals and weddings, and that’s about it,’ said [legal scholar] Robert Verchick The death of Diamond highlights an important distinction. There is a difference between saving a community and saving its individual members.¹⁰¹

However, the threat is often graver for Indian communities, largely because of their unique history and cultures. Few other cultures are as predicated on their specific community or geography as Indigenous peoples, both in the United States and elsewhere.¹⁰² Anthropologists have documented the immensity of the harm suffered by Indigenous peoples forced from their homes. For instance, examining the Indigenous inhabitants of the Marshall Islands, forced to relocate following American nuclear weapons testing near their home in the 1940s and 1950s, the anthropologist Stuart Kirsch has written about the concept of “culture loss.”¹⁰³

Though scholars have discussed this concept in other contexts for decades, Kirsch noted that “claims of loss are particularly salient for Indigenous communities, which frequently have special ties to land and place that, while they have analogues elsewhere, differ in relation to the way that these societies organize and reproduce themselves.”¹⁰⁴ Discussing Alaskan Indigenous villages

99. Martin, *supra* note 3.

100. Stein, *supra* note 80.

101. *Id.* For more on Diamond, see STEVE LERNER & ROBERT D. BULLARD, *DIAMOND: A STRUGGLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA’S CHEMICAL CORRIDOR* (2006).

102. See BURKETT, *supra* note 77, at 8 (“The impacts of climate change can pose a heightened existential threat to Native Americans and Alaska Natives because of the place-centered nature of their cultural and religious identities and the particular indicators of tribal community health, such as cultural cohesion and use of natural resources.”); Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, pt. I (2008); Tsosie, *supra* note 95, at 245–46.

103. Stuart Kirsch, *Lost Worlds: Environmental Disaster, Culture Loss, and the Law*, 43 CURRENT ANTHROPOLOGY 167, 168 (2001).

104. *Id.* at 178. Others have noted the harms of “culture loss” for Marshall Islanders. Gil Marvel P. Tabucanon has written of the deep, intergenerational damage done when Americans relocating the Indigenous peoples of the Bikini Atoll (which is within the Marshall Islands) “fail[ed] to understand the Bikinians’ deep attachment and connection to their island of origin.” Gil Marvel P. Tabucanon, *Protection for Resettled Island Populations: The Bikini Resettlement and its Implications for Environmental and*

quickly becoming unlivable, Joel Clement, the former DOI scientist, used an even starker term: “cultural death.”¹⁰⁵ Behavioral scientists too have documented the unique harms suffered by Indigenous peoples torn from their cultures. One recent study indicated that separation from their familial and ancestral homes has significant intergenerational consequences for Indians, even several generations later.¹⁰⁶ Other studies have suggested that forced acculturation policies have led to “anger, depression, guilt, and anxiety, internalized oppression, and feelings of inadequacy in parenting roles.”¹⁰⁷

II. THE INADEQUACY OF EXISTING LEGAL STRATEGIES

In April 2009, representatives of Indigenous communities from around the world gathered in Anchorage, Alaska for the Indigenous Peoples’ Global Summit on Climate Change.¹⁰⁸ They issued a number of calls for action, which have collectively come to be called the Anchorage Declaration.¹⁰⁹ “We are deeply alarmed by the accelerating climate devastation brought about by unsustainable development,” they wrote, invoking the “profound and disproportionate adverse impacts on our cultures, human and environmental health, human rights, well-being, traditional livelihoods, food systems and food sovereignty, local infrastructure, economic viability, and our very survival as Indigenous Peoples.”¹¹⁰ They called upon the United Nations Framework Convention for Climate Change (UNFCCC) to “recognize the historical and ecological debt of [rich and industrialized] countries in contributing to greenhouse gas emissions.”¹¹¹ They continued, “We call on these countries to pay this historic debt.”¹¹²

Yet the ability of Indigenous peoples to compel wealthy countries to pay their moral debts has been severely hampered by the inadequacy of existing legal strategies. As this Part will show, few of these strategies have meaningfully advanced the cause of preserving Indigenous peoples’ lives and ways of life.

Perhaps the law itself is inadequate to address the immensity of climate change. “[E]nvironmental and natural resources law are based on assumptions of ecological stasis and seek to preserve and restore this presumed stasis,” wrote the scholar Maxine Burkett.¹¹³ “Neither of these goals . . . fit in a world marked by

Climate Change Migration, 5 J. INT’L HUMANITARIAN LEGAL STUD. 7, 7 (2014). “The Bikinian resettlement proved not only disruptive, but also destructive of their culture, identity, and lifestyle.” *Id.* at 26.

105. Martin, *supra* note 3.

106. Melissa L. Walls & Les B. Whitbeck, *The Intergenerational Effects of Relocation Policies on Indigenous Families*, 33 J. FAMILY ISSUES 1272, 1272 (2012).

107. *Id.* at 1273.

108. Indigenous Peoples’ Global Summit on Climate Change, *Anchorage Declaration* (Apr. 24, 2009), unfccc.int/resource/docs/2009/smsn/ngo/168.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Burkett, *supra* note 53, at 450.

continual, unpredictable, and nonlinear transformations of complex ecosystems.”¹¹⁴ Yet Indigenous peoples and their allies must seek redress by any available means—including the law. This Part considers many of these legal strategies and ultimately concludes that they have, at least for now, failed to provide a right to resettlement for American Indians.

The structure of this Part borrows from the work of legal scholar Randall S. Abate, who wrote,

There are five potential sources of relief for Kivalina and similarly situated vulnerable indigenous communities: (1) an international community response, likely connected to a post-Kyoto climate change agreement; (2) a U.S. government response; (3) a state government response; (4) climate change litigation in U.S. courts; and (5) a private sector-funded relocation fund.¹¹⁵

This Part assesses all five of these sources of relief, as well as a sixth: more creative sources, including transitional international adjudicatory bodies, new international guiding principles, amendments to American statutes, and even a new conception of rights. Ultimately, all of the strategies discussed herein are laudable and many are vitally necessary for Indigenous peoples around the world, but none are likely to provide relief as immediate or irrevocable for American Indian communities as one grounded in the federal trust duty.

A. *International Law*

Although there are now several international legal agreements aimed at helping those displaced by climate change, few have had significant effects on the lives of climate refugees. This is in large part because climate refugees do not technically fit into the current international legal definition of “refugees.” Further, the United States has revealed itself to be uniquely hostile to international law, refusing to enter into many agreements or be bound by even those few agreements it has ratified. Because of this, international law is unlikely to provide a helpful forum for Indian climate refugees, at least for now.

According to the United Nations’ 1951 Refugee Convention, a “refugee” is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹¹⁶ It would be quite a stretch for those displaced by climate change to meet these requirements, largely because their fear is not persecution but rather the

114. *Id.* (citing Robin Kundis Craig, “Stationary is Dead”—Long Live Transformation Five Principles for Climate Adaptation Law, 34 HARV. ENVTL. L. REV. 10, 27 (2010)).

115. Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 FORDHAM ENVTL. L. REV. 10, 12 (2013).

116. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137.

annihilation of their homelands.¹¹⁷ Though, in practice, “several UN organs and agencies already assist existing and potential victims of climate-induced displacement,”¹¹⁸ some within the UN doubt the desirability of including climate migrants as “refugees,” arguing that this could “place a potentially unbearable strain on current standards and practices.”¹¹⁹

Scholars have pointed out that this leaves climate refugees without *any* recognition under existing international refugee law. For instance, Anja Mihr has noted, “These people are often called climate refugees, environmental refugees or climate migrants in an attempt to give them some form of legal status. But their legal status is far from clear. Their rights and entitlements are not (yet) clearly covered under international law, nor by international refugee law”¹²⁰ Additionally,

the UN definition indicates that if the situation in their homeland or territory improves and is pacified, then the refugee may return to their land, home and workplace. This condition may be impossible if people migrate due to climate change, because their land, homes and workplaces may not exist anymore—unless they can manage to farm under the sea or on desert sand.¹²¹

In January 2020, the UN Human Rights Committee ruled that individuals fleeing the effects of climate change should be considered refugees under existing international law if their lives are truly at imminent risk.¹²² However, the bar identified in this ruling, to meet the imminent risk standard, is extremely high—far too high for many individuals already fleeing climate catastrophe—and it is as yet unclear how much of an effect such a ruling will have.¹²³

The applicability of other international legal provisions to climate refugees is likewise uncertain.¹²⁴ The UNFCCC, the foundational framework for international climate change cooperation, demanded in 1992 that states “facilitate adequate adaptation to climate change” and “[c]ooperate in preparing

117. See Bryne, *supra* note 44, at 781–82; Benoit Mayer, *Critical Perspective on the Identification of Environmental Refugees’ as a Category of Human Rights Concern*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 37 (Dimitra Manou et al. eds., 2017). For an assessment of the meaning of “persecution” under international law, see Teresa Thorp, *Transitional Law in the Climate Change Context*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 70–1 (Dimitra Manou et al. eds., 2017).

118. Thorp, *supra* note 117, at 69.

119. *Id.* On the complexities of defining climate change-induced migration, see Alison Heslin et al., *Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration*, in LOSS AND DAMAGE FROM CLIMATE CHANGE 238–40 (Reinhard Mechler et al. eds., 2018).

120. Anja Mihr, *Climate Justice, Migration and Human Rights*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 51 (Dimitra Manou et al. eds., 2017).

121. *Id.*

122. See Rob Picheta, *Climate Refugees Cannot Be Sent Back Home, United Nations Rules in Landmark Decision*, CNN (Jan. 20, 2020), <https://www.cnn.com/2020/01/20/world/climate-refugees-unhrc-ruling-scli-intl/index.html>.

123. *Id.* (noting that “even Kiribati’s dire situation did not meet the threshold”).

124. I am indebted to Calvin Bryne for identifying many of these. See Bryne, *supra* note 44, at 777–83.

for adaptation to the impacts of climate change,”¹²⁵ but it did not address climate refugees with any specificity. The International Labour Organization (ILO), a UN agency tasked with promoting labor justice, has also called for the recognition of rights of migrant workers,¹²⁶ but the ILO’s resolutions likewise fail to specifically address climate refugees, as do the Guiding Principles on Internal Displacement, published by the UN Office of the High Commissioner for Human Rights.¹²⁷

In more recent years, some international bodies have called for the specific protection of those displaced by climate change, but these demands are unfortunately largely aspirational and fail to bind the United States. The African Union adopted a convention in 2009, which called on African nations to “take measures to protect and assist persons who have been internally displaced due to natural or human made [sic] disasters, including climate change,” but it only applies to persons “in Africa.”¹²⁸ In 2011, a UNFCCC working group urged countries to embark on “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels,”¹²⁹ but this request imposed no demands on these countries, nor could it.¹³⁰ In 2013, representatives from ten countries, including the United States, gathered in Australia and adopted the Peninsula Principles on Climate Displacement within States, which “provide a comprehensive normative framework, based on principles of international law, human rights obligations and good practice, within which the rights of climate displaced persons within States can be addressed.”¹³¹ Yet these principles simply set out a framework, not a set of binding legal obligations.¹³²

Most of the international law protecting Indigenous peoples likewise falls short of protecting climate refugees. In 1994, the United States ratified the International Convention on the Elimination of all Forms of Racial

125. U.N. Framework Convention on Climate Change, art. 4(1)(b), (c), May 9, 1992, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107.

126. G.A. Res 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990).

127. Francis M. Deng (Representative of the Secretary-General), *Human Rights, Mass Exoduses, and Displaced Persons, Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/ Add.2 (Feb. 11, 1998). Gil Marvel P. Tabucanon has noted that many countries have accepted the “authoritative character” of the Guiding Principles, and many international tribunals have relied on them, but they remain “non-binding.” Tabucanon, *supra* note 104, at 30–31.

128. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), art. 5(4), Oct. 23, 2009.

129. U.N. Framework Convention on Climate Change, *The Cancun Agreements Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, para. 14(f) (Mar. 15, 2011).

130. *Id.* (distinguishing between “this decision” and “a legally binding outcome in the future”).

131. See Displacement Sols., *Peninsula Principles on Climate Displacement Within States*, princ. 1(a) (2013), <http://displacementsolutions.org/wp-content/uploads/2014/12/Peninsula-Principles.pdf>.

132. Bonnie Docherty, *General Obligations*, in REPAIRING DOMESTIC CLIMATE DISPLACEMENT: THE PENINSULA PRINCIPLES 74 (Scott Leckie & Chris Huggins, eds., 2015).

Discrimination,¹³³ and subsequent declarations by the UN call on ratifying nations to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”¹³⁴ However, such recommendations are nonbinding.¹³⁵ The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, more forcefully states that “Indigenous peoples shall not be forcibly removed from their lands or territories” and that “[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just compensation and, where possible, the option of return.”¹³⁶ Indeed, the Declaration goes even further, as Gil Marvel P. Tabucanon has pointed out: Indigenous people have a “right not to be subjected to forced assimilation or destruction of their culture,”¹³⁷ and countries must

provide effective mechanisms for prevention of, and redress for . . . [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources; . . . [and] [a]ny form of forced population transfer which has the aim or effect of violating or undermining any of their rights.¹³⁸

Yet the United States was one of just four nations to vote against the Declaration, and, in any event, it is also nonbinding.¹³⁹ The UN Conference on Environment and Development’s ambitious (and controversial)¹⁴⁰ Agenda 21, which calls on states to protect Indigenous communities “from activities that are environmentally unsound” and which the United States has ratified,¹⁴¹ is simply a statement of intent, not a binding treaty.

There is one binding international agreement that would seem to apply to Indigenous climate refugees. The ILO’s Indigenous and Tribal Peoples Convention prohibits the relocation of Indigenous peoples from their homeland unless such removal becomes “necessary,” and then it must be undertaken with the Indigenous peoples’ “free and informed consent,”¹⁴² and they must be “provided in all possible cases with lands of quality and legal status at least equal

133. G.A. Res. 2106 (XX), annex, International Convention for the Elimination of All Forms of Racial Discrimination, 20 UN GAOR Supp. (No. 14), UN Doc. A/6014 (1966) (Dec. 21, 1965).

134. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 23 on Indigenous Peoples, UN Doc. A/52/18, annex V (1997).

135. Tabucanon, *supra* note 104, at 31–32.

136. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, at art. 10, UN Doc. A/RES/61/295, (Oct. 2, 2007).

137. *Id.* at art. 8(1).

138. *Id.* at art. 8(2).

139. Tabucanon, *supra* note 104, at 32. For still another nonbinding international agreement, see Organization of American States, Proposed American Declaration on the Rights of Indigenous Peoples, art. XIII.1, in *Annual Report of the Inter-American Commission on Human Rights to the Twenty-Seventh Regular Session of the General Assembly*, Ch. IV, OEA/Ser.G/CP/doc.2882/97 (Apr. 15, 1997).

140. Caitlin Dickson, *Agenda 21 The U.N. Conspiracy That Just Won’t Die*, DAILY BEAST (Apr. 13, 2014), <https://www.thedailybeast.com/agenda-21-the-un-conspiracy-that-just-wont-die>.

141. U.N. Conference on Environment and Development, Agenda 21, annex 2, ch. 26, para. 3(a), U.N. Doc. A/CONF.151/26/Rev.1 (Vol.II) (1992).

142. U.N. Int’l Labor Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), arts. 16(1)-(2), 72 ILO Official Bull. 59, 28 ILM 1382 (1989).

to that of the lands previously occupied by them, suitable to provide for their present needs and future development.”¹⁴³ This Convention is a binding treaty, but it has only been ratified by two dozen countries; unsurprisingly, the United States is not one of them.¹⁴⁴

In spite of the limitations of international law, some Indigenous individuals fleeing climate change have sought relief by declaring themselves “refugees.” The courts of New Zealand have heard some of the first of these appeals, and their response has been weak and insufficient. In 2015, for instance, a person from the small and vulnerable island nation of Kiribati sought refugee status on the basis of rising sea levels threatening to destroy his home country. The New Zealand Supreme Court rejected this claim, concluding that displacement induced by climate change did not make an applicant eligible for refugee status under international law.¹⁴⁵ The year before, a family from another sinking island nation, Tuvalu, sought a visa as refugees, arguing that climate change made them fear returning to their home.¹⁴⁶ Their request was denied, and the family appealed; a New Zealand immigration tribunal acknowledged that the family had established “exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand.”¹⁴⁷ Nonetheless, the tribunal declined to explicitly hold that climate change could provide a basis for granting a resident visa, relying on other factors to permit entry for this particular family.¹⁴⁸

Indeed, “[b]etween 2000 and 2015, there were over twenty cases in Australia and New Zealand where people from Tuvalu and Kiribati argued that they should receive refugee protection from climate change impacts, but all failed.”¹⁴⁹ The decisions of the New Zealand courts make unfortunate sense in the context of New Zealand’s colonial history. As Paul McHugh has noted, New Zealand’s courts have “an essentially ahistorical, highly idealized, not to say

143. *Id.* at art. 16(4).

144. Tabucanon, *supra* note 104, at 33. As a result of its binding nature, this Convention has resulted in significant legal victories for Indigenous people in Colombia and Argentina, see Nicholas Kaldawi, *Indigenous Health Policy in the United States and Latin America: The Marshall Trilogy and the International Human Rights Approach*, 33 ARIZ. J. INT’L & COMP. L. 481, 494–95 (2016), and it has influenced policy in countries ranging from Cambodia to Norway, see Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*, 79 NORDIC J. INT’L L. 433, 453–55 (2010).

145. *Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107 (N.Z.); see also *Legal Issues in Climate Change Litigation*, 23 E. & CENT. EUR. J. ON ENVTL. L. 75, 80 (2017). As alluded to above, see *supra* notes 122–123, the U.N. Human Rights Committee recently ruled that even Teitiota did not meet its newly articulated imminent risk threshold to qualify as a refugee.

146. *In re: AD (Tuvalu)* [2014] NZIPT 501370-371 (N.Z.).

147. *Id.*

148. *Legal Issues in Climate Change Litigation*, *supra* note 145, at 80.

149. Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 WINDSOR Y.B. ACCESS JUST. 1, 5 (2016); see also Rana Balesh, *Submerging Islands Tuvalu and Kiribati as Case Studies Illustrating the Need for a Climate Refugee Treaty*, 5 EARTH JURIS. & ENVTL. JUST. J. 78, 78 (2015).

patriarchal, sense of constitutional being,” and its common law retains “a highly Anglocentric manner of conceiving the history and character of the New Zealand constitution,” especially when it comes to dealing with the country’s Indigenous peoples.¹⁵⁰ This has apparently influenced the way New Zealand courts treat other countries’ Indigenous peoples as well.

There are some indications, however, that Indigenous communities may have more luck invoking the binding ILO Convention in international tribunals. In 2001, the Awas Tingni community of eastern Nicaragua won a case in the Inter-American Court of Human Rights,¹⁵¹ preventing the Nicaraguan government from allowing logging on the community’s traditional lands without its consent.¹⁵² The Inter-American Court relied on the ILO Convention to reach its judgment, “even though Nicaragua was not a party at that time to the Convention.”¹⁵³ In two subsequent cases, the Inter-American Court ruled that Paraguay could not expropriate the traditional lands of the Exnet-Langua people without providing equivalent lands, based on the Indigenous community’s right to life.¹⁵⁴ These decisions provide encouraging first steps, but they were not about Indigenous climate refugees. Furthermore, though the Inter-American Court’s judgments are binding on countries that have accepted its jurisdiction, the United States has not.¹⁵⁵ Interestingly, this has not stopped several American Indians from filing suit in the Inter-American Court, arguing successfully that the United States government was encroaching on their traditional lands,¹⁵⁶ but the United States government has not changed its position.¹⁵⁷

150. P.G. McHugh, *Tales of Constitutional Origin and Crown Sovereignty in New Zealand*, 52 U. TORONTO L.J. 69, 71 (2002).

151. This is a judicial body associated with the Organization of American States, which adjudicates whether States have violated human rights. See generally JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2d ed. 2013).

152. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., No. 11.577, ¶ 137 (Aug. 31, 2001).

153. *Tabucanon*, *supra* note 104, at 34.

154. *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter.-Am. Ct. H.R., No 146, ¶ 248 (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Inter.-Am. Ct. H.R., No. 125, ¶ 242 (June 17, 2005).

155. Jennifer A. Amriott, Note, *Environment, Equality, and Indigenous Peoples’ Land Rights in the Inter-American Human Rights System Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL. L. 873, 889 (2002).

156. *Mary & Carrie Dann v. United States*, Inter-Am. Ct. H.R., No. 11.140, ¶ 91 (Sept. 27, 1999); *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Act and Omission of the United States* (Dec. 7, 2005), <https://perma.cc/R33S-CPNL>. The Danns prevailed, though the Commission has no means to enforce its rulings. *Mary & Carrie Dann v. United States*, Inter-Am. Ct. H.R., No. 11.140, ¶ 94 (Dec. 27, 2002).

157. In addition, while this Article was in the midst of the editorial process, five Indian communities (including Kivalina and Isle de Jean Charles) appealed to the United Nations to intervene. See Nick Martin, *America’s Climate Refugees Are Pleading for Help. The Government Has No Answer*, NEW REPUBLIC (Jan. 24, 2020), <https://newrepublic.com/article/156299/americas-climate-refugees-pleading-help-government-no-answer>. Such an appeal, while powerful symbolically, “is largely aesthetic . . . [as] there is little that the intergovernmental body can do” to bind the United States. *Id.*

B. U.S. Government Response

There is no federal statute that specifically addresses climate refugees, much less Indigenous climate refugees, much less Indian communities seeking refuge from climate change. Further, there is no federal agency—indeed, no federal funding—dedicated to addressing climate refugees.¹⁵⁸ Throughout the past century, the United States has relocated communities facing environmental catastrophe, but these relocations have been largely ad hoc and the result of government largesse, not based on any notion of a right to resettlement. A brief survey of relevant American law and history demonstrates the importance of locating such a right.

One of the few areas of federal law that could potentially provide some measure of relief to climate refugees would be immigration law. Under federal law, the attorney general may grant “temporary protected status” (TPS) to a citizen of a foreign country if she finds that “there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected.”¹⁵⁹ The attorney general has done so repeatedly in the past, such as when Hurricane Mitch struck Honduras in 1999¹⁶⁰ and when earthquakes devastated El Salvador in 2001¹⁶¹ and Haiti in 2010.¹⁶² Yet TPS is definitionally temporary, and also discretionary, so “it does not represent a long-term solution to climate-induced migration.”¹⁶³ Further, it applies only to residents of foreign countries, so it provides no solution at all to American Indian communities.

Federal disaster relief statutes could also potentially provide much-needed aid, yet their terms do not seem to encompass harms induced by climate change. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) of 1988 enables the federal government to provide support and money to state and local governments for “major disasters” and “emergencies.”¹⁶⁴ Yet, as multiple scholars have shown, the conditions exacerbated by climate change, which make relocation so vital, do not fit easily into the Stafford Act’s definition of either major disasters or emergencies.¹⁶⁵ This is largely because the Stafford Act is framed in reference to singular events—“tidal wave, tsunami, earthquake,

158. Stein, *supra* note 80.

159. 8 U.S.C. § 1254a(b)(1)(B)(i) (2018).

160. Mejia Rodriguez v. U.S. Dep’t of Homeland Sec., 562 F.3d 1137, 1140 (11th Cir. 2009).

161. Alas-Murcia v. U.S. Att’y Gen., 589 F.App’x 441, 443 (11th Cir. 2014).

162. NAACP v. U.S. Dep’t of Homeland Sec., 364 F. Supp. 3d 568, 571–72 (D. Md. 2019).

163. Bryne, *supra* note 44, at 784; see also Carey DeGenaro, *Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond*, 86 U. COLO. L. REV. 991, 994–96 (2015).

164. 42 U.S.C. §§ 5121–5123 (2018).

165. See Kelley Pettus, Note, *The First American Climate Refugees and the Need for Proactive Relocation*, 87 GEO. WASH. L. REV. 172, 183–84 (2019); Jennifer J. Marlow & Lauren E. Sancken, *Reimagining Relocation in a Regulatory Void: The Inadequacy of Existing US Federal and State Regulatory Responses to Kivalina’s Climate Displacement in the Alaskan Arctic*, 7 CLIMATE L. 290, 301–02 (2017).

volcanic eruption, landslide, mudslide”¹⁶⁶—as opposed to slow-moving, gradual conditions. The Hazard Mitigation Grant Program, administered by Federal Emergency Management Agency (FEMA), is likewise unable to provide Indian communities with “a practical means of addressing its climate-based hazards.”¹⁶⁷ The same is true of the National Flood Insurance Program, which FEMA also administers.¹⁶⁸

History provides more instructive guidance for communities fleeing environmental catastrophe. “Following the great Dust Bowl, the epic flood of 1927, and the Great Depression,” wrote Julie Koppel Maldonado and her coauthors,

cities and states made laws against those who migrated to other regions for subsistence. When squalor conditions in cities became a health and human rights issue . . . President Roosevelt instituted policies regarding relocation and subsistence farms, resulting in a complex network of 100 federally funded multidimensional relocation projects across the US.¹⁶⁹

More recently, the U.S. Department of Housing and Urban Development (HUD) granted \$48.3 million to the Indian village of Isle de Jean Charles, Louisiana, which has been forced to relocate because of climate change.¹⁷⁰ This is the first federal grant of this scale for an Indian community forced to flee climate catastrophe, and it could provide a model for future relocation efforts. “We see this as setting a precedent for the rest of the country, the rest of the world,” one HUD administrator told the *New York Times*.¹⁷¹ Yet the Isle de Jean Charles grant was also a completely discretionary decision by the federal government, not the result of a broadly enforceable right, so it is not something vulnerable communities can rely on.

The federal government has also agreed to relocate entire communities when it acknowledges its culpability in making their homes unlivable. For instance, following American nuclear testing near the Marshall Islands in the 1940s and 1950s, the United States entered into a Compact of Free Association (COFA) with the Marshallese government, allowing Marshallese to relocate to the United States without visas.¹⁷² In the COFA, the federal government explicitly “accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens . . . resulting from the nuclear testing program [of] the Government of the United States.”¹⁷³ As a result of the COFA, thousands of Marshallese have relocated in the United States; many more

166. 42 U.S.C. § 5122.

167. Marlow & Sancken, *supra* note 165, at 302; *see also* Pettus, *supra* note 165, at 185.

168. Marlow & Sancken, *supra* note 165, at 306.

169. Maldonado, *supra* note 66, at 609.

170. The specific condition leading to the relocation was increased flooding, as a result of rising sea levels. *See* Stein, *supra* note 80.

171. Davenport & Robertson, *supra* note 83.

172. Compact of Free Association Act, U.S. Public Law 99-239, 99 Stat. 1770 (1986).

173. *Id.* at § 177(a); *see also* Tabucanon, *supra* note 104, at 34.

have done so recently not because of the legacy of nuclear testing, but because of increasingly devastating storms.¹⁷⁴ Yet this relocation has been far from perfect. The Marshallese have faced some discrimination in the United States,¹⁷⁵ and many have suffered economic and socio-cultural dislocations.¹⁷⁶ And the COFA is set to expire in 2023.¹⁷⁷ Once again, this does not provide an immediately reproducible model for hundreds of Indian communities.

Recent examples of Indian communities attempting to relocate confirm the great importance of having a *right*, not relying on ad hoc government largesse. Newtok is “the most advanced in its relocation efforts” among vulnerable Alaskan Native communities, according to the scholar Robin Bronen.¹⁷⁸ “The community has identified a relocation site and has acquired the land through an act of Congress. A state agency planner has also been dedicated to coordinating the efforts of approximately 25 different government agencies to facilitate relocation.”¹⁷⁹ However, Bronen continued,

these agencies have no mandate or dedicated funding for relocation assistance. Complex regulations that guide the work of each agency also present tremendous roadblocks to moving forward with the relocation effort. The regulations of several agencies require that an existing community with a minimum population be at the site before infrastructure is built. The agencies responsible for erosion control and flood prevention have no regulatory guidance to relocate the communities. In addition, there is no lead agency designated to create a relocation strategy and coordinate the various agencies working on housing, transportation, community infrastructure, education, health and related socio-economic needs. The indigenous tribes are also hampered because of limited administrative and technical staff to work with multiple state and federal agencies on relocation activities.¹⁸⁰

Even though Alaska’s governor created a working group to provide protection to endangered communities, its work “has been challenging because relocation is the only durable solution, and no government agency has the authority or experience to relocate communities.”¹⁸¹ Without a concrete right, federal relocation efforts will continue to be slow and unreliable, when undertaken at all.

174. Yamada, *supra* note 53, at 95.

175. *Id.*

176. Tabucanon, *supra* note 104, at 17; *see also* Kirsch, *supra* note 103.

177. Yamada, *supra* note 53, at 95.

178. Bronen, *supra* note 77.

179. *Id.*

180. *Id.*; *see also* Marlow & Sancken, *supra* note 165, at 314 (“Relocation exposes the inapplicability of existing regulations to aid communities attempting to relocate in a predisaster context and, more specifically, Kivalina’s experience that the worsening disruption of village social, economic, and cultural livelihoods is a direct consequence of this legal and policy gap.”).

181. Bronen, *supra* note 77.

C. State Government Response

Most of the scholarship on potential American legal bases for the relocation of those displaced by climate change has focused on federal law, but an alternative exists under state law. Even though several state constitutions contain promising language, courts have been reluctant to interpret this language in a way that could give Indian communities a right or a cause of action. Further, while several states have assisted in relocation efforts—consider the earlier examples of Odanah and Newtok—this has, as with the federal government, all been ad hoc and unpredictable.

According to the legal scholar Rebecca Tsosie, “Most state constitutions contain the general disclaimer of state jurisdiction over Indian lands that was a condition of being admitted to statehood,” but few of these have been interpreted as “supporting recognition of ‘special rights’ for Native people”¹⁸² Two state constitutions, however, have constitutional provisions “specifically addressing the unique culture and status of Native peoples: Montana and Hawai’i.”¹⁸³ The Montana constitution declares, “The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.”¹⁸⁴ Tsosie has commented, “This constitutional provision is quite unique and does not have a counterpart in any other state constitution.”¹⁸⁵ The Hawai’i constitution, while not as strong, nonetheless “reaffirms” that the state “shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”¹⁸⁶

Tsosie did not consider the potential of these constitutional provisions to support an Indian right to resettlement, but these provisions should be understood in the context of complementary constitutional rights to the environment. Montana’s constitution states,

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.¹⁸⁷

Hawai’i’s constitution states,

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and

182. Rebecca Tsosie, *The Challenge of Differentiated Citizenship Can State Constitutions Protect Tribal Rights?*, 64 MONT. L. REV. 199, 211 (2003).

183. *Id.* at 214.

184. MONT. CONST. art. X § 1(2) (amended 1972, current through 2017).

185. Tsosie, *supra* note 182, at 217.

186. HAW. CONST. art. XII, § 7 (amended 1978, current through 2019).

187. MONT. CONST. art. II, § 3 (amended 1972, current through 2017).

conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.¹⁸⁸

Together, the Indian rights' provisions and the environmental provisions could support a right of Indian communities threatened with environmental devastation to resettlement. In particular, Hawai'i's environmental provision grants citizens the ability to enforce their "right to a clean and healthful environment" against the state.¹⁸⁹ However, any argument for resettlement based on these constitutional provisions would be stretching their meaning beyond the intent of the constitutions' framers, and, further, courts in Montana in particular have interpreted these provisions fairly conservatively. In Montana, the state supreme court has scrupulously avoided giving substantive meaning to environmental provisions, evincing what one scholar called "judicial restraint, not activism."¹⁹⁰ Meanwhile, "for thirty years the [Indian rights'] provision has merely served as a hortatory statement on the ideals to be achieved by state law . . . the 'full promise' of the provision has not been achieved."¹⁹¹

In Hawai'i, Indian communities might have a more plausible argument that they have a right to resettlement. The Hawai'i Supreme Court recently ruled that the environmental right guaranteed in the constitution "is a substantive right . . . a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process."¹⁹² Further, the state supreme court has ruled that agencies undertaking or approving development of undeveloped land must first consider Indigenous Hawaiians' gathering rights.¹⁹³ However, the court has also written, "the [environmental] right is defined by existing law relating to environmental quality,"¹⁹⁴ which is a limited construction. Hawai'i's responsibility to protect its Native peoples will be discussed further in Subpart III.A.3.

Other state constitutions include rights to a clean environment, though not specific rights for Indian communities. For instance, Illinois's constitution states, "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General

188. HAW. CONST. art. XI, § 9 (amended 1978, current through 2019).

189. *Id.*

190. Jack Tuholske, *Going with the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation*, 72 MONT. L. REV. 237, 249 (2011).

191. Tsosie, *supra* note 182, at 217. Although in 1999 Montana enacted legislation to implement the constitutional provision, H.B. 528, 56th Leg. (Mont. 1999), this does not appear to have extended the provision's force beyond the educational realm.

192. *In re Maui Elec. Co.*, 408 P.3d 1, 13 (Haw. 2017).

193. *Public Access Shoreline Hawaii v. Hawai'i Cty. Planning Comm'n*, 903 P.2d 1246, 1272 (Haw. 1995) (holding that "to the extent feasible . . . the [government] must protect the reasonable exercise of customary or traditional rights" on land that has not yet "reached the point of 'full development'").

194. *In re Maui*, 408 P.3d at 13.

Assembly may provide by law.”¹⁹⁵ In theory, this could give Indians the right to compel the government, or even a private carbon polluter, to finance their relocation. But this would be a stretch, and the general assembly has not enacted a law addressing climate refugees. Further, the Illinois Supreme Court has not been receptive to creative uses of this constitutional provision. In 2015, the court ruled that, while the constitution “gives private citizens the right to enforce this right . . . [this] does not create any new causes of action Therefore, although plaintiff need not allege a special injury to bring its environmental claim, there must nevertheless still exist a cognizable cause of action.”¹⁹⁶ In another case, the court interpreted the provision narrowly, holding that the right to a “healthful environment” was not intended to include the protection of endangered species.¹⁹⁷ State courts across the country have likewise settled on very narrow constructions of statutes that could have theoretically given citizens the right to sue state or private parties to fund a relocation.¹⁹⁸

D. Climate Change Litigation

If international law, federal statutory law, and state law do not clearly give Indian communities a right to resettlement, they might consider bringing suit to compel either relocation, or the provision of funding for relocation, from the government or from private parties. Such a claim could be vested in constitutional rights, such as equal protection or due process, or common law rights, such as nuisance or public trust. Such claims are creative and certainly worth pursuing, but recent cases suggest they are unlikely to find immediate supporters within the federal judiciary. This does not mean Indian communities should not bring such cases—far from it—but it does mean that if these communities are searching for an existing right to relocation, they must look elsewhere.

In an effort to secure the funds for relocation, some Indian communities have sought to use common law nuisance suits. For instance, the Alaskan village of Kivalina brought suit against two dozen oil, energy, and utility companies in 2009, seeking damages under a federal nuisance claim, “based on their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming.”¹⁹⁹ Yet the court dismissed the claim in part on the grounds that Kivalina lacked standing to sue, a holding that was affirmed by the Ninth Circuit.²⁰⁰ The Fifth Circuit reached a similar result in a nuisance, trespass, and negligence case that several Gulf Coast

195. ILL. CONST. art. XI, § 2 (amended 1977, current through 2019).

196. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012).

197. *Glisson v. City of Marion*, 720 N.E.3d 1034, 1041–42 (Ill. 1999).

198. See Scott W. Stern, *Standing for Everyone* *Sierra Club v. Morton*, *Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 *FORDHAM ENVTL. L. REV.* 21, 91–97 (2018).

199. *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 868 (D.N. Cal. 2009).

200. *Id.* at 868, *aff'd*, 696 F.3d 849, 868–69 (9th Cir. 2012).

landowners had filed against energy companies.²⁰¹ Several district courts reached the same result in cases brought by municipalities against energy companies,²⁰² further indicating a lack of judicial receptiveness to creative nuisance arguments.²⁰³

Other communities have sought to use equal protection and due process suits, with similarly dispiriting results. As mentioned in the introduction to this Article, when the youth of Alaska sued the state for violating their equal protection and due process rights, the court dismissed the complaint because it raised “non-judicial political questions,”²⁰⁴ drawing on a 2014 decision by the Alaska Supreme Court in another climate change case filed by minors from across the state.²⁰⁵ The District Court for the Eastern District of Pennsylvania likewise recently dismissed a case in which minors sued the president, secretaries of Energy and the Interior, the departments themselves, and Environmental Protection Agency, for violating their due process rights through environmental “rollbacks.”²⁰⁶

Nonetheless, some academics have remained hopeful about the prospect of climate change litigation,²⁰⁷ and others have pointed out that, even when unsuccessful, such litigation can drive policy changes.²⁰⁸ Further, some common law and constitutional climate lawsuits survived motions to dismiss far longer than many critics expected, most notably the *Juliana* case.²⁰⁹ There may be an

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

202. Order Granting Motion to Dismiss Amended Complaints at 15–16, *City of Oakland v. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018); Opinion and Order Dismissing Amended Complaint at 3–8, 23, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018) (No. 18 Civ. 182 (JFK)).

203. On courts’ general unwillingness to allow climate claims to go to trial, see Katrina Fischer Kuh, *The Legitimacy Judicial Climate Engagement*, 46 *ECOLOGY L.Q.* 731, 731 (2019).

204. *Sinnok v. State*, No. 3AN-17-09910 CI, 2018 WL 7501030, at *4 (Alaska Super. Ct. Oct. 30, 2018).

205. *Kanuk v. State*, 335 P.3d 1088, 1091 (Alaska 2014) (upholding the dismissal of a complaint from “minors from communities across Alaska . . . [because] the claims involved political questions best answered by other branches of state government”).

206. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 243 (D.E. Pa. 2019); see also *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012).

207. See, e.g., Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 *ENVIRONS: ENVTL. L. & POL’Y J.* 47, 68 (2017); Mary Christina Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 *WASH. ENVTL. L. REV.* 633, 683 (2016); Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 *ENVTL. L.* 259, 260 (2015).

208. See, e.g., David Markell, *Can Nonstatutory Federal Climate Litigation Drive Federal Climate Policy?*, 49 *TRENDS* 12, 14 (2017); Theodore Okonkwo, *Protecting the Environment and People from Climate Change Through Climate Change Litigation*, 10 *J. POLS. & L.* 66, 67 (2017); Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, in *CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES* 568 (ELI Press, 2016) (stating “[a]lthough courts are not the best avenue to pursue effective and comprehensive regulation of climate change, the common law can be a powerful mechanism to goad proper regulatory responses to climate change impacts.”).

209. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Ore. 2016). In this case,

additional equal protection argument to be made in the climate relocation context, as government disaster relief is quite inequitably distributed, with more aid going to wealthier and whiter Americans.²¹⁰ This litigation remains among the most novel and symbolically powerful methods of seeking recompense for state or private contributions to climate change. Still, Indian communities seeking relocation likely need to consider alternative options.

E. Private Sector Response

As previously discussed, some citizens have brought suit against private fossil fuel companies, seeking compensation for climate harms.²¹¹ So far, such litigation has not borne fruit, though it may down the road. Some scholars, however, have proposed alternative methods through which the private sector could be compelled to pay for climate relocation. Randall S. Abate, for instance, has advocated for the creation of “a relocation fund that would provide proactive relocation funding to these communities that are most vulnerable and in need of assistance.”²¹² He suggested financing such a fund with a carbon tax comparable to the funding mechanism that finances the “Superfund” under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²¹³ Abate pointed out that other countries, including Australia, have created similar funds, in part relying on private money.²¹⁴ He also pointed to the Victim Compensation Fund of 2001 and the BP Oil Spill Fund as valuable models.²¹⁵ This is a laudable idea, yet there does not currently seem to be much political appetite for this kind of tactic in the United States.

a group of young people between the ages of eight and nineteen . . . allege [that the United States has] known for more than fifty years that the carbon dioxide (“CO₂”) produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia,

and that the government’s failure to act to ameliorate this damage “violate[s] their substantive due process rights to life, liberty, and property, [and the government’s] obligation to hold certain natural resources in trust for the people and for future generations.” *Id.* at 1233. On January 17, 2020, a three-judge panel of the Ninth Circuit dismissed the *Juliana* complaint, finding that the plaintiffs had fulfilled the injury prong of standing but not the redressability prong, and that the “plaintiffs’ case must be made to the political branches or to the electorate at large . . .” No. 18-36802, 2020 U.S. APP. LEXIS 1579, at *32 (9th Cir. Jan. 17, 2020). That same day, the plaintiffs announced they would request a rehearing en banc. *See* Julia Olson et al., *Decision of Divided Ninth Circuit Court of Appeals Finds Primarily for Juliana Plaintiffs, but Holds Federal Judiciary Can Do Nothing to Stop the U.S. Government in Causing Climate Change and Harming Children* (Jan. 17, 2020), <https://perma.cc/625V-UY2Y>. As of the publication of this Article, such a rehearing has not yet occurred.

210. *See* Rebecca Hersher, *How Federal Disaster Money Favors the Rich*, NAT’L PUB. RADIO (Mar. 5, 2019), <https://www.npr.org/2019/03/05/688786177/how-federal-disaster-money-favors-the-rich>.

211. *Supra* notes 199–206, 209.

212. Abate, *supra* note 115, at 13.

213. *Id.* at 13–14. Jason Iverson made a similar argument in a 2013 note. *See* Jason Iverson, *Funding Alaska Village Relocation Caused by Climate Change and Preserving Cultural Values During Relocation*, 12 SEATTLE J. SOCIAL JUST. 561, 586–88 (2013).

214. Abate, *supra* note 115, at 28–30.

215. *Id.* at 33–34.

F. More Creative Responses

Considering the difficulties present in each of these strategies, Indian communities in need of relocation may consider alternative strategies to compelling governments or private actors to support their resettlement. This Subpart addresses several strategies that scholars have proposed, under both international and domestic law. Ultimately, none provides a right to resettlement, as this Article argues the federal trust duty does.

1. International Law

Acknowledging the failure of international law to provide for, or even comprehend, climate refugees, many scholars have advocated new international legal agreements. Rana Balesh has argued for “a comprehensive climate change refugee treaty that includes provisions for sovereignty, relocation and funding.”²¹⁶ Benoit Mayer has advocated for the UN General Assembly to endorse a framework recognizing the rights of climate refugees.²¹⁷ Robin Bronen has proposed the creation of “Guiding Principles of Climigration.”²¹⁸ Many other scholars have made similar proposals.²¹⁹ These proposals attest to the pressing need for international cooperation in addressing the almost unthinkable harms wrought by climate change, and some form of treaty or framework may come to pass in the not-too-distant future. At the moment, however, it is hard to imagine the United States submitting to any kind of binding international agreement, much less one requiring it to accept climate refugees.

Taking a slightly different tack, but also emphasizing the failure of international law, Teresa Thorp has advocated the use of “transitional legal frameworks”—such as tribunals, truth commissions, and hybrid frameworks of domestic and international composition—to “protect the individual and collective rights of current and future generations in the climate change context [which] may . . . at least partially remedy existing and potential harms while advancing solidarity.”²²⁰

Finally, Rebecca Tsosie has argued for a “new conception of rights” to “address the unique harms of climate change” as they impact Indigenous peoples.²²¹ She discussed four theoretical bases for “an indigenous right to

216. Balesh, *supra* note 149, at 81.

217. Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 *COLO. J. INT'L ENVTL. L. & POL'Y* 357, 357 (2011).

218. Bronen, *supra* note 93, at 394 (advocating the creation of an international institutional framework to guide relocation and ensure it is grounded in justice, respect, and equity).

219. Jane McAdam, *Refusing Refuge' in the Pacific (De)constructing Climate-Induced Displacement in International Law*, in *MIGRATION AND CLIMATE CHANGE* 104 (Etienne Piguet et al. eds. 2011) (listing several of these); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *HARV. ENVTL. L. REV.* 349, 357 (2009).

220. Thorp, *supra* note 117, at 68.

221. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 *U. COLO. L. REV.* 1625, 1625 (2007).

environmental self-determination” and concluded that this right must exist “outside domestic law.”²²² Once again, these solutions are laudable,²²³ yet the United States has historically refused to submit to international adjudicatory authority or recognize substantive international human rights law.

2. *Domestic Law*

Emphasizing self-reliance, Elizaveta Barrett Ristroph has pointed out that several Alaskan Indigenous villages have eschewed reliance on government and simply relocated themselves, as Nuiqsut and Chenega Bay did, with tents and small cabins, in the 1970s.²²⁴ This strategy “depends on the willingness of at least some residents to live in an unfinished community in order to make it a reality,” she wrote.²²⁵ “This could be more appealing for communities that currently lack indoor plumbing than for those that have functioning systems.”²²⁶ It might be more appealing to some communities, she continued, to co-relocate, drawing on a history of cooperating or confederating.²²⁷ Alternatively, villagers could move together to an existing hub community—that is, one close in proximity to the original site and to which villagers already have familiarity.²²⁸

Many scholars have suggested amending federal disaster response statutes to allow for proactive climate relocation. In a 2019 note, Kelley Pettus suggested adding a third category of disaster response to the Stafford Act for impending climate change disasters, “which would trigger certain types of federal grants to assist with relocation of vulnerable communities facing the most critical effects of climate change.”²²⁹ Pettus pointed out that “both former President Obama and current President Trump declined to recognize the impacts of erosion and climate change in Alaska as a major federal disaster,” preventing Indigenous Alaskan communities from accessing funding or relocation services from FEMA or HUD.²³⁰ Other scholars have called for broadening or making more effective use of FEMA’s Public Assistance Program,²³¹ FEMA’s Pre-Disaster Mitigation Program,²³² HUD’s Indian Community Development Block Grant program,²³³ and the Department of Agriculture’s Natural Resources Conservation Service.²³⁴

222. *Id.* at 1651, 1654–57.

223. For skepticism of international law solutions to the climate change-induced displacement, see McAdam, *supra* note 219.

224. Elizaveta Barrett Ristroph, *When Climate Takes a Village: Legal Pathways Toward the Relocation of Alaska Native Villages*, 7 CLIMATE L. 259, 275 (2017).

225. *Id.*

226. *Id.*

227. *Id.* at 276.

228. *Id.* at 278.

229. Pettus, *supra* note 165, at 172.

230. *Id.* at 176–77.

231. Iverson, *supra* note 213, at 594–95, 598.

232. Ristroph, *supra* note 224, at 279–80.

233. Iverson, *supra* note 213, at 596, 598–99; Ristroph, *supra* note 224, at 281–82.

234. Ristroph, *supra* note 224, at 280–81.

Still others have called for broadening immigration statutes. For instance, in a 2017 article Katrina M. Wyman highlighted three programs the United States could expand to admit foreign climate migrants under existing domestic law: (1) humanitarian parole,²³⁵ (2) temporary protected status (TPS), and (3) temporary low-skilled labor migration programs.²³⁶ Emily Naser-Hall has argued for the creation of a new “visa-type program” for environmentally displaced persons.²³⁷ Casey DeGenaro has assessed an immigration reform bill proposed by Senator Brian Schatz of Hawai’i, which has a section devoted to “Specific Consideration of Stateless Groups of Individuals,”²³⁸ and concluded that, while it is “an important starting point,” it fails to be nearly comprehensive enough.²³⁹ Any changes to the American immigration system along these lines would do tremendous good, but they would not address the unique problems faced by Indian villages confronting annihilation.

Finally, some scholars have come close to advocating a litigation strategy founded on the federal trust duty, though none has explored this idea in doctrinal depth. For instance, Randall S. Abate noted in passing in a discussion of Kivalina suing to fund its relocation, “The federal government has a treaty-based trust relationship that requires the federal government to vigorously protect these tribes’ interests and protect them from harm.”²⁴⁰ Jonathan M. Hanna, in his 2007 report on Indian communities and climate change, wrote that “[a] number of factors compel the federal government to take action to address the severe and disparate impact that climate change will have on native communities. At the heart of this obligation is the trust responsibility, which requires the federal government to protect tribal land and resources.”²⁴¹ However, his analysis of the trust duty was limited to just a single paragraph.²⁴² E. Rania Rampersad devoted several pages of a 2009 note arguing for a “stewardship claim and trust fund remedy,” under which Indians could sue a “company or corporation” for contributing to climate change, which harmed their land; a court could then order damages, which would be placed into a trust for the Indians, who would be the

235. 8 U.S.C. § 1182(d)(5)(A) (2018). Parole is when an alien is allowed into the interior of the United States without this being an “entry” for immigration purposes. It is typically for aliens to visit dying relatives, serve as witnesses for trial, receive medical treatment, etc. *Id.*

236. Katrina M. Wyman, *United States’ Options for Receiving Cross-Border Climate Migrants*, 7 CLIMATE L. 232, 237–53 (2017).

237. Emily Naser-Hall, *Square Pegs in Round Holes: The Case of Environmentally Displaced Persons and the Need for a Specific Protection Regime in the United States*, 22 TULANE J. INT’L & COMP. L. 263, 298 (2014).

238. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3413).

239. DeGenaro, *supra* note 163, at 1033–34.

240. Abate, *supra* note 115, at 13.

241. HANNA, *supra* note 78, at 29.

242. *Id.*

beneficiaries of this trust and formally act as stewards of the land in question.²⁴³ Though founded on a trust theory, this argument does not explicitly apply the federal trust doctrine, and it is more about tribes serving as trustees of their land than having a right to new land. As discussed in Part III, former EPA National Ombudsman Robert J. Martin has argued powerfully that the trust duty, in addition to a novel interpretation of CERCLA,²⁴⁴ gives the president the authority to relocate the village of Kivalina.²⁴⁵ However, Martin did not delve into the trust duty in much depth, restricting his article to “the narrow issue of whether the tribal permanent relocation authorities of CERCLA section 9626(b) should be available to the Village of Kivalina,” which is located near many open dump sites that arguably fall under CERCLA’s specific purview.²⁴⁶ And Mary Christina Wood wrote a 2017 article in which she argued for a “dual sovereign trust framework,”²⁴⁷ under which tribes could “assert their standing as cotenants and co-trustees of the atmosphere, just as they do with a shared fishery.”²⁴⁸ She elaborated, “Tribes could step into a vacuum of climate leadership by announcing the fiduciary obligation to protect the atmosphere and call for compliance . . . on the part of all states and the federal government.”²⁴⁹ This powerful argument, founded more on the public trust doctrine than the federal trust doctrine, is, like Rampersad’s, more about conceiving of a new way for Indians to control their land, not to obtain new land.

III. THE TRUST DUTY AND THE RIGHT TO RESETTLEMENT

If the potential solutions surveyed in Part II are inadequate, what remains? The following Part seeks to provide an answer. The central claim of this Article is that the federal trust duty creates a right to resettlement for Indian communities at risk of destruction or devastation by climate change. The federal trust doctrine has been called the “cornerstone” of Indian law,²⁵⁰ and this Part shows how that came to be: how the doctrine evolved and changed, what is its current scope, whether it protects the Indigenous peoples of Alaska and Hawai’i, and how might it be more creatively wielded to secure for Indian communities the protection

243. E. Rania Rampersad, Note, *Indigenous Adaptation to Climate Change Preserving Sustainable Relationships through an Environmental Stewardship Claim & Trust Fund Remedy*, 21 GEO. INT’L ENVTL. L. REV. 591, 604–06 (2009).

244. 42 U.S.C. § 9626(b) (2018).

245. Robert J. Martin, *The Village of Kivalina Is Falling into the Sea Should CERCLA Section 9626(B) Be Available to Move the Village from Harm’s Way?*, 2 BARRY UNIV. EARTH JURS. & ENVTL. JUST. J. 1, 1 (2012).

246. *Id.* at 4.

247. Mary Christina Wood, *Tribal Environmental Leaders Summit Keynote Address Tribal Trustees in Climate Crisis*, 2 AM. IND. L.J. 518, 519 (2017).

248. *Id.* at 545.

249. *Id.* at 545–46.

250. *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2001); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495 n.110 (1994).

they need and demand. Ultimately, it concludes that, based on history, case law, statutes, and treaties, the trust duty ensures a right to community relocation for all of the Indigenous peoples of the United States whose lands, lives, and livelihoods are threatened by climate change.

A. *The History and Scope of the Trust Duty*

1. *History*

Broadly speaking, scholars have divided the history of the federal trust duty into two periods: the first, from the nineteenth century into the early twentieth, marked by the dominance of a “guardian-ward” model, and the second, emerging in the 1930s and solidifying in the 1970s, marked by a “general trust” model.²⁵¹ Today, the trust duty is both a binding moral obligation and an exacting fiduciary one; the move toward Indian self-sufficiency in the 1970s did not diminish the federal government’s trust responsibility. And because most of the recent litigation over the trust duty has been consumed with Indians’ ability to exact monetary damages from the government, this Article argues that an opening remains to seek declaratory and injunctive relief to compel the government to fulfill its trust obligations.

Scholars often trace the federal trust duty to the 1830s, when the Supreme Court decided the so-called Cherokee cases.²⁵² Yet some have argued that the trust relationship predates these decisions by several decades, that it emerged instead from the process by which the United States government negotiated for or seized Indian land.²⁵³ Many of the treaties into which Indian nations entered in the eighteenth and nineteenth centuries explicitly stated that the federal government would “protect” them, in exchange for the cession of land; the vast majority contained federal promises of food, clothing, services, or the

251. See, e.g., MATTHEW L.M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* § 5.2, 128–31 (2017).

252. See, e.g., Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1215–16 (1975); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1001 (1981); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 423–24 (1984).

253. See Sharon O’Brien, *The Government-Government and Trust Relationships: Conflicts and Inconsistencies*, 10 AM. IND. CULTURE & RES. J. 57, 76 (1986); see also ROBERT A. WILLIAMS JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (1997). Nell Jessup Newton has pointed out that various cases have indicated several potential sources for the trust relationship: “Ownership of Indian land, the helplessness of Indian tribes in the face of a superior culture, higher law, the entire course of dealings between the government and Indian tribes, treaties, and ‘hundreds of cases and . . . a bulging volume of the U.S. Code’ have all been cited as the source.” Nell J. Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635, 637–38 (1982).

preservation of an autonomous, permanent homeland.²⁵⁴ Mary Christina Wood has powerfully summed this up:

Nearly all native peoples in this country, including those in Alaska and Hawaii, share in common a loss of their land to the impulses of an immigrant majority population with a colonialist, capitalist persuasion. The vast cessions of land by the native peoples were premised on federal promises that the native peoples could continue their way of life on homelands of smaller size, free from the intrusions of the majority society. Most fundamentally, the modern form of the trust obligation is the federal government's duty to protect this separatism by protecting tribal lands, resources, and the native way of life.²⁵⁵

As this Article will discuss below, this conception of the duty is vital to the argument that a right to resettlement exists. Indeed, it is vital to the argument that there is any meaningful trust relationship at all.

In 1831, the Supreme Court decided *Cherokee Nation v. Georgia*, in which Chief Justice Marshall wrote that while the Cherokee Nation was a “distinct political society,” it was not a “foreign state” and thus not entitled to original jurisdiction in the Court.²⁵⁶ Writing with blandly bigoted paternalism, Marshall called Indian tribes “domestic dependent nations” and concluded, “They are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”²⁵⁷ Three other Justices wrote opinions at length. Two of these, Justices Johnson and Baldwin, concurred in the judgment but argued that the Cherokee were not a “state” in any sense, but rather a conquered people.²⁵⁸ The third, Justice Thompson, dissented, arguing that the Cherokee were a full-fledged “foreign state,” cowed but not conquered.²⁵⁹ They enjoyed a contractual relationship with the United States, he continued, which must serve as their protector.²⁶⁰ It is in this decision that the trust doctrine originates judicially. And while Justice Marshall's opinion won the day, and enjoyed prominence for more than a century, it was arguably Justice Thompson's dissent that ultimately prevailed.²⁶¹

254. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14–19 (1987); Wood, *supra* note 250, at 1497. For more on the historical and legal context in which these treaties should be interpreted, see Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783-1795*, 106 J. AM. HIST. 591 (2019).

255. Wood, *supra* note 250, at 1496.

256. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

257. *Id.* at 17.

258. *Id.* at 23 (Johnson, J., concurring); *id.* at 38 (Baldwin, J., concurring).

259. *Id.* at 50 (Thompson, J., concurring).

260. *Id.* Reid Peyton Chambers has pointed out that this dissent “closely paralleled” a New York state opinion from 1823. See Chambers, *supra* note 252, at 1217 n.23.

261. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 893 (2017) (stating “[t]he deep political theory behind the origins of the federal-tribal relationship and the origins of the modern trust relationship is best encapsulated in Justice Thompson's dissenting opinion in *Cherokee Nation v. Georgia*.”).

The next year, in 1832, the Court decided *Worcester v. Georgia*.²⁶² Writing again for the majority, Chief Justice Marshall “meticulously analyzed” the treaties between the Cherokee and the United States to counter the “conquered subjects” conception of Justices Johnson and Baldwin.²⁶³ Marshall wrote that Indians had a right to self-government within their borders, a right “not only acknowledged, but guaranteed by the United States.”²⁶⁴ The United States owed the tribe “protection”—protection from violence and trespass by outsiders²⁶⁵—yet the Cherokees remained a domestic dependent nation. They enjoyed a “relation” with the United States, which was “that of a nation claiming and receiving the protection of one more powerful”²⁶⁶ *Worcester* was “the foundational Supreme Court case on federal Indian law,” clarifying that Indians were not American citizens but rather nationals of dependent, subsidiary powers to which the United States owed a duty of trust.²⁶⁷ Yet the broadness and vagueness of Marshall’s reasoning and meaning have proven to be perplexing. As an influential unsigned note in the *Harvard Law Review* put it in 1984:

Chief Justice Marshall never articulated the source of the fiduciary duties owed by the United States to the Indians. He cited neither cases, nor statutes, nor the Constitution to support the view that the United States was obliged to act as a guardian to the tribes. Moreover, although a traditional trust relationship requires ‘a manifestation of an intention to create it,’ the Court never stated how the United States or the Cherokees had manifested such intent. Apparently Marshall derived the trust obligations from his own moral judgment about the role that a powerful nation should play toward a weaker one with which it had close relations.²⁶⁸

In addition, Marshall only framed the trust duty in “broad moral terms; he did not specify what the United States’ role as guardian obligated it to do for the tribes.”²⁶⁹ It was unclear whether the trust relationship existed as an independent legal doctrine, or simply as a consequence of specific treaties; it was unclear whether the fiduciary duties of the trust were meant to be directly enforceable against the government.²⁷⁰

For roughly the next century, the trust duty was characterized by the logic of a guardian-ward relationship.²⁷¹ This corresponded with “the shifting balance of military power between the federal government and native nations,” during

262. 31 U.S. (6 Pet.) 515 (1832).

263. Chambers, *supra* note 252, at 1218.

264. *Worcester*, 31 U.S. (6 Pet.) at 561–62.

265. *Id.* at 551–52.

266. *Id.* at 555.

267. FLETCHER, *supra* note 251, at 127.

268. Clinton, *supra* note 252, at 424–25.

269. *Id.* at 425; see also Raymond Cross, *Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine*, 39 TULSA L. REV. 369, 377 (2013) (critiquing Marshall’s “[f]ailure to [m]ore [c]ompletely [d]efine [h]is [t]win [c]onceptions of the [f]ederal [t]rust [d]uty and Indian [s]elf-[d]etermination”).

270. Chambers, *supra* note 252, at 1220.

271. FLETCHER, *supra* note 251, at 128–31.

which the government ignored the assurances of treaties and embarked on “policies bent on destroying the Indian way of life.”²⁷² Marshall’s “moral commitment,” commented one scholar, “would not withstand the constant pressures of the land-hungry new nation.”²⁷³ The Supreme Court held that Indians were “effectively subhuman as a matter of law,”²⁷⁴ and its Indian jurisprudence during this period has been characterized as “extremely deferential to Congressional judgment,”²⁷⁵ even as Congress stripped away Indian lands²⁷⁶ and sovereignty.²⁷⁷ The Court reiterated that, because of Indians’ “weakness and helplessness . . . there arises the duty of protection.”²⁷⁸ But this duty of protection was predicated on the United States’ supposed cultural superiority.²⁷⁹ And Congress enjoyed virtually unlimited “plenary” power over Indian lands, including the power to seize tribal lands and distribute them to white settlers,²⁸⁰ so long as it acted in “good faith,” which was presumed.²⁸¹

In the 1930s, however, the Court began a “slow retreat” from the guardian-ward model.²⁸² “The Court could no longer ignore the all-too-evident and deepened vulnerability of the Indian peoples to the unchecked discretion of the federal Indian agencies over their lives and property,” the legal scholar Raymond Cross has written.²⁸³ “The accumulated administrative abuses heaped on these dependent peoples forced the Court to resurrect Marshall’s long-disregarded federal guardianship doctrine.”²⁸⁴ So, in the 1930s and 1940s, the Court held that Congress could not void treaty rights without just compensation,²⁸⁵ that the executive branch could not dispose of tribal lands at all without congressional authorization,²⁸⁶ that the United States must be held to the “most exacting fiduciary standards” when managing tribal money,²⁸⁷ and that statutes will ordinarily be construed to prevent the taking of Indian land.²⁸⁸ Between the

272. Wood, *supra* note 250, at 1501.

273. Eugenia Allison Phipps, *Feds 200, Indians 0: The Burden of Proof in the Federal/Indian Fiduciary Relationship*, 53 VAND. L. REV. 1637, 1654 (2000).

274. Matthew L.M. Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1, 12 (2019) (citing *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)).

275. FLETCHER, *supra* note 251, at 129.

276. See General Allotment Act, 24 Stat. 388 (1887).

277. See Major Crimes Act, 23 Stat. 38 (1885).

278. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); see also *United States v. Nice*, 241 U.S. 591 (1916).

279. Note, *supra* note 252, at Subpart II.A; see, e.g., *United States v. Sandoval*, 231 U.S. 28, 39, 46 (1913); *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

280. Phipps, *supra* note 273, at 1655.

281. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903).

282. FLETCHER, *supra* note 251, at 131.

283. Cross, *supra* note 269, at 380.

284. *Id.*

285. E.g., *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).

286. See, e.g., *United States v. Creek Nation*, 295 U.S. 103, 111 (1935); *Cramer v. United States*, 261 U.S. 219, 235 (1923); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 114 (1919).

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

288. See *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 360 (1941).

1940s and 1970s, the Court did not “significantly elaborate[] upon the meaning of the trust relationship,”²⁸⁹ but congressional enactments began to acknowledge the government’s trust duty. Indeed, since the 1970s, nearly all federal Indian legislation explicitly acknowledges the general trust relationship.²⁹⁰

At the same time, Presidents Johnson and, especially, Nixon, began promoting Indian self-determination, but also emphasizing that the federal government would remain the Indians’ trustee.²⁹¹ The federal government “must make it clear,” Nixon famously declared in 1970, “that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.”²⁹² And, in the 1970s, the courts began invoking the trust doctrine to demand the government properly manage tribal property²⁹³ and to hold the government liable for mismanagement.²⁹⁴ This period was so transformative that one scholar later called the trust doctrine a “creation of the 1970s.”²⁹⁵

In the 1980s, the Supreme Court allowed the government to be held liable for monetary damages when violating the trust, but it also made it harder for Indians to sue the government for violation of its fiduciary responsibilities, demanding evidence of federal waiver of sovereign immunity and overwhelming federal control of the corpus.²⁹⁶ Since then, much of the trust litigation has focused on when the government’s breach of a trust is compensable, resulting in a series of confusing, apparently contradictory decisions.²⁹⁷ The Court has also clarified that the government may act contrary to its trust obligation when

289. Chambers, *supra* note 252, at 1233.

290. United States v. Jicarilla Apache Nation, 564 U.S. 162, 192–93 (2011); FLETCHER, *supra* note 251, at 131; *see, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 1901(2)–(3) (2018) (establishing “that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources” and “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe”).

291. FLETCHER, *supra* note 251, at 133; Cross, *supra* note 269, at 373.

292. H.R. DOC. 91-363, 91st Cong. 1 (July 8, 1970) (Message from the President of the United States Transmitting Recommendations for Indian Policy).

293. Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

294. Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979) (holding that the Secretary of the Interior breached his fiduciary duty in failing to require energy companies holding leases on reservation land to perform their obligations as set out in the lease terms).

295. Milner S. Ball, *Constitution, Court, Indian Tribes*, 12 AM. B. FOUND. RES. J. 3, 62 (1987).

296. United States v. Mitchell, 463 U.S. 206 (1983) (holding that the federal government could be held accountable in money damages for failing to responsibly manage timber resources on reservations in the Pacific Northwest). For a thorough analysis of this decision, *see* Newton, *supra* note 253.

297. Compare United States v. Navajo Nation, 556 U.S. 287 (2009), and United States v. Navajo Nation, 537 U.S. 488 (2003), and Samish Indian Nation v. United States, 657 F.3d 1330 (Fed. Cir. 2011), with United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), and Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 738 (Fed. Cl. 2011), and Navajo Tribe v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980); *see also* Russell Lawrence Barsh, *Is There Any Indian “Law” Left? A Review of the Supreme Court’s 1982 Term*, 59 WASH. L. REV. 863, 886 (1984) (expressing confusion about how *Mitchell* would affect Indian law).

Congress has imposed a conflicting duty on the government.²⁹⁸ This was, however, the exception and not the rule; in general, the Court affirmed the existence of a fiduciary trust duty, even in the absence of a specific statute establishing a management duty.²⁹⁹

2. Present Scope

As Matthew L.M. Fletcher has shown,³⁰⁰ Congress has acknowledged that the trust duty imposes an “obligation” on the federal government to provide Indians with educational services,³⁰¹ health care services,³⁰² adequate housing,³⁰³ and public safety.³⁰⁴ Courts have held that the trust duty requires the federal government to protect Indians’ water supplies³⁰⁵ and their lands,³⁰⁶ safeguard their wildlife resources,³⁰⁷ and clean up hazardous waste.³⁰⁸ And EPA has “expressly acknowledged its trust obligation, pledging that ‘in keeping with the federal trust responsibility, [the agency] will assure that Tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect

298. *Nevada v. United States*, 463 U.S. 110, 142 (1983); see also Ann C. Juliano, *A Step Backward in the Government’s Representation of Tribes: The Story of Nevada v. United States*, in *INDIAN LAW STORIES* 297, 323–24 (Carole E. Goldberg et al., eds., 2011); Ann C. Juliano, *Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes*, 37 *GA. L. REV.* 1307 (2002); FLETCHER, *supra* note 251, at 147–48.

299. *Nevada*, 463 U.S. at 142, 145 (Brennan, J., concurring); Phipps, *supra* note 273, at 1670–71; Wood, *supra* note 250, at 1525–26.

300. FLETCHER, *supra* note 251, at 134–37.

301. Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975), 25 U.S.C. § 5321 (2018); 25 U.S.C. § 3302(7) (2018) (providing “these services are part of the Federal Government’s continuing trust responsibility to provide education services to American Indian and Alaska Natives”); see also *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 114 (1938); Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 *U.A.L.R. L. REV.* 941, 964, 970–72 (1999).

302. Indian Health Care Improvement Act of 1976, Pub. L. 94-437, 90 Stat. 1400, 25 U.S.C. §§ 1601–1631 (“Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.”); see also *White v. Califano*, 581 F.2d 697, 698 (1978) (“We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians.”); Koral E. Fusselman, Note, *Native American Health Care: Is the Indian Health Care Reauthorization and Improvement Act of 2009 Enough to Address Persistent Health Problems within the Native American Community?*, 18 *WASH. & LEE J. C.R. & SOC. JUST.* 389 (2012).

303. Native American Housing Assistance and Self-Determination Act, Pub. L. 104-330, 110 Stat. 3017 (1996), 25 U.S.C. §§ 4101–4182. (stating “the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.”).

304. Tribal Law and Order Act, Pub. L. 111-211, § 202, 124 Stat. 2258 (2010) (“Congress finds that . . . the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country”).

305. *Smith v. United States*, 515 F. Supp. 56, 58 (N.D. Cal. 1978).

306. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

307. *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987).

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

reservation environments.”³⁰⁹ Scholars have further theorized that the trust duty demands that the government act to combat ocean acidification,³¹⁰ to protect Indian children,³¹¹ and to safeguard Indian cultural vitality.³¹² This last theory will be discussed further in Part IV. The trust duty requires the government to protect Indian property and resources not only on tribal lands, but also off tribal lands, if activities off the lands affect the lands or those living on them (or resources upon which the tribe depends).³¹³

A divide has emerged in the past half-century between the “specific” federal trust duty and the “general” federal trust duty. The “specific” trust duty arises when a statute or regulation imposes a particular burden or responsibility on the federal government; the “general” trust duty is the vague federal responsibility “to be ‘fair and honorable’ in its contemporary dealings with the Indian peoples.”³¹⁴ The “specific” trust duty creates enforceable legal rights for Indian peoples, while the “general” trust duty does not.³¹⁵ Numerous courts have held that the general trust duty does not impose any duty on the government beyond complying with generally applicable statutes and regulations.³¹⁶ This has long

309. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 10.01(2)(a) (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN’S HANDBOOK].

310. Robert T. Anderson, *Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENVTL. L. & POL’Y 473 (2016).

311. See Fletcher & Singel, *supra* note 261, at 964.

312. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 119–22 (1995); Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 707 (1989).

313. Pyramid Lake Paiute Tribe of Indians v. Dep’t of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988); Nance v. EPA, 645 F.2d 701 (9th Cir. 1980), *cert. denied*, 454 U.S. 1081 (1981); United States v. Washington—Phase II, 506 F. Supp. 187 (W.D. Wash. 1980), *aff’d, vacated in part*, 759 F.2d 1353 (9th Cir.) (per curiam) (en banc), *cert. denied*, 474 U.S. 994 (1985); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev’d in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); see also Wood, *Indian Land and the Promise of Native Sovereignty*, *supra* note 250, at 1528, 1532 (stating “[t]he duty to protect Indian lands would be rather shallow if courts were impotent to restrain actions occurring outside of Indian Country that violate the integrity of the native land base” and “[t]aken together, Nance, Northern Cheyenne, Pyramid Lake, and Washington-Phase II all evince a strong willingness to impose a trust duty to protect Indian lands and corollary resources from adverse agency action of an incidental nature. Courts should continue to interpret the trust responsibility liberally when tribes bring actions to protect their native lands or treaty resources against incidental action in an effort to enforce the underlying promise of separatism”); Mary C. Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 744 (1995).

314. Cross, *supra* note 269, at 383.

315. *Id.* at 375; Fletcher, *Failed Protectors*, *supra* note 274, at 10.

316. See Gros Ventre Tribe v. United States, 469 F.3d 801, 810–12 (9th Cir. 2006); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006); Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998); Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995); Vigil v. Andrus, 667 F.2d 931, 934 (10th Cir. 1982); Miccosukee Tribe of Indians of Fla. v. United States, 980 F. Supp. 448, 461 (S.D. Fla. 1997); see also COHEN’S HANDBOOK, *supra* note 309, at

been the position of the Department of Justice.³¹⁷ Yet the line between the “specific” and the “general” trust duties remains unclear. As discussed in Subpart III.B, the courts can infer specific, enforceable trust duties even without specific statutory language.³¹⁸ The Supreme Court has recently stated that it looks to “common law principles to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed,”³¹⁹ and the D.C. Circuit has written that while the “general ‘contours’ of the government’s obligations may be defined by statute . . . the interstices must be filled in through reference to general trust law.”³²⁰ The indeterminacy between “specific” and “general” has led the legal scholar Raymond Cross to call the modern trust doctrine “schizophrenic.”³²¹ Cross has also noted that the distinction “between the ‘generalized’ federal trust duty on the one hand and the ‘specific’ federal trust duty on the other derives, in my mind, directly from the anti-Indian policies and precedent of the late nineteenth century.”³²²

Another question has to do with whether a violation of the trust duty is compensable. As mentioned in the previous Subpart, much of the recent trust duty litigation has focused on when tribes may recover monetary damages for a governmental breach.³²³ This litigation has yielded several confusing court decisions.³²⁴ But, as this Article will show in Subpart III.B, this question is not terribly relevant to Indian communities seeking to assert a right to resettlement, and can largely be ignored.

Yet another tricky question is which Indians the trust duty protects. There are many signs that the trust duty does not merely extend to federally registered tribes. For instance, several statutes do not require federal recognition in order for Indians to receive statutory benefits.³²⁵ *United States v. Sandoval*, a Supreme Court case from 1913, extended the guardian-ward relationship to tribes that

§ 10.01(2)(a) (stating “[i]n the absence of specific statutory duties, federal agencies discharge their trust responsibility if they comply with the statutes and general regulations”).

317. 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. ENVTL. & ADMIN. L. 397, 429–31 (2017).

318. See *infra* note 397, and accompanying text.

319. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

320. *Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001).

321. Cross, *supra* note 269, at 375.

322. *Id.* (characterizing this distinction as a relic of the prejudices of late-nineteenth century jurists, “fundamentally at odds with the contemporary congressional policies that are strongly supportive of Indian self-determination”).

323. See *supra* note 297, and accompanying text.

324. Compare *United States v. Navajo Nation*, 556 U.S. 287 (2009) (finding no compensable breach of the federal trust duty), and *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *Samish Indian Nation v. United States*, 657 F.3d 1330 (D.C. Cir. 2011), with *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (finding a compensable breach of the federal trust duty), and *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 738 (Fed. Cl. 2011), and *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980).

325. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(e); Indian Financing Act of 1974, 25 U.S.C. § 1452(c).

never entered into treaties with the United States.³²⁶ In 1933, the Court expanded this to include the inhabitants of “any unceded lands owned or occupied by an Indian nation or tribe of Indians.”³²⁷ More recently, the First Circuit has held that the Nonintercourse Act,³²⁸ a collection of statutes setting the boundaries and reservations and dating back to the eighteenth century, “establishes a trust relationship between the United States and a tribe with respect to protection of the lands of a tribe covered by the Act, regardless of whether it is federally recognized.”³²⁹ Indians may be American citizens and still receive the trust duty,³³⁰ though not if they’ve assimilated into a non-Indian community and completely lost their tribal identity.³³¹

This question is highly relevant to this Article, as many of the Indian communities likely to be displaced are not recognized, including those living Alaska and Hawai’i. This Article now turns to the question of whether Indians living in these states are owed the trust duty.

3. *Trust Duty in Alaska?*

Although Congress has revoked most existing reservations in Alaska,³³² and although the Supreme Court has held that Alaskan villages are not always considered “dependent Indian communities,”³³³ Alaskan Natives nonetheless enjoy a trust relationship with the federal government.³³⁴ According to legal scholars David Case and David Voluck, “The emergence of a judicially recognized, federal trust responsibility to protect Alaska Native subsistence culture and economy is an important by-product of the various subsistence exemptions found in federal-conservation treaties and statutes.”³³⁵ Indeed, the

326. *United States v. Sandoval*, 231 U.S. 28, 48 (1913); *see also* Wood, *supra* note 250, at 1496 n.115 (stating “[i]t is clear that the trust relationship also applies to tribes that did not enter into treaties with the United States.”).

327. *United States v. Chavez*, 290 U.S. 357, 364 (1933); *see also* Gretchen G. Biggs, *Is There Indian Country in Alaska? Forty-Four Million Acres in Legal Limbo*, 64 U. COLO. L. REV. 849, 854 (1993).

328. 25 U.S.C. § 177 (2012).

329. *Greene v. Rhode Island*, 398 F.3d 45, 55 (1st Cir. 2005); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

330. *United States v. Nice*, 241 U.S. 591, 598 (1916).

331. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978).

332. *See* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (2006); *see also* Tsosie, *Climate Change and Indigenous Peoples*, *supra* note 95, at 241.

333. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530–31 (1998); *see also* Biggs, *supra* note 327, at 854–56 (identifying three criteria federal courts use to identify which Alaskan Native villages are “dependent Indian communities”).

334. HANNA, *supra* note 78, at 18; COHEN’S HANDBOOK, *supra* note 309, at § 4.07(3)(a) (stating “Alaska Natives, including Indians, Eskimos, and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.”); Biggs, *supra* note 327, at 859–64 (demonstrating that the trust relationship continues after the Alaska Native Claims Settlement Act).

335. DAVID CASE & DAVID VOLUCK, *ALASKA NATIVES AND AMERICAN LAW* 272 (2d ed. 2002).

Alaska Statehood Act of 1958 specifically acknowledged land within the borders of the state “held by the United States in trust for said natives.”³³⁶

Lower courts have repeatedly affirmed the existence of the trust duty toward Alaskan Natives. In *People of Togiak v. United States*, the district court held that DOI could not transfer control over subsistence management to the state because of its “trust responsibility toward Indians.”³³⁷ This trust responsibility included “the duties so to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities against interference by the States.”³³⁸ In three other cases, the D.C. Circuit and District Court for the District of Alaska affirmed the existence of a trust duty toward the Indians of Alaska.³³⁹

The Supreme Court has never specifically held that the federal government owes a trust duty to Alaskan Natives, but decisions from a century ago lend considerable weight to that proposition. As mentioned above, in 1913 the Court held that tribes that never entered into treaties with the United States nonetheless enjoy the guardian-ward relationship.³⁴⁰ And in 1918, the Court clarified that, although the Indigenous peoples of Alaska do not have a treaty with the United States, they retain the right to self-government, a right the government must protect.³⁴¹

4. *Trust Duty in Hawai‘i?*

Under DOI rules, the federal recognition of tribes is limited “to those American Indian groups indigenous to the continental United States,”³⁴² which means that Hawaiian Natives cannot become members of federally recognized tribes.³⁴³ This has grave consequences. As the legal scholar Rebecca Tsosie has written,

Nonrecognized tribes and Native Hawaiians are indigenous peoples, but they do not have the ability to regulate their lands and resources as distinctive governments, nor do they have the ability to receive statutory delegations of federal authority, which would allow them to exercise meaningful control over air, water, or land resources.³⁴⁴

336. Act of July 7, 1958, Pub L. No. 85-508, 72 Stat. 339, § 4.

337. 470 F. Supp. 423, 428 (D.D.C. 1979).

338. *Id.* (internal citations omitted).

339. *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978); *Eric v. Sec’y of U.S. Dep’t of Hous. & Urban Dev.*, 464 F. Supp. 44, 49 (D. Alaska 1978).

340. *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

341. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88–89 (1918) (cited in FLETCHER, *supra* note 251, at 133 n.62).

342. 25 C.F.R. § 83.3(a) (2019).

343. See COHEN’S HANDBOOK, *supra* note 309, at § 3.02(7)(a); see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004) (holding that this definition does not violate the equal protection rights of Hawaiian Natives).

344. Tsosie, *Climate Change and Indigenous Peoples*, *supra* note 95, at 242.

Yet it is unclear whether this means that Native Hawaiians are not still owed a trust duty by the federal government. Though the answer to this question is far from certain, and though the Supreme Court has avoided answering it, several scholars, courts, and federal pronouncements seem to have concluded that the trust duty does extend to Native Hawaiians. Yet even if it does not, the State of Hawai'i has a unique trust duty toward Indigenous Hawaiians that could obviate the need for them to demand a right to resettlement from the federal government.

In *Rice v. Cayetano*, the leading Supreme Court case on the status of Native Hawaiians, the majority did not reach the question of whether the federal trust exists for Hawaiians, although Justice Breyer wrote in concurrence, “there is no ‘trust’ for native Hawaiians here,”³⁴⁵ and Justice Stevens responded in dissent, “the grounds for recognizing the existence of federal trust power here are overwhelming,” based on the United States’ seizure of Native lands and Congress’s formal apology to all Native peoples.³⁴⁶ Stevens also added that Breyer’s “contention that ‘there is no ‘trust’ for native Hawaiians here,’ appears to make the greater mistake of conflating the public trust established by Hawai’i’s Constitution and laws with the ‘trust’ relationship between the Federal Government and the indigenous peoples.”³⁴⁷

Many scholars have argued that Hawaiians are included in the federal trust relationship,³⁴⁸ while at least one has argued against this.³⁴⁹ Federal courts have reached conflicting decisions as to the existence of a federal trust duty.³⁵⁰ Many federal laws specifically acknowledge the “trust relationship” or “special relationship” between Native Hawaiians and the federal government.³⁵¹ Further,

345. 528 U.S. 495, 525 (1996) (Breyer, J., concurring).

346. *Id.* at 532–34 (Stevens, J., dissenting).

347. *Id.* at 543 n 15 (Stevens, J., dissenting).

348. Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation Lessons from Federal Indian Law Precedents*, 43 AM. IND. L. REV. 75, 87–88 (2018); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 95–97 (1998); Kimberly A. Costello, Note, *Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812, 833 n.92 (2001); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination A Native Hawaiian Perspective*, 8 ARIZ. J. INT’L & COMP. L. 77, 80–88 (1991); Charles F. Wilkinson, *Land Tenure in the Pacific The Context for Native Hawaiian Land Rights*, 64 WASH. L. REV. 227, 231–32 (1989).

349. Stuart Minor Benjamin, *Equal Protection and the Special Relationship The Case of the Native Hawaiians*, 106 YALE L.J. 537, 541–42 (1996).

350. *Compare* Keaukaha-Panaewa Cmty. Ass’n v. Hawaiian Homes Comm’n, 739 F.2d 1467, 1472 (9th Cir. 1984), with *Han v. Dep’t of Justice*, 824 F. Supp. 1480, 1486 (D. Haw. 1993).

351. Costello, *supra* note 348, 818 n.24, 843 n.122 (2001) (citing Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701 (1994) (referring to a “trust relationship” and a “historical and unique legal relationship” between Native Hawaiians and the United States); Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 9202, 108 Stat. 3518, 3796 (recognizing “the special relationship which exists between the United States and the Native Hawaiian people”); Native Hawaiian Education Act, 20 U.S.C. § 7902 (1994) (acknowledging a “special relationship” between the federal government and Hawaiian Natives); Joint Resolution (Apology Resolution), Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing for depriving Native Hawaiians of the right to self-determination and encouraging reconciliation efforts); Act to Provide for the Admission of the State of Hawaii into the Union (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959) (creating a “public

in 2016, DOI issued a rule acknowledging Native Hawaiians’ “inherent sovereign authority that has not been abrogated or relinquished, as evidenced by Congress’s consistent treatment of this community over an extended period of time . . . [and] enact[ment] [of] more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community.”³⁵²

A trust relationship also exists between the Hawaiian natives and the state government. In the years following *Rice v. Cayetano*, many decisions by the Hawai’i Supreme Court have held that the state of Hawai’i has an “affirmative duty to proactively protect and preserve traditional and customary Native Hawaiian rights because of the state’s public trust duties under Article XII section 7,”³⁵³ the constitutional provision discussed above. In *Ka Pa’akai O Ka ‘Aina v. Land Use Commission*, the state supreme court laid out a three-part test to determine whether the state had abided by its trust duty to Native Hawaiians:

- (1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist.³⁵⁴

trust” to benefit Native Hawaiians)); *see also* COHEN’S HANDBOOK, *supra* note 309, at § 4.07(4)(a) (“Since 1974, Congress has included Native Hawaiians in numerous laws providing benefits and protections to Native Americans, using a definition that includes any descendant of the aboriginal people of the Hawaiian Islands”).

352. Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50); Opulauoho, *supra* note 348, at 93; *see also* COHEN’S HANDBOOK, *supra* note 309, at § 4.07(4)(c) (“The rule acknowledges that there is a special political and trust relationship between the federal government and Native Hawaiian community and sets forth a process for a Native Hawaiian government to seek a formal relationship with the federal government, analogous to the relationship between federally recognized tribes and the United States”).

353. Kathryn Stanaway, *Sustainable Nearshore Marine Fisheries in Hawai’i Applying Principles from Traditional Practitioners in Hawai’i and Aotearoa New Zealand*, 18 ASIAN-PACIFIC L. & POL’Y J. 123, 146 (2017); *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000); *Ka Pa’akai O Ka’Aina v. Land Use Comm’n*, 7 P.3d 1068 (Haw. 2000); *Ahuna v. Dep’t of Hawaiian Homes Lands*, 640 P.2d 1161, 1168–70 (Haw. 1982); *see also* D. Kapua’ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157, 185 (2016); Hokulei Lindsey, *Native Hawaiians and the Ceded Lands Trust Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223, 225 (2009).

354. *Ka Pa’akai*, 7 P.3d at 1084.

Though the exact scope of this trust duty continues to be debated,³⁵⁵ it has been repeatedly affirmed.³⁵⁶

B. The Trust Duty as Creating a Right to Resettlement

The federal trust duty creates a right to resettlement for Indian communities facing climate change-induced displacement. The following Subpart will show that this right exists in federal law and that Indian tribes can assert it through an action in federal court. Statutes, treaties, and the common law, as well as history, have given rise to a federal trust duty to protect Indian land, resources, homes, and lives from the effects of climate change and to relocate Indians when this becomes the only way to maintain that protection. As this Subpart argues, according to settled principles of law, this trust duty is so far-reaching that it effectively guarantees a right to resettlement. For a court to hold otherwise would be a flagrant and devastating violation of the federal government's duty toward Indians—it would be leaving them to their annihilation. As Justice Marshall wrote in *Worcester*, “Protection does not imply the destruction of the protected.”³⁵⁷

To enforce this right to resettlement, Indian communities should bring actions against the federal government for declaratory and injunctive relief.³⁵⁸ This would be a fitting continuation of nearly half a century of creative Indian law scholarship. In 1974, Reid Peyton Chambers, then a lawyer at DOI, wrote a seminal article in the *Stanford Law Review* entitled, “Judicial Enforcement of the Federal Trust Responsibility to Indians.”³⁵⁹ In it, he wrote that a handful of recent cases

have suggested that the trust responsibility itself, apart from any specific treaty, statute, or agreement, creates legally enforceable duties for federal officials in their dealings with Indians. These cases indicate that a cause of action may be brought against officials for equitable or declaratory relief for breach of trust, even where no statute or treaty has been violated.³⁶⁰

355. *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752 (Haw. 2018); *Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp.*, 177 P.3d 884, 927–28 (Haw. 2008), *rev'd and remanded sub nom. Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009); Eric K. Yamamoto & Sara D. Ayabe, Symposium, *The Moon Court Era Courts in the “Age of Reconciliation” Office of Hawaiian Affairs v. HCDCH*, 33 U. HAW. L. REV. 503, 509 (2011); Melody Kapilialoha MacKenzie, Symposium, *State-Tribal Relations Past, Present, and Future Ke Ala Loa—The Long Road Native Hawaiian Sovereignty and the State of Hawaii*, 47 TULSA L. REV. 621, 635–38 (2012).

356. *See Maui Tomorrow v. State*, 131 P.3d 517 (Haw. 2006); Sproat, *supra* note 353, at 203–04; *see also* 2011 Haw. Sess. Laws 646, codified as HAW. REV. STAT. § 10H (2014).

357. 31 U.S. (6 Pet.) at 551–52.

358. An action would have to be against the federal government, as states do not owe the same trust duty to Indians as the federal government does. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 n.5 (9th Cir. 2002). For reasons discussed above, however, this is different from Native Hawaiians, who plausibly could bring a trust action against the state government. *See supra* Subpart III(A)(4).

359. *See* Chambers, *supra* note 252.

360. *Id.* at 1215.

Since then, a generation of Indian law scholars have taken up this banner and repeated calls for “a vibrant and judicially enforceable federal trust doctrine.”³⁶¹ This Article now proposes precisely the kind of action Chambers and the others have been calling for.

How exactly do tribes enforce the trust duty? As the editors of the influential *Cohen’s Handbook of Federal Indian Law* have written, “Three essential predicates must be met in order to seek specific relief against the federal government for breach of trust: subject matter jurisdiction; a statutory consent to suit; and the existence of a claim upon which relief can be granted.”³⁶² The predicate of subject matter jurisdiction can be dispensed with quickly enough; numerous courts have held that breach of trust claims give rise to federal question jurisdiction.³⁶³ The question of consent, too, is hardly a live issue.³⁶⁴ “Because of the pervasive role of the Interior Department and other federal agencies in administering Indian affairs,”³⁶⁵ Indians can challenge federal action or inaction under the Administrative Procedure Act (APA).³⁶⁶ The APA has waived the federal government’s sovereign immunity for those seeking non-monetary relief, claiming agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”³⁶⁷ including violations of statutes, treaties, and common law.³⁶⁸ This has been affirmed by many courts,³⁶⁹ including many cases of tribes seeking declaratory and injunctive relief for breach of trust.³⁷⁰

The central issue is thus whether there exists a claim upon which relief can be granted. As the legal scholar Curtis G. Berkey has noted, courts often fail to understand the distinction between stating a claim for *damages* and stating a

361. Cross, *supra* note 269, at 371; *see also* Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 248–49 (2003); Wood, *supra* note 27, at 355.

362. COHEN’S HANDBOOK, *supra* note 309, at § 5.05(1)(a).

363. *See* 28 U.S.C. §§ 1331, 1362; *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 31, 39 n.14 (D.D.C. 1998); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1198–99 (D. Minn. 1996); *White v. Matthews*, 420 F. Supp. 882, 887–88 (D.S.D. 1976); *see also* COHEN’S HANDBOOK, *supra* note 309, at § 5.05(1)(a) (“It is well-established that breach of trust claims against the federal government raise federal questions.”).

364. COHEN’S HANDBOOK, *supra* note 309, at § 5.05(1)(a) (stating “[t]he requirement of a statutory consent to sue is also easily met in a claim for specific relief.”).

365. *Id.*

366. 5 U.S.C. § 701 *et seq.* (2018).

367. 5 U.S.C. §§ 702, 706(2)(A).

368. COHEN’S HANDBOOK, *supra* note 309, at § 5.05(1)(a).

369. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Klamath Tribes v. United States*, No. C.V. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996); *Nw. Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

370. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 30–31 (D.C. Cir. 1998); *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986); *Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981); *N. Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1275 (D. Wyo. 2009); *Khodara Envtl., Inc., ex rel. Eagle Envtl., L.P. v. Burch*, 245 F. Supp. 2d 695, 711 (W.D. Pa. 2002); *Eric v. Sec’y of U.S. Dep’t of Hous. & Urban Dev.*, 464 F. Supp. 44, 48 (D. Alaska 1978).

claim for *declaratory and injunctive relief*.³⁷¹ “The failure to appreciate this distinction has resulted in the erroneous rule that the federal government satisfies its trust obligations if it complies with applicable statutes, unless a statute or treaty imposes specific duties apart from such statutes,” Berkey wrote.³⁷² Yet this is the standard for damages suits, *not* for declaratory or injunctive relief.³⁷³ Much of this judicial confusion has resulted from the fact that the “overwhelming line of controlling case law” involves tribes seeking monetary damages, not “claims for declaratory and injunctive relief.”³⁷⁴ The infamous *Mitchell* line of cases,³⁷⁵ which has dominated the Court’s trust duty jurisprudence in recent decades,³⁷⁶ “dealt with monetary damages claims.”³⁷⁷ “Where a tribe seeks monetary damages for a breach of the trust relationship,” one district court summarized, “a cause of action will not be found unless the tribe can identify specific treaty provisions, Congressional statutes or regulations, or a specific trust corpus that the United States has agreed to safeguard.”³⁷⁸

But for cases involving tribes seeking declaratory or injunctive relief, federal compliance with specific statutory or regulatory duties is insufficient to show satisfaction of the trust; additional, enforceable trust duties may also exist.³⁷⁹ “When a tribe seeks only equitable relief . . . courts examine the relevant federal statutes, regulations, and treaties to determine whether a claim for breach of a trust duty exists, and if it does, the scope of that duty,” summed up the district court.³⁸⁰ The existence of this duty “can be *inferred* from the provisions of a statute, treaty or other agreement, ‘reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.’”³⁸¹

371. Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U. L. REV. 1069, 1077 (2006). For examples of courts making this mistake, see *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471, 479 (9th Cir. 2000); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 573–74 (9th Cir. 1998); *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1225–27 (D. Mont. 2004); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 882–84 (D. Ariz. 2003).

372. Berkey, *supra* note 371, at 1077.

373. See Wood, *supra* note 27, at 363–68.

374. *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 21 (D.C. Cir. 1999) (stating “[i]herefore, because plaintiffs seek relief other than money damages, the sovereign immunity analysis is finished.”).

375. See *United States v. Mitchell*, 463 U.S. 206 (1983); *United States v. Mitchell*, 445 U.S. 535 (1980).

376. See *United States v. Navajo Nation*, 556 U.S. 287 (2009); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

377. *Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2017 U.S. Dist. LEXIS 49969, at *29 (D.S.D. Mar. 31, 2017).

378. *Id.* at *22–23.

379. *Id.* at *23 (citing *Blue Legs v. Bureau of Indian Affs.*, 867 F.2d 1094, 1100 (8th Cir. 1989)).

380. *Id.*

381. *Blue Legs*, 876 F.2d at 1100 (emphasis added) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)); see also *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980) (stating “[i]f . . . the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence *vel non* of the relationship can be inferred from the nature of the transaction or activity.”); *N. Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 997 (D. Mont. 2016) (“NAT [the Tribe] claims that trust duties can be implied from the federal-tribal

Indeed, in *Blue Legs v. Bureau of Indian Affairs*, the Eighth Circuit found that the federal government had a trust obligation to clean up hazardous dumps on Indian lands, even though the Resource Conservation and Recovery Act (RCRA) contained no specific trust language.³⁸²

The first question, then, becomes whether the tribes can point to a statute or other source of law to show that the federal government has a trust obligation to resettle Indians facing climatological annihilation. The second question is the scope of this trust obligation. The first place to which courts can look to find a trust obligation is history. History has been invoked in cases of Indians seeking to enforce the trust duty, to show that past events have given rise to present trust obligations.³⁸³ “It cannot be disputed that the history of the federal government’s dealings with the Indian nations has resulted in the creation of a unique legal relationship between reservation Indians and the federal government,” wrote one district court in 1976, finding a “trust responsibility.”³⁸⁴ Further, Congress has explicitly acknowledged that its history of abuse or oppression gave rise to trust obligations, as in the COFA with the Marshall Islands.³⁸⁵ Scholars too have asserted that historical mistreatment of Indians has given rise to trust duties.³⁸⁶

The Supreme Court has also used history to find a trust duty. Justice Stevens’s dissent in *Rice v. Cayetano*, for example, relied on the past to discern the existence of a trust.³⁸⁷ “As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming,” he wrote.³⁸⁸ “Shortly before its annexation in 1898, the Republic of Hawaii (installed by United States merchants in a revolution facilitated by the U.S. Government) expropriated some 1.8 million acres of land that it then ceded to the United States.”³⁸⁹ This action, more than the subsequent laws acknowledging it, gave rise to the trust duty. Indeed, the Court’s majority explicitly recognized in *Mitchell* that courts look to past actions, not statutory wording, to discern a trust duty:

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or

relationship, and the Court should imply such a trust duty here. The Court agrees and declines to dismiss NAT’s breach of trust claim.”); *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995) (“We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise.”).

382. *Blue Legs*, 867 F.2d at 1100 (8th Cir. 1989).

383. *See, e.g.*, *Cramer v. United States*, 261 U.S. 219, 229 (1923); *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978).

384. *White v. Matthews*, 420 F. Supp. 882, 887 (D.S.D. 1976).

385. Compact of Free Association Act, U.S. Public Law 99-239, 99 Stat. 1770, § 177(a) (1986).

386. *See Cross, supra* note 301.

387. 528 U.S. 495, 532 (2000) (Stevens, J., dissenting).

388. *Id.*

389. *Id.*

underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.³⁹⁰

Thus, the United States' history of moving Indians to lands that are vulnerable to climate impacts is highly relevant to determining whether any trust obligations exist. As mentioned in Part I, many Indian communities are only in lands that are prone to flooding or permafrost melting because the federal government forced them to be there.³⁹¹ For instance, the villagers of Kivalina, Alaska, "did not settle on a barrier island by choice."³⁹² Historically, the Kivalliniġmiut people were semi-nomadic, moving seasonally across a territory of more than two thousand miles.³⁹³ But then they were "forcibly relocated in 1905 when the federal Bureau of Education compulsorily consolidated the Kivalliniġmiut people onto a shifting barrier island (currently known as the village of Kivalina) where it built a school."³⁹⁴ Indeed, many Inuit peoples did not even live in permanent villages until American missionaries coerced them into doing so.³⁹⁵ To put it starkly, the federal government put the Kivalliniġmiut and other Indigenous peoples in a vulnerable place; now it is the federal government's duty to get them out.³⁹⁶

Courts also look to statutes, regulations, and treaties to find a trust duty. They often find such a duty even in the absence of specific statutory language based on "the nature" of the relationship between the government and tribe.³⁹⁷ In *United States v. White Mountain Apache*,³⁹⁸ for instance, the Supreme Court found the existence of a trust duty "even though there was not a word in the only relevant law that suggested such a mandate."³⁹⁹ In the landmark case of *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the First Circuit found there to be a trust duty on the basis of "rights and duties encompassed" in the Nonintercourse Act,⁴⁰⁰ a statute dating back to the eighteenth century.⁴⁰¹ Further, there is a long-held rule that statutes passed for the benefit of Indians

390. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

391. *See supra* notes 66–70, and accompanying text.

392. Marlow & Sancken, *supra* note 165, at 292–93.

393. *Id.* at 293–94.

394. *Id.*

395. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 14 (Dec. 7, 2005), http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

396. *Cf.* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019) (making a similar moral argument in the migration context).

397. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980); *see also* *Blue Legs v. Bureau of Indian Affs.*, 867 F.2d 1094, 1100 (8th Cir. 1989); *Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 997 (D. Mont. 2016).

398. 537 U.S. 465, 476–77 (2003).

399. *Rey-Bear & Fletcher*, *supra* note 317, at 432 n.210. In this case, the Court found a compensable breach of a trust relationship because the federal government had itself occupied and used the land at issue. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476–77 (2003).

400. 25 U.S.C. § 177.

401. 528 F.2d 370, 379 (1st Cir. 1975).

“are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”⁴⁰² The Ninth Circuit has employed this rule of “sympathetic construction”⁴⁰³ in the trust duty context, using it to find the existence of a trust obligation in a statute that did not explicitly contain one.⁴⁰⁴

There are several statutes that could imply the existence of a duty to relocate Indian communities that will be destroyed by climate change. For instance, in CERCLA, Congress recognized its trust duty to relocate Indian communities whose homes were contaminated by hazardous waste:

Should the President determine that proper remedial action is the permanent relocation of tribal members away from a contaminated site because it is cost effective and necessary to protect their health and welfare, such finding must be concurred in by the affected tribal government before relocation shall occur. The President, in cooperation with the Secretary of the Interior, shall also assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe. Any lands acquired for relocation of tribal members shall be held in trust by the United States for the benefit of the tribe.⁴⁰⁵

Former EPA National Ombudsman Robert J. Martin has persuasively argued that CERCLA, as well as the trust duty, gives the president the authority to relocate the village of Kivalina.⁴⁰⁶ While Martin restricts his argument to a “narrow” consideration of Kivalina, which is impacted by both climate change and open dumps,⁴⁰⁷ the principle undergirding his Article has far broader application. CERCLA reflects Congress’s intention to undertake a trust duty to relocate Indian communities impacted by environmental degradation. Surely this same intention applies to climate change, the harms of which have been exacerbated by the federal government.

Another statute that arguably reflects congressional assumption of a trust duty to relocate vulnerable Indian communities is the 2005 Consolidated Appropriations Act. Section 117 of the Act authorized the Secretary of the Army “to carry out, at full Federal expense, structural and non-structural projects for storm damage prevention and reduction, coastal erosion, and ice and glacial

402. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *see also* COHEN’S HANDBOOK, *supra* note 309, at § 10.01(2)(a) (stating “[b]ecause of the trust responsibility, federal agencies may be required to interpret their statutory and regulatory obligations to the greatest benefit of the tribe”).

403. William C. Canby Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 19–21 (1987).

404. *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1997). Indeed, the Supreme Court has even suggested that trust duty gave rise to this rule of sympathetic construction. *See Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

405. 42 U.S.C. § 9626(b) (2018); *see also* Abate, *supra* note 115, at 42 (“Congress recognized the federal trust relationship between the federal government and federally recognized tribes in granting authority to the President under CERCLA § 9626(b) to permanently relocate an Indian tribe or Alaska Native village threatened by hazardous waste contamination.”).

406. Martin, *supra* note 245, at 1.

407. *Id.* at 4.

damage in Alaska, including relocation of affected communities and construction of replacement facilities.”⁴⁰⁸ Although the Act allotted \$2.4 million to allow Indigenous villages, including Newtok and Shishmaref, to construct seawalls and other coastal erosion barriers, no money was ever disbursed for relocation,⁴⁰⁹ and section 117 was repealed in 2009.⁴¹⁰ Nonetheless, its passage and disbursement of some funds indicates the federal government taking responsibility for mitigating the extreme vulnerability of Indian communities in places like Alaska’s barrier islands; its repeal, and the failure to disburse money for relocation, shows that this trust obligation is as yet unfulfilled.

Treaties are also congressional enactments that courts should scrutinize to determine the existence of a trust duty. Indeed, many recent federal laws specifically acknowledge that the promises of treaties gave rise to trust obligations;⁴¹¹ this parallels the *Worcester* opinion, in which Chief Justice Marshall determined the existence of the trust duty through a detailed analysis of the treaties between the Cherokee and the United States.⁴¹² Thus, it is significant that many treaties specifically include assurances that the federal government would “protect” the tribes.⁴¹³ In the 1807 treaty with the Ottowas, for instance, the Indian nations “acknowledge themselves to be under the protection of the United States.”⁴¹⁴ The United States has a clear trust duty to fulfill the obligations set forth in these treaties—even, and especially, if that trust duty necessitates relocating Indians placed in danger by climate change. The Supreme Court has held that Congress cannot void treaty rights without compensation (compensation that could be used for relocation).⁴¹⁵ As Justice Black wrote in 1960, “Great nations, like great men, should keep their word.”⁴¹⁶

408. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 117, 118 Stat. 2944 (2004).

409. Iverson, *supra* note 213, at 589–90.

410. Omnibus Appropriations Act, Pub. L. No. 111-8, § 117, 123 Stat. 524 (2009).

411. *See, e.g.*, Native American Housing Assistance and Self-Determination Act, Pub. L. 104-330, 110 Stat. 3017 (1996), 25 U.S.C. §§ 4101–4182 (stating “the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition . . .”); Tribal Law and Order Act, Pub. L. 111-211, § 202, 124 Stat. 2258 (2010) (stating “Congress finds that . . . the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country”).

412. 31 U.S. (6 Pet.) 515, 551–62 (1832).

413. *See* Wood, *supra* note 250, at 1497 nn.118–22 (providing examples).

414. Treaty with the Ottowas, Nov. 17, 1807, art. VII, 7 Stat. 105, 106.

415. *See* Shoshone Tribe v. United States, 299 U.S. 476 (1937). This case concerned how much a tribe was owed when the government breached a treaty by allowing another tribe to occupy land that had been set aside for the exclusive occupation of the first tribe alone. *See also* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (likewise affirming that compensation was due for federal breach of treaty rights).

416. Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

A parallel logic can be observed in the Court's recent opinion in *McGirt v. Oklahoma*,⁴¹⁷ decided shortly before this Article went to print. In *McGirt*, the Court held that much of what was considered to be eastern Oklahoma is actually an Indian reservation—in large part on the basis of promises contained in treaties. Justice Gorsuch, writing for the majority, began by invoking the “promise” that was made on “the far end of the Trail of Tears,” nearly two centuries before; “[b]ecause Congress has not said otherwise, we hold the government to its word.”⁴¹⁸ He concluded by noting:

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, 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. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.⁴¹⁹

In other words, federal promises—made, enshrined in a treaty, and not withdrawn—give rise to an unavoidable duty of fulfillment, no matter how “great” the “price of keeping them.” The same logic should hold for the trust duty. Notably, the Court reached this sweeping ruling in spite of Oklahoma's alarm “about the potentially ‘transform[ative]’ effects” of such a decision.⁴²⁰ “[T]he magnitude of a legal wrong,” Justice Gorsuch wrote, “is no reason to perpetuate it.”⁴²¹

If courts determine that there is a trust duty to protect Indian lands, lives, and livelihoods, the second question courts must answer is what is the *scope* of that duty? As the editors of *Cohen's Handbook of Federal Indian Law* have written, “If a claim for breach of trust for specific relief or money damages exists, the applicable statutes, regulations, treaties, and executive orders ‘define the contours of the United States’ fiduciary responsibilities.”⁴²² It is thus relevant that many treaties with Indians promised specifically to provide for the preservation of a permanent homeland.⁴²³ As the historian Charles F. Wilkinson

417. No. 18-9526 (July 9, 2020), https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.

418. *Id.* slip op. at 1.

419. *Id.* slip op. at 42.

420. *Id.* slip op. at 36.

421. *Id.* slip op. at 38.

422. COHEN'S HANDBOOK, *supra* note 309, at § 5.05(2) (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983)).

423. WILKINSON, *supra* note 254, at 14–19; Wood, *supra* note 250, at 1497.

noted, many treaties guaranteed the Indians territory “for absolute and undisturbed use and occupation” of the tribe.⁴²⁴

It is also relevant that courts have repeatedly rejected the argument that “no duty should be imposed upon the government not set forth explicitly in statutes and regulations.”⁴²⁵ As the Court of Federal Claims recently put it, the Supreme Court “thoroughly repudiated” this “cramped view of [the government’s] fiduciary obligations.”⁴²⁶ Rather, as the D.C. Circuit has written, the “general ‘contours’ of the government’s obligations may be defined by statute [but] the interstices must be filled in through reference to general trust law.”⁴²⁷

These general trust law principles indicate that the scope of the government’s duty to protect and preserve Indian lands and resources is vast—effectively giving rise to a right to resettlement. In *United States v. White Mountain Apache Tribe*, for instance, an Indian tribe alleged that the government breached its fiduciary duty to manage land held in trust for the tribe. The Supreme Court held that “elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”⁴²⁸ The government is obligated to do everything it can so that the land and resources it has promised to Indians do not “fall into ruin”; if this becomes impossible, it follows that the government must compensate Indians as best it can—by relocating them to comparable land with comparable resources.

Further, as the editors of *Cohen’s Handbook* have added, while “[p]rivate trust law principles are most often invoked in controversies involving direct management of tribal resources and funds,”⁴²⁹ these principles are less useful in the context of Indians seeking the performance of trust obligations, and courts can decline to rely on some common law trust principles when doing so would be inappropriate or unhelpful.⁴³⁰ Here, in light of the importance and uniqueness of the trust duty toward Indians, courts often go even further. As one district court wrote in 2008:

It is clear that the duties of the trustee and the principles of equity that govern failures to account are derived from statutes as informed by common-law principles of trust, but it is also clear that those statutory and common-law principles are tempered by the unique nature of the trust and of the trustee. . . . [W]here the trust is of enormous scope, the trustee of unusual character, and the data affected with such great uncertainty, the law of trusts

424. *Id.*

425. COHEN’S HANDBOOK, *supra* note 309, at § 5.05(2) (citing numerous cases rejecting this argument).

426. *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 736 (2011) (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 470 (2003)).

427. *Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001).

428. *White Mountain Apache*, 537 U.S. at 475.

429. COHEN’S HANDBOOK, *supra* note 309, at § 5.05(2).

430. *See, e.g., Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980); COHEN’S HANDBOOK, *supra* note 309, at § 5.05(2).

is a sort of magnetic compass; it cannot be expected to point to due north, or to “map directly” onto this context.⁴³¹

Rather, in cases where tribes seek to compel federal compliance with the duty, several courts have demanded all federal action “possible” to ensure fulfillment of trust obligations.⁴³² In *Pyramid Lake Paiute Tribe v. Morton*, for instance, a tribe challenged a DOI regulation allowing water from the Truckee River—vital to the Paiute’s livelihood—to be diverted away to an irrigation district.⁴³³ The court found that DOI owed a trust duty to the tribe, and so the Secretary must “assert his . . . authority to the fullest extent possible to” preserve the tribe’s water.⁴³⁴

Likewise, in *Northern Cheyenne v. Hodel*, the tribe objected to the Bureau of Land Management’s issuance of coal leases on public lands near the reservation, arguing this would harm the tribe and thus violate the federal trust duty.⁴³⁵ The court agreed, writing that the “special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully the potential impacts to the Tribe.”⁴³⁶ The court continued:

Ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in the decisional process . . . violated this trust responsibility. Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider impacts of his action upon a potentially affected tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary’s obligations are any less than this would be to render the trust responsibility a pro forma concept absolutely lacking in substance.⁴³⁷

Thus, it would seem that the scope of the government’s trust duty is to do everything “possible”⁴³⁸ to protect and preserve the Indian communities threatened by climate change, including, naturally, their relocation.

Additionally, the government cannot avoid its trust obligations by arguing that it is not the sole, or even the main, party that has contributed to anthropogenic climate change. As the circuit court wrote in *Blue Legs v. Bureau of Indian Affairs*,

431. *Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 225 (D.D.C. 2008).

432. *See, e.g., Okanogan Highlands All. v. Williams*, No. 97-806-JE, 1999 U.S. Dist. LEXIS 4068, at *46 (D. Or. Jan. 12, 1999); *Klamath Tribes v. United States*, No. C.V. 96-381-HA, 1996 WL 924509, at *21–*22 (D. Or. Oct. 2, 1996).

433. 354 F. Supp. 252, 254–56 (D.D.C. 1972), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev’d in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

434. *Id.* at 256.

435. *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065, 3071 (D. Mont. 1985), *rev’d on other grounds*, 851 F.2d 1152 (9th Cir. 1988).

436. *Id.*

437. *Id.*

438. *See supra* notes 433–434, and accompanying text.

BIA [Bureau of Indian Affairs] and IHS [Indian Health Service] have not merely violated the RCRA, but, in so doing, they have violated their fiduciary obligation toward the plaintiffs and the Tribe. They are required to insure that the dumps are cleaned up, even if others contributed to the problem and even if the RCRA does not clearly set forth what role BIA and IHS are to play under the statute.⁴³⁹

That the circuit court found this “obligation,” in spite of the apparent limitations mentioned in the last clause, provides a powerful precedent.

A review of the relevant history and case law reveals the existence of a federal trust duty to protect Indian land, resources, homes, and lives from the effects of climate change. In a rapidly warming world, this trust duty must include a duty to relocate Indians. Indeed, this duty is so broad that it effectively guarantees a right to resettlement.

IV. THE RIGHT TO RESETTLEMENT AS A COMMUNITY

This right to resettlement is not limited to individuals. It is, in fact, a right to *community* resettlement—the right for an Indian community to be relocated *as a community*. Historically, many community resettlements have “followed a model of individual buyouts,” wherein the government offers “lump-sum payments to residents and leav[es] them to their own devices to restart their lives.”⁴⁴⁰ This model, however, saves the individual but kills the community.⁴⁴¹ This is especially true of Indian communities whose cultures are based on close-knit community and kinship ties. Thus, this Part argues, the trust duty to relocate Indian communities threatened by climate change must include the obligation to relocate them as communities, if the communities decide such relocation is necessary.

As Jeri Beth K. Ezra noted, “Native American religions are highly diverse and difficult to generalize accurately. Nonetheless, certain commonalities exist among all Indigenous North American cultures. Typically, Native Americans practice site-specific religions, attaching religious significance to the particular site where an event occurred, rather than to the event itself.”⁴⁴² For decades, advocates have been attempting to invoke the place-based nature of Indian

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

440. Stein, *supra* note 80; *see also* Sherri Brokopp Binder, *Resilience and Postdisaster Relocation A Study of New York's Home Buyout Plan in the Wake of Hurricane Sandy* (Aug. 2013), https://hazards.colorado.edu/uploads/quick_report/binder_2013.pdf; John Lovett, *Moving to Higher Ground Protecting and Relocating Communities in Response to Climate Change*, 42 VT. L. REV. 25, 33–51 (2017).

441. *See* Stein, *supra* note 80.

442. Ezra, *supra* note 312, at 705 n.2; *see also* Wood, *Protecting the Attributes of Native Sovereignty*, *supra* note 312, at 195 (internal citations omitted) (noting “[a] striking common feature of native cultures is their inextricable tie to the natural world.”); Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 868 (2008).

religions to protect homelands from infringement or desecration, often with little success.⁴⁴³

Yet, as Alex Tallchief Skibine has written, Indian religion is distinct from Indian culture:⁴⁴⁴ “[C]ulture can and does change, religion usually does not.”⁴⁴⁵ Indian culture is not just place-based; it is also based on community ties, and, because of this, Indian communities can relocate and maintain their culture, so long as the community stays together.⁴⁴⁶ As Mary Christina Wood noted, “Indian culture honors community, and cultural norms generally prioritize communal harmony over individual competition.”⁴⁴⁷ Richard Herz has added, “Native American peoples . . . see themselves as inherently social beings born into a network of group relations.”⁴⁴⁸ Their societies are less “individualist” than most American ones, and have such “communal elements” as group “socialization processes, kinship structures, and community-based religions.”⁴⁴⁹

Many of the Indians whose homes are being displaced by climate change have testified to the importance of their communities to maintaining their cultural identity and the immense threat separation poses. “Lot of us like to take care of our community first and then ourselves last, you know?” Shishmaref Vice Mayor Stanley Tocktoo asked journalist Amy Martin.⁴⁵⁰ He explained

People here rely on each other for all of the essentials of life. They visit each other when they’re sick, they take care of each other’s kids. They depend on subsistence hunting to feed their families and share that food with elders and others who can’t go out and hunt themselves. And they know that their future depends on keeping those relationships intact.⁴⁵¹

“People here want to stay together,” Martin concluded.⁴⁵² Studying the Isle de Jean Charles relocation, scholar Kelley Pettus noted,

Because the Biloxi-Chitimacha-Choctaw Tribe has a unique cultural identity, Louisiana was concerned that members of the tribe would be forced

443. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1987); *Crow v. Gullet*, 541 F. Supp. 785, 790 (D.S.D. 1982).

444. Alex Tallchief Skibine, *Culture Talk or Culture War in Federal Indian Law*, 45 TULSA L. REV. 89, 90 (2009); see also David Bogen & Leslie F. Goldstein, *Culture, Religion and Indigenous People*, 59 MD. L. REV. 48 (2009).

445. Skibine, *Culture Talk or Culture War*, *supra* note 444, at 90.

446. S. James Anaya & Robert A. Williams Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 45 (2001); Tabucanon, *supra* note 104, at 27.

447. Wood, *Protecting the Attributes of Native Sovereignty*, *supra* note 312, at 196.

448. Richard Herz, Note, *Legal Protection for Indigenous Cultures Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 698–99 (1993).

449. *Id.* at 699; see also Rebecca Tsosie, *Reclaiming Native Stories An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 307–08 (2002) (stating “for Native people, culture is an inseparable aspect of their daily existence, and the survival of Native nations depends upon cultural maintenance. In comparison, many non-Indian people treat culture as an abstract concept, something that can be easily separated from everyday life.”).

450. Martin, *supra* note 3.

451. *Id.*

452. *Id.*

to move to disparate parts of the state, jeopardizing the tribe's historical traditions. Resettling the community as a whole would promote 'cultural traditions . . . with the tribal members living in one community.⁴⁵³

Several scholars and advocates have argued that the federal trust duty can protect Indian cultural sites.⁴⁵⁴ Mary Christina Wood has gone even further, arguing that the trust duty protects Indian "cultural vitality."⁴⁵⁵ A thriving culture, she noted, is crucial to the maintenance of political and social autonomy, and thus to the tribe's very survival.⁴⁵⁶ Indeed, in one influential case,⁴⁵⁷ the First Circuit declined to recognize the Mashpee as a federally protected "tribe" because it had assimilated and lost too much of its distinctive cultural identity.⁴⁵⁸ In other words, the court held that without its distinct culture, a tribe ceases to be a tribe.⁴⁵⁹ Such an argument can be taken still further. In order for a tribe to survive, it must remain as a community; so if relocation is vital to its survival, it must be relocated as a community.

Courts have shown some openness to this line of reasoning, suggesting it is grounded in trust obligations. In 1978, for instance, a district court ruled that a state policy of allowing only Indians to sell their handmade goods in a museum was not a violation of equal protection.⁴⁶⁰ Rather,

[b]ecause the federal government and the State of New Mexico are committed to insure the political separateness and cultural survival of Indian tribes, and because Indians who live on or near a reservation are members of distinctive cultural communities which would be gradually destroyed if some protection were not given against forced assimilation, Indians have gained a unique status in the law which no other group, racial or otherwise, can claim.⁴⁶¹

453. Pettus, *supra* note 165, at 175.

454. Elizabeth Bower, Note, *Standing Together How the Federal Government Can Protect the Tribal Cultural Resources of the Standing Rock Sioux Tribe*, 42 VT. L. REV. 605 (2018); Ezra, *supra* note 312, at 707; Brief of Amici Curiae Ass'n of Am. Indian Affairs, Pueblo of Pojoaque, and University of New Mexico School of Law Natural Resources and Environmental Law Clinic in Support of Plaintiff Standing Rock Sioux Tribe's Motion for Summary Judgment, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Case No. 1:16-cv-1534-JEB (D.D.C. 2016).

455. Wood, *supra* note 312, at pt. VII.

456. *Id.* at 192–93, 219.

457. See JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL*, at xii (1991).

458. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581–88 (1st Cir. 1979).

459. Notably, the *Mashpee* court "devalued the oral history of the Mashpee where it conflicted with written documents" in reaching its decision. Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence The Mashpee Indian Case*, 1990 DUKE L.J. 625, 632 (1990); see also Jo Carrillo, *Identity as Idiom Mashpee Reconsidered*, 28 IND. L. REV. 511, 544–45 (1995).

460. *Livingston v. Ewing*, 455 F. Supp. 825, 831 (D.N.M. 1978), *aff'd*, 601 F.2d 1110 (10th Cir. 1979).

461. *Id.*

This trust obligation to protect Indian culture can also be inferred from statutes.⁴⁶² Consider section 801 of the Alaska National Interest Lands Conservation Act⁴⁶³:

The Congress finds and declares that (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence; (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses⁴⁶⁴

The Act further acknowledged that the “continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened,” though Congress pointed to the threat of Alaska’s “increasing population,” not climate change.⁴⁶⁵ The Act continued, “it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.”⁴⁶⁶ The language of this Act clearly indicates congressional assumption of a trust duty to provide for Alaskan Natives’ continued subsistence uses of their ancestral lands; now that these lands are being eliminated by the threat of climate change, it is “necessary” for Congress to relocate them to other public lands where they can continue distinctive cultural practices.

Treaties are the final source of this interpretation of the trust duty. As noted above, many treaties guaranteed territory for Indian communities for perpetual and undisturbed use and occupation and specifically mentioned that the federal government would protect this territory.⁴⁶⁷ In assuring Indians a right to permanently occupy reservations—together, as a community—and in promising them federal protection from forces that might threaten that community, the federal government undertook a trust obligation to protect their communal culture and integrity. Other treaties specifically promised Indians “free exercise of their religion without restriction,”⁴⁶⁸ which Mary Christina Wood has

462. See, e.g., Native American Graves Protection and Repatriation Act, Pub. L. No. 101- 601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013); Native American Language Act, Pub. L. No. 101-477, 104 Stat. 1153 (1990) (codified as amended at 25 U.S.C. §§ 2901 *et seq.*).

463. Pub. L. No. 96-487, § 802, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. § 3111).

464. *Id.* § 3111(1)–(2).

465. *Id.* § 3111(3).

466. *Id.* § 3111(4).

467. See *supra* notes 413–414 and accompanying text.

468. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. IX, 9 Stat. 108, 116.

interpreted as another guarantee of “[t]he fiduciary duty to protect native culture.”⁴⁶⁹

Notably, courts have interpreted such treaties as creating trust obligations far broader than the words on the page, including obligations to protect Indian culture. In *Menominee Tribe v. United States*,⁴⁷⁰ the Supreme Court held that the federal government’s treaty with the Menominee, which protected “their way of life,” included their rights to hunt and fish on their ancestral lands—rights vital to their culture, and which the federal government could not abrogate.⁴⁷¹ In *United States v. White*, the Eighth Circuit held that even though treaties with the Red Lake Band of Chippewa Indians did not specifically mention the rights to hunt and fish, these must be protected⁴⁷² because of their “cultural significance” to the Chippewa.⁴⁷³ The right to cultural and community integrity must likewise emanate from the terms and intentions of these treaties.

An Indian right to community resettlement can be found in statutes, treaties, and settled case law. All of these sources embody a federal duty arising from a history of promises made and promises broken.

CONCLUSION

New international agreements, bodies, frameworks, and funding are vital to deal with the imminent species-wide climate change crisis. This crisis is larger than any one government, or country, or continent, and it is likely that the present international political and economic order is distinctly ill-equipped to tackle it. The solution presented in this Article is a small one, one that only suggests the existence of a right to resettlement for Indian communities in the United States. The solution presented in this Article is in no way meant to denigrate or distract from these other, broader solutions—which are crucially necessary—or to suggest that the threats facing Indian communities are more pressing or more important than those facing other Indigenous and vulnerable communities around the world. The solution presented in this Article is admittedly inadequate to take on the larger crisis at hand.

An American court ruling that the trust duty includes a right to resettlement for Indian communities facing climate annihilation would be a bold yet necessary step toward fulfilling the government’s obligations. It would require a judge willing to give full force to the trust duty and likely bear the burden of conservative outcry in the process. Mary Christina Wood has written that, even where “the law provides firm principles,” whether a court recognizes those principles

469. Wood, *Protecting the Attributes of Native Sovereignty*, *supra* note 312, at 216–17.

470. 391 U.S. 404 (1968).

471. *Id.* at 406.

472. 508 F.2d 453 (8th Cir. 1974).

473. Ezra, *supra* note 312, at 729.

comes down to judicial courage. Back in the 1970s, when Judge Boldt and Judge Belloni issued their famous decisions upholding treaty fishing rights in the Pacific Northwest—decisions that essentially recognized native nations as cotenants of a shared fishery—the judges exemplified judicial resolve. They were threatened, hung in effigy, ruthlessly criticized, mocked in the press, and were the subject of bumper stickers that read ‘screw Boldt, slice Belloni.’ They nevertheless stood unwaveringly by principles of justice.⁴⁷⁴

This kind of resolve is needed today, more than ever.

Yet this judicial courage would not be a panacea. Even if courts were to recognize such a right, and even if the federal government showered Indian communities with funding for relocation, looming questions would remain: where to go, how to go, how to make sure relocation is equitable? These communities “would still face the existential problems of how to maintain an economy in remote locations with few job opportunities and (in many cases) declining subsistence opportunities,” Elizaveta Barrett Ristroph has written.⁴⁷⁵ Communities must engage “in difficult conversations about the potential scenarios that could occur as climate change worsens and more communities are competing for the same limited resources.”⁴⁷⁶

And even while this judicial courage is necessary, it is important to remember that it does not emerge out of nowhere. Law changes when social movements demand that it changes. The 2007 UN Declaration on the Rights of Indigenous Peoples, for instance, was the direct result of more than forty years of Indigenous activism, in the United States and around the world.⁴⁷⁷ Surely it is no coincidence that courts strengthened the federal trust duty in the 1970s, at the exact moment that the Red Power Movement, American Indian Movement, and other Indian activists were demanding structural changes across the country. It is up to those of us who aspire to be allies to support the Indigenous activists of today and to follow where they lead.

474. Wood, *supra* note 247, at 543–44.

475. Ristroph, *supra* note 224, at 283.

476. *Id.* at 283–84.

477. See NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE AND THE LONG TRADITION OF INDIGENOUS RESISTANCE ch. 6 (2019).

