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Here Today, Gone Tomorrow—Is Global Climate Change Another White Man’s Trick to Get Indian Land? The Role of Treaties in Protecting Tribes as They Adapt to Climate Change

Hope M. Babcock

Georgetown University Law Center, babcock@law.georgetown.edu

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GLOBAL CLIMATE CHANGE ANOTHER WHITE
MAN’S TRICK TO GET INDIAN LAND? THE
ROLE OF TREATIES IN PROTECTING TRIBES
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*Hope Babcock**

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ABSTRACT

Indian Tribes are at the tip of the spear when it comes to climate change. Their dependence on their homelands for subsistence and cultural sustenance has made them vulnerable to climate-driven changes like sea level rise, shoreline erosion, and drought. As climate change makes their land less suitable for the animals and plants they depend on, tribes are facing increasing pressure to move to survive. Complicating any such move is its effect on tribal treaties that grant tribes sovereignty over their traditional land and their members. If tribes are forced to sever themselves from their homelands, will that affect their sovereignty; can their treaties migrate with them as they move to new land; where can tribes move to that will enable them to survive as distinct political sub-units in our federal system of government; and will these treaties make their assimilation into any new community impossible? This Article looks at these and many other questions in an attempt to understand how climate change may affect tribes as we know them today and begins to answer some of them. However, there are too many questions to answer in a single article. Therefore, this Article’s major contributions are identifying the problem and related questions and then proposing an analytical framework that separates legal from moral questions, and practical from constitutive ones, and contextualizes these questions in a rapidly changing physical world. Developing and applying this framework may help identify which institutions should try and answer the various questions raised in the Article, what tools they might be expected to use, and in what order the questions should be addressed.

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INTRODUCTION

While likely not as purposeful as the allotment policies of the nineteenth century, climate change is the latest threat to tribal nations and individual Indian people living and working on their own lands.¹

* Professor Babcock is a law professor at Georgetown University Law Center where she teaches environmental and natural resources law and directs an environmental clinic. She has written many articles on the topic of tribal sovereignty and other issues of relevance to Indian tribes. *See, e.g.,* Hope Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Re-invigorated, and Re-empowered*, 2005 UTAH L. REV. 443; Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13 (2014); Hope Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006); Hope Babcock, *The Stories We*

Climate change will have a substantial impact on Indian tribes whose subsistence as well as spiritual and traditional needs led them to settle along the country's coasts.² Yet, the water that drew tribes to settle near it has become a place of danger as sea levels rise in response to global climate change. If seas continue to rise, there seems to be little question that some coastal tribes will need to move inland away from the shore and their traditional homelands. Inland tribes will also not be unscathed by climate change. They may find that their traditional lands no longer support their needs as the effects of drought and higher temperatures brought on by climate change substantially disrupt the landscape they depend on. Climate-induced impacts will profoundly affect, more likely destroy, subsistence hunting, fishing, and gathering—integral parts of the cultures of many tribes no matter where they live.

This Article explores questions raised by the intersection of this anticipated migration with tribal treaties that apply to lands that may soon need to be abandoned—questions such as whether Indian treaties will move with tribes as they migrate to more hospitable areas, and whether rights protected under those treaties will guarantee tribes equivalent replacement acreage or land with similar value to the lands left behind. What treaty-protected rights, including access to sacred sites and burial grounds as well as gathering and wildlife take rights, will tribes retain in their original land once they have been abandoned? Are those lands still reserved to the tribes that once lived there or are they open to non-Indians? These questions

Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious, 55 VILL. L. REV. 803 (2010); Hope Babcock, "[This] I know from My Grandfather:" *The Battle for Admissibility of Aboriginal Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19 (2012-2013). She thanks Georgetown University Law Center's ongoing support of her scholarship as well as the research support provided by the Law Center's library, particularly by Rachel Jorgensen, who indefatigably found every eighteenth-century treaty between the United States government and a tribe that mentioned off-reservation hunting, fishing, and gathering. This Article was written under the auspices of a Law Center summer research grant.

1. Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 550 (2015).

2. For a thorough examination of what is to be an Indian tribe in the United States, see generally Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017) (arguing among other things that a race-based definition is inapt).

hint at the potential disruption to the expectations of individuals who have gained rights on abandoned tribal lands and the new demands that will be placed on currently occupied land as tribes move there. One goal of this Article is to understand to what extent treaties may exacerbate or help resolve the tensions that this migration will create, if treaties even continue to exist after tribes abandon their land.

The scholarly literature has not addressed the effect of climate change on the promises made centuries ago in Indian treaties to protect tribes on lands reserved for them. This Article seeks to fill that gap by examining that effect and the resultant questions that must be answered if tribes are to remain a vibrant, independent source of alternative cultural norms despite the effects of climate change on their continued existence.³ But there are too many questions for a single article to answer them all; certainly, this one cannot. The Article's contributions, therefore, are to bring the problem to the attention of other scholars, to identify the relevant questions, and to propose an analytical framework for answering them—a framework that separates legal from moral questions, and practical from constitutive ones, and contextualizes them in a rapidly changing physical world. Developing and then applying this framework may help identify which institutions should try and answer the various questions, what tools they might be expected to use, and in what order the questions should be addressed.

This Article begins by discussing the impact of climate change on Indian tribes, touching briefly on current efforts by tribes to relocate or adjust the boundaries of their existing reservations to access replacement resources for those that are disappearing. In Part II, this Article examines the special connection that tribes have to their traditional lands⁴—that connection can be physical, spiritual,

3. See S. James Anaya, *The Situation of Indigenous Peoples in the United States of America*, 32 ARIZ. J. INT'L & COMP L. 51, 52 (2015) ("The Special Rapporteur concludes that indigenous peoples in the United States – including American Indian, Alaska Native and Native Hawaiian peoples – constitute vibrant communities that have contributed greatly to the life of the country; yet they face significant challenges that are related to widespread historical wrongs, including broken treaties and acts of oppression, and misguided government policies, that today manifest themselves in various indicators of disadvantage and impediments to the exercise of their individual and collective rights.").

4. This connection is true for tribes who do not live on a reservation; many "urban Indians," Indians unconnected to a reservation, return to the reservation for ceremonial and other events. Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13, 35 (2014).

and centuries old, and can have defining legal consequences.⁵ Implicit in this discussion is whether tribes can continue to exist as tribes in a normative and legal sense once physically separated from their traditional lands, as this Article posits they may have to be. The constitutive importance of land to tribes distinguishes them from other communities that must move to avoid the effects of climate change.⁶

Part III of this Article turns to Indian treaties and looks at two primarily legal questions: (1) whether treaties attach to tribal land or tribes; and (2) the extent to which courts have recognized treaty rights beyond the boundary of reserved tribal lands.⁷ The first question raises a subsidiary question; namely, if treaties attach to the land, whether those rights remain in effect once the tribe has abandoned its treaty-protected land; while the second question probes the extent of the geographic elasticity of off-reservation treaty rights. More specifically, will tribes retain a treaty-protected right of access to former tribal lands? If they can do this, will it enable them to continue to take resources on those lands or engage in tribal ceremonies on them; alternatively, do treaty-protected sovereign prerogatives follow a tribe to its new land? Will tribal treaties, if they continue to exist, make the assimilation of tribes into their host communities more difficult, perhaps impossible? This Article looks

5. Hope Babcock, “[*This*] I Know from My Grandfather:” *The Battle for Admissibility of Aboriginal Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19, 23-26 (2012-2013) (discussing connection of tribes to their land).

6. See Krakoff, *supra* note 2, at 547 (“Though legal definitions of ‘tribe’ were freighted with discriminatory meanings for centuries, today domestic and international legal criteria defining tribal status focus instead on historical ties to land as well as continuity of politics, culture, and self-understanding.”) (emphasis in original); see also *id.* at 533-34 (“*United States v. Montoya*, decided twelve years earlier, defined a tribe as ‘a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.’”).

7. Elizabeth Kronk Warner advocates the use of treaties by the federal government to protect tribes against the adverse effects of climate change. See Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 922 (2016) (“[I]t may be possible to successfully use certain treaty provisions to require the United States to work to protect tribal resources through enforcement of treaty provisions. By looking back to the historical rights attached to tribal treaties, tribes may be able to apply such protections in a new fashion to combat the negative impacts of climate change.”). This Article takes no position on that recommendation.

at case law, scholarly writings, and a selection of treaties to formulate some tentative answers to these questions.

Part IV turns to the question of where tribes might go if they are forced to abandon their ancestral lands. Embedded in this question are a host of subsidiary questions of practical and moral significance.⁸ For example, do refugee tribes have a morally and legally defensible claim to land of equivalent acreage and function and value to what they once had under their treaties; should tribes be resettled on public or private lands, or on other reserved lands in Indian country;⁹ and what is the extent of the federal government's treaty-based trust or moral responsibility to facilitate, even fund, this migration and resettlement? This Part also identifies the tension that might arise when both Indian and non-Indian communities suddenly find that they have been conscripted into hosting displaced Indian tribes, immigrants from cultures governed by laws and institutions different from their own.

The last Part of this Article sorts these questions into four categories, hinted at above—legal, moral, practical, and

8. This Article is not proposing to attribute moral significance to climate change. If a paradigmatic moral problem is one where a person intentionally harms another person, then, as Krakoff says, the “spatial and temporal dispersion that defines global warming makes these identifications and connections particularly difficult to make.” Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 890 (2008). Although, she notes that the moral compass may be swinging back toward conceiving of global warming as a moral issue as more information is gained about the connections between human actions and their effects on the world. *Id.* at 891.

9. Indian Country includes:

[A]ll land[s] within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1949). Also included in the term Indian Country are lands held by the federal government in trust for Indian tribes that exist outside of formal reservations. See *Definition of Indian Country for EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country> [https://perma.cc/A8AG-HL92] (last visited Sept. 12, 2017). These lands are considered informal reservations. *Id.*

constitutive—what it is to be a tribe. This Part concludes that the most important category of questions is practical, such as resolving where tribes can move to and where the funds will be found to defray the cost of those migrations. In the next tier of questions are those the answers to which will allow tribes to retain their identities and functionality as tribes. Answers to legal questions may provide tools to assure tribes the land and resources they need, but are not defining in their own right; while moral questions will find answers in society's acknowledgment of the harms done to tribes since their conquest and its willingness to absorb and not resist these migrant cultures. This last category of questions seems the most difficult to answer because they are so contextual—dependent on the time frame in which they arise, and the mood and needs of the country when the conflicts and tensions present themselves. Removing these questions from the “must answer now” list and demoting legal questions to a lower category of significance may be this Article's most important contribution, as doing this will direct attention to the most pressing questions—the practical ones that must be answered in the near future in a way that allows the essential elements of what it is to be an Indian tribe to continue unimpaired.

The topic this Article addresses is an important one, not just because the fate of tribes as separate sovereign nations in this country is at risk, but also because the situation facing tribes in the continental United States¹⁰ may predict what may happen under international treaties that determine boundaries between nations and the allocation of international resources among them as those treaties become disconnected from and irrelevant to the physical landscape. Amending and adjusting any treaty to the physical realities of the twenty-first century may not be easy. In this way, starting down a path toward solving the governance problems climate change poses for tribes in the United States may point a path forward in the international arena.

10. This Article does not discuss native Hawaiian communities and villages because of their separate status under U.S. laws. For an interesting discussion of whether native Hawaiians should be analogized to Indian tribes, see *Rice v. Cayetano*, 528 U.S. 495, 495 (2000) (holding Hawaiian statute limiting only Hawaiians right to vote for trustees of a state agency was a race-based classification in violation of the 15th Amendment and overturning the lower court's decision analogizing between Indian tribes and Hawaiians).

I. THE IMPACT OF CLIMATE CHANGE ON INDIAN TRIBES

The harmful impacts of climate change—“longer heat seasons, which result in droughts, shorter and warmer winters, and more frequent extreme weather patterns such as hailstorms and heavier rains”¹¹—are by now well known. “Flooding, wildfires, mudslides, tornados, hurricanes, and disease outbreaks” have all been associated with climate change.¹² “At best, the symptoms of climate change alter the ability of individuals and governments to use their lands in ways they have in years past. At worst, they force relocation of entire communities and endanger human lives.”¹³ Robin Bronen, the Executive Director of the Alaska Institute of Justice, has coined the term “climigration” to describe the phenomenon of communitywide relocation in response to changes in the weather.¹⁴ Climate change

11. Ford & Giles, *supra* note 1, at 524. See also Carl Bruch, *A Toolbox for Environmentally Displaced Persons*, ENVTL. F. 52, 55 (2016) (“While a lot of attention has focused on sea-level rise, storms, floods, and fires associated with climate change, there is growing concern that substantial increases in heat waves may drive more migration and do so sooner than other factors.”); Michael B. Gerrard, *Sadly, the Paris Agreement Isn’t Nearly Enough*, ENVTL. F. 52, 57 (2016) (“Climate change can cause displacement in multiple ways. The most prominent are water shortages and desertification that threaten food supplies and livelihoods, extreme weather events, sea-level rise, and loss of Arctic sea ice. Often these conditions combine with existing poverty and political instability and make those worse.”).

12. Ford & Giles, *supra* note 1, at 524.

13. *Id.* at 521. See Vanessa Haley-Benjamin, *It is Time to Help the World’s Most Vulnerable People*, ENVTL. F. 52, 54 (2016) (“Scientists predict climate change may drive from 50 to 250 million people from their homes by 2050.”); ENVTL. L. INST., *Can the World Community Handle Environmental Refugees?*, ENVTL. F. 52, 52 (2016) (“The United Nations High Commissioner for Refugees estimates that climate change will displace up to 250 million people over the next 35 years, many permanently.”). See also Patty Ferguson-Bohnee, *The Impacts of Coastal Erosion on Tribal Cultural Heritage*, 29 FORUM J., 2015 58, 63 (“Ninety percent of the residents of the Isle de Jean Charles Band of Biloxi Chitimacha Indian Community have already been forced to relocate due to land loss.”). Although climate change is only one case of land loss in the lower bayous of Terrebaun and Lafourche Parishes, the others being flood control measures, loss of barrier islands, and aggressive cutting of canals through wetlands by oil companies, sea level rise and resultant flooding has caused substantial erosion and increased vulnerability to extreme weather events, like hurricanes. *Id.* at 59-61. Terrebonne Parish is among the fastest eroding areas in the United States. *Id.* at 58.

14. Kavya Balaraman, *Alaska Communities Grow Despite Threat of Future Relocation*, E&E News (Feb. 24, 2017), www.eenews.net/climatewire/stories/1060050504/print [<https://perma.cc/Q296-NU2Z>].

could displace more people than those displaced by war, political repression, and other factors forcing people to move.¹⁵

In many ways, Indian tribes are at the tip of the climate-change spear as the changing climate imperils their ability to carry on their traditional way of life and their beliefs.¹⁶ While it is true that climate change is not just affecting Indian tribes and that the threat of forced relocations face non-Indian communities as well as Indian ones,¹⁷ the effects of climate change are “amplified” for tribes because of their

15. *Can the World Community Handle Environmental Refugees?*, *supra* note 13, at 52. Indeed, the impact of global climate change on people is so profound that some have said it rises to the level of a human rights violation. *See* Jeremy M. Bellavia, *What Does Climate Justice Look Like for the Environmentally Displaced in a Post Paris Agreement Environment? Political Questions and Court Deference to Climate Science in the Urgenda Decision*, 44 DENV. J. INT'L L. & POL'Y 453, 465 (2016) (“Climate change has a direct impact on human rights. The International Covenant on Economic, Social and Cultural Rights and The International Covenant on Civil and Political Rights, among others provide for rights directly related to climate change (e.g., improvement of environmental and industrial hygiene, life, work, culture). Environmental degradation caused by climate change affects people’s ability to exercise these rights.”).

16. *See* Ford & Giles, *supra* note 1, at 546 (quoting Press Release, Kevin Washburn, Assistant Secretary for Indian Affairs, U.S. Dep’t of the Interior, Secretary Jewell Announces New Tribal Climate Resilience Program (July 16, 2014)) (“We have heard directly from tribes about climate change and how it dramatically affects their communities, many of which face extreme poverty as well as economic development and infrastructure challenges. These impacts test their ability to protect and preserve their land and water for future generations.”). Assistant Secretary Washburn’s comments are echoed by Secretary of the Interior Sally Jewell. *See id.* (“Sally Jewell’s July 2014 statement that ‘climate change is a leading threat to natural and cultural resources across America, and tribal communities are often the hardest hit’ affirms that impacts are serious in Indian country, warranting an appropriately comprehensive response.”). *See also* Kronk Warner, *supra* note 7, at 917-18 (describing the impact of climate change on the Swinomish and Nez Pierce tribes); Krakoff, *supra* note 8, at 876 (reporting that “Coho salmon . . . have been found one thousand miles further north than their traditional habitat”).

17. Ford & Giles, *supra* note 1, at 551 (“Everyone is impacted by climate change, Indian and non-Indian alike. The plight of reservation communities already faced with forced relocation is soon to be shared by non-Indian communities.”). A 2007 study by the Natural Resources Law Center at the University of Colorado Law School documents how sea-level rise in Alaska threatens Alaskan villages’ traditional hunting and gathering practices, puts increased pressure on tribal reserved water rights in the Southwest, and threatens to inundate tribal reservations in Florida. Krakoff, *supra* note 8, at 865 (citing JONATHAN M. HANNA, NATIVE COMMUNITIES AND CLIMATE CHANGE (Natural Res. Law Ctr., Univ. of Colo. Law Sch. 2007), http://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1014&context=books_reports_studies [<https://perma.cc/89HS-EE58>]).

unique attachment to their lands and the enduring negative “legacy of the removal of Indian peoples from their lands.”¹⁸

In nearly all cases the loss of land meant the substantial or complete undermining of indigenous peoples’ own economic foundations and means of subsistence, as well as cultural loss, given the centrality of land to cultural and related social patterns. Especially devastating instances of such loss involve the forced removal of indigenous peoples from their ancestral territories, as happened for example, with the Choctaw, Cherokee and other indigenous people who were removed from their homes in the south-eastern United States to the Oklahoma territory in a trek through what has been called a “trail of tears,” in which many of them perished.¹⁹

Unlike their non-Indian neighbors, Indian tribes have a long history of fighting to “preserve access to ancestral lands and traditional hunting areas,” often the areas that will be “most profoundly affected by climate change-related disaster[s].”²⁰ To the extent that climate change “extinguish[es] what tribes have fought for centuries to preserve,” it all but guarantees future litigation and conflict as the situation involving remaining resources becomes more severe.²¹

The importance of subsistence hunting and fishing for many tribes also makes them especially vulnerable to climate change. For many tribes, these activities are such an integral part of their culture²² that the term subsistence has become “synonymous with culture, identity, and self-determination.”²³ Yet, it is the areas that have been

18. Ford & Giles, *supra* note 1, at 520 (identifying the problems presented by removal of tribes because of the negative history associated with tribal removal programs throughout the history of Indian–federal government relations).

19. Anaya, *supra* note 3, at 61. See also Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 NAT. RES. J. 55, 59 (2016) (“The dispossession of tribal peoples from their original lands had a devastating impact on their lives, societies, traditions and well-being. Yet, they persevered, and the memories and stories of their ancestral lands remain.”).

20. Ford & Giles, *supra* note 1, at 524. See also Benjamin Schachter, *What Do The Climate Displaced Really Need?*, ENVTL. F. 52, 59 (2016). Like other displaced persons or migrants who are different from the majority culture, tribes may also “face discrimination, difficulty accessing public services, and diminished well-being.” *Id.*

21. Sarah Krakoff, *supra* note 8, at 878. This would apply to any resource that a tribe depends on, whether it be salmon, blueberries, or water. See *id.*

22. Anaya, *supra* note 3, at 62 (“In many places, including in Alaska and the Pacific Northwest in particular, indigenous peoples continue to depend upon hunting and fishing, and the maintenance of these subsistence activities is essential for both their physical and their cultural survival, especially in isolated areas.”).

23. Ford & Giles, *supra* note 1, at 524-25.

“long inhabited by subsistence-based communities” that are being substantially changed, even destroyed by rising sea levels, thawing tundra, or drought.²⁴ Indeed, “[i]ndigenous communities across the country have already been forced to relocate entire village populations, dismantle existing infrastructure, seek out new hunting and fishing areas, and rebuild community-gathering spaces as traditional villages are overcome by flooding as a result of rising sea levels.”²⁵

A climate-altered environment puts at risk the resources on which tribes depend for sustenance and for cultural nourishment.²⁶ For example, changes in the timing of animal migrations and the “seasonal appearance and abundance of plants and animals . . . [will] have profound impacts for [tribes who] practic[e] subsistence- and place-based ways of life.”²⁷ These climate-induced changes to the natural environment may also affect places that are sacred to tribes or have historical significance to them, altering perhaps forever the cultural traditions and experiences associated with them.²⁸

Examples can be found throughout Indian Country of how “climate change threatens to degrade or eliminate fish, game, and wild and cultivated crops that have been used for food, medicine, and economic and cultural purposes for generations.”²⁹ In the Midwest, for example, shorter winters brought on by climate change are accompanied by less “annual snowfall amounts, more frequent

24. *Id.* Ford and Giles, who focus principally on the effects of climate change on native Alaskan villages, do not mention drought. But drought that is affecting Western non-Indian communities is affecting Indian ones even more profoundly for the reasons developed in this Article.

25. *Id.* at 525.

26. *See id.* (“A changing environment puts such resources at risk, which will affect both sustenance and cultural dependence on environmental resources.”); *see generally* Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649 (2017).

27. *See* Ford & Giles, *supra* note 1, at 525-26. On the topic of the effect of climate change on wildlife migrations, *see generally* Babcock, *supra* note 26.

28. *See* Ford & Giles, *supra* note 1, at 525; *see also* Ferguson-Bohnee, *supra* note 13, at 64 (discussing the threat sea level rise poses for the Pointe-au-Chien community’s historical sites, and saying, “[a]nthropologists working with the tribe have identified more than 20 traditional cultural properties in the Pointe-au-Chien territory, most have been deemed worthy of National Register consideration. To date, the Louisiana SHPO has not recommended any properties from Pointe-au-Chien for inclusion in the National Register despite the threatened status of sacred sites and prehistoric sites maintained by the tribe”).

29. *See* Ford & Giles, *supra* note 1, at 526.

intense rainfall and flooding events, and increasing occurrence of tornadoes and windstorms.”³⁰ These changes decrease the supply of maple syrup, cause lower water levels and an increase in algae blooms, which threaten fish populations, adversely affecting Indian tribes.³¹ “[H]igher winter and summer temperatures have exacerbated stresses on moose populations, including prolonging the existence of life-threatening parasites,”³² like ticks. These stresses caused a 52% decline in moose population from 2010 to 2013,³³ which, if continued, could have a devastating impact on tribes that depend on moose for food.

The Passamaquoddy Tribes in the northeast report that wild blueberry and shellfish harvests are down because of the presence of more invasive species and ocean acidification, both commonly understood effects of climate change.³⁴ “Blueberries and shellfish have been traditional food staples and income generators for the Passamaquoddy people” for generations.³⁵ The Tribes also have noticed “changes in the species composition of its forest and a loss of their medicinal plants.”³⁶

Tribes in the Rocky Mountain West are seeing the cumulative effects of higher temperatures and drought conditions in “higher risks from fire hazards, increases in stream and lake temperatures, melting glaciers, and reduced snowpack. Higher mortality rates in native wildlife species, such as bighorn sheep, were also reported on the Wind River Reservation.”³⁷ “Severe storms and rising sea levels are forcing tribal villages of the Quinault Indian . . . to relocate.”³⁸

30. *Id.* at 527.

31. *See id.* at 526.

32. *Id.* at 527. *See also* Brian MacQuarrie, *Ticks Devastate Maine, N.H. Moose Populations*, BOS. GLOBE, Jan. 13, 2017, <https://www.bostonglobe.com/metro/2017/01/13/winter-ticks-exact-heavy-toll-new-england-moose/PmpQ3QAHm9C1imAxxzMhDM/story.html> [https://perma.cc/T8DG-BSX8] (reporting that ticks, aided by warming temperatures and shorter winters, which allow them to live longer, are killing 70% of Maine and New Hampshire’s moose calf population).

33. Ford & Giles, *supra* note 1, at 527.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 528 (“Specifically, the Tribe found approximately fifteen percent of the uplands on the reservation, including agricultural lands and shorelines, are vulnerable to inundation from sea level rise.”). It is estimated that the potential economic loss of all structures and buildable lots from this vulnerability is \$107,193,860 (2010 dollars). *Id.*

The Swinomish Tribal Community in Washington State reports that 15% of the uplands on the reservation, including agricultural lands and shorelines, are vulnerable to inundation from sea-level rise.³⁹ This landscape change threatens the tribe's ability not only to grow food for its members, but also "to generate revenue from agriculture, coastal recreation, or fishing practices," presenting "a very real threat" to the tribe's economic security.⁴⁰ Sea-level rise increases "the reservation's risk of isolation from the mainland during high tidal events."⁴¹ As transportation and access routes to the mainland become impassable, the tribe's capacity to respond to health and safety emergencies diminishes, increasing the risk to the tribe and its members.⁴² These are all "grievous impacts on tribal economies and ways of life."⁴³

"Climate change-induced rising sea levels, saltwater intrusion, erosion, [and] land loss" magnify the adverse effect of generations of oil and gas extraction and poor river management techniques for native communities in coastal Louisiana.⁴⁴ Erosion, combined with intense storms and rising sea levels, has reduced the land base of the Biloxi-Chitimacha-Choctaw community on the Isle de Jean Charles from 15,000 acres to a quarter-mile wide strip of land, a half-mile long.⁴⁵ "As a result of climate change, the land is literally disappearing beneath the feet of those who have remained on the community's traditional lands."⁴⁶ Indian communities, like the Biloxi-Chitimacha-Choctaw, find themselves faced with the cost and distress of relocation or must find the means and funds to physically hold onto their land.⁴⁷ In Florida, sea-level rise will flood the Seminole and Miccosukee tribal reservations and the resources that they depend on, like "mangrove forests, cypress domes, and saw grass prairies for hunting, gathering, and other traditional subsistence activities."⁴⁸

39. *Id.* at 541.

40. *Id.* at 541-42 ("[The] Swinomish quantified the economic impact of the foreseeable results of climate change and found that the total potential economic loss as a result of climate change could top one hundred million dollars. Economic losses so great certainly imperil tribal security.").

41. *Id.* at 541.

42. *See id.*

43. *Id.* at 528.

44. *Id.* at 529.

45. *Id.*

46. *Id.*

47. *See id.*

48. Krakoff, *supra* note 2, at 885.

Southwestern tribes “have observed damage to their agriculture and livestock, the loss of springs and medicinal and culturally important plants and animals, and impacts on drinking water supplies.”⁴⁹ There are over seventy federally recognized tribes in the region, all of which depend on the area’s scant water resources to subsist.⁵⁰ As the region’s water supply dwindles, tribes that are dependent on reserved rights to those waters will in all likelihood find themselves in litigation to preserve those rights and, with those rights, a deep cultural attachment to the land that “has existed for millennia.”⁵¹ As a grim indication of what the future may look like, the U.S. Department of Agriculture declared the San Carlos Apache reservation a primary natural disaster area in 2011 “as a result of a combination of drought, high winds, excessive heat, and wildfires.”⁵² The Department concluded that higher temperatures may well cause increased desertification.⁵³

The most significantly affected Indian communities are located in the Bering Strait region, where rising temperatures have caused thinner “ice buildup” along coastal areas and melting permafrost on which native villages are built—changes that are threatening not only the subsistence culture of those villages, but also their physical survival.⁵⁴ Experts believe that some of the villages in the area will

49. T.M.B. Bennett et al., *Indigenous Peoples, Land, and Resources*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 297, 303 (J. M. Melillo et al. eds., 2014).

50. Krakoff, *supra* note 2, 883.

51. *Id.* at 878, 884. Krakoff warns if history is any guide, tribes will lose those battles to the “greater political power that rests with competing water users in the region, including large and growing cities, metropolitan districts, and agricultural interests.” *Id.* at 884-85.

52. Ford & Giles, *supra* note 1, at 529 (citing Ron Capriccioso, *USDA Designates Reservation in Arizona as Disaster Area*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 21, 2011), <https://indiancountrymedianetwork.com/news/usda-designates-reservation-in-arizona-as-disaster-area/> [https://perma.cc/A34U-NPJ8]).

53. Ford & Giles, *supra* note 1, at 529 (“[F]uture impacts to the region will likely include increased desertification due to rising temperatures.”) (citing Gregg Garfin et al., *Southwest*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 462, 463 (J. M. Melillo et al. eds., 2014)).

54. Ford & Giles, *supra* note 1, at 529 (citing F.S. Chapin III et al., *Alaska and the Arctic*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 514, 518, 523) (J. M. Melillo et al. eds., 2014); *see also id.* at 530 (“Members of Alaska Native villages sometimes rely on subsistence for survival and are severely impacted by a changing climate.”); Balaraman, *supra* note 14 (“Climate change factors that cause climigration are decreased Arctic sea ice, which is no longer providing a buffer to storms that come in, coupled with

probably be abandoned in a decade because of higher risks of harm from rising seas, increased storm events, and erosion.⁵⁵ Also at risk is the “intimate relationship” the Inuit culture has developed with its environment, which has enabled them to subsist for centuries.⁵⁶ The potential irrelevance of this traditional knowledge as the environment around them changes not only makes hunting and travel increasingly hazardous, but “undermines the ability of the elder generations to teach the younger generations” about these practices, thus disrupting “the cultural continuity” that sustains them.⁵⁷

Although Indians make up only 1.7% of the population of the United States, the communities in which they live are on some of the most climate-change threatened land in the country.⁵⁸ Because of their dependence on this vulnerable land base for physical and cultural survival, climate change may also ultimately destroy these distinctive societies unless somehow they can survive in place or reconstitute themselves in a new location.⁵⁹ The next Part of this Article expands on this unique connection between tribes and their homelands.

II. THE CONNECTION OF TRIBES TO THEIR LAND

Our births, lives, and deaths on this site have brought us into citizenship with the land. We participate in its renewal, have responsibility for its continuation, and grieve for its losses. As citizens with this land, we also feel the presence of our ancestors, and strive with them to have the relationships of our polity respected. Our loyalties, allegiance, and

permafrost thaw as a result of radically increased temperatures . . . [which] is causing accelerated rates of erosion.”); Krakoff, *supra* note 8, at 879-80 (reporting that Alaskan regional temperatures have risen by six to eight degrees Fahrenheit in the last fifty years, causing ice thinning, increase in forest fires, insect infestations, and coastal erosion as well as tundra habitat for birds, caribou, and reindeer).

55. Balaraman, *supra* note 14 (noting that young mothers and children are not leaving because they lack good employment and relocation options, making them less resilient to major climatic or weather events, like major storms).

56. Krakoff, *supra* note 8, at 881.

57. *Id.*

58. Anaya, *supra* note 3, at 53-54 (showing that Anaya also notes that a much smaller percentage are enrolled members of recognized tribes). *See also* Babcock, *supra* note 4, at 35 (showing that additionally, there are only 566 federally recognized Indian tribes and 326 federally recognized Indian reservations to which treaties might apply).

59. Krakoff, *supra* note 8, at 888. Krakoff worries that unless the adverse effects of climate change on tribes are mitigated, there may be “an unintentional exercise in tribal termination, if what it means to be a tribe is to retain a distinctive worldview and culture.” *Id.*

affection is related to the land. The water, wind, sun, and stars are part of this federation. The fish, birds, plants, and animals also share this union. Our teachings and stories form the constitution of this relationship, and direct and nourish the obligations this citizenship requires.⁶⁰

A tribe's lands are critically important to it.⁶¹ Land to tribes is "more than dirt and plants"; it is "often constitutive of cultural identity."⁶² Wildlife and plants on or near tribal reservations provide a source of "subsistence, medicine and traditional ceremonies."⁶³ Tribes rely on the productivity of their lands "to support multi-generational habitation, an important enduring, and unique feature of Indian culture."⁶⁴ This gives tribes "a multi-generational, cultural bond to their land that makes that land unique and nonfungible."⁶⁵ To a tribe, its homeland is its "cultural centerpiece": Land can be the source of a tribe's "spiritual origins and sustaining myth," providing "a

60. Amar Bhatia, *We Are All Here to Stay? Indigeneity, Migration and 'Decolonizing' the Treaty Right to Be Here*, 13 WINDSOR Y.B. ACCESS TO JUST. 39, 62 (2013) (emphasis removed) (quoting John Borrows, 'Landed' Citizenship: Narratives of Aboriginal Political Participation, in CITIZENSHIP, DIVERSITY & PLURALISM 326-347 (Alan C. Cairns et al. eds., Montreal & Kingston: McGill & Queen's Univ. Press, 1999) (reprinted in RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW) (Univ. of Toronto Press, 2002)).

61. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (citations omitted) ("It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have memories and their loves. Some things are worth more than money and the costs of a new enterprise.").

62. Kronk Warner, *supra* note 7, at 918; Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1640 (2000) ("Many Indian tribes, for example, identify their origin as a distinct people with a particular geographic site.").

63. Hope Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 486. See also VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 62 (2d ed. 1992) ("American Indians hold their lands—places—as having the highest possible meaning, and all their statements are made with this reference point in mind.").

64. Babcock, *supra* note 63, at 486. See also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 15 (1995) ("[A]ttractions and connections [to the land] do not prevent people from leaving the reservation, . . . they do make leaving hard. . . . But most who leave return.").

65. Babcock, *supra* note 63, at 489. See also POMMERSHEIM, *supra* note 64, at 13-15 (referring to land as a "cultural taproot" by explaining that "[l]and is basic to Indian people: they are part of it and it is part of them; it is their Mother").

landscape of cultural and emotional meaning.”⁶⁶ Indeed, for many tribes, land is not abstract; it lives and actually “stalks” and takes care of people, helps them “live right,” and provides “solace and nurture.”⁶⁷

Tribal lands are also the touchstone of a tribe’s sovereignty in federal courts—a crucial condition of tribal sovereignty.⁶⁸ Critically, in an era in which tribes may have to abandon their reservations in response to climate change, as a matter of Supreme Court jurisprudence, the ability of those tribes to govern their members lessens the further away a tribe moves from its historic reservation boundaries.⁶⁹

Although the land holdings of modern tribes are significantly smaller than the areas they once held or controlled, these lands still “provide some physical space and material bases for the tribes to maintain their cultures and political institutions, and to develop economically.”⁷⁰ While many non-Indians may feel attached to the place where they live and may become despondent at the thought of moving, they are not necessarily tied to that land by religion or

66. POMMERSHEIM, *supra* note 64, at 14. *See also* Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989) (“Land is inherent to Indian people; they often cannot conceive of life without it. They are part of it and it is part of them; it is their Mother.”); DELORIA, *supra* note 63, at 70 (“Tribal religions are actually complexes of attitudes, beliefs, and practices, fine-tuned to harmonize with the lands on which the people live.”).

67. POMMERSHEIM, *supra* note 64, at 14-15. However, “tribal cultural landscapes, which form a sacred living place and are recognized for the powers inherent therein, do not have neatly established boundaries,” creating challenges for both tribes and whoever owns the off-reservation land. Wolfley, *supra* note 19, at 70; *see also id.* at 70-71 (describing some of the challenges of identifying sacred cultural landscapes and sites).

68. *See* POMMERSHEIM, *supra* note 64, at 13 (referring to land as the “irreducible touchstone of tribal prosperity and well-being”); *see also* Babcock, *supra* note 63, at 487-88 (discussing the importance of land to tribal sovereignty, and saying “the Court considers the presence of tribal land to be a precondition for the exercise of tribal sovereignty”).

69. *See* Babcock, *supra* note 63, at 488. The loss of sovereignty that tribes may experience if they are forced by climate change to abandon their land triggers the question of whether they acquire the status of being stateless and thus the possible protection of an international Convention Relating to the Status of Stateless Persons. *See* Bellavia, *supra* note 15, at 464. While this convention was “not developed with this type of tragedy in mind, [it] may provide assistance to the environmentally displaced.” *Id.*; *see also id.* (“In the context of climate change, a person becomes stateless when an individual’s country of birth disappears or the individual otherwise becomes marginalized and no longer recognized by a state.”).

70. Anaya, *supra* note 3, at 54.

culture or dependent on it for the basic necessities of life.⁷¹ Unlike most non-Indians, a loss of a tribe's homeland could result in a loss of that tribe's identity and eventually its existence as a separate and unique, self-governing society.⁷² Thus, loss of a tribe's land due to climate change "threatens not only the territorial sovereignty of Indians and tribes, but also [their] cultural sovereignty [and separateness] as well."⁷³ Thus, relocation for a tribe and separation from its traditional land has a different meaning than for non-Indians. "For Native communities, it is not just the place that matters, but the animate world of which it is a part: the animals, plants, seasons, and rhythms that flow from centuries of knowledge about a place and all of its emanations."⁷⁴

Additionally, tribal lands can provide important revenue for tribes. For example, some tribes lease their lands to energy companies⁷⁵ and to companies who want to use them for the disposal of wastes.⁷⁶ Other tribes operate hotels, ski resorts, and gambling casinos on their reservations.⁷⁷ Others engage in commercial

71. Wolfley, *supra* note 19, at 55 ("[L]and constitutes cultural identity. Many tribes identify their origin as distinct people with a particular geographic site, such as a river, mountain, or valley, which becomes a central feature of the tribe's cultural worldview, traditions and customs."); *see also* Krakoff, *supra* note 8, at 869 ("While particular places can take on sacred significance, such as the town of Bethlehem or the site of the crucifixion, they do so typically because of the historical events that took place there. For American Indians, the place itself is sacred, and therefore the starting point for the system of beliefs and ethics that generate from it. . .").

72. 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, 10-11 (2013); *see also* POMMERSHEIM, *supra* note 64, at 13 (a separate land base for tribes is critical for them "remaining indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them") (citing WILLIAM CRONON, *CHANGES IN THE LAND* 163-67 (1983)).

73. Kronk Warner, *supra* note 7, at 918.

74. Krakoff, *supra* note 8, at 872.

75. *See, e.g.*, Ben Nighthorse Campbell, *The Truth About the Indian Energy Bill*, INDIAN COUNTRY TODAY (July 25, 2003), <https://indiancountrymedianetwork.com/news/campbell-the-truth-about-the-indian-energy-bill/> [<https://perma.cc/CS5A-RX76>].

76. *See, e.g.*, Valerie Taliman, *Opponents Call Nuke Deal Environmental Racism*, INDIAN COUNTRY TODAY (Apr. 9, 2002), <https://indiancountrymedianetwork.com/news/opponents-call-nuke-deal-environmental-racism/> [<https://perma.cc/V35X-ZLEP>].

77. *See, e.g.*, Cate Montana, *Tulalip Quil Ceda Village May Be Larger Than Marysville*, INDIAN COUNTRY TODAY (Nov. 15, 2000), <https://>

activities that depend on the natural resources on those lands or adjacent waters, like providing guiding services for non-Indian hunters and fishers or selling these resources on the commercial market.⁷⁸

A factor that distinguishes tribal land from non-Indian land is that tribal members do not own the reservation land that their homes sit on; tribal land is owned by the federal government in trust for the tribe occupying the land.⁷⁹ This trust-based ownership of tribal lands creates a unique relationship between reservation-based tribes and the federal government—a relationship unlike anything in the non-Indian world. Although the federal government's trust relationship attaches to federally recognized tribes, the nature of the relationship may change if tribal lands are no longer involved.

The attachment of tribes to their land distinguishes them from other migrants or displaced persons, as tribes would not leave their land voluntarily unless the land became uninhabitable, whereas non-Indians might leave because of changes in the labor market or political factors.⁸⁰ Further, proximity to their land is not determinative of the legal status of non-Indians, nor are non-Indians dependent on their land for physical and cultural survival.

This Part of the Article has shown that land is constitutive of what makes a tribe a tribe in both a cultural and legal sense—it is an essential part of a tribe's self-identification and how the non-Indian world views a tribe's sovereign prerogatives. Understanding the centrality of land to a tribe makes understanding changes in a tribe's relationship to its land of central importance to resolving any

indiancountrymedianetwork.com/news/tulalip-quil-ceda-village-may-be-larger-than-marysville/ [https://perma.cc/67TH-95CR].

78. See *supra* Part I (discussing Passamaquoddy and Washington coastal tribes).

79. See Anaya, *supra* note 3, at 58 (“Under federal law, pursuant to its historical protectorate, or trusteeship, the United States holds in trust the underlying title to the Indian lands within reservations and other lands set aside by statute or treaty for the tribes. The Department is responsible for overseeing some 55 million surface acres and the subsurface mineral resources in some 57 million acres.”); see also Kronk Warner, *supra* note 7, at 921 (“[T]he federal government owns naked fee title to land held in trust for tribes.”) (citing *Johnson v. M’Intosh*, 21 U.S. 543 (1823)).

80. See Mariya Gromilova, *Finding Opportunities to Combat the Climate Change Migration Crisis: The Potential of the “Adaption Approach,”* 33 PACE ENVTL. L. REV. 105, 111 (2016) (indicating that “environmental degradation is an ‘impact multiplier and accelerator to other drivers of human mobility’ rather than a predominant cause for migration”) (citing ÉTIENNE PIGUET ET AL., *MIGRATION AND CLIMATE CHANGE* 12-13 (Cambridge Univ. Press 2011)).

questions arising from the impact of climate change on a tribe's lands.

If land, in the words of Frank Pommersheim, is “a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspiration of Indian people, their communities, and their tribes,”⁸¹ the “irreducible touchstone of tribal posterity and well-being,”⁸² what happens when that land disappears or can no longer be occupied by the tribe? What happens to the identity of the tribe that has to separate itself from its traditional lands—the source of its origin story, its spiritual and physical sustenance? Can treaties in any way blunt the adverse impact on tribes of migration away from their traditional lands? Even if treaty rights are retained in some way, will a tribe's separation from its land base lessen the effectiveness of legal precedent that has used that base as a justification of tribal self-government and sovereignty?⁸³

81. POMMERSHEIM, *supra* note 64, at 11 (“It is a place that marks the endurance of Indian communities against the onslaught of a marauding European society; it is also a place that holds the promise of fulfillment.”).

82. *Id.* at 13. Pommersheim rests any hope that Indians might someday “transform [their] modern social, economic, and political conditions” and “redefine and redirect the political, legal, and social relationships [with] . . . non-Indians” on non-Indians gaining a firmer understanding of the importance of tribal land. *Id.*; *see also* Babcock, *supra* note 63, at 490 (“Without this land base, Indian tribes quite simply cease to exist as culturally distinct societies.”); Krakoff, *supra* note 2, at 547 (“Though legal definitions of ‘tribe’ were freighted with discriminatory meanings for centuries, today domestic and international legal criteria defining tribal status focus instead on historical ties to land as well as continuity of politics, culture, and self-understanding.”) (emphasis in the original).

83. A question beyond the scope of this Article is whether the abandonment of lands reserved to a tribe under a treaty due to the effects of climate change disestablishes the tribal reservation in a legal sense. Although the most common way that reservations are disestablished is through an act of Congress, “surrounding circumstances” and the land's subsequent treatment can also be indicative of disestablishment. *See* Joel West Williams, *The Five Civilized Tribes' Treaty Rights to Water Quality and the Mechanisms of Enforcement* 39-40 (Aug. 8, 2016) (unpublished L.L.M. thesis, Vermont Law School) (on file with Author) (referring to these as a “hierarchy of three factors” and citing *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016), and *Solemn v. Bartlett*, 465 U.S. 463, 470 (1984), in support). Of these, according to Williams, a statute is the most determinant, and subsequent treatment is the least persuasive. *Id.* at 40 (citing *Parker*, 136 S. Ct. at 1079). As no law has been passed yet disestablishing any reservation, and continued use by tribes, when possible, for ceremonial or other purposes, indicates a continuing interest in land abandoned only because of the uncontrollable effects of climate change as opposed to any sale or transfer of land out of tribal control, there should be no disestablishment of any reservation in this situation. *Id.*

Accordingly, Part III of the Article turns to the topic of Indian treaties—whether they attach to a tribe or the tribe’s lands and whether their treaties’ continued existence might blunt the negative impact of a tribe’s removal from its homelands by preserving at least a tribe’s sovereign prerogatives on its new lands and conceivably also on its abandoned lands. Perhaps the language of some treaties might enable those tribes not to completely abandon their current lands by adjusting the boundaries of their reserved lands to reach off-reservation resources that may be less affected by climate change.

III. INDIAN TREATIES

Humanity . . . acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed . . . [H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old . . .⁸⁴

Treaties play both a protective and confounding role for tribes confronted with the harm caused by climate change: protective because the promises made in them to protect the tribal signatories and their land from harm were intended to be permanent, and confounding because it is not at all clear what happens to treaties when tribes are forced to abandon their treaty-protected lands.⁸⁵ Do treaties continue to give tribes rights on their abandoned lands so that they can return to them for ceremonial or other purposes regardless of whether there are new occupants whose needs can be met by the climate-altered land? Do treaties and the governance and cultural prerogatives in them follow tribal signatories to new homelands, potentially creating assimilation problems with their new neighbors? While treaties distinguish Indians from non-Indians, in a world of climate change, treaties may cease to exist once a tribe leaves its protected lands, eliminating that distinction.

84. *Johnson v. M’Intosh*, 21 U.S. 543, 589 (1823), *quoted in* Amanda Rogerson, Comment, *The Tribal Trust and Government-to-Government Consultation in a New Ecological Age*, 93 OR. L. REV. 771, 779 (2015).

85. Elizabeth Kronk Warner argues that “treaties may be used as expressions of both political and cultural sovereignty because treaties were negotiated between two separate sovereigns, the United States and tribes, and because treaties often protect valuable cultural resources such as tribal resources.” Kronk Warner, *supra* note 7, at 920; *see also* Tsosie, *supra* note 62, at 1620 (“[A]s an historical matter, treaties with Indian nations and treaties with foreign nations share a common status: They are negotiated accords between separate political sovereigns designed to secure the mutual advantage of both parties.”).

This Part of the Article provides some background on tribal treaties in an attempt to provide partial answers to some of these and other relevant questions. The Part tentatively concludes that treaties are tied to a tribe's reserved land, not to the tribe; that while the boundaries of tribal reserved lands may be elastic, that elasticity is not enough to allow treaties to follow a migrating tribe to its new homeland; and that treaties have constitutive, legal, and moral significance, meaning that questions about them straddle those three categories, making categorization and priority setting of these and other related questions messy.

A. Treaty-Making History in the United States

Before formation of the United States, English, French, Spanish, Dutch, and the American colonies entered into hundreds of treaties with Indian tribes across North America.⁸⁶ Between 1778 and 1871, the United States ratified 400 treaties with Indian tribes.⁸⁷ In 1871, the era of treating with Indian tribes abruptly ended with the insertion of language in an appropriation bill forbidding the federal government from entering into any more treaties with tribes. Nearly all of the treaties “promised a permanent homeland” as well as the provision of food, clothing, and services to the signing tribes.⁸⁸ “In exchange for peace, the United States promised to respect the tribe’s sovereignty and to provide for the wellbeing of tribal members.”⁸⁹

In these treaties, Indian tribes treated away rights they possessed in their lands in exchange for various promises and payments, as well as for protection against non-Indian settlers and marauding Indians.⁹⁰ Thus, tribes reserved some rights they already possessed and traded other rights to the United States.⁹¹ As the U.S. Supreme Court said in 1905,⁹² “the treaty was not a grant of rights to

86. Robert J. Miller, *Treaties Between the Eastern Shawnee Tribe and the United States: Contracts Between Sovereign Governments*, in *THE EASTERN SHAWNEE TRIBE OF OKLAHOMA: RESILIENCE THROUGH ADVERSITY*, at 8 (Stephen Warren ed., 2017). The treaties are available at <http://digital.library.okstate.edu/kappler/index.htm> [<https://perma.cc/C44R-VUTM>].

87. Miller, *supra* note 86, at 1; Wolfley, *supra* note 19, at 59 (“Over 400 treaties were signed between Indian tribes and the United States.”).

88. Wolfley, *supra* note 19, at 59.

89. *Id.*

90. Miller, *supra* note 86, at 2.

91. *Id.*

92. *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that tribes with treaties that reserved the right to “tak[e] fish at all usual and accustomed

the Indians, but a grant of rights from them—a reservation of those not granted.”⁹³ Yet, the common misapprehension of this fact has made Indian treaties highly controversial because people view them as giving Indian “special rights.”⁹⁴

The history of Indian treaties in this country is not a pretty one. The goal of the United States in executing treaties with tribes was to physically separate them from white settlers and to remove Indians from their lands.⁹⁵ The result of this policy was to force tribes onto ever smaller areas of land, sometimes forcing them to cohabit with tribes with different governance structures and beliefs, even to live with some tribes who had been their enemies.⁹⁶

places” guaranteed those tribes access to their usual and accustomed places, even if they were on private land). *Winans* further held that private property rights did not preclude tribal treaty rights, *Id.* at 380-81, and opined that the tribes’ ability to exercise their treaty rights was “not much less necessary to the existence of [the] Indians than the atmosphere they breathed.” *Id.* at 381, *quoted in* Lauren Goschke, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest*, 27 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 315, 329 (2016).

93. *Winans*, 198 U.S. at 381, *quoted in* Miller, *supra* note 86, at 2. Miller explains that this is “why American Indian homelands are called ‘reservations’ and why the lands of the First Nations in Canada, for example, are called ‘reserves.’” Miller, *supra* note 86, at 3 (quoting *Winans*, 198 U.S. at 381); *see also* Ford & Giles, *supra* note 1, at 537 (explaining that it is a basic principle of federal Indian law that “Indian nations retain those rights Congress has not expressly taken away”).

94. Miller, *supra* note 86, at 2. State officials vigorously oppose any assertion of treaty rights by tribes, and issues about tribal treaties occasionally appear in the news. *Id.*

95. *See* Duane Champagne, *Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 109, 116 (1993) (explaining that the policy of separating Indians from non-Indians, which culminated in the current reservation system, originated in the colonial period when the British Crown viewed separation as the most expedient way to avoid costly wars, secure English economic interests in the Indian ruled interior, and protect the Crown’s seaboard trade); *see also* Babcock, *supra* note 63, at 459-60 (“When Indian presence became too much for the white settlers, the simplest, most practical solution for the Crown—succeeded by the federal government—was to move the nearest Indian tribe to a more remote location, and to solemnize by treaty the promises made to the Indians in exchange for the loss of their lands.”); Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 172 (1987) (describing the mercantile goals of the British government in the period before the Revolution).

96. Krakoff, *supra* note 2, at 544-45 (“Federal law and policy toward American Indians also reconstituted Native nations in various ways, forcing some distinct groups together and artificially separating others, thereby imposing membership criteria on tribes that reflected the federal goals of controlling tribes’ existence and minimizing their disruptions to non-Indians.”); *see also* Ralph W.

Additionally, “[t]he federal government has a long and appalling history of breaking treaties with Indian nations,” repeatedly ignoring the solemn promises contained in them and acting to curtail rights granted under them, or arranging “for the seizure and dispersal of tribal property without paying just compensation.”⁹⁷ The Supreme Court repeatedly sustained such acts of abrogation when it was in the national interest,⁹⁸ which it frequently appears to have been. Indeed, the Special Rapporteur on the Rights of Indigenous Peoples noted with respect to indigenous peoples living in the United States that

[t]he federal judiciary, in particular the United States Supreme Court, has played a significant role in defining the rights and status of indigenous peoples. While affirming indigenous peoples’ rights and inherent sovereignty, it has also articulated grounds for limiting those rights on the basis of colonial era doctrine that is out of step with contemporary human rights values.

Consistent with well-established methods of judicial reasoning, the federal courts should discard such colonial era doctrine in favour of an alternative jurisprudence infused with the contemporary human rights values that

Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 650 n.23 (1991) (noting how different tribes were “consolidated on a single confederated reservation, including tribes with diverse cultures,” sometimes with histories of “outright hostility towards each other”); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 224 (1984) (noting how Congress authorized consolidating tribes with no cultural or historic connections, including tribes who were “ancient enemies,” on reserved lands, and citing as an example the discussion in *Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937), of congressional authorization of the occupancy of Shoshone land by Arapahos who were the Shoshone’s long-time enemy).

97. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 2 (1991); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 95-96 (2002) (stating that the history of federal Indian policy is a betrayal of almost every clause in Article III of the 1787 Northwest Ordinance, in which the federal government promised “[t]he utmost good faith [will] always be observed towards the Indians; their land and property shall never be taken from them without their consent”) (citing Northwest Ordinance of 1787, art. III, ch. VIII, 1 Stat. 50, 52 (1789)); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 291 (1955) (holding that the federal government may seize without compensation Indian land it has refused to recognize by treaty or statute).

98. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (upholding allotment of Indian lands while recognizing that no legal norm limited Congress’ ability to enact laws that conflict with Indian treaties); see also Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 263 (discussing how Congress throughout the nineteenth and early twentieth centuries “unilaterally abrogated” numerous Indian treaties).

have been embraced by the United States, including those values reflected in the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, just as the Supreme Court looked to the law of nations of the colonial era to define bedrock principles concerning the rights and status of indigenous peoples, it should now look to contemporary international law, to which the Declaration is connected, for the same purposes.

Accordingly, the federal courts should interpret, or reinterpret, relevant doctrine, treaties and statutes in light of the Declaration, both in regard to the nature of indigenous peoples' rights and the nature of federal power.⁹⁹

The history of Indian treaties in the United States creates problems for both tribes and non-Indians when it comes to moving tribes off of treaty-protected lands. The treaties implemented a federal policy of forced removal and isolation of tribes and of opening up those lands to non-Indian settlement: a policy carried out against the wishes of most tribes.¹⁰⁰ The solemn promises in these treaties were often broken and not honored by courts, sowing distrust of the federal government in tribes.¹⁰¹ While treaties remain important constitutive and legal documents for tribes, many non-Indians who compete for treaty-protected resources like salmon or water would prefer that they disappear, as indicated by the many challenges to assertions of treaty-protected rights by tribes.¹⁰² The

99. Anaya, *supra* note 3, at 75.

100. See Krakoff, *supra* note 2, at 544 (describing the effect of disparaging characterizations of Indians as serving "the purpose of achieving their disappearance from the land, or in Patrick Wolfe's influential terminology, they served the goal of indigenous 'elimination.' Settler/colonial societies—like the United States, Australia, Canada, and New Zealand—had to wrest land and resources from indigenous populations, which they quickly outnumbered. The structure of race in American Indian law—which either assumed or actively worked toward elimination of Native people—served to accomplish the objective of freeing up the land").

101. See Anaya, *supra* note 3, at 61 ("Many Indian nations conveyed land to the United States or its colonial predecessors by treaty, but almost invariably under coercion following warfare or threat thereof, and in exchange usually for little more than promises of government assistance and protection that usually proved illusory or worse. In other cases, lands were simply taken by force or fraud. In many instances treaty provisions that guaranteed reserved rights to tribes over lands or resources were broken by the United States, under pressure to acquire land for non-indigenous interests. It is a testament to the goodwill of Indian nations that they have uniformly insisted on observance of the treaties, even regarding them as sacred compacts, rather than challenge their terms as inequitable.").

102. This is supported by all the challenges to treaty-asserted rights by tribes, like those that triggered the Boldt decision from the Supreme Court after a long and protracted litigation. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674-75, 685 (1979) (guaranteeing tribes the right to take a substantial amount of fish in common with non-Indian fishers at their usual and accustomed places); *Kronk Warner*, *supra* note 7, at 924, 928. The *Montana v.*

justifiable fear of that result and the historical use of treaties to forcibly remove tribes from their homelands may make tribes reluctant to abandon their treaty-protected lands, regardless of the reason, while potential host communities for the climate migrants may resist the addition of Indians whose unique prerogatives treaties protect.¹⁰³

B. Additional Factors that Also Make Treaties Problematic in an Era of Climate Change

In addition to the emotional freight that treaties carry for Indians and non-Indians alike, there are other aspects of tribal treaties that are relevant for understanding their intersection with global climate change. Specifically, what can treaties tell us about whether they attach to the land or the treating tribe, whether tribes continue to retain rights under them after they abandon treaty-protected lands, and whether they are sufficiently elastic to extend tribal prerogatives under them to wherever a given tribe migrates?

1. *Determining Whether Treaties Attach to the Land or to Tribes*

One conclusion that can be drawn from the previous discussion about treaties is that they attach to the land and not to the tribal signatories. While treaties empower tribes to govern their members, that sovereignty is land-based and does not inhere in a tribe separate from the land it governs. After all, the rationale behind federal Indian treaty-making was to move tribes off of their existing homelands to new lands where they could be Indian, physically and geographically separate from non-Indian society. Indians who travel from their treaty-protected reservation appear to be owed no greater duty of

United States case is another example of a challenge to a tribe asserting its off-reservation fishing and hunting rights in the face of a challenge to those rights. 450 U.S. 544 (1981); Kronk Warner, *supra* note 7, at 928 n.73.

103. See Kronk Warner, *supra* note 7, at 959-60 (discussing the doctrine of *rebus sic stantibus* or Article 62 of the Vienna Convention on the Law of Treaties, which provides that a signatory of a treaty may terminate it if there has been “a fundamental change in circumstances”). Professor Kronk Warner does not believe that the doctrine could be applied to void any treaty due to changed circumstances wrought by climate change because physical changes have only to do with a treaty’s interpretation, not its validity or that the affected duty was essential to the parties’ consent which would be unlikely in most circumstances, especially those involving the removal of a tribe to a new location or smaller reservation. *Id.* at 961.

care than non-Indians with respect to any activities they engage in, affirming this view of treaties as land-based.¹⁰⁴ Non-Indian laws apply to the actions of off-reservation Indians; being an off-reservation Indian covered by a treaty is a matter of indifference to the legal system. Thus, it is reasonable to conclude that reserved tribal lands are the *sine qua non* of an Indian treaty.

If treaties are attached to a migrating tribe, how could they be reattached to new tribal lands—lands, in all likelihood, occupied by non-Indians or Indians from different tribes? While not exactly apposite to *City of Sherrill v. Oneida Nation*,¹⁰⁵ the case is instructive on this point. In *City of Sherrill*, the U.S. Supreme Court applied the equitable doctrines of laches, acquiescence, and impossibility to block an assertion of sovereignty over lands the tribe had acquired within its original aboriginal land base. The Court relied on the “non-Indian character of the area and its inhabitants,” as well as two hundred years of New York and its counties’ consistent exercise of regulatory authority over the lands in question and the long delay the tribes took to seek relief.¹⁰⁶ Any sovereignty claim made by a migrating tribe over new lands would not even be a matter of “rekindling embers of sovereignty that long ago grew cold,”¹⁰⁷ as the Court said in *City of Sherrill*; in all likelihood, there would be no prior tribal claim to the land at all. Nor would non-Indian occupants of the land to be occupied by a migrating tribe have had any prior experience with tribal government; all their experience up to that point would have been with county or state government. The Court in *City of Sherrill* also made much of the fact that if the Court granted the Oneida Nation sovereignty over the lands in question “it would result in a ‘checker-boarding’ of regulatory authority,” which would upset and “disrupt the ‘justifiable expectations’ of non-Indian landowners,”¹⁰⁸ as would happen in the case of a resettled self-governing, sovereign tribe.

104. No case could be found confirming this point. The closest is *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (holding that state officials operating on a reservation to investigate off-reservation violations of state law are not held accountable for tortious conduct and civil rights violations in tribal court, only in either federal or state court).

105. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005).

106. *See id.* at 202-03.

107. *Id.* at 214.

108. Williams, *supra* note 83, at 44.

City of Sherrill and its progeny make clear the judicial branch's reluctance to recognize any assertion of tribal property rights where the claim might disrupt the established order,¹⁰⁹ as would be true of any assertion of treaty-based sovereignty by a climate refugee tribe over land occupied by non-Indians or even other tribes. Thus, absorbing a tribe with treaty-protected privileges into a preexisting community with its own structure and privileges could be extremely unsettling and might well generate sufficient opposition to bar the tribes' resettlement in that community.

If the conclusion that treaties attach to the land is correct, then treaty protections on that land should survive even the tribe's abandonment of it. Only congressional abrogation of the treaty would rescind rights granted to the tribe under it. Thus, a tribe should be able to prevent non-Indians from settling on its abandoned lands or from taking resources from it and should have continuing access to it. These are enforceable rights that not only a tribe can exercise on its own behalf, but also the federal government, as trustee for a tribe and the dominant owner of the land, can, and arguably should, exercise on the tribe's behalf.

2. *The Extent to Which Off-Reservation Treaty Rights Are Elastic*

Some Indian treaties also granted tribes hunting, fishing, and gathering rights in addition to the right to occupy the lands covered by their treaty.¹¹⁰ The existence of these rights hints at the possibility that reservation boundaries may be sufficiently porous to bulge where necessary for tribal survival. Interpretive canons employed when questions about Indian law arise and two theories of geography

109. See *id.* at 45.

110. For example, Article V of the Treaty of Point Elliott granted the Swinomish Tribal Community:

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

See Kronk Warner, *supra* note 7, at 924. Professor Kronk Warner goes on to wonder whether Article V of the Treaty of Point Elliott, which protects a resource of what she calls "of profound importance" to the Tribe and assures the Tribe of continued access to that resource, could be the basis of an enforceable trust claim against the federal government given the effects of climate change on fish and shellfish. See *id.* at 925.

that lessen the significance of governance boundaries might also help in this respect.

Courts have recognized that treaty rights can extend beyond the physical boundaries of treaty-protected land unless extinguished by the “plain and unambiguous” congressional intent to do so.¹¹¹ For example, in the Northwest, treaties were used to retain extensive off-reservation rights for signatory tribes.¹¹² The 1795 Treaty of Greenville, under which “Indians retained the right to hunt on the lands they had ceded to the United States if they did so peaceably and without creating injury to Americans,” is an example of this.¹¹³ Another example is an 1808 treaty with a number of tribes involving land in Michigan when it was a territory, where tribes retained the privilege of hunting and fishing on the lands that they had ceded to the United States in exchange for the promise that they remained “under the protection of the United States and of no other sovereign.”¹¹⁴ An 1817 treaty with other Great Lakes tribes gave signatory tribes the additional right to tap trees on ceded lands for purposes of making sugar as long as the activity did not unnecessarily harm the trees.¹¹⁵ This pattern repeated itself in treaties

111. See Goschke, *supra* note 92, 319 n.13, 322.

112. *Id.* at 326 (“Tribes throughout the Northwest used their treaties to reserve their right to continue to hunt, fish, and gather. The reservation clause in each of these treaties is virtually identical, guaranteeing tribes ‘the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . together with the privilege of hunting, gathering roots and berries . . . upon open and unclaimed land.’”). “Treaties that contain this clause are called the ‘Stevens Treaties’ because they were negotiated by Isaac Stevens, a man who was hired to extinguish all Indian title in [the] Northwest as quickly as possible to open up land for white settlers seeking to homestead on that land.” *Id.*

113. Miller, *supra* note 86, at 14.

114. *Id.* at 16. See also Goschke, *supra* note 92, at 325 (“In the Northwest, tribes used their treaties to ensure continued access to resources on the vast areas of land ceded to the United States. This concept, known as the ‘reserved rights doctrine,’ means that unless tribes expressly ceded a right, they retain that right. The reserved rights doctrine is especially important in the Northwest where tribes explicitly reserved the right to access and use off-reservation resources because the reserved rights doctrine gives tribes an additional layer of protection over off-reservation treaty resources.”).

115. See *id.* at 22. Miller reports that the September 29, 1817 Treaty with the Wyandots, etc., at Rapids of the Miami of Lake Erie, repeated a similar provision from earlier Shawnee treaties that the Indians could hunt on the lands they had ceded to the United States, as long as the U.S. continued to own them. The 1817 Treaty also contained a new provision that Indians could make sugar from the trees on lands they had ceded to the United States, as long as the U.S. owned the lands, and so far

in other regions of the country.¹¹⁶ In more modern times, federal courts have recognized off-reservation fishing rights granted a northwestern tribe in tribal lands that had not been expressly ceded in treaties with the tribe.¹¹⁷

But when conquest or a treaty extinguished a tribe's aboriginal title in off-reservation lands, the treaty simultaneously extinguished off-reservation hunting, fishing, and gathering rights, unless a new treaty, law, or Presidential order "explicitly or implicitly reserved these rights."¹¹⁸ Therefore, one would need to examine the individual treaties of migrating tribes to see if the tribe continued to possess unextinguished off-reservation rights. While still in effect, off-

as they caused 'no unnecessary waste upon the trees.' The United States also agreed to pay for the damages that loyal tribes and Indians incurred during the War of 1812, as determined by the Secretary of War.

Id. See also Catherine M. Ovsak, Note, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177, 1189 (1994) ("Regardless of whether a treaty contains an express provision that the tribe seeks to retain off-reservation hunting and fishing rights, some courts have found an implied reservation of those rights. For example, in *State v. Clark*, the Minnesota Supreme Court held that 'it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to give them a home' when analyzing a treaty that failed to expressly retain off-reservation hunting and fishing rights. Once a court determines that express or implied off-reservation hunting and fishing rights have been retained, these rights then receive federal protection.").

116. See Ovsak, *supra* note 115, at 1208-09 (describing a federal district court's affirmance in *Mille Lacs Band of Chippewa v. Minnesota*, 861 F. Supp. 784, (D. Minn. 1994), of off-reservation hunting, fishing, and gathering rights granted the Mille Lacs Band of the Chippewa Indians, in successive treaties between the federal government despite various removal orders).

117. Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 10, 22 (2017) ("Soon after its historic 1905 decision, the Court expanded the nature of the tribal reserved right to extend to lands not expressly ceded by the treaties, ruling that Yakama fishers' treaty rights extended to the Oregon side of the Columbia River."). In Canada, it appears that Indigenous peoples still participate in their traditional territories, notwithstanding the borders and boundaries of reserves, relying on them for food, water, medicine, memories, friends, and work. Blumm is referring to *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), which he said "[implied] that 'time immemorial' water rights to fulfill the Klamath Reservation's fishing and hunting purposes . . . inferred a water right for the Klamath Tribe's reservation to sustain treaty-reserved hunting and fishing rights in Klamath Marsh." *Id.* at 22, 22 n.122. See also Bhatia, *supra* note 60, at 63.

118. See Goschke, *supra* note 92, at 322; Wolfley, *supra* note 19, at 59. But see Ovsak, *supra* note 115, at 1185 ("[F]ederal regulation of off-reservation hunting and fishing rights must be authorized by federal statute as regulation that is essentially a modification of those rights.").

reservation hunting, fishing, and gathering rights are enforceable by the federal government.¹¹⁹

Interpretative tropes, which are applied in the favor of tribes when questions arise about how a treaty should be interpreted, also favor a liberal or expansive interpretation of Indian treaties, including any grant of off-reservation rights. In cases involving matters of Indian law, the “standard principles of statutory construction do not have their usual force.”¹²⁰ Called the “Indian canons,” courts since the early nineteenth century have interpreted treaty provisions as favoring Indians when a contrary, less favorable interpretation might be possible.¹²¹

A basic Indian canon of construction is that tribal property rights and sovereignty are preserved unless Congress’s intent to abrogate them is “plain and unambiguous” or its action is “clear and plain.”¹²² In the words of one Indian law scholar, “Indians fought hard, bargained extensively, and made major concessions in return for such rights. Treaties can, therefore, properly be regarded as negotiated contracts of a high order,” which the courts should respect

119. See Ovsak, *supra* note 115, at 1189 (“Once a court determines that express or implied off-reservation hunting and fishing rights have been retained, these rights then receive federal protection.”).

120. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985).

121. See Kronk Warner, *supra* note 7, at 931 (“Today, the canons of construction of Indian law require that (1) ‘treaties . . . be liberally construed in favor of the Indians,’ (2) ‘all ambiguities . . . be resolved in [Indians’] favor,’ (3) ‘treaties . . . be construed as the Indians would have understood them,’ and (4) ‘tribal property rights and sovereignty [be] preserved unless Congress’s intent to the contract is clear and unambiguous.’ These canons have been applied by the courts over the ensuing decades to protect tribal rights from infringement by other sovereigns and individuals. Ultimately, the Court has broadly applied the canons of construction, and only declined to apply the canons where such application would be inconsistent with the purposes of the relationship between Congress and the tribe(s) at issue.”) (alterations in original) (citation omitted). Although one might question the continuing need for these protective canons, as Professor Kronk Warner points out, one of their purposes was to protect tribal sovereignty and independence, both of which are threatened by climate change. *Id.* at 932. See also *Cnty. of Yakima v. Conf. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (“Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”).

122. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 353 (1941). See also *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 123, 160 (1934) (explaining that “intention to abrogate or modify a treaty is not to be lightly imputed to the Congress”); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”).

and give effect to.¹²³ Through the Indian canons of construction, federal courts “counterpoise the inequality” from the injustice done when tribes were dispossessed of their lands.¹²⁴ But it would be a stretch beyond the reach of most canons to extend a tribe’s treaty-based off-reservation rights to lands that do not adjoin the tribe’s reservation, as would in all likelihood be the situation, if tribes had to migrate any distance to avoid the effects of climate change.

Additionally, there are two theories about boundaries, critical legal geography and the concept of governable spaces, which might be used in any effort to make reservation boundaries seem more porous. These theories view boundaries as “neither fixed nor physical, but instead [to] reflect a series of relationships shaped by a violent history of interactions between people, place, and property law.”¹²⁵ These theories have some salience since the federal government “largely fabricated” the boundaries of existing reservations “through the process of removal and the imposition of the reservation system.”¹²⁶ The theories deemphasize the reliance on fee acquisition as a prerequisite of sovereignty and suggest non-fee dependent ways in which tribes can extend their sovereignty beyond the boundaries of their reservation.¹²⁷ For example, as critical legal geography transforms the relationship between property and sovereignty into “one that is spatially contingent and socially malleable,” this might help tribes “expand their interests outside reservation boundaries without necessarily acquiring fee title to property.”¹²⁸ Seeing property from “this perspective [means that]

123. Kronk Warner, *supra* note 7, at 932.

124. United States v. Winans, 198 U.S. 371, 380-81 (1905); *see also* South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting) (saying an Indian interpretative canon “is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage” Indian Nations).

125. *See* Jacquelyn Amour Jampolsky, *Property, Sovereignty, and Governable Spaces*, 34 L. & INEQ. 87, 92 (2016).

126. *See id.*

127. *See id.* at 104 (discussing the concept of critical legal geography and explaining the concept’s use as a means “to reexamine the assumption that property in land necessarily presupposes and delimits sovereignty by viewing the construction of space and law as mutually and concomitantly generative of each other. This approach deemphasizes fee acquisition as a necessary step to expanding sovereign authority to govern, and it opens new strategic and theoretical discussions about how tribes can circumscribe the ‘unfortunate paradigm’ of tribal sovereignty”).

128. *See id.* at 106.

‘property rights do not constitute a pre-existing socio-spatial order’ that the law describes” and which must rigidly be adhered to.¹²⁹

Similarly, the concept of governable spaces suggests that “property can be used to create new spaces of governance that are not contingent on fee rights to land.”¹³⁰ Jacquelyn Jampolsky believes that less than fee title “can generate governable spaces across, without consideration of, or in spite of landed boundaries delimited by fee-title ownership.”¹³¹ She suggests that looking at property from the perspective of its “spatio-legal effects” can create what she calls “governable spaces that are purely social,” which negate the need for land as a basis for tribal sovereignty.¹³² Thus, any cooperative management regime, like wildlife management arrangements or even school boards at schools that tribal and non-Indian children attend, or shared use of land like irrigation districts, might provide the foundation for a shared governing space. Jampolsky suggests usufructuary rights, like easements, contracts, and consulting agreements under federal laws, like the National Historic Preservation Act,¹³³ or by private arrangements, are ways of creating governable spaces that transcend reservation boundaries, in which tribes can exercise sovereign prerogatives unattached to an underlying fee arrangement, like ownership.¹³⁴

Thus, Jampolsky argues, since property is a legal construct, “tribes can use property to negotiate categories of space and law that exceed both the physical boundaries of reservations and the legal categories of property rights”¹³⁵ to create new governing spaces. As “a tool of governance” that is “spatially and temporally malleable,” property “can create new spaces that may exceed the significance of reservation boundaries as a limit on tribal nation-building.”¹³⁶

129. *See id.*

130. *See id.* at 117.

131. *See id.*

132. *See id.*

133. National Historic Preservation Act, 16 U.S.C. § 106 (recodified as 54 U.S.C. § 300101 (1966)).

134. *See* Jampolsky, *supra* note 125, at 118.

135. *Id.* at 106.

136. *Id.* at 116 (quoting Michael Watts, *Antinomies of Community: Some Thoughts on Geography, Resources and Empire*, 29 TRANSACTIONS INST. BRIT. GEOGRAPHERS 195, 205 (2004)) (“These spaces are contingent on the territorializing, or anchoring of government thought and practice to an identifiable parcel of land, and they are equally constrained and morphed on multiple scales by the political economy of resource development. These spaces are not just reflective

Applying her reasoning to the current problem, a tribe's dependence on adjacent lands for resources to sustain it or for places on which to engage in important cultural rituals might bring that land into the tribe's sphere of governance.

Therefore, while the law may confine the limits of tribal sovereignty "through traditional interpretations of reservation boundaries as dispositive of civil and regulatory jurisdiction," critical legal geography and the concept of governable spaces imply that "the law, vis-à-vis property, may additionally afford opportunities to transcend these limitations when pursuing nation-building beyond reservation boundaries."¹³⁷ The implications of this thinking for expanding the boundaries of reservations to reach replacement resources or even to a separate land base is quite emboldening and might provide a theoretical basis to extend tribal governance prerogatives to entirely new areas of settlement in ways that even a grant of off-reservation rights in a treaty might not.¹³⁸ But even the concept of "governable spaces requires a visible land base," which may no longer exist once a tribe has to abandon its reservation, although a multiple of factors, like "political economy, legal complex, cultural traditions, and ethnic identities," contribute to what such a space is.¹³⁹

The off-reservation hunting, fishing, and gathering rights some treaties grant tribes suggest that those tribes might be able to push out the boundaries of their protected reserves to reach nearby resources, enabling them to offset their loss on their lands from climate change and thus, perhaps stay in place.¹⁴⁰ The concepts of

of the economic or legal framework of resource development; they are also generative of diverse and contested 'forms of rule, conduct, and imagining.'").

137. *Id.* at 93.

138. See Rogerson, *supra* note 84, at 792 ("Fundamentally, the federal trust responsibility toward tribes cannot be delineated by reservation boundaries or even by the boundaries of tribes' ceded lands. As climate changes manifest, crucial cultural resources may persist in new environments, and tribes may need to develop a cultural stake in lands that were previously irrelevant to their cultural practices and traditions. Thus, in order for the trust responsibility to remain relevant, it must be flexible and expansive enough to protect these changing needs.").

139. Jampolsky, *supra* note 125, at 116.

140. On the theory that the impacts of climate change may meet the legal standard of tribal imperilment set out in the *Montana v. United States* case, to the degree that it threatens the tribe's political integrity, economic security, or health or welfare, a federal court might be willing to extend tribal sovereignty beyond the boundaries of a reservation even if not authorized by a treaty, because doing so would be necessary to maintain the tribe's general welfare. *But see* *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (limiting a tribe's regulatory authority

critical legal geography together with the concept of governable spaces, although deployed in response to a different problem, by viewing reservation boundaries as less fixed, might achieve the same result. However, supporting a tribe's ability to gather resources beyond the geographic limits of their reservation might embroil them in ongoing battles with their non-Indian neighbors.¹⁴¹ The likelihood of such conflicts erupting would probably depend on the extent of the intrusion, its frequency and duration, the availability of the sought-after resource for all, and whether the intrusion could be contracted for, as Jampolsky suggests.¹⁴² Whether those boundaries under any right or theory could be stretched to areas with no geographic or even historical connection to the base reservation, such as a new homeland for the tribe, may be a bridge too far.

3. *Tribal Treaties Have Constitutive, Legal, and Moral Dimensions and Create Serious Practical Problems*

Treaties are “foundational” legal documents for tribes that affirm tribal sovereignty over tribal lands and tribal members and establish the outer limits of those lands. Based on a “unique relationship of trust and protection that the European sovereigns assumed toward the Indian nations[,] . . . Indian treaty rights are sui generis, imparting a distinctive legal relationship [between the federal government and tribes] that is unparalleled in other areas of [U.S.] law.”¹⁴³ Many tribes conceive of treaties as the “‘cornerstone’ of their sovereignty and legal identity vis-à-vis the non-Indian world”¹⁴⁴—the “charters by which Indian[s] . . . [gained] the right to rule themselves on their reserved [lands]” and to enter into a government-to-government relationship with the federal

over non-Indian hunting and fishing on non-Indian owned land within reservation boundaries), which seems to cabin the general authority substantially. *See also* Rogerson, *supra* note 84, at 785 (“Going forward, tribes need control over those cultural resources that happen to shift off-reservation due to climatic changes, as well as additional control over those resources persisting off-reservation that are imperiled by climate change.”); Goschke, *supra* note 92, at 357 (“A treaty right to gather is meaningless if there is nothing to gather.”).

141. *See* Babcock, *supra* note 4, at 39-40 (discussing sources of boundary disputes involving transboundary resources like water and minerals between tribes and their neighbors).

142. Jampolsky, *supra* note 125, at 121-22.

143. *See* Tsosie, *supra* note 62, at 1623.

144. *See* Babcock, *supra* note 63, at 464.

government.¹⁴⁵ Treaties affirm the cultural separation of Indians from non-Indian society,¹⁴⁶ allowing Indians to be Indian, free from the influence of the dominant society. “The unique triumvirate of corporate (self-government), individual (eligibility for allotments, special reservations), and property (hunting, fishing, and gathering) rights articulated in treaties further distinguish Indians in a fundamental way from all other groups and individuals in the United States.”¹⁴⁷ In this way treaties are also constitutive.

Moreover, treaties have a moral dimension for all signatories. There is an assumption that the promises made in them will be kept,¹⁴⁸ and that the rights set out in them will be permanent.¹⁴⁹ To tribes, treaties represent “[r]eal promises,” which advance the “fulfillment of the ultimate promise”—the reservation as a homeland and an “island[] of Indianness within the larger society.”¹⁵⁰ They “constitute ‘sacred text[s]’ that represent[] the moral obligations of the United States to racially and culturally distinct groups that have been treated unjustly by the dominant society.”¹⁵¹ The multivalent nature of treaties means not only that courts play a major role in their interpretation and enforcement, but also that society’s view of the durability of the moral bargains made in them is critical for their viability.¹⁵²

Treaties are an unwelcome practical perplexity in a world altered by climate change. They may cease to exist once a tribe leaves its treaty-protected lands, leaving tribes indistinguishable from non-Indians and unprotected. Yet, if treaties remain viable to

145. Williams, Jr., *supra* note 95, at 194.

146. POMMERSHEIM, *supra* note 64, at 16 (quoting CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 4 (1987)) (stating that “[t]he concept of an Indian reservation is best defined as the concrete manifestation of a guarantee of a ‘measured separatism’ to Indian[s] . . . as the result of negotiated treaties and settlements reached between Indian tribes and the federal government”).

147. David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 299 (1998).

148. Kronk Warner, *supra* note 7, at 956 (“[T]he bedrock of international law is that nation states are bound to keep their word under treaties—*pacta sunt servanda*.”).

149. *Id.* at 927-28.

150. WILKINSON, *supra* note 146, at 121-22.

151. Kronk Warner, *supra* note 7, at 934-35 (quoting Tsosie, *supra* note 62, at 1623) (noting in addition that “Presidents from Washington to Nixon have characterized the Nation’s commitments to Indians in moral terms”).

152. See Goschke, *supra* note 92, at 315, 320-21, 325-26, 329-33, 338-41 (describing the salmon and shellfish wars to the northwest between Indians and non-Indians and the current conflicts over gathering huckleberries).

the extent that the prerogatives granted in them attach to the signatory tribes, they may create assimilation problems for tribes seeking to move to new homelands. The fraught history of tribal treaty making and breaking may create barriers for tribes faced with having to abandon their treaty-protected lands unless they can be assured of reentry rights once they leave, but this may unsettle expectations of any non-Indian who has gained rights in those lands. The fact that tribes may lose the sovereignty rights granted them in treaties once they abandon their treaty-protected lands puts a premium on the federal government to create a sufficient sovereignty framework for tribes so that they can maintain their otherness in a new location, yet doing this may well disrupt the communities that they have migrated to.

Up until this point in the Article, the discussion has been more abstract, examining the special relationship that tribes have with their land and the importance of treaties to tribes as foundational documents that define tribal rights and sovereign prerogatives. We have seen that many of the questions raised in Parts II and III of the Article are defining of who and what tribes are, as well as legal and moral in character. But the last paragraph in this Part hints at some of the practical questions raised by the intersection of tribal treaties and climate change—where can tribes go and how will they maintain their unique tribal attributes once they are no longer geographically and physically distinct from non-Indians without making their coexistence in their new communities impossible? It is to these questions that the Article now turns.

IV. WHERE CAN CLIMATE REFUGEE TRIBES GO?

In addition to the fact that there is no guidance to help entire communities, like tribes, relocate, there are several factors that make relocation especially difficult for tribes.¹⁵³ The long negative history of federal tribal removal programs designed to open up tribal lands to non-Indian settlement and weaken tribal sovereignty may make tribes suspicious of any modern removal program, regardless of how laudable the goals are, and reluctant to leave their lands. Since land is essential to tribes, they cannot simply be slotted into existing towns; there must be enough land under their control or land to

153. See Balaraman, *supra* note 14 (saying lack of a “governance framework for communitywide relocation” will make the task of relocation “far from an easy task”).

which they have access, to enable them to continue to practice some of their subsistence skills. But there are no longer areas of unoccupied land for tribes to inhabit that are not under some form of congressionally mandated federal management policies,¹⁵⁴ let alone lands that might replicate those the tribes may have to abandon. Tribes cannot move onto another Indian reservation or lands occupied by non-Indians without creating severe dislocations for the existing inhabitants. If the latter is to happen, and if it can happen, the federal government will have to acquire the land from willing sellers or take it by eminent domain, either of which will cost a substantial amount of money in an era of federal fiscal constraint, and the latter of which will cause great unhappiness. Thus, even though it is becoming increasingly clear for some tribes that they can no longer stay on their treaty-protected homelands, getting them to move and selecting a new location for them will be extremely difficult.¹⁵⁵

Resolving the questions raised in this Part of the Article are of the utmost importance. Unless tribes can relocate as an intact cultural

154. See, e.g., the National Park Service Organic Act, 16 U.S.C. § 1 (1916) (“The [National Park] service . . . shall promote and regulate the use of Federal areas, known as national parks, monuments, and reservations . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2001) (“The Congress declares that it is the policy of the United States that . . . (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.”); see also § 1714 (setting out specific procedures for the withdrawal of public lands).

155. One possibility not discussed in this Article is whether displaced tribes who have suffered past persecution might be considered refugees under various international treaties and thus gain rights to a new permanent home. See Bellavia, *supra* note 15, at 461 (“Environmental migrants, who can prove a recognized form of past persecution or well-founded fear of future harm on account of five specific categories, may obtain ‘refugee’ status. Refugee status might enable the individual to permanently relocate. Unlike soft instruments . . . , binding international law creates positive obligations on states to protect refugees. However, to be granted refugee status, a person must demonstrate that they were persecuted.”). The question would be whether the history of tribal–federal government relations constitutes persecution of tribes. It seems fairly certain at this point that the impact of climate change on tribes, despite its anthropomorphic origins, does not qualify as persecution. *Id.*

unit, they will cease being tribes. Yet, as will become clearer below, these are also the hardest questions to answer—questions that are not resolved by treaties and may even be made worse by treaties and the rights granted to tribes under them. They are also hard questions to resolve because many players have a role in finding answers—the federal government, state governments, local governments, non-transient tribes, private property owners, and community organizations like churches, schools, civic associations, among others—which may make assigning responsibility difficult. Moreover, tribes are not the only ones adversely affected by climate change, which means they may soon be competing for scarce resources and attention with other stressed communities, industries, and individuals. So for tribes, time is of the essence to start finding answers to these questions.

A. Adverse History of Tribal Removal Programs

There is a long, contentious history of U.S. tribal removal programs under color of treaty. This history may make it difficult for the federal government to initiate any effort to move tribes off their protected lands, even if those lands are seriously threatened by climate change. Trust between tribes and the federal government was severely, perhaps irreparably, compromised during the Indian removal period and its aftermath.¹⁵⁶

“The Removal Era of the nineteenth century was a time of forced marches and devastation for many Indian peoples.”¹⁵⁷ These painful memories of the removal era and other negative federal policies towards Indians promoting Indian assimilation into non-Indian society leave tribes justifiably suspicious of any federal policy that might also be construed as “chipping away” at their ability to

156. Ford & Giles, *supra* note 1, at 530 (“The second factor playing uniquely into any discussion around tribal climate change adaptation, the long history of the removal of Indian people from their traditional homelands, has complex implications for tribal nations—and the federal government.”).

157. *Id.* See also Wolfley, *supra* note 19, at 57 (dividing federal Indian policy into two distinct periods, and saying “[i]n the nineteenth century, the overriding policy of the federal government was marked by two federal Indian policy periods: removal (1830–1860) and reservation (1860–1887). During these two periods, the federal government removed tribal people from the eastern and southern states to isolated lands of smaller size known as reservations, and entered into treaties with western tribes to reduce their aboriginal land holdings”).

manage their reserved lands¹⁵⁸ and govern their members.¹⁵⁹ Examples of such policies include the Dawes General Allotment Act of 1887,¹⁶⁰ in which tribal lands were subdivided and eventually sold to non-Indians,¹⁶¹ and congressional adoption of a policy of terminations, which involved steps to end the special status of Indian tribes and convert their lands to private ownership.¹⁶² Congress also eroded tribal criminal jurisdiction by the enactment of laws like the Major Crimes Act of 1885, which established federal jurisdiction over certain crimes committed in Indian country, even those committed by Indians, and Public Law 280 of 1953, which extended state criminal and civil jurisdiction to Indian country in designated states.¹⁶³ “A need for relocation must therefore be administered on a sensitive government-to-government basis between the United States and these tribes to ensure that they are adequately protected and that their traditions are preserved to the maximum degree possible in finding a suitable new community for relocation.”¹⁶⁴

The federal trust relationship, based in part on Indian treaties,¹⁶⁵ arguably requires the federal government to provide assistance to

158. Ford & Giles, *supra* note 1, at 530-31. *See also id.* at 533-34 (“There has been nearly two hundred years of Supreme Court case law and federal statutory regulation since *Worcester*, which have chipped away at the ability of tribal nations to regulate wholesale their reservation lands and natural resources.”). *See generally* Babcock, *supra* note 63, at 490-509 (discussing federal policies that have diminished tribal authority over tribal lands and members).

159. Anaya, *supra* note 3, at 55-57. For a thorough and neutral description of some of these policies, see *id.* *See also id.* at 52 (noting the “persistent deep-seated problems related to historical wrongs, failed policies of the past and continuing systemic barriers to the full realization of indigenous peoples’ rights”).

160. 25 U.S.C. § 331 (1887) (repealed in part 2000).

161. *See* Babcock, *supra* note 63, at 494-95 (explaining how the Dawes Act, 25 U.S.C. §§ 332-334, 339, 341-42, 348-49, 354, 381 (2000) “authorized the partition of tribal lands among . . . tribal members and the sale of unpartitioned land to white homesteaders” and saying that the Act’s effect was “to cut Indian homelands apart, to obliterate the boundary separating Indians from non-Indians, and to reduce substantially the land under tribal control”).

162. Anaya, *supra* note 3, at 57. Although Congress’ termination policy was eventually abandoned, several tribes lost federal recognition and their self-governing status, and also lost land. *Id.*

163. *Id.* at 65.

164. Abate, *supra* note 72, at 42.

165. *Id.* at 12. “The highest priority vulnerable population for the government should be federally recognized tribes, like the Native Village of Kivalina. 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.” *Id.*

tribes that must move to avoid the impacts of climate change. As a trustee for Indian tribes, the government “has charged itself with moral obligations of the highest responsibility and trust,” resulting in its actions being held to “exact[ing] fiduciary standards.”¹⁶⁶ Some, like Randall Abate, argue that this trust relationship means that any relocation funds available to communities to respond to climate change should be given first to tribes.¹⁶⁷ That trust obligation could be interpreted as requiring the federal government to replicate as near as possible the functions and values of the abandoned land that tribes had been forced to occupy in the first place. The argument would be that since tribes were placed on their reserved lands by military fiat or in a bargained-for exchange, but not as a result of their free will, the United States has, at minimum, a moral obligation to replicate the functions and values of these lands in any new lands tribes move to.

And what of the tribal lands left behind? In the Tribal Removal Era, these lands were quickly claimed by non-Indian settlers. Would these lands still be protected by a treaty that excluded non-Indians or which prevented non-Indians from using these abandoned lands and their resources for other purposes, as if the tribe was still in residence? Might these treaties be construed to allow tribes access to their former lands to perform ceremonies, hunt, fish, or gather resources regardless of whether there are new occupants?¹⁶⁸ What of

166. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

167. Abate, *supra* note 72, at 42-43 (“[F]ederally recognized tribes are first in line for this assistance because of the federal government’s trust relationship with these tribes, and the climate change relocation fund must be administered with that reality in mind.”). Abate notes that this is recognized in the Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA). *Id.* at 43 (“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.”). One source of federal obligation to fund this tribal migration and resettlement might be the Indian Self-Determination and Education Assistance Act of 1975, committing the federal government “to supporting and assisting Indian tribes in the development of strong and stable tribal governments.” 25 U.S.C. § 5302(b) (1988). However, an examination of that law’s provisions is beyond the scope of this Article.

168. The report of the Special Rapporteur on the Situation of Indigenous Peoples in the United States recommended, as a measure of reconciliation and redress, the inclusion of measures that would restore or secure indigenous peoples’ capacities to maintain connections with places and sites of cultural or religious significance that they lost when land was wrongfully taken from them. *See* Anaya, *supra* note 3, at 73.

tribal burial grounds—should the remains buried there be exhumed and removed to the tribe’s new location? Even if tribal rules allow this to happen, is doing this feasible? Would host communities accept exhumed bodies; could they be forced to? Can tribes use their treaties to require the federal government to find them a new home, insist on prerogatives protected in those treaties in their new location, and prevent others from entering their new land?

It is doubtful that tribal treaties would compel affirmative answers to these questions as a matter of law. But are there moral reasons based on the history of forced removal of tribes from their traditional homelands that the federal government should use its trust responsibilities to preserve these abandoned lands for tribes, just as they protected the lands when they were occupied by a tribe? Do these same moral reasons support the disgorgement of private lands to accommodate tribal migrants because in all likelihood that land was once occupied by tribes? Should tribes be entitled to reparations for the harm that has been done to them over the centuries since their “conquest,” which might pay for new land to reconstitute themselves, or should the federal government use its powers of eminent domain to confiscate private lands on which tribes might relocate?¹⁶⁹ Is there a moral obligation on society that profited from the harms done to Indians to answer these and other questions about tribal relocation in the favor of tribes?

B. The Need for a Compatible, Willing Host for Climate Refugee Tribes

Assuming some tribes must move to avoid the harmful effects of climate change, where can they go without cost to and dislocation of the new land’s existing occupants?¹⁷⁰ Tribes would likely be

169. This suggestion is not as far-fetched as it might sound, as the U.N. Special Rapporteur examining the situation of indigenous peoples in the United States made a similar suggestion as part of the healing process for harms done to them by ill-conceived governmental policies. *See id.* (“Other measures of reconciliation should include efforts to identify and heal particular sources of open wounds. And hence, for example, promised reparations should be provided to the descendants of the Sands Creek massacre . . .”).

170. Bellavia, *supra* note 15, at 454 (discussing the strain placed on host communities by in-state migrations of displaced persons at an international scale, and saying, “[i]ncreasing migration into urban areas strains local infrastructure and increases competition for natural resources, creating social unrest and political instability”); *see also id.* at 459 (“Many displaced by climate change relocate within

permanent residents unlike an individual migrant who might stay in a location only temporarily before moving on. Depending on the size of the tribe and the number of displaced members, a tribe moving to a new location is equivalent to a village or even a town moving—so the village within a village may be permanent. Perhaps government subsidies to the host communities to defray the cost of resettling these climate migrants might help with the transition or the costs of resettlement, but it still leaves open issues involving meshing different governance institutions, mores, and traditions.

When the federal government removed tribes from their existing lands over a century ago, they were moved to non-occupied territory that settlers did not want at the time, not to land with existing residents and well-established communities. Other than federal lands, there are no longer vast areas of unoccupied land.¹⁷¹ But it would not be easy resettling migrant tribes on federal lands. The presence of tribes could affect the prior uses of those lands and could even cause whole areas of public lands to be withdrawn from non-Indian visitation. Congress reserved Indian lands in order “to encourage, assist and protect the Indians.”¹⁷² Reservations allow tribes to live separate from non-Indians,¹⁷³ entitling tribes to close their reservations to non-Indians, keeping out the influence of the majority culture and protecting what is uniquely Indian about them. Closing public lands, however, conflicts with the federal laws

their home state. Migration into urban areas increases competition for already scarce resources and can challenge already fragile governments.”).

171. Even if there were unoccupied land for tribes to move to and the tribe had the money to buy that land, either in its own right or as a result of federal largess, the tribe would receive only a beneficial interest in the land without any sovereign prerogatives over it, until the Secretary of Interior brought that land into trust for the tribe. Jampolsky, *supra* note 125, at 88-89. *See also id.* at 89 n.10 (“Acquiring fee title alone is not enough to reassert sovereignty over lands outside reservation boundaries, and the process for bringing land into trust is often not an option for tribes.”). Jampolsky notes in addition that this is not an option for unrecognized tribes. *Id.* at 125; *see City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202-03 (2005) (holding that the Oneida Indian Nation could not avoid local property taxes on fee land, despite its location within the original boundaries of the Reservation, because such avoidance would disrupt state and local governance).

172. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918).

173. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 604-05 (1975) (“[R]eservations are sanctuaries where land is not subject to taxation; where individual Indians are free of most taxes; where many state laws do not apply; and where Indian customs and traditions are supreme.”).

governing their management, which requires that they be open for public use, and would probably necessitate amending those laws and management policies¹⁷⁴—not an easy thing to accomplish in the current political environment.

In all likelihood, therefore, tribes will have to move onto occupied land. But it may not be easy for a tribe to find a community willing to host it. A tribe is a foreign society with its own rules and mores, which has been able to exist in isolation from mainstream America for centuries. What community will accept them given their “strangeness”? Is there enough space for an entire tribe to move to without displacing or crowding the individuals who already live there? Will there be enough water, game animals, fish, and arable land to sustain the needs of the new as well as old occupants? How will tribal governments be integrated into local governments? What about the loss of tax revenues and the community’s need to provide services to additional people?

Could tribes move onto the reservations of other tribes, assuming there was room for them? Probably not. For example, while substantial financial assistance and assurances that the sovereign prerogatives a migrating tribe enjoyed on their old lands will continue on any new land they occupy might help persuade tribes to abandon their homelands, these benefits might make it difficult to move refugee tribes onto existing reservations. It would not be unreasonable for the host tribe to want the same financial assistance to absorb the newcomers as well as equivalent tribal treaty protected prerogatives. The former will increase the cost of any tribal resettlement program substantially, while the latter will create conflicts between the migrant tribe and the host tribe. Given the differences among treaties borne of the circumstances in which they were negotiated, it is unlikely that the same rights were granted in the treaties governing the migrant and host tribes. So meshing treaty prerogatives, let alone transferring them among co-located tribes, would be extremely difficult.

Additionally, every tribe’s customs, governing institutions, laws, rituals, and social structure is unique to it—melding them or

174. See generally Wolfley, *supra* note 19, at 55, 57 (discussing the relationship of tribes with the National Park Service, including the evolution of National Park Service Indian policies, and the application of trust obligations to accommodate tribal interests in the national parks). Wolfley advocates in favor of the National Park Service’s prioritizing tribal interests “to enable tribal peoples to access aboriginal lands where time-honored traditions and practices are celebrated and life is renewed.” *Id.*

finding ways that these differences do not create barriers and tensions between the host and migrant tribes on a circumscribed land base could be a daunting task. Moreover, the negative history during the Indian removal period when different tribes were combined in the same confined geographic area, including tribes that had repeatedly warred against each other, may make this task even more difficult in Indian country than elsewhere as there is a possibility that a similar pattern might present itself.

These same prerogatives and differences that create problems with locating migrant tribes on other tribal lands will also make it difficult to move tribes to non-Indian lands. What town or county will want to, let alone be able to, host a sub-government with its own elected officials, laws, and governing institutions and to integrate that totally separate community into the preexisting one? Special rights given to tribes, like no sales or property taxes, sovereign immunity, or the right to try non-Indians in tribal courts for certain violations, have been problematic enough for non-Indians¹⁷⁵ when tribal members live on their own lands interspersed with non-Indian lands, as often happens with reservations that had been subject to allotment policies. These differences would likely become more acute when an entire tribe moves in next door unless an allotment policy was reenacted or a form of zoning employed to divide the host community into separate Indian and non-Indian allotments or zones, with all the inefficiencies that such a solution might cause.

Faced with these types of problems and unwelcome solutions, one can only imagine, in an era of heightened xenophobia as the United States is currently going through, how welcome tribes would be.¹⁷⁶

175. See Babcock, *supra* note 4, at 40.

176. An issue beyond the scope of this Article is whether The United Nation's Convention on the Status of Refugees might protect tribes seeking new lands on which to settle from discrimination or persecution, even though they do not meet the Convention's definition of refugee (someone who has fled his or her country out of a fear of persecution based on "race, religion, nationality, membership in a particular social group, or political opinion," and whose government is unwilling to provide protection or support). See Gromilova, *supra* note 80, at 115-16. Additionally, like other climate migrants, tribes are not fleeing their government and have no desire to leave it. See Jane McAdam, *From Economic Refugees to Climate Refugees?*, 10 MELBOURNE J. INT'L L. 579, 591-93 (2009), quoted in Gromilova, *supra* note 80, at 119:

Whereas refugees within the *Refugee Convention* definition flee their own government (or actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not

C. Financial Assistance for Climate Refugee Tribes and Host Communities

One thing that is clear and devoid of theory, if not complexity, is that tribes will need financial assistance to move.¹⁷⁷ This will make any tribal relocation program extremely expensive, perhaps prohibitively so, in an era of constrained federal expenditures.¹⁷⁸ Many, perhaps even most, Indian tribes lack the funds to protect themselves from the effects of climate change, let alone to finance a move to new lands.¹⁷⁹ While government grants and technical assistance might help, assuming a willing Administration,¹⁸⁰ the costs

escaping his or her government, but rather is seeking a refuge from—yet within—states that have contributed to climate change.

However, what might be of relevance is Resolution 10/4 adopted by the U.N. Office of the High Commissioner for Human Rights and by the International Council of Human Rights Policy, which specifically addressed the relationship between climate change and international law. This resolution noted “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights,” and listed among the human rights that can be adversely affected by climate induced migration, the “right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, the right to take part in cultural life, the right to self-determination, and the right to development.” *Id.* at 120 (quoting Human Rights Council Res. 10/4, U.N. Doc. A/HRC/10/29 (Mar. 20, 2009)).

177. See Christopher Mele & Daniel Victor, *Reeling from Effects of Climate Change, Alaskan Village Votes to Relocate*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/shishmaref-alaska-elocate-vote-climate-change.html?mcubz=0> [<https://perma.cc/GM5U-2VBS>] (commenting that the village needs \$180 million to complete the move that they have started).

178. Some have suggested the creation of a relocation fund that would provide proactive relocation funding to these communities that are most vulnerable and in need of assistance. Randall Abate has suggested that the fund could be funded in part from a carbon tax on private sector entities, like those who have contributed to climate change. See Abate, *supra* note 72, at 13-14; see also *id.* at 33 (“Major emitters of greenhouse gases should be the principal source of revenues for the fund.”). Alternatively, a carbon tax could be used as a source of revenues for tribal relocation costs. *Id.* at 39. “[T]he funds for this mechanism could be generated in part by a carbon tax that applies to all U.S. residents, which would replicate the approach in CERCLA that combined a general tax and a tax on generators of hazardous substances to support the Superfund.” *Id.* at 33, n.112.

179. *Id.* at 10-11.

180. See Ford & Giles, *supra* note 1, at 546; see also Press Release, Kevin Washburn, Assistant Secretary for Indian Affairs, U.S. Dep’t of the Interior, Secretary Jewell Announces New Tribal Climate Resilience Program (July 16, 2014) (“We are committed to providing the means and measures to help tribes in their efforts to protect and mitigate the effects of climate change on their land and natural resources.”).

to relocate a small tribe, let alone a large tribe, would far outstrip the funds that might come with a particular grant.¹⁸¹ There may also be a need for government subsidies to help communities defray their costs of absorbing tribal migrants.¹⁸²

The costs of relocating tribal communities will be substantial. The Government Accountability Office (GAO), in 2003, determined that flooding and erosion would affect 184 Alaskan indigenous villages, four of which, Kivalina, Koyukuk, Newtok, and Shishmaref, faced “imminent threats of disaster.”¹⁸³ Six years later, in a second report, GAO found that three times as many communities faced imminent destruction.¹⁸⁴ Yet, there is no single governmental source of funds earmarked for relocation of tribal communities such as these.¹⁸⁵ While mitigation planning assistance is available to Indian tribal governments under FEMA, such assistance is only short-term and limited to victims of single-event natural disasters like hurricanes, tornadoes, and earthquakes.¹⁸⁶ “Drought is the only gradual ecological process listed in the statute as a potential catalyst for a presidential disaster declaration.”¹⁸⁷ This means that residents of these coastal Alaskan indigenous communities must “wait for disaster to strike before they are eligible for assistance under FEMA,” and even then, “the maximum amount of assistance available to individuals and[/]or families is \$25,000.”¹⁸⁸ The estimated costs to relocate a single Alaskan village, Kivalina, run as high as \$400 million—“a potential average cost of at least \$250,000 per individual.”¹⁸⁹

Randall Abate calls for “a new climate change adaptation remedy,” which would establish a relocation fund to “provide proactive relocation funding to these communities that are most

181. *Id.* (“Federal agency support, primarily through grant-making or technical assistance for tribal nations to undertake these tasks, could be particularly helpful in the coming years.”).

182. *See supra* Section IV.B.

183. Abate, *supra* note 72, at 24. *But see* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012) (dismissing a native village claim against fossil fuel plants for causing global climate change that harmed them).

184. Abate, *supra* note 72, at 24 (complaining that “no discussion had begun on a strategy to mitigate the ensuing consequences of flooding and coastal erosion”).

185. *Id.* at 25.

186. *Id.* at 24 n.72, 26-27.

187. *Id.* at 27.

188. *Id.* at 43.

189. *Id.*

vulnerable and in need of assistance.”¹⁹⁰ He also suggests the use of federal or state eminent domain authority to assist individuals or families to vacate their current domicile and move somewhere else when they have experienced a disaster. For example, “[u]nder the Uniform Relocation Assistance and Real Property Acquisition Policies Act, the federal government or a state agency will provide moving and related expenses, replacement housing for homeowners including mortgage insurance, replacement housing for tenants, relocation planning, and last resort housing replacement by the federal government.”¹⁹¹ However, not only do tribal members not own their homes, but it also seems unlikely that that program could be stretched to provide relocation assistance to an entire tribe, let alone provide assistance when the disaster is not a onetime occasion, but a continuing ongoing problem, which may affect different parts of a tribe’s reservation at different times and in different ways.

This Part of the Article, which has focused on the issue of where tribes can relocate after climate change forces them to abandon their treaty-protected land, has primarily identified questions and problems that defy easy answers. Finding a place for tribes to move to, financing that move, and assuring that tribes retain enough of their cultural identity without their traditional land base and perhaps their treaties are problems for tribes that are not solved by a treaty and may indeed be exacerbated by the existence of a treaty. Embedded in treaties are questions about whether the treaty remains in effect on abandoned tribal lands enabling tribes both to access those lands and prevent access by non-Indians, and whether sovereign prerogatives granted in a treaty might accompany the tribe to any new lands it moves to, perhaps complicating that move fatally. Thus, while the questions raised in this Part are mostly practical, legal and moral suasion might be brought to bear to help answer them, as this Part has also shown.

The final Part of the Article proposes an epistemological approach to these questions, which might reduce them to a manageable size and help put them in priority order. This might enable others to start answering them more definitively than has been done here.

190. *Id.* at 13.

191. *Id.* at 28.

V. A FRAMEWORK FOR SORTING AND PRIORITIZING QUESTIONS
ABOUT THE INTERSECTION OF TRIBAL TREATIES AND CLIMATE
CHANGE

The last Part of the Article proposes an epistemology of everything by sorting the questions identified in the earlier parts of the Article into four categories: legal, moral, practical, and constitutive—what it is to be an Indian tribe. Doing this may help determine which questions need to be addressed first, as well as the institutions which should be responsible for answering them. Thus, courts may be the best institution to resolve legal questions, while religious institutions, civic associations, and schools might be the best ones to resolve moral questions. Only tribes can say what is essential to them, although historical experience may provide some guidance to others. And resolving practical questions about where tribes can move to and the extent to which they want to be, can be, or should be assimilated into their host communities have more of an element of needing all available hands on deck because of the complexity of these questions and the cross-cutting nature of any answers to them.

Each Part of the Article has labeled the types of questions being asked and inferred where the most likely source of institutional answers might be found.¹⁹² The Article has also identified where there may be overlap between categories. Some questions invoke more than one category, like understanding the role of treaties which have constitutive, legal, and moral elements to them. In that situation, the task becomes determining which of the multiple categories of questions is dominant and to focus on answering the part of the question that has the most urgency. Thus, a practical question that also has a legal or moral component would fall in the first priority to be answered, and not in a lower category, although answers to the non-practical parts of the questions might wait.

Pure legal questions and questions that go to the core of what it is to be a tribe seem to be the easiest ones to answer, in part because there will generally be only a single source tasked with the job of

192. See Appendix A for a chart sorting the questions into various categories. As the text has made clear, however, many of these questions spill over into other categories. Therefore, a question's placement in a particular category reflects the Author's identification of the dominant element of the question, which in turn reflects the order in which the questions should be answered. If a question can clearly be subdivided into co-equal parts, then a subpart may appear in another category.

answering the question, a court or a tribe itself, and because there should be ample precedent to guide the answer. Whereas the second category of questions, the moral ones, seems the most difficult to answer because the questions are so contextual—dependent on the time frame in which they arise and the mood and needs of the country when the conflicts and tensions present themselves. For example, labeling climate change as a human rights issue and equating it to other human rights campaigns like the civil rights movement or the effort to integrate transgendered peoples into contemporary American life might heighten the contentiousness of the underlying cause, illustrating the problems with seeing an issue in moral terms.¹⁹³ One might hope that the nation's response would be charitable and helpful to displaced tribes because “[c]limate change is changing the norm . . . [for] the way we discuss policies to govern human mobility. We can debate the intricacies of this problem, but [society's] response is the true measure of our compassion for the world's most vulnerable people.”¹⁹⁴ But there is no guarantee that seeing something in moral terms would assure that result.

It seems obvious that the most important and time sensitive category of questions are those that are labeled practical—resolving where tribes can move to and where the funds will be found to defray the cost of this migration must be the first order of business, followed by questions, the answers to which will allow tribes to retain their identities and functionality as sovereign tribes. Unless answers to questions that seek to preserve tribes as separate unique cultures can be found, then even answers to practical questions, which save individual tribal members, may not preserve that identity. Answers to legal questions, like the extent of the federal government's trust responsibilities, may provide tools to assure tribes the land and resources they need but are not defining in their own right; answers to moral questions, however, reside in society's acknowledgment of the harms done to tribes and its willingness to absorb these migrant cultures—a true unknown.

Removing moral questions from the “must answer now” list and demoting legal questions to a lower category of significance may be the Article's most important contribution, as it will direct attention to the most pressing questions—the practical and

193. See, e.g., Bellavia, *supra* note 15, at 467 (“Climate change as a human rights issue is not different from social and political movements in the past.”).

194. Haley-Benjamin, *supra* note 13, at 54.

constitutive ones that must be answered now, if Indian tribes are to survive as a source of alternative cultural norms to ours. Practical questions, like where can tribes move to, who will defray the cost of those moves, and the extent to which tribes will assimilate into their new community, are difficult to resolve. However, they might be less so, if the federal government were to deploy a heavy hand and play a decisive role in the process, like condemning resettlement land for a refugee tribe and providing funds for doing that, as well as for the costs of migration and the costs of accommodation borne by the host community.

CONCLUSION

Today, indigenous peoples in the United States face multiple disadvantages, which are related to the long history of wrongs and misguided policies that have been inflicted upon them. Nonetheless, American Indians, Alaska Natives and Native Hawaiians have survived as peoples, striving to develop with their distinct identities intact, and to maintain and transmit to future generations their material and cultural heritage. While doing so, they add a cultural depth and grounding that, even while often going unnoticed by the majority society, is an important part of the country's collective heritage.¹⁹⁵

Climate change makes the survival of many of United States tribes uncertain. This is because the land on which tribes depend for their sustenance, cultural identity, and sovereignty is becoming less secure as it floods, erodes out from under them, or dries up in response to our changing climate. As a result, tribes are being forced to abandon their treaty-protected lands, raising a host of questions about the status of these abandoned lands and the legal force and effect of these treaties once a new "homeland" is found, if it can be found.

This Article has tried to identify the many questions that arise from this most recent threat to the survival of tribes in this country—a threat that faces non-Indian communities to be sure, but not with quite the same disestablishing effects. Non-Indian communities can reestablish themselves, but tribes without their traditional land base and treaty-protected sovereign prerogatives quite simply may cease to exist. Thus, there is an urgency to answering the many questions raised here.

The grouping of questions into four categories, what the Article calls a taxonomy of questions, is an attempt to impose some order on

195. Anaya, *supra* note 3, at 55.

them, to invite their prioritization and identification of the institutions that should be charged with their resolution.

The hope is that doing this will enable others to do the hard work of answering the most urgent questions, as time is of the essence if tribes are to survive as anything other than interesting relics of our past.¹⁹⁶

196. See Krakoff, *supra* note 8, at 867. Krakoff describes climate change as “an intergenerational collective problem of potentially tragic proportions. Each generation has incentive not to act, since the effects will be felt later. Yet only the current generation has the ability to take steps to avoid compounding the misery inflicted on future generations.” *Id.*

APPENDIX A

LEGAL	MORAL	CONSTITUTIVE	PRACTICAL
Do treaties attach to the land?	Does the federal government have an obligation to fund cost tribal relocation?	What are consequences of tribes' unique attachment to their land?	Where can displaced tribes go?
Do treaties attach to tribes?	Does the federal government have an obligation to acquire land for displaced tribes?	What are the constitutive consequences for tribes if abandoning their lands abrogates their treaties?	Can tribes relocate to federal lands?
Do treaties grant tribes off-reservation rights?	Does the federal government have a moral obligation to provide tribes with land of equivalent value and functionality?	Can tribes still be tribes without their homelands?	Can tribes relocate on other tribal reservations?
Are reservation boundaries flexible?	Should tribes be entitled to reparations for harms done to them by society?	Can tribes still be tribes without their treaties?	Can tribes relocate to private land?
Do treaties grant tribes right to exclude non-Indians from abandoned lands?	Should the federal government use eminent domain to acquire new lands for displaced tribes?	How can tribes be assured of sovereignty without their lands or treaties?	From where will funds come to defray cost of tribal relocation?
Do treaties grant tribes right of access to abandoned lands?			Will either the concept of critical legal geography or governable spaces enable tribes to move to new areas?
What are the legal consequences for tribes if they abandon their treaty-protected lands?			
Can treaties attach to land already occupied by non-tribal members?			