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Improving Native American Tribes' Voice in International Climate Change Negotiations

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Cover Page Footnote

J.D., Emory University School of Law (2017); B.A., Brown University (2014). I would like to thank Professor Robert O. Saunooke for his insightful feedback on this Article and the editors of the American Indian Law Journal for their thorough edits and feedback during the editing process.

IMPROVING NATIVE AMERICAN TRIBES'
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Jin Hyung Lee

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IMPROVING NATIVE AMERICAN TRIBES' VOICE IN INTERNATIONAL CLIMATE CHANGE NEGOTIATIONS

Jin Hyung Lee *

I. INTRODUCTION

Native Americans from Kivalina, Alaska are likely to lose their homes by 2025 due to climate change.¹ Living on the Alaskan coast in the Arctic Circle, the people of Kivalina rely upon whales that camp atop sea ice and sea ice to protect their village from strong sea waves.² The rise in sea level and warming temperatures due to climate change have caused the people of Kivalina to lose their traditional means of subsistence and their land.³ Native Americans in northern Alaska are not the only tribes affected by climate change.

In the Pacific Northwest, Native Americans heavily rely on salmon for their cultural, social, economic, and spiritual livelihood.⁴ However, warmer surface and water temperatures, changes in the hydrological cycle, and freshwater inflow will affect

* J.D., Emory University School of Law (2017); B.A., Brown University (2014). I would like to thank Professor Robert O. Saunooke for his insightful feedback on this Article and the editors of the *American Indian Law Journal* for their thorough edits and feedback during the editing process.

¹ Adam Wernick, *Will These Alaska Villagers be America's First Climate Change Refugees?*, PUBLIC RADIO INTERNATIONAL (Aug. 9, 2015, 9:00 AM EDT), <https://www.pri.org/stories/2015-08-09/will-residents-kivalina-alaska-be-first-climate-change-refugees-us>.

² Chris Mooney, *The Remote Alaskan Village that Needs to be Relocated Due to Climate Change*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/?utm_term=.d0250cd25939.

³ *Id.*

⁴ Jonathan M. Hanna, Report, *Native Communities & Climate Change: Protecting Tribal Resources as Part of Nat'l Climate Policy*, 8 NAT. RESOURCES L. CTR., (2007), https://adapt.nd.edu/resources/696/download/07_RR_Hanna.pdf. (stating that Native American tribes of the Pacific Northwest relied on salmon runs for year-round sustenance, and reflected their reverence for salmon in artwork and spiritual practices).

future salmon population, and thereby impact tribes.⁵ In the Southwest, reduction in water resources will affect Native American tribes' ability to continue subsisting on agriculture and raising livestock and performing many tribal religious ceremonies.⁶ In the Midwest, climate change affects the forestlands a number of Native American tribes rely upon. Culturally significant resources, such as maple sugar and wild rice, have shifted in response to warmer temperatures and because Native American reservations remain fixed; these tribes are losing these resources.⁷

The consequences of climate change are only expected to continue. Currently, the Earth contains the highest concentration of greenhouse gases (GHGs) in history, which absorb heat emitted from the Earth's surface, trap them inside the atmosphere, and increase the global temperature, among creating other impacts.⁸ However, future projections have GHG emission continuing to rise, such that global temperatures are expected to increase at least 1.5-2.0°C,⁹ unless stringent mitigation efforts are taken.¹⁰ As a result, extreme weather and climate events will become more likely,¹¹ which will cause food and water sources to become more scarce.¹² However, the impacts of climate change will not affect

⁵ *Id.* at 7-8.

⁶ *Id.* at 20 (stating that fresh or rain water plays an important role in the many tribal rituals in the Southwest).

⁷ NATIONAL ASSESSMENT SYNTHESIS TEAM, U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY & CHANGE 84-85 (2000), <https://data.globalchange.gov/assets/9a/aa/ec5b4bb3b895bc8369be2ddac377/nca-2000-report-overview.pdf>.

⁸ INEZ FUNG, ET AL., ROYAL SOCIETY & US NATIONAL ACADEMY OF SCIENCES, CLIMATE CHANGE SCIENCE & CAUSES 2 (Feb. 27, 2014), available at <http://dels.nas.edu/resources/static-assets/exec-office-other/climate-change-full.pdf>.

⁹ This temperature increase translates to 2.7-3.6° F.

¹⁰ R.K. Pachauri (Chairman), et al., IPCC, CLIMATE CHANGE SYNTHESIS REPORT 10 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf.

¹¹ *Id.* In IPCC reports, scientists ground each finding with an assignment of confidence, based "on the assessed likelihood of an outcome or a result." *Id.* at 2, n. 1. The assignments of confidence are: virtually certain 99–100% probability; extremely likely 95–100%; very likely 90–100%; likely 66–100%; more likely than not >50–100%; about as likely as not 33–66%; unlikely 0–33%; very unlikely 0–10%; more unlikely than likely 0–5%; and exceptionally unlikely 0–1%. *Id.*

¹² Pachauri et al., *supra* note 11, at 13.

everyone equally. Certain regions, specifically areas with generally greater proportions of disadvantaged people and developing communities, will experience more severe risks and impacts.¹³

Native Americans tribes¹⁴ fall within this susceptible category. Although the particular impacts will differ based on the geographic region occupied by Native Americans, the consequences will likely be severe.¹⁵ Tribal livelihood is heavily integrated into the ecosystem.¹⁶ Many tribes subsist on fish, wildlife, and native plants.¹⁷ Many also have their cultural identities rooted in the continuation of a long-standing relationship with the natural world.¹⁸

In response to the harsh realities of climate change, the United Nations (UN) negotiated the Framework Convention on Climate Change (Convention), a treaty aimed at stabilizing GHG concentrations.¹⁹ To accomplish the goals of the Convention, nation-states who signed the Convention (Parties) meet every year at the Conference of the Parties (COP) to discuss the best ways to mitigate and adapt to climate change.²⁰ Unfortunately, tribes are not a party to the Convention, and may only participate in the COP as an observer.²¹ Moreover, even though Native Americans have

¹³ *Id.*

¹⁴ This Article differentiates between Native Americans, Tribes, and indigenous peoples. Native Americans refer to individual indigenous peoples residing in the United States. Tribes refer to the group of indigenous peoples residing in the United States. Indigenous peoples encompass all indigenous peoples around the world.

¹⁵ Jamie K. Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Reg. of Reservation Lands & Natural Resources*, 41 WM. MITCHELL L. REV. 519, 525 (2015) (stating that because many tribal communities rely on their environment for many types of resources, climate change imposes high stakes on their livelihood as it impacts their environmental resources).

¹⁶ Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RES. & ENV'T 45, 45 (2008).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.N. Framework Convention on Climate Change art. 2, May 9, 1992, Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf [hereinafter UNFCCC Treaty].

²⁰ *Id.* at art. 7.

²¹ See UNFCCC, PARTIES TO THE CONVENTION & OBSERVER STATES, (2014) http://unfccc.int/parties_and_observers/parties/items/2352.php (Native American Tribes are neither listed as a Party nor as an Observer State).

differing priorities in regards to climate change, the UN categorized all indigenous peoples worldwide into one group, through which Native Americans are to express their concerns.²²

This article explores the legal tools available to Native Americans, as domestic-dependent nations to the United States, that would provide them with a greater voice at these COP meetings. In considering the various methods available, this article identifies the use of treaty rights would provide the tribes the greatest possibility of influencing international climate change negotiations.

Part II provides a background on how international climate change negotiations operate and how the United States interpret the legal rights of Native Americans. Part III explores the legal methods available to tribes that could increase their participation in international climate change negotiations. In exploring the direct and indirect legal options to increase tribal participation, Part III concludes by finding that indirectly influencing climate change negotiations through enforcing the United States' treaty obligations would have the greatest potential for success.

II. BACKGROUND

This article proposes that Native American tribes best outlook to influencing international climate change negotiations is through enforcing its treaty rights on the United States. A cursory background on the UN international climate change negotiations and the rights of Native Americans in the United States explain why this Article's proposal is the most viable option for Native Americans. Part II presents this background in three sections. Section A provides an overview of the international climate change negotiations process. Section B explains the role of Native Americans in these negotiations. Finally, Section C provides an overview of Native American rights under the United States' legal system.

²² See Terri Hansen, *Indigenous Caucus Presents Climate Priorities to COP21*, INDIAN COUNTRY MEDIA NETWORK (Dec. 2, 2015), <https://indiancountrymedianetwork.com/news/environment/indigenous-caucus-presents-climate-priorities-to-cop21/> (last visited Mar. 8, 2017).

A. *Overview of the United Nations Framework Convention on Climate Change and the Conference of the Parties Meetings*

Recognizing the potential harms from anthropogenic carbon dioxide emissions, UN member states established the Intergovernmental Panel on Climate Change (IPCC) to impartially address the complex issue of climate change.²³ In 1990, the first IPCC report on climate change concluded that anthropogenic activities were substantially increasing atmospheric concentrations of GHGs, and that if no preventative action was taken, then the mean global temperature would rise by an unprecedented amount.²⁴ Unable to ignore these harsh conclusions, the UN General Assembly established the Intergovernmental Negotiating Committee (INC) for a UN Framework Convention on Climate Change (Convention).²⁵

Nations differed in how they viewed climate change should be mitigated. For example, some developing nations insisted they had a right to develop and believed reducing their GHG emissions may jeopardize their economic growth.²⁶ To them, the developed nations had caused much of the problem of climate change and therefore, should be the ones primarily responsible for mitigating climate change.²⁷ Other developing nations, particularly those more immediately threatened by climate change, wanted all nations to reduce their greenhouse gas emissions.²⁸ In contrast, although developed nations recognized their contribution to climate change and accepted taking primary responsibility to reduce their emissions, they wanted the support of developing countries to make efforts in reducing their emissions as well.²⁹

In 1992, the INC finalized the Convention and opened it up for signing at the Earth Summit in Rio de Janeiro. One hundred and fifty-four nations, including the United States, and the European Union signed the Convention, agreeing to stabilize “greenhouse

²³ UNFCCC Secretariat, *United Nations Framework Convention on Climate Change: The First Ten Years*, 12 (Sept. 2009) available at http://unfccc.int/resource/docs/publications/first_ten_years_en.pdf.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 14.

²⁹ *Id.*

gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”³⁰

As signatories to the Convention, parties meet annually at the Conference of the Parties (COP).³¹ The COP is the supreme decision-making body of the Convention.³² It ensures effective implementation of the Convention by (1) examining the parties' obligations annually; (2) exchanging information on measures to address climate change; (3) coordinating climate change measures taken by parties, at their request; (4) refining methodologies used to combat climate change; (5) mobilizing financial resources; and (6) establishing subsidiary bodies, as necessary, to implement the Convention.³³

Also included in the COP are various types of observers: permanent observer states, UN Systems and its specialized agencies, non-governmental organization (NGO) observers, intergovernmental organization (IGO) observers, and for-profit companies.³⁴ All observers have the opportunity to participate in the COP and lobby member states for specific language in resolutions.³⁵ Permanent observer states have additional voice in the COP.³⁶ They may speak at the General Assembly, participate in procedural votes, co-sponsor and sign General Assembly resolutions, and have free access to most General Assembly meetings and relevant documentation.³⁷ However, permanent

³⁰ UNFCCC Treaty, art. 2, 1992, 31 ILM 849 (1992).

³¹ UNFCCC Treaty, art. 7, 1992, 31 ILM 849 (1992).

³² UNFCCC, CONFERENCE OF THE PARTIES (2014), available at <http://unfccc.int/bodies/body/6383/php/view/documents.php#c>.

³³ UNFCCC Treaty, art. 7.2, 1992, 31 ILM 849 (1992).

³⁴ UNFCCC, OBSERVER ORGANIZATIONS, (2014), available at http://unfccc.int/parties_and_observers/observer_organizations/items/9524.php.

³⁵ See Farah Mihlar, *Voices that must be Heard: Minorities & Indigenous People Combating Climate Change*, MINORITY RIGHTS GROUP INT'L 2 (2015), http://minorityrights.org/wp-content/uploads/2015/07/MRG_Brief_ClimateC.pdf.

³⁶ Currently, the Mission of the Holy See and Palestine are the only permanent observer states. See U.N., NON-MEMBER STATES (Nov. 2012), available at <http://www.un.org/en/sections/member-states/non-member-states/index.html>.

³⁷ John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, AM. SOC. OF INT'L LAW (Dec. 7, 2012), <https://www.asil.org/insights/volume/16/issue/37/legal-implications-un-general-assembly-vote-accord-palestine-status>.

observers may not vote on resolutions or other substantive matters.³⁸

In December 2015, the COP adopted the first legally binding global climate agreement, in which the Parties agreed to implement plans to limit global temperature rise to 2°C.³⁹ Known as the Paris Agreement, it entered into force on November 4, 2016. As a Party to the Convention, the United States signed this Agreement.⁴⁰ The latest COP (COP22) sought to initiate proactive actions towards meeting the Paris Agreement goals.⁴¹ In doing so, the COP22 identified increasing the voices of the most vulnerable states to climate change as a priority.⁴² Although indigenous peoples and tribes are groups vulnerable to climate change, they were not identified as such.⁴³ Prior to the COP22 negotiations, the United States had contacted tribes and other interested civil society members to discuss their specific vulnerabilities to climate change, and how such vulnerabilities should be addressed in negotiations.⁴⁴ Some tribes attended the meeting, but no other separate climate change briefings with tribes occurred prior to the COP22.⁴⁵

B. *Role of Native Americans in the COP*

Only nations that have signed the Convention are considered Parties.⁴⁶ Non-signatory nations may participate at the COP as observers.⁴⁷ The Convention only requires observers to be “qualified in matters covered by the Convention” and to have “informed the secretariat of its wish to be represented” at the

³⁸ *Id.*

³⁹ EUROPEAN COMMISSION, PARIS AGREEMENT (Oct. 18, 2016), http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm.

⁴⁰ UNFCCC, PARIS AGREEMENT – STATUS OF RATIFICATION (Oct. 5, 2016), available at http://unfccc.int/paris_agreement/items/9444.php.

⁴¹ *COP22 in Marrakech: The COP Of Action*, COP22, <http://www.cop22.ma/en/cop22-marrakech-cop-action>.

⁴² *Id.*

⁴³ *See id.* (identifying African countries and island nations as the most vulnerable).

⁴⁴ Press Release, Dr. Jonathan Pershing, Special Envoy for Climate Change (Nov. 17, 2016), available at <https://2009-2017.state.gov/s/climate/releases/2016/264436.htm>

⁴⁵ *Id.*

⁴⁶ UNFCCC Treaty, art. 7.6, 1992, 31 ILM 849 (1992).

⁴⁷ *Id.*

COP.⁴⁸ Among these observers include observer states, such as Palestine, and observer organizations, such as the European Union.⁴⁹ Both observer states and observer organizations may participate in the COP, but lack voting rights.⁵⁰

Tribes are not Parties nor Observer States in the Convention.⁵¹ In fact, unlike other international treaties, the Convention does not recognize indigenous communities, including tribes.⁵² Originally, indigenous groups were given mere observer status to provide them the opportunity to attend the COP meetings and lobby for change.⁵³ By 2001, the Convention included indigenous peoples as a “constituency,” a cluster group for observer NGOs, which provided greater recognition.⁵⁴

However, remaining in NGO observer status has frustrated indigenous peoples’ ability to have a voice in these COP meetings and has inhibited their ability to take proactive climate action. As an NGO observer, indigenous tribes are unable to acquire financial support from the Convention’s financial mechanism, the Global

⁴⁸ *Id.*

⁴⁹ U.N., ABOUT PERMANENT OBSERVERS, *available at* <https://www.un.org/en/sections/member-states/about-permanent-observers/index.html>

⁵⁰ UNFCCC Secretariat, *Organizational Matters: Adoption of the Rules of Procedure*, art. V.7, U.N. DOC. FCCC/CP/1996/2 (May 22, 1996), <http://unfccc.int/resource/docs/cop2/02.pdf>.

⁵¹ See UNFCCC, *supra* note 22.

⁵² Mihlar, *supra* note 36, at 2 (stating that the Convention fails to recognize indigenous communities, unlike the Convention on Biodiversity).

⁵³ Mihlar, *supra* note 36, at 2.

⁵⁴ Mihlar, *supra* note 36, at 3. Although the UN has not yet defined “indigenous,” it identifies indigenous people as those who fall under the following criteria: (1) Peoples that self-identify “as indigenous peoples at the individual level and accepted by the community as their member;” (2) Peoples with a “[h]istorical continuity with pre-colonial and/or pre-settler societies;” (3) Peoples with a “[s]trong link to territories and surrounding natural resources;” (4) Peoples with “[d]istinct social, economic or political systems;” (5) Peoples with “[d]istinct language, culture and beliefs;” (6) Peoples that “[f]orm non-dominant groups of society;” and (7) Peoples with “[r]esolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.” U.N. Permanent Forum on Indigenous Issues, INDIGENOUS PEOPLES, INDIGENOUS VOICES: FACTSHEET, http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

Environmental Facility (GEF).⁵⁵ Additionally, they are excluded from the Clean Development Mechanism (CDM) projects, in which developed countries provide financial assistance to developing countries for renewable energy projects.⁵⁶

As a result, there have been several attempts by indigenous peoples to elevate their status from NGO-observer to permanent observer. The Navajo Nation requested permanent observer status to gain full participation within the UN in 2009,⁵⁷ and continues to request permanent observer status.⁵⁸ The UN has not informed the Navajo Nation why its request continues to be denied.⁵⁹ Additionally in 2013, indigenous peoples requested “regular and permanent status” into the UN.⁶⁰ This request was also denied.

In 2007, the UN General Assembly formally adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP), which required nations and states to openly work with indigenous peoples to “consult and cooperate in good faith with the indigenous peoples concerned . . . before adopting and implementing legislative or administrative measures that may affect them.”⁶¹ However, that

⁵⁵ Elisa Calliari, *Palestine Celebrates Full Membership to the UNFCCC*, INTERNATIONAL CLIMATE POLICY MAGAZINE (Apr. 5, 2016), available at <http://climateobserver.org/depth-palestines-full-membership-unfccc/>

⁵⁶ *Id.* (stating that observers cannot participate in CDM projects because they are not Parties to the Kyoto Protocol).

⁵⁷ Resolution of the Intergovernmental Relations Committee of the Navajo Nation Council, Supporting the Navajo Nation Human Rights Commission’s Position Statement Advocating for Special Recognition Status of the Navajo Nation Before the United Nations, 21ST NAVAJO NATION COUNCIL (July 9, 2009), <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/ParticipationUN/NavajoNation.pdf>.

⁵⁸ JACKSON S. BROSSY, NAVAJO NATION WASHINGTON OFF., FY 2016 SECOND QUARTER REPORT (2014), <http://nnopvp.org/wp-content/uploads/2016/04/NAVAJO-NATION-WASHINGTON-OFFICE.pdf>.

⁵⁹ Thorough investigation into the Navajo Nation’s application have resulted in zero answers. JACKSON S. BROSSY, *supra* note 59.

⁶⁰ *Indigenous Nations Call for Full & Effective Participation of Indigenous Nations in United Nations*, NAT’L CONG. OF AM. INDIANS (June 18, 2013), <http://www.ncai.org/news/articles/2013/06/18/indigenous-nations-call-for-full-and-effective-participation-of-indigenous-nations-in-united-nations>.

⁶¹ G.A. Res. 61/295 A, U.N. Declaration on the Rights of Indigenous Peoples, art. 20 (Sept. 13, 2007) available at <http://www.un-documents.net/a61r295.htm> [hereinafter UNDRIP].

same year, indigenous groups were excluded from meetings where Parties were making policy decisions.⁶²

In 2008, indigenous groups established the International Indigenous Peoples Forum on Climate Change (IIPFCC) to represent indigenous peoples participating in the Convention.⁶³ As the official caucus for the Convention, the IIPFCC meets every morning during the COP to set its agenda and proposals to the Parties.⁶⁴ Through the caucus, indigenous groups were able to gain some benefits in the COP negotiations. For example, the COP in 2010 made some efforts to include key demands of indigenous organizations by recognizing indigenous people as rights-holders, rather than just vulnerable groups.⁶⁵ However, the following year, decisions emerging from the COP failed to make any direct references to indigenous groups.⁶⁶ Again in 2015, indigenous groups found the Paris Agreement unsatisfactory for their needs.⁶⁷

In May 2016, representatives of indigenous peoples called for the UN to designate them permanent observer status to participate more fully in the work of UN bodies, such as being involved in international climate change talks.⁶⁸ Indigenous peoples sought to move away from NGO observer status, such that they would be

⁶² Mihlar, *supra* note 36, at 3.

⁶³ *About the International Indigenous Peoples' Forum on Climate Change*, INT'L INDIGENOUS PEOPLES FORUM ON CLIMATE CHANGE (2008), <http://www.iipfcc.org/who-are-we/>.

⁶⁴ Hansen, *supra* note 23.

⁶⁵ INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, *U.N. Framework Convention on Climate Change*, 519, 522 (2011), http://www.iwgia.org/images/stories/int-processes-eng/UNFCCC/unfccc_iw2011.pdf.

⁶⁶ INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, 20th Sess., *Conference of the Parties COP 16–20* (2010–Dec. 2014) available at <http://www.iwgia.org/human-rights/un-mechanisms-and-processes/un-framework-convention-on-climate-change-unfccc/conferences-of-the-parties-cop-16-20>.

⁶⁷ Terri Hansen, *Paris Agreement 1.5C Climate Limit Denounced by Indigenous as a Red Line to Catastrophe*, INDIAN COUNTRY MEDIA NETWORK (Apr. 23, 2016), <http://indiancountrytodaymedianetwork.com/news/environment/paris-agreement-1-5-c-climate-limit-denounced-by-indigenous-as-the-red-line-to-catastrophe/> (last visited Mar. 8, 2017).

⁶⁸ Press Release, *Representatives of Indigenous Peoples Call for Greater Participation in United Nations Bodies, as Permanent Forum Concludes Week One*, U.N. HR/5302 (May 13, 2016), <http://www.un.org/press/en/2016/hr5302.doc.htm> [hereinafter U.N. HR/5302].

recognized as peoples rather than organizations.⁶⁹ Through this recognition, indigenous peoples hoped to gain greater participation capabilities at the UN.⁷⁰ The United States representative for indigenous peoples also agreed, stating that indigenous peoples should not have to participate as NGOs “because many tribal communities [were] self-governed and their leaders were accountable to those who had elected or appointed them.”⁷¹ The UN is scheduled to take note of the indigenous peoples’ listed concerns, and approve a provisional agenda focused on indigenous rights in May of 2017.⁷²

Although tribes are represented as observers at the COP meetings, they are represented within a constituency of indigenous peoples.⁷³ Indigenous peoples speak with one voice through the IIPFCC even though they are extremely diverse, inhabit every continent, speak different languages, and have distinct social and cultural institutions.⁷⁴ In addition to the IIPFCC, there are fifty indigenous NGOs with observer status.⁷⁵ However, unlike other indigenous communities living within countries that are Parties to the Convention, Native American tribes are sovereign nations and as such have a unique relationship with the United States.⁷⁶ This unique relationship affects the tribes’ legal rights.

C. Overview of Native American Rights

The Supreme Court cases in the 1800s known as the “Marshall Trilogy” laid the foundation for the Native American tribes’

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Concluding 15th Session, Permanent Forum on Indigenous Issues Sends 3 Draft Decisions for Consideration by Economic & Social Council*, U.N. HR/5308 (May 20, 2016), <https://www.un.org/press/en/2016/hr5308.doc.htm>.

⁷³ *See supra* note 64.

⁷⁴ Terri Hansen, *supra* note 23.

⁷⁵ *See UNFCCC, ADMITTED NON-GOVERNMENTAL ORGANIZATIONS (2014) available at*

http://unfccc.int/parties_and_observers/observer_organizations/items/9519.php

⁷⁶ *See* Rebecca A. Tsosie, *Protecting Indigenous Identities: Struggles & Strategies under International & Comparative Law*, 7 *ASIAN-PACIFIC L. & POL’Y J.* 38, 42 (2006) (stating that the domestic-dependent nation status of Native Americans is an Anglo-American creation made to fit the European-derived political structure).

unique relationship with the United States.⁷⁷ The Court ruled that Native American tribes were “domestic-dependent nations” to the United States,⁷⁸ and that the United States had dominion over tribes, as trustees of tribal land.⁷⁹ Further, the Court ruled that tribes were also “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”⁸⁰ Thus, tribes were not determined to be independent, sovereign nations, but they were also not on the same footing as States.

The Marshall Trilogy has resulted in Native American rights revolving around two ideas: (1) Congress’ plenary power to regulate Native American tribes, and (2) the United States government’s trust responsibility to act in the best interest of tribes.⁸¹ Under the plenary power doctrine, Congress has the power to impose legislation for the protection and benefit of Native Americans.⁸² In the absence of Congressional authority over Native Americans, tribes retain inherent sovereignty over their people within their territories.⁸³

Under the government’s trust responsibility, the government must protect the tribes’ ability to maintain their existence, based upon the individual treaties between the United States and the various tribes.⁸⁴ Laid out in these treaties, in relevant part, is an exchange of the tribes ceding their lands for the United States’ promise to protect tribal rights. Courts read these treaty rights in favor of the tribes, by interpreting them in accordance to how

⁷⁷ The Marshall Trilogy consists of *Johnson v. M’Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 1 (1832).

⁷⁸ *Cherokee Nation*, 30 U.S. at 17.

⁷⁹ *Id.*

⁸⁰ *Worcester*, 31 U.S. at 557.

⁸¹ Tsosie, *supra* note 78, at 45.

⁸² *United States v. Kagama*, 118 U.S. 375, 383 (1886).

⁸³ *United States v. Wheeler*, 435 U.S. 313, 326 (1978). In limited circumstances, tribes also have authority over non-member Indians and non-Indians within their territories. See Violence Against Women Act, P.L. 113–14 (2013); Attorney’s Process and Investigation Services v. Sac & Fox Tribe of the Mississippi in Iowa, 609 F.3d 927, 939 (8th Cir. 2010).

⁸⁴ Mary C. Wood, *Indian Land & the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1567 (1994).

tribes would have interpreted the treaties.⁸⁵ The Supreme Court discarded the canon of statutory construction, which entails the courts must read treaties through an objective lens, because of the unique conditions under which tribal treaties were negotiated.⁸⁶ The United States had greater leverage in writing the treaties than the tribes and thus, the courts give tribes deference in construing the terms of their treaties.⁸⁷ Therefore, not only are tribal treaties interpreted in the manner the tribes would have understood them, but they are also liberally construed in favor of the tribes and all ambiguous terms in the treaties are resolved in favor of the tribes.⁸⁸

For example, tribes have successfully enforced their treaty rights in ensuring their rights to water and fishing.⁸⁹ Tribal rights to water have long been established as a trust responsibility of the United States.⁹⁰ In 1908, the Supreme Court established the foundation for Tribal water rights within the Winters doctrine.⁹¹ Although the treaty between the United States and the tribe in the Winters case did not explicitly reserve the tribe with the right to water,⁹² the Court held that the tribe had an implied reserved right to the water residing within the boundaries of its reservation.⁹³ Thus, the Winters doctrine affirmed the tribes' federally reserved

⁸⁵ *Worcester*, 31 U.S. at 552.

⁸⁶ See *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899) (The Court held that in interpreting Tribal treaties "it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law . . . [while] the Indians . . . are a weak and dependent people.").

⁸⁷ *Id.*

⁸⁸ *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) (construing treaties in favor of tribes); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973) (construing ambiguities in treaties in favor of tribes).

⁸⁹ See *infra* notes 100-103 and accompanying text.

⁹⁰ See *Winters v. United States*, 207 U.S. 564, 577 (1908).

⁹¹ See *id.* (In *Winters*, tribes sued to enjoin defendants, individuals, cattle companies, and irrigation companies from further construction and operation of their dams by alleging that, in establishing its reservation, the government had reserved water rights to the Tribe as well).

⁹² See *id.* (The Tribe in *Winters* claimed its reservation, based on its treaty with the U.S., comprised of land for ranching and agriculture, which relied heavily on the River).

⁹³ *Id.* at 565-66.

water rights, which were not subject to state law and could be asserted at any time.⁹⁴

Because the Court in *Winters* held the tribe had an implied reserved rights of water to meet the purposes of its reservation, the quantity of water allowed to the reservation is limited to meet the reservation's needs.⁹⁵ However, in *Arizona v. California*, the Supreme Court expanded the *Winters* doctrine by concluding that the quantity of water allocated to a tribe must take into account "the future as well as the present needs of the Indian Reservations."⁹⁶ Several years later, the Court further expanded the *Winters* doctrine to include an implied reserved Tribal right of groundwater.⁹⁷ However, once a tribe's water right is quantified, it cannot be increased.⁹⁸

In addition, Courts have upheld the United States' trust obligations to tribes and have ensured tribal rights to their resources, as set forth in their treaties, remain protected.⁹⁹ For example, Native American tribes in the Pacific Northwest have successfully protected their right to fish outside of their tribal reservations and their right to a sufficient habitat for fish.¹⁰⁰ Courts, interpreting treaties in favor of tribes, have found that (1) the tribes have a right to sufficient in-stream flows to protect the fishing/hunting purposes of their people;¹⁰¹ (2) that the United States government can curtail non-Indian fishing to protect the tribe's fisheries;¹⁰² and (3) that the United States government properly denied a permit for a fish farm that could have interfered with the tribes' right to fish.¹⁰³

⁹⁴ Amy C. Allison, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 WASH. L. REV. 1193, 1195 (2002).

⁹⁵ *See id.* at 1206.

⁹⁶ *Arizona v. California*, 373 U.S. 546, 600 (1963).

⁹⁷ *Cappaert v. United States*, 426 U.S. 128, 142-43 (1978).

⁹⁸ *Nevada v. United States*, 463 U.S. 110, 143-44 (1983) (preventing the re-quantification of a Tribe's water right due to *res judicata*).

⁹⁹ *See infra* 101-103.

¹⁰⁰ Rachael P. Osborn, *Native American Winters Doctrine & Stevens Treaty Water Rights: Recognition, Quantification, Management*, 2 AM. INDIAN L. J. 76, 78 (2013).

¹⁰¹ *United States v. Adair*, 723 F.2d 1394, 1415 (1983).

¹⁰² *Parravano v. Masten*, 70 F.3d 539, 547-48 (9th Cir. 1995).

¹⁰³ *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1521-22 (W.D. WA 1996).

The courts have yet to determine whether the Winters doctrine applies to ensuring a right to a specific water quality.¹⁰⁴ It can be argued that if the Winters doctrine seeks to allocate enough water to achieve the purposes of the reservations as set forth in tribal treaties, it appears that tribes have the right to water quality. A tribe would not be able to meet the purposes of its reservation without potable water.¹⁰⁵ And as the above cases reveal, tribal treaty rights have been a strong legal tool in ensuring that the United States uphold its trust obligation to tribes.

III. INCREASING NATIVE AMERICAN TRIBAL VOICES IN CLIMATE CHANGE NEGOTIATIONS

Considering Native American tribes' lack of representation at the COP, this Part considers the methods through which tribes could gain a greater voice in climate change negotiations. Section A explores the possibility of tribes influencing climate change negotiations directly through elevating their status at the Convention. Section B explores an indirect method through which tribes could influence climate change negotiations by enforcing the United States' treaty obligations to the tribes to protect tribal resources. In considering these two methods, this Part concludes that Tribal enforcement of the United States' treaty obligations is the most viable option to increase Tribal voices in climate change negotiations.

A. *Elevating Tribal Status at the Conference of Parties*

As indigenous peoples worldwide are represented in one group, which only holds NGO-observer status at the COP and lacks voting rights, Native American tribes could seek to increase their influence at international climate change negotiations by elevating their status to either member states or permanent observers. Each possibility is discussed in turn.

¹⁰⁴ See discussion *infra* Section III. Lower courts seemed to have implied tribes have a right to water quality as well.

¹⁰⁵ See Sean M. Hanlon, *A Non-Indian Entity is Polluting Indian Waters: "Water" Your Rights to the Waters, & "Water" Ya Gonna Do About It?*, 69 MONT. L. REV. 173, 205 (2008) ("The Winters doctrine would not be satisfied if the reserved water provided to the reservation to fulfill its purposes was polluted or otherwise unusable or unnatural.").

1. Member State Status

Becoming a member state would permit Native American tribes to sign the Convention and become a party with full participation and voting power at the COP.¹⁰⁶ Although this method is ideal in that it would provide tribes with the greatest voice to influence climate change negotiations, it is also the least feasible method.

Membership into the UN is set out in the UN Charter, which declares that “membership in the United Nations is open to all peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”¹⁰⁷ The existence of a state is defined by the “Montevideo Criteria” under international law as (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter into relations with other states.¹⁰⁸ Because the “Montevideo Criteria” do not include independence or complete sovereignty, it is possible for a dependent state, such as Native American tribes, to become a UN member state.¹⁰⁹

However, the admission of any state to membership requires “a decision [by] the General Assembly upon the recommendation of the Security Council.”¹¹⁰ For the Security Council to recommend a state’s admission into the UN, all five permanent members of the Security Council must recommend admission.¹¹¹ As the United States is one of the five permanent members of the Security Council, tribes are unlikely to be admitted as a member into the UN.¹¹² If the United States recommend tribes be admitted into the UN, then it would dissolve the domestic-dependent relationship the

¹⁰⁶ See *supra* notes 30, 31-33 and accompanying text.

¹⁰⁷ U.N. Charter, Ch. II, art. 4, available at <http://www.un.org/en/sections/un-charter/chapter-ii/index.html>.

¹⁰⁸ *U.N. Permanent Observer Status & Indigenous Peoples*, *supra* note 48.

¹⁰⁹ India became a UN member state prior to its independence from Great Britain. *U.N. Permanent Observer Status & Indigenous Peoples*, *supra* note 37.

¹¹⁰ U.N. Charter, Ch. II, art. 4, available at <http://www.un.org/en/sections/un-charter/chapter-ii/index.html>.

¹¹¹ *Id.*

¹¹² See *The U.N. Security Council*, U.N. FOUND., available at <http://www.unfoundation.org/what-we-do/issues/united-nations/the-un-security-council.html?referrer=https://en.wikipedia.org/>. (The five permanent members are: China, the Russian Federation, France, the United Kingdom, and the U.S.).

United States maintains with tribes because it would recognize tribes as complete sovereigns.¹¹³ Further, because states require recommendation by the Security Council and sufficient votes from the General Assembly, several states that satisfy the “Montevideo Criteria” lack admission into the UN.¹¹⁴ Therefore, it is highly unlikely tribes will gain UN member status any time soon.

2. Permanent Observer Status

Although the UN Charter does not include provisions to establish the requirements for a state or entity to become a Permanent Observer, it generally requires the state or entity to apply for Permanent Observer status to the UN General Assembly.¹¹⁵ The General Assembly then approves new Permanent Observers through resolutions adopted by a majority vote.¹¹⁶

After representatives of indigenous peoples called for greater participation in UN bodies, such as the Convention, the General Assembly compiled member states’ views on whether indigenous peoples should be granted Permanent Observer status as indigenous peoples are recognized “as peoples rather than non-governmental organizations.”¹¹⁷ Many member states expressed a desire to include indigenous peoples as Permanent Observers, including the United States.¹¹⁸ However, further consultation revealed concerns about granting Permanent Observer status to

¹¹³ See *supra* notes 79-81. Similarly, China, a permanent member of the U.N. Security Council, has successfully blocked Taiwan’s attempt to become a member of the U.N. since 1993. Sigrid Winkler, *Taiwan’s UN Dilemma: To Be or Not To Be*, BROOKINGS INST. (June 20, 2012), <https://www.brookings.edu/opinions/taiwans-un-dilemma-to-be-or-not-to-be/> (Taiwan’s bid into the U.N. “had only minimal chances for success due to China’s staunch opposition and the power it yielded in the U.N. to convince other members that there was no place for Taiwan.”).

¹¹⁴ See *e.g.*, Winkler, *supra* note 115 (Taiwan is not a UN member because China does not recognize it as a sovereign nation).

¹¹⁵ John Cerone, *supra* note 38.

¹¹⁶ John Cerone, *supra* note 38.

¹¹⁷ U.N. HR/5302, *supra* note 70.

¹¹⁸ See U.N. HR/5302, *supra* note 70, (The U.S. representative noted that tribes “should not have to participate at the United Nations as non-governmental groups, because many Tribal communities self-governed and their leaders were accountable to those who had elected or appointed them.”).

indigenous tribes.¹¹⁹ Some member states found indigenous peoples should only be given Permanent Observer status in UN bodies which affect indigenous peoples' interests.¹²⁰ Others found practical obstacles to giving Permanent Observer status to indigenous Tribes, like there would not be enough time to allow all interested indigenous tribes to speak.¹²¹ Not only does the lack of consensus on indigenous peoples elevation to Permanent Observer status make this legal tool unviable, but the grouping of all indigenous peoples into one Permanent Observer presents other problems.

Including all indigenous peoples into one Permanent Observer exposes certain concerns. Over 370 million people, residing in over seventy nations identify as indigenous people.¹²² Although all indigenous peoples would appreciate reductions in GHG emissions, they will likely differ in the methods through which states should reduce emissions.¹²³ This difference in opinion would inevitably hinder indigenous peoples' ability to effectively influence international climate change negotiations as a strong, united voice.¹²⁴

Additionally, certain indigenous peoples have already made significant strides towards adapting to climate change.¹²⁵ Thus,

¹¹⁹ See Memorandum from Mogens Lykketoft (President), U.N. General Assembly, to All Permanent Representatives & Permanent Observers to the United Nations, Final Compilation of Views on Enabling Indigenous Peoples' Participation in the U.N. 3 (July 8, 2016), <http://www.un.org/pga/70/wp-content/uploads/sites/10/2015/08/Consultation-process-on-the-rights-of-indigenous-peoples-8-July-2016.pdf>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *supra* text accompanying notes 16-19. With climate change affecting indigenous peoples in different ways, indigenous peoples may have different needs through which they seek to respond to climate change. See Mihlar, *supra* note 36, at 1-2.

¹²⁴ The European Union has suffered similar consequences as Members of the U.N. See Diana Panke, *The Eur. Union in the U.N.: an Effective External Actor?*, 21 J. EUROPEAN PUB. POL'Y 1050 (2014) (stating that the European Union needs a common position and more to become an effective actor in international negotiations).

¹²⁵ See Terri Hansen, *8 Tribes That Are Way Ahead of the Climate-Adaptation Curve*, INDIAN COUNTRY TODAY (Oct. 15, 2013), <https://indiancountrymedianetwork.com/news/environment/8-tribes-that-are->

indigenous peoples may have different needs in regards to quantity of resources as some have already initiated action toward climate change adaptation. Because indigenous peoples may have varying degrees of needs, it's uncertain whether including all indigenous peoples into one Permanent Observer state would be fruitful. Moreover, the denied requests for Permanent Observer status suggests the UN remains unwilling to include Native Americans into these high-level meetings.

B. Enforcing the United States' Treaty Obligations

As many Native American tribal treaty rights are premised upon adequate environmental protections, this article suggests that Native American tribes use the United States' treaty obligations to further their involvement in climate change negotiations, and to push the United States to take a stronger stance in climate change negotiations.¹²⁶ Tribes will likely have greater success in influencing climate change negotiations by acting indirectly through the United States. Tribes have the ability to enforce upon the United States its obligations to ensure their treaty rights are protected.¹²⁷ Because there are over 500 federally recognized tribes¹²⁸ in the United States with their own distinct treaties, this article focuses on the United States' treaty obligations to tribes in the Pacific Northwest to illustrate the power of treaty obligations in enforcing environmental rights.

1. Pacific Northwest Tribes and Their Right to Fish

For Native American tribes in the Pacific Northwest (Washington and Oregon specifically), the right to fish is essential to their way of life.¹²⁹ Fish, particularly salmon, play “a

way-ahead-of-the-climate-adaptation-curve/ (last visited Mar. 8, 2017) (listing eight tribes that have begun climate change adaptation plans).

¹²⁶ See Osborn, *supra* note 102, at 78 (Pacific Northwest tribes have the right to take fish as set forth in the Stevens Treaty).

¹²⁷ See *e.g.*, *Parravano*, 70 F.3d at 547-48 (upholding that the government had a trust obligation to protect the tribes' fisheries).

¹²⁸ See Indian Entities Recognized & Eligible To Receive Services From the U.S. Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1942 (Jan. 14, 2015) (listing the federally recognized tribes in the United States).

¹²⁹ See Hanna, *supra* note 5, at 5.

fundamental and cherished part in the cultural, social, economic, and spiritual life of Pacific Northwest Tribes.”¹³⁰ Due to this great significance, Pacific Northwest tribes reserved the right to fish when they ceded their lands to the United States.¹³¹ In signing the Stevens Treaty,¹³² Pacific Northwest tribes retained the “exclusive right of taking fish in all the streams, . . . running through or bordering said reservation . . . [and] at all usual and accustomed places, in common with citizens of the Territory.”¹³³ Similar treaty language exists in several other treaties signed by other Pacific Northwest tribes.¹³⁴

With this treaty language and the Indian canons of construction used to interpret tribal treaties, Pacific Northwest tribes have successfully protected their right to take fish. Initially, courts were not receptive to the tribes’ treaty rights. In *Puyallup Tribe v. Department of Game of Washington (Puyallup I)*, the Supreme Court held that tribes had a right to fish at their “usual and accustomed places,” and that right could not be abrogated by the state.¹³⁵ However, the Court also held that the state had the right to regulate the manner in which tribes fished because the language of

¹³⁰ *Id.*

¹³¹ See Osborn, *supra* note 102, at 78.

¹³² The Stevens Treaty refers to ten treaties negotiated by Isaac Stevens in 1853 with Pacific Northwest Tribes. Osborn, *supra* note 102, at 95. See Treaty with Nisqualli, Puyallup, Etc. (Treaty of Medicine Creek), U.S.- Nisqualli- Puyallup, art. III, Dec. 26, 1854, 10 Stat. 1132, 1133; Treaty with the Dwámish Indians (Treaty of Point Elliott), U.S.-Dwámish Tribe, art. V, Jan. 22, 1855, 12 Stat. 927, 928; Treaty with the S’Klallams (Treaty of Point No Point), U.S.- S’Kilallam Tribe, art. IV, Jan. 26, 1855, 12 Stat. 933, 934; Treaty with the Makah Tribe (Treaty of Neah Bay), U.S.- Makah Tribe, art. IV, Jan. 31, 1855, 12 Stat. 939, 940; Treaty with the Walla-Wallas, U.S.-Walla Walla Tribe, art. I, June 9, 1855, 12 Stat. 945, 946; Treaty with the Nez Perce, U.S.-Nez Perce Tribe, art. III, ¶ 2, June 11, 1855, 12 Stat. 957, 958; Treaty with the Tribes of Middle Oregon, art. I, ¶ 3, June 25, 1855, 12 Stat. 963, 964; Treaty with the Qui-Nai-Elts (Treaty of Olympia), U.S.-Qui-Nai-Fis, art. III, July 1, 1855, 12 Stat. 971, 972; Treaty with the Flatheads (Treaty of Hell Gate), U.S.-Flathead Tribe, art. III, ¶ 2, July 16, 1855, 12 Stat. 975, 976.

¹³³ See, e.g., Treaty with the Yakima, U.S.-Yakama Nation, art. III, ¶ 2, June 9, 1855, 12 Stat. 951, 953.

¹³⁴ See Treaty with the Nez Perce, art. 3, June 11, 1855, 12 Stat. 957; Treaty at Medicine Creek, art. 3, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliot, art. 5, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, art. 4, Jan. 26, 1855, 12 Stat. 933.

¹³⁵ *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392, 398 (1968).

the Stevens Treaty was silent as to the “mode or modes of fishing that [were] guaranteed.”¹³⁶

Later in *United States v. Washington*, the Ninth Circuit Court of Appeals found the tribal treaties did not imply a broader right to habitat protection because it lacked a basis in precedent, lacked theoretical or practical necessity for the right, had an unworkably complex standard of liability, and had the potential to disproportionately disrupt essential economic development.¹³⁷

Yet, almost immediately after the *Washington* decision, the Ninth Circuit seemingly backtracked on holding that the tribal treaties did not imply a right to fish habitat protection. One year after *Washington*, the Ninth Circuit held that tribes had a right to sufficient in-stream flows to protect their fishing-hunting purposes of their reservations.¹³⁸ Sufficient in-stream flow is a habitat characteristic necessary for salmon survival.¹³⁹ Therefore, the court seems to imply that tribal right to fish includes sufficient protection of fish habitat. One could argue that this holding does not contradict the court’s holding in *Washington*, but rather is attributed to the *Winters* doctrine that held that tribes had an implied reserved right to a quantity of water necessary to meet the purposes of their reservation.¹⁴⁰ However, the Ninth Circuit affirmatively held that the *Winters* doctrine, not only reserved the Tribes’ water quantity, but also a sufficient quality of water to meet the purposes of their reservation.¹⁴¹

¹³⁶ *Id.*

¹³⁷ *United States v. Washington (Washington I)*, 694 F.2d 1374, 1381 (9th Cir. 1982). This decision overturned the Western District Court of Washington’s holding that tribes had an implied right to habitat protection from their treaty rights to fish. *See United States v. Washington*, 506 F. Supp. 187, 205 (W.D. Wash. 1980). The court noted that a Tribe could only enjoy its right to take fish if a healthy habitat existed for fish to survive. *Id.*

¹³⁸ *Adair*, 723 F.2d at 1415.

¹³⁹ *See Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1310 (Wash. 1993) (noting that a minimum instream flow is required to maintain anadromous fish life).

¹⁴⁰ *See Washington I*, 694 F.2d at 1384 (stating that the *Winters* doctrine is only applied to the quantity of water in traditional fishing grounds, not the quality); *see Winters supra* note 95.

¹⁴¹ *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454 (D. Ariz. 1996), *aff’d*, 117 F.3d 425 (9th Cir. 1997) (the implied-reservation-of-water doctrine reserved the San Carlos Apache Tribe a sufficient quality of water to support agriculture).

In addition, lower courts have reaffirmed this new recognition of an implied right to habitat protection. For example, the Klamath Tribe, located on the southern border of Oregon, successfully halted timber sales planned by the United States Forest Service on forest lands inhabited by treaty deer herds.¹⁴² The District Court of Oregon held that the government had a “substantive duty to protect to the fullest extent possible the tribes’ treaty rights, and the resources on which those rights depend.”¹⁴³

Further, in Washington, the Yakama Nation succeeded in requiring off-reservation in-stream flow to remain at certain levels to protect salmon populations, which they have a treaty right to fish.¹⁴⁴ The Western District Court of Washington held that tribal treaties imposed a duty on the state to “refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage.”¹⁴⁵ The court was careful to narrow the scope of its decision, noting that it was not “a broad environmental servitude.”¹⁴⁶ Rather, the decision simply prohibited states from taking actions that degraded fish habitats.¹⁴⁷ However, avoiding habitat degradation and protecting fish habitat are simply two sides of the same coin. Even with climate change affecting in-stream flow in certain seasons, the Yakama Nation has been able to assert its Stevens Treaty water rights to continue protecting fish and its habitat.¹⁴⁸

These more recent decisions suggest courts are willing to read tribal treaty rights as extending to fish habitat protection. Based upon the courts’ favorable rulings for tribes, the following subsection explores how tribes may utilize their treaty rights to insist

¹⁴² *Klamath Tribes v. United States*, 1996 WL 924509, No. 96-381-HA, at *7-10 (D. Or. Oct. 2, 1996).

¹⁴³ *Id.* at *8.

¹⁴⁴ See Memorandum Opinion re: Motions for Partial Summary Judgment, *State Dep’t of Ecology v. Acquavella*, 100 Wash.2d 651 (1983) *aff’d*, *State Dep’t of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wn.2d 257 (1993) (No. 77-2-01484-5) (finding that the Tribe held off-reservation in-stream flow water rights for “the absolute minimum amount of water necessary to maintain anadromous fish life in the Yakima River”).

¹⁴⁵ *United States v. Washington (Washington II)*, 20 F. Supp. 3d 828, 892 (W.D. Wash. 2007).

¹⁴⁶ *Id.* at 899.

¹⁴⁷ *Id.*

¹⁴⁸ Osborn, *supra* note 102, at 100.

the United States protect their interests in international climate change negotiations.

2. Recognizing the United States' Treaty Obligations in Climate Change Negotiations

The success of Pacific Northwest Native American tribes protecting their treaty rights reveal that Tribes have a strong legal tool to influence international climate change negotiations even though they are not parties nor Permanent Observers. Tribes may indirectly influence climate change negotiations by working closely with the United States to ensure their treaty rights to water, hunting, and other natural resources remain protected. Although the United States have often neglected Tribal interests when making decisions that affect them, the Obama Administration was open to working closely with tribes on issues that concern them.¹⁴⁹

Hoping to improve government-to-government relationships with tribes, President Obama reaffirmed Executive Order 13175 and directed all federal agencies to implement policies that would ensure federal agencies engage in regular and meaningful consultation and collaboration with tribes.¹⁵⁰ Additionally, the United States changed its position to support the UNDRIP.¹⁵¹ Although the UNDRIP is not legally binding, it contains political and moral force by which the United States aspires to abide.¹⁵² Among other rights affirmed to indigenous peoples, it requires nations and states to openly work with indigenous peoples to “consult and cooperate in good faith with the indigenous peoples concerned . . . before adopting and implementing legislative or

¹⁴⁹ See Press Release, White House, *Presidential Memorandum on Tribal Consultation* (Nov. 5, 2009), available at <https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president> (Historically, the U.S. have failed to include the “voices of tribal officials in formulating policy affecting their communities.”).

¹⁵⁰ *Id.*

¹⁵¹ Press Release, U.S. Dep’t of State, *Announcement of U.S. Support for the U.N. Declaration on the Rights of Indigenous Peoples*, <http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf>.

¹⁵² U.S. Dep’t of State, *U.N. Declaration on the Rights of Indigenous Peoples Review*, <http://www.state.gov/s/tribalconsultation/declaration/index.htm>.

administrative measures that may affect them.”¹⁵³ This consultation and cooperation extends to national decisions that may affect indigenous peoples rights to their natural resources.¹⁵⁴

In accordance with the Obama Administration's push for greater Tribal consultation, federal agencies have engaged tribes in important federal decisions that would affect them. For example, the Army Corps of Engineers rejected a massive coal port from being built because it recognized that the Lummi Nation had a right to fish and crab in its usual and accustomed areas for the present and in the future and that the coal mine would disrupt that right.¹⁵⁵ In addition, the United States State Department consulted tribes situated within the Great Lakes Basin in its negotiation of the Great Lakes Water Quality Agreement with Canada and used Tribal input throughout the negotiation process.¹⁵⁶ Further, the Environmental Protection Agency (EPA) established “national guidelines and institutional controls for [Tribal] consultation across EPA [programs and regional offices]” to ensure Tribal concerns were appropriately considered and addressed.¹⁵⁷ This inclusion of Tribal guidance seeks to improve the EPA's consultation with tribes on treaty rights and to ensure the EPA properly protects those treaty rights.¹⁵⁸

The improved coordination efforts with tribes by the Obama Administration, State Department, and EPA provide hope for tribes to gain leverage in climate change negotiation talks. Having these positive relations with the State Department and the EPA is significantly important to this initiative because the State Department and the EPA are the main federal agencies that inform

¹⁵³ UNDRIP, *supra* note 63.

¹⁵⁴ *Id.*, art. 32 61/295.

¹⁵⁵ Seattle Times Editorial Board, *Cherry Point Coal Terminal Rejection Affirms Tribal Rights & Treaties*, SEATTLE TIMES (May 11, 2016), <http://www.seattletimes.com/opinion/editorials/cherry-point-coal-terminal-rejection-affirms-tribal-rights-and-treaties/>.

¹⁵⁶ Meeting Announcement, U.S. Dep't of State, *Great Lakes Water Quality Agreement* (Feb. 13, 2012), <http://www.state.gov/s/tribalconsultation/183868.htm>.

¹⁵⁷ U.S. EPA, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 1 (May 4, 2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

¹⁵⁸ *Id.* at 3.

the United States delegation at the COP.¹⁵⁹ In the same manner that the State Department consulted with and used input from affected tribes in negotiating the Great Lakes Water Quality Agreement with Canada, tribes should seek to engage the State Department and EPA in ensuring that tribal climate change concerns are appropriately addressed at the COP. tribes can remind the United States of its obligation to ensure tribal treaty rights, such as their right to fish and implicitly, their right to fish habitat protection, remain protected in light of climate change.¹⁶⁰

Regardless of whether future Presidential Administrations and federal agencies deviate from the Obama Administration's footsteps in coordinating with tribes, the United States remains a trustee to tribes with undeviating trust obligations. One of these trust obligation is to uphold tribes' treaty rights, which have judicially been defined to ensure that tribal rights to their resources are reasonably protected for the future.¹⁶¹ As the future viability of tribal resources are subject to climate change, courts have begun to and will need to take climate change into account when interpreting tribal treaty rights.¹⁶²

Based on the United States' trust obligation to uphold tribal treaty rights, tribes have the power to influence the United States' role in international climate change negotiations that non-Tribal citizens lack. Domestically, the United States must ensure that Tribal rights to their resources do not diminish due to climate change. This domestic obligation has the potential to influence the position the United States would take at future COP meetings, as the United States cannot take a position against reducing GHG emissions if the position would indirectly harm Tribal rights. Thus, Tribal rights play a greater role in influencing the United States' climate change position as non-Tribal citizens of the United States lack legally defined rights to water, hunting, and other environmental resources.

Because Tribal rights are legally enforceable, the United States should be required to include Tribal interests in negotiating terms

¹⁵⁹ See U.S. EPA, INTERNATIONAL CLIMATE PARTNERSHIP, <https://www.epa.gov/climatechange/international-climate-partnerships> (stating that EPA and the U.S. State Dep't takes the lead on producing key climate change documents as required under the Convention).

¹⁶⁰ See *supra* text accompanying note 6.

¹⁶¹ See *supra* notes 110-14 and accompanying text..

¹⁶² See *supra* notes 5-11, 144-62 and accompanying text.

of future international agreements, and in developing national implementation plans to reduce its GHG emissions. Moreover, this inclusion aligns with the United States' support for the UNDRIP.¹⁶³ Unfortunately, the United States latest report submitted to the COP on how the United States will decarbonize its economy failed to address how it will work with tribes to decarbonize their economies.¹⁶⁴ This lack of consultation and inclusion of Tribal interests reveal that even progressive Presidential Administrations supportive of working closely with tribes have room for improvement. Therefore, tribes must proactively hold the United States accountable. Tribes can no longer take a backseat in mitigating and adapting to climate change as tribes are already beginning to experience the negative consequences of climate change.¹⁶⁵

Because tribal concerns are imbedded in the United States' legal trust obligation, this method of improving Tribal voice in climate change negotiations holds the most potential. Additionally, this method mitigates the concerns of providing Permanent Observer status to Native American tribes. Moreover, tribal concerns would be dealt with prior to climate change negotiations, so the practical concerns of providing space and time for all Native American tribes to speak would not be an issue for the United Nations.

VI. CONCLUSION

This article explores the legal avenues for increasing Native American Tribal voices at the UN climate change negotiations because the consequences of climate change is gradually becoming a reality that disproportionately affect Native American tribes. Per the reasons discussed within this article, the enforcement of the United States' Tribal treaty obligations is the most feasible method of improving Native American voices in climate change

¹⁶³ See UNDRIP, *supra* note 63.

¹⁶⁴ See The White House, *U.S. Mid-Century Strategy for Deep Decarbonization* (Nov. 2016), https://obamawhitehouse.archives.gov/sites/default/files/docs/mid_century_strategy_report-final.pdf (noting methods through which cities and states could reduce carbon emissions through alternative energy sources, but not mentioning Native American tribes).

¹⁶⁵ See *supra* notes 5-11.

negotiations. Although obstacles exist for implementing this method, tribes have succeeded in judicially enforcing treaty obligations related to the environment upon the United States. This success in United States' courts provides the legal precedent and foundation for tribes to hold the United States accountable at international climate change negotiations, where hopes of actual independent representation remain unlikely.