

# STANDING ROCK IN THE SWAMP: OIL, THE ENVIRONMENT, AND THE UNITED HOUMA NATION’S STRUGGLE FOR FEDERAL RECOGNITION

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I. INTRODUCTION .....	141
II. TRIBAL SOVEREIGNTY AND THE ENVIRONMENT .....	144
III. FEDERAL RECOGNITION.....	147
IV. PROBLEMS WITH THE PROCESS.....	153
V. THE HOUMA.....	157
A. A BRIEF HISTORY OF THE HOUMA.....	157
B. REBUTTING THE BIA’S PROPOSED FINDING .....	164
C. THE HOUMA SINCE THE BIA’S PROPOSED FINDING .....	174
VI. CONCLUSION .....	183

## I. INTRODUCTION

The Standing Rock Sioux Tribe’s battle against the Dakota Access Pipeline (DAPL) has sparked an unprecedented interest in American Indian rights.<sup>1</sup> Part of the public’s fascination with the

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1. Leah Donnella, *The Standing Rock Resistance Is Unprecedented (It’s Also Centuries Old)*, NPR (Nov. 22, 2016), <https://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old> (“The scope of resistance at Standing Rock exceeds just about every protest in Native American history.”); William Yardley, *At Standing Rock, the Nation’s Most Famous Environmental Protest, Not Just Any Toilet Will Do*, L.A. TIMES (Feb. 12, 2017), <http://www.latimes.com/nation/la-na-standing-rock-composting-toilets-20170131-story.html> (noting that Standing Rock is “one of the nation’s largest and longest

battle at Standing Rock lies in the Sioux's well-documented history of fighting injustices against their land and people.<sup>2</sup> Standing Rock is a continuation of Sioux resistance. This battle is not the result of the Sioux's military might; rather, it is possible because of the Standing Rock Sioux Tribe's status as a federally recognized tribe. Federal recognition gives the tribe rights to protect its land, water, and air.<sup>3</sup>

In stark contrast to the Sioux, the United Houma Nation (UHN)<sup>4</sup> is neither well known nor a federally recognized tribe. However, the Houma's battles with the oil industry long pre-date the current situation at Standing Rock. The Houma's ancestral land has been a spaghetti bowl of oil and gas pipelines for decades.<sup>5</sup> In fact, their land has literally vanished from the face of the Earth as a result of the destruction brought about by the oil industry, forcing them to become "America's first climate refugees."<sup>6</sup> Moreover, their Indian identity has been constantly questioned by the federal government and racist local whites because their traditional culture does not comport with mainstream American notions of what an Indian should be.<sup>7</sup>

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environmental protests").

2. Donnella, *supra* note 1 (noting the Lakota Sioux's resistance to the U.S. Army's attempt to steal their land in the mid 1800s); Emilene Ostlind, *Red Cloud's War*, WYOHISTORY.ORG, <https://www.wyohistory.org/encyclopedia/red-clouds-war> (last visited Mar. 13, 2018); Thomas Powers, *How the Battle of Little Bighorn Was Won*, SMITHSONIAN MAG. (Nov. 2010), <https://www.smithsonianmag.com/history/how-the-battle-of-little-bighorn-was-won-63880188/>.

3. *See infra* Part II.

4. Throughout this Article, both "UHN" and "Houma" will be used. The UHN is the tribe's legal name and was adopted in response to the federal recognition process. The UHN was officially incorporated in 1979. Houma is what the people call themselves and what the people have always been known. Accordingly, UHN refers specifically to the legal entity when used in this Article.

5. *Louisiana Pipelines & Platforms*, ST. OF LA. DEP'T OF NAT. RES., [http://www.dnr.louisiana.gov/assets/images/oilgas/refineries/LA\\_pipelines\\_2008.jpg](http://www.dnr.louisiana.gov/assets/images/oilgas/refineries/LA_pipelines_2008.jpg) (last visited Mar. 13, 2018).

6. Anne Lagamayo, *Climate Change Threatens to Wash Away Couple's History*, CNN (Mar. 2, 2017), <http://www.cnn.com/2017/03/02/us/heart-of-the-matter-climate-change-louisiana/index.html> (noting the residents of the Isle de Jean Charles are "the country's first-ever climate refugees" and are predominantly enrolled in the Biloxi-Chitimacha-Choctaw Native American tribes or the United Houma Nation); Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees'*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html>. The relationship between the Biloxi-Chitimacha-Choctaw and UHN is discussed later in this Article.

7. *See* Kimberly Krupa, "So-Called Indians" Stand Up and Fight: How a Jim Crow Suit Thrust a Louisiana School System into the Civil Rights Movement, 51 LA. HIST.: J. LA. HIST. ASS'N 171, 174-75 (2010) ("Across the country, civil-rights battles

Despite having a documented presence in Louisiana for over three centuries, the federal government refuses to recognize the UHN as a tribe.

The federal government's persistent failure to recognize the UHN is an injustice that is the root of other injustices. Without recognition by the federal government, the Houma have suffered discrimination because of their Indian blood while simultaneously having their Indian ancestry questioned.<sup>8</sup> Without federal recognition, the Houma are powerless to protect their ancestral lands from oil companies. Without federal recognition, the Houma can do nothing as their homeland and holy places wash away.

This Article uses the UHN as a case study to illustrate the significance of federal recognition to American Indian environmental rights. Part II discusses tribal sovereignty in the environmental sphere. Next, Part III explains the importance of federal recognition for Indian tribes and how tribes obtain federal recognition. Part IV discusses problems with the federal

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were spreading from cities and metropolises into rural areas. Amidst this turmoil was Terrebonne Parish's white establishment, which stubbornly refused to adapt to the modern world, and anti-Indian discrimination was widespread. Former councilman J. B. Breau, a Cajun, remembers that he lived next to Houma Indians growing up, but his family forbade him to play with them. 'I could not go to school with them. That hurt. I could not go to the movies. I could not go on vacation with them.');

Cain Burdeau, *Native Americans in Louisiana Swamps Seek Tribal Recognition*, BUS. INSIDER (Nov. 25, 2015), <http://www.businessinsider.com/ap-native-americans-in-louisiana-swamps-seek-tribal-recognition-2015-11> ("Every day at school they'd beat me up, bloody me up, for being Indian,' recalled the 80-year-old Santini, who's worked on tugboats, laid pipelines and built homes."); Kimberly Krupa, *Native Americans Recall Local Indian Schools with Fondness and Melancholy*, HOUMA TODAY (Nov. 23, 2003), <http://www.houmatoday.com/article/DA/20031123/news/608098921/HC/> ("Henry L. Bourgeois, who served as Terrebonne superintendent of schools for 41 years, from 1914 to 1955, nurtured the racist attitude among school officials that successfully kept Indians from attending all-white schools through some of the most tumultuous years of integration, records show."); Adam Crepelle, *The Struggle for Federal Recognition of Louisiana's Indian Tribes*, LA. CULTURAL VISAS (Winter 2016), <http://www.knowlouisiana.org/arbitrary-process> ("Racial discrimination has always been a fact of life for the Houma. A three-way system of segregation existed for [v]irtually all institutions' in Terrebonne and Lafourche parishes. Local whites in the parish often referred to Houma by the pejorative 'sabine,' a term that if used today will still ignite a fight from many Houma elders. In 1944, a school for Indians was established in Terrebonne Parish; soon after, Lafourche Parish opened its own Indian school. The Civil Rights Act officially ended segregation in public institutions in 1964, but Houma children remained in segregated Indian schools until 1969.").

8. See Krupa, *supra* note 7; Burdeau, *supra* note 7; *Native Americans Recall Local Indian Schools*, *supra* note 7; Crepelle, *supra* note 7.

recognition process. Then, Part V tells the story of the Houma. A conclusion, recommending Congress pass legislation granting the UHN federal recognition, follows in Part VI.

## II. TRIBAL SOVEREIGNTY AND THE ENVIRONMENT

Tribal sovereignty has been recognized since long before the United States' founding.<sup>9</sup> Indian tribes are considered "domestic dependent nations"<sup>10</sup> and are presumed to have all the governmental powers that Congress has not explicitly divested from them.<sup>11</sup> In fact, the United States Constitution does not apply to tribes<sup>12</sup> though Congress requires that tribes grant individuals within their territory similar protections by virtue of

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9. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) (noting that tribes were sovereigns prior to the arrival of Europeans); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172–73 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, BUS. L. TODAY (Mar. 2013), [http://www.americanbar.org/publications/blt/2013/03/04\\_miller.html](http://www.americanbar.org/publications/blt/2013/03/04_miller.html) ("Indian tribes were sovereign nations prior to the founding of the United States."); Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 768 (2012) ("Indian governments have inherent sovereignty which is not derived from any other government but rather from the people themselves.").

10. See, e.g., *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority.").

11. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d. 1221, 1228 (D. Nev. 2014) ("Congressionally recognized tribes retain all aspects of sovereignty they enjoyed as independent nations before they were conquered, with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure.") (internal citations omitted); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 762 (2004) ("In fact, the basis for much federal Indian law is the maxim that Indian Tribes have the inherent authority of all sovereigns until Congress takes it away.").

12. *Talton v. Mayes*, 163 U.S. 376 (1896) (holding the Bill of Rights does not apply to Indian tribes); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (noting that tribes surrendered no powers at the Constitutional Convention).

the Indian Civil Rights Act.<sup>13</sup>

Land under tribal control is considered “Indian country,”<sup>14</sup> and state law is presumed to be inapplicable within a reservation’s borders.<sup>15</sup> Accordingly, tribes have varying degrees of control over various activities that occur on their land.<sup>16</sup> For example, tribes can exercise civil and criminal jurisdiction over persons in Indian country subject to extreme limitations.<sup>17</sup> Tribes have the power to tax activities that occur on tribal land<sup>18</sup> and are immune from state taxes in certain instances.<sup>19</sup> It is well known that tribes can operate casinos on their land.<sup>20</sup> Tribes can also establish their own hunting and fishing laws on their reservations.<sup>21</sup> But environmental regulation may be the apex of tribal sovereignty.

Federal policy encourages tribes to control their natural resources.<sup>22</sup> In fact, the Environmental Protection Agency (EPA) was among the original federal agencies to develop a policy explicitly detailing how it would interact with Indian tribes.<sup>23</sup>

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13. 25 U.S.C. §§ 1301–1304 (2013).

14. 18 U.S.C. § 1151 (2015).

15. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding the laws of Georgia “have no force” inside the Cherokee Nation); Lonnie E. Griffith Jr., § 92 *Authority and Nature of Trust Land for Benefit of Indians or Tribes*, in 42 C.J.S. INDIANS (March 2018) (“A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe.”).

16. Bruce Duthu, *The Houma Indians of Louisiana: The Intersection of Law and History in the Federal Acknowledgment Process*, 38 LA. HIST. 409, 412 (1997) (“Indian tribes can nonetheless exert considerable influence over tribal lands.”).

17. See, e.g., *Montana et al. v. United States*, 450 U.S. 544 (1981) (limiting tribal civil jurisdiction over non-Indians to instances where the non-Indians consent to tribal jurisdiction or when the non-Indians’ activity threatens the welfare of the tribe); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indians).

18. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that tribes have an inherent power to tax).

19. *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164 (1973) (holding an Indian’s on-reservation income is exempt from state taxes).

20. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2013 & Supp. 2017).

21. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding a tribe’s wildlife regulatory authority over both Indians and non-Indians can preempt state wildlife regulations on a reservation).

22. Lynn H. Slade & Walter E. Stern, *Environmental Regulations on Indian Lands*, GP SOLO MAG., Fall, 1995, (noting Congress has taken action to improve tribal regulatory authority in the environmental realm).

23. *EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984 Indian Policy)*, EPA, <https://www.epa.gov/tribal/epa-policy>.

The EPA's policy is to have "meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes."<sup>24</sup> Environmental legislation expressly declares that tribes shall be treated as states under the Clean Water Act;<sup>25</sup> the Comprehensive Environmental Response, Compensation, and Liability Act;<sup>26</sup> the Clean Air Act;<sup>27</sup> and the Safe Drinking Water Act.<sup>28</sup> Tribes are also recognized by the Resource Conservation Recovery Act<sup>29</sup> and the Federal Insecticide, Fungicide, and Rodenticide Act.<sup>30</sup> These Acts and the EPA's policy promote tribal self-governance in the environmental realm.<sup>31</sup>

Tribes have used their sovereign status to create particularized environmental standards on their lands. For example, the Northern Cheyenne of Montana was the first tribe to have its reservation redesignated by the EPA from a Class II to a more highly regulated Class I site.<sup>32</sup> The redesignation forced a power company located thirteen miles away from the tribe's reservation to redesign the energy facility to comply with tribal air standards.<sup>33</sup> The Seminole Tribe of Florida has established

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administration-environmental-programs-indian-reservations-1984-indian-policy (last visited Mar. 13, 2018) ("The U.S. Environmental Protection Agency was one of the first federal agencies with a formal policy specifying how it would interact with tribal governments and consider tribal interests in carrying out its programs to protect human health and the environment.").

24. *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA 1, 1 (May 4, 2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

25. 33 U.S.C. § 1377 (2016).

26. 42 U.S.C. § 9626(a) (2013).

27. 42 U.S.C. § 7601(d)(A) (2013).

28. 42 U.S.C. § 300j-11(a)(1) (2011).

29. 42 U.S.C. § 6903(13) (2012).

30. 7 U.S.C. § 136u(a) (2009).

31. Rebecca M. Mitchell, *People of the Outside: The Environmental Impact of Federal Recognition of American Indian Nations*, 42 B.C. ENVTL. AFF. L. REV. 507, 509 (2015) (noting that federal recognition is the key to tribal environmental control); Eve Darian-Smith, *Environmental Law and Native American Law*, 6 ANN. REV. L. & SOC. SCI. 359, 372 (2010) ("In a series of moves throughout the 1970s, the EPA supported tribal governmental control over non-Indian environmental degradation that affected the health of Indians on reservation lands."); *Tribal Assumption of Federal Laws-Treatment as a State (TAS)*, EPA, <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> (last visited Mar. 13, 2018) (noting that some federal environmental laws "expressly provide for Indian tribes to play essentially the same role in Indian country that states do within state lands").

32. Mitchell, *supra* note 31, at 523–24.

33. *Id.*; Vanessa Baehr-Jones & Christina Cheung, *An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act*, 34 U.C. DAVIS L.

specific water quality standards for each of its five separate reservations.<sup>34</sup> The tribe's water quality program decreased the volume of nutrients entering tribal waters and improved water quality.<sup>35</sup> The Hoopa Valley Tribe has protected the surface waters on its reservation by developing water quality standards.<sup>36</sup> Several other tribes have used their sovereign status to improve the air and water quality on their land.<sup>37</sup>

The EPA consults with all indigenous peoples in the United States;<sup>38</sup> nevertheless, it has an extreme preference for working with "federally recognized" tribes.<sup>39</sup> Federal recognition is the keystone for the application of tribal provisions in environmental and many other areas of law.<sup>40</sup>

### III. FEDERAL RECOGNITION

The United States government segregates Indian tribes into two groups: federally recognized tribes and tribes that are not federally recognized.<sup>41</sup> There are currently 573 federally

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REV. 189, 211–13 (2011).

34. *Case Study: The Seminole Tribe of Florida Uses Water Quality Standards to Solve a Nutrient Problem*, EPA 1, 1 <https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-seminole.pdf> (last visited Mar. 29, 2018).

35. *Id.*

36. *Case Studies in Tribal Water Quality Standards Programs: The Hoopa Valley Tribe*, EPA 1, 1 (July 2006), <https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-hoopa.pdf>.

37. Mitchell, *supra* note 31, at 522 (noting six tribes have redesignated their reservation air quality standards to Class I by 2015); *Case Studies, Video, and Publications on Tribal Water Quality Standards*, EPA, <https://www.epa.gov/wqs-tech/case-studies-video-and-publications-tribal-water-quality-standards> (last visited Mar. 29, 2018) (listing several tribes that have implemented water quality programs).

38. *Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, EPA 1, 2 (Jul. 24, 2014), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-indigenous-policy.pdf> ("The EPA consults with federally recognized tribes and provides meaningful involvement opportunities for indigenous peoples throughout the United States, and others living in Indian country, and considers the potential impact of Agency actions that may affect their human health or environmental interests.").

39. *Id.*

40. See e.g., 12 U.S.C. § 5481(27) (2014 & Supp. 2017); Katherine Womack, *Future of Equality for Virginia's Tribes: Reform the Federal Acknowledgement Process to Repair Injustice*, 15 RICH. J.L. & PUB. INT. 475, 493 (2011) (noting that federal agencies typically use federal recognition as the criteria for which tribes are eligible for services).

41. Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PENN. L. REV. 1827 (2003) ("Native American tribes are divided into two categories: those recognized by the

recognized Indian tribes.<sup>42</sup> These tribes have a direct government-to-government relationship with the United States.<sup>43</sup> Due to tribal sovereignty, individual Indians enrolled in federally recognized tribes are citizens of their tribe, more than mere members of “private, voluntary organizations.”<sup>44</sup> Tribal citizenship creates a political classification rather than a racial classification which distinguishes Indians from other minority groups and enables citizens of federally recognized tribes to receive unique legal treatment without running afoul of the Constitution’s Equal Protection Clause.<sup>45</sup> Although federal recognition has been termed a “magical status,”<sup>46</sup> the government’s failure to recognize an Indian tribe does not mean the government denies the members of the unrecognized tribe are Indians.<sup>47</sup>

Tribes have achieved federal recognition in a variety of ways. Treaties and statutes were the original methods the United States used to recognize tribes,<sup>48</sup> and the United States entered

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federal government, and those not formally ‘recognized’ by the United States.”).

42. *NCAI Congratulates Tribal Nations in Virginia on Federal Recognition*, NAT’L CONG. OF AM. INDIANS (Jan. 30, 2018), <http://www.ncai.org/news/articles/2018/01/30/ncai-congratulates-tribal-nations-in-virginia-on-federal-recognition>.

43. William J. Clinton, *Government-to-Government Relations With Native American Tribal Governments*, THE WHITE HOUSE (Apr. 29, 1994), [https://www.justice.gov/archive/otj/Presidential\\_Statements/presdoc1.htm](https://www.justice.gov/archive/otj/Presidential_Statements/presdoc1.htm) (“The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.”); Barack Obama, *Presidential Memorandum on Tribal Consultations*, OBAMA WHITE HOUSE ARCHIVES (Nov. 5, 2009), <https://obama.whitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president> (noting the government-to-government relationship between tribes and the United States).

44. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

45. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that treating citizens of Indian tribes different does not constitute racial discrimination).

46. Matthew L. M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 489 (2006).

47. *The Federal Recognition Bill: Hearing on S. 479 Before the S. Comm. on Indian Affairs*, 103rd Cong. (1995) (statement of Sen. John McCain, Chairman, S. Comm. on Indian Affairs) (“Federal recognition does not decide whether an individual is, or is not, an Indian. To be sure, that recognition has immense consequences for individual Indians, but recognition or non-recognition does not change the Indian identity of an individual.”); *United Houma Nation v. Babbitt*, 1997 WL 403425, at \*7 (D.D.C. July 8, 1997) (“Failure to recognize this distinction results in the misperception that nonrecognition as a tribe is equivalent to a refusal to recognize a person’s Indian heritage.”).

48. Kristin Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 959 (2016).



into approximately 400 treaties with Indian nations.<sup>49</sup> However, Congress passed legislation prohibiting the United States from entering into new treaties with tribes in 1871.<sup>50</sup> While the President has the authority to recognize tribes through an executive order, no tribe has been recognized in this manner in years.<sup>51</sup> Likewise, federal courts have the authority to recognize tribes.<sup>52</sup> The courts have played a limited role in recognition over the last forty years,<sup>53</sup> but some scholars believe this trend may be changing.<sup>54</sup>

Since the 1970s, tribes have achieved recognition primarily through legislation or the administrative recognition process.<sup>55</sup> Legislation has been the most common way for tribes to achieve recognition during this timeframe.<sup>56</sup> However, congressional action is inherently political. The increased number of tribes seeking recognition in the 1970s led the Bureau of Indian Affairs (BIA) to seek an apolitical and systematic method of determining which tribes to recognize.<sup>57</sup>

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49. Adam Creppelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 319 (2017); Kirke Kickingbird, *New Horizons in Indian Country*, 43 HUM. RTS. 1, 4 (2017); Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 663 (2002).

50. 25 U.S.C. § 71 (2013).

51. *United States v. John*, 437 U.S. 634, 644 (1978) (noting Executive Branch action denoted the Mississippi Choctaw “as Indians”); Carlson, *supra* note 48, at 964 (noting that the Constitution gives the President the authority to recognize tribes by virtue of the President’s treaty power); Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U.L. REV. 141 (1995).

52. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 25 U.S.C. § 479a-1 (1994) (reclassified as 25 U.S.C. § 5131 (Supp. 2017)).

53. Carlson, *supra* note 48, at 964–65.

54. Mather, *supra* note 41, at 1860 (noting recent judicial decisions suggest tribes should consider pursuing federal recognition judicially).

55. *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before the Committee on Indian Affairs United States Senate*, 112th Cong. 684 (2012) (statement of John Norwood, Co-Chair, Task Force on Federal Acknowledgment, Nat’l Cong. of Am. Indians) (“But for roughly the past 35 years, recognition has been either through Congress or primarily through the administrative process.”); Carlson, *supra* note 48, at 964–65 (“Since the 1970s, however, the OFA and Congress have emerged as the two institutions most likely to extend recognition to Indian tribes.”).

56. Carlson, *supra* note 48, at 957.

57. *Basis for BIA’s Tribal Recognition Decisions Is Not Always Clear: Testimony Before the Committee on Indian Affairs, U.S. Senate*, 107th Cong. 3 (2012) (statement of Barry T. Hill, Director, Nat’l Resources and Env’t) (“[I]n response to an increase in

Attempts to develop objective criteria for tribal recognition have a long history. In 1901, the Supreme Court 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.”<sup>58</sup> The BIA, a federal agency originally located in the Department of War and designed to subjugate Indians,<sup>59</sup> sought to establish guidelines for tribal recognition under the Indian Reorganization Act.<sup>60</sup> However, Congress adopted a policy of tribal termination in the 1950s.<sup>61</sup> The federal termination policy was designed to “Americanize” American Indians<sup>62</sup> and reduce federal financial obligations to tribes.<sup>63</sup> During this abysmal era, the federal

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the number of requests for federal recognition, the department determined that it needed a uniform and objective approach to evaluate these requests.”); Crepelle, *supra* note 7 (noting that “the administrative process was supposed to provide an objective answer to which groups are ‘real’ tribes”).

58. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

59. *Mission Statement*, BIA, <https://www.bia.gov/bia> (last visited Mar. 29, 2018) (“The BIA has changed dramatically over the past 185 years, evolving as Federal policies designed to subjugate and assimilate American Indians and Alaska Natives have changed to policies that promote Indian self-determination. . . . The BIA, one of the oldest bureaus in the Federal government, was administratively established by Secretary of War John C. Calhoun on March 11, 1824, to oversee and carry out the Federal government’s trade and treaty relations with the tribes.”).

60. Carlson, *supra* note 48, at 959.

61. H.R. Res. 108, 83rd Cong., 67 Stat. B132 (1st Sess. 1953); Casey R. Kelly, *Orwellian Language and the Politics of Tribal Termination (1953–1960)*, 74 WESTERN J. COMM. 351 (2010) (“[T]ermination signaled the decline of New Deal enthusiasm for tribal sovereignty.”).

62. Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) (“Many Indians, however, doubted the sincerity of efforts to ‘Americanize’ them by terminating their federally recognized status as sovereign, self-defining peoples.”).

63. Alys Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Aug. 16, 2016), <https://indiancountrymedianetwork.com/history/events/harry-s-truman-beginning-of-indian-termination-era/>; Clayton R. Koppes, *From New Deal to Termination: Liberalism and Indian Policy, 1993–1953*, 46 PACIFIC HIST. REV. 543, 561 (1977) (“Indians presented solely an economic problem. Emphasizing the efficient use of taxpayers’ dollars, he tailored his administration to what he saw as the inevitable course of history.”); Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986 (1956). Public Law 83-280 was passed in 1953. It transferred federal criminal jurisdiction over Indian reservations in six states to the states themselves without providing any federal funds making it an unfunded mandate. That is, Public Law 83-280 was designed to reduce federal expenditures. See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOC., LLC, <http://www.aidanc.net/publications/pl280.htm> (last visited Mar. 29, 2018) (“State dissatisfaction has focused upon the failure of the Act to provide federal funding for states assuming

government terminated its relationship with over 100 tribes.<sup>64</sup> The tribal termination era began to end in 1968.<sup>65</sup>

President Richard Nixon formally rebuked tribal termination and embraced tribal self-determination in 1970.<sup>66</sup> The shift in federal policy combined with the American Indian Movement sparked an interest in the United States' indigenous people.<sup>67</sup> Moreover, the termination era's Urban Indian Relocation Program bussed Indians from their rural reservations to major cities, making Indians more visible to the American mainstream.<sup>68</sup> The relocation of Indians to urban areas also helped foster a pan-Indian identity.<sup>69</sup>

Interest in American Indian culture led to the creation of the American Indian Policy Review Commission in 1975.<sup>70</sup> The Commission found that hundreds of tribes were denied federal recognition,<sup>71</sup> yet the BIA's tribal recognition decisions followed no anthropological or legal rationale.<sup>72</sup> Indeed, the Commission

authority under Public Law 280. The states were handed jurisdiction, but denied the funds necessary to finance it (in today's language - an 'unfunded mandate').")

64. Crepelle, *supra* note 7 (noting over one hundred tribes were terminated from the 1950s through the 1960s); Kelly, *supra* note 61, at 12–13 (noting that 109 tribes were terminated).

65. See, e.g., *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (hunting and fishing rights are retained by tribes even after Congress terminates their reservation); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2013).

66. Richard Nixon, *Special Message to the Congress on Indian Affairs*, THE AM. PRESIDENCY PROJECT (Jul. 8, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2573>.

67. Crepelle, *supra* note 7 (noting that the "Red Power" movement helped raise interest in issues affecting the American Indian community); Carlson, *supra* note 48, at 969 (stating the Red Power movement helped generate interest in American Indian issues).

68. Gloria Hillard, *Urban American Indians Rewrite Relocation's Legacy*, NPR (Jan. 7, 2012), <http://www.npr.org/2012/01/07/143800287/urban-american-indians-rewrite-relocations-legacy>; Crepelle, *supra* note 7.

69. Levanne R. Hendrix, *1953 to 1969: Policy of Termination and Relocation*, ETHNOGERIATRICS STANFORD SCH. OF MED. (2017), [https://geriatrics.stanford.edu/ethnomed/american\\_indian/learning\\_activities/learning\\_1/termination\\_relocation.html](https://geriatrics.stanford.edu/ethnomed/american_indian/learning_activities/learning_1/termination_relocation.html) ("Some of those who stayed established Indian cultural communities within the urban environment, and helped create the urban Pan-Indian movement of today."); Kelly, *supra* note 61, at 27 ("Urban relocation contributed to the rise of pan-Indian ethnic identification in the inner-city and direct action protests.").

70. S.J. Res. 133, 93rd Cong. (1973–1974).

71. *American Indian Policy Review Commission Final Report*, AM. INDIAN POLICY REVIEW COMM'N 1, 442 (1997), <http://files.eric.ed.gov/fulltext/ED164229.pdf> ("There are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289.").

72. *Id.* ("Trying to find a pattern for the administrative determination of a federally recognized Indian tribe is an exercise in futility.").

noted that some tribes were denied federal recognition “solely on the grounds that there was only enough money for already-recognized tribes.”<sup>73</sup> The task force concluded, however, that the denial of recognition had devastating effects on Indians. For example, Indians in Louisiana were committed to mental institutions for speaking their native languages because non-Indians believed the state did not have any Indians; thus, people “talking Indian” were deemed insane.<sup>74</sup> Due to the arbitrariness and severe consequences of recognition decisions, the task force recommended the creation of a federal recognition process.<sup>75</sup>

Congress did not act on the Commission’s recommendation; nonetheless, the BIA developed an administrative federal recognition process in 1978.<sup>76</sup> The process was designed to consistently and equitably determine which tribes deserved recognition.<sup>77</sup> The process has undergone revisions over the years, but the seven criteria remain largely the same.<sup>78</sup> The seven criteria in their current form are:

Petitioner must be consistently identified as an American Indian entity since 1900.

From 1900 to present, the Petitioner must be a distinct community.

From 1900 to present, the Petitioner must exercise political authority over the community.

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73. *Final Report*, *supra* note 71, at 476. The Houma were a victim of funding based recognition decisions. When deciding whether to provide Indian education funds to the Houma in the 1930s, the Houma’s status as a legitimate Indian tribe was not the issue. Rather, Willard Beatty, the director of Indian education, warned that extending BIA services to the Houma would be financially burdensome. The Houma were denied a relationship with the federal government on a monetary basis—not because of their status as an Indian tribe. BRIAN KLOPOTEK, *RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES* 58 (2011).

74. *Final Report*, *supra* note 71, at 463 (“There were incidents when Indians speaking their tribal languages were committed to mental institutions because their neighbors, who did not acknowledge their Indian identity, thought they were having ‘fits.’”).

75. *Id.* at 481–83.

76. Womack, *supra* note 40, at 490 n.122; Carlson, *supra* note 48, at 960.

77. Carlson, *supra* note 48, at 960 (“BIA officials expected the process to emerge as the dominant way for tribes to gain recognition and thus ensure consistency, fairness, efficiency, and transparency.”); *Federal Recognition*, *supra* note 55, at 21 (statement of John Norwood) (“[T]he administrative process that was meant to be an objective method to correct the relationship between our Country and the historically verifiable American Indian nations.”).

78. Crepelle & Block, *supra* note 49.

Petitioner must provide a governing document.

The members of the Petitioner must descend from a historical Indian tribe or group of tribes that amalgamated and functioned as a single entity.

Petitioner must be predominantly composed of persons who are not enrolled in a federally recognized tribe.

Petitioner must not have been terminated by Congress or barred from federal recognition.<sup>79</sup>

#### IV. PROBLEMS WITH THE PROCESS

Since its creation, the federal recognition process has been widely critiqued. Republican and Democratic legislators, as well as the Government Accountability Office, have described the federal recognition process as in dire need of reform.<sup>80</sup> Petitioning tribes spend an average of thirty years in the federal recognition process costing petitioners millions of dollars.<sup>81</sup> Moreover, the documentary requirements range from daunting to impossible as tribes must compile tens of thousands of pages of evidence.<sup>82</sup> The federal recognition process is so exacting that it has been estimated that approximately 70% of the currently recognized tribes could not successfully pass the administrative recognition process today.<sup>83</sup>

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79. 25 CFR § 83.11 (a)–(g) (2017).

80. See, e.g., *Federal Recognition*, *supra* note 55, at 1–2 (statement of Sen. Daniel Akaka); *id.* at 3 (statement of Sen. John Barrasso); *Improvements Needed in Tribal Recognition Process*, U.S. GOV'T ACCOUNTABILITY OFF. 1 (Nov. 2001), <https://www.gao.gov/assets/240/232806.pdf>.

81. *Id.* at 2 (statement of Sen. Jon Tester) (noting the Little Shell Tribe has been in the federal recognition process for thirty-four years and spent over \$2 million in legal fees); *id.* at 21 (statement of John Norwood, Co-Chair, Task Force on Federal Acknowledgement, National Congress of American Indians) (noting the federal recognition process can take over thirty years and cost over a million dollars); Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451, 468 (2015).

82. *Federal Recognition*, *supra* note 55, at 2 (statement of Sen. Jon Tester) (noting the Little Shell have compiled over 70,000 pages of documents trying to complete the federal recognition process); *id.* at 21 (stating federal recognition petitions are over 10,000 pages long).

83. *Id.* at 21 (statement of John Norwood, Co-Chair, Task Force on Federal Acknowledgement, National Congress of American Indians) (“In reviewing petitions for Federal recognition, the manner in which the criteria have been applied has become increasingly unreasonable, overwhelmingly expensive and unjustifiably unpredictable. So much so that an estimated 72 percent of currently recognized Tribes could not successfully navigate the process as the criteria are applied today.”).

Documentation is certainly an appropriate facet of a tribal recognition process; however, the exacting level currently required is neither practical nor fair. Historically, Indians did not keep written records of their existence; thus, tribes—pursuant to their traditional ways—did not produce documents capable of meeting this requirement.<sup>84</sup> Another problem with written records is that European and American historians and ethnographers, particularly before the Civil Rights Movement, often embraced the vanishing Indian theory and had no desire to acknowledge Indian existence.<sup>85</sup> Likewise, Indians, particularly in the South, were not legally allowed to identify as “Indians” because the only racial choices were often “white” or “colored.”<sup>86</sup> Infamously, Virginia destroyed documents proving that Indians lived within the state’s borders pursuant to its Racial Integrity Act in 1924.<sup>87</sup> Virginia tribes could not pass through the federal acknowledgement process because of this racist law.<sup>88</sup> Finally, Indians often concealed their ancestry due to racial antipathy towards Indians.<sup>89</sup>

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84. Dirk Olin, *Tribal Recognition*, N.Y. TIMES MAG., Nov. 25, 2002, at 35, 38 (quoting N. Bruce Duthu: “What’s more, the [BIA] privileges the written record, but many tribes’ most powerful evidence comes out of an oral tradition.”).

85. Dina Gilo-Whitaker, *Real’ Indians, the Vanishing Native Myth, and the Blood Quantum Question*, INDIAN COUNTRY TODAY (Aug. 30, 2015), <https://indiancountrymedianetwork.com/news/opinions/real-indians-the-vanishing-native-myth-and-the-blood-quantum-question/>; Womack, *supra* note 40, at 499 (noting that there is a “notion that ‘true Indians’ have died out—a prediction popularized by Thomas Jefferson—and that these groups have long ago ‘abandoned’ tribal lands and customs, assimilating into American society”).

86. Womack, *supra* note 40, at 497 (stating that Virginia threatened criminal sanctions against persons identifying themselves an “Indian”); DENISE BATES, *THE OTHER MOVEMENT: INDIAN RIGHTS AND CIVIL RIGHTS IN THE DEEP SOUTH* 73–74 (1st ed. 2012) (discussing the racial classification struggles presented by the MOWA Choctaw and the Houma during the days of segregation in the South).

87. Womack, *supra* note 40, at 497 (“Virginia’s Racial Integrity Act of 1924 ‘empowered zealots’ like Plecker to destroy state records, as well as criminalizing the act of designating one’s self a ‘Indian,’ punishable by up to a year in jail.”); *Federal Recognition*, *supra* note 55, at 5 (prepared statement of Sen. Jim Webb) (“Virginia passed ‘race laws’ in 1705, which regulated the activity of Virginia Indians. In 1924, Virginia passed the Racial Integrity Law, and the Virginia Bureau of Vital Statistics went so far as to eliminate an individual’s identity as a Native American on many birth, death and marriage certificates. The elimination of racial identity records had a harmful impact on Virginia’s tribes, when they began seeking Federal recognition.”).

88. *Federal Recognition*, *supra* note 55, at 4 (statement of Sen. Jim Webb) (discussing the difficulties Virginia tribes in the federal recognition process because the records of their Indian identity were destroyed).

89. Mather, *supra* note 41, at 1829–30 (noting that Indians tried to stay away

There are more sinister critiques of the recognition process. Many claim that economic issues are a major factor. Critics assert limited BIA funds prompt recognized tribes to oppose the recognition of additional tribes because more recognized tribes reduce each tribe's slice of the pie.<sup>90</sup> Similarly, tribal casinos have increased the amount of scrutiny petitioning tribes face because the tribes are often perceived as merely seeking gaming revenue.<sup>91</sup> Tribal land claims and natural resources have played a role in tribal recognition.<sup>92</sup>

Racial and cultural stereotypes also factor into the federal recognition process. Critics contend the federal recognition process forces Indians to comply with stereotypes about how Indians "should" look, dress, and act.<sup>93</sup> Indeed, many traditional tribal governments did not have Western style central

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from federal agents and concealed their Indian identity because "to have been identified by the federal government as Native Americans 'would have been for them to die'"; Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 665 (2013) (noting that members of Juaneno Band of Mission Indians identified as Mexican to avoid anti-Indian racism).

90. MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS 42, 70, 107 (2006); Mark Moberg & Tawnya Sesi Moberg, *The United Houma Nation in the U.S. Congress: Corporations, Communities, and the Politics of Federal Acknowledgement*, 34 URBAN ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 85, 94 (2005) ("Despite their common embrace of Native American identity, petitioning tribes often encounter their stiffest resistance from already recognized groups. Given the limited pool of federal funds for economic development and social services on Indian reservations (and the severity of their already unmet needs) existing tribes often fear that any additions to the roster of recognized groups will diminish the resources available to all.").

91. Mather, *supra* note 41, at 1835 (noting that gaming "has cast a shadow over federal recognition"); Riley, *supra* note 81, at 483 (noting that the Indian gaming has made the federal recognition process more contentious).

92. Aura Bogado, *For Some Native Tribes, Federal Recognition Remains Out of Reach*, COLOR LINES (Oct. 15, 2014), <https://www.colorlines.com/articles/some-native-tribes-federal-recognition-remains-out-reach> (noting that land claims are major issues for tribes seeking federal recognition in California and Connecticut); Kelly, *supra* note 61, at 10 ("They calculated that termination would be a cost-efficient way to develop tribal natural resources.").

93. Womack, *supra* note 40, at 485 ("As a result, tribe members may resent these preconceived ideas about how an 'Indian' should dress or act, but may find that living up to these notions is a requirement to socially or legally 'be Indian' in the United States."); Mather, *supra* note 41, at 1831 (noting that some tribes were not recognized because their citizens had "radios in their homes," as this meant they were "too civilized" for federal recognition); Creppelle, *supra* note 7 (noting that Anglo-American notions of "Indianness" influence federal recognition decisions).

governments,<sup>94</sup> accordingly, many tribes struggle to satisfy this bureaucratic requirement. Furthermore, critics contend the federal recognition process favors tribes without African ancestry over tribes with African ancestry.<sup>95</sup>

The federal recognition process itself has even destroyed some tribes. The length of time, financial burden, and emotional strain that accompany the federal recognition process produce fissures within the petitioning tribes;<sup>96</sup> in fact, multiple tribes have “splintered” while undergoing the process.<sup>97</sup> Various motivations exist for separating from petitioning tribes, but some separations are an effort to seize political power over the resources federal recognition may bring.<sup>98</sup> When a tribe splinters, the tribe’s odds of achieving federal recognition decrease because

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94. See, e.g., *U.S. v. Washington*, 384 F. Supp. 312, 354–55 (W.D. Wash. 1974) (noting the tribes in the Puget Sound had “[n]o formal political structure” when they first encountered the United States, and that Governor Stevens “created political entities” of the Indians in the region and selected their leaders); Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 456–58 (1996) (noting the Hopi did not have a centralized government until it adopted a constitution under the Indian Reorganization Act in 1936 and that the election was controversial because voting method used was “alien to the Hopi”); Riley, *supra* note 89, at 667 (“Many traditional tribal governing structures do not utilize overt control of individuals’ behavior.”); Crepelle, *supra* note 7 (“A criterion for petitioners is the historical status of a tribal political structure, as imagined by Anglo-Americans; historically, however, many Indian tribes did not have a prototypical central government that would dictate how individual Indians lived their lives. Instead, the family, or other small bands of people, often comprised the major governing unit.”); Duthu, *supra* note 16, at 427.

95. Riley, *supra* note 89, at 647 (“In addition, the OFA has been criticized for employing racist interpretations based on overvaluing the importance of Indian phenotype where the membership has high amounts of African-American blood.”); KLOPOTEK, *supra* note 73, at 8 (“[F]ederal recognition policy in the present day presses tribes to distance themselves from blacks—even pressing tribal members who do not have African ancestry to distance themselves from tribal members who do—in order to have their Indian racial and political identity validated.”); Cedric Sunray, *Pamunkey Pride and Prejudice: How the Feds Mandated Racism*, INDIAN COUNTRY TODAY (Feb. 17, 2015), <https://indiancountrymedianetwork.com/news/opinions/pamunkey-pride-and-prejudice-how-the-feds-mandated-racism/>.

96. Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271, 284 (2001) (“While political factions are well known within Indian tribes, they are particularly likely to arise during a period of high stress and difficult decision-making.”).

97. Riley, *supra* note 89, at 495–96 (noting multiple tribes have splintered during the federal recognition process).

98. *Id.* at 498 (“The influx of outside money creates an environment ripe for internal conflict as some individuals may be more likely to pursue splinter groups in order to gain power and control over decisionmaking.”); Myers, *supra* note 96, at 284 (noting multiple tribes have “split into two or more groups during the petitioning process”).



it is more difficult for the tribe to demonstrate that it is a community under a common political leadership.<sup>99</sup>

## V. THE HOUMA

This Part provides a brief summary of the Houma's story. It begins with a discussion of their history and shines light on major errors made by the BIA in interpreting the UHN's federal recognition petition. Lastly, this Part discusses the Houma's struggles since the BIA's proposed finding.

### A. A BRIEF HISTORY OF THE HOUMA

The Houma entered the historical record when French explorer Rene-Robert Cavelier, Sieur de La Salle heard of the tribe during his Mississippi River expedition.<sup>100</sup> Henri de Tonti was the first European to contact the Houma in 1686 and formed an alliance with the tribe proclaiming them “the bravest savages of the river.”<sup>101</sup> In 1699, Pierre Le Moyne, Sieur d'Iberville was the next European to encounter the Houma<sup>102</sup> and named the area inhabited by the tribe “Baton Rouge” for the red stick used to mark the Houma's border with the Bayougoula.<sup>103</sup> When Iberville returned to the Houma village a year later, half the tribe had been killed by the “abdominal flux.”<sup>104</sup> Alcohol had taken a toll on the Houma as well.<sup>105</sup>

Colonial and tribal warfare disrupted life for the Houma and many other tribes. In 1706, a large portion of the Houma migrated south towards Bayou St. John.<sup>106</sup> There, they entered

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99. Myers, *supra* note 96, at 284 (noting splintering “is unlikely to help” tribes in the recognition process); Riley, *supra* note 89, at 468 (“When a tribe splinters, there is a chance that neither segment will successfully go through the FAP procedure, even when together they may have.”).

100. *Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgement of the United Houma Nation, Inc.*, BIA 1, 14–15 (Dec. 13, 1994), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001465.pdf> [hereinafter *Summary UHN*]; JOHN REED SWANTON, INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF THE GULF OF MEXICO 285 (2010).

101. *Id.*

102. *Id.*

103. Crepelle, *supra* note 7.

104. SWANTON, *supra* note 100, at 287–88.

105. MILLER, *supra* note 90, at 159.

106. WALTER L. WILLIAMS, SOUTHEASTERN INDIANS SINCE THE REMOVAL ERA 94 (2009); T. MAYHEART DARDAR, WOMEN-CHIEFS AND CRAWFISH WARRIORS: A BRIEF HISTORY OF THE HOUMA PEOPLE 20 (2000).

into another alliance with the French in 1717.<sup>107</sup> The Houma had split into two villages by the 1730s, the main body on the east bank of the Mississippi and a small village on the west bank.<sup>108</sup> Other tribes, like the Acolapissa and Bayougoula, began merging with the Houma during this period.<sup>109</sup> Loyal allies to the French, the main corpus of the Houma relocated to the Spanish controlled west bank after Britain's victory in the French and Indian War.<sup>110</sup>

Living on the border of two colonial powers caused political fissures within the Houma.<sup>111</sup> Though an element of the tribe was pro-British, Spanish Governor of Louisiana Alexander O'Reilly hosted a medal ceremony to form an alliance with the Houma and other tribes in 1769.<sup>112</sup> In 1775, the Houma resided in three camps in different locations and with different leaders.<sup>113</sup> The northern Houma villages, one located at present day Burnside, Louisiana, and another about five miles north, caused trouble for the Spanish.<sup>114</sup> The southern village was located at the Lafourche ("the fork"), that is, the fork near present day Thibodaux.<sup>115</sup> Spanish Commandant Louis Judice, Sr., attempted to unite the tribe in Lafourche, away from the white settlers.<sup>116</sup> The effort was unsuccessful, and the northern bands of the Houma have been lost to history.<sup>117</sup>

The southern band migrated farther south to "Chufuhouma," the site of the present day city of Houma.<sup>118</sup> While Louisiana was under Spanish dominion, Spain awarded land grants to the Houma.<sup>119</sup> Spain treated the Houma favorably,<sup>120</sup> and the Houma

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107. Duthu, *supra* note 16, at 420.

108. *Id.* at 421.

109. *See id.*; DARDAR, *supra* note 106, at 22.

110. Duthu, *supra* note 16, at 421.

111. *Id.*

112. DANIEL H. USNER, INDIANS, SETTLERS, & SLAVES IN A FRONTIER EXCHANGE ECONOMY: THE LOWER MISSISSIPPI VALLEY BEFORE 1783, at 129–31 (New ed. 1992).

113. *See* DARDAR, *supra* note 106, at 28; Duthu, *supra* note 16, at 422.

114. *See* DARDAR, *supra* note 106, at 28; Duthu, *supra* note 16, at 422; FRED B. KNIFFEN ET AL., THE HISTORIC INDIAN TRIBES OF LOUISIANA FROM 1542 TO PRESENT 85 (1994) ("The Houma, whether moving or not, were a source of consternation to the Spanish, who finally abandoned all thought of forming a fixed Indian policy for this mixed group.").

115. Duthu, *supra* note 16, at 422–23; DARDAR, *supra* note 106, at 28.

116. Duthu, *supra* note 16, at 422.

117. *See* DARDAR, *supra* note 106, at 28; Duthu, *supra* note 16, at 422–23.

118. Duthu, *supra* note 16, at 423; DARDAR, *supra* note 106, at 28.

119. MILLER, *supra* note 90, at 161 ("During the late Spanish colonial period both sides agreed that three United Houma ancestral families secured land grants on

fought with the Spanish during the American Revolution.<sup>121</sup> When Spain transferred Louisiana to France in 1800, France continued Spain's policy towards the Indians.<sup>122</sup> France sold Louisiana to the United States three years later, and the Louisiana Purchase required the United States to honor agreements made between Spain and the Indians.<sup>123</sup> The Houma met with William C.C. Claiborne, the first American governor of New Orleans, in 1806 and 1811 to secure a relationship with the United States.<sup>124</sup> Claiborne recognized the tribe by presenting the Houma leaders with coats, as gift giving was the mechanism colonial governments used to recognize tribes.<sup>125</sup> Though the Houma helped the United States defeat the British at the Battle of New Orleans in 1815,<sup>126</sup> the United States denied the Houma's land claim in 1817 stating, "[w]e know of no law of the United States by which a tribe of Indians have a right to claim lands as a donation."<sup>127</sup>

By the 1820s, the Houma community was situated in present day Terrebonne and Lafourche Parishes.<sup>128</sup> White settlers who migrated to Chufuhouma chose to name it Houma for the Indian tribe residing in the area.<sup>129</sup> Indian removal was also underway at this time,<sup>130</sup> and the isolated swamps of Terrebonne and Lafourche offered a good place for Indians to seek refuge.<sup>131</sup> Interestingly, the Choctaw who were removed to Oklahoma asked

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Bayou Terrebonne near present-day Montegut . . .").

120. KNIFFEN, *supra* note 114, at 88 (noting that Spain's policy towards Louisiana's Indians was more favorable to the Indians than that of France or Britain).

121. DARDAR, *supra* note 106, at 26.

122. Treaty of San Ildefonso art. 3, Oct. 1, 1800, [http://avalon.law.yale.edu/19th\\_century/ildefens.asp](http://avalon.law.yale.edu/19th_century/ildefens.asp).

123. Louisiana Purchase Treaty art. VI, Apr. 30, 1803, [http://avalon.law.yale.edu/19th\\_century/louis1.asp](http://avalon.law.yale.edu/19th_century/louis1.asp).

124. Duthu, *supra* note 16, at 424.

125. *Id.*; MILLER, *supra* note 90, at 162.

126. DARDAR, *supra* note 106, at 32.

127. *Summary Under the Criteria and Evidence for Amended Proposed Finding Against Federal Acknowledgment of the Pointe-au-Chien Indian Tribe*, BIA 1, 14 (May 22, 2008), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001476.pdf> [hereinafter *Summary PAC*].

128. *See* DARDAR, *supra* note 106, at 32.

129. WILLIAMS, *supra* note 106, at 97.

130. *See Indian Removal 1814-1858*, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2959.html> (last visited Mar. 13, 2018); *Trail of Tears*, HIST., <http://www.history.com/topics/native-american-history/trail-of-tears> (last visited Mar. 13, 2018).

131. WILLIAMS, *supra* note 106, at 97.

the Houma to join them in the Indian Territory in the 1840s because both tribes spoke Mobilian, but the Houma remained in their new homeland.<sup>132</sup> Tensions between the local whites and the Houma peaked when the white settlers torched the house of Rosalie Courteau, the Houma's leader.<sup>133</sup> The Houma drifted farther into the bayous as result.<sup>134</sup> Nevertheless, the Houma were not confined to a single settlement. Rather, the Houma settlements stretched from Golden Meadow to St. Mary Parish (over fifty miles east to west); moreover, the Houma would venture as far north as Pointe Coupee (over 100 miles from Houma).<sup>135</sup>

Acclaimed anthropologist John Swanton, considered the foremost expert in southeastern Indian tribes, briefly visited the Houma in April of 1907.<sup>136</sup> He concluded, "It is plain that remnants of all sorts of tribes joined the Houma before and at this period, though it is certain that most of these were Muskogean, and that the Houma was always the dominating element."<sup>137</sup> The Houma's openness to other tribes extended to people of European and African ancestry. The Houma's willingness to accept diverse persons into the tribe made it easy for whites in Jim Crow Louisiana to question the Houma's Indian identity and resulted in the derogatory epithet "Sabine"—meaning not a *real* Indian.<sup>138</sup>

For purposes of segregation, Louisiana's court system ruled the Houma were "colored" in 1918,<sup>139</sup> and the Houma were forced to attend unaccredited, underfunded missionary schools that only reached the sixth grade.<sup>140</sup> Taking an interest in the tribe,

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132. KNIFFEN, *supra* note 114, at 124.

133. DARDAR, *supra* note 106, at 34.

134. *Id.*

135. *Id.*

136. Julian H. Steward, *John Reed Swanton 1873-1958: A Biographical Memoir*, <http://www.nasonline.org/publications/biographical-memoirs/memoir-pdfs/swanton-john.pdf> (last visited Mar. 1, 2018) ("His field was gradually extended to the Indians of the lower Mississippi Valley and the southeastern United States, including such tribes as the Choctaw, Chickasaw, Creek, Natchez, and others. He became the undisputed authority on this area."); SWANTON, *supra* note 100, at 291.

137. SWANTON, *supra* note 100, at 292.

138. Duthu, *supra* note 16, at n.98; Krupa, *supra* note 7, at 176 (noting the term "Sabine" was used to raise questions about the Houma's identity).

139. *Henry Billiot v. Terrebonne Parish School Board*, 143 La. 623 (1918) (refusing to reverse the lower court's ruling that the Houma are "colored" on procedural grounds).

140. Krupa, *supra* note 7, at 178–79.

renowned anthropologist Frank Speck<sup>141</sup> secured a federal grant to establish a school system for the Houma in Terrebonne in the early 1940s.<sup>142</sup> Lafourche Parish established an Indian-only school system a few years later.<sup>143</sup> Houma parents seeking the best for their children began to migrate to nearby parishes that would admit their children into schools.<sup>144</sup> Terrebonne and Lafourche were the only parishes in Louisiana that implemented three-way segregation—white, black, and Indian.<sup>145</sup>

To make matters worse, oil companies began to take an interest in the Houma's land during the 1930s.<sup>146</sup> Much of the Houma's ancestral land was lost during this era. The illiterate, non-English speaking Houma were told that they were leasing their land when the documents were actually quit-claim deeds.<sup>147</sup> The law was also against the Houma as BIA anthropologist Ruth Underhill forlornly wrote to Frank Speck in 1938:

My present opinion is that the Indians have been robbed of their property but by entirely legal procedure . . . . The means are Louisiana law which forbids “bastards” to inherit, even if their father makes a will in their favor. The Indians, who do not go in for white marriage procedure are all technically “adulterous bastards”, with no rights to their father's lands.<sup>148</sup>

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141. See Margaret Bruchac, *The Speck Connection: Recovering Histories of Indigenous Objects*, PENN MUSEUM BLOG (May 20, 2015), <https://www.penn.museum/blog/museum/the-speck-connection-recovering-histories-of-indigenous-objects/>.

142. Moberg & Moberg, *supra* note 90, at 98–99 (“Taking a personal interest in the plight of the Houma, the anthropologist Frank Speck approached the Commissioner of Indian Affairs in Washington and secured the first federal grant for the construction of an Indian school in Terrebonne Parish.”).

143. WILLIAMS, *supra* note 106, at 103.

144. T. Mayhear Dardar, *Tales of Wind and Water: Houma Indians and Hurricanes*, 32 AM. INDIAN CULTURE & RES. J. 27, 27 (2008).

145. *Summary UHN*, *supra* note 100, at 241 (“The unique tripartite form of segregation practiced in Terrebonne and Lafourche Parishes divided, ‘whites,’ ‘blacks,’ and ‘sabines,’ the last term considered by most to have been a derogatory term designating the petitioner's members and their ancestors.”); Crepelle, *supra* note 7.

146. WILLIAMS, *supra* note 106, at 101; Duthu, *supra* note 16, at 431; Moberg & Moberg, *supra* note 90, at 99.

147. Janel Curry & Marie Roper, *Southern Hospitality: Calvin Ties to Houma Tribe Reach Across Generations*, THE CALVIN SPARK (Fall 2008), <https://www.calvin.edu/publications/spark/2008/fall/houma.htm>; Moberg & Moberg, *supra* note 90, at 100.

148. WILLIAMS, *supra* note 106, at 101.

Houma lands were taken through coercion as well.<sup>149</sup> Even if the Houma were able to hold onto their land, the increased value of the land due to oil caused land loss through tax sales.<sup>150</sup>

Things gradually started to improve for the Houma in the 1960s. The Civil Rights Movement started to make its way down the bayou, and in 1963, a federal court ordered an end to Terrebonne's unequal Indian schools.<sup>151</sup> However, the desegregation order was implemented slowly; consequently, many Houma children would remain in Indian schools until 1969.<sup>152</sup> The Houma also began to formally organize in the 1970s by forming the Houma Tribe and the Houma Alliance.<sup>153</sup> The Houma living in Terrebonne and Lafourche Parishes united in 1979 creating the United Houma Nation (UHN).<sup>154</sup>

The UHN officially entered the administrative federal recognition process in 1979.<sup>155</sup> With 17,000 enrolled citizens, it was the largest group to enter the tribal recognition process.<sup>156</sup> The slow rate of progress led the UHN to seek recognition through Congress. Though the UHN succeeded in having Senator Bennett Johnston introduce a bill to recognize the tribe in 1990, the bill was introduced while Congress was on recess.<sup>157</sup> Unsurprisingly, the bill did not pass.<sup>158</sup> Professor Mark Moberg and Tawnya Sesi Moberg posit the senator introduced the bill at this time for political purposes because the bill enabled the senator to win Houma votes without upsetting his oil industry support.<sup>159</sup> Indeed, oil companies lobbied to block the UHN from gaining federal recognition.<sup>160</sup>

Oil companies have long opposed the Houma's federal recognition. In the 1930s, Frank Speck wrote that oil companies staunchly opposed any action that may give the Houma rights to

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149. Crepelle, *supra* note 7; Duthu, *supra* note 16, at 431 n.97.

150. Crepelle, *supra* note 7; Moberg & Moberg, *supra* note 90, at 100.

151. Krupa, *supra* note 7, at 172-73.

152. N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 218 (2009).

153. 2004 Bill Text LA S.C.R. 105 (June 1, 2004).

154. *Id.*; Duthu, *supra* note 16, at 420 n.43.

155. *Letter of Intent from Tribal Chairman to Secretary of the Interior*, DEP'T OF THE INTERIOR (Jul. 3, 1979), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001463.pdf>.

156. Moberg & Moberg, *supra* note 90, at 103.

157. *Id.* at 111.

158. *Id.*

159. *Id.*

160. MILLER, *supra* note 90, at 201.

land.<sup>161</sup> The Louisiana Land and Exploration Company, a large landholder in the region, actively performed research to undermine the Houma's federal recognition efforts in the 1990s.<sup>162</sup> As Professor Mark Edwin Miller stated, oil companies lobby against the Houma because "tribal acknowledgement would give the Houmas standing in court to press claims under federal Indian laws."<sup>163</sup> Several others have made this argument.<sup>164</sup>

In December of 1994, the BIA issued a proposed finding against extending federal recognition to the UHN.<sup>165</sup> The BIA said the UHN failed to prove it was continuously a distinct community that exercised political authority over its citizens from European contact to present.<sup>166</sup> More specifically, the BIA found the UHN was not a community under a common political authority from European contact to 1830; the UHN was a community under a common leadership from 1830 to 1880; and after 1880, the UHN divided into six or more distinct political communities.<sup>167</sup> The BIA determined that "Indian ancestry can

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161. Moberg & Moberg, *supra* note 90, at 99 ("[During the late 1930s and early 1940s,] Speck explained in his communications to federal authorities, Houma efforts to win federal recognition were strenuously opposed by oil and gas companies that were then laying claim to the region's energy resources.").

162. MILLER, *supra* note 90, at 201.

163. *Id.*

164. See, e.g., Purvi Shah et al., *RadTalks: What Could Be Possible if the Law Really Stood for Black Lives?*, 19 CUNY L. REV. 91, 102 (2015) (quoting Collette Pichon Battle: "The problem when the federal government doesn't recognize you when you're the largest tribe in South Louisiana is that you don't get royalties when your land sits on a lot of oil and gas. You also don't get a say in how disasters are cleaned up in your community, with your tribe."); Frederic Allamel, *The Houma Indians' Battle Against the Ocean*, 25 DISASTER PREVENTION & MGMT. 183, 187 (2016) (noting the oil industries opposition to any activity that could make them liable for Louisiana's land loss); Kari Huss, *For Bayou Tribe, New Year Brings Only Uncertainty*, NBC NEWS (Jan. 2, 2011), [http://www.nbcnews.com/id/40846123/ns/us\\_news-environment/t/bayou-tribe-new-year-brings-only-uncertainty/#.Wc0OG7KGOUk](http://www.nbcnews.com/id/40846123/ns/us_news-environment/t/bayou-tribe-new-year-brings-only-uncertainty/#.Wc0OG7KGOUk) (quoting Michael Dardar: "[O]il companies petitioned the Bureau of Indian Affairs against recognition of the of the Houma tribe."); Moberg & Moberg, *supra* note 90.

165. *Summary UHN*, *supra* note 100.

166. *Id.*

167. *Id.* at 15 ("The evidence in this case is complex, and presents a unique situation, in comparison to previous acknowledgment cases, because of the three-stage historical process just described in outline form: 1. Prior to 1830, no evidence of a social community; 2. 1830 to 1880, a single UHN ancestral community; 3. 1880 to the present, several (six or more) socially and politically independent communities. Thus, when speaking of the UHN petitioner's ancestors between 1830 and 1880, the reference will be to a single 'community.' From 1880 to the present the reference will be to the separate UHN 'communities.'"). *Id.* at 7.

be verified for the petitioner without doubt or question.”<sup>168</sup> Nonetheless, the BIA said “there is no evidence that the [UHN] descend from the historical Houma Indian tribe.”<sup>169</sup> The UHN challenged the finding in federal court but was unsuccessful.<sup>170</sup>

### B. REBUTTING THE BIA’S PROPOSED FINDING

The BIA’s proposed finding on the UHN’s petition has been widely critiqued.<sup>171</sup> One of the most befuddling aspects of the BIA’s assessment of the UHN’s petition is its rejection of academic research in support of the tribe.<sup>172</sup> For example, John Swanton visited the Houma in 1907 and concluded they were the descendants of the historic Houma tribe.<sup>173</sup> Swanton’s work was essential to multiple other tribes’ success in the federal recognition process.<sup>174</sup> Frank Speck, also a highly esteemed anthropologist, ardently asserted the Houma he visited in the 1930s descended from the Houma of old.<sup>175</sup> Several other scholars linked the present day UHN to the historic Houma tribe.<sup>176</sup> The BIA’s response to academia: “From the 1940’s to the present, subsequent scholars continued to identify the petitioner’s ancestors as descendants of the historical Houma Indian tribe based on the *unfounded* assumptions of Swanton and Speck.”<sup>177</sup> This is peculiar because many of these diverse researchers have scholastic qualifications far superior to those of the BIA’s staff.<sup>178</sup>

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168. *Summary UHN*, *supra* note 100, at 33.

169. *Id.* at 10.

170. *United Houma Nation v. Babbitt*, 1997 WL 403425 (D.D.C. July 8, 1997).

171. *See, e.g.*, Crepelle, *supra* note 7; MILLER, *supra* note 90, at 107; Moberg & Moberg, *supra* note 90.

172. *Summary UHN*, *supra* note 100, at 13.

173. *Id.* at 12–13.

174. MILLER, *supra* note 90, at 178 (“Yet although earlier BAR [Branch of Acknowledgment and Research] teams had relied upon Swanton’s work in positive findings on the Tunica-Biloxis, Poarch Creeks, and others, the UHN team set out to debunk his theories in the Houma case.”); Moberg & Moberg, *supra* note 90, at 111 (“In support of their assertion that BAR acted arbitrarily, the tribe noted that the proposed finding disparaged Swanton’s ethnographic work on the Houma, although the same researcher was valued as a primary ethnographic authority on three other southeastern tribes that were granted recognition.”).

175. *Summary UHN*, *supra* note 100, at 13 (“Frank G. Speck expressed no doubts about Swanton’s identification of the group with the historical Houma tribe.”).

176. *See, e.g.*, Moberg & Moberg, *supra* note 90, at 99 (“Swanton, Speck, Nash, Underhill and Meyer, all highly regarded ethnographers who lived with the Houma between 1907 and 1945, described them as ethnic Indians whose tribal status and land claims were worthy of federal protection.”).

177. *Summary UHN*, *supra* note 100, at 13 (emphasis added).

178. MILLER, *supra* note 90, at 203 (noting the BAR researchers on the UHN’s



Similarly, the BIA's reading of the Houma's historical migration is extremely adversarial. All accept that the French first encountered the Houma near present day Baton Rouge. Although scholars who have studied the Houma agree the tribe gradually migrated to their present location in Louisiana's coastal wetlands to avoid European encroachment, the BIA asserted that these scholars' conjectures were unsubstantiated.<sup>179</sup> Professor and federal recognition expert Mark Miller has summarized the Houma's contention that the tribe migrated south to Terrebonne and Lafourche Parishes by stating, "In light of the existing evidence, however, the group's arguments as to its origins are certainly logical."<sup>180</sup>

According to the BIA, "there is no evidence that [the UHN] descend from the historical Houma Indian tribe."<sup>181</sup> The BIA admits the UHN are of Indian ancestry but claims the Houma are a mix of tribes.<sup>182</sup> More specifically, the BIA avers that John Swanton gave the Indians living in Terrebonne and Lafourche Parishes the name "Houma."<sup>183</sup> The BIA's assertion is simply flummoxing. Presumably, the culturally related Choctaw would be able to identify the Houma.<sup>184</sup> The Oklahoma Choctaw invited the Houma to the Choctaw reservation in the 1840s;<sup>185</sup> therefore, the Houma have been identified as *Houma* for over a century by an Indian Nation long recognized by the federal government.<sup>186</sup>

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petition lacked Ph.Ds. but "were directly challenging the primary source work and observations of a figure noted as a leading scholar in his discipline").

179. *Summary UHN, supra* note 100, at 146–47 (stating the authors have "no primary documents" to support their migration theory).

180. MILLER, *supra* note 90, at 202.

181. *Summary UHN, supra* note 100, at 10.

182. *See, e.g., Summary UHN, supra* note 100, at 15–16 (noting the United Houma Nation is composed of Indians of "partially unknown tribal backgrounds").

183. *See* MILLER, *supra* note 90, at 178–79 ("According to the federal government, outsiders such as Swanton invented the Houmas as Indians . . .").

184. *See, e.g., Houma*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/places/united-states-and-canada/us-political-geography/houma> (last visited Mar. 20, 2018) ("They were closely related to the Choctaw, Chickasaw, and Chakchiuma tribes."); Iti Fabvssa, *Our Ancient Neighbors from the Past into the Present*, CHATA ANUMPA AIKHVNA SCH. OF CHOCTAW LANGUAGE (May 2015), <http://www.choctaw.school.com/home-side-menu/iti-fabvssa/our-ancient-neighbors-from-the-past-into-the-present.aspx> ("The Houma are linguistically and culturally related to the Choctaw."); *Summary UHN, supra* note 100, at 35 (noting that John Swanton thought the words he observed during his visit with the Houma were "pure Choctaw").

185. *See* KNIFFEN, *supra* note 114, at 124.

186. The Choctaw have numerous treaties with the United States. *See Pre-Removal Government Treaties*, CHOCTAW NATION, <https://www.choctawnation.com/history-culture/history/government-treaties> (last visited Mar. 30, 2018).

Furthermore, the *New Orleans Daily Picayune* reported in 1892—fifteen years before Swanton’s visit—that the “Houmas Indians” lived at the edges of Terrebonne and Lafourche Parishes against the Gulf in palmetto huts.<sup>187</sup> Thus, the Houma were identified as Houma well before an academic allegedly gave them the name.

The UHN readily acknowledges its pan-tribal heritage; indeed, most tribes have amalgamated with other tribes. Indians throughout North America commonly engaged in exogamous marriages.<sup>188</sup> For example, the Navajo creation story sets forth four clans, but today there are over 100 Navajo clans because the Navajo absorbed various peoples.<sup>189</sup> In Louisiana, the Tunica-Biloxi, who successfully passed through the federal recognition process, are a combination of four tribes.<sup>190</sup> Even the Coushatta Tribe of Louisiana, which is small and traditional,<sup>191</sup> is not “pure” Coushatta. The tribe’s preeminent leader, Ernest Sickey,<sup>192</sup> is half Choctaw.<sup>193</sup> Tribes are nations—not simply racial groups; hence, intermarriage with other tribes should have little bearing on a tribe’s identity. Regarding the Houma, Frank Speck passionately wrote, “In my judgment, as based upon comparisons with Indians of the southeastern tribes over a number of years, I should rate the Houma as a people possessing Indian blood and

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187. J. Daniel D’Oney, *The Houma Nation: A Historiographical Overview*, 47 LA. HIST.: J. LA. HIST. ASS’N 63, 74 (2006).

188. *Summary UHN*, *supra* note 100, at 16 (noting that tribes frequently mixed with other tribes in Louisiana and formed new groups); Duthu, *supra* note 16, at 426; Angelique EagleWoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 807 (2010) (noting intertribal marriages were frequent prior to European contact).

189. *Navajo Clan System*, NAVAJO CODE (Apr. 13, 2014), <https://navajocodetalkers.org/navajo-clan-system/> (noting there were originally four Navajo clans but over 100 exist now).

190. *Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Tunica-Biloxi Indian Tribe of Louisiana Pursuant to 25 CFR 54*, BIA 1, 1 (Dec. 4, 1980), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001252.pdf> (“The contemporary Tunica-Biloxi Indian Tribe is the successor of the historical Tunica, Ofo, and Avoyel tribes, and part of the Biloxi tribe.”).

191. KNIFFEN, *supra* note 114, at 306 (“The Koasati [Coushatta], in several respects, are the most purely Indian of all the Louisiana tribes. They are almost entirely full bloods.”).

192. More information about Ernest Sickey can be found in Denise Bates’s forthcoming book, *Basket Diplomacy*, which will be published by the University of Nebraska Press in 2019.

193. BATES, *supra* note 86, at 13 (noting Ernest Sickey is half Choctaw and half Coushatta).

cultural characters to a degree about equal to that of the Creek, Choctaw, Catawbe, and Seminoles.”<sup>194</sup> Each of the named tribes are federally recognized.

The BIA’s denial that the Houma are a distinct community flies in the face of both fact and law. Indeed, the BIA’s denial contradicts its own conclusion that the Houma have been identified “as a mixed-blood Indian community” since the 1850s.<sup>195</sup> Likewise, BIA researchers who visited the Houma in the 1930s classified the Houma as an Indian community.<sup>196</sup>

The Houma were a community unto themselves for much of the tribe’s existence. Until the 1950s, there were no paved roads connecting the Houma to the outside world; thus, the Houma lived largely isolated amongst other members of the tribe.<sup>197</sup> The Houma dug canals to facilitate travel and communication between the Houma communities. Professor Bruce Duthu, who is Houma, writes, “Digging and cleaning the canals was an important communal event.”<sup>198</sup> The Houma would also band together after storms to provide aid to afflicted members of the community.<sup>199</sup>

When the Houma interacted with non-Indians, they were subjected to racial discrimination, and the BIA states, “Discrimination on a racial basis can, in fact, be strong evidence for the existence of distinct community.”<sup>200</sup> Many Houma elders recall signs on private businesses stating, “No Indians Allowed.”<sup>201</sup> Terrebonne and Lafourche Parishes segregated whites, blacks, and Indians in schools, churches, movie theaters, and other establishments until the late 1960s and early 1970s.<sup>202</sup>

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194. Ann Fischer, *History and Current Status of the Houma Indians*, 6 MIDCONTINENT AM. STUD. J. 149, 150–51 (1965).

195. *Summary UHN*, *supra* note 100, at 9.

196. *Id.* at 11 (“Reports compiled during the 1930’s by researchers sent by the Bureau of Indian Affairs accepted the community as mixed-blood Indian, but no federal assistance was provided.”).

197. Krupa, *supra* note 7, at 175 (“The tribe’s geographic isolation was partly to blame, since paved roads did not connect the thinly settled bayous to central Houma until after the early 1950s.”); KNIFFEN, *supra* note 114, at 79 (“The Houma occupied this territory almost in isolation until the development of petroleum resources there by outside interests in the 1940s.”).

198. Duthu, *supra* note 16, at 428.

199. Dardar, *supra* note 144, at 29 (discussing the author’s experience during Hurricane Camille).

200. *Summary UHN*, *supra* note 100, at 4.

201. BATES, *supra* note 86, at 75–76.

202. *Summary UHN*, *supra* note 100, at 241 (noting the three-way racial

Thus, the Houma were *legally required* to be a distinct community.<sup>203</sup>

Countless studies have been performed on the Houma, and they unanimously certify the Houma as a community.<sup>204</sup> This is particularly noteworthy because some of those who have studied the Houma have done so for the express purpose of impugning the Houma's identity.<sup>205</sup> For example, Henry L. Bourgeois was the superintendent of schools in Terrebonne Parish from 1914 to 1955.<sup>206</sup> He wrote:

They call themselves Indians, and claim a social status comparable to that of the white man. But, as a matter of fact, they are not Indians. They are the descendants of that union of the Indian and the free *gens de couleur* of many generations back, with large infusions of white blood. They are pariahs. They disdain contact with the negroes, and they find the doors of the whites closed against them. Consequently, they have thrust themselves into an imaginary racial zone standing midway between the whites and the blacks.<sup>207</sup>

It is worth noting that Bourgeois acknowledged the Houma are of Indian descent in courtroom testimony.<sup>208</sup> It is also worth noting that a high school named after Bourgeois in Terrebonne Parish

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segregation in Terrebonne and Lafourche Parishes).

203. H. F. 'Pete' Gregory, "A Promise from the Sun:" *The Folklife of Traditions of Louisiana Indians, Folklife, in LOUISIANA: A GUIDE TO THE STATE* (1985) ("Geographic isolation and the fact that the Houma were segregated from both blacks and whites in schools, movies, churches, and other public places, kept the people together and limited language exchanges.").

204. Forrest Deseran, *An Assessment of Housing of Indian, White, and Black Residents in Two Rural Louisiana Communities*, LSU AGRICULTURAL EXPERIMENT STATION REPS. 1, 27 (1979) (stating the black, white, and Indian communities in Dulac and Grand Caillou have a strong sense of community, and this is particularly true among the Indians—the Houma); Duthu, *supra* note 16, at 431–32 (noting that numerous researchers have studied the Houma since the 1950s, and "they consistently portray the Houma as a distinct community of Indians").

205. Duthu, *supra* note 16, at 431 (noting a study by Parenton and Pellegrin "appears blatantly racist").

206. Rachel D. Minchew, "Because Colored Means Negro" *The Houma Nation and Its Fight for Indigenous Identify Within a South Louisiana Public School System, 1916-1963*, UNIV. OF NEW ORLEANS THESES AND DISSERTATIONS 1, 12 (2017), <http://scholarworks.uno.edu/cgi/viewcontent.cgi?article=3459&context=td>.

207. *Id.* at 12–13 (quoting HENRY L. BOURGEOIS, *FOUR DECADES OF PUBLIC EDUCATION IN TERREBONNE PARISH* 64 (1938)).

208. *Id.* at 12 ("Bourgeois's language throughout his testimony suggests that Indian ancestry for the Houma tribe was less debatable.").

selected an Indian brave as its mascot.<sup>209</sup>

Since the BIA denied the Houma's existence as a community, it concluded that no one exercised political authority over the Houma.<sup>210</sup> There is some truth to this; however, it totally misses the reality of indigenous society. To this day, the only individual that all Houma agree was a leader of the tribe is Rosalie Courteau,<sup>211</sup> yet the BIA claims "there is no evidence" that she exercised political authority over the tribe.<sup>212</sup> The BIA's error in determining the Houma lacked, and continue to lack, political authority over its members is that most tribes did not have coercive, centralized governing structures until the modern era.<sup>213</sup> Throughout pre-contact North America, political leadership was often ad hoc rather than for a defined term.<sup>214</sup> Ad hoc leadership

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209. Krupa, *supra* note 7, at 176 n.17.

210. See *Summary UHN*, *supra* note 100, at 26.

211. Duthu, *supra* note 16, at 428 ("She was the last Houma leader reputed to have exercised any sort of broad authority over the general tribal membership.").

212. *Summary UHN*, *supra* note 100, at 26–27 (noting that there is proof Rosalie "was widely respected in the ancestral community" but asserting there is no evidence that she had political authority over the community).

213. See, e.g., *Summary Under the Criteria and Evidence for Proposed Finding for Federal Acknowledgement of the Jena Band of Choctaw Indians*, BIA 1, 80 (Sep. 27, 1994), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001446.pdf> (evaluating the Jena Band of Choctaw Indians petition for federal recognition and determining to recognize the tribe although, "[t]here was no tribal council or other formal political leadership within the tribe prior to 1974"); Matthew L. M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 KAN. J.L. & PUB. POL'Y 525, 534 (2004–2005) ("The kind of coercive, arbitrary, and violent government actions generated by EuroAmerican governments - i.e., imprisonment, execution, police brutality, denial of governmental benefits and services, eminent domain, interrogation, entrapment, surveillance, quartering of soldiers, and so on - were rarely, if ever, perpetuated by Indian communities."); See MILLER, *supra* note 90, at 183 (noting that tribes commonly were not "organized as a tribe" until the federal government organized them); *Amended Request for Urgent Action under Early Warning Procedure* 1, 3 (July 1, 2000), <https://law.arizona.edu/sites/default/files/wscerdamendedrequest.pdf> ("Western Shoshone political and social structures have traditionally been decentralized under a system suited to their harsh natural environment.").

214. THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* 3 (3rd ed. 2016) ("Leadership in a Cherokee community, in fact, rested with a person who could inspire followers rather than someone born to office."); Tracy Becker, *Traditional American Indian Leadership: A Comparison with U.S. Governance* 1, 4 (1997), <http://www.navajocourts.org/Harmonization/Traditional%20American%20Indian%20Leadership.pdf> ("American Indian leaders were humble servants to the community. Individual American Indians did not seek leadership or promote themselves for it. Rather, persons with strong traditional values and persons who contributed to the community emerged as leaders.").

often translated into consensus-based governments; thus, individuals enjoyed a high degree of personal liberty.<sup>215</sup> The BIA's finding of no political leadership among the present day UHN accords with the earliest written records of the Houma which state, "The [Houma] chiefs are no more masters of their people than are the chiefs of the other nations in the direction of Canada. I have only noticed among them more civility."<sup>216</sup>

Another point the BIA got wrong in its proposed finding is the Houma's treaty with the United States. The BIA cited a 1930s report from the Assistant Commissioner of Indian Affairs, which stated the Houma never had a treaty with the United States and relied on this to deny the tribe federal recognition.<sup>217</sup> Despite its questionable constitutionality,<sup>218</sup> the Louisiana Purchase was ratified by Congress in 1803.<sup>219</sup> The Louisiana Purchase required the United States to honor obligations made between Spain and the Indians.<sup>220</sup> Spain granted the Houma a medal—the original mechanism used by colonial governments to entreat with the Indian nations<sup>221</sup>—in 1769, and this created a formal relationship between Spain and the Houma.<sup>222</sup> Therefore, the United States has a treaty with the Houma. Indeed, the United States admitted that it has a treaty with the Houma in

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215. Crepelle & Block, *supra* note 49, at 339 ("As a result of the rule of law and private property rights, American Indian culture was based upon the individual."); *American Indians—How They Govern Themselves*, UTAH DIVISION OF S. HIST., <http://ilovehistory.utah.gov/topics/government/indians.html> (last visited Mar. 1, 2018) (noting the Paiute leaders operated by consensus, and that the Ute leaders "could only lead as long as people chose to follow." Also, noting Goshute leaders "didn't have political power, only the power to make suggestions"); KLOPOTEK, *supra* note 73, at 179 (stating that traditionally, Choctaw leaders "did not have to be obeyed").

216. SWANTON, *supra* note 100, at 287.

217. *Summary UHN*, *supra* note 100, at 208.

218. NCC Staff, *The Louisiana Purchase: Jefferson's Constitutional Gamble*, NAT'L CONST. CTR. (Oct. 20, 2017), <https://constitutioncenter.org/blog/the-louisiana-purchase-jeffersons-constitutional-gamble> (discussing President Jefferson's doubts about the constitutionality of the Louisiana Purchase).

219. *Today in History-October 20*, LIBR. OF CONGRESS, <https://www.loc.gov/item/today-in-history/october-20> (last visited Mar. 1, 2018).

220. Louisiana Purchase Treaty art VI, Apr. 30, 1803, [http://avalon.law.yale.edu/19th\\_century/louis1.asp](http://avalon.law.yale.edu/19th_century/louis1.asp).

221. Duthu, *supra* note 16, at 424 (noting medals were a common way of acknowledging tribes); Richard H. Engeman, *The Jefferson Peace Medal: Provenance and the Collections of the Oregon Historical Society*, 107 OR. HIST. QUARTERLY 290, 290–91 (2006) (noting the Spanish and British authorities, and later the United States government, issued medals to Indians as "tokens of peace and emblems of influence and authority").

222. USNER, *supra* note 112, at 131.

1977.<sup>223</sup> The United States has the power to abrogate treaties with Indian tribes;<sup>224</sup> however, Congress must clearly express its intent to terminate the treaty.<sup>225</sup> Congress has never manifested such an intent to terminate its treaty with the Houma. If the United States had honored its treaty obligations under the Louisiana Purchase, it would never have *forgotten* the Houma, and the tribe would be recognized today.<sup>226</sup>

The BIA also made some profoundly absurd assertions against the Houma. For example, the BIA could not confirm a clear connection between the City of Houma and the Houma Indians.<sup>227</sup> Although cities and states are commonly named for nearby Indian tribes,<sup>228</sup> the BIA said there is evidence that the Houma were named after the city rather than the city being named after the nearby tribe.<sup>229</sup> The BIA's evaluation of Houma ancestor Louis le Sauvage is another example. Louis le Sauvage can be translated to "Louis the Indian."<sup>230</sup> Common sense

223. *Final Report*, *supra* note 71, at 450.

224. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding Congress has the power to abrogate treaties with Indian tribes). *But see* *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.")

225. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (holding that treaty rights can survive tribal termination).

226. *See* MILLER, *supra* note 90, at 162 ("[I]t is a sad reality that had the United States lived up to its treaty obligations to honor previous Spanish and French policies, many of Louisiana's small Indian nations would still exist today.") (internal citations omitted).

227. *Summary UHN*, *supra* note 100, at 30 n.34 ("Since the ancestors of the petitioner had been living over 20 miles south of the location of the city of Houma for 30 to 40 years by the time the city was founded in 1834, this does not indicate a connection between them and the band camped for some time northwest of the city location."); MILLER, *supra* note 90, at 167 (noting the peculiarity of the BIA questioning the nexus between the tribe and the town's name).

228. *See, e.g.,* Cecily Hilleary, *Native Americans Gave Places, Animals, Plants Their Names*, VOA (Nov. 17, 2017), <https://www.voanews.com/a/native-american-tribes-gave-plates-animals-plants-their-names/4079554.html>.

229. *Summary PAC*, *supra* note 127, at 78–79 (stating that "one oral history explicitly denied that these Indians were 'Houma,' saying that the Indians were named for the town after they arrived there.")

230. In the early days of the United States, Indians were frequently referred to as "savages." *See, e.g.,* *Letter from George Washington to James Duane (7 September 1783)*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-11798> (last visited Mar. 30, 2018) ("I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return us soon as the pursuit is at an end and fall perhaps on those that are left there; when the

suggests that a person who is a leader of an Indian tribe and named “the Indian” is probably an Indian. The probability increases when, as the BIA admitted, the person’s sister has “an Indian name.”<sup>231</sup> The odds further increase when the individual’s niece is an Indian, a point ceded by the BIA.<sup>232</sup> Nevertheless, the BIA could not confirm that Louis le Sauvage was an Indian—it posited that le Sauvage may have been Flemish.<sup>233</sup>

An excusable mistake made by the BIA regards the Houma’s language. The BIA claimed the words Swanton collected during his visit to the Houma were Mobilian, a common trade language spoken by southeastern tribes prior to European contact.<sup>234</sup> The Houma certainly would have spoken Mobilian as well as Choctaw, Chickasaw, and other languages used by tribes throughout the southeastern United States.<sup>235</sup> Nevertheless, research has conclusively proven that the Houma had their own distinct language.<sup>236</sup> Though the Houma’s traditional language is no longer spoken,<sup>237</sup> it remained in use through the early twentieth century.<sup>238</sup>

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gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape.”).

231. *Summary UHN, supra* note 100, at 162.

232. *Id.* (stating le Sauvage was Rosalie Courteau’s uncle).

233. *Id.* (finding there is insufficient evidence to confirm Louis le Sauvage’s Indian ancestry while admitting there is “a strong possibility that there was Indian heritage here”).

234. *Id.* at 35 (“The words collected by Swanton, which he labelled ‘pure Choctaw,’ are in fact Mobilian trade jargon, a language that would have been spoken by Indians of most tribes along the gulf coast of the United States, from Florida to Louisiana.”).

235. NICHOLAS FARACLAS, AGENCY IN THE EMERGENCE OF CREOLE LANGUAGES: THE ROLE OF WOMEN, RENEGADES, AND PEOPLE OF AFRICAN AND INDIGENOUS DESCENT IN THE EMERGENCE OF THE COLONIAL ERA CREOLES 193–94 (2012) (“Houma children would have grown up speaking the Houma language of their mothers plus the Kosati, Choctaw, Chickasaw, etc. language of their fathers.”).

236. Cecil H. Brown & Heather K. Hardy, *What Is Houma*, 66 INT’L J. AM. LINGUISTICS 521, 542 (2000) (“The large number of unique Houma items robustly indicate Houma’s status as an independent language within the Western Muskogean branch.”); FARACLAS, *supra* note 235, at 188 (“Houma is a distinct language within the Western Muskogean group, rather than a dialect of Choctaw, Chicksaw, or of any other Muskogean language.”).

237. However, efforts are underway to revive the Houma’s pre-contact tongue. See Mark Guarino, *Young Members of Louisiana’s Houma Nation Try to Reclaim Tribe’s Lost Language*, WASH. POST (Jan. 3, 2015), [https://www.washingtonpost.com/entertainment/young-members-of-louisianas-houma-nation-try-to-reclaim-tribes-lost-language/2014/12/29/9c5a60c2-849e-11e4-9534-f79a23c40e6c\\_story.html?utm\\_term=.36fe6d3031d2](https://www.washingtonpost.com/entertainment/young-members-of-louisianas-houma-nation-try-to-reclaim-tribes-lost-language/2014/12/29/9c5a60c2-849e-11e4-9534-f79a23c40e6c_story.html?utm_term=.36fe6d3031d2)

238. Brown & Hardy, *supra* note 236, at 521 (noting Swanton collected seventy-



The BIA claimed that the Houma's native tongue was replaced by Cajun French.<sup>239</sup> Many other researchers have reached the same conclusion.<sup>240</sup> However, this is not correct. The French contacted the Houma in the late 1600s and formed an alliance soon after.<sup>241</sup> Cajuns did not set foot in Louisiana until the mid 1700s;<sup>242</sup> consequently, the Houma learned French from the French explorers—not the Cajuns.<sup>243</sup> Furthermore, approximately seventy-five original Houma words, plus some other Muskogean words, are still in circulation in Houma French,<sup>244</sup> and Houma French is spoken with a cadence and enunciation similar to Muskogean.<sup>245</sup> Accordingly, the Houma speak their own distinct version of French.<sup>246</sup> This seems to conclusively connect today's UHN to the Houma of old; otherwise, it is exceedingly difficult to explain how an isolated community of historically illiterate, swamp-dwelling Indians speak the French of Moliere.

Despite the BIA's denial of the Houma's ancestry, today's UHN is widely recognized as the descendant of the historic Houma tribe. France, the first European nation to contact the Houma, entered an alliance with the tribe over three centuries ago.<sup>247</sup> To this very day, France recognizes the UHN as the descendants of the Houma who encountered the French in the late seventeenth and early eighteenth centuries.<sup>248</sup> Moreover,

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five Houma words during his visit with the tribe in 1907).

239. *Summary UHN*, *supra* note 100, at 304.

240. *See e.g.*, Duthu, *supra* note 16, at 433.

241. *Id.* at 420 (“In 1717, the Houma and several other tribes entered into an alliance with the French.”); MILLER, *supra* note 90, at 159 (stating the Houma “became fast allies with the French, welcoming them into their villages and intermarrying with them”).

242. *Cajuns in the 18th Century*, ACADIAN CAJUN GENEALOGY & HISTORY, <http://www.acadian-cajun.com/hiscaj2b.htm> (last visited Mar. 14, 2018) (noting Cajuns did not begin migrating to Louisiana until after 1755).

243. FARACLAS, *supra* note 235, at 194 (noting Houma French was more than likely a distinct language before Cajuns entered Louisiana).

244. Brown & Hardy, *supra* note 236, at 521 (noting there are seventy-five Houma words in circulation, but Muskogean words are also used in Houma French).

245. FARACLAS, *supra* note 235, at 238 (“In the great majority of cases, Houma French verbs are used in their bare stem form, which is also the case for verbs unmarked for tense, aspect, or modality in the third person singular and plural in West Muskogean languages.”).

246. D’Oney, *supra* note 187, at 77 (“[T]he Houma are French speaking, but with a dialect easily discernible from their Cajun neighbors.”).

247. Duthu, *supra* note 16, at 420–21.

248. Crepelle, *supra* note 7 (noting that France formally celebrated a 317-year alliance with the Houma in 2016).

federally recognized tribes acknowledge the UHN as the heirs of the Houma of old.<sup>249</sup> Interestingly, federal agencies recognize the UHN as a tribe. The 2010 Census lists “Houma” as an Indian tribe, and every tribe on the list is federally recognized.<sup>250</sup> The Smithsonian Institution is a federal entity, and it also recognizes the UHN as the successors to the historic Houma.<sup>251</sup> The Smithsonian has several pictures of individuals identified as Houma from times when the BIA says the Houma did not exist.<sup>252</sup> In recent years, the Smithsonian has hosted citizens of the UHN and acknowledged them as Houma.<sup>253</sup>

### C. THE HOUMA SINCE THE BIA’S PROPOSED FINDING

Much has changed for the UHN since it was denied federal recognition. The most sudden change resulted from the BIA’s assertion that the Houma may qualify for federal recognition as multiple smaller groups rather than as a single large tribe like the UHN.<sup>254</sup> Two groups broke from the UHN in response to its recognition woes and filed for federal recognition as distinct entities. The BIA has denied both groups’ petitions for the same

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249. MILLER, *supra* note 90, at 191 (noting the Coushatta and Chitimacha “accepted the Houma people as a tribe”); Earl J. Barbry Sr., *Tunica-Biloxi Tribe of Louisiana Letter of Support for Federal Recognition of the Untied Houma Nation* (July 22, 2014).

250. Tina Norris et al., *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BUREAU 1, 10, 17 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>. The Lumbee are federally recognized but are ineligible for federal services available to Indian tribes. See *Lumbee FAQ’s*, LUMBEE TRIBE OF N.C., <http://www.lumbee.com/faqs-history> (last visited Mar. 14, 2018) (“[T]he United States Congress did enact a law in 1956 which recognized the Lumbee, while withholding all privileges and benefits normally associated with recognition.”).

251. *Legal History: Legal Nature of the Smithsonian*, SMITHSONIAN, <https://www.si.edu/ogc/legalhistory> (last visited Mar. 14, 2018) (noting the Smithsonian Institution is a federal entity).

252. See WILLIAMS, *supra* note 106, at 95, 102.

253. See, e.g., *The 6th Annual Living Earth Festival Is On!*, THE NAT’L MUSEUM OF THE AM. INDIAN (Jul. 17, 2015), <http://blog.nmai.si.edu/main/2015/07/the-6th-annual-living-earth-festival-is-on.html> (noting Janie Luster is Houma); see *Indian Santa*, THE NAT’L MUSEUM OF THE AM. INDIAN, <http://filmcatalog.nmai.si.edu/title/4018/> (last visited Mar. 14, 2018) (noting Adam Crepelle is Houma); *My Louisiana Love*, THE NAT’L MUSEUM OF THE AM. INDIAN, <http://filmcatalog.nmai.si.edu/title/4011/> (last visited Mar. 14, 2018) (noting Monique Verdin is Houma).

254. *Proposed Finding Against Federal Acknowledgment of the United Houma Nation, Inc.*, 59 FED. REG. 66118, 66119 (Dec. 22, 1994), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001466.pdf> (“There is the possibility though not well-documented at this time, that some or all of the component communities on the lower bayous may meet criteria 83.7 (b) and (c) from 1880 to the present, as separate communities.”).

reasons that it denied the UHN.<sup>255</sup> Peculiarly, the groups that splintered from the UHN now disclaim all affiliation with the Houma.<sup>256</sup> The BIA pointed out the oddity of their contention by noting that the vast majority of the splinter tribes' members were enrolled in the UHN prior to the BIA's negative proposed finding on the UHN petition.<sup>257</sup> Indeed, the BIA noted the Pointe-au-Chien Indian Tribe, one of the tribes that broke from the UHN, was originally named the "Documented Houma Tribe."<sup>258</sup>

More significant than the splintering of the tribe, the Houma's culture has become more endangered than ever before due to climate change and coastal erosion.<sup>259</sup> The Houma remain tethered to Louisiana's coast for their subsistence, medicine, and cultural crafts.<sup>260</sup> Unfortunately, coastal erosion is occurring at a faster rate in Louisiana than any other state<sup>261</sup> and threatens the Houma's traditional ways.<sup>262</sup> UHN Chief Thomas Dardar testified before the Senate Committee on Indian Affairs in 2012 that "[c]oastal erosion affects our Tribe more than it does any other group of people."<sup>263</sup> In fact, much of the land Chief Dardar

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255. *Amended Proposed Finding Against Acknowledgment of the Pointe-au-Chien Indian Tribe (PACIT) of Louisiana*, 73 FED. REG. 31142 (May 30, 2008), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001477.pdf>; *Amended Proposed Finding Against Acknowledgment of the Biloxi, Chitimacha Confederation of Muskogees, Inc., of Louisiana*, 73 FED. REG. 31140 (May 30, 2008), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001471.pdf>.

256. *Summary PAC*, *supra* note 127, at 4; *Summary Under the Criteria and Evidence for Amended Proposed Finding Against Federal Acknowledgment of the Biloxi, Chitimacha Confederation of Muskogees, Inc.*, BIA 1 (May 22, 2008), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001470.pdf> [hereinafter *Summary BCC*].

257. *Summary PAC*, *supra* note 127, at 4; *Summary BCC*, *supra* note 256, at 4.

258. *Summary PAC*, *supra* note 127, at 4.

259. *Testimony of Chief Thomas Dardar, Jr. Principal Chief of the United Houma Nation before the Senate Committee on Indian Affairs*, OVERSIGHT HEARING ON ENVTL. CHANGES ON TREATY RIGHTS, TRADITIONAL LIFESTYLES AND TRIBAL HOMELANDS (July 19, 2012), <https://www.indian.senate.gov/sites/default/files/upload/files/Thomas-Dardar-testimony071912.pdf> [hereinafter *Testimony of Chief Dardar*]; Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT'L L.J. 607, 612 (2009) (stating, "Indigenous peoples and poor communities are vulnerable to the impacts of climate change, as their way of life is intrinsically linked to the land and their culture.").

260. *Testimony of Chief Dardar*, *supra* note 259, at 3.

261. Jessica R.Z. Simms, *Why Would I Live Any Place Else?: Resilience, Sense of Place and Possibilities of Migration in Coastal Louisiana*, 33 J. COASTAL RES. 408, 409 (2017) (noting "coastal Louisiana outpaces the rest of the coastal United States and ranks among the highest rates of deltaic land loss in the world.").

262. *Testimony of Chief Dardar*, *supra* note 259, at 2.

263. *Id.* at 3.

and other Houma have hunted on for generations has washed away.<sup>264</sup>

Barrier islands are Louisiana's first line of defense against hurricanes, and erosion is erasing this protection.<sup>265</sup> The rapidly disappearing barrier islands once served as buffers that slowed storms.<sup>266</sup> Houma communities are situated directly on Louisiana's Gulf Coast; consequently, hurricanes hit them the hardest.<sup>267</sup> This is made all the more worrisome as many scientists expect climate change to produce storms of greater magnitude,<sup>268</sup> possibly at a higher frequency too.<sup>269</sup> When

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264. *Testimony of Chief Dardar*, *supra* note 259, at 3 ("I remember hunting on lands that are now underwater as a child. As a grandfather, my heart hurts that I will never be able to share that land and experience with my grandchildren.")

265. Justin Nobel, *Louisiana Is Restoring Its Barrier Islands to Defend Against Hurricanes and Rising Seas*, AUDUBON (Fall 2017), <http://www.audubon.org/magazine/fall-2017/louisiana-restoring-its-barrier-islands-defend> (quoting Governor John Bel Edwards as stating: "If we don't restore these barrier islands, then our future is in peril," he told me. "That land is the first line of defense. What we cannot have is a situation where the Gulf of Mexico is lapping at the levees of New Orleans."); Miguel Llanos, *Louisiana Loses Chunk of Natural Storm Barrier*, NBC NEWS (Nov. 4, 2005), [http://www.nbcnews.com/id/9910082/ns/us\\_news-environment/t/louisiana-loses-chunk-natural-storm-buffer/#.WrBhTGrrwaUk](http://www.nbcnews.com/id/9910082/ns/us_news-environment/t/louisiana-loses-chunk-natural-storm-buffer/#.WrBhTGrrwaUk) ("Rex Caffey, a wetlands and coastal issues professor at Louisiana State University, echoed the USGS concerns, adding that the hurricanes also hammered another natural storm surge buffer: barrier islands just off the coastline.")

266. Dardar, *supra* note 144, at 29 (noting that before coastal erosion became severe, the marshlands absorbed the impact of storms for generations and helped protect the Houma); Craig E. Colten, *Environmental Management in Coastal Louisiana: A Historical Overview*, 33 J. COASTAL RES. 699, 706 (2017) (noting the loss of coastal wetlands makes Louisiana's more vulnerable to storms); *Barrier Islands*, COASTAL WETLANDS PLANNING, PROTECTION, AND RESTORATION ACT PROGRAM 1, 31, [https://www.lacoast.gov/new/Ed/Curriculum/TT\\_BarrierIslands.pdf](https://www.lacoast.gov/new/Ed/Curriculum/TT_BarrierIslands.pdf) (last visited Mar. 14, 2018) ("Barrier islands take the brunt of impact from an incoming storm, thereby protecting the habitats and structures behind them. This makes barrier islands important in times of hurricanes and tropical storms.")

267. *See e.g.*, Teri C. Hansen, *Hurricane Gustav Leaves Louisiana Tribes with Severe Damage*, INDIAN COUNTRY NEWS, <http://www.indiancountrynews.com/index.php/news/8-general-stories/4418-hurricane-gustav-leaves-louisiana-tribes-with-severe-damage> (last visited Mar. 14, 2018); Heather Andrews Miller, *Houma Tribe Hammered by Hurricanes*, 23 ABORIGINAL MULTIMEDIA SOC'Y OF ALBERTA 9 (2005), <http://www.ammsa.com/publications/windspeaker/houma-tribe-hammered-hurricanes-0> (noting the Houma were devastated by Hurricane Katrina).

268. Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. L. & SOC. CHANGE 357, 359 (2011) ("Scientists believe that climate change will increase the duration and frequency of extreme weather events, such as hurricanes, tropical cyclones, and storm surges."); Stuart Leavenworth, *Hurricanes Irma, Harvey Restart Debate on Climate Change and Warmer Oceans*, THE MIAMI HERALD (Sept. 6, 2017), <http://www.miamiherald.com/news/nation-world/article171632462.html>

Hurricanes Ike, Rita, Gustav, and Katrina pummeled the Houma community,<sup>270</sup> the tribe was ineligible for federal aid because the tribe lacks recognition.<sup>271</sup>

Erosion of the Houma's land is directly tied to federal recognition. Levees were built along the Mississippi to prevent flooding; however, this also prevented sediment from being deposited into the land.<sup>272</sup> Moreover, the levees were intended to protect population centers like New Orleans and excluded Houma communities. Though this was supposedly done on a cost-benefit basis,<sup>273</sup> leaving the Houma outside of the levees could be deemed environmental racism akin to rerouting the Dakota Access Pipeline from predominantly white Bismarck to the majority American Indian Standing Rock Sioux Reservation.<sup>274</sup> If the

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(“[T]here is scientific consensus that that a warming planet will produce bigger and more destructive hurricanes, with many scientists arguing that those impacts are already occurring.”); Rebecca Lindsey, *Climate Change: Global Sea Level*, CLIMATE.GOV (Sep. 11, 2017), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

269. David Roberts, *Climate Change Did Not “Cause” Harvey or Irma, but It’s a Huge Part of the Story*, VOX (Sept. 11, 2017), <https://www.vox.com/energy-and-environment/2017/8/28/16213268/harvey-climate-change> (noting scientists are currently debating whether climate change will produce storms more frequently).

270. Dardar, *supra* note 144, at 31–32 (Katrina left approximately 1,000 Houma homeless and directly affected thousands more).

271. *Id.* at 32 (noting that FEMA and the Red Cross largely ignored the Houma in the wake of Katrina); *Native American Group Hit Hard By Oil Spill*, NPR (June 3, 2010), <https://www.npr.org/templates/story/story.php?storyId=127405886> (quoting Chief Brenda Dardar as stating: “When it came time to recovery with the devastating four hurricanes in the last three years, we were left on our own. We did not receive direct assistance from FEMA as a tribe or as an indigenous nation.”).

272. *Testimony of Chief Dardar*, *supra* note 259, at 3; Colten, *supra* note 266, at 702 (noting that levees redirect sediment that would have been deposited on the land into the Gulf of Mexico).

273. Alicia Miranda Ollstein & Kira Lerner, *These Native American Tribes Are Fighting to Stop Their Land from Literally Disappearing*, THINKPROGRESS (Jan. 22, 2015), <https://thinkprogress.org/these-native-american-tribes-are-fighting-to-stop-their-land-from-literally-disappearing-a38f5e9f530e/> (noting that the Isle de Jean Charles was left out of the levee on a cost benefit basis); Patty Ferguson-Bohnee, *The Impacts of Coastal Erosion on Tribal Cultural Heritage*, 29 FORUM J. 57, 63–64 (2015), <http://www.sackstierney.com/articles/PDF/ferguson-forum-journal.pdf> (noting the area where the PAC and Houma are located was excluded from the Louisiana Master Plan for coastal protection due to its expense).

274. Phil McKenna, *Confidential Dakota Pipeline Memo: Standing Rock Not a Disadvantaged Community Impacted by Pipeline*, INSIDE CLIMATE NEWS (Mar. 6, 2017), <https://insideclimatenews.org/news/06032017/dakota-access-pipeline-protests-dapl-standing-rock-environmental-assessment-trump>; Catherine Thorbecke, *Why a Previously Proposed Route for the Dakota Access Pipeline Was Rejected*, ABC NEWS (Nov. 3, 2016), <http://abcnews.go.com/US/previously-proposed-route-dakota-access-pipeline-rejected/story?id=43274356> (noting Rev. Jesse Jackson identified the

Houma were federally recognized, there is a strong possibility that the tribe would be *worth* including in the levee system.<sup>275</sup>

As the Houma lacked federal recognition when oil was discovered on their land, Houma land was not held in trust by the federal government. This enabled oil companies to use unscrupulous methods to procure—better yet steal—the Houma’s land.<sup>276</sup> Oil companies cut hundreds of miles of channels through the Houma’s ancestral land which enabled salt water to intrude into the freshwater marshes.<sup>277</sup> The resulting salinity increases kill freshwater vegetation, destroying the root systems that hold the land together against the tide and causing accelerated erosion.<sup>278</sup> Additionally, removing oil from the land causes the land to sink and exacerbates erosion.<sup>279</sup> Oil companies have also

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rerouting of the DAPL as “the ripest case of environmental racism I’ve seen in a long time”).

275. Marisa Katz, *Staying Afloat: How Federal Recognition as a Native American Tribe Will Save the Residents of Isle de Jean Charles, Louisiana*, 4 LOY. J. PUB. INT. L. 1, 8 (2003) (stating that federal recognition provides the best tool for including the Isle de Jean Charles on relocation. The article focuses on the Biloxi-Chitimacha-Choctaw but notes they separated from the United Houma Nation pursuant to the Houma’s federal recognition struggles); Ferguson-Bohnee, *supra* note 273, at 65 (noting that the PAC’s lack of federal recognition makes it difficult for it preserve its land and culture).

276. *See supra* Part V.A.

277. KNIFFEN, *supra* note 114, at 310 (noting that dredging canals for oil and gas production has led to the erosion of the Houma’s land); *Testimony of Chief Dardar*, *supra* note 259, at 3 (noting oil companies have “dredged ten thousand miles of channels” through Louisiana’s wetlands); *Louisiana Environmental Restoration*, S. REGIONAL WATER PROGRAM, <http://srwqis.tamu.edu/louisiana/program-information/louisiana-target-themes/watershed-restoration/> (last visited Mar. 14, 2018) (noting channel dredging has led to land loss along Louisiana’s coast); Colten, *supra* note 266, at 705 (noting that canals dug by oil companies have contributed to the erosion of Louisiana’s wetlands).

278. Shirley Laska, et al., *Layering of Natural and Human-Caused Disasters in the Context of Sea Level Rise*, in MICHELE COMPANION, *DISASTER’S IMPACT ON LIVELIHOOD AND CULTURAL SURVIVAL: LOSSES, OPPORTUNITIES, AND MITIGATION* 227 (Michele Companion, ed., 1st ed. 2015) (“The infusion of saltwater through the canals into the swamps kills the plants, resulting in the soil dissolving into the water and washing away. Damage from the canals has never been remediated.”); *Louisiana Environmental Restoration*, S. REGIONAL WATER PROGRAM, <http://srwqis.tamu.edu/louisiana/program-information/louisiana-target-themes/watershed-restoration> (last visited Mar. 14, 2018); *Hit Hard By Oil Spill*, *supra* note 271 (quoting Chief Brenda Dardar as stating: “And so there’s location canals that has allowed salt water intrusion into our tribal communities as well, which has afforded more coastal erosion and wetlands lost.”).

279. Chris Kardish, *Southern Louisiana Picks a Fight with Big Oil to Save the Wetlands*, GOVERNING (Aug. 25, 2015), <http://www.governing.com/topics/transportation-infrastructure/gov-louisiana-wetlands-lawsuits.html> (noting that oil extraction has caused a “subsidence bowl” in Long Beach, California); *see also* Stephen A.

buried toxic chemicals in the Houma's traditional land further harming the environment and causing illness among the tribe's citizens.<sup>280</sup> If the Houma were federally recognized, the tribe may have had land placed in trust and the ability to implement environmental regulations to protect its land and citizens.

The BP oil spill absolutely devastated the Houma. The spill released over 100 million gallons of oil into the Gulf of Mexico.<sup>281</sup> Worse, the dispersant used to mitigate the harms of the spill is likely more toxic than the oil itself.<sup>282</sup> Most Houma families are employed in the oil or seafood industry, many in both.<sup>283</sup> The BP oil spill shut down both of these industries, leaving countless Houma families without work; furthermore, the pollution left the seafood the Houma rely on for subsistence inedible.<sup>284</sup> The UHN filed a claim with BP in hopes of receiving compensation for their financial and cultural loss. BP responded to the claim:

While BP indeed processes claims from federally recognized

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Nelson, *Subsidence: Dissolution & Human Related Causes*, NATURAL DISASTERS, TULANE (Nov. 3, 2016), [http://www.tulane.edu/~sanelson/Natural\\_Disasters/subsidence.htm](http://www.tulane.edu/~sanelson/Natural_Disasters/subsidence.htm) (“When oil and natural gas are withdrawn from regions in the Earth near the surface, fluid pressure provided by these fluids is reduced[.] With a reduction in fluid pressure, the pore spaces begin to close and the sediment may start to compact resulting in subsidence of the surface.”); Allamel, *supra* note 164, at 186 (“Indeed, whenever oil and gas are extracted from the ground, a void is formed and then, pulled by gravity, the land that sits above sinks inexorably at a rate of one centimeter per year.”).

280. John McQuaid, *Uneasy Proximity*, NOLA.COM (Aug. 12, 2016), [http://www.nola.com/politics/index.ssf/2000/05/uneasy\\_proximity.html](http://www.nola.com/politics/index.ssf/2000/05/uneasy_proximity.html); Moberg & Moberg, *supra* note 90, at 114 (noting the Louisiana oil lobby “guttled oilfield waste disposal regulations” and the waste was disposed in the Houma community of Grand Bois causing illness among the residents).

281. The Ocean Portal Team, *Gulf Oil Spill*, SMITHSONIAN NAT'L MUSEUM OF NAT. HIST., <http://ocean.si.edu/gulf-oil-spill> (last visited Mar. 14, 2018).

282. Kate Sheppard, *BP's Bad Breakup: How Toxic Is Corexit?*, MOTHER JONES (2010), <http://www.motherjones.com/environment/2010/08/bp-ocean-dispersant-corexit/> (noting the unknown toxicity of Corexit, the chemical used to clean up the oil); David Kirby, *Corexit, Oil Dispersant Used by BP, Is Destroying Gulf Marine Life, Scientists Say*, HUFFPOST (Apr. 25, 2013), [http://www.huffingtonpost.com/2013/04/25/corexit-bp-oil-dispersant\\_n\\_3157080.html](http://www.huffingtonpost.com/2013/04/25/corexit-bp-oil-dispersant_n_3157080.html) (noting the potentially lethal effects of Corexit).

283. Duthu, *supra* note 16, at 432 (noting the Houma citizens are economically dependent upon the seafood and oil industry); Moberg & Moberg, *supra* note 90, at 104 (“[F]ishing and shellfishing remain the principal sources of income for most of the Houma families.”).

284. Huss, *supra* note 164 (quoting UHN councilwoman Laura Billiot as stating, “[The oil spill] has changed our diet a lot.”); Laska, *supra* note 278, at 232 (noting Louisiana's indigenous fishermen could not eat their catch in the wake of the BP spill).

Indian Tribes through this process, our review of your submission indicates that the United Houma Nation is not a federally recognized Indian Tribe entitled to assert claims pursuant to the Oil Pollution Act of 1990 (“OPA”). Therefore, we are closing your file with regard to this matter.<sup>285</sup>

The National Association for the Advancement of Colored People’s (NAACP) investigation into the BP spill concluded, “The oil industry lobby is blocking [the UHN’s] request because they want access to lands that would be protected under the federal designation.”<sup>286</sup> Thus, the BP spill provides yet another example of the oil industry’s interest in preventing the UHN from achieving federal recognition.

UHN citizens are amongst the “United States first climate refugees” due to coastal erosion resulting in large part from the historic disregard of the tribe’s rights.<sup>287</sup> The Indian inhabitants of the Isle de Jean Charles, Louisiana received a \$48 million federal grant to relocate from their rapidly eroding homeland in 2016.<sup>288</sup> Unregulated oil drilling, the building of levees along the Mississippi River, and sea level rise have caused the Isle de Jean Charles to shrink from 22,000 acres in 1955 to a mere 320 acres today.<sup>289</sup> The UHN’s recognition problems are clear in the grant’s announcement. Although the UHN was listed in Phase I of Louisiana’s grant application, it was excluded from subsequent

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285. Letter from Geir Robinson, Director of Claims, BP Gulf Coast Restoration Organization, to Lanor Curole & Thomas Dardar, Jr., on *Claim Filed on Behalf of United Houma Nation* (Nov. 18, 2010); Alison Watson & Bennett Collins, *Protecting the Seas to Save the Land: The Fight Against the Fossil Fuel Industry in the Gulf and Its Implications for the Nation*, INTERCONTINENTAL CRY (March 27, 2016), <https://intercontinentalcry.org/protecting-seas-save-land/> (quoting BP’s November 18, 2010 response to the United Houma Nation’s claim).

286. *BP Oil Drilling Disaster—NAACP Investigation*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE 1, 8 [http://naacp.3cdn.net/b827a4ea75a4bbbd5c\\_jfm6bee32.pdf](http://naacp.3cdn.net/b827a4ea75a4bbbd5c_jfm6bee32.pdf) (last visited Mar. 14, 2018).

287. See, e.g., Christopher Flavelle, *The First U.S. Climate Refugees*, BLOOMBERG (Mar. 20, 2016), <https://www.bloomberg.com/view/articles/2016-03-20/the-first-u-s-climate-refugees>; Coral Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees’*, N.Y. TIMES (May, 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html>; Kyla Mandel, *America’s First Climate Refugees Have Been Abandoned by Trump*, MOTHER JONES (Oct. 17, 2017), <https://www.motherjones.com/environment/2017/10/climate-refugees-trump-hud/>.

288. *LA Receives \$92 Million from U.S. Dept. of Housing and Urban Development for Coastal Communities, Disaster Resilience*, OFF. OF COMMUNITY DEV. DISASTER RECOVERY UNIT ST. OF LA. (Jan. 25, 2016), <http://www.doa.la.gov/OCDDRU/NewsItems/Louisiana%20Receives%20NDRC%20Award.pdf>.

289. *Id.*



renditions of the grant.<sup>290</sup> Consequently, the UHN was not named in the award. The grant named the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw Tribe (BCC), who broke from the UHN after its unsuccessful federal recognition bid, as the sole recipient of the grant.<sup>291</sup> This exacerbated the ill will between some members of the UHN and BCC leadership and resulted in multiple acrimonious meetings between the BCC, the UHN, and the State of Louisiana. Eventually, Louisiana admitted its mistake in the following statement:

Phase II of the state's NDRC application specifically references the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw. This reference was made under the belief that all inhabitants of the Island affiliate with this tribe. There are apparently also members of the United Houma Nation living on the Island, and there may be Island residents who don't affiliate with any tribe. As such, specific tribal membership will not be a requirement for inclusion in the resettlement, as the state's objective is the resettlement of all willing members of the Isle de Jean Charles community, irrespective of any familial, cultural or tribal affiliation.<sup>292</sup>

Little progress has been made with the relocation as of this date, and the inter-tribal squabbles continue. The BCC claim all of the Island's residents belong to it while the UHN claims ten of the twenty-five families on the Island are enrolled in it.<sup>293</sup> However, the differences are purely a matter of name. The BCC and the UHN are the same people. As the Phase I Report notes, "[E]veryone on the Island is related, and one resident described how tribal membership is based on choices residents made with regards to staying with UHN or separating to form the BCC. Two residents said they didn't know which tribe they were supposed to be in."<sup>294</sup> The separation was the result of the specific language

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290. *National Disaster Resilience Competition: Phase I Application*, DISASTER RECOVERY UNIT 1, 40 (Mar. 27, 2015), [http://www.doa.la.gov/OCDDRU/Disasters/NDRC/NDRC\\_Phase\\_I\\_Web.pdf](http://www.doa.la.gov/OCDDRU/Disasters/NDRC/NDRC_Phase_I_Web.pdf).

291. *National Disaster Resilience Competition: Grantee Profiles*, U.S. DEPT. OF HOUSING AND URBAN DEV. 1, 10 (Jan. 2016), <https://www.hud.gov/sites/documents/NDRCGRANTPROF.PDF> [hereinafter HUD].

292. *CDBG-NDR Award Fact Sheet*, ST. OF LA. (2017) (on file with author).

293. Jacob Batte, *Tensions Arise Between Local Indian Tribes over Effort to Abandon Sinking Island*, HOUMA TODAY (May 11, 2016), <http://www.houmatoday.com/news/20160511/tensions-arise-between-local-indian-tribes-over-effort-to-abandon-sinking-island>.

294. *The Resettlement of Isle de Jean Charles: Report on Data Gathering and*

in the BIA's proposed finding against recognizing the UHN stating the Houma could achieve federal recognition as six or more small tribes rather than a single tribe.<sup>295</sup> Hence, the BIA's negative proposed finding seems to have been designed to fracture the Houma in the long tradition of the United States' divide-and-conquer Indian policy.<sup>296</sup>

The Houma are currently amidst another battle with an oil company. Energy Transfer Partners (ETP), the same company that is building the DAPL, is building an oil pipeline that will transport nearly half a million barrels of oil a day across south Louisiana.<sup>297</sup> Although the Bayou Bridge Pipeline will not traverse any land currently in the UHN service area, it does cross land historically occupied by the Houma.<sup>298</sup> That is, the Bayou Bridge Pipeline will likely defile Houma sacred sites because the UHN lacks federal recognition; thus, it lacks legal standing to

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*Engagement Phase*, U.S. DEPT. OF HOUSING AND URBAN DEV. 1, 22 (May 2017), <http://isledenjeancharles.la.gov/sites/default/master/files/public/IDJC-Final-Report-Update.pdf>.

295. *Proposed Finding Against Federal Recognition of the United Houma Nation, Inc.*, 59 FED. REG. 66118, 66119 (Dec. 22, 1994), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001466.pdf> ("There is the possibility though not well-documented at this time, that some or all of the component communities on the lower bayous may meet criteria 83.7 (b) and (c) from 1880 to the present, as separate communities.").

296. Lauren Gold, *Mission Impossible: Native San Gabriel Valley Tribes Seek U.S. Recognition*, PASADENA STAR-NEWS (June 3, 2013), <https://www.pasadenastarnews.com/2013/06/03/mission-impossible-native-san-gabriel-valley-tribes-seek-us-recognition/> (noting the split of the Gabrielenos into five groups makes it much less likely for the Gabrielenos to gain federal recognition); Jay Tavaré, *Divide and Conquer*, HUFFPOST (Aug. 24, 2011), [https://www.huffingtonpost.com/jay-tavare/divide-and-conquer\\_b\\_927818.html](https://www.huffingtonpost.com/jay-tavare/divide-and-conquer_b_927818.html); *War of 1812 Holds Key to Native Americans' "Banishment"*, WILTON BULLETIN (Nov. 3, 2012), <https://www.wiltonbulletin.com/799/war-of-1812-holds-ke-to-native-americans-qbanishmentq/>; Alicia Ault, *A Territorial Land Grab That Pushed Native Americans to the Breaking Point*, SMITHSONIAN.COM (Oct. 9, 2017), <https://www.smithsonianmag.com/smithsonian-institution/territorial-grab-pushed-native-americans-breaking-point-180965142/> ("The Fort Wayne treaty—most likely, by design—seemed to pit tribe against tribe—a typical divide and conquer strategy.").

297. Karen Graham, *Dakota Access Fight Moves to Louisiana's Bayou Bridge Pipeline*, DIGITAL J. (Jan. 22, 2017), <http://www.digitaljournal.com/news/environment/dakota-access-fight-moves-to-louisiana-s-bayou-bridge-pipeline/article/484216> (noting the pipeline will carry 480,000 barrels of oil a day across Louisiana if it is completed).

298. *Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgment of the United Houma Nation, Inc.*, DEP'T OF THE INTERIOR 1, 137 (1994), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/ofa/petition/pdf/idc-001465.pdf> (noting the Houma were located in present day St. James and Ascension Parishes in the late 1700s and early 1800s).

protect its historic holy places.<sup>299</sup> ETP has already illegally destroyed sacred sites in order to accelerate the construction of the DAPL,<sup>300</sup> and the UHN has fewer legal rights than the federally recognized Standing Rock Sioux Tribe. Furthermore, the Bayou Bridge Pipeline will pass beneath the Bayou Lafourche, which is a major source of drinking water for the Houma.<sup>301</sup> Bayou Bridge is a serious threat to the Houma water supply because the DAPL has already leaked.<sup>302</sup> The potential harm to the environment remains unknown because the Army Corps of Engineers refuses to conduct a full Environmental Impact Statement of Bayou Bridge.<sup>303</sup>

## VI. CONCLUSION

Unfortunately, the struggles that the Standing Rock Sioux Tribe and the UHN are currently facing are not unique. Indigenous people have long suffered egregious violations of their rights at the hands of industry.<sup>304</sup> Though the United States signed the United Nations Declaration on the Rights of Indigenous Peoples in 2010,<sup>305</sup> the Declaration has not carried any weight in United States courts.<sup>306</sup> In fact, many tribal leaders

299. Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 100 (2009) (noting that Texaco discovered a burial site in the Houma's territory but the Houma were unable to stop the site from being excavated because the Houma are not federally recognized).

300. Larry Buhl, *Destruction of Sacred Burial Grounds Prompts Federal Judge to Protect Some Tribal Sites from Dakota Access Pipeline*, DESMOG (Sep. 6, 2016), <https://www.desmogblog.com/2016/09/06/dakota-access-pipeline-sacred-sites-federal-judge>.

301. Raúl Grijalva, *Letter to Lieutenant General Todd T. Semonite*, HOUSE COMM. ON NAT. RES. (Nov. 21, 2017), <http://democrats-naturalresources.house.gov/imo/media/doc/2017-11-21%20RG%20to%20Army%20Corps%20on%20Bayou%20Bridge%20EIS.pdf>.

302. Cole Kazdin, *The Dakota Access Pipeline Is Already Leaking*, VICE (May 11, 2017), [https://www.vice.com/en\\_us/article/d7adaj/the-dakota-access-pipeline-is-already-leaking](https://www.vice.com/en_us/article/d7adaj/the-dakota-access-pipeline-is-already-leaking).

303. Cherri Foytlin, *Joint Statement on the U.S. Army Corps of Engineers' Approval of the Bayou Bridge Pipeline*, BOLD LA. (Dec. 15, 2017), <http://stopetp.org/2017/12/15/bbp-approval-response/>.

304. James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc A/HRC/24/41 (2013), [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\\_en.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf).

305. *President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples*, NAT'L CONG. OF AM. INDIANS (Dec. 16, 2010), <http://www.ncai.org/news/articles/2010/12/16/president-obama-announces-u-s-support-for-united-nations-declaration-on-the-rights-of-indigenous-peoples>.

306. *Isaac v. Sigman*, 2017 WL 2267264, at \*6 (D.N.J. May 24, 2017) ("The Third Circuit has recognized that, when the United Nations adopts a nonbinding

fear a new tribal termination may be coming to Indian country.<sup>307</sup>

The United States' past transgressions continue to haunt the field of federal Indian law, and this is especially true in the realm of federal recognition. The Little Shell Tribe of Montana was forcibly removed from its homeland; consequently, it now has "gaps" in its historical record that make passing through the federal recognition process impossible.<sup>308</sup> Similarly, racist state policies in the Deep South have made it exceedingly difficult for tribes in the region, like the MOWA Choctaw, to prove their "Indian-ness" in the federal recognition process.<sup>309</sup> The Duwamish have been banned from living in the City of Seattle—which is named for their great leader—because of their identity and are accepted as a tribe by other federally recognized tribes.<sup>310</sup> Nevertheless, the Duwamish have been denied federal recognition.<sup>311</sup> Countless other examples exist.<sup>312</sup>

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declaration that contains a statement of principles, no private right of action exists . . . other federal courts have concluded that this particular Declaration does not create a private right of action."); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2018 WL 1385660, at \*5 (D.D.C. Mar. 19, 2018) ("Courts have consistently held that UNDRIP is a non-binding declaration that does not create a federal cause of action.").

307. Ruth Hopkins, *Trump's Termination Era 2.0*, INDIAN COUNTRY TODAY (Dec. 13, 2016), <https://indiancountrymedianetwork.com/news/opinions/trumps-termination-era-2-0/>; Indigenous Law and Policy Center, *Donald Trump, and Indian Country's Termination Fears*, TURTLE TALK, <https://turtletalk.wordpress.com/2017/05/08/donald-trump-and-indian-countrys-termination-fears/> (May 8, 2017) ("Indian country's biggest fear with a Trump Administration has been that the Federal Government would usher in yet another era of tribal termination."); Tom Perez, *Trump Is Breaking the Federal Government's Promises to Native Americans*, L.A. TIMES (Aug. 7, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html> ("By steering the government toward Termination-era policies, Trump threatens the health and prosperity of Native Americans and drags us all backward. This approach has devastated Indian Country before. We cannot allow it to happen again.").

308. Gabriel Furshong, *Will the Little Shell Tribe Finally Be Recognized?*, HIGH COUNTRY NEWS (Dec. 7, 2015), <http://www.hcn.org/issues/47.21/will-the-little-shell-tribe-finally-be-recognized>.

309. Garry Mitchell, *Alabama Indian Tribe Seeks Federal Recognition*, NEWS OK (Dec. 2, 2002), <http://newsok.com/article/2817296> (noting "racially discriminatory policies contributed to the lack of documentary records" that prevent the MOWA Choctaw from proving they are a tribe).

310. Richard Walker, *10 Things You Should Know About the Duwamish Tribe*, INDIAN COUNTRY TODAY (July 16, 2015), <https://indiancountrymedianetwork.com/news/politics/10-things-you-should-know-about-the-duwamish-tribe/>.

311. *Summary Under the Criteria and Evidence for Final Decision on Judicial Remand Against Acknowledgment of the Duwamish Tribal Organization*, DEPT OF THE INTERIOR (July 24, 2015), [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/025\\_duwami\\_WA/025\\_fdr2.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/025_duwami_WA/025_fdr2.pdf).

The Houma need and deserve federal recognition. It is cruel for a group of people to suffer the slings and arrows of racism because of their Houma blood while the BIA claims the Houma do not exist. This injustice is compounded by the environmental devastation the Houma have suffered. The Houma's inability to exercise jurisdiction over their land leaves oil companies—like BP—unaccountable for the destruction they have caused to the Houma's environment and culture. As former UHN Chief Brenda Dardar-Robichaux testified to the Subcommittee on Insular Affairs Wildlife and Oceans:

The relationship between the Houma People and these lands is fundamental to our existence as an Indian nation. The medicines we use to prevent illnesses and heal our sick, the places our ancestors are laid to rest, the fish, the shrimp, crabs and oysters our people harvest, our traditional stories and the language we speak are all tied to these lands inextricably. Without these lands, our culture and way of life that has been passed down generation to generation will be gone.<sup>313</sup>

The Houma have been in the federal recognition process since 1979. Congress should intercede and enact legislation recognizing the Houma. Recently, Congress passed a bill that President Trump signed into law granting six Virginia tribes federal recognition.<sup>314</sup> Virginia's tribes struggled in the administrative recognition process because of the state's racist history.<sup>315</sup> The Houma face similar documentation challenges as a result of Louisiana's racist past that make it exceedingly difficult for the tribe to pass through the administrative

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312. See, e.g., P. Denetclaw & B. Bennett, *CA Tribe Has New Recognition Hopes After Costly, Two-Decade Struggle*, INDIAN COUNTRY TODAY (July 21, 2014), <https://indiancountrymedianetwork.com/news/politics/ca-tribe-has-new-recognition-hopes-after-costly-two-decade-struggle/> (noting the Muwekma Ohlone Tribe was federally recognized but dropped from the list of recognized tribes because a BIA agent thought it was easier to remove the tribe from the list of recognized tribes than find the tribe land); *Racial Classification*, LUMBEE HIST., <http://lumbee.web.unc.edu/online-exhibits-2/racial-classification/> (last visited Mar. 14, 2018) (discussing the Lumbee racial classification).

313. Erick Rhoan, *The Rightful Position: The BP Oil Spill and Gulf Coast Tribes*, 20 SAN JOAQUIN AGRIC. L. REV. 173, 178 (2011).

314. Thomasina E. Jordan, *Indian Tribes of Virginia Federal Recognition Act of 2017*, H.R. 984, 115th Cong. (2017–2018).

315. Katherine Womack, *Future of Equality for Virginia's Tribes: Reform the Federal Acknowledgement Process to Repair Injustice*, 15 RICH. J.L. & PUB. INT. 475 (2011).

recognition process. However, the Houma face an obstacle that the Virginia tribes did not.

Each day that passes results in more of the Houma's traditional land washing away, and with it, Houma culture. The Houma are worthy of federal recognition and need recognition to protect their land and preserve their way of life. Congress should pass legislation granting the Houma federal recognition. Without federal recognition, the Houma's history, culture, and way of life will be lost to the ever-encroaching sea.