

THE UNITED STATES FIRST CLIMATE
RELOCATION:
RECOGNITION, RELOCATION, AND
INDIGENOUS RIGHTS AT THE ISLE DE JEAN
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INTRODUCTION

In 2009, the Office of the United Nations High Commissioner for Refugee’s predicted that up to 200 million people would be forced to relocate due to climatic events by 2050.¹ More recent estimates put the number of climate displaced persons at over a billion by the middle of the century.² Even this number may be low as over 20 million people have been displaced by climatic events each year since 2008.³ The United States will not be spared from this issue either as approximately 40% of the United States population resides in coastal areas.⁴ Sea-level rise is expected to inundate between 272 and 427 United States communities by the year 2060.⁵ Despite the presence and magnitude of climate displacement, there are no international laws governing people who are forced to relocate due to climatic events.⁶ The United States does not have a plan to address climate relocation either.⁷

1. Office of the United Nations High Commissioner for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law* 3 (Bonn: United Nations, 2009), <https://perma.cc/YY87-XRU3>.

2. Charles Geisler & Ben Currens, *Impediments to Inland Resettlement Under Conditions of Accelerated Sea Level Rise*, 66 LAND USE POL’Y 322, 323 (2017) (noting that high population growth could put 1.4 billion in low elevation coastal zones by 2060).

3. *Frequently Asked Questions on Climate Change and Disaster Displacement*, United Nations High Commissioner for Refugees (Nov. 6, 2016), <https://perma.cc/W6RV-WYR6> (“An annual average of 21.5 million people have been forcibly displaced by weather-related sudden onset hazards – such as floods, storms, wildfires, extreme temperature – each year since 2008.”).

4. Rebecca Lindsey, *Climate Change: Global Sea Level*, Climate.gov (Sep. 11, 2017), <https://perma.cc/J4ZB-QANC> (“In the United States, almost 40% of the population lives in relatively high population-density coastal areas, where sea level plays a role in flooding, shoreline erosion, and hazards from storms.”).

5. Kristina A. Dahl, Erika panger-Siegfried, Astrid Caldas, & Shana Udvardy, *Effective Inundation of Continental United States Communities with 21st Century Sea Level Rise*, ELEM SCI ANTH, 5:37 (2017), <https://perma.cc/QJQ2-MNEV> (see Table 1).

6. Elizaveta Barrett Ristroph, *When Climate Takes a Village: Legal Pathways toward the Relocation of Alaska Native Villages*, 7 CLIMATE L. 259, 265 (2017) (noting “the lack of an international framework to facilitate ‘climate refugees’.”); Anthony Oliver-Smith & Alex de Sherbinin, *Resettlement in the Twenty-First Century*, FORCED MIGRATION REV. 24 (Feb. 2014), <https://perma.cc/8FG4-R562> (“There are still no globally binding agreements or treaties that guarantee the rights of people who have been uprooted by causes such as climate change, environmental disruption, disasters or development projects.”).

7. Victoria Herrmann, *The United States’ Climate Change Relocation Plan: What Needs to Happen Now*, Atlantic Council 1 (Aug. 2017), <https://perma.cc/9FBM-NZXC> (stating that “the US federal government remains ill-prepared to deal with the immense and

However, the United States awarded a \$48 million grant to relocate the indigenous inhabitants of the Isle de Jean Charles in 2016.⁸ The Isle de Jean Charles is an extreme example of the ravages of coastal erosion and rising sea levels.⁹ The Isle de Jean Charles had a land mass of over 22,000 acres in 1955, but today it is a mere 320 acre strip.¹⁰ The Island once had a population of 750 people,¹¹ but erosion and climatic events have driven all but roughly 100 away.¹² The remaining residents of the Island have been named “the United States first climate refugees.”¹³ Although the relocation of the Isle de Jean Charles community is supposed to serve as “a model for future climate change resettlements across the country,”¹⁴ the relocation has gotten off to a rocky start.

While this article focuses almost exclusively on the Isle de Jean Charles relocation, it hopes to be useful to other climate induced relocations. Section I begins with a discussion of the two major factors contributing to the disappearance of Louisiana’s coast, the blocking of the Mississippi River and the oil industry. In Section II, the article provides an overview of federal recognition, a short history of Louisiana’s coastal tribes, and how being

undeniable human security challenge at hand. At present, there is no dedicated funding, dedicated lead agency, or dedicated policy framework to guide communities in need of relocation.”); Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL’Y 457, 462 (2015) (noting that no federal agency has taken the lead in the proposed relocation of Alaska Native Villages).

8. Office of Community Dev. Disaster Recovery Unit State of Louisiana, *LA Receives \$92 Million from U.S. Dept. of Housing and Urban Development for Coastal Communities, Disaster Resilience*, (Jan. 25, 2016), <https://perma.cc/5GY9-SP52> [hereinafter, “OCD”].

9. Julie Dermansky, *Climate Change Threatens Louisiana’s Isle de Jean Charles, but Doesn’t Dampen Holiday Cheer*, Desmog (Dec. 24, 2015), <https://perma.cc/PQX5-3H68> (“The island is ground zero for climate change. It is impacted by severe storms, rising tides and coastal erosion all at the same time.”); First People’s Conservation Council, *Our Communities—Isle de Jean Charles Biloxi-Chitimacha-Choctaw*, <https://perma.cc/2HVS-HNSN> (last visited Dec. 11, 2017) (“We are on the front lines of coastal erosion and the effects of global warming. Our lands fast eroding, loosing [sic] the battle would mean a genocide of our Tribe.”).

10. OCD, *supra* note 8.

11. Doug Herman, *Prospects Are Looking Up for This Gulf Coast Tribe Relocation to Higher Ground*, SMITHSONIAN.ORG (Aug. 9, 2018), <https://perma.cc/VKH8-CLBV>.

12. *The Resettlement of Isle de Jean Charles: Report on Data Gathering and Engagement Phase 11* (Nov. 2016; updated May 2017), <https://perma.cc/GA5V-ZL3D> [hereinafter, “Resettlement Report”].

13. 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’*, THE NEW YORK TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html>; Madison Margolin, *First US Climate Refugees Get \$48 Million to Move*, THE CHRISTIAN SCIENCE MONITOR (May 3, 2016), <https://www.csmonitor.com/Environment/2016/0503/First-US-climate-refugees-get-48-million-to-move>.

14. OCD, *supra* note 8.

denied federal recognition has impacted them. Section III compares federal Indian law with the rights of indigenous peoples under international law, along with a discussion of the numerous international indigenous human rights violations Louisiana's coastal tribes have suffered. Then in Section IV, the article discusses the initial confusion surrounding the relocation grant. Section V then provides a summary of Phase I of the relocation project. Finally, Section VI explores unanswered questions relating to the grant.

I. HOW THE RESIDENTS OF THE ISLAND BECAME "CLIMATE REFUGEES"

Although numerous news reports have called the Islanders "climate refugees," the moniker is not appropriate according to current refugee law. Legally, status as a "refugee" requires that a person have a legitimate fear of persecution.¹⁵ The residents of the Isle de Jean Charles are not moving because of persecution; in fact, many of the Island's residents like their current living situation.¹⁶ They are moving because their land is vanishing. Thus, they are more aptly denoted as "climate migrants"¹⁷ or "climate-displaced persons"¹⁸ though these terms are not without controversy.¹⁹

Louisiana has lost over 2,000 square miles of land since the 1930s.²⁰ On average, the state lost a football field worth of land every hour between 1985 and 2010.²¹ The rate has slowed in recent years but can increase at any

15. *Convention and Protocol Relating to the Status of Refugees*, United Nations High Commissioner for Refugees, Art. 1(A)(2), <http://www.unhcr.org/en-us/3b66c2aa10>.

16. *Resettlement Report*, *supra* note 12, at 11 (noting that 28 of the Island's residents openly state they do not want to move).

17. Carey DeGenaro, *Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond*, 86 U. COLO. L. REV. 991, 994 (2015) ("The term 'climate migrants' refers to individuals or groups of individuals induced to leave their home country as a result of the impacts of climate change.").

18. Marissa S. Knodel, *Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific*, 14 VT. J. ENVTL. L. 127, 144 (2012) (examining whether the definition of refugee should be expanded to include climate-displaced persons).

19. The fact that the residents of the Isle de Jean Charles are being forced to relocate due to environmental change is beyond dispute. However, which human displacements can be attributed to environmental changes is not always straightforward. For example, people fleeing Syria's civil war have been called climate refugees. See Jordan Wendle, *The Ominous Story of Syria's Climate Refugees*, SCIENTIFIC AMERICAN (March 2016), <https://perma.cc/U3C3-JUXV>.

20. *Land Loss*, Restore the Mississippi River Delta (2017), <https://perma.cc/NY7E-9UNX>.

21. David Hammer, *Verify: Louisiana Is Not Losing a Football Field of Land Every Hour*, WWLTV (Oct. 12, 2017), <https://perma.cc/SG9P-PCKK> ("[Louisiana] never has lost land at any constant rate that would show itself 'every hour.' But over the 25-year span from 1985 to 2010, it did lose about a football field per hour, on average.").

moment.²² Though climate change has adversely impacted Louisiana's coastline, the seeds of its doom were not sowed by CO₂ emissions.²³ While many things have contributed to Louisiana's coastal erosion,²⁴ this section discusses the two major factors that have caused Louisiana to lose a land mass between the size of Rhode Island and Delaware from its coast.²⁵

A. Taming the Mississippi

Blocking the Mississippi River was the first major blow to Louisiana's coast. Like all rivers, the Mississippi River has flooded and altered its course over the centuries.²⁶ This is part of the natural cycle and the floods deposit land building sediment.²⁷ In fact, South Louisiana's unique shape is the result of the Mississippi's path meandering over millennia.²⁸

Although natural, the Mississippi's floods made France's efforts to establish a colony in Louisiana difficult during the early 1700s. When the Mississippi overflowed in 1719 and soaked New Orleans, the French immediately began levee construction.²⁹ The French even required

22. Mark Schleifstein, *Louisiana Land Loss, While Slowing, Still a Football Field Every 100 Minutes*, THE TIMES-PICAYUNE (Jul. 12, 2017), <https://perma.cc/AZ9N-NALJ> (noting the rate of land loss in Louisiana has slowed, but that events, such as hurricanes, can accelerate the loss rate).

23. *Biloxi-Chitimacha-Choctaw Indians: Rising Tides*, Northern Ariz. University (2017), <https://perma.cc/2Z92-ESWJ> ("The plight of the islanders certainly did not start with global warming. It is the result of a half-century of irresponsible oil and natural gas extraction practices and a levee project that left the islanders at the mercy of some Earth's most severe storms.").

24. For example, nutria, large rodents introduced to Louisiana by accident from South America, eat the vegetation that holds Louisiana's wetlands together and "are currently affecting an estimated 100,000 acres of coastal wetlands." See *Nutria, Eating Louisiana's Coast*, U.S. Geological Survey/National Wetlands Research Center (Jun. 4, 2001), <https://perma.cc/4M4G-B7GW>.

25. Geography, *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (last revised Dec. 5, 2012), <https://perma.cc/QH2P-5H7T> (noting Rhode Island has a total area of 1,545 square miles, and Delaware has a total area of 2,489 square miles).

26. William Sargent, *Letting Mississippi Run Its Natural Course Could Save New Orleans from Hurricanes*, THE CHRISTIAN SCIENCE MONITOR (May 19, 2011), <https://perma.cc/L46P-RSV8> ("For thousands of years, the Mississippi River has naturally writhed back and forth like a water hose, spewing muddy sediment loads first one place then another along several hundred miles of coast.").

27. *Land Loss*, *supra* note 20 (noting sediment deposition from the Mississippi River built Louisiana's wetlands).

28. John McPhee, *Atchafalaya*, THE NEW YORKER (Feb. 23, 1987), <https://perma.cc/N54M-ZLDK> (describing how the Mississippi's changing course shaped Louisiana).

29. J. David Rogers, *Chapter Four: History of the New Orleans Flood Protection System*, Independent Levee Investigation Team New Orleans Levee Systems Hurricane Katrina 4-3 (May 17, 2006), <https://perma.cc/VX26-JMGQ> (noting that Bienville responded to a flood in 1719 ordering the construction of levees); *The Orleans Levee District—A*

landowners to build levees on their riverfront property.³⁰ Efforts to tame the Mississippi continued over the years and resulted in 1,500 miles of levees being built by 1927, but this still was not enough to stop the river from flooding.³¹

The Great Flood of 1927 broke levees all along the Mississippi, destroyed thousands of structures, killed approximately 1,000 people, and displaced over half a million more.³² Congress responded to the flood's devastation by passing the Flood Control Act of 1928. As a result of the Act, the federal government took responsibility for levee construction and flood control along the Mississippi. The federal flood control effort has succeeded in preventing the Mississippi from flooding as severely as it did in 1927. However, shackling the Mississippi in its path has deprived Louisiana's coast of sediment. Lack of sediment is a major reason why Louisiana's coast is disappearing so fast.³³

B. The Oil Industry

People have known that Louisiana is loaded with oil for centuries. The state's indigenous inhabitants used the oil that naturally oozed from the

History, Orleans Levee District, <https://perma.cc/YEP9-ZTAX> (last visited Dec. 11, 2017) (noting a flood in 1719 prompted Bienville to begin construction of a levee).

30. *A History*, *supra* note 29 (“In 1743 an ordinance was passed threatening landowners with loss of their property if their levees were not rebuilt.”); Katherine Kemp, *The Mississippi Levee System and the Old River Control Structure*, THE LOUISIANA ENVIRONMENT (Jan. 6, 2000), <https://perma.cc/WYP2-BKLA> (“By 1743, French landowners were required to build and maintain the levees along their riverfront property or forfeit their lands to the French crown.”); *Flood Control & Land Loss in Louisiana*, Louisiana Resiliency Assistance Program (2017), <https://perma.cc/5K76-LSDA> [hereinafter, “*Flood Control & Land Loss*”] (“The colonial French government required property owners to construct their own levees in a law passed in 1724.”).

31. Alexis C. Madrigal, *What We've Done to the Mississippi River: An Explainer*, THE ATLANTIC (May 19, 2011), <https://perma.cc/N5F3-33M4> (“By the time of the great 1927 flood, there were 1500 miles of levees, and that was only the beginning.”).

32. *Flood Control & Land Loss*, *supra* note 30 (“Levees broke in 246 places in the lower Mississippi Valley, inundating 27,000 square miles of land, displacing 700,000 people, killing 1,000 more (246 in the New Orleans area), and damaging or destroying 137,000 structures.”); Susan Scott Parrish, *The Great Mississippi Flood of 1927 Laid Bare the Divide Between the North and the South*, SMITHSONIAN (Apr. 11, 2017), <https://perma.cc/U5D2-W8DN> (noting that over 600,000 people were made homeless by the flood and up to 1,000 people were killed by it).

33. Jaap H. Nienhuis, Torbjorn E. Tornqvist, Krista L. Jankowski, Anjali M. Fernandes, & Molly E. Keogh, *A New Subsidence Map for Louisiana*, The Geological Society of Am. (2017), <https://perma.cc/7TYL-U4FD> (naming levees as the major cause of Louisiana's rapid subsidence though the process has likely been occurring naturally at a much slower rate); Craig E. Colten, *Environmental Management in Coastal Louisiana: A Historical Overview*, 33 J. COASTAL RES. 699, 702 (2017) (noting that levees redirect sediment that would have been deposited on the land into the Gulf of Mexico).

Earth as medicine.³⁴ Hernando DeSoto was the first European to set foot in Louisiana in 1540, and he, along with subsequent explorers, noted the presence of oil in Louisiana.³⁵ The first oil producing well occurred in 1886 at the state's Sulphur Mines.³⁶ Two years later, a night watchman struck a match near a water well in Shreveport and detected natural gas seeping from it.³⁷

Louisiana's oil boom began with the Heywood well in Jennings in 1901,³⁸ and the oil and gas industry was largely unregulated when it took off.³⁹ To facilitate the movement of heavy equipment, oil and gas companies carved thousands of miles of canals through Louisiana's wetlands.⁴⁰ These canals allow saltwater to enter the freshwater marsh and kill the freshwater

34. *History of Oil & Gas in Louisiana the Gulf Coast Region*, La. Department of Natural Resources, <https://perma.cc/8EU4-LYT2> (last visited Dec. 12, 2017) (“Indians in Louisiana used oil from natural seeps for medicines.”).

35. *Id.* (“In 1540, Hernando DeSoto discovered the resource. Early explorers called the oil “stone pitch” and used it to seal their ships.”).

36. *First Louisiana Oil Well*, American Oil & Gas Historical Society (2017), <https://perma.cc/4Q67-U35C> (noting Professor Thomas Watson has found evidence suggesting Louisiana's first oil production occurred in 1886 rather than the widely reported date of 1901); see also *History of the Oil Industry*, Louisiana Mid-Continent Oil and Gas Association (accessed Dec. 11, 2017), <https://perma.cc/SF8N-ARMN> (“The Louisiana Oil and Coal Company drilled a well about 15 miles west of Lake Charles in search of oil but was unsuccessful although it did reveal very extensive sulfur deposits.”) [hereinafter, “*History of the Oil Industry*”].

37. *The History: How Did All This Start?*, Louisiana's Oil (Jul. 12, 2010), <https://perma.cc/F5FY-N6JD> (noting natural gas was accidentally discovered in 1870); *History of the Oil Industry*, *supra* note 36 (noting a night watchman struck a match and found gas in Shreveport in 1870).

38. *History of the Oil Industry*, *supra* note 36 (“The Heywood well six miles from Jennings was brought in, producing the first oil discovered in the state in commercial quantities and marking what is recognized as the birth of the industry in the state.”); *1902: Oil Is Discovered in Louisiana*, THE TIMES-PICAYUNE (Oct. 6, 2011), <https://perma.cc/S7CX-6PX8> (“The first successful oil well in Louisiana was drilled in Jennings in late 1901, spawning an industry that dominated the state for decades.”).

39. Diane Austin, et al., *History of the Offshore Oil and Gas Industry in Southern Louisiana Interim Report Volume I*, U.S. DEP'T OF THE INTERIOR 8 (Jul. 2004), <https://perma.cc/22HR-UHPP> (noting the dearth of environmental regulations when Louisiana's oil industry was forming).

40. 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> (“There are at least 10,000 miles of canals cut across coastal Louisiana to access rigs, navigate barges and construct pipelines.”); John Carey, *Louisiana Wetlands Tattered by Industrial Canals, Not Just River Levees*, SCIENTIFIC AM. (Dec. 1, 2013), <https://perma.cc/3Q3V-UEW4> (noting the harm done by the thousands of kilometers cut into wetlands by oil and gas companies).

flora that bind Louisiana's wetlands.⁴¹ Consequently, the saltwater intrusion causes coastal erosion.⁴²

The oil and gas industry has had devastating effects on Louisiana's coast. Vanishing wetlands caused by oil-industry activity has made Louisiana more vulnerable to hurricanes because the wetlands that once weakened storms are immensely diminished, offering less protection to coastal residents.⁴³ Furthermore, extraction of oil and gas causes the land to sink,⁴⁴ exacerbating the subsidence caused by building levees around the Mississippi.⁴⁵ Climate change is likely to compound these issues due to sea-level rise as well as stronger and more frequent hurricanes.⁴⁶ In addition to destroying homes, hurricanes destroy wetlands.⁴⁷

II. LOUISIANA'S COASTAL INDIGENOUS COMMUNITIES

Three tribes reside on Louisiana's coast in Terrebonne and Lafourche Parishes: the United Houma Nation (UHN), the Pointe-au-Chien Indian Tribe (PAC), and the Biloxi-Chitimacha-Choctaw Indians (BCC). The citizens of all three tribes are related and share the same culture. All three tribes have been located along Louisiana's coast for at least two centuries.

41. Kardish, *supra* note 40 (“[T]he canals disrupt the natural process that replenishes wetlands with sediment and allows saltwater intrusion that corrodes freshwater vegetation.”); Carey, *supra* note 40.

42. 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, <https://perma.cc/RSE5-7QCG> (last visited Mar. 14, 2018).

43. Louisiana Environmental Restoration, *supra* note 42 (“[Louisiana's wetlands] formed a natural barrier against hurricanes, which lose strength as they travel over land.”).

44. Laska, *supra* note 42 (noting that removing oil and gas creates a vacuum that leads to subsistence, and that Long Beach, California is a well-known example).

45. Nienhuis, et al., *supra* note 33 (noting that building levees to prevent the Mississippi River from flooding “is the fundamental culprit” of Louisiana's sinking wetlands).

46. Lindsey, *supra* note 4; 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*, MIAMI HERALD (Sep. 6, 2017), <https://perma.cc/98RY-6N4T> (“[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.”).

47. Lindsey, *supra* note 4; *Land Loss*, *supra* note 20.

Each of the tribes is an amalgamation of multiple tribes. Nevertheless, the UHN, PAC, and BCC adamantly disagree about their origins.

The section begins by providing an overview of federal Indian law and tribal federal recognition. Next, the section summarizes the history of Louisiana's coastal tribes. The section concludes by examining major events that have affected the tribes since the UHN's unsuccessful federal recognition bid.

A. Indian Tribes, the Environment, and Federal Recognition

Indian tribes are more than “private, voluntary organizations.”⁴⁸ Tribes are nations,⁴⁹ and their sovereignty predates the Constitution.⁵⁰ Tribal sovereignty means tribal citizenship is a political rather than a racial classification.⁵¹ Thus, individuals enrolled in a tribe are citizens of the tribe, not merely members.⁵² For tribal citizenship to carry any weight, however, individuals must be enrolled in a federally recognized tribe.

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

49. *Worcester v. Georgia*, 31 U.S. 515, 541–543 (1832) (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 125 (2002) (“The United States Constitution clearly recognized and ratified the status of Indian tribes as nations originally outside the federal union.”).

50. *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. State Tax Comm’n of Arizona*, 411 U.S. 164, 172–173 (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.”).

51. *Morton v. Mancari*, 417 U.S. 535, 553 (1974); *United States v. Antelope*, 430 U.S. 641, 646 (1977); Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DEN. U. L. REV. 141, 154 (1995) (“It has so far been possible to avoid such equal protection concerns in Indian law by pointing to the ‘political’ character of Indian identity within the venerable tradition of tribal sovereignty.”).

52. See generally Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Tribes Sovereign Power Over Membership*, 92 VA. L. REV. 793 (2006) (discussing tribal citizenship in the context of disenrollment); Berger, Bethany R., *Race, Descent, and Tribal Citizenship*, THE CIRCUIT. 7 Vol. 4, 29, (2013), <https://perma.cc/D38E-NS68> (“Tribal citizenship is necessary to vote in a tribe, and is required for certain benefits, such as distribution of per capita payments from casino profits”); William Norman, Jr., Kirke Kickingbird, and Adam Bailey, *Tribal Disenrollment Demands a Tribal Answer*, Vol. 43 HUMAN RIGHTS MAGAZINE No. 1, <https://perma.cc/8THV-4LTN> (“Like other governments, tribes define their own polities, including setting the requirements to be a citizen.”).

Federal recognition has been described as a “magical status”⁵³ because it is the key to tribal sovereignty. Federal recognition provides tribes with a formal government-to-government relationship with the United States⁵⁴ and enables tribes to have their own land bases that are largely outside of state control.⁵⁵ The United States Indian policy has gone through many swings over the years, and most were designed to stamp out tribal culture.⁵⁶ But since President Nixon, the United States Indian policy has been tribal self-determination.⁵⁷ Tribal self-determination has resulted in countless clashes between state and tribal law.⁵⁸

Since the dawn of the self-determination era, the federal government has favored federally recognized tribes taking control of their natural resources.⁵⁹ Tribal sovereignty, combined with the federal government’s

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

54. William J. Clinton, *Government-to-Government Relations With Native American Tribal Governments*, Memorandum for the Heads of Executive Departments and Agencies, (Apr. 29, 1994), <https://perma.cc/5CL4-QKFW> (“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*, Memorandum for the Heads of Executive Departments and Agencies, (Nov. 5, 2009), <https://perma.cc/J467-MNYF> (noting the government-to-government relationship between tribes and the United States).

55. *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.”).

56. Stephen L. Pevar, *THE RIGHTS OF INDIANS AND TRIBES* 1-13 (3rd ed.); William C. Canby Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 12-34 (5th ed.). The Indian Reorganization Act era, 1934-1953, is the only era when the federal government was not explicitly attempting to eliminate tribal culture prior to the Self-Determination Era, but even during the Indian Reorganization Act era, the federal government has been criticized as being extremely paternalistic. See Adam Creppelle & Walter Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 324 (2017) (“The Act succeeded in preventing land erosion but did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal activities.”)

57. Richard Nixon, *Special Message to the Congress on Indian Affairs* (Jul. 8, 1970), <https://perma.cc/YC9B-E2MD>; Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93- 638, 88 Stat. 2203.

58. E.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (holding a tribe’s wildlife regulatory authority over both Indians and non-Indians can pre-empt state wildlife regulations on a reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 227 (1987) (holding states cannot prohibit tribal gaming if states permit some forms of gaming); *Okla. Tax Comm’n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 516 (1991) (holding states cannot sue tribes to collect taxes).

59. Lynn H. Slade & Walter E. Stern, *Environmental Regulations on Indian Lands*, GP SOLO, Vol. 12, No. 4 (Fall 1995), <https://perma.cc/ZX2D-NJQ2> (noting Congress has taken action to improve tribal regulatory authority in the environmental realm); EPA Policy for the

tribal self-determination policy, enables tribes to enact environmental regulations that are more stringent than those of the surrounding state.⁶⁰ For example, the Clean Water Act allows tribes to be treated as states;⁶¹ consequently, the City of Albuquerque must comply with the Pueblo of Isleta's more stringent water quality standards.⁶² The Clean Air Act (CAA) also allows tribes to be treated as states,⁶³ and multiple tribes have utilized the CAA to protect their reservations from off reservation air pollution.⁶⁴ Indeed, the Ninth Circuit has held "a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation."⁶⁵ Most famously, the legal challenges mounted against the Dakota Access Pipeline are possible, in large part, because of the Standing Rock Sioux Tribe's federal recognition.⁶⁶

Tribal environmental sovereignty is only possible for federally recognized tribes, and many legitimate tribes, such as the Duwamish, Little Shell, and the United Houma Nation, are not federally recognized.⁶⁷ However, the matter is more complicated than simply categorizing tribes as federally recognized or not⁶⁸ because a tribe may be considered recognized

Administration of Environmental Programs on Indian Reservations (1984 Indian Policy), <https://perma.cc/ERN2-MM3J>; ("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.").

60. See 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, 522 (2015).

61. 33 U.S.C. 1377 (2016).

62. *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) ("[T]he 1987 amendment to the Clean Water Act clearly and unambiguously provides tribes the authority to establish NPDES programs in conjunction with the EPA. Under §§ 1311, 1341, 1342 and 1377, the EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.").

63. 42 U.S.C. 7601(d)(A) (2006).

64. Vanessa Baehr-Jones & Christina Cheung, *An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act*, 34 U.C. DAVIS L. REV. 189, 210–218 (2011) (discussing tribes that have utilized the Clean Air Act to redesignate their reservations as Class I zones).

65. *Nance v. EPA*, 645 F.2d 701, 715 (9th Cir. 1981).

66. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTH JUSTICE (Dec. 4, 2017), <https://perma.cc/MKT4-YB33>.

67. *Federal and State Recognized Tribes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 2016), <https://perma.cc/C447-9W2T>.

68. Ford, *supra* note 51, at 160 (stating that "tribes cannot be neatly divided into "recognized" and "nonrecognized" tribes for all purposes; rather, a tribe may "exist" for some purposes but not for others. . . . The legal principles developed under one statutory scheme often cannot be transferred to other situations because of the peculiar context in which the original principles were developed.").

for some purposes but not recognized for others.⁶⁹ Some of the tribes that lack federal recognition are recognized by states.⁷⁰ This provides the tribes with a sense of legitimacy and makes them eligible for certain federal benefits.⁷¹ Then there are tribes who lack both state and federal recognition. Hence, these tribes and their members are ineligible for many programs open to Indians.⁷²

Currently, federal recognition can be achieved in three ways: by an act of Congress, a federal court decision, and the administrative recognition process.⁷³ The federal recognition process has been widely critiqued.⁷⁴ In fact, it has been stated, “[I]t is apparent that the question of whether a tribe has been recognized is resolved without reference to the factual, ethnological characteristics, at the time of decision, of the Indian group involved.”⁷⁵ The federal recognition process is also extremely expensive and time consuming; indeed, petitioning tribes often spend millions of dollars and decades in the process.⁷⁶

69. See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (N.D. N.Y. 1975) (“There is nothing in the Act to suggest that ‘tribe’ is to be read to exclude a bona fide tribe not otherwise federally recognized.”).

70. Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79, 83 (2008).

71. *Id.* (“State recognition can also provide tribes with limited state and federal benefits, and clarify which tribes are exempt from the purview of state legislation that explicitly excludes ‘Indians.’”); Adam Creppelle, *Arbitrary Process: The Struggle for Federal Recognition of Louisiana’s Indian Tribes*, PEPPERDINE NEWSROOM (Dec. 12, 2016), <https://perma.cc/4GBD-4PAN> [hereinafter, “Creppelle, *Arbitrary Process*”] (“Though largely symbolic, state recognition makes tribes and their members eligible for certain state benefits and some federal benefits, like the Small Business Administration’s 8(a) Business Development Program and the Indian Arts and Crafts Act.”).

72. Enrollment in a federally recognized tribe is the generally accepted criteria for being “Indian.” However, determining whether someone is an “Indian” can be a complicated matter. See Hallie Bongar White, et al., *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 433 (2008) (“[T]here are dozens of different definitions of the term ‘Indian’ under federal law.”); Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 369 (2016) (See “Who Is an Indian?” discussing the difficulties of determining who is an Indian).

73. Act of Nov. 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791, Sec. 103(3).

74. E.g., see generally N. Bruce Duthu, *The Houma Indians of Louisiana: The Intersection of Law and History in the Federal Acknowledgement Process*, LOUISIANA HIST. Vol. 38, No. 4 (Aug. 1997); see generally Mark Edwin Miller, *Forgotten Tribes* (2004); see generally Adam Creppelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation’s Struggle for Federal Recognition*, 64 LOY. L. REV. 141 (Spring 2018) [hereinafter, “Creppelle, *Standing Rock*”]; Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629 (2013).

75. Ford, *supra* note 51, at 156–57 (quoting L.R. Weatherhead in *What Is an “Indian Tribe”?*—*The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 8 (1980)).

76. E.g., *Federal Recognition: Politics and Legal Relationship Between Governments*, Hearing Before the Committee on Indian Affairs United States Senate 112th Congress 2nd

B. A Brief History of Louisiana's Coastal Tribes

The Indians in Terrebonne and Lafourche Parishes lived largely in isolation during the nineteenth century. However, in the early twentieth century, the discovery of oil in the swamps and marshes suddenly made their homeland desirable.⁷⁷ Unscrupulous oilmen were more than willing to capitalize on their cultural differences with the Indians. Years of isolation from the rest of the state meant that many of the Indians did not speak English, much less read it.⁷⁸ The Indians were told they were signing leases when in fact they were signing their land over to an oil company for a scintilla of the land's value.⁷⁹ Louisiana also did not recognize customary tribal marriages and prohibited children born to unmarried parents from inheriting land; consequently, the Houma lost much of their land through Louisiana's inheritance law.⁸⁰ Even if the Indians were able to hold onto their land, the increased value resulting from the surrounding oil bonanza left them unable to pay the tax bill.⁸¹ Oil industry workers also resorted to violence to steal Indian land.⁸²

There was not much the Indians could do to stop the land theft. They suffered formal discrimination because of their Indian heritage.⁸³ Although BIA investigators in the 1930s categorized the Indians in Terrebonne and Lafourche Parish as a "mixed-blood Indian community,"⁸⁴ the BIA noted

Session, 2 (Jul. 12, 2012), <https://perma.cc/Y9FP-7AQ8> (Sen. Jon Tester noting the Little Shell have spent over \$2 million and 30 years in the federal recognition process).

77. Walter L. Williams, *Southeastern Indians Since the Removal Era* 101; Duthu, *The Houma Indians of Louisiana*, *supra* note 74, at 431.

78. Crepelle, *Standing Rock*, *supra* note 74.

79. Curry, Janel and Marie Roper, Southern Hospitality: Calvin's ties to Houma tribe reach across generations *The Calvin Spark* 54 (3): 27-30 (2008); Mark Moberg & Tawnya Sesi Moberg, *The United Houma Nation in the U.S. Congress: Corporations, Communities, and the Politics of Federal Acknowledgment*, 34 *URB. ANTHROPOLOGY* 85, 100 (2005).

80. Williams, *supra* note 77, at 101 (quoting BIA anthropologist Ruth Underhill's 1938 letter to Frank Speck: "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.").

81. Moberg & Moberg, *supra* note 79, at 100.

82. Crepelle, *Arbitrary Process*, *supra* note 71; Duthu, *The Houma Indians of Louisiana*, *supra* note 74, at n.97.

83. *Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgement of the United Houma Nation, Inc.* 241, BUREAU OF INDIAN AFFAIRS, (Dec. 13, 1994) <https://perma.cc/2EMM-H9Y2> [hereinafter, "*Summary UHN*"] (noting the segregation of whites, blacks, and Indians in Terrebonne and Lafourche Parishes); Crepelle, *Arbitrary Process*, *supra* note 71 ("Racial discrimination has always been a fact of life for the Houma.").

84. *Summary UHN*, *supra* note 83, 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.").

they were “scattered” along Louisiana’s coast.⁸⁵ This would have made providing services to the Indians costly, so the government chose not to recognize them.⁸⁶ Without recognition as *legitimate* Indians, local whites saw the opportunity to disparage them as “Sabines,” a derogatory term meaning not a real Indian.⁸⁷ Well into the twentieth century, Terrebonne and Lafourche Parishes had white, black, and Indian sections of churches, buses, other public places, and even established separate Indian schools.⁸⁸ A landmark legal victory in 1963 brought by Houma Indian, Margie Naquin, against the Terrebonne School Board led to the desegregation of the Parish’s schools.⁸⁹ Nevertheless, Houma children would remain in Indian schools until 1969.⁹⁰

Building off of the Civil Rights Movement, the Indians on Louisiana’s coast began to organize in the 1970s. They formed two groups, the Houma Alliance and the Houma Tribe,⁹¹ and in 1977, the federal government admitted that it has a treaty with these two tribes.⁹² The tribes united in 1979 giving rise to the United Houma Nation of today.⁹³ The UHN was one of the four tribes originally named to Louisiana’s Inter-Tribal

85. Williams, *supra* note 77, at 100.

86. Brian Klopotek, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES 58 (2011) (noting that Willard Beatty, the director of Indian education, advised against providing the Houma with Indian education funds in the 1930s because it would be financially burdensome for the agency. The decision had nothing to do with the Houma’s legitimacy as an Indian tribe).

87. Duthu, *The Houma Indians of Louisiana*, *supra* note 74, at n.98; Kimberly Krupa, “So-Called Indians” Stand Up and Fight: How a Jim Crow Suit Thrust a Louisiana School System into the Civil Rights Movement, LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION, Vol. 51, No. 2 at 176 (Spring 2010) (noting the term “Sabine” was used to raise questions about the Houma’s identity).

88. Summary UHN, *supra* note 83, at 241 (noting the three way racial segregation in Terrebonne and Lafourche Parishes); 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), <https://perma.cc/G7SN-AE35> (“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.”).

89. Krupa, *supra* note 87, at 172.

90. N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 218 (The Penguin Group eds., 2008).

91. S. Con. Res. 105, 2004 Leg. Reg. Sess. (La. 2004).

92. *American Indian Policy Review Commission Final Report Submitted to Congress*, Volume One of Two Volumes 450, (May 17, 1977), <https://perma.cc/8SMZ-ZQJH> [hereinafter, “AIPRC”] (The treaty has never been abrogated; therefore, the treaty, under current Indian law doctrine, remains in effect.); *Menominee Tribe v. United States*, 391 U.S. 404, 416 (1968).

93. S. Con. Res. 105, 2004 Leg. Reg. Sess. (La. 2004); Duthu, *The Houma Indians of Louisiana*, *supra* note 74, at n.43.

Council (ITC).⁹⁴ The UHN entered the federal recognition process in 1979,⁹⁵ and the oil industry, as it long had,⁹⁶ actively opposed the tribe's recognition.⁹⁷

The BIA issued a proposed finding against recognizing the UHN in 1994.⁹⁸ The BIA's finding has been widely critiqued by academics.⁹⁹ For example, the BIA denied links between the city of the Houma—where Houma Indians have lived for centuries—and the UHN.¹⁰⁰ Consequently, the BIA said “there is no evidence that the [UHN] descend from the historical Houma Indian tribe,”¹⁰¹ though it admitted that “Indian ancestry can be verified for the petitioner without doubt or question.”¹⁰² The BIA did offer the UHN's citizens a lifeline for federal recognition. It said the UHN may be able to successfully complete the federal recognition process as six or more smaller communities rather than as one single tribe.¹⁰³

Internal leadership issues combined with the tribe's recognition struggles prompted the PAC and the BCC to separate from the UHN and seek recognition apart from it. The vast majority of people enrolled in the PAC and BCC were previously enrolled in the UHN.¹⁰⁴ Although the PAC and

94. Denise Bates, *The Other Movement: Indian Rights and Civil Rights in the Deep South* 19 (2012) (“[I]ncorporated in 1974, the Inter-Tribal Council (ITC) of Louisiana served four Indian groups—the Houma Alliance, the Chitimacha, the Jena Band of Choctaws, and the Coushatta—that came together as a ‘formal unit’ to apply for grants.”).

95. United Houma Nation Inc., *Letter of Intent* (Jun. 2, 1979), <https://perma.cc/U9ZC-B6JD>.

96. Moberg & Moberg, *supra* note 79, 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.”).

97. Mark Miller, *supra* note 74, at 201 (noting that oil companies actively opposed the Houma's attempt at federal recognition); Moberg & Moberg, *supra* note 79, (noting that bills introduced to recognize the Houma were strategically drafted and introduced by legislators so as to avoid offending their oil industry donors).

98. *Summary UHN*, *supra* note 83.

99. E.g., Duthu, *The Houma Indians of Louisiana*, *supra* note 74; Mark Miller, *supra* note 74; Moberg & Moberg, *supra* note 79.

100. *Summary UHN*, *supra* note 83, at 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 74, at 167 (noting the peculiarity of the BIA questioning the nexus between the tribe and the town's name).

101. *Summary UHN*, *supra* note 83, at 10.

102. *Id.* at 33.

103. *Proposed Finding Against Federal Recognition of the United Houma Nation, Inc.*, BUREAU OF INDIAN AFFAIRS, (Dec. 13, 1994), <https://perma.cc/S7BR-J2MW> at 66,119 (“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.”).

104. *Summary Under the Criteria and Evidence for Amended Proposed Finding Against Federal Acknowledgement of the Pointe-au-Chien Indian Tribe* 4, BUREAU OF

BCC petitions have extracted large portions of their research from the UHN's petition,¹⁰⁵ both tribes deny any connection with the historic Houma tribe.¹⁰⁶ The BIA found this strange noting the PAC's original legal name upon separating from the UHN was the "Documented Houma Tribe."¹⁰⁷ The PAC and BCC have been denied recognition for the same reasons as the UHN.¹⁰⁸

The BCC and PAC are currently trying to achieve full recognition of their tribal status in the State of Louisiana. Both are actively seeking to join the ITC but have not been admitted as of this date.¹⁰⁹ The PAC and BCC have not achieved state recognition yet,¹¹⁰ though Louisiana grants persons enrolled in these tribes narrow recognition as Indians pursuant to the following resolution:

WHEREAS, unless these tribes are either formally recognized by the state during this regular session of the Legislature, or the members of these tribes have their Indian ancestry reacknowledged by the state, more federal Indian education funds will be lost in the parishes of Lafourche and Terrebonne.

THEREFORE, BE IT RESOLVED by the Legislature of Louisiana that the state of Louisiana formally reacknowledges the Indian ancestry of members of the Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogees ("BCCM"), the Bayou Lafourche Band of the BCCM, the Grand Caillou/Dulac

INDIAN AFFAIRS, (May 22, 2008), <https://perma.cc/54JW-6A59> [hereinafter, "*Summary PAC*"]; *Summary Under the Criteria and Evidence for Amended Proposed Finding Against Federal Acknowledgment of the Biloxi, Chitimacha Confederation of Muskogees, Inc. 4*, BUREAU OF INDIAN AFFAIRS, (May 22, 2008), <https://perma.cc/CT5E-Y7UR> [hereinafter "*Summary BCC*"].

105. The UHN petition is labeled 56. The PAC petition is 56b, and the BCC petition is 56a.

106. *Summary BCC*, *supra* note 104, at 4; *Summary PAC*, *supra* note 104, at 4.

107. *Summary PAC*, *supra* note 104, at 4.

108. *Amended Proposed Finding Against Acknowledgment of the Pointe-au-Chien Indian Tribe (PACIT) of Louisiana*, BUREAU OF INDIAN AFFAIRS, (May 30, 2008), <https://perma.cc/4FES-89SY>; BUREAU OF INDIAN AFFAIRS, *Amended Proposed Finding Against Acknowledgment of the Biloxi, Chitimacha Confederation of Muskogees, Inc. (BCCM) of Louisiana*, FEDERAL REGISTER: THE DAILY JOURNAL OF THE UNITED STATES GOVERNMENT, (May 30, 2008), <https://perma.cc/C4QT-8SFS>.

109. *The 5 Tribes*, INTER-TRIBAL COUNCIL OF LOUISIANA, <https://perma.cc/5CJD-7AK6> (last visited Dec. 13, 2017) (noting Louisiana's four federally recognized tribes and the UHN compose the state's intertribal council).

110. The BCC and PAC were recently named to the Native American Commission. H.R. HB660, Reg. Sess. (La. 2018) <https://perma.cc/EEZ9-N4EB>; however, the Director of Indian Affairs for Louisiana recently stated she was unaware of legislation altering the PAC and BCC's status under SCR 105.

Band of the BCCM, known collectively as the “BCCM Tribes” and the Pointe-au-Chien Indian Tribe for the sole purpose of qualifying for Indian education and health care benefits due these Native American citizens.¹¹¹

C. Cultural Struggles and the Environment

The culture of Louisiana’s coastal tribes is in grave danger due to coastal erosion. In a 2012 Senate Committee on Indians Affairs hearing, UHN Chief Thomas Dardar testified, “Coastal erosion affects our Tribe more than it does any other people.”¹¹² UHN citizens rely on the wetlands for food, craft materials, and medicines.¹¹³ However, much of the land that Chief Dardar and other indigenous families have relied on for generations has been lost to erosion.¹¹⁴ Due to coastal erosion, the barrier islands are vanishing, and this leaves the tribes more vulnerable to hurricanes.¹¹⁵ As the tribes are pushed farther inland, maintaining their traditional ways will become more difficult, possibly impossible.

The lack of federal recognition is a major reason why the tribes are unable to protect their environment. The Indian tribes on Louisiana’s coast were deemed unworthy of protection when levees were built to protect New Orleans and other population centers.¹¹⁶ Excluding the Indian tribes from the levees on a cost-benefit basis fits the definition of environmental racism,¹¹⁷

111. S. Con. Res. 105, 2004 Leg. Reg. Sess. (La. 2004).

112. *Testimony of Chief Thomas Dardar, Jr. Principal Chief of the United Houma Nation before the Senate Committee on Indian Affairs, Oversight Hearing on Environmental Changes on Treaty Rights, Traditional Lifestyles and Tribal Homelands* 3 (Jul. 19, 2012), <https://perma.cc/AK3Z-DKFM> [hereinafter “Testimony of Thomas Dardar”].

113. *Id.*

114. *Id.* (“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.”).

115. Terri C. Hansen, *Hurricane Gustav Leaves Louisiana Tribes with Severe Damage*, INDIAN COUNTRY NEWS, <https://perma.cc/83ZD-6XN5> (last visited on Aug. 29, 2018) (noting the United Houma Nation was the community hit the hardest by Hurricane Gustav); Heather Andrews Miller, *Houma Tribe Hammered by Hurricanes*, 23 WINDSPEAKER PUBLICATION 7, 9 (2005), <https://perma.cc/4QW5-V9W2> (noting the Houma were devastated by Hurricane Katrina); Herman, *supra* 11 (“Back then, a hurricane hit, we’d get a foot of water on the land here,” Billiot states.”Now, if there’s a hurricane in Texas, we get seven or eight feet of water here. There’s no more land, no buffers, no barrier islands to stop the surge.”).

116. Alicia Miranda Ollstein & Kira Lerner, *These Native American Tribes Are Fighting to Stop Their Land from Literally Disappearing*, THINKPROGRESS (Jan. 22, 2015) <https://perma.cc/UDD6-X6HV> (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*, FORUM JOURNAL VOL. 29, No.4, 63–64 (2015), <https://perma.cc/647J-ULVN> (noting the area where the PAC and Houma are located was excluded from the Louisiana Master Plan for coastal protection due to its expense).

117. A Brief History of Environmental Justice and EJ Defintions, ENVIRONMENTAL JUSTICE: A PRIMER (AUG. 29, 2018), <https://perma.cc/4WZX-4K2G> (“Whether, by conscious

much like rerouting the DAPL towards the majority American Indian Standing Rock Sioux Reservation in order to avoid the predominantly white city of Bismarck.¹¹⁸ Federal recognition, at the very least, would have given the tribes the opportunity to be heard¹¹⁹ and may very well have made the tribes worth including in the levee system.¹²⁰ Likewise, the tribes may have had land placed in trust if they were recognized.¹²¹ This would have made it much more difficult for oil companies to swindle the tribes of their lands.

As the tribes on Louisiana's coast are not federally recognized, they have few rights under federal law. The UHN has tried to stop oil companies from digging up the bones of its ancestors; however, the UHN efforts have been denied because the Native American Graves Protection and Repatriation Act only applies to federally recognized tribes.¹²² The tribes

design or institutional neglect, actions and decisions that result in the disproportionate exposure of people of color to environmental hazards and environmental health burdens.”); Thula Rafaela de Oliveira Pires and Virginia Totti Guimaraes, *Environmental Injustice, Environmental Racism, and the Framework for Socio-Racial Stratification in Sacrificial Zones: The Case of the Santa Cruz Neighborhood in Rio de Janeiro*, LAW.YALE.EDU (Aug. 29, 2018, 2:28 PM) <https://perma.cc/5EHZ-QVWZ> (“a form of institutional discrimination that materializes through policies, practices, or directives that affect differently and disadvantageously individuals, groups, or communities on the basis of their ethnic or racial identity.”); Rozelia S. Park, *Racism Through the Lens of Transboundary Movement of Hazardous Wastes*, 5 INDIAN JOURNAL OF GLOBAL LEGAL STUDIES: DIGITAL REPOSITORY @ MAURER LAW 2, 659 (1998) <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1138&context=ijgls> (“Conscious intent to continue racial subordination is not necessary: ‘any action that has negative predictable consequences for racial minorities can be an act of environmental racism It is only important that the practice in question perpetuates the dominance of one race over another.’”)

118. Phil McKenna, *Confidential Dakota Pipeline Memo: Standing Rock Not a Disadvantaged Community Impacted by Pipeline*, INSIDE CLIMATE NEWS (Mar. 6, 2017), <https://perma.cc/9L9A-5XYT>; Catherine Thorbecke, *Why a Previously Proposed Route for the Dakota Access Pipeline Was Rejected*, ABC NEWS (Nov. 3, 2016), <https://perma.cc/AKZ5-B97W> (noting Rev. Jesse Jackson identified the rerouting of the DAPL as “the ripest case of environmental racism I’ve seen in a long time.”).

119. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000), <https://perma.cc/7B9X-W6K4> (noting it is the United States policy to have “meaningful consultation and collaboration with tribal officials” but limiting this policy to federally recognized tribes).

120. 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, 23 (2003) (stating that federal recognition provides the best tool for including the Isle de Jean Charles in the levee. The article focuses on the Biloxi-Chitimacha-Choctaw but notes they separated from the United Houma Nation pursuant to the BIA’s finding); Ferguson-Bohnee, *supra* note 116, at 65 (noting that the PAC’s lack of federal recognition makes it difficult for it preserve its land and culture).

121. 25 U.S.C. § 5108 (1988).

122. Ryan M. Seidermann, *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 were unable to stop the site from being excavated because the Houma are not federally recognized).

have brought legal actions to protect their land but have been unsuccessful because they lack federal recognition.¹²³ Professor Mark Edwin Miller, author of two books on federal recognition, has stated, “To the oil company it was clear that tribal acknowledgment would give the Houmas standing in court to press land claims under federal Indian laws.”¹²⁴

The 2010 *Deepwater Horizon* disaster illustrates Professor Miller’s point. The over 100 million gallons of oil spilled into the Gulf of Mexico put several Indian families out of work and left them unable to subsist on the wetlands.¹²⁵ The UHN responded to the spill by submitting a damages claim to BP.¹²⁶ BP responded to the UHN thusly:

While BP indeed processes claims from federally recognized 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.¹²⁷

After conducting an examination of the BP oil spill, the National Association for the Advancement of Colored People issued a report concluding, “The oil industry lobby is blocking [the UHN’s] request because they want access to lands that would be protected under the federal designation.”¹²⁸ The NAACP’s conclusion has been reached by several others.¹²⁹ In fact, Professors Mark Moberg and Tawnya Sesi Moberg

123. Louisiana Land and Expl. Co. v. Verdin, 681 So.2d 63 (La.App. 1 Cir. 9/27/96); Dion v. Knap, 230 So.2d 842 (La. App. 1 Cir. 2/2/1970).

124. Mark Miller, *supra* note 74, at 201.

125. Crepelle, *Standing Rock*, *supra* note 74, at 179.

126. *The new millennium – 2000-2012*, BP.COM (last visited Aug. 29, 2018, 3:22 PM), (“With the new millennium came a new focus for the company – within the first five years it had changed its name to BP, set its sights on newer assets and established an alternative and low carbon energy business.”).

127. BP response to the United Houma Nation’s claim, November 18, 2010.

128. National Association for the Advancement of Colored People, *BP Oil Drilling Disaster—NAACP Investigation* 8, <https://perma.cc/3H92-XFRZ> (last visited Sept. 21, 2018).

129. Purvi Shah, Colette Pichon Battle, Vincent Warren, Alicia Garza, & Elle Hearn, *RadTalks: What Could Be Possible if the Law Really Stood for Black Lives?*, 19 CUNY L. REV. 91, 102 (2015) (quoting Colette 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*, DISASTER PREVENTION & MANAGEMENT, Vol. 25 Issue: 2, p.187 (2016) (noting the oil industries opposition to any activity that could make them liable for Louisiana’s land loss); Kari Huus, *Long-suffering Tribe Fears Oil May Strike Final Blow*, NBC NEWS (May 11, 2010), <https://perma.cc/FRX7-6L2Q> (quoting Michael

published an article in 2005 detailing how oil politics have subverted the UHN's federal recognition.¹³⁰

III. TURNING FROM FEDERAL INDIAN LAW TO UNDRIP

Federal Indian law offers little solace to the UHN and BCC because neither is federally recognized.¹³¹ Part of the reason federal Indian law is of little value to these tribes is that it remains rooted in antiquated and unjust doctrines. Contrarily, the leading source on indigenous rights in international law is more in tune with modern notions of justice.

This section briefly contrasts federal Indian law with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Then it highlights some of the key violations the BCC and UHN have suffered under the UNDRIP.

A. Federal Indian Law Versus UNDRIP

Although the United States official policy towards Indian tribes is self-determination,¹³² federal Indian law remains anchored in the past. The Doctrine of Discovery is widely regarded as racist today.¹³³ Nevertheless, the

Dardar, "oil companies petitioned the Bureau of Indian Affairs against recognition of the of the Houma tribe.").

130. Moberg & Moberg, *supra* note 79.

131. 25 C.F.R. 83.2(a); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (C o A D.C. 2008) ("To qualify for federal benefits, however, tribes must meet conditions set by federal law. The most important condition is federal recognition, which is 'a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.'"); John Railey, *Railey: Full federal recognition for Lumbee long overdue*, WINSTON-SALEM JOURNAL (Jun. 2, 2017), <https://perma.cc/Y93Q-UK2P> ("It's a status that would mean the tribe would get the federal benefits they need just as much as all the other American Indian tribes that have long received those benefits for necessities such as education, housing and economic development.").

132. Nixon, *supra* note 57; Indian Self-Determination and Education Assistance Act of 1975, *supra* note 57.

133. '*Doctrine of Discovery*', *Used for Centuries to Justify the Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, Permanent Forum Told*, Permanent Forum on Indigenous Issues, Eleventh Session HR/5088 (May 8, 2012), <https://perma.cc/7YF2-E5F2>; Tadodaho Sid Hill, *Stand for Human Rights for Indigenous Peoples and Renounce the 'Doctrine of Discovery'*, HUFFPOST, <https://perma.cc/GN22-726A> (last visited Jan. 18, 2018), ("It has been a long path to get the United Nations Permanent Forum on Indigenous Issues to confront the racist underpinnings of the Doctrine of Discovery, in part because the Papal Nuncio, the Vatican's representative to the UN, has claimed it is ancient history and no longer relevant."); Rebecca Nagle, *The 15th-Century Doctrine that Let Columbus 'Discover America' Is Now the Basis of Indian Policy*, THINKPROGRESS (Oct. 9, 2017), <https://perma.cc/52ML-L4SU> ("For us as Native Americans, it is the fight to reject the incredibly racist legal framework under which we still live. The same 15th-century doctrine that allowed Columbus to "discover Hispanola" (and gave his

Doctrine is a pillar of present-day Indian law;¹³⁴ in fact, the Supreme Court explicitly cited the Doctrine in 2005 to rule against an Indian tribe.¹³⁵ Likewise, the doctrine of congressional “plenary power” over Indians was born out of a belief in American Indian inferiority.¹³⁶ Congress, however, still claims plenary power over Indian tribes,¹³⁷ though the doctrine is wholly unmoored from any constitutional authority.¹³⁸ The foundations of federal Indian law have been slammed by the United Nations as “out of step with contemporary legal developments in indigenous rights.”¹³⁹

army license to rape, murder, and enslave Taino people) is the basis of U.S. federal Indian policy today.”).

134. Walter Echo-Hawk, *In the Light of Justice*, 2 (2013); Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization*, Location 4601 (2012) (“In the United States, the Doctrine of Discovery, its underlying legal principles, and sometimes even its nineteenth-century racist language of savagery are still used by courts and policy makers to decide the basic human rights of American Indian tribes over their traditional lands and resources.”).

135. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202 n.1 (2005).

136. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (holding congress has “plenary authority” over Indians because “their very weakness and helplessness” and “dependency”); Robert A. Williams, Jr., *Like a Loaded Weapon* 72 (2005) (“Significantly, the plenary power doctrine was generated directly out of the principles of white racial superiority affirmed by the Marshall model’s originating precedents in a series of major nineteenth-century Supreme Court decisions that followed the Marshall Trilogy.”); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 163 (2002) (“Indeed, this section demonstrates how the so-called federal Indian plenary power doctrine under which Congress claims complete, virtually unlimited, legislative control over any matter involving Indians, including the very continued existence of the Indian tribes, merely constitutes a racist American relic of ‘white man’s burden’ arguments employed to justify American colonialism.”).

137. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs”); *United States v. Wheeler*, 435 U.S. 313, 331 (1978) (“This problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether.”).

138. *See United States v. Bryant*, 136 S.Ct 1954, 1968 (2016) (Thomas, J., concurring) (“Congress’ purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress’ power to “regulate Commerce . . . with Indian Tribes,” not the Senate’s role in approving treaties, nor anything else—gives Congress such sweeping authority.”); Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 46 (2009) (“Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism—a colonialism in which a ‘conquered people’ only has authority at the ‘sufferance’ of the ‘conqueror.’”); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 262 (2007).

139. Committee on the Elimination of Racial Discrimination 59th Session Summary of the 1475th Meeting, CERD/C/SR/1475 p. 9, para. 33 (Aug. 22, 2001).

In stark contrast to federal Indian law, modern international law conventions respect the rights of indigenous people.¹⁴⁰ The UNDRIP is a landmark achievement in indigenous law because self-determination is at its essence.¹⁴¹ It was designed with substantial input from indigenous peoples.¹⁴² After decades of negotiations,¹⁴³ the UNDRIP was adopted by an overwhelming majority of the United Nations General Assembly in September of 2007.¹⁴⁴ Though the United States originally opposed the UNDRIP, it has since adopted it.¹⁴⁵ The UNDRIP is not legally binding in the United States; nonetheless, it “has both moral and political force.”¹⁴⁶

B. UNDRIP and the Isle de Jean Charles

Nearly all of the UNDRIP’s 46 articles are relevant to the Isle de Jean Charles relocation.¹⁴⁷ This section will focus on three interrelated principles from the UNDRIP: the right to self-determination, right to traditional lands, and the right to free, prior, and informed consent. Each shall be discussed separately below although there is overlap between the issues.

1. Right to Self-Determination

The UNDRIP states “Indigenous peoples have the right to self-determination.”¹⁴⁸ The UHN and BCC have been denied this right by the

140. *E.g.*, G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1 and 5(e)(vi); G.A. Res. 2200A (XXI) International Covenant on Economic, Social, and Cultural Rights, Art. 1, 3, and 15; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, Art. 1 and 27.

141. Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT’L L. & FOREIGN AFF. 1, 2 (2010) (“The right of self-determination for indigenous peoples within states is perhaps the most important right included in the Declaration on the Rights of Indigenous Peoples adopted by the United Nations in 2007.”).

142. S. James Anaya, *International Human Rights and Indigenous Peoples* 55 (2009) (“In 1988, the Working Group chairperson, Erica-Irene Daes, produced the first complete draft of the Declaration, which substantially reflected proposals submitted by indigenous peoples’ representatives.”).

143. *Id.* at 136 (noting the United Nations began to study the situation of indigenous peoples in 1972); United Nations, *Historical Overview*, <https://perma.cc/SA2C-K6SG> (last visited Dec. 15, 2017) (“The efforts to draft a specific instrument dealing with the protection of indigenous peoples worldwide date back over several decades.”) (hereinafter “UN Historical Overview”).

144. UN Historical Overview, *supra* note 143.

145. *Id.*

146. U.S. Dept. of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* 1 (Jan. 12, 2011), <https://perma.cc/L5C6-SR7R>.

147. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter “UNDRIP”].

148. *Id.* art. 3.

United States because the federal government refuses to grant them federal recognition. To be considered “indigenous” under the United Nations framework, the most crucial element in determining indigeneity is self-identification as indigenous peoples.¹⁴⁹ Self-identification can be problematic because it is prone to exploitation.¹⁵⁰ Nevertheless, self-identification is not an issue with the BCC or UHN.

The BCC and UHN both proudly claim their American Indian heritage. Moreover, they have suffered discrimination because of their Indian blood¹⁵¹ and fought many fights when their Indian identity was disparaged.¹⁵² The State of Louisiana has recognized the UHN as an Indian tribe since the 1970s,¹⁵³ and the State of Louisiana recognizes BCC citizens as Indians. The United States has identified the UHN as a “mixed-blood Indian community” since the mid-nineteenth century;¹⁵⁴ indeed, the United States cedes that the contemporary UHN is composed of Indians.¹⁵⁵ As the BCC is composed of persons previously enrolled in the UHN, the federal government acknowledges the BCC is composed of Indians.¹⁵⁶ Nonetheless, the United States refuses to extend federal recognition to the tribes.¹⁵⁷ This is a

149. United Nations Permanent Forum on Indigenous Issues, Indigenous Peoples, *Indigenous Voices Factsheet*, 1 <https://perma.cc/V7ZZ-8KML> (last visited Dec. 15, 2017) (“According to the UN the most fruitful approach is to identify, rather than define indigenous peoples. This is based on the fundamental criterion of self-identification as underlined in a number of human rights documents.”).

150. For example, the Boers claim to be indigenous peoples although many in the international community are weary of classifying the Boers as indigenous peoples. *The Boer Nation of Southern Africa*, Volkstaat.net (Jan. 18, 2011, 2:53 PM) <https://perma.cc/F729-98CY>.

151. *Summary UHN*, *supra* note 83, at 241 (noting the three-way racial segregation in Terrebonne and Lafourche Parishes).

152. Cain Burdeau, *Native Americans in Louisiana Swamps Seek Tribal Recognition*, THE BULLETIN 225 (Nov. 26, 2015), <https://perma.cc/Z9PM-72FZ>.

153. By placing the precursor to the UHN, the Houma Alliance, on the ITC, Louisiana recognized the UHN as a tribe (the UHN remains on the ITC) and the tribe’s citizens as Indians.

154. *Summary UHN*, *supra* note 83, at 9 (“The UHN undoubtedly descends from people who since the mid-nineteenth century have been intermittently identified as Indian, as a mixed-blood Indian community. . .”).

155. *Id.* at 33 (stating that “Indian ancestry can be verified for the petitioner without doubt or question.”).

156. *Summary BCC*, *supra* note 104, at 10 (“This amended proposed finding concludes that identifications of a “Houma” population or group when combined with other identifications of settlements or groups of the “Houma” associated with the petitioner’s subgroups provide evidence sufficient to demonstrate the substantially continuous identification of the subgroups of the petitioner as Indian entities since 1900.”).

157. Sara Sneath, *Louisiana tribes say federal recognition will help to face threat of climate change* NOLA.COM (July 26, 2018, 6:30 AM), <https://perma.cc/6DDR-HEHM> (“Like many Native Americans without federal recognition, coastal Louisiana tribes endured prejudice against their perceived otherness without the legal rights afforded by their identity.”).

preposterous contradiction of the principles endorsed by the United States when it signed the UNDRIP.

2. Rights to Land

Indigenous cultures are inextricably tied to the land;¹⁵⁸ thus, the UNDRIP has several provisions pertaining to land and culture.¹⁵⁹ The Isle de Jean Charles and much of the UHN's traditional land have been lost to erosion resulting from (non-indigenous) human activity.¹⁶⁰ In fact, buried alongside the bones of the tribes' ancestors is a tangle of oil pipelines.¹⁶¹ Furthermore, oil companies have disposed of toxic chemicals in the UHN's land,¹⁶² which is a flagrant contravention of the UNDRIP.¹⁶³ 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.¹⁶⁴

The destruction of the tribes' lands translates into several violations of the UNDRIP. Louisiana's vanishing coast makes the tribes' right to their traditional land¹⁶⁵ a nullity that is impossible to remedy. Likewise, coastal

158. Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 *TRANS NAT'L L. & CONTEMP. PROBS.* 343, 350 (2017) ("Indigenous communities' claims differ from many other environmental claims because many indigenous cultures and traditions are tied to the environment in a manner that traditionally differs from that of the dominant society."); Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 *WIS. INT'L L.J.* 607, 612 (2009) ("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.").

159. See, e.g., UNDRIP, *supra* note 147, arts. 8, 10–13.

160. See *supra* Part I.

161. La. Dep't of Nat. Res., *Louisiana Pipelines & Platforms*, <https://perma.cc/MH9R-7YLY> (last visited Dec. 16, 2017).

162. John McQuaid, *Uneasy Proximity*, *THE TIMES-PICAYUNE*, <https://perma.cc/5A5H-S3LJ> (last updated Aug. 12, 2016).

163. UNDRIP, *supra* note 147, art. 29(2).

164. Erick Rhoan, *The Rightful Position: The BP Oil Spill and Gulf Coast Tribes*, 20 *SAN JOAQUIN AGRIC. L. REV.* 173, 178 (2010).

165. UNDRIP, *supra* note 147, art. 26(1).

erosion eviscerates the tribes' right to preserve their lands and resources¹⁶⁶ and access their sacred sites.¹⁶⁷ Their right to maintain their traditional means of subsistence¹⁶⁸ and medicines¹⁶⁹ will be hopeless to uphold as they are driven from the wetlands by rising seas, erosion, and other climatic events. Moreover, the tribes' right to preserve their spiritual connection to their lands, waters, and natural resources will be thoroughly transgressed as their ancestral homeland melts into the increasingly polluted sea.¹⁷⁰ The utter despoliation of the tribes' lands evinces a flagrant violation of both the state and federal governments' duty to recognize and protect indigenous land.¹⁷¹

3. Right to Free, Prior, and Informed Consent

Free, prior, and informed consent is a crux of international indigenous rights.¹⁷² Federal Indian policy used to reflect this principle, at least in theory, because the United States entered into treaties with Indian tribes.¹⁷³ However, Congress enacted a law prohibiting the United States from entering into additional treaties with tribes in 1871.¹⁷⁴ Although the United States no longer entreats with tribes, a treaty entered into between the federal government and a tribe remains in full force unless Congress expressly abrogates it.¹⁷⁵ The United States has admitted that it has a treaty with the UHN but refuses to honor it.¹⁷⁶ The UNDRIP provides that governments are bound to "honour and respect" treaties made with indigenous nations.¹⁷⁷

Under the UNDRIP, free, prior, and informed consent extends beyond making treaties with indigenous peoples. Indigenous people are entitled to have their voices heard on issues that impact them and have the right to select their own representatives.¹⁷⁸ The UNDRIP requires states to consult with indigenous people in good faith and obtain their free, prior and

166. *Id.* art. 29(1).

167. *Id.* art. 11(1).

168. *Id.* art. 20(1).

169. *Id.* art. 24(1).

170. *Id.* art. 25.

171. *Id.* art. 26(3).

172. U.N. Human Rights Office of the High Commissioner, *Free, Prior and Informed Consent of Indigenous Peoples* (Sept. 2013), <https://perma.cc/4YBT-QCLH>.

173. *American Indian Treaties*, NATIONAL ARCHIVES, <https://perma.cc/57CS-AHK2> (last updated Oct. 4, 2016).

174. 25 U.S.C. § 71 (2000). This law is of dubious constitutionality. *See United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., dissenting) (noting the statute prohibiting the United States from entering treaties with tribes is "constitutionally suspect").

175. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-13 (1968) (holding that treaty rights can survive a tribe's termination).

176. AIPRC, *supra* note 92, at 450.

177. UNDRIP, *supra* note 147, art. 37(1).

178. *Id.* art. 18.

informed consent before taking actions that affect them.¹⁷⁹ Extremely pertinent to the Island relocation, the UNDRIP provides that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.¹⁸⁰

The relocation project is not forcibly removing anyone from the Island,¹⁸¹ but the process has failed to meaningfully consult with the Island's indigenous population. Despite the Island's small size and one road,¹⁸² Louisiana was unaware that more than one tribe calls the Island home.¹⁸³ Such gross neglect indicates an extreme failure to communicate with the indigenous inhabitants of the Island.

IV. THE RELOCATION GRANT AND THE TROUBLE THAT ENSUES

As part of the National Disaster Resilience Competition, President Obama made approximately \$1 billion available to states that had

179. *Id.* art. 19.

180. *Id.* art. 10.

181. The Island's Indian inhabitants are being moved from their homeland because of federal and state neglect. They are not being *forced* to move from the Island at the barrel of a gun like the Cherokee were driven from their homes. See Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994) (“After John Marshall’s 1832 *Worcester* decision, sixteen thousand Cherokees were driven at gunpoint from their homeland in Georgia over the ‘Trail of Tears’ and more than four thousand of their number died enroute.”).

182. *Resettlement Report*, *supra* note 12, at 9 (“All Island addresses are along the single road that stretches 1.6 miles from 300 Island Road to 600 Island Rd.”).

183. State of Louisiana CDBG-NDR Award Fact Sheet. Sent by Pat Forbes on March 1, 2016. Additionally, the State of Louisiana underestimated how many ancestors are beneath the island's cemetery in its proposal. See David Osborne, *America's first climate change refugees are preparing to leave an island that will disappear under the sea in the next few years*, BUSINESS INSIDER (Apr. 1, 2018) (stating that “residents on Isle de Jean Charles [are] canaries in the mineshaft. And if they are not opposed outright, they see problems and pitfalls everywhere, a couple of which emerged at the most recent of the monthly community meetings on the island, instituted by Mr. Forbes to make sure their concerns are heard. For example: moving the quick is one thing, but what about the dead? What does the state propose doing about their ancestors beneath the island's overgrown cemetery? (There may be as many as 200 resting there, but one estimate puts the number at only 50.”).

experienced major disasters between 2011 and 2013.¹⁸⁴ The funds were provided through the U.S. Department of Housing and Urban Development (HUD) for the purpose of rebuilding communities and increasing their resilience. HUD would award the funds to the winning projects for the purpose of rebuilding communities and increasing their resilience.¹⁸⁵ The competition officially began in September of 2014, and it solicited “innovative resilience projects to better prepare communities for future storms and other extreme events.”¹⁸⁶

One of the winning projects was a \$48 million grant to relocate residents of the Isle de Jean Charles.¹⁸⁷ The grant specifically names the BCC as the beneficiary.¹⁸⁸ BCC Chief Albert Naquin stated, “We have been working on this for 13 years. Finally, we can bring our people to a safe place to enjoy life together and move forward with better living conditions and a higher quality of life.”¹⁸⁹ The grant is supposed to help the tribe preserve its traditional culture;¹⁹⁰ indeed, the grant states it is designed to foster “a resilient and historically-contextual community.”¹⁹¹ This is certainly a noble goal, but the subsequent developments reveal that neither Louisiana nor the federal government knew anything about the Isle de Jean Charles’s indigenous inhabitants.

Though the BCC was delighted to be named the sole recipient of the grant, the UHN was not pleased.¹⁹² The Phase I grant application included the UHN;¹⁹³ nonetheless, the UHN was not mentioned in the grant award.¹⁹⁴ The BCC and the Lowlander Institute, the group that helped author the grant, contend the grant was meant to relocate the BCC exclusively.¹⁹⁵ Likewise, the BCC claim all 25 families on the Isle de Jean Charles are enrolled in the BCC, but the UHN asserts that 10 of the families are enrolled UHN citizens.¹⁹⁶ It is worth noting that the UHN failed to send a representative to

184. State of Louisiana, Division of Administration, *National Disaster Resilience*, <https://perma.cc/SKW5-A6Z2> (last visited Dec. 15, 2017) [hereinafter, “*National Disaster Resilience*”].

185. *Id.*

186. *Id.*

187. OCD, *supra* note 8.

188. U.S. Dep’t of Hous. & Urban Dev., *National Disaster Resilience Competition: Grantee Profiles*, at 7 (2016) <https://perma.cc/657C-CV2G> [hereinafter “HUD”].

189. OCD, *supra* note 8.

190. *Id.*

191. HUD, *supra* note 188, at 7.

192. Jacob Batte, *Tensions Arise Between Local Indian Tribes over Effort to Abandon Sinking Island*, HOUMATODAY (May 11, 2016, 1:57 PM), <https://perma.cc/W7CK-4A9E>.

193. State of La. Div. of Admin. Office of Cmty. Dev. Disaster Recovery Unit, *National Disaster Resilience Competition: Phase I Application* 40 (Mar. 27, 2015), <https://perma.cc/ZVF2-UMFV>.

194. HUD, *supra* note 188, at 7.

195. Batte, *supra* note 192.

196. *Id.*

any of the meetings or workshops during the application process.¹⁹⁷ This may explain why the UHN was left out of Phase II of the grant application.¹⁹⁸

Soon after the grant was awarded, multiple contentious meetings between Louisiana, the BCC, and the UHN, took place to discuss whether the UHN should be included in the grant.¹⁹⁹ In a 2016 Isle de Jean Charles relocation fact sheet, the State of Louisiana declared:

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.²⁰⁰

BCC Chief Naquin was upset that the UHN would be included in the grant.²⁰¹ He likened revising the grant to include the UHN to the treaties signed during the Indian Removal Era.²⁰²

The tensions between the BCC and UHN are the result of fabricated differences.²⁰³ Both tribes are composed of the same people. They share the same language, culture, and blood—all of the Isle de Jean Charles's Indian residents are related.²⁰⁴ Distinctions between the tribes are purely titular; in fact, some indigenous inhabitants of the Isle de Jean Charles “are unsure about which organization they belong to.”²⁰⁵ Tribal membership is based

197. *Id.*

198. State of La. Div. of Admin. Office of Cmty. Dev. Disaster Recovery Unit, *National Disaster Resilience Competition: Phase II Application* 105 (Oct. 27, 2015), <https://perma.cc/M2XP-KRFR>.

199. Crepelle, *Standing Rock*, *supra* note 74, at 181 (“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.”).

200. State of Louisiana CDBG-NDR Award Fact Sheet. Sent by Pat Forbes on March 1, 2016.

201. Batte, *supra* note 192.

202. *Id.*

203. Crepelle, *Standing Rock*, *supra* note 74, at 182 (noting the BCC separated from the UHN pursuant to the BIA's recommendation which appears to be “in the long tradition of the United States divide-and-conquer Indian policy.”)

204. *Resettlement Report*, *supra* note 12, at 18 (“During our interviews, residents did not bring up tribal distinctions and more often noted that everyone on the Island is related . . .”).

205. *Id.*

upon whether people wanted to stay in the UHN after its unsuccessful attempt in the federal recognition process or leave the UHN to form the BCC.²⁰⁶ The feud between the two tribes is primarily between some members of the current leadership of the UHN and the BCC. BCC and UHN leadership have disappointed the citizens of both tribes during the relocation process.²⁰⁷

V. RELOCATION IMPLEMENTATION TO DATE

The Island relocation is laid out in three phases. Phase I of the project was completed in November of 2016 and updated in May of 2017.²⁰⁸ This phase was primarily about data collection. Phase II of the project is planning the relocation. To date, the State of Louisiana has named CSRS, Inc. as the master planner of the project,²⁰⁹ and it has selected a site for the relocation community.²¹⁰ The third and final phase of the project is executing the plan, which will include purchasing land, building houses, and designing job training programs.²¹¹

So far, it seems like Louisiana has made some effort to get input from the Island's residents. Nevertheless, the data reported in Phase I suggest Louisiana has not succeeded. The Island has roughly 100 residents,²¹² and only four of the 20 residents who responded to the survey attended a community meeting about the relocation project.²¹³ Of these, two said "they were observers and not participants in the work."²¹⁴ Obtaining the community's free, prior and informed consent will require the active participation of more than two percent of the Island's inhabitants. Island

206. *Resettlement Report*, *supra* note 12, at 22 ("Island residents indicated that everyone 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.").

207. *Id.* at 22.

208. *Id.* at coversheet.

209. State of La. Div. of Admin. Office of Cmty. Dev. Disaster Recovery Unit, *State names CSRS Inc. as Master Planner to Oversee Design of Isle De Jean Charles Resettlement Community* (Sept. 25, 2017), <https://perma.cc/PZL2-VGJZ> [hereinafter, "OCD-CSRS"].

210. Tristan Baurick, *Here's Where Residents of Sinking Isle de Jean Charles Will Relocate*, THE TIMES-PICAYUNE, <https://perma.cc/46EK-MUKM> (last updated Dec. 20, 2017); Faimon A. Roberts, *State Chooses Site Near Thibodaux to Relocate Isle de Jean Charles Climate Refugees*, THE ADVOCATE (Dec. 21, 2017), <https://perma.cc/DPJ6-CDP9>.

211. *Phase 3 of the Resettlement Project*, ISLE DE JEAN CHARLES RESETTLEMENT, <http://isledejeancharles.la.gov/phase-3-resettlement-project> (last visited Dec. 16, 2017).

212. *Resettlement Report*, *supra* note 12, at 11.

213. *Id.* at 21 (stating that "[o]f the 20 residents who responded, 16 had heard about the previous visioning efforts. Of the 16 who heard about it, four said they attended a community meeting.").

214. *Id.*

residents, as well as tribal leaders, should be meaningfully consulted to develop a strategy to boost resident participation in the relocation process.²¹⁵

The site selected for the relocation community is approximately 40 miles northwest of the Isle de Jean Charles.²¹⁶ This is near where most of the Island's residents wanted to move.²¹⁷ However, some of the Island's residents have stated that they will not move north of Houma.²¹⁸ Although the new site is too far north for some Islanders, rapid coastal erosion could make the site beach front property in a matter of decades.²¹⁹ This raises the question of whether it is prudent to relocate people to a site that probably will not last. Alaska, which is seeking solutions to relocate several of its indigenous communities,²²⁰ expressly takes into account the future risk of flooding and erosion in state managed construction projects.²²¹ Furthermore, it is the federal government's policy to avoid the risks associated with development in a floodplain.²²²

The pattern of migration is uncertain at the moment, and Louisiana is making funds available to relocate all Island residents regardless of whether they want to be part of the community or not.²²³ Of the Island's 99 residents, 49 would like to resettle with the community.²²⁴ Eleven of the Island's residents do not want to relocate with the community.²²⁵ Seven residents of the Island are unsure whether they want to move.²²⁶ However, 28 Island residents openly state that they do not want to relocate.²²⁷

215. Bronen, *supra* note 46, at 393 (“Culturally and linguistically appropriate mechanisms for participation and consultation are fundamental components of the relocation process.”).

216. Baurick, *supra* note 210; Roberts, *supra* note 210.

217. *Resettlement Report*, *supra* note 12, at 14 (noting that 18 of the 35 residents who were interviewed selected Schriever as their preferred relocation site).

218. *Id.* at 12 (“Residents from 3 households, including 11 people (11 percent of Island population), said they want to resettle but will only go as far as a few places in southern Terrebonne Parish.”).

219. *See* Baurick, *supra* note 210 (“Even at the relocation site several miles from the coast, flooding and storms will still have an impact, and the high rate of coastal land loss could bring the shore to Houma over the next century.”); *See also* Bob Marshall, *2017 Coastal Master Plan Grimmer Future for Louisiana Coast as Worst-Case Scenario Becomes the Best-Case*, *The New Orleans Advocate* (Jan. 3, 2017), <https://perma.cc/3J8U-KQQ5>.

220. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION (2009) (noting 31 villages face “imminent threats” from flooding and erosion).

221. Alaska Admin. Order No. 175 (June 8, 1998), <https://perma.cc/P975-CHE4>.

222. Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977).

223. *Resettlement Report*, *supra* note 12, at 24 (“The State has made it a priority of the project to ensure all Island residents have the option to move to higher ground, regardless of whether they want to be a part of the new community.”).

224. *Id.* at 11–12.

225. *Id.*

226. *Id.*

227. *Id.*

The Island's residents have expressed what they want from the move. They want to live in a safe, quiet, and isolated community.²²⁸ Being closer to school, work, and other things is a goal of Island residents, but they want to be outside of town.²²⁹ They also want their homes raised, which although a recent development, the Phase I reports notes that "raised homes have since taken on cultural significance and other positive associations."²³⁰ During the relocation process, finding a way for the Islanders' to continue harvesting oysters, shrimp, and other seafood in their backyard will likely be the most difficult facet of Island life to replicate.²³¹ Losing access to fishing, which is an occupation, hobby, and means of subsistence for some Islanders, is a reason some people do not want to relocate or are unsure about relocating.²³² Furthermore, the ability to collect one's own seafood has long been a part of the Islanders' indigenous culture, and this tradition is jeopardized by the relocation.²³³

VI. UNANSWERED QUESTIONS

There are several unanswered questions about the relocation project, and there are several questions that simply have not been asked. Some of these questions are specific to the Island relocation, but many are germane to any climate induced relocation. This section addresses some of these issues.

A. Land and Home Ownership

The land and home ownership structure in relocation communities will play a major role in how the relocation unfolds.²³⁴ According to the Phase I Report, the State of Louisiana and its partners will figure out the ownership issues in Phase II.²³⁵ The ownership structure will impact many

228. *Id.* at 15.

229. *Id.*

230. *Id.* at 17.

231. *Id.* at 16.

232. *Id.*

233. Testimony of Thomas Dardar, *supra* note 112, at 2 (noting that since the UHN ancestors migrated to what is today Terrebonne and Lafourche Parishes, "crawfish, crabs, shrimp, oysters and many varieties of fish have always been plentifully available"); Terri Hansen, *Gulf Tribes Struggling a Year After Oil Spill*, INDIAN COUNTRY TODAY (Apr. 22, 2011), <https://perma.cc/27ZT-ZBVH>.

234. Bronen, *supra* note 46, at 404 ("Relocation of an entire village to a new location creates complex and unique public and private property rights issues that need to be addressed in the relocation planning process.").

235. *Resettlement Report*, *supra* note 12, at 23.

things, such as taxes and insurance.²³⁶ The ownership framework will also impact the community's ability to attract private investment.²³⁷

Additionally, what happens to the properties that the Islanders are moving from? Many Island residents want to keep their homes on the Island once the relocation is complete.²³⁸ This is certainly reasonable. Nonetheless, it seems like the federal government buying the Island residents a second home will generate negative sentiments about the project.²³⁹ Negative sentiments are all the more likely if the second home is in an area that may be submerged within the owner's lifetime.

The ownership question may be further complicated if the BCC or UHN obtain federal recognition. The federal government dedicating funds to move a community of Indians would seem to confer recognition on the tribe or tribes in which the Indians are enrolled.²⁴⁰ If only one of the tribes located on the Island achieves federal recognition, it is almost certain that the citizens of the unrecognized tribe will attempt to enroll in the other tribe.²⁴¹ Enrolling in the recognized tribe is rational because federal recognition brings benefits to the recognized tribe's citizens.²⁴² Transferring enrollment is particularly

236. *Id.*

237. *The Role of Property Rights in Investment Promotion*, RESERVE BANK OF ZIMBABWE, at p.7, para. 34-35 (January 2009) <https://perma.cc/V5KP-B8XB>; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Best Practices in Investment for Development: How to attract and benefit from FDI in small countries, Lessons from Estonia and Jamaica*, Series B, Number 6 (2011), <https://perma.cc/QV7V-2SGE> at p. 20 ("Providing an attractive operating environment for business has been a foundation of Estonian policy since early on. Key features have included (a) observance of private property rights and intellectual property rights . . ."); Luca Ventura, *Eurozone Attracts Record Foreign Investment*, GLOBAL FINANCE (Sept. 9, 2016), <https://perma.cc/2X8Q-25SL> (noting Europe managed to attract private investors thanks to private property rights); ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, *Best Practice Guide for a Positive Business and Investment Climate*, (2006), <https://perma.cc/95C7-NUP9> at 65 ("Modern market economies presuppose the existence of private property.").

238. *Resettlement Report*, *supra* note 12, at 15.

239. For example, the Federal Emergency Management Agency requires that people abdicate their current property before it will fund peoples move. See STATE OF N.J. OFFICE OF EMERGENCY MGMT., L11-11-063, WHY ACQUISITION? FEDERAL ASSISTANCE IN THE ACQUISITION OF PROPERTY.

240. 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, 490 (2015) ("In 1916, the BIA sought to purchase forty acres of land for the Ione, and moved the tribe to that land. This constituted recognition since the United States provided a 'service' to the Ione.").

241. *Resettlement Report*, *supra* note 12, at 22 ("Island residents indicated that everyone 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.").

242. Cecily Hilleary, *US Government Decides Which Are, Are Not, Legitimate Native American Tribes*, VOA (May 2, 2017 12:42 PM) <https://perma.cc/EJ9M-DCVR> ("Once the group has obtained federal recognition, they are eligible for federal programs that benefit their tribal citizen's needs," said Darling."); Arica Coleman, *From the 'Pocohontas Exception' to a 'Historical Wrong': The Hidden Cost of Formal Recognition for American*

logical in this case because the two tribes were a single tribe not long ago; that is, the people in both tribes are the same in all but the tribal name. However, the enmity some members of both of the current tribal councils have for the other tribe make it unlikely that citizens of the rival tribe will be welcomed.²⁴³

Although recent Supreme Court jurisprudence makes the practice questionable,²⁴⁴ the Secretary of the Interior has the authority to create reservations for federally recognized tribes.²⁴⁵ The reservation could be home to both tribes.²⁴⁶ The relocation community could be divided into two reservations, one for each tribe.²⁴⁷ Alternatively, the land belonging to the citizens of the recognized tribe could be taken into trust while the land belonging to the citizens of the unrecognized tribe remains in fee, creating a “checkerboard.”²⁴⁸

Indian Tribes, TIME (Feb. 9, 2018), <https://perma.cc/V4D9-WQ9V> (“For a Native American tribe, federal recognition comes with a host of benefits, including housing, health and education funding.”); Warner, Kaine, *Wittman Request Briefing With Bureau Of Indian Affairs For Newly Recognize Federal Tribes*, KAINE.SENATE.GOV (Feb. 7 2018), <https://perma.cc/ND83-GY3E> (“As new federally recognized tribes, the Chickahominy, the Chickahominy—Eastern Division, the Upper Mattaponi, the Rappahannock, the Monacan, and the Nansemond, have a right to understand all the benefits and resources that are available to them under this designation.”).

243. However, citizens of the tribes, generally speaking, get along fine with each other. This suggests that leadership changes for both tribes may end their silly bickering. Nevertheless, tribes throughout the country are disenrolling their citizens. (See Cecily Hilleary, *Native American Tribal Disenrollment Reaching Epidemic Levels*, VOA (Mar. 3, 2017, 10:38 AM), <https://perma.cc/8FIX-SDGF>. Who knows what the future holds for the two tribes.

244. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (holding the phrase “now under Federal jurisdiction” means tribes under federal jurisdiction in 1934 rather than those that are *now* under federal jurisdiction).

245. 25 U.S.C. § 5110 (2016).

246. *E.g.*, David Lewis, *Confederated Tribes of Grand Ronde*, THE OREGON ENCYCLOPEDIA (July 20, 2017), <https://perma.cc/F5NA-5FLU> (noting that over 20 tribes call the Grand Ronde Reservation home); Jack McNeel, *10 Things You Should Know About the Confederated Tribes of the Colville Reservation*, INDIAN COUNTRY TODAY (Sept. 2, 2017), <https://perma.cc/3Q2B-92TT> (noting that 14 tribes call the Colville Reservation home); WIND RIVER INDIAN RESERVATION (2017), <https://perma.cc/5ZPJ-EPMT> (noting that the Wind River Reservation is home to the Eastern Shoshone and Northern Arapaho).

247. For example, *Nebraska v. Parker*, 136 S.Ct. 1072, 1077 (2016) (noting the Omaha Tribe sold a portion of its reservation to the United States so that a reservation could be created for the Winnebago Tribe).

248. *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 415 (1989) (stating that “[t]he remaining fee land is scattered throughout the reservation in a ‘checker-board’ pattern.”); *UTE Indian Tribe of Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016) (“But this sort of ‘checkerboard’ jurisdiction—where state and local officials bear criminal enforcement power on some lands and federal and tribal officials oversee others—is the natural consequence of Congress’s decision to open and then close reservation lands to outside settlement.”); *Big Horn County Elec.Coop., v. Denis Adams*, 219 F.3d 944, 948 (9th Cir. 2000) (“There is a checkerboard pattern of land

In any of these scenarios, the reservation and all land within it would become “Indian country.”²⁴⁹ Having the land become Indian country offers benefits such as improved housing and economic opportunities.²⁵⁰ However, ownership and regulatory issues will likely become more complex if the land is designated as Indian country.²⁵¹ Furthermore, federally recognized tribes possess the power to exclude people from their land.²⁵² It is possible that the government of one of the tribes could banish citizens of the other tribe from all or part of the community. This is exceedingly unlikely to occur, but it is theoretically possible. It would be terribly ironic for a community of *climate refugees* to banish their kin and neighbors from their relocated community due to tribal political antics. Where would the banished refugees go? Again, this almost certainly will not occur in this climate relocation, but as climate relocation becomes more common, this issue is bound to arise and should be given consideration.

B. Relocation Residency Dates

Determining a residency date for eligibility to participate in the relocation is a first-order priority. Current Island residents are eligible to participate in the resettlement project, and there is little controversy over this.²⁵³ The relocation funds come from a grant for communities that suffered disasters between 2011 and 2013.²⁵⁴ Hence, it makes sense to include people who moved from the Isle de Jean Charles in response to Hurricane Isaac, which hit the Island in 2012.²⁵⁵

ownership on the Reservation composed of fee land owned by non-Indians and members of the Tribe and trust land held by the United States in trust for the Tribe.”).

249. 18 U.S.C. § 1151(1976).

250. *Fee to Trust*, BUREAU OF INDIAN AFFAIRS, <https://perma.cc/RS52-6QS7> (last visited Sept. 21, 2018).

251. Adam Creppelle & Walter Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. C. R. & SOC. JUST. 315, 328–331 (2017) (discussing how regulatory issues and weak property rights stifle reservation economies); 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, 819–820 (2010) (“[T]rust-land restrictions effectively limit a tribe’s revenue base and limit the ability for either a tribe or an individual to utilize the primary asset—land and resources derived from the land.”); Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L. J. 115, 119 (2017) (“When you combine these economic restrictions with the inherent economic and tribal tax restrictions of federal trust land you then have a perfect storm creating generations of poverty and all the social ills of such a system.”).

252. *Duro v. Reina*, 495 U.S. 676, 696 (1990) (“The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.”).

253. *Resettlement Report*, *supra* note 12, at 23.

254. *National Disaster Resilience*, *supra* note 184.

255. *Resettlement Report*, *supra* note 12, at 23.

However, people have been moving away from the Island for years. In fact, some people moved away from the Island in response to storms in the 1980s and 1990s, like Hurricanes Juan and Andrew.²⁵⁶ The Indian families who left the Island pursuant to Hurricane Andrew have roots on the Island just as deep as those who were forced to move by Hurricane Isaac.²⁵⁷ Interestingly, naming a hurricane from the 1980s or 1990s as the residency date would mean all of the Island's inhabitants considered themselves Houma. The BCC did not break away from the UHN and form a separate entity until 1995—soon after the UHN was denied federal recognition by the BIA.²⁵⁸ Accordingly, there was no BCC until 1995. Assuming the residency date was shifted to Hurricane Andrew in 1992, how would this impact the UHN's and BCC's involvement in the project?

C. Culturally Appropriate Relocation

In press releases, the State of Louisiana has stated the relocation will be handled in a “culturally appropriate” manner.²⁵⁹ The fact that the planners are considering cultural issues is good as the Indian Relocation Act of 1956²⁶⁰ was designed to abolish tribal culture, and the Act was an abysmal failure.²⁶¹

256. Herman, *supra* note 11.

257. Ada Deer, *OFFICE OF FEDERAL ACKNOWLEDGEMENT, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGEMENT OF THE UNITED HOUMA NATION, INC.*, U.S. DEP'T OF INT. at 20 (1994), <https://perma.cc/GG4J-3FV5> (noting the UHN's ancestors were on the Isle de Jean Charles between 1830 and 1880); Carl J. Artman, *OFFICE OF FEDERAL ACKNOWLEDGEMENT, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGEMENT OF THE BILOXI, CHITIMACHA CONFEDERATION OF MUSKOGEEES, INC.*, US DEP'T OF INT. at 4 (2008), <https://perma.cc/3V67-GSZG> (noting ancestors of the BCC were on the Isle de Jean Charles “by at least the 1870's”).

258. *Id.* at 2 (noting most of the BCC's members were enrolled in the UHN prior to the BIA's refusal to recognize the UHN, and also noting the BCC submitted a petition for federal recognition in 1995 that was separate from the UHN); *Biloxi Chitimacha Confederation of Muskogees Articles of Incorporation*, LOUISIANA SECRETARY OF STATE, <https://perma.cc/9B76-E2MB> (noting the Biloxi Chitimacha Confederation of Muskogees formed in 1995); *Isle de Charles Band of Biloxi-Chitimacha-Choctaw, Inc. Articles of Incorporation*, LOUISIANA SECRETARY OF STATE, <https://perma.cc/H6SC-46SL> (noting the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw, Inc. formed in 2009).

259. OCD-CSRS, *supra* note 209 (“And equally important, CSRS grasps the need to take into consideration the tribal history of the residents of Isle de Jean Charles, many of whom are American Indians, in a manner that is culturally appropriate.”); OCD, *supra* note 8 (“The award will fund a resettlement model that is scalable, transferrable and supportive of cultural and social networks.”).

260. Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986 (1956).

261. Tony Hillerman, *Relocation Indian*, THE TONY HILLERMAN PORTAL, <https://perma.cc/4KKT-5K9L> (last visited Dec. 17, 2017) (“In essence, the Indian Relocation Act resulted in the isolation of relocation Indians from their communities and cultural practices.”); Ojibwa, *American Indian Relocation*, NATIVE AMERICAN NETROOTS (May 14, 2010), <https://perma.cc/Z8FR-7RHR>.

However, what is culturally appropriate? Tribal culture, like all culture, is constantly changing.²⁶² For example, the Houma obtained almost all of their food through agriculture when the French first encountered them.²⁶³ The swamps of Terrebonne and Lafourche Parishes were not suitable for large scale farming; therefore, the Houma became hunters and fishermen upon migrating into the Parishes.²⁶⁴ The State of Louisiana needs to elucidate what is meant by culturally appropriate, so the UHN and BCC know what to expect from the state moving forwards.

D. Earning a Living

People often select their residence based upon job opportunities; accordingly, employment must be considered in community relocations. Most of the Island's residents earn their living as fishermen or on supply boats²⁶⁵ and are rightfully concerned about what relocation means for their livelihood.²⁶⁶ Likewise, climate law scholar Barrett Ristroph has noted that job training is a cost of climate relocation.²⁶⁷ Nichols State University and Fletcher Technical Community College are a short drive from the relocation site. The Louisiana ITC also has job training programs.²⁶⁸ The Island residents should be eligible for educational opportunities at these institutions because the Islanders will need new skills to earn a living farther inland.

The relocation site should contain an enterprise that comports with the community's historical and cultural skills. Many of the Island's residents are apprehensive about losing the ability to procure seafood from their backyards.²⁶⁹ A fish farm could address this concern, and this would be in

262. *Cultural Anthropology & Linguistics*, HUMBOLDT STATE UNIVERSITY, <https://perma.cc/L65C-8K4R> (last visited Dec. 17, 2017) ("Like language, human cultures are dynamic, constantly changing in response to the environment, the people, and other cultures."); Crepelle, *Arbitrary Process*, *supra* note 71 ("Indian culture has always been diverse and evolving."); *Resettlement Report*, *supra* note 12, at 17 (noting that the recent innovation of raised homes has "taken on cultural significance").

263. John Reed Swanton, *INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF THE GULF OF MEXICO* 289 ("As they are satisfied with their squashes and their corn, of which they have an abundance, they are indolent and hardly ever hunt.").

264. Williams, *supra* note 77, at 98.

265. Darren Simon, *Tribal Chief on Isle de Jean Charles Says It's Time to Leave*, *The Times-Picayune* (Sep. 21, 2008), <https://perma.cc/U8YR-UWEW> (stating "The population, which Naquin said peaked at 350 to 400 people, has shrunk too.").

266. *Resettlement Report*, *supra* note 12, at A-12 (stating, "Cant [sic] make a crabber a farmer and vice-versa.").

267. Ristroph, *supra* note 6, at 266.

268. *Services*, INTER-TRIBAL COUNCIL OF LOUISIANA, <https://perma.cc/R4TA-TKAX>, (last visited Dec. 17, 2017).

269. *Resettlement Report*, *supra* note 12, at A-9 (stating that there is no way to replace the "[a]ccess to fresh seafood.").

line with the community's desires.²⁷⁰ Any seafood related industry would be a cultural match for the Islanders, and there is strong precedent for tribal success in culturally compatible wildlife industries.²⁷¹ Regardless, the relocation project should grant the Islanders subsistence rights at the relocation site as well as on the Island to ensure that the families have some means of providing for themselves.²⁷²

E. Relocation as a Taking

There is only one business on the Island, the Isle de Jean Charles Marina, and it serves as a convenience store for those on the Island. Relocating the Island community will almost certainly impact the business.²⁷³ Is relocating the Island community, the business's customers, a taking?²⁷⁴ The Supreme Court considers factors such as whether there has been a physical invasion of the property, the economic impact of the regulation on the property owner, and whether the action has interfered with the property owner's investment-backed expectations.²⁷⁵

In this instance, the business owner's property is not being physically taken by the government. The owner's business expectations will likely be adversely impacted by the relocation, but a decline in sales has been foreseeable. The Island has long been eroding, and people have been moving away from the Island because of this for years. However, this is moot because no regulatory change has occurred. Rather, the Island's residents are having their relocation subsidized. The relocation is also being made at the residents' discretion. The same rationale applies to the property-value decrease that may result from the relocation. Consequently, a successful takings claim is unlikely to arise from the relocation.

270. *Id.* at A-6 (“Many residents want to be self-sufficient as possible, catching seafood and growing food on site, and selling it at a farmers market.”).

271. *E.g.*, Mike Altizer, *2017 Awards of Excellence: Jicarilla Apache Nation Receives Sporting Heritage Award*, SPORTING CLASSICS DAILY (Feb. 6, 2017), <https://perma.cc/28D8-LEUS> (“[T]he Jicarilla Apache Reservation has produced more record-book bucks than any other location in the West and is the world’s No. 1 destination for Boone & Crockett mule deer.”); Karen Graham, *Coho Salmon Reintroduced into Oregon River by Nez Perce Tribe*, DIGITAL JOURNAL (Mar. 11, 2017), <https://perma.cc/E4ED-33XN>; *Honoring Nations All-Stars Profile: The Red Lake Walleye Recovery Program Red Lake Nation* (2013), <https://perma.cc/XYN2-V9Q8>.

272. Ristroph, *supra* note 6, at 286 (noting that subsistence skills are developed over generations and should be included when Alaska Native Villages relocate).

273. *Resettlement Report*, *supra* note 12, at 24 (noting that when residents leave the Island, the store will probably see a decrease in sales).

274. U.S. Const. amend V (stating “nor shall private property be taken for public use, without just compensation”).

275. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

F. Racism at the Relocation Site

What happens when 100 Indians move into a predominantly white area?²⁷⁶ The Parishes of Terrebonne and Lafourche segregated blacks, whites, and Indians until the late 1960s.²⁷⁷ UHN elders remember signs in local businesses stating “No Indians Allowed.”²⁷⁸ Likewise, not too long ago, white parents forbid their children from associating with Houma children.²⁷⁹ Stereotypes already abound that American Indians are rich from federal funds,²⁸⁰ and the indigenous Islanders have been in the national news for receiving nearly \$50 million.²⁸¹ There is no magical way to address the local history of discrimination against Indians, but it is something that should be present in the planner’s mind as they consider social and economic opportunities for those being relocated.²⁸²

G. Shortage of Funds

The State of Louisiana was awarded \$48 million for the relocation. This seems like a large sum to relocate roughly two dozen households when compared to the estimated \$80 to \$130 million to relocate the approximately 450 residents of Newtok, Alaska.²⁸³ Nevertheless, the cost to relocate the Isle de Jean Charles community is estimated to be \$100 million.²⁸⁴ Government

276. U.S. Census Bureau, *Profile of General Population and Housing Characteristics: 2010*, AMERICAN FACT FINDER, <https://perma.cc/2ZXJ-7LKV> (last visited Dec. 17, 2017) (noting Schriever, Louisiana is 69.1% white, 25.9% black, and 1.4% American Indian).

277. *Summary UHN*, *supra* note 83, at 241 (noting the three-way racial segregation in Terrebonne and Lafourche Parishes).

278. DENISE BATES, *THE OTHER MOVEMENT: INDIAN RIGHTS AND CIVIL RIGHTS IN THE DEEP SOUTH* 75-76 (2012); Shanondora M. Billiot, *How Do Environmental Changes and Shared Cultural Experiences Impact the Health of Indigenous Peoples in South Louisiana?*, ARTS & SCIENCES ELECTRONIC THESES & DISSERTATIONS, May 2017, at 100.

279. Krupa, *supra* note 87, at 174–75 (quoting former councilman J. B. Breaux, “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.”).

280. *How Myths, Stereotypes, and Misperceptions Affect Relationship Building with Tribes*, WORKING IN INDIAN COUNTRY (Apr. 16, 2012), <https://perma.cc/EPE3-FAVZ> (listing as the number one stereotype about how “American Indians receive payments from the Federal government just for being an Indian.”); Kenneth Padgett, *Redface! The History of Racist American Indian Stereotypes* (May 9, 2012), <https://perma.cc/CHF2-WVQY> (noting Indians are often stereotyped as rich).

281. *E.g.*, Christopher Flavelle, *As This Town Slips Into Sea, a \$48 Million Rescue Runs into Obstacles*, BLOOMBERG (Jul. 3, 2017), <https://www.bloomberg.com/news/features/2017-07-03/louisiana-town-convulsed-by-relocation-as-climate-policy-shifts>.

282. Billiot, *supra* note 278, at 100–101.

283. Rachel Waldholz, *Alaskan Village, Citing Climate Change, Seeks Disaster Relief in Order to Relocate*, NPR (Jan. 10, 2017), <https://www.npr.org/2017/01/10/509176361/alaskan-village-citing-climate-change-seeks-disaster-relief-in-order-to-relocate>.

284. Herrmann, *surpa* note 7, at 6.

projects almost always come in over budget too,²⁸⁵ and Louisiana is particularly bad at budgeting.²⁸⁶ Louisiana also has a history of granting contracts to political favorites.²⁸⁷ Accordingly, it seems inevitable that the project will face a monetary shortfall. There needs to be a plan to address this scenario.

H. Restore Rather than Relocate

It seems as though the \$48 million could be used to restore or at least prevent the further erosion of the 320-acre Island. If China can build islands in the middle of the ocean,²⁸⁸ why is the United States unable to stop a thin strip of land from eroding further? Certainly, restoring the Island would impact the ecosystem, but the Island's disappearance alters the ecosystem too. Options to restore the Island were never considered. Given that most of the Islanders would like to remain in their current and historic homes, it seems as though restoring or protecting the Island should have at least warranted a discussion.

CONCLUSION

Sadly, the Isle de Jean Charles will ultimately be lost to the sea because the United States and the oil industry have failed to respect the rights of the Island's indigenous inhabitants. Disregard for the rights of indigenous peoples has been a common theme around the globe, particularly in the extractive industry.²⁸⁹ Hopefully the international community's recent interest in indigenous rights, as reflected in the UNDRIP, will prevent tragedies like the one affecting indigenous inhabitants of the Isle de Jean Charles from happening again.

285. Bent Flyvberg, *Megaprojects: Over Budget, Over Time, Over and Over*, CATO POLICY REPORT (Jan./Feb. 2017), <https://perma.cc/56GJ-S42M> (discussing problems with mega projects, many of which are relevant to all government projects); Michael Shulman, *Why do big public infrastructure projects so frequently go over budget?*, YAHOO FINANCE (Mar. 27, 2017), <https://perma.cc/8P5T-GQXV>; Anthony Olivo and Katherine Shaver, *Why costs often creep on public-works projects*, THE WASHINGTON POST (May 14, 2014) <https://perma.cc/7H7Z-4D8H>.

286. Office of the Governor, *FY 2017 Budget Deficit: FAQs* (Jan. 27, 2017), <https://perma.cc/6HMY-3THT>.

287. E.g., *Some of Gov. Bobby Jindal's donations came as state awarded incentives, contracts*, NOLA.COM (Sept. 8, 2016, 12:38 PM), <https://perma.cc/64BX-FHYJ>; *Bobby Jindal's political appointees have showered his campaign with cash*, NOLA.COM (Aug. 23, 2017), <https://perma.cc/R6KH-P6M4>; *The rise and fall of Gov. Edwin Edwards*, NOLA.COM (May 30, 2017), <https://perma.cc/EJ5Z-3LW4>.

288. Eleanor Ross, *How and Why China Is Building Islands in the South China Sea*, NEWSWEEK (Mar. 29, 2017).

289. Human Rights Council, Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/24/41 (2013) <https://perma.cc/7E8X-QZCC>.

As the Isle de Jean Charles relocation moves forwards, the process must be illuminated by the principles from the UNDRIP. This will help ensure that the rights of the Islanders are not trampled as the relocation process progresses. The state and federal officials involved in the relocation must seek the Islanders free, prior and informed consent throughout the process. Louisiana has begun to take steps to include the Islanders in the relocation's planning and must continue to do so. Furthermore, the Islanders' should have firmly secured rights to the land at the relocation site, and they should maintain their right to access land on the Isle de Jean Charles.

Perhaps most importantly, the United States must extend federal recognition to the Islanders. This is the only way the United States can comport with the UNDRIP's principle of indigenous self-determination. Although self-determination is the United States official policy towards Indian tribes,²⁹⁰ the Islanders cannot meaningfully exercise this right because they lack federal recognition. The denial of their federal recognition is absurd because the federal government concedes the tribes' citizens are Indians, acknowledges that they were discriminated against because of their Indian blood, and admits it has a treaty with the UHN. Quite simply, the broken federal recognition process has resulted in the Islanders being denied their rights as indigenous peoples.

The splintering of the UHN, resulting in the formation of the BCC, makes achieving federal recognition trickier. The division makes it more difficult for the UHN to demonstrate political unity,²⁹¹ and the recent birth of the BCC combined with the BCC's lengthy identification as "Houma" spell trouble for the BCC in the administrative recognition process. Nevertheless, Congress can intervene and extend recognition to the Islanders. The unique situation facing the Islanders combined with the strong evidence that the BIA erred in denying the UHN federal recognition suggest legislation is the best option to resolve the Islanders recognition struggle. Injustices will continue to besiege the Islanders until they receive federal recognition.

290. Nixon, *supra* note 57; Indian Self-Determination and Education Assistance Act of 1975, *supra* note 57.

291. 25 C.F.R. 83.11(c).