15

Federal Recognition

As in the international arena, recognition is vital to tribal sovereignty.[1] Federally recognized tribes have a direct government-to-government relationship with the United States. This means federally recognized tribes are more than nonprofits, corporations, or social clubs; rather, federal recognition means tribes are sovereign governments with the right to make their own laws and be governed by them. Accordingly, federal laws can single out the citizens of federally recognized tribes for unique treatment without violating the Constitution's Equal Protection Clause because federal recognition elevates "Indian" from a racial to a political classification. Federally recognized tribes can have reservations, and state law is presumed to be inapplicable on the land of federally recognized tribes. Thus, federal recognition acknowledges a tribe exists as a government.

15.1 RECOGNIZED TRIBES

Currently, there are 574 federally recognized tribes, and each is unique. For example, the Navajo Nation has a 16 million-acre reservation – larger than the state of West Virginia – but the Pitt River Tribe's reservation encompasses 1.32 acres.[2] The Cherokee Nation has the largest

[1] Joshua Keating, *How to Start Your Own Country in 4 Easy Steps*, Foreign Pol'y (Feb. 26, 2008), https://foreignpolicy.com/2008/02/26/how-to-start-your-own-country-in-four-easy-steps/ [https://perma.cc/8TPG-ZTUF]; Remy Melina, *How to Become a Country in 3 Easy Steps*, Live Science (Feb. 8, 2011), www.livescience.com/33003-how-are-new-countries-established.html [https://perma.cc/4YPM-YJCJ].

[2] *What Is a Federal Indian Reservation?*, U.S. Dep't of the Interior, Indian Affs. (Aug. 19, 2017), www.bia.gov/faqs/what-federal-indian-reservation#:~:text=The%20largest%20is%20the%2016,River%20Tribe's%20cemetery%20is%20located [https://perma.cc/E8DH-EKRM].

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population of any tribe with 430,000 citizens.[3] The Augustine Band of Cahuilla Indians has a population of approximately twelve citizens, making it the smallest tribe.[4] Of the approximately 10,000 citizens of the Mississippi Band of Choctaw Indians, 80 percent speak fluent Choctaw,[5] whereas few of the Choctaw Nation's 200,000-plus citizens speak Choctaw.[6]

But not all tribes are federally recognized. Some tribes are recognized exclusively by the surrounding state. Most states do not provide the tribes they recognize with any benefits, but some states confer significant benefits on the tribes they recognize, such as Connecticut affording tribes reservations and tax exemptions.[7] While state recognized tribes are eligible for a handful of federal programs, state recognized tribes are not usually considered "tribes" under federal law. This means state recognized tribes are not sovereigns, and the individuals enrolled in state recognized tribes lack political status as Indians. Though state recognition has few sovereign or material benefits, it does provide an air of legitimacy. Hence, state recognition is better than no recognition, and some groups claiming tribal status lack any recognition. Both state recognized tribes and non-recognized are typically legally organized as nonprofit corporations.

To be sure, some state recognized and non-recognized tribes have dubious claims to tribal status. For example, the *Los Angeles Times* ran an exposé highlighting minority contracts awarded to very questionable

[3] ᎣᏏᏲ *Osiyo!*, Cherokee Nation, www.cherokee.org/#:~:text=Today%2C%20the%20Cherokee%20Nation%20is,reservation%20boundaries%20in%20northeastern%20Oklahoma [https://perma.cc/99A6-SPNF].

[4] Ricardo Lopez, *How One of America's Smallest Indian Tribes Bounced Back from the Brink of Dying Out*, Desert Sun (updated Oct. 16, 2019), www.desertsun.com/story/news/local/coachella/2019/05/02/how-one-americas-smallest-tribes-survived/3280808002/ [https://perma.cc/5V3G-96VM]; Mary Ann Green, Presentation, *Augustine Band of Cahuilla Indians*, Energy.gov (Nov. 2007), www.energy.gov/sites/prod/files/2016/01/f28/07111review_turner.pdf [https://perma.cc/9ZHM-YCAJ].

[5] Patricia Kwachka & Roseanna Thompson, *Choctaw Language*, Mississippi Encyc., https://mississippiencyclopedia.org/entries/choctaw-language/#:~:text=Today%2C%20Choctaw%20is%20the%20traditional,members%20speak%20the%20language%20fluently [https://perma.cc/N4LG-T3CN].

[6] *About the Choctaw Nation*, Choctaw Nation of Oklahoma, www.choctawnation.com/about/ [https://perma.cc/B7ZL-MXEU].

[7] Christopher Reinhart, Conn. Gen. Assembly's Off. Legis. Rsch., 2002-R-0118, Effect of State Recognition of an Indian Tribe (Feb. 7, 2002), www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0118.htm [https://perma.cc/8N4J-WFDA].

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tribes.[8] Determining which tribes are "real" is a highly controversial matter. And for all its importance, federal recognition is often a matter of historical accident.

15.2 ACHIEVING FEDERAL RECOGNITION

The United States has recognized tribes as sovereigns since its inception. The first tribe formally recognized by the United States was the Delaware in 1778. The United States pursued a treaty with the Delaware because it wanted access through the tribe's land and hoped the tribe would aid the Continental Army.[9] Over the next ninety-three years, the United States would enter approximately 400 treaties with Indian tribes. Treaties are nation-to-nation agreements; hence, treaties clearly acknowledge tribes' sovereign status. But in 1871, the United States stopped making treaties with tribes. From that point on, the United States engaged with tribes via statutes and executive orders. The Bureau of Indian Affairs (BIA) also recognized some tribes by deciding to extend services to them.

Despite deciding to recognize tribes, there was no formal definition of a tribe.[10] Without formal criteria, recognition was often a matter of luck. For example, the United States entered treaties with tribes who posed military threats and were on valuable lands. Hence, tribes who posed no military threat or had undesirable territories were unlikely to enter a treaty with the United States.[11] Many of these tribes were denied recognition. Throughout most of the United States' history, the federal government expected tribes to disappear, so it was not particularly concerned about recognizing tribes or

[8] Adam Elmahrek & Paul Pringle, *Claiming to Be Cherokee, Contractors with White Ancestry Got $300 Million*, L.A. Times (June 26, 2019, 4 am PT), www.latimes.com/local/lanow/la-na-cherokee-minority-contracts-20190626-story.html [https://perma.cc/9Y3C-5R3S]; Adam Elmahrek & Paul Pringle, *Two Tribes Aren't Recognized Federally. Yet Members Won $500 Million in Minority Contracts*, L.A. Times (Dec. 31, 2019, 5:54 pm PT), www.latimes.com/california/story/2019-12-31/native-american-tribes-alabama-minority-contracts [https://perma.cc/8TDY-BC8X].

[9] Ryan P. Smith, *Why the Very First Treaty Between the United States and a Native People Still Resonates Today*, Smithsonian Mag. (May 24, 2018), www.smithsonianmag.com/smithsonian-institution/why-very-first-treaty-between-us-and-native-people-still-resonates-today-180969157/ [https://perma.cc/3ZSY-NT5D].

[10] William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 334 (1990).

[11] Raith Roessel, *Federal Recognition – A Historical Twist of Fate*, NARF Legal Rev. (Native Am. Rights Fund, Boulder, CO), Summer 1989, at 1, http://narf.org/nill/documents/nlr/nlr14-3.pdf [https://perma.cc/K7F5-WJ84].

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accurately classifying tribal communities. Similarly, stereotyped notions of tribal identity were used when making recognition decisions. To illustrate, the BIA refused to recognize one tribe because its citizens had radios, and radios indicated its citizens were "civilized" and not real Indians.[12] The congressionally created American Indian Policy Review Commission found some tribes were denied federal recognition based purely on cost; that is, recognizing the tribe would be too financially burdensome for the BIA.[13] Racism has also factored into federal recognition determination as tribes with Black ancestry often faced questions about their authenticity.[14]

Arbitrary recognition decisions became a bigger problem during the 1970s. The United States Indian policy had shifted to a policy of tribal self-determination, and minority rights were becoming a more significant issue. Accordingly, an increasing number of groups were claiming to be tribes. In response to a federal report admitting the inconsistencies of tribal recognition decisions, the BIA created the administrative federal acknowledgment process in 1978. The process requires tribes to satisfy seven criteria:

1. Petitioner must be consistently identified as an American Indian entity since 1900.
2. From 1900 to present, the Petitioner must be a distinct community.
3. From 1900 to present, the Petitioner must exercise political authority over the community.
4. Petitioner must provide a governing document.
5. The members of the Petitioner must descend from a historical Indian tribe or group of tribes that amalgamated and functioned as a single entity.
6. Petitioner must be predominantly composed of persons who are not enrolled in a federally recognized tribe.
7. Petitioner must not have been terminated by Congress or barred from federal recognition.[15]

While the federal acknowledgment process was supposed to be objective and efficient, it has failed on both accounts.

[12] Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. Pa. L. Rev. 1827, 1831 (2003).

[13] Adam Crepelle, *Standing Rock in the Swamp: Oil, The Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 Loy. L. Rev. 141, 152 n.73 (2018).

[14] Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. Rev. L. & Soc. Change 629, 665 (2013).

[15] 25 C.F.R. § 83.11 (2024).

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15.3 PROBLEMS WITH THE FEDERAL ACKNOWLEDGMENT PROCESS

The federal acknowledgment process is indisputably a failure, as has been acknowledged by Republicans, Democrats, and the Government Accountability Office (GAO).[16] The process was supposed to provide equitable, consistent tribal determinations in two years.[17] However, the GAO has determined the BIA recognition decisions have been inconsistent. A seventy-year gap was too long to show continuous existence for one tribe, but the BIA determined a seventy-year gap did not disprove the continuous existence of a different tribe.[18] And rather than two years, completing the process often takes more than thirty years.[19] The process can require petitioning groups to compile more than 100,000 pages of documents.[20] Compiling these documents can easily cost more than $1 million, a sum most petitioning groups do not have.[21] While a thorough procedure is reasonable, the federal acknowledgment process goes too far. According to John Norwood, Co-Chair of the National Congress of the American Indians' Task Force on Federal Acknowledgment, "an estimated 72 percent of currently recognized Tribes could not successfully navigate the process as the criteria are applied today."[22]

To be sure, documentation is a reasonable requirement, but the level of proof currently demanded is often unfeasible. Writing is not part of traditional Indigenous cultures; hence, Indigenous People did not keep written records of their existence. Most traditional Indigenous knowledge – to this day – is often transmitted orally,[23] and the BIA does not

[16] *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 1–2 (2012) (statement of Hon. Daniel Akaka, U.S. Sen. from Haw.); *id.* at 3 (statement of Hon. John Barrasso, U.S. Sen. from Wyo.); U.S. Gov't Accounting Off., GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process 1 (2001).

[17] U.S. Gov't Accounting Off., GAO-02-415T, Indian Issues: More Consistent and Timely Tribal Recognition Process Needed 2 (2002) (statement of Barry T. Hill, Dir. Nat. Res. & Env't).

[18] *Id.* at 4.

[19] *Hearing: Federal Recognition*, *supra* note 16, at 2; *id.* at 21; Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 Am. Indian L. Rev. 451, 468 (2015).

[20] Michael Nelson, *The Quest to Be Called a Tribe*, Legal Affs., Sept./Oct. 2003, www.legalaffairs.org/issues/September-October-2003/review_nelson_sepoct03.msp [https://perma.cc/NU2J-2P67].

[21] *See* Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 153 n.81.

[22] *Hearing: Federal Recognition*, *supra* note 16, at 21.

[23] Nelson, *supra* note 20.

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give much weight to oral records.[24] The existing historical written records of Indigenous People were usually transcribed by Europeans and Americans who were not well-versed in tribal culture. Moreover, many Americans expected tribes to disappear anyway, so they were not fastidious in documenting tribal customs.[25] Similarly, racism undermined recordkeeping efforts. For example, Virginia's Racial Integrity Act of 1924 destroyed all evidence of Indians within its borders and made it virtually impossible for tribes in Virginia to successfully complete the federal acknowledgment process.[26] Then Indians who could pass as white often did to avoid discrimination. These individuals would have left scant evidence of their tribal affiliation, and ironically, their efforts to avoid discrimination now lead to discrimination in the federal acknowledgment process.[27]

Although the criteria themselves are facially reasonable, they are heavily influenced by stereotypes about what a tribe should be. Consequently, tribes seeking federal recognition must contort their image to match what western eyes would like to see. To illustrate, the administrative regulations automatically assume a tribe is a distinct community under a common political leadership if half the group's members consistently intermarry.[28] But as the regulations acknowledge, marrying outside of the tribal community was a common practice throughout Indigenous North America,[29] which was practical as intermarriage increased genetic diversity and facilitated commercial relationships. Moreover, the very concepts of political authority and community are highly culturally relative. While some tribes had highly structured governments, most were decentralized and exercised little authority over their citizens.[30] This means

[24] N. Bruce Duthu, *The Houma Indians of Louisiana: The Intersection of Law and History in the Federal Acknowledgment Process*, 38 La. Hist. 409 (1997).

[25] Roxanne Dunbar-Ortiz & Dina Gilio-Whitaker, "All the Real Indians Died Off" and 20 Other Myths About Native Americans 7–13, 76–81 (2016); Katherine Womack, *Future of Equality for Virginia's Tribes: Reform the Federal Acknowledgement Process to Repair Injustice*, 15 Rich. J. L. & Pub. Int. 475, 499 (2011); Dina Gilo-Whitaker, *"Real" Indians, the Vanishing Native Myth, and the Blood Quantum Question*, Indian Country Today (updated Sept. 12, 2018), https://indiancountry medianetwork.com/news/opinions/real-indians-the-vanishing-native-myth-and-theblood-quantum-question/ [https://perma.cc/75YW-TF9C].

[26] *Hearing: Federal Recognition*, *supra* note 16, at 5 (statement of Hon. Jim Webb, U.S. Sen. from Va.); Womack, *supra* note 25, at 497.

[27] Mather, *supra* note 12, at 1829–30; Riley, *Shifting Foundation*, *supra* note 14, at 665.

[28] 25 C.F.R. § 83.11(b)(2)(ii)(2024).

[29] *Id.* § 83.11(b)(1)(i).

[30] United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974); Adam Crepelle, *Arbitrary Process: The Struggle for Federal Recognition of Louisiana's Indian Tribes*, 64

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many tribes may not be able to meet the BIA's administrative guidelines *because they have traditional tribal political institutions*. The same goes for community – the term means something different in every culture.

The BIA also has expectations for how Indians should look. For example, when the Tigua were at the signing of a Texas bill in support of their recognition, their attorney ordered the Tigua men to shave their mustaches. The attorney's reason: "I didn't want press coverage with people with Mexican type mustaches on."[31] Former Tigua governor Joe Sierra noted lawmakers "only saw an Indian" while he was dressed in "feathers like a savage."[32]

Then there's politics. The BIA has limited funds, and recognizing more tribes means fewer funds per tribe. Similarly, gaming has impacted incentives. Tribes with established casinos do not want a newly recognized tribe to open a casino that will increase competition for gaming revenue. As a result, federally recognized tribes have a financial incentive to oppose the recognition of other tribes. Private industry gets involved too. Businesses will actively oppose the recognition of tribes[33] while supporting the recognition of the tribe they have partnered with.[34] Private enterprises engage in the same behavior when a group seeking federal recognition has natural resources on its land because extractive industries fear federal recognition will grant tribes control over the resources, which could impact ongoing or historic business operations.[35] Third parties are allowed to comment on petitions for federal acknowledgment too.[36]

15.4 THE COUSHATTA JOURNEY

The Coushatta lived in the area encompassing the present-day states of Tennessee and Alabama for hundreds of years. During his raid of North

Parishes (Winter 2016), https://64parishes.org/arbitrary-process?utm_source=LEH+Newsletter+January+2017&utm_campaign=January+2017&utm_medium=email [https://perma.cc/885N-AKSA]; Duthu, *supra* note 24, at 427; Riley, *Shifting Foundations*, *supra* note 14, at 667; Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. Rev. 449, 458 (1996).

[31] Mark Edwin Miller, Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process 229 (2004).

[32] *Id.* at 211.

[33] *Donald Trump and Federal Indian Policy: "They Don't Look Like Indians to Me,"* Turtle Talk (July 25, 2016), https://turtletalk.blog/2016/07/25/donald-trump-and-federal-indian-policy-they-dont-look-like-indians-to-me/ [https://perma.cc/VN4S-6XX6].

[34] Nelson, *supra* note 20.

[35] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 155.

[36] 25 C.F.R. § 83.22 (2024); *Fixing the Federal Acknowledgment Process: Hearing before the S. Comm. on Indian Affs.* 111th Cong. 17 (2009).

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America, Hernando de Soto encountered the Coushatta in 1540[37] and set the tribe on a 300-year migration.[38] By the 1880s, the Coushatta had settled near Elton, Louisiana. The Coushatta worked alongside Cajuns, Blacks, and Germans in the agricultural and lumber industries for menial wages.[39] Additionally, Coushatta women bartered and sold their elegant pine needle baskets to help support their families.[40] Despite participating in the mainstream economy, most Coushatta only spoke their traditional Indigenous language, Kosati, during the early twentieth century.[41] Compared to other Indians in the southeast, the Coushatta had amicable relations with the local white community, including being allowed to attend white schools.[42]

Despite their migration and interactions with other cultures, the Coushatta governance system,[43] language, and community always remained intact. Nonetheless, the United States did not recognize the Coushatta as an Indian tribe. While the federal government did not doubt the Coushatta's Indian heritage or continuing culture, the federal government noted the Coushatta were able to sustain themselves without the shackles of federal supervision.[44] However, a federal report did acknowledge the Coushatta "are desperately poor, and dire poverty is pitiable." The federal report attributed the Coushatta's poverty to their rural location, pointing out many non-Indians in the area were also poor.[45] The federal government finally provided assistance to the Coushatta in 1935 when the tribe began administering a local Indian school that only went to the fourth grade.[46] The school was poorly funded and focused on teaching the Coushatta to farm rather than the skills they needed to compete in the modern economy. Hence, Coushatta who attended the school were usually ill-equipped to transition into the local white school.[47]

[37] *Our Story: A History of Resilience and Perseverance*, Coushatta Tribe of Louisiana, www.coushatta.org/our-story/#:~:text=The%20Coushatta%20people%20have%20called,aimed%20at%20avoiding%20European%20encroachment [https://perma.cc/HT5S-63CZ].

[38] *Id.*

[39] Denise E. Bates, Basket Diplomacy: Leadership, Alliance-Building, and Resilience among the Coushatta Tribe of Louisiana, 1884–1984, at 5 (2020).

[40] *Id.* at 8.

[41] *Id.* at 7.

[42] *Id.* at 10.

[43] *Id.* at 18.

[44] *Id.* at 40.

[45] *Id.* at 42.

[46] *Id.* at 45.

[47] *Id.* at 55.

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The limited benefits of federal recognition were short-lived as the BIA unilaterally and unlawfully ceased providing services to the Coushatta in 1953 – the peak of the termination era.[48] Ernest Sickey was born to rectify this wrong.

Ernest was born to Davis and Daisy Sickey. He grew up in Elton, Louisiana speaking Kosati, Choctaw, French, and English.[49] The family was poor, and Davis was not a member of the Coushatta government. Nevertheless, he felt obligated to advocate for the tribe despite his fifth-grade education and limited English.[50] Davis regularly met with Louisiana officials in hopes of improving life for the tribe. In fact, he named Ernest after a Louisiana senator in an attempt to curry favor.[51] Davis regularly brought his young son to meetings of the Louisiana legislature in Baton Rouge and legal conferences throughout the southeast.[52] During these events, Ernest analyzed not just the events but also the way people communicated with one another.[53] Ernest would take his first political action as an eight-year-old boy when his father had him write a letter to a Louisiana congressman in hopes of securing aid for the Coushatta.

After graduating high school, Ernest studied broadcasting at the University of Houston for two years before joining the United States Air Force in 1962.[54] Ernest was designated a supply specialist, so he never saw duty in Vietnam. Instead, he served his six years in Baton Rouge and Alexandria, Louisiana.[55] Trying to figure out life after the military, he moved in with his parents. One day, Ernest and his father visited an Indian cemetery. Ernest was moved by the graves of dead babies – babies who died from poverty-related conditions.[56] Ernest decided his path was to improve life for his tribe, and community elders asked him to help the tribe regain its federal recognition.[57]

The path, however, was far from clear. The federal acknowledgment process had not been created, and the Coushatta were located in Louisiana. As a Jim Crow state, Louisiana's policy was people were either white or "colored" – no Indians. In fact, Louisiana placed Indians

[48] *Id.* at 75.
[49] *Id.* at 93.
[50] *Id.* at 85.
[51] *Id.* at 87.
[52] *Id.* at 92.
[53] *Id.*
[54] *Id.* at 95.
[55] *Id.*
[56] *Id.* at 101.
[57] *Id.*

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in mental institutions for speaking their Indigenous language.[58] After all, if no Indians were in the state, claiming to speak a Native language indicated mental incapacity.[59] Ernest knew he had to educate people about tribal sovereignty.[60] He also knew the tribe needed money.[61]

Ernest and other Coushatta decided to capitalize on stereotypes about Indians for political and economic gain. Coushatta partnered with the Boy Scouts to start an Indian Princess pageant in the 1960s.[62] The event succeeded at raising the Coushatta's profile and generating donations for the tribe. Soon after, the Coushatta incorporated under Louisiana law to provide the tribe with a formal structure. The tribe then opened a store called the Trading Post.[63] The Trading Post sold traditional Coushatta baskets, but it also offered token Indian items, like Plains Indian tribal headdresses, to appeal to customers. Ernest reached out to the Louisiana Tourist Commission for an endorsement, and it obliged, describing the Coushatta business as the "first Indian trading post since frontier days [operated by] perhaps the last full-blooded tribe in this state."[64] The Trading Post was a commercial success and raised the Coushatta's public profile.

The Trading Post was a Coushatta community effort; however, the political pursuit of federal recognition was largely Ernest himself. He would drive to Baton Rouge and take the bus to Washington, DC in order to meet with policymakers face to face. During most of the meetings, he intentionally dressed in business suits "because that's what white people understand."[65] Ernest knew garnering support would require a non-Indian benefit, so he emphasized how Coushatta federal recognition would create economic opportunities for non-Indians too.[66] Strategically, Ernest did not carry business cards. Instead, he carried a briefcase full of four-inch Coushatta baskets. The baskets were unique and helped make Ernest memorable, but he knew non-Indians often associate Indians with baskets. Thus, the baskets helped show the Coushatta were still a real tribe. Handing out baskets to politicians also increased demand for Coushatta baskets.[67]

[58] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 152.
[59] *Id.*
[60] BATES, *supra* note 39, at 132.
[61] *Id.* at 108.
[62] *Id.* at 106–07.
[63] *Id.* at 109–13.
[64] *Id.* at 110.
[65] *Id.* at 147.
[66] *Id.* at 133.
[67] *Id.* at 134–37.

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Ernest's campaign earned the Coushatta many powerful friends. His efforts bore fruit when Louisiana conferred recognition on the Coushatta in 1972, marking the first time the state recognized a tribe. One year later, the Coushatta's attorney submitted an eight-page letter to the BIA arguing the Coushatta was never lawfully terminated and, consequently, was entitled to recognition.[68] Due to Ernest's relationship-building efforts, the Louisiana congressional delegation actively monitored the BIA. The BIA re-recognized the Coushatta on June 27, 1973.[69] Although the BIA would deny the Coushatta governmental authority until 1975,[70] the Coushatta is now a fully functioning government. It continues to preserve its language and customs. Moreover, it employs more than 2,500 people – mostly non-Indians – and is one of the top-ten largest employers in Louisiana.[71]

Ernest served as the Coushatta Tribe of Louisiana's inaugural chairman and remained in that position for more than a decade. However, Ernest's impact extended far beyond the Coushatta. Under Ernest's leadership, the Coushatta became one of the initial members of the United Southern and Eastern Tribes, an organization that advocates for tribes in the south and eastern United States. The Inter-Tribal Council of Louisiana, formed in 1975, was a direct product of Ernest's advocacy. Ernest also helped other tribes achieve federal recognition, including the Tunica-Biloxi Tribe of Louisiana and the Jena Band of Choctaw Indians, located in Louisiana. When Ernest passed away on May 17, 2023, he was still fighting for the federal recognition of the United Houma Nation (UHN).[72]

15.5 THE HOUMA'S ONGOING QUEST

The Houma first encountered Europeans when French explorer Henri de Tonti journeyed down the Mississippi River in 1686. Tonti quickly allied with the Houma, describing the tribe as "the bravest savages of the river."[73] The French would ultimately name the Houma's territory Baton

[68] *Id.* at 152–53.
[69] *Id.* at 153.
[70] *Id.* at 159.
[71] *Spotlight on Our Tribes: The Coushatta Tribe of Louisiana*, NAT'L CTR. FOR AM. INDIAN ENTER. DEV. (Sept. 2, 2020), www.ncaied.org/spotlight/spotlight-on-our-tribes-the-coushatta-tribe-of-louisiana/ [https://perma.cc/TQH8-H6UV].
[72] S. Con. Res. No. 60, 2023 Reg. Sess. (La. 2023), www.legis.la.gov/Legis/ViewDocument.aspx?d=1326852 [https://perma.cc/8QAD-PMGX].
[73] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 157.

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Rouge, for the red stick the tribe used to mark its border. While relations between the French and Houma were generally amicable, disease and other colonial events forced the Houma to migrate farther south.[74] The Houma moved west into Spanish Louisiana after France's defeat in the French and Indian War.[75] Spain entered a treaty with the Houma,[76] and the Houma fought with Spanish Governor of Louisiana Bernardo de Gálvez in the American Revolution,[77] inflicting crucial defeats upon the British at Baton Rouge, Mobile, and Pensacola.[78]

After the war, the Houma went farther south to the location of the present-day city of Houma, Louisiana.[79] Spain continued to recognize the Houma's sovereignty. When Spain transferred Louisiana back to France, Spain required France to honor its treaties with the Houma and other tribes in the 1800 Third Treaty of San Ildefonso.[80] Three years later, France sold Louisiana to the United States, and the Louisiana Purchase obligated the United States to honor agreements Spain had made with Indian tribes.[81] Houma leaders met twice with William C. C. Claiborne, the first American Governor of New Orleans, and Claiborne provided the Houma chiefs with coats – a conventional means of mechanism used by the United States and other colonial powers to recognize Indian tribes.[82] With sovereign relations affirmed, the Houma fought alongside the United States at the Battle of New Orleans.[83] Notwithstanding, the United States denied the Houma's land claim after the war, asserting, "We know of no law of the United States by which a tribe of Indians have a right to claim lands as a donation."[84] For the next century, the Houma would remain largely isolated in the swamps of Terrebonne and Lafourche Parishes, on Louisiana's central Gulf Coast.[85]

[74] *Id.*
[75] *Id.* at 158.
[76] *Id.*
[77] Woody Holton, "*Independence Lost,*" *by Kathleen DuVal*, N.Y. Times (July 2, 2015) (reviewing Kathleen DuVal, Independence Lost: Lives on the Edge of the American Revolution (2016)), www.nytimes.com/2015/07/05/books/review/independence-lost-by-kathleen-duval.html [https://perma.cc/P53Q-W97B].
[78] *Id.*
[79] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 158.
[80] *Id.* at 159.
[81] Treaty with France for the Cession of Louisiana, U.S.-French Republic, art. VI, Apr. 30, 1803, 8 Stat. 200, 202.
[82] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 159.
[83] *Id.*
[84] *Id.*
[85] *Id.*

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The Houma were not literate, so few written records of the tribe exist during this period. However, the federal reports from the 1850s note the Houma existed in Terrebonne and Lafourche Parishes "as a mixed-blood Indian community."[86] Mixed-blood presented a problem in Jim Crow Louisiana, where one drop of Black blood meant a person was legally Black. Mixed ancestry resulted in the Houma constantly being questioned about their Indian ancestry and receiving the derogatory epithet "sabine," meaning not a real Indian. Hence, Henry L. Bourgeois, the Terrebonne Parish school superintendent from 1914 to 1955, wrote of the Houma:

> They call themselves Indians, and claim a social status comparable to that of the white man. But, as a matter of fact, they are not Indians. They are the descendants of that union of the Indian and the free gens de couleur of many generations back, with large infusions of white blood. They are pariahs. They disdain contact with the negroes, and they find the doors of the whites closed against them. Consequently, they have thrust themselves into an imaginary racial zone standing midway between the whites and the blacks.[87]

The Louisiana court system shared Bourgeois' view, determining the Houma were "colored" rather than Indians.[88] But due to the Houma's large population and refusal to be classified as "colored," Terrebonne and Lafourche Parishes implemented a three-way system of racial segregation: white, Black, and Indian.

But racism was not the only problem the Houma faced. Their land had oil. Oil companies were quick to take advantage of the Houma, many of whom could not speak English, during the 1930s. Houma signed documents believing they were leasing their land when in fact they were signing quitclaims.[89] When Houma would not freely turn over their land, oil companies resorted to violence.[90] Louisiana's law worked against the Houma too, as the increased property value due to oil production left the Houma unable to afford the property taxes.[91] Additionally, Louisiana law forbade the children of unwed mothers from inheriting property. The Houma, who maintained a distinct community, often married under traditional Houma law rather than Louisiana law. Thus, children born from traditional Houma unions

[86] *Id.* at 167.
[87] *Id.* at 168.
[88] Henry Billiot v. Terrebonne Parish School Board, 143 La. 623 (1918).
[89] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 161.
[90] *Id.* at 162.
[91] *Id.*

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were "adulterous bastards" under Louisiana law and ineligible to inherent their father's land.[92]

The federal government was not blind to the Houma's plight; nevertheless, it refused to recognize the Houma during the 1930s. In 1931, Roy Nash of the Office of Indian Affairs (OIA), as the BIA was known prior to 1947, visited the Houma. He reported to the Commissioner of Indian Affairs: "[The Houma] are all mixed bloods. French and Indian is the characteristic cross, a mixture which in Canada is considered pretty fine. But there is a five per cent [*sic*] which shows unmistakable Negro Blood, and that is where all the trouble lies."[93] In addition to having mixed racial ancestry, a 1939 OIA letter indicated recognizing the Houma would have been expensive. The communication noted the OIA's education services to the Coushatta quickly expanded into other areas; hence, funding the Houma's education would have led to other programs and more costs.[94] This indicated money – rather than tribal authenticity – was a pivotal factor in the OIA's failure to recognize the Houma.

Things slowly improved for the Houma. The Houma won a federal court case ordering their admission into public schools in 1963, but the order was slowly implemented, resulting in Houma children attending poorly funded Indian schools until 1969. The federal self-determination policy and Ernest Sickey's advocacy led the Houma to formally organize as the United Houma Nation in the 1970s. The Houma were named one of the initial four tribes on the Louisiana Intertribal Council in 1975.[95] Four years later, the Houma entered the administrative federal acknowledgment process and would languish there until 1994.

In 1994, the BIA decided against recognizing the Houma, contending the Houma failed to meet three of the mandatory criteria. The BIA claimed the Houma were not a tribe prior to 1830 but were a tribe from 1830 to 1880. Following 1880, the BIA asserted the Houma divided into six or more tribes. Consequently, the BIA determined the Houma did not constitute a distinct community and was not united under a common political body.

[92] *Id.* at 161.

[93] Nicholas Anthony Ng-A-Fook, Understanding an Indigenous Curriculum in Louisiana Through Listening to Houma Oral Histories, at 34 (May 2006) (Ph.D. dissertation, La. St. U.), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=3747&context=gradschool_dissertations [https://perma.cc/93XW-4TQR].

[94] Brian Klopotek, Recognition Odysseys: Indigeneity, Race, and Federal Tribal Recognition Policy in Three Louisiana Indian Communities 58 (2011).

[95] Bates, *supra* note 39, at 190.

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While the BIA did conclude the "Indian ancestry can be verified for the petitioner without doubt or question," the BIA asserted the Houma were not "Houma."[96] The Houma unsuccessfully challenged the BIA's finding in federal court. As a result, the Houma remain without federal recognition.

The BIA's finding has been subjected to significant criticism. First of all, the BIA's denial that the contemporary Houma are heirs of the historic Houma tribe is odd. The Houma have been identified as Houma by outside authorities and other tribes for well over a century. Even the BIA noted the Houma remain on Louisiana's Gulf Coast in a 1966 report.[97] Nevertheless, the BIA asserted the legendary anthropologist John Swanton gave the Houma its name in the early 1900s. The BIA went so far as to claim the Houma may have been named for the city of Houma rather than the city of Houma being named for the tribe located in the area for years before the city was established. Notably, the city of Houma itself states the Houma tribe is the city's namesake. While leading anthropologists such as John Swanton recognized the Houma they visited in the early and mid 1900s as heirs of the Houma of old, the BIA simply brushed off their claims as "unfounded assumptions."[98] Significantly, Swanton's work was essential to the federal recognition of multiple southeastern tribes.[99] The BIA has only questioned the veracity of Swanton's research about the Houma.[100]

The BIA's contention that the Houma were not a distinct community is also peculiar. BIA reports from the 1850s and 1930s specifically describe the Houma as an "Indian community."[101] This was the only plausible conclusion to reach as the Houma lived in isolated parts of the swamp with no paved roads until the 1950s.[102] Furthermore, the Houma suffered racial discrimination and were legally restricted to Indian areas in public places. The segregation mandate lasted through the early 1970s.

[96] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 163–64.

[97] Bureau of Indian Affs., dep't of the Interior, Indians of the Gulf Coast States, at Doc. Resume,5, 19 (1968), https://files.eric.ed.gov/fulltext/ED028866.pdf [https://perma.cc/XYE4-BHFL].

[98] Off. of Fed. Acknowledgment, U.S. Dep't of the Interior, Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgment of the United Houma Nation, Inc., 5 (1994), www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/056_uhouma_LA/056_pf.pdf [https://perma.cc/ZTQ6-6U63].

[99] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 164.

[100] Miller, Forgotten Tribes, *supra* note 31, at 204.

[101] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 167.

[102] *Id.*

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Segregation meant the Houma *legally had to be a distinct community*.[103] The BIA admitted, "Discrimination on a racial basis can, in fact, be strong evidence for the existence of distinct community."[104] Nonetheless, the BIA believed the Houma were not a distinct community.

The BIA's conclusion that the Houma lacked a political authority may be right; however, it ignores the way Indigenous societies operated. Indeed, one of the earliest written accounts of the Houma states, "The [Houma] chiefs are no more masters of their people than are the chiefs of the other nations in the direction of Canada. I have only noticed among them more civility."[105] Hence, the Houma leaders not exercising strong political influence over the Houma citizenry should help prove the Houma of today descended from the Houma of old. Lack of strong political bodies was not unique to the Houma. Among many – perhaps most – Indian tribes, political leadership was situational. That is, leaders were appointed based on the needs of the community. This means the BIA judged the Houma government from a western lens rather than the Indigenous perspective the Houma itself applied.

Several other errors exist in the BIA's finding. Two are illustrative. One is the BIA said the Houma do not have a treaty with the United States, but the 1977 American Indian Policy Review Commission determined the Houma do have a treaty with the United States.[106] The United States has never abrogated the Houma's treaty rights vested in the Louisiana Purchase; thus, the United States is still legally bound by the treaty – even if the federal government ignores it.[107] Thus, by denying the UHN federal recognition, the United States is violating a treaty – the supreme law of the land. Notably, France continues to recognize its treaty with the Houma. It held a 317-year anniversary of its alliance with the Houma in 2016.

The other legally significant error is the BIA's assessment of the Houma language. The BIA reasonably assumed the Houma, located in south Louisiana, spoke Cajun French, but recent linguistic studies have shown the Houma spoke a different version of French than their Cajun neighbors. Houma French is actually two generations older than Cajun French because the Houma learned French from the French explorers, not the Cajuns. The Houma French also contains some of the original Houma words and is

[103] *Id.* at 168.
[104] Summary Against Fed. Acknowledgment United Houma Nation, *supra* note 98, at Introduction: Social/Racial Distinctions.
[105] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 170.
[106] *Id.* at 170–71.
[107] McGirt v. Oklahoma, 591 U.S. 894, 937–38 (2020).

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spoken with a cadence similar to other Muskogean languages.[108] Language should be decisive proof of the Houma's authenticity. After all, there is no other explanation for the Houma speaking the French dialect of Paris circa 1700 than the Houma learned it from French explorers circa 1700.[109]

Perhaps the BIA's conclusions can be explained by third-party influence, particularly the oil industry. The Houma's south Louisiana lands were rich in oil and exploited by oil companies during the first half of the twentieth century. During the 1930s, anthropologist Frank Speck opined oil companies opposed Houma federal recognition because federal recognition would give Houma rights over their land and the oil beneath it.[110] Oil companies petitioned the BIA and performed research to undermine the Houma's attempt to navigate the federal acknowledgment process. Professor Mark Edwin Miller, a premier authority on tribal federal recognition, explained "tribal acknowledgement would give the Houmas standing in court to press claims under federal Indian laws."[111] This was on full display in 2010 during the BP oil spill.

The Houma were devastated by oil from BP. Furthermore, the chemicals BP used to clean up the spill may have been more poisonous than the oil. In addition to the immense environmental damage, the BP spill devastated the Houma economically. Lack of educational opportunities led many Houma to pursue careers in the oil and seafood industries. BP shut both down; consequently, numerous Houma families were out of work. The spill also meant Houma families could not supplement their diets by fishing or hunting as oil and other toxins ruined wild game. Given the hardship the spill caused the Houma people, the UHN filed a claim in hopes of receiving compensation but was rejected by BP. BP explained:

> 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.[112]

[108] Crepelle, *Standing Rock in the Swamp*, *supra* note 13, at 173.
[109] *Id.*
[110] *Id.* at 162.
[111] Miller, *supra* note 31, at 201.
[112] Letter from Geir Robinson, Dir. of Claims, BP Gulf Coast Restoration Org., to Lanor Curole & Thomas Dardar Jr., on Claim Filed on Behalf of United Houma Nation (Nov. 18, 2010).

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An investigation into the BP spill by the National Association for the Advancement of Colored People found "[t]he oil industry lobby is blocking [the Houma's] request because they want access to lands that would be protected under the federal designation."[113]

But powerlessness against oil companies is only one issue. Without federal recognition, the UHN is not a "real" government in the eyes of the federal government. Therefore, the UHN has no consultation rights, which makes it easy to exclude Houma communities from important projects such as levies. Likewise, the Houma are not eligible for direct federal assistance when the tribe is struck by hurricanes including Katrina, Rita, and Ida. The Houma are not eligible for most federal programs designed to foster tribal citizen health and educational attainment. And without federal recognition, it becomes increasingly hard for the UHN to preserve its way of life. After all, hurricanes and coastal erosion are forcing families to relocate, which will cause the tribal community to disperse.

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The Houma are a particularly egregious example of the United States' failure to recognize Indian tribes. However, other legitimate tribes have been denied recognition. Failure to recognize a legitimate Indian tribe is the apex of colonization – denying the existence of a people. Denying a tribe recognition prevents it from functioning as a government.

[113] Nat'l Ass'n for the Advancement of Colored People, BP Oil Drilling Disaster—NAACP Investigation Report 8 (2010) [https://perma.cc/PG33-YVBF].

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