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Oil, Indifference, and Displacement: An Indigenous Community Submerged and Tribal Relocation in the 21st Century

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Cover Page Footnote

The author thanks Professor Angelique EagleWoman and the Native American Law and Sovereignty Institute at Mitchell Hamline School of Law for guidance and inspiration in this work.

OIL, INDIFFERENCE, AND DISPLACEMENT: AN INDIGENOUS COMMUNITY
SUBMERGED AND
TRIBAL RELOCATION IN THE 21ST CENTURY

Jared E. Munster, Ph.D.[†]

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I. INTRODUCTION

On August 25, 2022, the first residents of “New Isle” received keys to their homes, officially signaling the end of Isle de Jean Charles, a small island community in south Louisiana.¹ The community, consisting entirely of members of federally unrecognized Indigenous Tribes, has been slowly eroding into the Gulf of Mexico over the last century. From an island measuring approximately twenty-two thousand acres in the early twentieth century, the land mass is now barely more than three hundred acres. The population is small but resilient, isolated and close-knit.

Through the twentieth century, south Louisiana experienced booms and busts. The region has provided seafood to consumers and oil to quench the nation’s thirst for energy. All the while, the Indigenous residents of some of the most geographically isolated communities in the continental United States have tried to protect their subsistence lifestyles and their culture which had been firmly rooted in the now rapidly disappearing soil. Channelization of the Mississippi River and the exploitation of petroleum resources provided the perfect confluence of circumstances to deprive the marsh of replenishing nutrients while simultaneously crushing the delicate substrate beneath the treads of heavy equipment.

This article will focus on the Indigenous communities of the south Louisiana marshes, their history, their community, and the land from which their communities developed.² This article will focus on how that land came to be over the course of thousands of years and how it was destroyed in less than one hundred.³ Finally, this article will focus on how the traditional ways of life and culture of these Indigenous communities may be protected as the people are relocated for their physical protection.⁴

II. PEOPLE AND PLACES OF THE BARATARIA-TERREBONNE BASINS

Before beginning discussion of what may be lost, it is critical to understand what has been and what remains. The Barataria and Terrebonne Basins are a vast, contiguous area of estuarial wetlands in southeast Louisiana, bounded by the Mississippi River on the north and east, the Atchafalaya River on the west and the Gulf of Mexico to the south.⁵ Among the earliest known

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¹ Kezia Setyawan, *Move-in day for Isle de Jean Charles resettlement residents marked with relief — and uncertainty*, WWNO - NEW ORLEANS PUBLIC RADIO (Aug. 25, 2022), [<https://perma.cc/BMH3-XG8X>] [hereinafter, “Setyawan, *Move-in day*”].

² See *infra* Sec. II.

³ See *infra* Sec. III.

⁴ See *infra* Sec. IV.

⁵ Lawrence S. McKenzie III, et al., *Land Use and Socioeconomic Status and Trends in the Barataria Terrebonne Estuarine System*, BARATARIA TERREBONNE NAT’L ESTUARY PROGRAM, 1 (1995), [<https://perma.cc/U2G7-HZT2>]

occupants of the region were Indigenous peoples who began at least seasonal use of the land approximately 1,800 years ago.⁶ Archaeological evidence indicates the earliest occupants likely occupied the area in the summer and fall, during times of lower water levels allowing small communal settlements on natural ridges and ready access to the basin's abundant fauna.⁷

When Europeans arrived along the Gulf Coast, the Indigenous population in and near the Barataria-Terrebonne Basins comprised three primary Tribes: the Houma, the Bayougoula, and the Chitimacha, each occupying a distinct area in the larger basin.⁸ While the Tribes were initially cooperative with European settlement efforts, infringement on territory, disease, and the French practice of selling Indigenous peoples into slavery drove the Indigenous population to relocate from their ancestral lands. This relocation resulted in the convergence of tribes, and the assimilation of unique tribes into larger tribal communities.⁹ The result was that:

[h]arassed tribes such as the Houma found refuge literally at land's end, occupying the attenuated natural levees that extended toward the Gulf of Mexico. Places of concentration included Barataria, Bayou du Lac, Grand Caillou and Isle [de] Jean Charles. The settlements in these places were the antecedents of the line villages of later French population.¹⁰

The full story of these first-wave relocations has been lost to time, and historians recognize that some smaller, early Indigenous peoples were likely lost as well.¹¹ However, the survival of the tribes to the present represents the strength and resilience of Indigenous people and culture in spite of centuries of displacement.¹² Following displacement to the swamps of south Louisiana, two Indigenous communities now call the area home: The Houma Tribe and the Biloxi-Chitimacha-Choctaw Tribe.

A. *The Houma Tribe*

The Houma Tribe, today known as the United Houma Nation ("Houma Nation"), was first in contact with Europeans in the 1680s during French expeditions along the Mississippi River, at which time the tribe was settled in the Burnside area near modern Baton Rouge, adjacent to the

⁶ *Id.* at 10-11, notably, Indigenous presence in the area now known as Louisiana likely began 10,000 to 12,000 years ago when sea levels were lower and before the Mississippi River built the deltaic system that existed until the twentieth century. As land area expanded due to sedimentation, the Indigenous inhabitants of the area successively ventured further south into the Barataria-Terrebonne Basin; Barbara Holmes, *Historic Resources Study: The Barataria Unit of Jean Lafitte National Historical Park*, SW. CULTURAL RES. CTR., 27 (1986), [<https://perma.cc/8J8X-ZL97>].

⁷ Holmes, *supra* note 6, at 28.

⁸ McKenzie et al., *supra* note 5, at 11.

⁹ *Id.*

¹⁰ FRED B. KNIFFEN, HIRAM F. GREGORY & GEORGE A. STOKES, *THE HISTORIC INDIAN TRIBES OF LOUISIANA FROM 1542 TO THE PRESENT* 21 (1987).

¹¹ *See id.* at 79.

¹² *Id.* at 79-80.

lands of the Bayougoula people.¹³ By the 1730s, population decline and external pressures from colonization caused the Bayougoula and other tribes, such as the Acolapissa, to begin merging with the Houma people before the group departed their traditional lands.¹⁴ The precise timing of the Houma Tribe’s relocation from Burnside to the “land’s end” is unclear from the historical record; the Houma Nation posit that the lack of records relating to relocation reflects the “continual pressure, the economic desire of their adversaries to prove the Houma people did not exist, and the continued denial of education which would have allowed them to record their history.”¹⁵ Some historians argue the Houma Tribe of the colonial era did not relocate from Burnside, but rather their population declined and they assimilated into other tribes, rather than tribes joining with them.¹⁶ However, based on the subsequent historical record and documentation through the late nineteenth century, this narrative is highly unlikely.¹⁷

En route, the Houma people first settled briefly on the banks of Bayou St. John, near New Orleans¹⁸ before travelling further to Chufufhouma (modern Houma).¹⁹ By the 1820s, the Houma Tribe settled in the swamps of lower Terrebonne Parish where they lived relatively undisturbed until the 1930s when oil was discovered under tribal lands.²⁰ While the Houma people were able to settle in the area, they were not isolated and were part of the larger community.²¹ The first Houma people to reside in lower Terrebonne “did not live in a distinct, identifiable Indian community — geographically, socially, or politically — exclusively made up of their own families or descendants,”²² which ultimately contributed to the denial of federal recognition through the Bureau of Indian Affairs (BIA) in 1994.²³

Though the community was relatively isolated until the 1930s, ethnohistorian John Swanton visited the tribe in 1907 and his subsequent writings on that visit have long informed the

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, 157-58 (2018) [HEREINAFTER “CREPELLE, *STANDING ROCK*”].

¹⁴ *Id.* at 158.

¹⁵ J. Daniel D’Oney, *The Houma Nation: A Historiographical Overview*, 47 LA. HIST.: J. LA. HIST. ASS’N 63, 73-74 (2006).

¹⁶ *Id.*; JOHN R. SWANTON, INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF GULF OF MEXICO 292 (1911) (this position is also reflected in the Bureau of Indian Affairs 1994 recommendation against tribal recognition, arguing that connection to the historic Houma Tribe cannot be conclusively established).

¹⁷ Bryan L. Guevin, *The Ethno-Archaeology of the Houma Indians* 64 (Dec. 1983) (M.A. thesis, Louisiana State University and Agricultural and Mechanical College) (LSU Historical Dissertations and Theses); D’Oney, *supra* note 15, at 74, citing *In Fair Terrebonne*, NEW ORLEANS DAILY PICAYUNE, July 17, 1892 (discussing the “Houmas Indians” residing along the bayous in lower Terrebonne Parish).

¹⁸ Guevin, *supra* note 17, at 64.

¹⁹ Crepelle, *Standing Rock*, *supra* note 13 at 158.

²⁰ *Id.* at 159; Adam Crepelle, *Tribal Recognition, Consultation, and Lessons from the First Climate Relocation*, 34 NAT. RES. & ENV’T 13, 16 (2020) [hereinafter “Crepelle, *Tribal Recognition*”].

²¹ OFF. OF FED. ACKNOWLEDGEMENT, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FED. ACKNOWLEDGMENT OF THE UNITED HOUMA NATION, ANTHROPOLOGICAL REPORT 3 (1994) [hereinafter “HOUMA NATION PROPOSED FINDINGS”].

²² *Id.*

²³ *Id.* at 6-17; *see infra* Sec. IV.D.1 for discussion on federal recognition and protections afforded Indigenous communities under the United Nations Declaration on the Rights of Indigenous Peoples.

“official” history of the Houma people.²⁴ Swanton concluded, based on an assessment of existing sources and census data, “in spite of mixture with whites and negroes, they form a distinct class of the population, and *prefer to be called* ‘Indians.’”²⁵ This questionably-informed determination published over a century ago has been raised continuously against the Houma people, and surfaced time and again in their decades-long pursuit of federal recognition.²⁶

The BIA first engaged with the Houma people in 1931 following a letter sent to the BIA’s commissioner one decade before.²⁷ Prior to this visit to south Louisiana, the only information on file with the agency was a brief, one paragraph statement from 1884, which ended with the sentence, “They are now supposed to be extinct.”²⁸ The BIA’s 1931 investigation was triggered by requests to recognize the tribe so federal education benefits could be obtained through the Bureau. This investigation concluded that “[i]f these mixed bloods were concentrated in any one place, it might be possible for the Federal government to afford them school facilities; but they are scattered widely through Louisiana.”²⁹ The BIA’s conclusion, one merely consisting of cost analysis, provided no finding on whether the Houma people otherwise qualified for federal recognition, and the commissioned report was filed with a note indicating that “[n]o action is recommended.”³⁰

Consideration of the Houma people’s right to recognition continued through the 1930s, with further investigations conducted through the course of that decade by additional representatives of the BIA. These culminated in a 1940 report recommending an “economical and experimental” measure of support to the newly established schools formed to provide public education to Houma children.³¹ There is no documentation reflecting what, if any, action was taken by the BIA in response to this recommendation. What is clear from the nature of the recommendation and other actions taken by the BIA in similar circumstances, is that this was not a question of recognition, merely a question of whether to provide limited funding that could assist an Indigenous community.³² In the 1970s, the Indigenous communities on the coast began to organize, resulting in two organizations, the Houma Alliance and the Houma Tribe; in 1979 these

²⁴ D’Oney, *supra* note 15, at 75.

²⁵ SWANTON, *supra* note 16 at 292 (emphasis added). In making this statement within the context of his larger report on the Houma Tribe, Swanton tacitly dismissed the assertion that the group truly descended from the historic Houma Tribe and instead acknowledged the group’s preference of being termed “Indians” despite his belief to the contrary. *Id.*

²⁶ D’Oney, *supra* note 15, at 75-76.

²⁷ Ernest C. Downs & Jenna Whitehead, *The Houma Indians: Two Decades in a History of Struggle*, 2 AM. INDIAN J. 2-3 (1976). The letter referenced was sent by Ernest Coycault, “a creole living in New Orleans and married to one of these Indians.” It was Mr. Coycault’s brother-in-law who later served as Swanton’s guide during his visit to the isolated, Native communities of south Louisiana in 1931. Bill Ellzey, *Harvard Anthropologist Tells What He Learned About Local Indians*, HOUMA TODAY (May 20, 2010) [<https://perma.cc/8ZFL-GPU4>].

²⁸ Downs & Whitehead, *supra* note 27, at 3.

²⁹ *Id.* at 3.

³⁰ *Id.* at 4.

³¹ Frank G. Speck, *The Houma Indians in 1940*, 2 AM. INDIAN J. 4, 14 (1976).

³² *Id.* at note 4, providing federal education funds were used to establish a school in Jena, Louisiana for a Choctaw community that was otherwise ineligible for BIA services.

groups consolidated into the Houma Nation.³³

In 1975, Congress adopted a Joint Resolution establishing the American Indian Policy Review Commission to “conduct a comprehensive review of the historical and legal developments underlying the Indians’ unique relationship with the federal government, in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians.”³⁴ In the final report issued by this Commission, there is a single notation indicating the existence of a colonial treaty with the Houma Tribe dating to 1777, predating the Louisiana Purchase by nearly forty years.³⁵ This reference is notable for two reasons: first, this directly contradicts the BIA’s 1931 representation to Congressman Charles Hayden, a member of the House Indian Affairs Committee, which stated (along with the tribe being extinct) that “no treaty was ever entered into by the [Houma tribe] and the Government;”³⁶ and second, because the Louisiana Purchase treaty specifically provided a “promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians.”³⁷ As a result, since the 1777 treaty with Spain had not been abrogated, the agreement between Spain and the United States as their sovereign successor “remains in effect.”³⁸

Following consolidation as the Houma Nation, the Tribe began the administrative recognition process in 1979 culminating in a finding against recognition by the BIA in 1994.³⁹ Administrative recognition by the BIA is based on an evaluation of seven criteria established in the Code of Federal Regulations and failure of an applicant to satisfy any one of the criteria requires the BIA to “determin[e] that the group does not exist as an Indian tribe within the meaning of Federal law.”⁴⁰ In the case of the Houma Nation, the findings noted deficiencies in three of the

³³ ADAM CREPELLE, *THE UNITED STATES FIRST CLIMATE RELOCATION: RECOGNITION, RELOCATION, AND INDIGENOUS RIGHTS AT THE ISLE DE JEAN CHARLES*, 6 BELMONT L. REV. 1, 14 (2019) [Hereinafter “Crepelle, *Climate Relocation*”].

³⁴ Pub. L. No. 93-580, 88 Stat. 1910 (1975).

³⁵ AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 450, Volume One of Two Volumes (1977), [https://perma.cc/RJH4-9ZHN].

³⁶ Downs & Whitehead, *supra* note 27, at 2.

³⁷ Carol Meyer, *The Louisiana Purchase and Indian Rights*, 2 AM. INDIAN J. 16, 17 (1976) The inclusion of this language in the treaty between the United States and France to execute the Louisiana Purchase is unique in that it represents a singular departure from both U.S. and European policies of the era which generally “dispose[d] of the territories of the Indian nations without any reserve of their rights.” Whether there was actual knowledge on the part of President Jefferson or his negotiators that treaties existed between Spain and the tribes predating Spain’s cession of the territory to France is unknown. However, Jefferson was aware that protection of tribal rights would be opposed by Congress and could impede ratification of the Purchase. As a result, President Jefferson passively provided “[i]t is said that no treaties have been entered into by Spain with the Indian nations westward of the Mississippi” despite formal treaties with numerous groups. *Id.*

³⁸ Crepelle, *Climate Relocation*, *supra* note 33, at n. 92 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 416 (1968)).

³⁹ *Id.* at 15; see generally 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 (2015) (detailing the history of the administrative recognition process through the BIA); see generally RACHAEL PASCHAL, *THE IMPRIMATUR OF RECOGNITION: AMERICAN INDIAN TRIBES AND THE FEDERAL ACKNOWLEDGEMENT PROCESS*, 66 WASH. L. REV. 1 (1991) (providing an explanation of the administrative recognition process, including lengthy time of review and application of evaluation criteria); see also ROBERTO IRAOLA, *THE ADMINISTRATIVE TRIBAL RECOGNITION PROCESS AND THE COURTS*, 38 AKRON L. REV. 867 (2005) (discussing the judicial practice of deferring to administrative determinations made by the BIA).

⁴⁰ HOUMA NATION PROPOSED FINDINGS, *supra* note 21, at 3.

seven administrative criteria: (1) documented descent from a tribe from historical contact to 1830; (2) genealogical connection to a historical tribe; and (3) membership descending from a historical tribe which functioned as a single political entity.⁴¹ These findings have been questioned since their publication due to internal inconsistencies within the BIA's report and for standing in contrast with the historical record.⁴²

The struggles faced by the Houma Nation in the BIA recognition process highlight the shortcomings of the BIA's criteria; for example, based on centuries of displacement and assimilation efforts, most historical Tribes are unable to meet the "political influence" requirement for functioning as a single political entity.⁴³ However, even looking beyond the recognition criteria imposed by the BIA, the political process undergirding administrative recognition brought intervention by oil exploration companies operating in the bayous of south Louisiana.⁴⁴

These companies understood that recognition by the BIA would allow the Houma Nation to act under the full gamut of Federal Indian laws, which would likely interfere with the *laissez-faire* means of operation they had grown accustomed to under Louisiana law.⁴⁵ These companies went so far as to conduct their own research into the history and functioning of the Houma Tribe, took depositions to find any information that could work against recognition, and began their own review of the Houma Nation's petition for recognition, which conveyed the clear message to the BIA that a finding of recognition would likely be challenged.⁴⁶

Based on the BIA's analysis, its proposed finding provided the recommendation that while the Houma Nation was ineligible for recognition based on the evaluation criteria, "at least six of the [Houma Nation's] settlements" could meet the criteria as distinct political entities where the Houma Nation as a whole could not.⁴⁷ The result of this language was a schism of the Houma Nation.

B. The Biloxi, Chitimacha Confederation of Muskogees and the Pointe-au-Chien Indian Tribe

Following the BIA's proposed findings on the Houma Nation's petition for recognition in 1994, and that report's assertion that some of the sub-groups of the Houma Nation appeared to descend from tribes other than the historic Houma Tribe, two groups separated from the Houma Nation with the goal of seeking recognition.⁴⁸ These groups, the Biloxi, Chitimacha Confederation

⁴¹ *Id.* at 9-38.

⁴² *Id.*; Crepelle, *Climate Relocation*, *supra* note 33, at 15; N. Bruce Duthu, *The Houma Indians of Louisiana: The Intersection of Law and History in the Federal Acknowledgment Process*, 38 LA. HIST.: J. LA. HIST. ASS'N 409, 410 (1997).

⁴³ MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 157 (2004); REBECCA M. MITCHELL, *PEOPLE OF THE OUTSIDE: THE ENVIRONMENTAL IMPACT OF FEDERAL RECOGNITION OF AMERICAN INDIAN NATIONS*, 42 BOS. COLL. ENV'T AFFS. L. REV. 507, 516 (2015); *see* BRIAN KLOPOTEK, *RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES* (2011).

⁴⁴ MILLER *supra*, note 43, at 201.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ HOUMA NATION PROPOSED FINDINGS, *supra* note 21, at 27-28.

⁴⁸ MILLER, *supra* note 43, at 199.

of Muskogeans (BC Confederation of Muskogeans) and the Pointe-au-Chien Indian Tribe (Pointe-au-Chien Tribe)⁴⁹ “generally accepted the [BIA] finding that their people did not descend from the Houma Tribe, but rather were an amalgamation of Biloxi, Chitimacha, Choctaw, and other battered colonial Tribes who coalesced on the lower bayous.”⁵⁰ In documenting their own history, the BC Confederation of Muskogeans and the Pointe-au-Chien Tribe have adopted significant portions of research compiled by the Houma Nation as their own.⁵¹

1. Biloxi, Chitimacha Confederation of Muskogeans

While the Houma Nation traces its lineage to the historic Houma Tribe encountered by the French and Spanish near modern Baton Rouge, the BC Confederation of Muskogeans traces its history to the land their people presently occupy.⁵² The BC Confederation of Muskogeans cites descent from the Biloxi, Chitimacha, Acolapissa, Atakapa, and Choctaw Tribes, which came together in the bayous of south Louisiana in the late 1700s to early 1800s, and currently comprise three separate bands: the Bayou Lafourche Band, the Grand Caillou/Dulac Band, and the Isle de Jean Charles Band.⁵³ Following separation from the Houma Nation, the members of the BC Confederation of Muskogeans no longer claim descent from the Houma Tribe, though they acknowledge that their members have been referred to as such for over a century.⁵⁴

The BIA found the supplemental material submitted by BC Confederation of Muskogeans insufficient to support a positive recommendation for federal recognition, finding “no historical evidence that a historical tribe continued to exist in or migrated to the area of modern Terrebonne Parish, inconsistent oral history accounts of [their] historical origins, and insufficient evidence to establish the tribal ancestry of historical individuals claimed as the founding Indian ancestors” of the Tribe.⁵⁵

Reviewing the historical record of locations and migration of Louisiana tribes, the BIA’s research could not “place any historical tribe in the vicinity of the earliest known historical settlement in Terrebonne Parish” by tribes from whom the BC Confederation of Muskogeans claim descent.⁵⁶ However, in 1849 the Louisiana Supreme Court found that the Chitimacha Tribe of Bayou Lafourche were present as early as 1699 and that the Biloxi Tribe was relocated to Bayou

⁴⁹ As a note on spelling, “Pointe-au-Chien” is the proper, adopted name of the Pointe-au-Chien Indian Tribe (Pointe-au-Chien Tribe) while “Pointe-aux-Chêne” is the name of the community. The terms will be used throughout this document with proper spelling based on the context of the name; see Gisèle D. Thériault, *Down the Bayou: Notes on Cultural Adaptation in the Native American Community of Pointe-au-Chien, Louisiana*, FOLKLIFE IN LOUISIANA: LOUISIANA’S LIVING TRADITIONS, n. 1, [<https://perma.cc/G2EJ-YFVJ>].

⁵⁰ MILLER *supra* note 43, at 199.

⁵¹ Crepelle, *Climate Relocation*, *supra* note 33, at 16.

⁵² OFF. OF FED. ACKNOWLEDGEMENT, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR AMENDED PROPOSED FINDING AGAINST FED. ACKNOWLEDGMENT OF THE BILOXI, CHITIMACHA CONFEDERATION OF MUSKOGEEES, INC. 83 (2008) [Hereinafter “BC CONFEDERATION OF MUSKOGEEES PROPOSED FINDINGS”].

⁵³ *Id.* at 4.

⁵⁴ *Id.*

⁵⁵ *Id.* at 7.

⁵⁶ *Id.*

Boeuf (north of modern Houma) to land occupied by the Choctaw Tribe.⁵⁷ In recounting tribal history regarding the land subject of the dispute in *Breaux v. Johns*, the Chitimacha Tribe provided that they were:

owners and possessors [of the land in question] as far back as tradition, authentic history, or the memory of man runneth, and holding it by descent through many generations of their ancestors; that their nation were owners and possessors of said land when the [F]rench nation first discovered it, and proclaimed its sovereignty over the territory of Louisiana; that the [F]rench and [S]panish governments recognized their title to the land, and by the treaties of Paris and San Ildefonso bound the United States government to do the same; [and] that the United States government, in a compact with the territory of Louisiana, at the time of her admission to the Union, acknowledged the title of the [Chitimacha Tribe]to the land.⁵⁸

The Louisiana Supreme Court ultimately rejected the Chitimacha Tribe’s claims on the land from time immemorial under the doctrine of discovery established by *Johnson v. M’Intosh*.⁵⁹ However, the Chitimacha Tribe’s attestation of their history on the land — paired with the Louisiana Supreme Court’s recitation of European claims to the land — provide a clear record of the Chitimacha Tribe’s presence from the earliest European contact.⁶⁰ At the time of contact with Europeans, the Chitimacha Tribe was found in two areas of Louisiana: the first group was found at Bayou Teche, near modern Charenton, and the second group was found adjacent to Bayou Lafourche (originally named the Chitimacha River).⁶¹

Ultimately, the Houma Tribe migrated to the areas of modern Terrebonne Parish historically occupied by the Chitimacha Tribe, as recounted above, with the Choctaw Tribe and the relocated Biloxi Tribe in proximity.⁶² This proximity — and ultimately a convergence of cultures and ancestry — is what underscores the struggle for recognition today. Ethnohistorian John Swanton, whose early twentieth century writings on Indigenous tribes have, questionably, been deemed authoritative,⁶³ noted the following when describing the Houma people:

⁵⁷ *Breaux v. Johns*, 4 La. Ann. 141, 141-43 (La. 1849) (notably, the Louisiana Supreme Court notes in this decision the Chitimacha Tribe was “made to appear in their national capacity”).

⁵⁸ *Id.* at 141.

⁵⁹ *Id.* at 142-43, citing *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543.

⁶⁰ *Id.* at 143-44. A substantial portion of the analysis provided by the Louisiana Supreme Court discusses the validity of possible land grants from the Spanish crown to the Chitimacha Tribe. In the will of Queen Isabella, she discusses not only the apostolic dispensation granted Spain by Pope Alexander VI for the lands discovered and to be discovered on the North American continent, which served as the foundation for claims of Spanish sovereignty, but also “title of the Indians to the lands allotted to them.” However, this title was subject to reversion to the Crown if the tribe abandoned the land; this reversion was a secondary basis for the Louisiana Supreme Court’s finding that the land patent granted to the petitioner by the United States was valid, since the United States would be successor in title to the Spanish Crown for reversion of the land in question, which was vacated by the Tribe in 1807. *Id.*

⁶¹ David I. Bushnell, Jr., *The Chitimacha of Bayou LaFourche, Louisiana*, 7 J. WASH. ACAD. SCI. 301-02 (1917).

⁶² *See, supra* Section II.A.

⁶³ D’Oney, *supra* note 15, at 75 (“Swanton’s work shows a pronounced lack of historical inquiry, as he relied on previous sources for the bulk of his historical section; with the exception of census figures, Swanton relied upon what other people had said about the Houma [people], some of which was wrong”).

Although they call themselves “Houmas” or, rather “Hômas,” it has been intimated . . . that remains of several other tribes, such as the Bayougoula and Acolapissa, have been incorporated with them. To these must be added Biloxi and Chitimacha, who were often introduced in the capacity of slaves, and probably the remnants of the Washa and Chawasha, besides individuals from a number of other Louisiana and Mississippi peoples.⁶⁴

Separate from the Chitimacha Tribe who occupy the bayous of Terrebonne Parish, another subset of the historic Chitimacha Tribe has obtained both land and tribal recognition. The Chitimacha Tribe of Charenton, Louisiana, is federally recognized and has possessed tribal land in fee since 1855.⁶⁵ While The Chitimacha Tribe of Charenton have attained recognition, those remaining in the areas where they were first encountered by Europeans, or those pushed further into the swamps, have not had the same recognition due to the absence a “satisfactory explanation of the migration of a tribal group or portion of an Indian tribe into Terrebonne Parish,” discounting their documented presence in the area since at least the time of European arrival.⁶⁶

2. Pointe-au-Chien Indian Tribe

Following the separation of the BC Confederation of Muskogeas from the Houma Nation in the 1990s, the Pointe-au-Chien Tribe separated from the BC Confederation of Muskogeas to pursue recognition as an independent tribe.⁶⁷ The Pointe-au-Chien Tribe petition asserts the same tribal descentance as the BC Confederation of Muskogeas petition, with the primary distinguishing factor being their tribe’s history as a geographically distinct community from the BC Confederation of Muskogeas Bands since the mid-1800s.⁶⁸ Just as the BC Confederation of Muskogeas petition was rejected by BIA, the Pointe-au-Chien Tribe petition met the same fate in a separate proposed finding issued on the exact same date.⁶⁹

C. A Shared History of Discrimination and Exclusion

Whether the Indigenous communities of southern Terrebonne Parish are considered as a single tribe or multiple distinct tribes, the Indigenous people of this area share a common history of discrimination and exclusion. As provided above, and as noted in the BIA’s proposed findings on the petitions filed by the BC Confederation of Muskogeas and Pointe-au-Chien Tribe, the Indigenous population of coastal Louisiana has been commonly referred to as the “Houma” for over a century, regardless of their specific tribal affiliation.⁷⁰ Prior to the discovery of oil in the

⁶⁴JOHN R. SWANTON, *supra* note 16, at 292.

⁶⁵ BC CONFEDERATION OF MUSKOGES PROPOSED FINDINGS, *supra* note 52, at 84.

⁶⁶ *Id.* at 84-85, 97.

⁶⁷ OFF. OF FED. ACKNOWLEDGEMENT, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR AMENDED PROPOSED FINDING AGAINST FED. ACKNOWLEDGMENT OF THE POINTE-AU-CHIEN INDIAN TRIBE 4-5 (2008).

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 11.

⁷⁰ *Id.* at 8; SWANTON, *supra* note 16, at 292; BC CONFEDERATION OF MUSKOGES PROPOSED FINDINGS, *supra* note 52, at 8.

swamps, the Indigenous communities were relatively isolated, and while they conducted business and bartered with communities, they were largely insular.⁷¹ The result of this isolation was that these communities spoke little English and could read even less.⁷² The primary language of these isolated communities in the 1930s was Cajun French.⁷³ The preservation of Cajun French in these communities is rooted in two separate but ultimately related causes: remoteness of the region due to the lack of roads to population centers and an absence of educational opportunities for those with real or perceived Indigenous ancestry.⁷⁴

Geographic isolation of disparate bayou communities, while beneficial in preserving traditional ways of life and culture, also served as a barrier to government services. Due to the remoteness of communities and separation from one another and population centers, there were few paved roads connecting Indigenous communities to cities until the 1950s.⁷⁵ Before those roads were constructed all travel between communities was done by boat.⁷⁶ Just as residents of these communities lived apart from established government services, government services — schools in particular — also did not come to them.⁷⁷ However, isolation was not the only reason for this; the reality of segregation in the Jim Crow South was also a significant contributing factor.⁷⁸

As asserted by Swanton from his visit to their communities in Terrebonne and Lafourche Parishes in 1907, the Houma Tribe consists of “the remnant of the tribe, mixed with other Indian peoples and white and negro blood.”⁷⁹ Whether this observation is correct or not, the Houma people were ostracized from their largely French-descended communities due to their darker complexions and last names.⁸⁰

Nowhere was discrimination more apparent than in the fifty-year struggle for public education for the Indigenous communities of the Louisiana coast.⁸¹ Parish governments operated a segregated school system and prohibited children of the Indigenous communities from attending “white only” schools, and the Houma people refused to send their children to the African-American schools, resulting in generations of Houma children not attending school at all.⁸² This was first challenged in *Billiot v. Terrebonne Parish School Board*.⁸³ Billiot challenged the parish

⁷¹ Crepelle, *Tribal Recognition*, *supra* note 20, at 16.

⁷² *Id.*

⁷³ Guevin, *supra* note 17, at 3.

⁷⁴ Kimberly Krupa, “So-Called Indians” *Stand Up and Fight: How a Jim Crow Suit Thrust a Louisiana School System into the Civil Rights Movement*, 51 LA. HIST.: J. LA. HIST. ASS’N 171, 175-76 (2010).

⁷⁵ *Id.* at 175.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ SWANTON, *supra* note 16, at 291.

⁸⁰ Krupa, *supra* note 74, at 175.

⁸¹ MILLER, *supra* note 43, at 180.

⁸² *Id.*; see generally Laura L. Lovett, “African and Cherokee by Choice”: *Race and Resistance under Legalized Segregation*, 22 AM. INDIAN Q. 203 (discussing racial tensions which developed between Native American and African American communities in the Jim Crow South).

⁸³ Racheal D. Minchew, “Because Colored means Negro” *The Houma Nation and its Fight for Indigenous Identity within a South Louisiana Public School System, 1916-1963* 11 (May 2017) (M.A. thesis, University of New Orleans) (University of New Orleans ScholarWorks@UNO) (discussing *Billiot v. Terrebonne Par. Sch. Bd.*, Terrebonne Parish Court House No. 7836, La. 20th Jud. Dist. 1916, unreported district court case).

school board, which denied his three children permission to attend a segregated white school due to Terrebonne Parish's classification of Indigenous children as non-white.⁸⁴ The result of this case was the court's declaration that the Billiot children were, in fact, not white.⁸⁵ Notably in this trial, the focus was not on the ancestry of the Indigenous people of Terrebonne Parish, but on the lineage of the Billiot family specifically; despite this, the court's ruling dictated the policy of the Parish for decades.⁸⁶

In the 1930s, religious organizations — primarily Methodist and Baptist — began establishing church schools to serve the Indigenous communities in Terrebonne Parish to fill the void left by the parish school board.⁸⁷ The first of these schools were established on houseboats, serving the Indigenous communities at Grand Caillou and Pointe-aux-Chêne.⁸⁸ By the late 1930s, the Parish opened the Lower Montegut Indian School, and the era of Terrebonne Parish's tri-racial school system began.⁸⁹

The "Indian Schools" established by Terrebonne Parish were crowded, one-room schoolhouses staffed by a single teacher with four grade levels in a single class.⁹⁰ "Students were not allowed to take books home, and teachers often dismissed classes early, sometimes before noon."⁹¹ There was no high school available to the Indigenous community of the Parish until 1957, and even then only one existed.⁹² Due to the dramatically substandard education provided to Indigenous students during this era and the geographic isolation of their communities, by 1960 it is estimated that only three-hundredths of one percent (.03%) of the Native American population of Terrebonne Parish received a high school education.⁹³

Ignoring the U.S. Supreme Court's ruling in *Brown v. Board of Education*, as was common throughout the South,⁹⁴ the Terrebonne Parish School Board continued operating their tri-racial school system until ultimately challenged again in March 1963.⁹⁵ This challenge, brought in federal court in New Orleans rather than a state district court, sought to enforce the U.S. Supreme Court's mandate of integration with "all deliberate speed."⁹⁶ *Naquin v. Terrebonne Parish School Board* presented fifty-six named plaintiffs from the Houma Indian community against the school

⁸⁴ *Id.* at 12.

⁸⁵ *Id.* at 18.

⁸⁶ D'Oney, *supra* note 15, at 75.

⁸⁷ MILLER, *supra* note 43, at 180.

⁸⁸ *Id.*; see Thériault, *supra* note 49, on spelling of "Pointe-aux-Chêne."

⁸⁹ Krupa, *supra* note 74, at 181. In the interest of preserving their radically segregated schools, the Terrebonne Parish School Board operated three separate (and highly unequal) school systems — one for whites, a second for "colored," and a third for "so-called-Indians." *Id.*

⁹⁰ *Id.* at 184.

⁹¹ *Id.*

⁹² *Id.* at 189-90.

⁹³ *Id.* at 181.

⁹⁴ ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 191 (2003) (providing "[m]any state officials argued a right to resist or even ignore *Brown*" under the doctrine of 'interposition and nullification.')

⁹⁵ *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954); Krupa, *supra* note 74, at 172.

⁹⁶ Krupa, *supra* note 74, at 184.

board, seeking to enjoin segregation in schools on the basis of race.⁹⁷ By fall of 1963, the U.S. District Court Judge, Herbert Christenberry, ordered the desegregation of eleventh and twelfth grades in the Terrebonne Parish schools, a survey to integrate tenth grade within thirty days, and a plan for desegregation of the entire school system within a year.⁹⁸ The last Indian school in Terrebonne Parish did not close until 1969; however, as with many schools in the segregated South, desegregation of public schools led to the formation of private schools to outrun meaningful integration.⁹⁹

The resulting lack of education and language barrier at the time of oil discovery was a substantial factor in the theft of land from many families.¹⁰⁰ In many cases, oil companies would convince Indigenous inhabitants they were signing leases to allow exploration, but in reality land was being transferred to these companies at a fraction of its actual value.¹⁰¹ Land not stolen through disingenuous transactions was often lost by order of the courts or through tax sales.¹⁰²

Louisiana law in the early twentieth century prohibited inheritance by children of unmarried parents.¹⁰³ As the Indigenous communities of south Louisiana practiced tribal marriages, which were not recognized by state law, the result was that any children born of these unions were prohibited from inheriting property which may have been held by their parents.¹⁰⁴ This alienation regime prevented inheritance even if specifically bequeathed in a will, and in the rare instances where a valid will could allow for inheritance, such an inheritance would have had to be registered at the parish courthouse, the requirement for which was not widely known.¹⁰⁵

The final tactic in acquiring land was in the form of tax sales which resulted from the non-payment of local property taxes.¹⁰⁶ As the discovery of oil in south Louisiana began to raise property values, the Indigenous communities which had long been subsistence hunters and fishers were unable to afford the rapidly increasing property tax bills caused by booming land values, allowing outside interests to purchase land directly through the local government.¹⁰⁷ The combination of these factors afforded little opportunity to prevent theft of traditional homes and tribal land by outside, monied interests.¹⁰⁸

⁹⁷ *Id.* at 185; *Naquin v. Terrebonne Par. Sch. Bd.*, No. 63-13291 (E.D. La. 1963).

⁹⁸ *Krupa*, *supra* note 74, at 190.

⁹⁹ *Id.* at 193-94 (providing “hundreds of students fled to hastily organized private schools, which received nearly \$1,000,000 in improvements during the racially sensitive years in which Indian and black students enrolled at formerly all-white schools”).

¹⁰⁰ *Crepelle*, *Tribal Recognition*, *supra* note 20, at 16.

¹⁰¹ *Crepelle*, *Climate Relocation*, *supra* note 33, at 13.

¹⁰² *Id.*

¹⁰³ *Id.*; see SUSAN SWANNER LASITER, *CAN LOUISIANA'S SUCCESSION LAWS SURVIVE IN LIGHT OF THE SUPREME COURT'S RECENT RECOGNITION OF ILLEGITIMATES' RIGHTS?*, 39 LA. L. REV. 1132 (1979).

¹⁰⁴ *Crepelle*, *Climate Relocation*, *supra* note 333, at 13.

¹⁰⁵ 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).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Crepelle*, *Climate Relocation*, *supra* note 33, at 13.

D. *Isle de Jean Charles and Pointe-aux-Chêne Communities*

... and as one nears the end of the road, he encounters the descendants of Houma Indians. They are on Bayou Caillou from Dulac south, on Little Caillou, on Bayou Terrebonne around Montegut, on Point au Chien, on Bayou La Fourche — not forgetting that strangest colony on the American continent which occupies the island called Jean Charles.¹⁰⁹

The Indigenous population inhabiting Isle de Jean Charles began settling on the island in the early 1800s, though this was largely an informal settlement on otherwise public land.¹¹⁰ These early inhabitants found refuge on the island following displacement by early European settlers, and migrated into this remote area, inaccessible except by boat, to prevent forced relocation.¹¹¹ In 1849, Louisiana enacted its first Swamp Land Grant Act, which established the alienability of certain swamplands which were deemed unfit for cultivation.¹¹² By 1880, the island consisted of four families, and by 1910 had grown to sixteen families and was referred to by its current name.¹¹³

In the 1950s, Isle de Jean Charles measured approximately five miles wide by twelve miles long, comprising roughly 22,000 acres, and boasting a population of 750.¹¹⁴ One “single, narrow, un-elevated road” is all that physically connects the island to Pointe-aux-Chêne, six miles away.¹¹⁵ The residents are mostly related to one another, and reside in small, wood-frame houses along the one roadway.¹¹⁶ Their families have lived on the island since its founding, and the residents are fishers, trappers, and oystermen.¹¹⁷

In the decades since 1950, coastal erosion and rising seas have whittled this island to roughly two percent of its 1950 landmass.¹¹⁸ By 2013, Isle de Jean Charles had been reduced to roughly one-quarter mile wide and two miles long, and persistent land loss has left only 320 acres

¹⁰⁹ Downs & Whitehead, *supra* note 27, at 3 (quoting Bureau of Indian Affairs Special Commissioner Roy Nash’s 1931 report on “Louisiana’s Three Thousand Outcasts”).

¹¹⁰ Brandon Naquin, *Canals, Community, and Coastal Permits: Overcoming Inadequate Remedies for Coastal Erosion within the Barataria-Terrebonne National Estuary*, 70 EMORY L.J. 663, 667 (2001).

¹¹¹ Julie Koppel Maldonado et al., *The Impact of Climate Change on Tribal Communities in the U.S.: Displacement, Relocation, and Human Rights*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 601, 605 (J.K. Maldonado, B. Colombi, & R. Pandya, eds., 2013).

¹¹² JACQUES MESTAYER, *SAVING SPORTSMAN’S PARADISE: ARTICLE 450 AND DECLARING OWNERSHIP OF SUBMERGED LANDS IN LOUISIANA*, 76 LA. L. REV. 889, 896 (2016). Subsequent Swamp Land Grant Acts were enacted in 1850 and 1880 to either add to the alienable land area or extend alienability through redefining “swamp and overflow” lands. *Id.*

¹¹³ MORGAN E. DUCOTE, *UPROOTED AND UNDERWATER: AN EXAMINATION OF THE IDEOLOGY TOWARDS THE LEGAL IMPLICATIONS OF COASTAL EROSION*, 45 S. UNIV. L. REV. 187, 192 (2018).

¹¹⁴ Maldonado et al., *supra* note 111, at 606; Naquin, *supra* note 110, at 667; Crepelle, *Climate Relocation*, *supra* note 33, at 3.

¹¹⁵ ELI KEENE, *LESSONS FROM RELOCATIONS PAST: CLIMATE CHANGE, TRIBES, AND THE NEED FOR PRAGMATISM IN COMMUNITY RELOCATION PLANNING*, 42 AM. INDIAN L. REV. 259 (2017) [hereinafter “Keene, *Relocations Past*”]; Marisa Katz, *Staying Afloat: How Federal Recognition as a Native American Tribe Will Save the Residents of Isle de Jean Charles*, 4 LOY. J. PUB. INT. L. 1, 4 (2003).

¹¹⁶ Katz, *supra* note 112, at 4.

¹¹⁷ *Id.*

¹¹⁸ Maldonado et al., *supra* note 111, at 606; Keene, *Relocations Past*, *supra* note 115, at 261.

of land above the rising tides.¹¹⁹ In 2002, there were seventy eight homes; by 2012, twenty-five.¹²⁰ The dwindling residents “have watched [the island] shrink year by year, seeing gardens, baseball sandlots and backyards vanish and shade trees wither into gray stumps from the infusion of saltwater;” the remaining land will eventually be lost to the sea as well.¹²¹ Protective wetlands which once surrounded the island have been washed away and the “traditional and medicinal plants, gardens, and trapping grounds are gone.”¹²² Further, the remaining residents of the island have fallen victim to encroachment of toxic industries, oil spills (most notably the *Deepwater Horizon* spill in 2010) and debris from countless hurricanes which “contaminate the air, soil, and water.”¹²³ Louisiana’s Coastal Protection and Restoration Authority has concluded that if no action is taken, Isle de Jean Charles will disappear into the Gulf of Mexico by 2050.¹²⁴ Based on this finding, and due to seemingly irreversible land loss and a small, poor population, state and federal officials have decided on a course of no action; the island will sink beneath the waves.¹²⁵

Six miles north ‘up the bayou’ from Isle de Jean Charles is the Pointe-aux-Chêne Community.¹²⁶ Socially, Pointe-aux-Chêne is highly similar to Isle de Jean Charles, the population is largely of Indigenous descent, and many of the families are related but it is physically connected to the surrounding region.¹²⁷ The original inhabitants of Pointe-aux-Chêne were Indigenous peoples, who occupied the region from time immemorial, establishing a community at this location in the early 1800s as Indigenous tribes sought refuge in the swamps to avoid forced relocation by European colonizers.¹²⁸

The Pointe-au-Chien Tribe which calls this place home has traditionally “lived a subsistence lifestyle — trapping, fishing, growing vegetables, and relying on “traiteurs,” traditional medicine people, to heal the sick and deliver babies.”¹²⁹ Traditional housing consisted of palmetto houses with dirt floors.¹³⁰ Much of the traditional ways of life have been retained in the community and converted to small economic opportunities; such as employment in the commercial fishing or shrimping industries.¹³¹ These activities have been impacted by time and encroachment of the outside world. Following the *Deepwater Horizon* explosion and oil spill in 2010 which released four million barrels of oil into the Gulf of Mexico, fisheries across the region

¹¹⁹ Maldonado et al., *supra* note 111, at 606; Naquin, *supra* note 110, at 667.

¹²⁰ Maldonado et al., *supra* note 111, at 606.

¹²¹ Rick Bragg, *As the Sea Swallows, the Islanders Hang On*, N.Y. TIMES, (June 30, 2002), [<https://perma.cc/S23B-VV2M>].

¹²² Maldonado et al., *supra* note 111, at 606.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Nathan Jessee, *Community Resettlement in Louisiana: Learning from Histories of Horror and Hope*, in LOUISIANA’S RESPONSE TO EXTREME WEATHER: A COASTAL STATE’S ADAPTATION CHALLENGES AND SUCCESSSES 147-148 (Shirley Laska ed., 2020).

¹²⁷ *Id.*

¹²⁸ Patty Ferguson-Bonhee, *Summer 2015 Forum Journal: High Water and High Stakes: Cultural Resources and Climate Change*, 29 SUMMER 2015 F. J., No. 4, 58 (2015); see Naquin, *supra* note 110, at 667.

¹²⁹ Ferguson-Bonhee, *supra* note 128, at 61.

¹³⁰ *Id.*

¹³¹ *Id.* at 62.

were disrupted for years.¹³² This was not only a commercial disaster for the community but a cultural one as well; the people of this fishing community are now reluctant to eat their catch.¹³³

Pointe-aux-Chêne's marginally inland location has buffered the community from the extent of land loss suffered by Isle de Jean Charles, but forces of nature and oil exploration have taken their toll nonetheless.¹³⁴ Barrier islands which once protected the community from tropical weather have deteriorated and saltwater intrusion into freshwater marshes has decimated plant life, exacerbating nature's erosive effects.¹³⁵ Adding to the devastating effects of coastal land loss in this region are increasingly powerful storms and the protection measures implemented to shield the communities.¹³⁶

Between 2005 and 2008 a low levee was built around Isle de Jean Charles to buffer the community from routine, tidal flooding, but during powerful storms, this levee overtops and leaves the community underwater for days until the water can be pumped from the inside of the levee.¹³⁷ In Pointe-aux-Chêne, there is no such levee, which has the effect of leaving that community unprotected from storm surge and also the creation of a funneling effect on the stormwater as levees of surrounding communities force ever-higher flooding into Pointe-aux-Chêne.¹³⁸ However, unlike Isle de Jean Charles, Pointe-aux-Chêne will be within the U.S. Army Corps of Engineers' "Morganza to the Gulf" levee protection project.¹³⁹

III. LAND LOSS

Accretion and erosion are natural forces that have opposed one another in the area which became south Louisiana for thousands of years.¹⁴⁰ This section discusses the natural forces which shaped the region since the last Ice Age through the changes wrought by man, which have forever altered the natural environment through taming the Mississippi River and petroleum exploration, to what is being done today in an effort to correct our mistakes.

The landscape of south Louisiana was shaped by riverine and tidal forces of the Mississippi River and the Gulf of Mexico for thousands of years.¹⁴¹ The alluvial flow of sediment carried by the Mississippi into the Gulf developed a complex and delicate deltaic ecosystem which consisted

¹³² *Deepwater Horizon - BP Gulf of Mexico Oil Spill*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill>, [<https://perma.cc/Q586-3GKR>] (last visited Mar. 13, 2023).

¹³³ Thériault, *supra* note 49.

¹³⁴ Ferguson-Bonhee, *supra* note 128, at 59.

¹³⁵ *Id.* at 58-59.

¹³⁶ *Id.* at 61.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ U.S. ARMY CORPS OF ENG'RS, SUMMARY OF THE MORGANZA TO THE GULF OF MEXICO, LOUISIANA FINAL POST AUTHORIZATION CHANGE REPORT, Figure S-2. Post-Authorization Morganza to the Gulf Project Map (May, 2013) [<https://perma.cc/D5RQ-M3DH>]; for detailed discussion on the "Morganza to the Gulf" project *see infra* Sec. III.C

¹⁴⁰ Andrea Fildani et al., *Late Pleistocene glacial transitions in North America altered major river drainages, as revealed by deep-sea sediment*, in SCIENTIFIC REPORTS, NATURE (Art. No. 13839 (2018)); OLIVER A. HOUCK, *LAND LOSS IN COASTAL LOUISIANA: CAUSES, CONSEQUENCES, AND REMEDIES*, 58 TUL. L. REV. 3, 17 (1983) [hereinafter "Houck, *Land Loss*"]

¹⁴¹ McKenzie, et al., *supra* note 5, at 5.

of a combination of two land types: natural levee deposits which created high, natural ridges, and swamps and marshes comprised largely of spongy soil in which plants and animals could establish their roots.¹⁴² However, nature balanced the sedimentary effects of the Mississippi with erosive action of the Gulf, which washed away land and minerals through waves and tidal action, requiring a constant resupply of fresh water and nutrients to sustain the soils.¹⁴³ Until approximately ninety years ago the natural balance of sedimentation versus subsidence and accretion versus erosion had continued unimpeded for over ten thousand years.¹⁴⁴

The Mississippi River is considered the most powerful force on the continent, carrying five hundred trillion gallons of fresh water and three hundred million tons of sediment from its farthest reaches in Montana and Minnesota to the estuaries of the Louisiana coastline.¹⁴⁵ This sediment was the raw material that formed the marshes along the coast as the river's water escaped the main channel through numerous outlets, slowed, and fanned out, with "additional supplies of fresh water, soils, and plant materials [that] would top the natural river banks and those of its smaller distributaries, replenishing the adjacent marshes and forming new ones."¹⁴⁶

By the beginning of the twentieth century, this fertile marshland of south Louisiana had been instrumental in developing and sustaining Indigenous cultures which had inhabited the land for millennia.¹⁴⁷ The natural alluvial streams provided for transportation, the sedimentary ridges provided high ground with an abundance of wildlife, and the coastal plains — those broader and higher land areas — provided ample space for homes and fields.¹⁴⁸ Then, in a short time, two events would happen which would dramatically reshape this landscape: The Mississippi River Flood of 1927 and the discovery of oil in the marshes of Louisiana in 1932.

A. *Flood Protection*

The Mississippi River Flood of 1927 claimed lives and destroyed property from Dorena, Missouri south through Arkansas, Tennessee, Mississippi, and Louisiana.¹⁴⁹ Once the waters subsided and blame could be assessed, there was a widespread push for federal action on flood protection, pushing aside what had been largely considered a local matter before the disaster.¹⁵⁰ Until this point, flood protection consisted of only levee construction while the design and

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Houck, *Land Loss*, *supra* note 140, at 17.

¹⁴⁶ *Id.* The Isle de Jean Charles other communities in the region are located on land which was created by the accretive sedimentation of the Mississippi River's Holocene deltaic plain. In particular, the deltaic lobes which gave rise to this area are attributable to the Teche and LaFourche deltaic lobes, which date to 3,500-2,800 years and 1000-300 years before present, respectively. Angeline M. Freeman et al., *A Review of How Uncertainties in Management Decisions Are Addressed in Coastal Louisiana Restoration*, 13 WATER 1528, 1530, Figure 1 (Iss. 11, May 29, 2021).

¹⁴⁷ MCKENZIE ET AL., *supra* note 5, at 10.

¹⁴⁸ *Id.*

¹⁴⁹ CHRISTINE A. KLEIN & SANDRA B. ZELLMER, *MISSISSIPPI RIVER STORIES: LESSONS FROM A CENTURY OF UNNATURAL DISASTERS*, 60 SMU L. REV. 1471, 1480-82 (2007).

¹⁵⁰ *Id.* at 1482.

maintenance of the levees was largely left to state and local officials, resulting in levees being constructed “as [the states] choose and where they choose until the action of the people in one State has thrown the waters back upon the people of another State, and vice versa.”¹⁵¹

While Congress became anxious to provide the leadership an outraged nation was demanding, President Coolidge firmly believed that it was not the federal government’s role to protect its people from floods or other acts of God.¹⁵² To overcome the president’s objection, Congress built-in requirements for local and state financial contributions to their proposed federal flood control projects.¹⁵³ The resulting Flood Control Act of 1928 asserted federal jurisdiction over the Mississippi River and provided for levees, spillways, reservoirs, and other flood control devices as necessary to ensure the Mississippi’s waters would be contained in future floods.¹⁵⁴

This was not the first time the federal government became involved with the Mississippi River’s channel, but combining flood control with its existing role would lead to devastation of the coastal wetlands. Beginning in 1872, Congress created the Mississippi River Commission to “permanently locate and deepen the channel and protect the banks of the Mississippi River, improve and give safety and ease to navigation thereof, prevent destructive floods, promote and facilitate commerce, trade, and the postal service . . .,” but of these, navigation was the highest priority.¹⁵⁵

This combination of ensuring deep water access to river ports with the new flood protection goals would result in a deep, fast-moving river constrained by artificial levees, ending the natural replenishment of coastal wetlands.¹⁵⁶

With the exception of the Mississippi’s one major distributary, the Atchafalaya River, water does not escape the Mississippi from the time it enters Louisiana until it and its freshwater, sediment, and nutrient loads are transported, through the jetties and the channeled outlets, out into the deeper waters of the Gulf of Mexico. The ships pass in safety to the sea. So do practically all the elements which raised 19,000 square miles of south Louisiana over the past 5,000 years.¹⁵⁷

This ejection of fresh water, sediments, and nutrients into the Gulf, which prevents this material from spreading across the coast to offset the impacts of tidal erosion and natural land subsidence, has directly contributed to Louisiana’s coastal land loss over the last century.¹⁵⁸ However, the channelization of the Mississippi River is not the sole cause of this land loss; the

¹⁵¹ *Id.*, quoting Congressman Edward Dennison of Illinois.

¹⁵² *Id.* at 1483.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1486.

¹⁵⁵ Houck, *Land Loss*, *supra* note 140, at 21.

¹⁵⁶ *Id.* at 22.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 22-23 (citing a conclusion by Dr. Sherwood Gagliano which provides “[h]istoric natural riverine processes of overbank flooding, crevassing, and upstream diversion were responsible for extensive sedimentation and deltaic plain progradation. Virtual elimination of these processes, coupled with extensive canalization and hydrocarbon extraction, has led to the serious land loss problem we now face.”); TIMOTHY BEATLEY ET AL., AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 26-27 (2nd ed., Apr. 2002).

other directly-contributing factor is oil and gas exploration and that industry's canalization of marshes.¹⁵⁹

B. Oil and Gas Production

Petroleum's presence under the soil of Louisiana has been a known fact since the first people inhabited the region.¹⁶⁰

It was everywhere, oil bubbling up from seeps in the Gulf of Mexico, from salt domes in the ground, wisps of methane in the air, exploding, usually in tiny pockets, once big enough to set an entire island on fire for several months, phenomena of wonder. The Seneca Nation along the Mississippi River had showed Hernando DeSoto their secret: viscous springs that had medicinal properties and could be used to gum up cracks in the hulls of boats.¹⁶¹

However, while its presence was known and its functionality appreciated, commercialization of oil in America only began in the latter part of the nineteenth century.¹⁶² By the beginning of the twentieth century, oil exploration was taking place in south Louisiana, and Standard Oil built what remains the largest oil refinery in the United States on the banks of the Mississippi River in Baton Rouge.¹⁶³

While petroleum may have been finding its way to the surface seeking purpose, obtaining the substance in commercially viable quantities required extraordinary effort, specialized equipment, and access into the delicate, marshy wetlands which comprised the bulk of south Louisiana.¹⁶⁴ Exploration was a "slow and incremental process, involving the adaptation of land-based equipment and technologies to particular locations."¹⁶⁵ The reason for this slow, difficult expansion into the wetlands is because the only navigable paths through the swamps at the time were small paths, which were opened either by hand or using a boat paddle.¹⁶⁶

But progress came, technology improved, and as a result, small traditional *pirogues*¹⁶⁷ were replaced with tracked vehicles which allowed oil companies to drive through the swamps compressing land and forever altering the environment.¹⁶⁸ Initially the land would recover from

¹⁵⁹ Houck, *Land Loss*, *supra* note 140, at 23.

¹⁶⁰ Oliver A. Houck, *The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone*, 28 TUL. ENV'T L.J. 185, 188 (2015) [hereinafter "Houck, *The Reckoning*"].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Naquin, *supra* note 110, at 673.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Holly Duchmann, *Pirogues Struggle to Stay Afloat in Modern Cajun Life*, HOUMA TODAY (Aug. 9, 2017), <https://www.houmatoday.com/story/lifestyle/2017/08/07/pirogues-struggle-to-stay-afloat-in-modern-cajun-life/19935337007/> [<https://perma.cc/FMN7-W63T>]. ("*Pirogue*" is a twelve to fourteen-foot-long, flat-bottomed boat well-suited for the shallow swamps of south Louisiana, which was used for hunting, fishing, fur trapping, and basic transportation").

¹⁶⁸ Naquin, *supra* note 110, at 673-74.

these incursions, but repeated travel along the same routes created irreversible damage to the delicate soil.¹⁶⁹ Compressed soil created the first canals through the swamps which soon led to the obvious conclusion that waterways would be easier to traverse than spongy land, and the oil and gas exploration companies quickly changed their focus to reshaping the marsh to suit their needs.¹⁷⁰

Tracked “marsh buggies” soon gave way to drilling barges and draglines to clear marshland and provide ready access to once-remote areas of south Louisiana.¹⁷¹ What began as small canals for exploration and test wells became “a galaxy of yet bigger canals to serve industry tankers, barges, and crew boats.”¹⁷² This network of canals grew both in size and quantity for decades, both of which contributed to the degradation of wetlands.¹⁷³ As the volume of production and size of equipment increased, so did these channels, with a typical channel measuring thirteen to fifteen feet deep and a width of one hundred thirty to one hundred fifty feet.¹⁷⁴ These canals, which were exponentially wider than natural channels in the wetlands, caused both immediate and progressive damage.¹⁷⁵

These canals cut through the interior marshes of south Louisiana and remaining land crumbled from the intrusion, their soft banks sloughed off naturally and in automobile-sized lumps from the wakes of passing boats. They ushered in Gulf water with higher levels of salinity, which stunted interior vegetation, seared the roots, and killed them outright, and things fell apart. They replaced a network of living veins and capillaries with straight-line ditches that drained areas above them and flooded those below. Left unchecked, the canals began to widen, doubling in size and continuing to expand until they literally ran out of marsh.¹⁷⁶

The damage inflicted by man-made changes to this sensitive environment was identified by coastal scientists as early as 1925.¹⁷⁷ Shortly after exploration for oil and gas began in the marsh, scientists with the Louisiana Department of Conservation (now the Department of Wildlife and Fisheries) documented newly created canals causing saltwater intrusion and increased salinity in the brackish marshes.¹⁷⁸

¹⁶⁹ *Id.* at 673-74.

¹⁷⁰ *Id.* (stating “[c]anals quickly became a cheap way to circumvent the land itself”).

¹⁷¹ *Id.* at 674; Houck, *The Reckoning*, *supra*, note 160, at 198.

¹⁷² Houck, *The Reckoning*, *supra* note 160, at 203. The canals which have created this “galaxy” were not all created by the oil and gas industry, but most were created *for* them. Navigation channels such as the Gulf Intracoastal Waterway, the Barataria Bay Waterway, and the Houma Navigation Canal were dredged as government projects to support navigation through the wetlands in support of the oil and gas industry in south Louisiana. The “Atchafalaya River and Bayou[s] Chene, Boeuf and Black, Louisiana” project alone dredged a channel through fifty miles of Terrebonne Parish wetlands to serve two oil rig builders near Morgan City. *Id.*

¹⁷³ *Id.* at 203-04; Naquin, *supra* note 110, at 675-76.

¹⁷⁴ Naquin, *supra* note 110, at 675.

¹⁷⁵ *Id.*

¹⁷⁶ Houck, *The Reckoning*, *supra* note 160, at 204.

¹⁷⁷ *Id.* at 198.

¹⁷⁸ *Id.*

The combination of taming the Mississippi River (which cut off the free flow of freshwater and sediment to the wetlands) and the man-made destruction of the alluvial soil resulted in the loss of over one million acres — more than two-thousand square miles — of coastal land between 1932 and 2000, with this number continuing to increase by roughly one acre per hour.¹⁷⁹ In total, this land loss has placed traditional, Indigenous, and coastal communities fifty miles closer to the open Gulf of Mexico and the impacts of dangerous tropical weather systems than they were a century ago.¹⁸⁰

Despite human-driven damages being observed in the wetlands as early as 1925, the State of Louisiana took no action to stop or slow the oil-thirsty exploitation of resources that was shredding the coast.¹⁸¹ With the adoption of the Clean Water Act (CWA) and the Coastal Zone Management Act (CZMA) in 1972, active destruction of the coast should have been slowed, but any incremental slowing that may have been achieved did not address the damage that was already done.¹⁸² Perhaps more disappointing than the absence of any remedial provisions was the milquetoast implementation of these federal laws by the U.S. Army Corps of Engineers and the State of Louisiana.¹⁸³ The most potentially impactful provision of the CWA relative to preserving wetlands is the § 404 permitting process which governs depositing materials into wetlands.¹⁸⁴ This process is administered by the U.S. Army Corps of Engineers, the same entity responsible for cutting many of the canals through the marsh in the years before the CWA, which was not overly enthusiastic about enforcing their newly-granted regulatory authority.¹⁸⁵

The CZMA's delegation of administration to the State of Louisiana fared no better than the CWA; while Louisiana was required to administer its coastal zone program in compliance with the federally-approved plan, there was even less enthusiasm in this than demonstrated by the U.S. Army Corps of Engineers.¹⁸⁶ Louisiana initially placed the authority for oversight with the Louisiana Coastal Commission, but following their rescission of a state permit for a new canal, the Louisiana Coastal Commission was dissolved and administrative responsibility was vested in the State Department of Natural Resources, which “[b]y the late 1970s, as coastal canalling reached new heights” was managed by a revolving cast of petroleum industry executives.¹⁸⁷

¹⁷⁹ Mestayer, *supra* note 112, at 892; Crepelle, *Climate Relocation*, *supra* note 33, at 4-5 (“[o]n average, the state lost a football field worth of land every hour between 1989 and 2010. The rate has slowed in recent years, but can increase at any moment”).

¹⁸⁰ Naquin, *supra* note 110, at 673.

¹⁸¹ *Id.* at 674-75.

¹⁸² *Id.* at 678.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 679.

¹⁸⁵ *Id.* at 679. To be clear, § 404 regulates depositing dredged or fill material into wetlands, not the actual dredging of the canal itself. However, a side-effect of the canal creation process was the creation of “spoil banks” which are the displaced debris of dredging activities, resulting in berms of soil defining the edges of the canals. Since the residual spoil banks are a deposit of dredged material, this activity would have been subject to regulation by the United States Army Corps of Engineers under the Clean Water Act had they chosen to assert their authority. *Id.*; Houck, *The Reckoning*, *supra* note 160, at 207; TODD AAGAARD ET AL., *PRACTICING ENVIRONMENTAL LAW* 359 (2d ed. 2021).

¹⁸⁶ Naquin, *supra* note 110, at 679.

¹⁸⁷ *Id.*; Houck, *The Reckoning*, *supra* note 160, at 224.

C. *Stemming the Tide of Land Loss*

Over the course of the last century, increased salinity levels in the wetlands combined with the erosive action of open waters and the combination of land subsidence and sea level rise have contributed to the relentless deterioration of Louisiana's coastal protection.¹⁸⁸ Based on estimated land losses over the last century, if no action is taken to slow deterioration an additional 200,000 acres of wetlands could be lost over the next seventy-five years.¹⁸⁹ Actual losses could be much higher as this estimate does not account for climate change, sea level rise, and land subsidence.¹⁹⁰

Subsidence in the coastal marshes of Louisiana is attributable to petroleum extraction, a connection which has been documented by “numerous field studies around the world since the 1920s.”¹⁹¹ Geologically, the ‘extraction-subsidence phenomenon’ is due to “petroleum [lying] in layers of sand pressed under layers of mud and caps of salt.”¹⁹² Since petroleum extraction began in the 1930s, “hundreds of billions to trillions of cubic feet of natural gas, tens of millions of barrels of oil, and tens of millions of barrels of associated formation water” have been pulled from beneath the wetlands, destabilizing the geological substrate.¹⁹³ By removing petroleum, the total mass of subsurface materials is reduced, reducing the vertical pressure of the Earth's surface resulting in a ‘deflation’ of the surface compacting the soils below.¹⁹⁴

In an effort to slow land loss, the Louisiana Legislature, in furtherance of the CZMA, directed the Department of Natural Resources to prepare a plan for diverting fresh water from the Mississippi River into the wetlands to “offset land loss and salt water intrusion,” and to “identify critically threatened coastal areas and barrier islands, and [to] undertake a pilot program for creation of artificial barrier protections.”¹⁹⁵ In 1981 the Legislature adopted the Department of Natural Resources report providing site-specific projects to address subsidence and land loss.¹⁹⁶ The projects proposed by the state comprised three approaches to wetlands restoration: (1) freshwater diversions, (2) barrier island and beach stabilization, and (3) management of Mississippi River outlets.¹⁹⁷

In total, between 1990 and 2011, one hundred fifty-one projects have been implemented for the restoration and preservation of Louisiana's wetlands.¹⁹⁸ The first freshwater diversion structures began operation in the early 1990s at Caernarvon, West Point a la Hache, and Naomi; while additional structures have been developed at Davis Pond and Myrtle Grove, as Louisiana

¹⁸⁸ U.S. ARMY CORPS OF ENGINEERS, *supra* note 139, at 20-21; “Salinity” is defined by the U.S. Army Corps of Engineers as “[t]he concentration of dissolved salts in a body of water.” *Id.* at 120.

¹⁸⁹ *Id.* at 21.

¹⁹⁰ *Id.*; “Subsidence” is defined by the U.S. Army Corps of Engineers as “[t]he gradual downward settling or sinking of the Earth's surface with little or no horizontal motion.” *Id.* at 120.

¹⁹¹ Houck, *The Reckoning*, *supra* note 160, at 218.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 121.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 123.

¹⁹⁸ Michael S. Kearney et al., *Freshwater river diversions for marsh restoration in Louisiana: Twenty-six years of changing vegetative cover and marsh area*, 38 GEOPHYSICAL RESEARCH LETTERS L16405, Aug., 2011, at 1.

remains “committed to building diversions as the best way to reconnect the river to the deltaic plain.”¹⁹⁹ Despite an investment of hundreds of millions of dollars over the course of three decades, a 2011 scientific analysis of the diversion projects found “that [the] three long-running diversion projects initiated to restore Mississippi Delta coastal marshes failed to increase vegetation cover or overall marsh area.”²⁰⁰ While the diversions built marginal amounts of new wetlands, hurricanes in the mid-2000s erased the new marsh land built since the implementation of the diversion structures.²⁰¹ This storm-driven loss is believed to have resulted from the newly created land being insufficiently solid to hold the roots of aquatic vegetation in severe storm conditions.²⁰² This starkly illustrates the reality that the wetlands, which developed through thousands of years and were destroyed in only a century, cannot simply be replaced.

In 2002, the United States Army Corps of Engineers completed a feasibility study for the Morganza to the Gulf project, which was proposed to “provide hurricane and storm damage reduction benefits while ensuring navigational passage and tidal exchange.”²⁰³ Planning for the project began in 1998 and was ultimately authorized by Congress as part of the Water Resources Development Act of 2007.²⁰⁴ The Morganza to the Gulf project consists of ninety-eight miles of levee structures, combined with twenty-two flood gates, twenty-three environmental water control structures, four pumping stations, and multiple, massive lock and floodgate structures to control federally-maintained navigation channels.²⁰⁵

Morganza to the Gulf is intended to protect the coastal communities of southeastern Louisiana from devastating storm surges associated with tropical weather systems.²⁰⁶ But not *all* communities would find protection behind the United States Army Corps of Engineers’ ninety-eight-mile levee system.²⁰⁷ Four communities were excluded from protection based on the engineering and cost assessments conducted as part of the 2002 feasibility study²⁰⁸. Three of the four communities were assessed as being comprised primarily of fishing camps or commercial fisheries; however, the fourth was a small community consisting of twenty-five families that would

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1, 5. The presence of vegetation in marsh areas is an indicator of both the health of the marsh environment and its ability to withstand erosive conditions. The root mat of the vegetation stabilizes soil, once the vegetation dies and roots decay, there is little left to protect the fragile sedimentary soil from saltwater encroachment and eventual disintegration. McKenzie et al., *supra* note 5, at 7.

²⁰¹ *Id.* at 5.

²⁰² *Id.*

²⁰³ U.S. ARMY CORPS OF ENG’RS, *supra* note 139, at i; (the formal name of the project as authorized is “Morganza to the Gulf of Mexico, Louisiana,” for ease of reference, the project will be referred to as “Morganza to the Gulf”).

²⁰⁴ *Id.* at i, iii; Water Resources Development Act of 2007, H.R. 1495, 110th Cong. § 1001(24) (2007). Morganza to the Gulf was authorized at a total cost of \$885,700,000; however, by 2013 the District Commander of the U.S. Army Corps of Engineers issued the Final Post Authorization Change Report for the project outlining scope and design changes which increased the fully funded total project cost to \$12,872,846,000. *Id.* at § 1001(24); U.S. ARMY CORPS OF ENG’RS, *supra* note 139, at xiv.

²⁰⁵ U.S. ARMY CORPS OF ENG’RS, *supra* note 139, at v, vii.

²⁰⁶ *Id.* at i.

²⁰⁷ *Id.* at 30.

²⁰⁸ *Id.*

be more cost-effective to relocate than to protect.²⁰⁹ That community is Isle de Jean Charles.²¹⁰

D. Exclusion of Isle de Jean Charles and Community Relocation

The assessment conducted as part of the 2002 feasibility study determined that including Isle de Jean Charles within the protective levee system would be cost-prohibitive and recommended relocation of the community in lieu of protection.²¹¹ According to the U.S. Army Corps of Engineers, the approximate cost of including the island within the levee system would have increased by approximately \$100,000,000, whereas relocation of residents was estimated at \$8,000,000.²¹² Residents opposed this proposal, and relocation costs were not included in the U.S. Army Corps of Engineers funding request, leaving the community and its residents vulnerable.²¹³ To provide some protection, local officials constructed a six-foot earthen levee around the community, which is only effective to hold back tidal flooding, but leaving the Isle de Jean Charles at risk of catastrophic flooding from hurricanes.²¹⁴ By comparison, the final levee specifications for Morganza to the Gulf provided for levee heights of fourteen feet.²¹⁵

Protecting Isle de Jean Charles did not meet the United States Army Corps of Engineers's cost-benefit analysis, therefore the recommendation was to simply abandon the community on the Gulf of Mexico side of the protective barriers.²¹⁶ Residents of the community were nearly unanimous in opposition to the relocation strategy, stating "they would rather live in ankle-deep muck than abandon a place they have lived for generations."²¹⁷ In a 2002 article in *The New York Times*, Chief Pierre Naquin of the BC Confederation of Muskogees of Isle de Jean Charles described the situation succinctly as: "[b]y leaving the people outside the levee's protection, the government is saying that the lives of the people here do not hold the same value as others."²¹⁸ Chief Naquin's assertion underscores the need to analyze projects such as Morganza to the Gulf in a way that understands the effect on the impacted community.²¹⁹

From a purely fiscal perspective, mathematical cost-benefit analyses make sense to ensure tax dollars flow to the most impactful use; however, in situations where lives and the history of a people are being sacrificed for the 'collective good,' the analysis must go beyond a mathematical expression.²²⁰ These types of decisions are political in nature and are decisions that determine who

²⁰⁹ *Id.* Following the feasibility study in 2002, the United States Army Corps of Engineers has identified a fifth community that will be outside of the protective levee system. The community of Gibson, Louisiana "was not identified as a community at risk in the original feasibility study because modeling at that time did not show storm surge reaching that area." *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Bragg, *supra* note 121.

²¹³ U.S. ARMY CORPS OF ENG'RS, *supra* note 139, at 30.

²¹⁴ Bragg, *supra* note 121.

²¹⁵ *Id.*

²¹⁶ Maldonado et al., *supra* note 111, at 606; U.S. ARMY CORPS OF ENG'RS, *supra* note 139, at 30.

²¹⁷ Bragg, *supra* note 121.

²¹⁸ *Id.*

²¹⁹ Maldonado et al., *supra* note 111, at 606.

²²⁰ *Id.*

gains and losses from such cost-benefit analyses, legitimized by government and project authorities, need to be critically considered to understand the underlying implications of who is being sacrificed for the greater common good. Attempting to explain the harm caused to individuals and communities by claiming the greater benefit to all, the cost-benefit analysis is entirely insufficient because it does not include the distribution of costs and benefits and completely ignores important social and cultural factors, instead only considering economic impacts.²²¹

Although the community was initially opposed to relocation from Isle de Jean Charles at the time of the feasibility analysis, leaders of the community began calls for relocation once the United States Army Corps of Engineers conclusively determined the path of levee protection would exclude the island.²²² Both immediately after the levee alignment decision, and again in 2009, the community sought relocation assistance, but there was no regulatory mechanism in place that would provide for “relocati[on of] an entire community without internal and little external funding.”²²³ Most importantly, residents were not merely interested in “community and cultural restoration, but also for traditional livelihood development to once again be a self-sustaining community.”²²⁴ Despite the community’s reconsideration of relocation following the 2002 feasibility study, the United States Army Corps of Engineers did not include relocation funding in either the initial proposal to Congress for project funding or in the Final Post Authorization Change Report issued in 2013, casting aside the island and its residents.²²⁵

In 2014, the United States Department of Housing and Urban Development launched the first National Disaster Resilience Competition (NDRC) as the awarding mechanism of Disaster Recovery Community Development Block Grants (CDBG-DR) authorized by the Disaster Appropriations Relief Act of 2013.²²⁶ Ultimately, the State of Louisiana was awarded \$92,629,249 for resilience projects across the state, including approximately \$48,000,000 for the resettlement of Isle de Jean Charles.²²⁷

E. Finding Higher Ground

When Louisiana was awarded funding for relocating the residents of Isle de Jean Charles in 2016, the residents were declared the nation’s first “climate refugees,” the precision of which is debated both in semantic accuracy and in factual accuracy.²²⁸ Regardless

²²¹ *Id.*

²²² *Id.*; U.S. ARMY CORPS OF ENG’RS, *supra* note 139, at 30.

²²³ Maldonado et al., *supra* note 111, at 606.

²²⁴ *Id.*

²²⁵ U.S. ARMY CORPS OF ENG’RS, *supra* note 139, at 30.

²²⁶ George I. Gonzalez, *HUD Awards \$1 billion Through National Disaster Resilience Competition*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, (Jan. 21, 2016), <https://archives.hud.gov/news/2016/pr16-006.cfm> [<https://perma.cc/QRQ2-Y8VS>].

²²⁷ *Id.*; Ducote, *supra* note 113, at 194; Crepelle, *Climate Relocation*, *supra* note 33, at 3.

²²⁸ Bragg, *supra* note 121; Crepelle, *Climate Relocation*, *supra* note 33, at 4 (providing that the term ‘refugee’ is inappropriate as applied to climate change relocation because the term is defined to require “legitimate fear of persecution” to qualify for refugee status; Nicholas Pinter, *The lost history of managed retreat and community relocation in the United States*, 9 ELEMENTA SCI. ANTHROPOCENE 1 (2021) (detailing disaster-driven retreat and full

of their status as refugees, Louisiana had successfully sought and received the funds it believed would be necessary to relocate the people of Isle de Jean Charles to higher ground.²²⁹ However, despite the continued erosion of their home and exclusion from the federal protective levee system, one year into relocation planning, one-third of the residents of Isle de Jean Charles “openly declared that they will not move.”²³⁰

The hostility toward relocation is largely attributable to the state’s lack of consultation with the residents of the island and an apparent indifference toward the unique cultural backgrounds of its residents.²³¹ Phase I of Louisiana’s application to the NDRC provided “[c]oastal Louisiana is home to the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw, the Point-Au-Chien Indian Tribe, the Grand Caillou-Dulac Band of the Biloxi-Chitimacha-Choctaw, the Bayou Lafourche Band of the Biloxi-Chitimacha, the Avoyel-Taensa Tribe/Nation, and the United Houma Nation” in recognition of the diversity of Native communities.²³² Phase II of the application and the subsequent grant award cited only the Isle de Jean Charles Band of the BC Confederation of Muskogees as being part of the relocation proposal and excluding the Houma Nation.²³³ The confusion apparently comes from conflicting claims of the two tribes, and the resulting belief of the State of Louisiana that all residents of Isle de Jean Charles were affiliated with the BC Confederation of Muskogees.²³⁴ The State of Louisiana amended the program to include members of the Houma Nation in the relocation program, but by that time the sentiment of residents on the island had shifted.²³⁵

Despite waning community support, Louisiana continued planning the relocation program.²³⁶ The state’s Office of Community Development selected a 515-acre site for the new community approximately forty miles north of Isle de Jean Charles in the community of Gray, Louisiana.²³⁷ The chosen location itself was contentious, with some residents objecting to the site

community relocation efforts taking place since 1881); Daniel H. de Vries & James C. Fraser, *Citizenship Rights and Voluntary Decision Making in Post-Disaster U.S. Floodplain Buyout Mitigation Programs*, 30 INT’L J. MASS EMERGENCIES & DISASTERS 1, 2-4 (2012) (discussing floodplain buyout programs managed by the Federal Emergency Management Agency following major flooding events to remove communities from threat of repetitive flood losses. While these programs are not generally considered climate-driven relocations, they were community-scale relocations driven by nature).

²²⁹ Crepelle, *Climate Relocation*, *supra* note 33, at 27.

²³⁰ Crepelle, *Tribal Recognition*, *supra* note 20, at 17.

²³¹ *Id.* at 16-17; Crepelle, *Climate Relocation*, *supra* note 33, at 27.

²³² STATE OF LOUISIANA, NATIONAL DISASTER RESILIENCE COMPETITION PHASE I APPLICATION 40 (2015).

²³³ Crepelle, *Climate Relocation*, *supra* note 33, at 27-28.

²³⁴ Crepelle, *Tribal Recognition*, *supra* note 20, at 16-17 (stating that while BC Confederation of Muskogees represented that all residents of Isle de Jean Charles affiliate with that Tribe, the Houma Nation stated that approximately half of the island’s residents are a part of their Tribe.) The dispute between the Tribes is “the result of fabricated differences” which only materialized when BC Confederation of Muskogees separated from the Houma Nation at BIA’s recommendation. *Id.* at 28; Crepelle, *Standing Rock*, *supra* note 13, at 182.

²³⁵ Crepelle, *Tribal Recognition*, *supra* note 20, at 16-17.

²³⁶ Eli Keene, *Relocations Past*, *supra* note 115, at 263.

²³⁷ Crepelle, *Climate Relocation*, *supra* note 33, at 30; Kezia Setyawan, *After 10 years, Isle de Jean Charles residents will soon have a new place to call home*, WWNO - NEW ORLEANS PUBLIC RADIO (Feb. 17, 2022), <https://www.wwno.org/coastal-desk/2022-02-17/isle-de-jean-charles-residents-expected-to-move> [<https://perma.cc/QW8L-HURY>] [hereinafter, “Setyawan, *After 10 years*”].

being too far from the ever-receding coastline.²³⁸ However, the state attempted to strike a balance in relocation planning, keeping residents close to their traditional homes while also providing a safe community away from the waves.²³⁹ A larger problem is that the new site will likely not survive; if the rate of coastal land loss experienced over the last century continues, this site may be underwater within the next few decades.²⁴⁰

Despite this risk and community hesitation in the years following the NDRC grant award, thirty-seven of forty-two eligible households from Isle de Jean Charles chose to relocate as part of the program.²⁴¹ Many of the concerns voiced by island residents during the relocation planning process including being in a safe, isolated community, continued access to fishing and seafood, and culturally appropriate raised homes were considered by relocation planners, to varying degrees of success.²⁴² Fishing, which has traditionally been an occupation, hobby, and means of survival for residents of the Isle de Jean Charles will be available within the resettlement community's two bayous and wetlands.²⁴³ However, oyster and shrimp harvests which have long been part of the Indigenous culture and economy of Isle de Jean Charles will likely be lost.²⁴⁴ Ultimately, the first relocated residents from the island began moving into their new homes in August of 2022, with completion of all thirty-seven homes projected for completion by early 2023.²⁴⁵

IV. CULTURAL, HISTORICAL, AND RESOURCE CONSIDERATIONS IN RELOCATION PLANNING

The United States Government's policies regarding disaster recovery and community resilience have long been focused on rebuilding in place following natural disasters.²⁴⁶ The Federal Emergency Management Agency (FEMA) allows a variety of remedial measures for protecting communities, including elevating buildings, constructing sea walls, and soil stabilization to protect from erosion.²⁴⁷ Despite the high cost of these measures, FEMA's standard approach has been to protect people and property where they are—even if losses are repetitive and mitigation measures will ultimately fail.²⁴⁸

A. *Need for a Consistent Policy Approach*

When the State of Louisiana was awarded the NDRC (National Disaster Resilience Competition) grant to relocate the Isle de Jean Charles community, observers believed that although it was a unique project, it was both a recognition that protection in place was no longer

²³⁸ Crepelle, *Climate Relocation*, *supra* note 33, at 30.

²³⁹ *Id.*

²⁴⁰ *Id.* (noting resettlement locations should be more carefully considered to ensure long-term viability).

²⁴¹ Setyawan, *After 10 years*, *supra* note 237.

²⁴² *Id.*; Crepelle, *Climate Relocation*, *supra* note 33, at 31.

²⁴³ Setyawan, *After 10 years*, *supra* note 237; Crepelle, *Climate Relocation*, *supra* note 32, at 31.

²⁴⁴ Crepelle, *Climate Relocation*, *supra* note 33, at 31.

²⁴⁵ Setyawan, *Move-in day*, *supra* note 1.

²⁴⁶ Eli Keene, *Resources for Relocation: In Search of a Coherent Federal Policy on Resettling Climate-Vulnerable Communities*, 48 TEX. ENV'T L. J. 119, 127 (2018) [hereinafter "Keene, *Resources for Relocation*"].

²⁴⁷ *Id.*

²⁴⁸ *Id.*

viable and that this would be a demonstration project for the relocation of threatened communities.²⁴⁹ Perhaps learning from this relocation, the Biden Administration’s Department of the Interior announced funding for a “Tribal Climate Resilience” project, as part of the Bipartisan Infrastructure Law of 2022.²⁵⁰ The program provides \$466,000,000 to BIA over five years, including \$130,000,000 for community relocation grants.²⁵¹

When Isle de Jean Charles received relocation funding through the State of Louisiana, the community was neither the only one in need of such funding nor the only one applying through the same program. During the same funding competition, the State of Alaska sought funding to relocate the village of Newtok, an Indigenous community on the Bering Sea whose land is being lost to erosion.²⁵² In addition to Newtok, three other Indigenous Alaskan villages (Kivilina, Koyukuk, and Shishmaref) were similarly threatened with imminent destruction as early as 2009, with another eight villages exploring relocation options for long-term survival.²⁵³ Although Newtok was denied funding through the 2016 NDRC process, President Obama visited Alaska that year and included a request of \$400,000,000 in the federal government’s fiscal year 2017 budget specifically for “the unique circumstances confronting vulnerable Alaska communities,” including potential relocation expenses.²⁵⁴ Newtok did receive \$15,000,000 in federal funding in 2018, which is slightly more than ten percent of the U.S. Army Corps of Engineers’s estimated cost of relocation, but residents are hopeful this funding may secure housing while relocation planning continues.²⁵⁵

Beyond Indigenous communities, FEMA has implemented voluntary post-disaster “buyout” programs to remove vulnerable populations from floodplains since the Mississippi River floods of 1993.²⁵⁶ Although awareness of the importance of relocations for community protection grew, the shortcomings of the 1993 flood relocations tamped down interest in such projects.²⁵⁷ The largest shortcoming identified in these efforts was the “lack of funding and lack of coordinated multiagency support for relocation” which impeded the success of the projects.²⁵⁸ Shortcomings in funding and coordination highlight the ad hoc nature of the mitigation concept which has become known as “managed retreat,” and the need for a consolidated, coordinated effort to address climate-vulnerable communities as climate change threatens even more coastal communities.

²⁴⁹ Christopher Flavelle, *Here’s Where the U.S. is Testing a New Response to Rising Seas*, N.Y. TIMES (Nov. 2, 2022) <https://www.nytimes.com/2022/11/02/climate/native-tribes-relocation-climate.html> [<https://perma.cc/K7DG-QNJE>].

²⁵⁰ U.S. DEP’T INTERIOR, *President Biden’s Bipartisan Infrastructure Law Supports \$45 Million Investment to Build Climate Resilience in Tribal Communities* (Nov. 2, 2022), <https://www.doi.gov/pressreleases/president-bidens-bipartisan-infrastructure-law-supports-45-million-investment-build> [<https://perma.cc/A4NF-BMJK>].

²⁵¹ *Id.*

²⁵² Keene, *Resources for Relocation*, *supra* note 246, at 131; Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179, 192 (2020).

²⁵³ Stern, *supra* note 252, at 192.

²⁵⁴ Keene, *Resources for Relocation*, *supra* note 246, at 132.

²⁵⁵ Stern, *supra* note 252, at 192-93.

²⁵⁶ Pinter, *supra* note 228, at 8.

²⁵⁷ *Id.*, at 11.

²⁵⁸ *Id.*

B. *The Moral Imperative of Relocating Indigenous Communities*

Since the preservation of Indigenous lands has become a practical impossibility due to rising seas and eroding land, it is necessary to ensure communities are relocated in culturally appropriate ways to ensure the survival of tradition and heritage, even as homelands are lost. Many Indigenous communities were pushed to low-lying areas either through pressure to avoid European contact — such as was the case with the tribes of south Louisiana — or through active involvement of the BIA in constructing schools and other community resources in vulnerable areas.²⁵⁹ As legal remedies under tort are unlikely to provide any relief to these communities, government assistance in relocation may be best conceptualized as righting past wrongs.²⁶⁰

Although through this lens federally-supported relocation is morally appropriate, the impact on the culture and heritage of Indigenous communities must be taken into account. In many cases, direct federal involvement has pushed communities to vulnerable areas; however, cultural ties to the land and water date from time immemorial.²⁶¹ Land loss, beyond displacement from areas of residence, means “substantial or complete undermining of [I]ndigenous peoples’ own economic foundations and means of subsistence, as well as cultural loss, given the centrality of land to cultural and related social patterns.”²⁶² The threats of climate change go beyond the potential for relocation and physical displacement to irreparably altering the environment that has supported Indigenous communities. This includes the degradation of fishing, game, and crops “that have been used for food, medicine, and economic and cultural purposes for generations.”²⁶³

Based on considerations of both physical and cultural vulnerability, including the ability for communities to continue traditional ways of life, land loss, and climate-driven relocation requires a delicate balance to protect Indigenous communities.²⁶⁴ Ensuring the vitality of Indigenous communities and culture after displacement must be a primary consideration of any relocation planning effort, as demonstrated by the deleterious effects on tribes resulting from federal projects over the last century.

C. *Displacement and Cultural Preservation in Submerged Indigenous Communities Due*

Climate change and coastal erosion do not present a novel challenge to Indigenous communities in the United States; two massive federal projects in the Midwest and the West left the landscape altered and submerged both traditional homelands and ways of life.

²⁵⁹ Ferguson-Bonhee, *supra* note 128, at 58; *see* Naquin, *supra* note 110, at 667; Keene, *Resources for Relocations* *supra* note 234, at 142.

²⁶⁰ Keene, *Resources for Relocation*, *supra* note 246, at 143-44 (discussing the impediments facing Tribes seeking relief under potential theories of liability: “A common law negligence theory based on BIA school site selection, for example, would quickly run into fatal hurdles in establishing duty, breach, and causation. Establishing legal liability for the government actions leading to increased vulnerability in the Louisiana Bayou is equally unlikely”).

²⁶¹ HOPE M. BABCOCK, *HERE TODAY, GONE TOMORROW — IS GLOBAL CLIMATE CHANGE ANOTHER WHITE MAN’S TRICK TO GET INDIAN LAND? THE ROLE OF TREATIES IN PROTECTING TRIBES AS THEY ADAPT TO CLIMATE CHANGE*, 2017 MICH. ST. L. REV. 371, 380 (2017).

²⁶² *Id.*

²⁶³ *Id.* at 381.

²⁶⁴ *Id.* at 380-81; *see* Keene, *Relocations Past*, *supra* note 115, at 263.

1. Damming the Missouri River under Pick-Sloan

In the 1950s and 1960s, the Pick-Sloan Plan — enacted to ensure year-round navigability of the Missouri River by controlling its level — submerged numerous treaty-protected reservations and forcibly relocated tribes to higher ground.²⁶⁵ The goal of Pick-Sloan was to dam the Missouri River to provide irrigation and adequate stream capacity to support year-round commerce.²⁶⁶ Of secondary concern, at best, in this program were the impacts on the Indigenous communities which had been forcibly resettled on the riparian bottomlands of the Missouri River in the latter half of the nineteenth century.²⁶⁷ When Reservations were established between 1851 and 1889, “there was plenty of timber and natural cover for livestock and the soil was fertile. Wildlife was abundant and the water supplies were plentiful.”²⁶⁸

Damages to the Indigenous culture of the Missouri River basin touched every aspect of life, from shifting the economic structure from subsistence to cash, severing sacred connections to the land, and forcing the exhumation and repatriation of tribal cemeteries.²⁶⁹ Congressional actions disestablishing reservations and authorizing submergence of tribal lands included provisions to provide hunting, fishing, and grazing rights on lands taken for the project as well as access to waterways and retention of mineral rights.²⁷⁰ Subsequent legislation provided for replacement of cemeteries, schools, and other community facilities out of project funds rather than tribal compensation funds.²⁷¹

In the case of the Missouri River basin, inundation was purposeful and the intended result of a federal undertaking to tame the Missouri River. Tribes were relocated to these low-lying, and flood-prone areas in the nineteenth century as part of the federal government’s Indian Removal policies.²⁷² By the middle of the twentieth century, the federal government removed the tribes again to decimate their homes in favor of supporting agriculture and navigation.²⁷³ Belatedly, Congress recognized the impact on Indigenous culture and provided for continuing access to ancestral homelands, but due to submergence of the lands, statutory rights provided to tribes are largely conceptual.²⁷⁴

2. The Grand Coulee Dam and Impacts on the Tribes of the Columbia River

The Grand Coulee Dam project began in the 1930s intending to bring hydroelectric power

²⁶⁵ Peter Capossela, *Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENV’T L. & LITIG. 143, 157-58 (2015).

²⁶⁶ *Id.* at 151-53.

²⁶⁷ *Id.* at 157.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 158-59.

²⁷⁰ *Id.* at 165-66.

²⁷¹ *Id.* at 167.

²⁷² *Id.* at 151-53.

²⁷³ *Id.*

²⁷⁴ *Id.*

to the state of Washington, and in doing so, flooded tribal lands to create a reservoir and extinguished salmon fisheries, which were a primary source of income for Indigenous communities.²⁷⁵ The dam project destroyed both the subsistence lifestyle and the economies of the Spokane Tribe and the Confederated Tribes of the Colville Reservation, setting off a decades-long legal dispute seeking proper compensation for these actions.²⁷⁶ In 1881, the United States specifically provided the riverbeds of the Spokane and Columbia Rivers as part of the Spokane and Colville Reservations, recognizing the importance of these waterways to the Indigenous people of the Pacific Northwest.²⁷⁷

Ignoring the importance of these areas, the dam was constructed and “[b]urial sites, village sites, spiritual sites [were] all lost to the rising waters,” these were lands that provided food and medicine, and which the Spokane and Colville people worked hard to make a home.²⁷⁸ Similar to the BC Confederation of Muskogees on Isle de Jean Charles, the Spokane Tribe and the Confederated Tribes of the Colville Reservation were among the most isolated communities in the United States before the Grand Coulee Dam project.²⁷⁹ There was a “very isolated, intact Indian communit[y]” into which thousands of construction workers were placed for the construction of the dam while the United States Government ensured tribal interests would be protected.²⁸⁰ Instead of protecting their interests, the land was submerged, houses were lost, and promises of shared revenue from the dam’s power generation never came to fruition.²⁸¹

The Spokane Tribe and the Tribes comprising the Confederated Tribes of the Colville Reservation have occupied the area for millennia, subsisting on fisheries in addition to wild game and agriculture.²⁸² And as with the Tribes of the Missouri River Basin and south Louisiana, actions of the federal government inundated their ancestral homes and caused them to retreat to higher ground.

D. Continuing Access to Natural and Cultural Resources

1. Access to Natural and Cultural Resources under the UNDRIP

Physical, tangible losses are, perhaps the least concerning element of the damage caused by land loss and climate change; however, they are inseparable from the largest threat to Indigenous communities: the erosion of culture.

Recognizing the importance of ensuring Indigenous people control of their communal lands and resources, the United States ratified the International Convention on the Elimination of

²⁷⁵ *Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act: Hearing on S. 1438 Before the Comm. on Indian Affs.*, 108th Cong. 16-17 (2003) (statement of Sen. Maria Cantwell of Washington).

²⁷⁶ *Id.* at 1 (statement of Sen. Daniel K. Inouye, Vice-Chairman, S. Comm. On Indian Affs.).

²⁷⁷ *Id.* at 19 (statement of Warren Seyler, Chairman, Spokane Tribal Business Council).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 23 (statement of Howard Funke, Counsel to Spokane Tribal Business Council).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 26 (testimony of Warren Seyler, Chairman, Spokane Tribal Business Council).

all Forms of Racial Discrimination in 1994.²⁸³ The United Nations, seeking to strengthen the convention, adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, with the United States voting against the non-binding measure.²⁸⁴ The UNDRIP provides “Indigenous peoples shall not be forcibly removed from their lands or territories” and further states, “[n]o relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just compensation and, where possible, the option of return.”²⁸⁵

With respect to the BC Confederation of Muskogees of Isle de Jean Charles, the Houma Nation, and the other Tribes of south Louisiana, relocation planning is being conducted with the participation of tribe members, but in hindsight, factors leading to their relocation were not with the prior, informed consent of Indigenous people. The application of the UNDRIP to Indigenous residents of Isle de Jean Charles is subject to academic debate due to the non-recognition by the United States of the BC Confederation of Muskogees or the Houma Nation as sovereign tribes.²⁸⁶ However, under the terms of the UNDRIP, recognition is not determinative of the rights of Indigenous peoples.²⁸⁷

The UNDRIP provides broad recognition of Indigenous people, deferring largely to self-identification of indigeneity over state-based recognition.²⁸⁸ This broad-based recognition of who is Indigenous stands in stark contrast with that of the United States government which requires satisfaction of an “acknowledgment” process.²⁸⁹ The modern acknowledgment process through the BIA has been in effect since the late 1970s and the criteria which must be satisfied “have been criticized for their inconsistency, their discriminatory nature, and the monetary expense they place on petitioning tribes.”²⁹⁰ The unforgiving rigidity of the BIA’s review criteria and intensity of analysis is attributed to a perceived potential for abuse of the recognition process.²⁹¹ However, in the absence of formal recognition, there is very little Indigenous communities in the United States can do to protect themselves from environmental degradation or actively seek protection in the spirit of self-determination advocated by the UNDRIP.²⁹²

As important as self-determination is under the UNDRIP, of equal importance is the right of access to tribal lands. The relationship between Indigenous communities and their land is

²⁸³ Stern, *supra* note 252, at 199.

²⁸⁴ *Id.* In 2010, President Obama announced a change in U.S. policy indicating support of the UNDRIP; however, the position of the U.S. regarding rights afforded under the Declaration is that the UNDRIP is not legally binding nor is it part of customary international law, rendering the Declaration aspirational at best. JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK WARNER, *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* 695-96 (4th ed. 2018) [hereinafter “ROYSTER ET AL.”]; Kevin Crow, *Does UNDRIP Matter: Indian Law in the United States & the International Right to Self-Determination*, 13 *HIBERNIAN L. REV.* 119, 123-24 (2014).

²⁸⁵ *Id.*

²⁸⁶ Crepelle, *Climate Relocation*, *supra* note 33, at 23.

²⁸⁷ REBECCA TSOSIE, *RECONCEPTUALIZING TRIBAL RIGHTS: CAN SELF-DETERMINATION BE ACTUALIZED WITHIN THE U.S. CONSTITUTIONAL STRUCTURE?*, 15 *LEWIS & CLARK L. REV.* 923, 943 (2011).

²⁸⁸ Crepelle, *Climate Relocation*, *supra* note 33, at 23.

²⁸⁹ Mitchell, *supra* note 43, at 514.

²⁹⁰ *Id.* at 515; *see supra* Sec. I.A.

²⁹¹ Mitchell, *supra* note 43, at 515.

²⁹² *Id.*

“fundamental to [their] existence.”²⁹³ Explaining the inherent connection of the Houma Nation to the land of south Louisiana, former Chief Brenda Dardar-Robicheaux provides:

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.²⁹⁴

As traditional lands have largely been lost to the sea, the right to return as called for under the UNDRIP is impossible; however, it may not be too late to work with the Indigenous communities of south Louisiana toward preservation of their traditional ways of life.²⁹⁵

Multiple Articles of the UNDRIP directly address the rights of Indigenous peoples to traditional lands.²⁹⁶ In particular, states are called upon to recognize and provide for use lands that are “owned, occupied or otherwise used or acquired” with respect to “customs, traditions, and land tenure systems” of Indigenous peoples.²⁹⁷ The UNDRIP further provides that Indigenous peoples have a right to restitution or equitable compensation for lands and resources taken or damaged without free, prior and informed consent.²⁹⁸ Rights of the BC Confederation of Muskogees and the Houma Nation afforded by the UNDRIP have largely been lost due to extensive land loss over the course of the last century; however, looking forward, Louisiana and the United States should seek to remedy this loss.²⁹⁹ Pursuant to Article 28, Section 2 of the UNDRIP: “compensation [for lands or resources taken without free, prior and informed consent] shall take the form of lands, territories and resources equal in quality, size, and legal status” or other adequate means of redress.³⁰⁰

Although Louisiana has provided a relocation site to residents of Isle de Jean Charles, the five hundred fifteen-acre, inland relocation site does not, and cannot compare with the natural environment that built the Indigenous culture of Isle de Jean Charles. Unfortunately, as discussed above, land-based compensation anticipated under the UNDRIP is a practical impossibility in the marshes of Louisiana, since any remaining land of similar quality to what was taken will soon be consumed by the Gulf just as their island has been.³⁰¹

2. Usufructuary Rights to Isle de Jean Charles and Submerged Lands

As the Indigenous residents of Isle de Jean Charles and south Louisiana begin moving to higher, safer ground, the state government must ensure that these communities have access to their

²⁹³ Crepelle, *Climate Relocation*, *supra* note 33, at 24 (quoting former Houma Nation Chief Brenda Dardar-Robicheaux).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 25.

²⁹⁶ ROYSTER ET AL., *supra* note 284, at 696-700.

²⁹⁷ *Id.* at 698 (UNDRIP Article 26).

²⁹⁸ *Id.* at 698 (UNDRIP Article 28).

²⁹⁹ Crepelle, *Climate Relocation*, *supra* note 33, at 24-25.

³⁰⁰ ROYSTER ET AL., *supra* note 284, at 698 (UNDRIP Article 28).

³⁰¹ Crepelle, *Climate Relocation*, *supra* note 33, at 30.

homelands while they are still above the water, as called for under the UNDRIP. A great deal of now-submerged lands remain under private ownership, but others have reverted to the State of Louisiana as public water bottoms.³⁰² One mechanism to provide continuing access to traditional lands and waters is through granting the tribes usufructuary rights to hunt and fish in accordance with their traditional subsistence lifestyles.³⁰³

Tribal usufructuary rights are regarded as real property interests in the land of another, which are generally established through treaty relationships between tribes and the United States Government.³⁰⁴ Although the BC Confederation of Muskogees and Houma Nation Tribes are not recognized, a similar relationship between the tribes and the State of Louisiana for access to ancestral lands could be developed. Both the BC Confederation of Muskogees and the Houma Nation are recognized by Louisiana in some capacity and this, combined with the state's ownership of submerged lands and buyouts relating to relocation, make this type of beneficial relationship possible.³⁰⁵

3. Land Management as a Quasi-Trust Relationship

The trust relationship between recognized tribes and the United States Government is one through which the government of the United States has consistently diminished the rights of sovereign Indigenous nations to self-determination.³⁰⁶ Established by judicial decisions beginning in 1823 and evolving with the needs of the government, the trust relationship was characterized as creating a fiduciary, legal, and moral obligation to tribes on the part of the federal government.³⁰⁷ This relationship has been modified through the course of the centuries at the convenience of the fiduciary with the support of the courts, but is nonetheless the legal framework within which tribes must operate.³⁰⁸

Though not an ideal relationship, the State of Louisiana could enter into a quasi-trust relationship with the BC Confederation of Muskogees and the Houma Nation to ensure perpetual access to their remaining ancestral lands and the waterways which long supported their subsistence economy and cultural heritage. While courts have not provided for the existence of trust relationships with non-recognized tribes, these rulings have only addressed the assertion of responsibility against the government.³⁰⁹ There is no prohibition on a state voluntarily entering into such an agreement with a tribal government, whether recognized or not.

An early concern voiced by the residents of Isle de Jean Charles was their desire to retain a presence on the island following relocation.³¹⁰ Under the relocation plan, new homes in the

³⁰² Mestayer, *supra* note 112, at 891.

³⁰³ ROYSTER ET AL., *supra* note 284, at 585.

³⁰⁴ *Id.* at 602-03.

³⁰⁵ Crepelle, *Climate Relocation*, *supra* note 33, at 16; Mestayer, *supra* note 112, at 891.

³⁰⁶ Susan M. Larned, *Water is Life: The Native American Tribal Role in Protecting Natural Resources*, 8 *Env't & Earth L. J.* 52, 66 (2018).

³⁰⁷ *Id.* at 64-65; see *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

³⁰⁸ Larned, *supra* note 306, at 65.

³⁰⁹ Tsosie, *supra* note 287, at 945-46.

³¹⁰ Crepelle, *Climate Relocation*, *supra* note 33, at 32.

relocated community would essentially be transferred to residents of Isle de Jean Charles as part of an agreement to abandon land on the island to the government.³¹¹ However, as the project progressed, the state agreed to allow relocated residents to maintain ownership of their property on the island, subject to limitations on improvements which may be made.³¹² This is certainly a welcome situation for relocated residents leaving Isle de Jean Charles, but it does not constitute a long-term strategy for ensuring tribal access to land and water resources into the future as the island fully disappears into the Gulf of Mexico.

V. CONCLUSION

The history of the BC Confederation of Muskogeans and the Houma Nation is one of migration, exclusion, and loss. Believed to have disappeared into the swamps of southeastern Louisiana or through absorption into other tribes, scholars and government officials considered the groups lost until oil was found under their feet. Then, as history has shown, Indigenous people, their ways of life, and connections to the very land they occupied since time immemorial were pushed aside to further exploitation of their lands.

The BC Confederation of Muskogeans and the Houma Nation are not recognized by the United States government, but that is where the substantive differences between their experience and the experience of recognized tribal nations end. Both groups have been subjected to land loss for the alleged greater good of American society, whether through construction of hydroelectric power plants or quenching a growing nation's thirst for oil. With respect to Isle de Jean Charles, the factors which led to the diminishing size of the island and the ultimate relocation of its residents are complicated and not directly attributable to any one actor, unlike the losses experienced in the Missouri or Columbia River basins. In what is the twenty-first century's first Native American relocation project, the hope is that this will serve as an example to those who will inevitably follow.

Tribal consultation on relocation strategies is required under the UNDRIP and as a moral imperative. Tribal communities have had little ability to determine their own futures even under what is known as the "Self-Determination Era" of tribal relationships with the United States Government. Tribes were not consulted when their lands were sacrificed to power the nation, nor were they consulted when generations of politicians chose to ignore the reality of climate change and rising tides; they should at least be respected enough to enjoy consultation and self-determination when being removed from their homes once again.

Finally, while relocation is inevitable as land slips into the sea, governmental actors managing the relocation and resettlement projects must ensure Indigenous communities have continuing access to their traditional lands and waters. Access to land may be a time-constrained concept, but access to waterways which has been instrumental to the development of Indigenous culture and traditional subsistence lifestyles must be protected. While residents of the island may or may not be properly called America's first climate refugees, they certainly will not be the last.

³¹¹ *Id.*

³¹² Setyawan, *After 10 years*, *supra* note 237.