

The Importance of Ensuring an Accessible Federal Acknowledgment Process for Indigenous Tribes in the Face of the Climate Crisis

Zoe Vogel*

I.	INTRODUCTION	275
II.	FEDERAL ACKNOWLEDGMENT PROCESS: PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE.....	278
	A. <i>History of Federal Recognition</i>	278
	B. <i>Current Process</i>	282
III.	THE IMPORTANCE OF AN ACCESSIBLE FEDERAL ACKNOWLEDGMENT PROCESS FOR INDIGENOUS TRIBES	285
	A. <i>Right to Culture</i>	286
	B. <i>Access to Federal Programs</i>	287
IV.	THE IMPORTANCE OF AN ACCESSIBLE FEDERAL ACKNOWLEDGMENT PROCESS FOR THE ENVIRONMENT	289
	A. <i>Indigenous Activism</i>	289
	B. <i>Co-Management</i>	291
V.	CONCLUSION.....	293

I. INTRODUCTION

While the diversity of Indigenous communities around the world is so complex as to escape a singular definition, the United Nations has constructed an understanding of the term that heavily emphasizes the communities' powerful relationship with their surrounding environment.¹

* © 2023 Zoe Vogel, J.D. Candidate 2023, Tulane University Law School; B.S.B. 2020, University of Minnesota. The author thanks her family, friends, and peers for their encouragement and support. Special thanks to advisor Professor Chris Dalbom and his funky shoes.

1. *Indigenous Peoples, Indigenous Voices Factsheet*, UNITED NATIONS PERMANENT F. ON INDIGENOUS ISSUES, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Apr. 4, 2022).

This understanding includes a recognition that Indigenous peoples hold unique knowledge systems, which encapsulate invaluable practices for sustainably managing natural resources.² Because ancestral lands are deeply connected to their physical and cultural survival, Indigenous peoples have a relationship with their land that extends past the bounds of the United States' property-based legal system.³ The United Nations upholds self-identification as a fundamental criterion of human rights by constructing an understanding of Indigenous identity that is focused on a community's self-identification.⁴ So, while the international community has constructed an understanding of "who are Indigenous peoples?" self-determination and a recognition of inherent sovereignty are the critical foundations upon which a community can be defined.⁵

While "sustainable development" is also difficult to encapsulate in a singular definition, the United Nations defines it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁶ The unifying paradigm for their work consists of three pillars: economic growth, social inclusion, and environmental protection.⁷ Because of the ways in which the cultures of Indigenous tribes transcend solely social relationships in between other people to include a relationship with the land itself, tribal acknowledgement is a unique area of law as it directly addresses these three considerations through a singular mechanism.⁸ As such, it is imperative that the federal acknowledgment process is formulated in such a way that considers both the context of its enactment as well as the breadth of its ramifications. The brutal history of the United States' relationship with Indigenous peoples demands that access to federal acknowledgment does not continue to inordinately place the burden for their own advocacy on tribes that have already been consistently disenfranchised.

Tribal recognition in the United States is critical because it is a federal acknowledgment of the tribes' inherent sovereignty and establishes a government-to-government relationship between a tribe and

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. G.A. Res. 42/187, ¶ 2 (Dec. 11, 1987); *see* Report of the World Commission on Environment and Development, at 61, U.N. Doc. UNEP/GC/14/13 (1987).

7. G.A. Res. 70/1, ¶ 13 (Sept. 25, 2015).

8. *Indigenous Peoples, Indigenous Voices Factsheet*, *supra* note 1.

the United States.⁹ While federal recognition, or lack thereof, is by no means determinative of any tribe's true legitimacy, it can be an important tool in exercising sovereignty.¹⁰ Tribes that have been federally recognized are acknowledged by the United States as having inherent tribal authority, and as such, they may establish independent tribal governments.¹¹ Additionally, federally-recognized tribes may have their land put into a trust, upon which management actions must be "judged by the most exacting fiduciary standards."¹² This trust responsibility extends past the land itself and is the foundation of most Indian federal assistance programs as it "includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government."¹³

In the face of the climate crisis, federal acknowledgment is critical for both the survival of Indigenous tribes and the natural environment. Tribes who have not been federally acknowledged lack access to many federal resources, which can impede their ability to invest in physical infrastructure and social programs necessary for today and the years to come.¹⁴ They are also unable to directly interface with federal agencies, which is essential when addressing climate change events or relocation strategies.¹⁵ A lack of support in the face of the climate crisis can result in a devastating loss of Indigenous culture and environmental activism. Indigenous activists are critical leaders in the environmental movement and have been at the forefront of major shifts in legal theory.¹⁶ Indigenous

9. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (May 4, 1994) (Presidential Memorandum).

10. *Rights of Indigenous People in Addressing Climate-Forced Displacement*, SABIN CENTER FOR CLIMATE CHANGE LAW (Jan. 15, 2020), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_USA-162020_complaint.pdf (human rights complaint submitted to the United Nations).

11. See *Williams v. Lee*, 358 U.S. 217 (1959); see *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that states may not regulate on-reservation activity inconsistent with tribal government prerogatives).

12. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

13. *American Indians and Alaska Natives—The Trust Responsibility*, ADMIN. FOR NATIVE AMERICANS, <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-trust-responsibility> (last visited Apr. 5, 2022).

14. 25 C.F.R. § 20.200 (2022) ("Indian Tribe" definition for purposes of financial assistance and social services programs is limited to those recognized as eligible because of their status as Indians).

15. *Rights of Indigenous People in Addressing Climate-Forced Displacement*, *supra* note 10, at 15.

16. Sheri Radford, *The Importance of Indigenous Activism Around the World*, ENV'T 911 (July 21, 2021), <https://www.environment911.org/The-Importance-of-Indigenous-Environmental-Activism-Around-the-World>.

communities also hold a wealth of traditional ecological knowledge that is invaluable to reshaping our institutional activities with the land.¹⁷ As such, it is imperative that the federal acknowledgment process is accessible for Indigenous tribes.

II. FEDERAL ACKNOWLEDGMENT PROCESS: PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

The federal acknowledgment process must be initiated by the tribe itself, and this element of self-identification is one of the only components of the international Indigenous recognition framework that plays a role in the United States.¹⁸ The United States requires each tribe to submit a petition that must meet a standard of validity established by the Department of the Interior (“DOI”).¹⁹ The process is expensive, time-consuming, and vague.²⁰ There are tribes who have been petitioning for recognition for thirty years and still have yet to receive a final decision, despite the financial, temporal, and emotional investments made throughout those decades.²¹

A. *History of Federal Recognition*

While the DOI’s promulgation of regulations to govern the federal recognition process in 1978 is perhaps the clearest delineation of how to achieve federal acknowledgment, it was not the first, nor is the only way.²² Before there was a “federal acknowledgement process,” it was simply the concept of “recognition,” which was typically done through bilateral treaties.²³ However, treaty-making with Indigenous groups was

17. See Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT’L ENV’T. L. & POL’Y 127 (1994).

18. 25 C.F.R. § 83.20 (2022).

19. 25 C.F.R. §§ 83.10, 83.20 (2022).

20. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on the Situation of Indigenous Peoples in the United States of America*, ¶ 56, U.N. DOC. A/HRC/21/47/Add/1, (Aug 30, 2012), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47-Add1_en.pdf.

21. *Rights of Indigenous People in Addressing Climate-Forced Displacement*, *supra* note 10, at 5.

22. Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 870–73 (2005).

23. *Id.* at 871.

2023]

IMPORTANCE OF ENSURING

279

unilaterally ended in 1871 by Congress and recognition eventually came to be managed through executive orders and Congressional acts.²⁴

In 1928, the Institute for Government Research released the Meriam Report, which was a survey of Indian reservation conditions.²⁵ The results detailed the economic destitution of tribal economies.²⁶ Throughout the history of the United States, Indian policy has been focused on assimilation into the European-American lifestyle, which included the establishment and forced attendance of boarding schools²⁷ and the practice of allotment.²⁸ With the goal of immediate and total assimilation, it is no surprise that these early policies had the effect of drastically destabilizing Indigenous tribes.

The first major piece of comprehensive legislation that attempted to address the issues identified by the Meriam Report was the Indian Reorganization Act of 1934 (Act),²⁹ which was the foundation of what was known as the “Indian New Deal.”³⁰ As President Roosevelt’s New Deal attempted to address the nation as a whole, John Collier, the commissioner of the Bureau of Indian Affairs (BIA), sought to use the reformist spirit of legislation at the time to address the marginalization of Indigenous communities.³¹ Collier’s intention to reform Indian policy was driven by a goal of preserving Indigenous culture, and the Act was the first of its kind to offer states federal money to support their Indigenous education, healthcare, and agricultural assistance programs.³²

The benefits of these programs could only be accessed by federally recognized tribes, so the DOI became much more involved in the recognition process following the passage of the Act.³³ While the Act itself provided recognition to tribes that had previously established a

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

25. LEWIS MERIAM ET AL., THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR (Institute for Government Research ed., 1928), <https://babel.hathitrust.org/cgi/pt?id=coo.31924014526150&view=lup&seq=9>.

26. *Id.*

27. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151 (2007).

28. Dawes Act, ch. 119, 24 Stat. 388 (1887) (repealed 1934).

29. The Indian Reorganization Act of 1934, 25 U.S.C.A §§ 5101–5144.

30. Jessie Kratz, “*Indian New Deal*,” NATIONAL ARCHIVES BLOG (Nov. 30, 2015), <https://prologue.blogs.archives.gov/2015/11/30/indian-new-deal/>.

31. *Id.*

32. 25 U.S.C. §§ 5101–5144.

33. Iraola, *supra* note 22, at 872.

relationship with the federal government, it also provided mechanisms through which some non-federally recognized tribes could become federally recognized.³⁴ The Act provided for the process to be administered by the Office of Federal Acknowledgment (OFA), which is housed in the BIA within the DOI.³⁵

While the process was more formalized than it ever had been, it had serious faults. In the 1960s and 70s, there were a series of cases brought before the judiciary by tribes seeking to enforce federal trust obligations and treaty rights.³⁶ The American Indian Policy Review Commission also put forward a report to Congress that criticized the BIA for its inconsistent treatment of petitioning tribes.³⁷ In response, the DOI promulgated specific regulations to govern the process.³⁸ These regulations articulate the standard of evidence, burden of proof, criteria for consideration, and administrative procedures to be utilized by the federal government in making the determination.³⁹ These regulations, first promulgated in 1978, articulate seven criteria to be considered:

1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
2. A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
3. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
4. It submits to the BAR a copy of the group's present governing document including its membership criteria;
5. The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical

34. 25 U.S.C. § 5129.

35. 25 U.S.C. §§ 5101–5144.

36. Iraola, *supra* note 22, at 872; Henry Sockbeson, *Reflections on a Flawed System*, 37 NEW ENG. L. REV. 483, 485 (2003) (discussing key cases).

37. Iraola, *supra* note 22, at 872; Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (to be codified at 25 C.F.R. pt. 83).

38. 25 C.F.R. §§ 83.1–83.13 (1978).

39. *Id.*

2023]

IMPORTANCE OF ENSURING

281

Indian tribes when combined and function as a single autonomous political entity;

6. The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe;
7. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.⁴⁰

In considering each of the criteria, the OFA is required to find a “reasonable likelihood of the validity of the facts.”⁴¹ If a party is dissatisfied with the outcome of the administrative proceedings available, review of the decision lies within the courts. Because the OFA is acting under Congressional direction, their decision is granted deference by the judiciary, which applies an arbitrary and capricious standard of review.⁴² This presents a difficult burden for the decision challenger to overcome.

These regulations were revised in 1994,⁴³ the same year in which Congress enacted the Federally Recognized Indian Tribe List Act.⁴⁴ The update clarified that the administrative procedures of the federal acknowledgment process, an act of Congress, or a decision of a United States court are the three ways in which an Indigenous tribe could become federally recognized.⁴⁵ While the prevailing majority opinion is that the administrative process is the dominant mode of attaining recognition, between the years of 1979 and 2013, the OFA had a lower success rate and recognized fewer tribes than Congress.⁴⁶ However, data also indicates that Congress has recently been more hesitant to pass recognition bills.⁴⁷ The amount of discretion and lack of clear standards that Congress has in this area indicate that a Congressional path towards acknowledgment is no easier to decipher than the administrative one.

40. 25 C.F.R. §§ 54.7(a)–(g) (1978).

41. 25 C.F.R. §83.10 (2022).

42. JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION, CONGRESSIONAL RESEARCH SERVICE (2016).

43. 25 C.F.R. § 83 (1994).

44. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791.

45. 25 C.F.R. §§ 83.8(c)(1)–(3) (1994).

46. Carlson, *supra* note 24, at 972.

47. *Id.* at 974.

The unique intersection between administrative and legislative actions in this space creates its own concoction of confusion. Legislative-administrative multiplicity occurs when “Congress acquiesces in agency action but continues to perform the same function.”⁴⁸ Although the Bureau of Indian Affairs is executing their Congressional mandate of managing the federal acknowledgment process, it recognizes that Congress “unquestionably has the power, in the first instance, to speak for the United States on recognition of groups as Indian tribes.”⁴⁹ While it is normal for Congress to exercise oversight over agencies, performing the function in a parallel manner is unique to the acknowledgement process.⁵⁰ Recognition of this intersection is important when addressing critiques of the administrative petition, as understanding the interaction between the two parallel processes can provide insight into how each may affect the work of the other.

B. *Current Process*

In response to repeated condemnations of the administrative process, the Bureau of Indian Affairs issued a proposal for changes to the Federal Acknowledgment Rule in 2014.⁵¹ Many of the criticisms they aimed to address were centered around the process’s lack of transparency, vagueness, and the imprecision with which petitions were evaluated.⁵² For example, in 2000 the Little Shell Tribe was told they “did not need to provide evidence of being identified as an Indian entity on a ‘substantially continuous basis’ in every decade” to satisfy the continuity criterion of the petition.⁵³ However, this was the precise basis upon which the DOI found that the tribe failed to meet the criterion.⁵⁴ This is reflective of the agency’s inconsistent application of the “reasonable likelihood” standard used to evaluate evidence, which has become increasingly difficult to meet over time.⁵⁵

48. *Id.* at 959.

49. Federal Acknowledgement of American Indian Tribes, 80 Fed. Reg. 37,861, 37,864 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83).

50. Carlson, *supra* note 24, at 998–1005.

51. Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (proposed May 29, 2014) (to be codified at 25 C.F.R. pt. 83).

52. *Id.*

53. *Fixing the Fed. Acknowledgment Process: Hearing Before the Comm. on Indian Affairs*, 111th Cong. 2 (2009).

54. *Id.*

55. *Id.*

2023]

IMPORTANCE OF ENSURING

283

In addition to the procedural issues, the proposed changes also aimed to address the fact that the petitioning process places a very heavy burden on the tribes, as it is exorbitantly expensive and time-consuming.⁵⁶ The U.S. Government Accountability Office, charged with being a source of objective and non-partisan information on government operations,⁵⁷ found in 2001 that the majority of tribes with petitions ready to be evaluated had been waiting at least five years.⁵⁸ The Pointe-au-Chien Tribe, in Southeast Louisiana, has been engaged in the administrative petitioning process since the 1990s, and a final decision has yet to be made.⁵⁹ This length of time is not unique, nor incredibly rare.⁶⁰

Revisions to the rule were made primarily to the processes and implementation of the federal acknowledgment process, rather than to the criteria themselves. A key procedural change was that the new rule instated a phased review of the criteria to address the speed with which petitions were evaluated.⁶¹ In Phase 1, the OFA determines if the petitioning tribe satisfies the governing document criterion (d), the descent criterion (e), unique membership criterion (f), and the termination criterion (g).⁶² If all of these are met, the OFA then considers the remaining criteria as Phase 2 of the process.⁶³ The intention behind the change is that it will allow for more expeditious negative findings, without compromising on the “rigor and integrity of the process.”⁶⁴

The administrative appeals process was also altered so that rather than having a limited reconsideration of final determinations before the Interior Board of Indian Appeals, the Secretary will review the proposed finding and the record, including an administrative law judge’s recommendation, before issuing a final determination.⁶⁵ This final

56. Anaya, *supra* note 20, at ¶ 57.

57. 31 U.S.C. §§ 711–721.

58. Carlson, *supra* note 24, at 963.

59. *Rights of Indigenous People in Addressing Climate-Forced Displacement*, *supra* note 10, at 5.

60. See Carlson, *supra* note 24 at 962; The Little Shell Band of Chippewa Indians of Montana first submitted a letter of intent in 1978. It took them fourteen years to compile their petition, and three additional years for the BIA to declare it complete. In 2000, the BIA issued a positive proposed finding. However, in 2009, the DOI issued a negative final determination. The appeals process continued until Congress passed the Little Shell Tribe of Chippewa Indians Restoration Act. S. REP. NO. 116-190 (2020).

61. 25 C.F.R. § 83.26 (2022).

62. *Id.*

63. *Id.*

64. Federal Acknowledgement of American Indian Tribes, *supra* note 49 at 37,862.

65. 25 C.F.R. § 83.41 (2022).

determination is then eligible to be challenged in a United States district court, which applies the arbitrary and capricious standard when reviewing the decision.⁶⁶ The reorganization of this process creates a greater opportunity for tribes and potential third parties to intervene if they receive a negative proposed finding, which is in furtherance of the department's articulated goals of promoting "fairness, objectivity, transparency and consistent implementation."⁶⁷

A third significant update to the procedures of the federal acknowledgement process is that the final rule provides for the codification of past department practices, to ensure consistency of decisions by eliminating that element of discretion.⁶⁸ As such, analogous pieces of evidence presented by tribes will be interpreted in the same way that they were previously, which may also be helpful in stabilizing expectations.⁶⁹ This is particularly important given the lack of definition for "reasonable likelihood" as the standard of proof.⁷⁰ While a definition was offered in the proposed rule,⁷¹ it was ultimately not included due to commenters' concerns about changing the standard of proof that was set forth by Congress.⁷²

The updates to the seven criteria were limited and changed only the agency's assessment of various forms of evidence to substantiate them.⁷³ One of the most important revisions is that the criteria of continual identification as an "Indian entity" no longer limits evidence of identification to external sources.⁷⁴ This allows for the petitioning tribe's own records to be utilized to satisfy this identification, which is critical in supporting the human rights concept of self-identification.⁷⁵ While this is a strong example of a way in which the petition process may be modified to increase its accessibility, there were many proposed changes with similar intentions that did not make it into the final rule.⁷⁶ As the agency aptly states: "Despite wide agreement by the public that this process is broken, solutions are not obvious because members of the public have

66. Cole, *supra* note 42.

67. Federal Acknowledgement of American Indian Tribes, *supra* note 49 at 37,863.

68. *Id.*

69. *Id.*

70. Federal Acknowledgement of American Indian Tribes, *supra* note 49 at 37,875.

71. Federal Acknowledgement of American Indian Tribes, *supra* note 51, at 30,774.

72. Federal Acknowledgement of American Indian Tribes, *supra* note 49, at 37,865.

73. 25 C.F.R. §§ 83.10-12 (2015).

74. 25 C.F.R. § 83.11(a)(7) (2015).

75. *Id.*; UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, *supra* note 1.

76. Federal Acknowledgement of American Indian Tribes, *supra* note 51, at 30,767.

2023]

IMPORTANCE OF ENSURING

285

differing perspectives on the exact nature of the problems. Some reforms are as controversial as the broken process.”⁷⁷

III. THE IMPORTANCE OF AN ACCESSIBLE FEDERAL ACKNOWLEDGMENT PROCESS FOR INDIGENOUS TRIBES

The government-to-government relationship created through the federal acknowledgment process has incredibly important ramifications for tribes and their members, as it creates a trust relationship which is protective of the land and cultural assets of the community,⁷⁸ grants the tribe access to federal support resources,⁷⁹ and allows the tribe to exercise political sovereignty.⁸⁰ Each of these are necessary to ensure that Indigenous tribes are able to enjoy the full range of human rights in the face of increasingly severe climate impacts.⁸¹

Limiting tribes’ ability to exercise self-determined action can increase their vulnerability to climate change.⁸² The interconnected relationship that Indigenous peoples have with the natural environment is integral to their spiritual identity, cultural heritage, and livelihoods.⁸³ As climate change impacts these ecosystems, that relationship is forced to change. Common examples include a loss of traditional food sources as species go extinct, or a loss of traditional ecological knowledge when the knowledge is no longer accurate.⁸⁴ These impacts can be wide-spread, as it can increase food insecurity and decrease opportunities for community building.⁸⁵ The institutional barriers that limit tribes’ adaptive capacities require access to federal resources to overcome, both when addressing extreme immediate events as well as the long-term effects.

77. Federal Acknowledgement of American Indian Tribes, *supra* note 49, at 37,864.

78. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

79. ADMIN. FOR NATIVE AMERICANS, *supra* note 13.

80. The Alaska Institute for Justice, Complaint to the United Nations: Rights of Indigenous People in Addressing Climate-Forced Displacement (Jan. 15, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_NA_complaint.pdf.

81. *Id.* at 9.

82. U.S. GLOBAL CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT CHAPTER 15: TRIBES AND INDIGENOUS PEOPLES (2018).

83. *Id.*

84. *Id.*

85. *Id.*

A. *Right to Culture*

The United Nations has consistently found that there is a human right to the “protection and promotion of culture.”⁸⁶ While this philosophy is articulated very generally in the Universal Declaration of Human Rights,⁸⁷ violent conflicts, climate change, and economic inequalities increasingly require this analysis to be done through a framework of protecting cultural heritage.⁸⁸ UNESCO specifically mentions the role of Indigenous communities and the requirement that States “respect, protect, and fulfil cultural rights.”⁸⁹

However, what constitutes a “cultural right” is difficult to define.⁹⁰ As such, it can be difficult to delineate what, exactly, is protected. The very breadth of what constitutes “culture” means that these rights can apply broadly, including language, expression, identity, and heritage.⁹¹ It gets increasingly complex when considering how these cultural rights apply to individuals as well as the communities to which they belong.⁹² United States jurisprudence has found that religion is a component of culture, demonstrating that particular practices may be protected. However, courts consistently find religion to be severable from other aspects of a community’s culture and thus other elements are not protected in the same way.⁹³

The law in the United States that most clearly articulates a protected right as it relates to culture is the First Amendment’s encapsulation of freedom of religion. In 1978, Congress passed the Indian Religious Freedom Act, which committed the United States “to protect and preserve for American Indians their inherent right of freedom to believe, express,

86. U. N. EDUC., SCI., AND CULTURAL ORG., RIGHT TO PARTICIPATE IN CULTURAL LIFE (2022), <https://en.unesco.org/human-rights/cultural-life>.

87. G.A. Res. 217 (III) A, Universal Declaration of Human Rights. (Dec. 10, 1948) (“1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

88. RIGHT TO PARTICIPATE IN CULTURAL LIFE, *supra* note 86.

89. *Id.*

90. Farida Shaheed, Report dated Mar. 22, 2010 from Independent Expert Farida Shaheed, submitted to the Human Rights Council, ¶¶ 4–5, U.N. Doc. A/HRC/14/36 (Mar. 22, 2010) (Independent expert stressed that there is no official definition of cultural rights).

91. *Id.* at ¶ 5.

92. *Id.* at ¶ 6.

93. Sharon O’Brien, *Cultural Rights in the United States: A Conflict of Values*, 5 LAW & INEQ. 267, 301–02 (1987).

2023]

IMPORTANCE OF ENSURING

287

and exercise traditional religions.”⁹⁴ This law was at the center of a series of cases around peyote, a small cactus that is a central sacrament for the Wixárika, an Indigenous peoples living in the United States and Mexico.⁹⁵ It was illegalized with the passage of the 1970 Controlled Substance Act due to its hallucinogenic properties, but members of the Peyote Way Church of God were able to secure an exemption as peyote is an important component of their religious practices.⁹⁶ The court recognized that “the use of such items as peyote are necessary to the survival of Indian religion and culture.”⁹⁷ While limited and controversial in its application, the Indian Religious Freedom Act is an important tool for tribes’ ability to protect their cultural practices that may otherwise not be protected under traditional western conceptions of religion. Because the United States does not recognize a general right to culture, it is one of only a few statutory protections of tribal traditions. However, protection under the Act is limited only to federally acknowledged tribes and, as such, the federal acknowledgment process is critical for a tribe’s ability to protect its culture.

B. Access to Federal Programs

The Department of Interior’s BIA maintains the relationships between tribal governments and the United States and is the office that facilitates support for tribal people and governments.⁹⁸ Over the past few decades their engagement strategy has shifted towards a greater emphasis on Indigenous self-determination while still offering support services to federally recognized tribes.⁹⁹ There are a wide array of different programs including workforce development, social services, power utilities, and economic development, which includes a Bureau of Indian Education.¹⁰⁰ When considered in sum, these programs are designed to promote long term sustainable development by supporting tribes’ ability to invest in themselves.¹⁰¹

94. 42 U.S.C. § 1996 (1978).

95. *See* *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 633 (N.D. Tex. 1983).

96. O’Brien, *supra* note 93, at 300.

97. *Id.*; *Peyote Way Church of God, Inc.*, 556 F. Supp. at 637.

98. 4 Stat. 564, 22 Cong. Ch. 174 (1832) (current version at 25 U.S.C. § 2).

99. *Programs and Services*, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/programs-services> (last visited Apr. 5, 2022).

100. *Id.*

101. *Id.*

In response to an increasing need to incorporate climate considerations into decision-making, the Office of Indian Affairs established the Branch of Tribal Climate Resilience in 2011.¹⁰² The program is designed to support climate resilience across each of the Indian Affairs' programs as well as the federally recognized tribes themselves, as "climate resilience strengthens tribal sovereignty."¹⁰³ They aim to do so by providing educational opportunities, access to scientific resources, and financial assistance.¹⁰⁴ This enables tribal and BIA resource managers to plan and make decisions that support climate resilient strategies.¹⁰⁵ The Branch even specifically acknowledges the importance of integrating traditional ecological knowledge into management of resources.¹⁰⁶

However, these critical resources are only available to tribes that have been granted federal recognition.¹⁰⁷ As such, there are Indigenous communities who do not have access to them, often because they are stuck or lost within the administrative process.¹⁰⁸ For example, the Louisiana coastline is known for its exploitation by the oil and gas industry, and the levee system that further disenfranchised coastal communities by excluding them from hurricane protection.¹⁰⁹ There are four state-recognized coastal tribes, and as a result of the climate crisis, they are all facing issues of land loss, increased temperatures, changes in species presence, saltwater intrusion, and the loss of traditional foods and medicinal plants.¹¹⁰ However, there is only one resiliency project. These circumstances, which would be dire for even a federally acknowledged tribe, are further complicated by a lack of federal recognition as it makes residents ineligible for tribal assistance from the Federal Emergency Management Agency (FEMA) or the BIA.¹¹¹ Traditional Chief Albert Naquin of the Isle de Jean Charles band of Biloxi-Chitimacha-Choctaw Tribe puts it plainly: "The red tape from being federally recognized is

102. U.S. DEP'T OF THE INTERIOR, BRANCH OF TRIBAL CLIMATE RESILIENCE, <https://www.bia.gov/bia/ots/tribal-climate-resilience-program> (last visited Apr. 5, 2022).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 25 C.F.R. § 83.2.

108. The Alaska Institute for Justice, *supra* note 80, at 13, 16.

109. *Id.* at 18–29; See Natasha Steinman & Kirsten Vinyeta, *Vulnerability of Coastal Louisiana Tribes in a Climate Change Context*, INST. FOR TRIBAL ENV'T. PROS. (Sept. 2012), http://www7.nau.edu/itep/main/tcc/docs/tribes/tribes_CoastalLA.pdf.

110. Steinman & Vinyeta, *supra* note 109.

111. FED. EMERGENCY MGMT AGENCY, FEMA POLICY NO. 305-111-1 (2016).

2023]

IMPORTANCE OF ENSURING

289

very, very red . . . They [the BIA] know we're Indians. We know we're Indians, but they just won't give us recognition because we don't have the proper historical records . . . Maybe they just don't want any more Indians."¹¹²

In 2020, five tribes filed a human rights complaint against the United States: Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw Indians of Louisiana, Pointe-au-Chien Indian Tribe, Grand Caillou/Dulac Band of Biloxi-Chitimacha-Choctaw, Grand Bayou Village, and Native Village of Kivalina.¹¹³ At the heart of the complaint were the rights of Indigenous peoples in the face of the climate crisis, and the failure of the United States to fulfill its duty.¹¹⁴ The allegations are that the United States failed to protect the tribes from harm, failed to protect their right to self-determination, and failed to protect their cultural heritage.¹¹⁵ All of these tribes are located in coastal areas that are seeing incredibly high rates of land loss.¹¹⁶ As the ground literally washes away from under their feet, they are unable to effectively call upon federal resources to support their loss.¹¹⁷

IV. THE IMPORTANCE OF AN ACCESSIBLE FEDERAL ACKNOWLEDGMENT PROCESS FOR THE ENVIRONMENT

A. *Indigenous Activism*

Because “the very cosmology of Indigenous Peoples” is deeply intertwined with their relationship with their ancestral land, Indigenous peoples around the world are at the forefront of addressing climate change and climate justice.¹¹⁸ Indigenous activists are some of the most important advocates for protecting our natural environment, as Indigenous peoples protect 80 percent of the world's biodiversity, despite making up less than 5 percent of the population.¹¹⁹ This is important to note, as much of this ‘activism’ that occurs is simply tribes engaging in their traditional

112. *Biloxi-Chitimacha-Choctaw Indians: Rising Tides*, INST. FOR TRIBAL ENV'T. PROS. (2008), https://www7.nau.edu/itep/main/tcc/docs/tribes/tribes_RisingTides.pdf.

113. The Alaska Institute for Justice, *supra* note 80, at 3.

114. *Id.*

115. *Id.* at 38.

116. *Id.* at 4–8.

117. *Id.* at 9.

118. Emma S. Norman, *Standing Up for Inherent Rights: The Role of Indigenous-Led Activism in Protecting Sacred Waters and Ways of Life*, 30 SOC'Y AND NAT. RES. 537, 537 (2017), <https://www.tandfonline.com/doi/full/10.1080/08941920.2016.1274459>.

119. Radford, *supra* note 16.

practices.¹²⁰ Settler colonialism and its impacts mean that often everyday activities can be “wrapped up in acts of resistance, activism, and even heroism.”¹²¹

Outside of the exercise of traditional culture, much of Indigenous activism works by influencing the legislative process, by shifting constituencies’ perspectives and putting pressure on legislators.¹²² However, recognized tribes are also able to advocate through unique measures like treaty rights. Treaty rights have been used to positively secure land and water rights, as well as impede the development of coal and gas infrastructure.¹²³

The United States has a long history of strong indigenous activism against the development of oil and gas pipelines.¹²⁴ An example of the effectiveness of this activism is the efforts that coalesced to cancel the Keystone XL pipeline, which was intended to move crude oil extracted from tar sands into the United States.¹²⁵ The proposed pipeline risked contamination of the Ogallala Aquifer, which is an incredibly valuable source of fresh water.¹²⁶ Indigenous communities from the United States and Canada worked together for more than ten years to oppose the construction of the pipeline, organizing marches, petitions, and sit-ins, including a demonstration on the National Mall.¹²⁷ There were also treaty rights arguments presented in court after the Rosebud Sioux Tribe (Sicangu Lakota Oyate) and Fort Belknap Indian Community (Assiniboine (Nakoda) and Gros Ventre (Aaniiih) Tribes) filed suit against the Trump Administration, DOI, and the Bureau of Land Management (BLM) over the issuance of permits.¹²⁸ The complaint included allegations that the BLM failed to analyze and did not uphold treaty obligations to protect the tribes’ natural resources and lands;

120. Norman, *supra* note 118.

121. *Id.*

122. *Indigenous Activists are United in a Cause and are Making Themselves Heard at COP26*, NPR (Nov. 9, 2021), <https://www.npr.org/2021/11/09/1053656078/young-indigenous-activists-united-in-climate-cause-at-cop26-summit> (quoting a traditional song, “The embers of our Indigenous voices, if they are neglected or ignored, they tend to start fires.”).

123. Anna V. Smith, *How do Tribal Nations’ Treaties Figure into Climate Change?*, HIGH COUNTRY NEWS (May 14, 2019), <https://www.hcn.org/articles/tribal-affairs-how-do-tribal-nations-treaties-figure-into-climate-change>.

124. Radford, *supra* note 16.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Keystone XL Pipeline*, NATIVE AMERICAN RIGHTS FUND, <https://www.narf.org/cases/keystone/> (last visited June 9, 2021).

2023]

IMPORTANCE OF ENSURING

291

TransCanada, the pipeline company, did not follow tribal laws even though they agreed to do so; and, although the proposed path for the pipeline crossed the tribes' homelands, they were not consulted as required by DOI policy.¹²⁹ While an executive order signed by President Biden revoked the pipeline permit before the legal issues of the case were addressed, legal battles such as these can have an important persuasive effect, whether or not the merits are reached.¹³⁰ Thanks to the crucial efforts of Indigenous activists, the pipeline was officially cancelled in 2021.¹³¹ Without federal recognition, those suits would not have been possible and the Indigenous activists would have been limited to extrajudicial measures. Situations such as this demonstrate the importance of federal recognition in ensuring that Indigenous activists have access to judicial, as well as legislative, forms of advocacy.

B. Co-Management

While the government-to-government relationship between recognized tribes and the United States government is often conflicting, there are also crucial opportunities for collaboration. Because natural resources are so tied to Indigenous tribes' cultures, the environmental field is often where this collaboration happens.¹³² For example, the Environmental Protection Agency (EPA) was the first federal agency to have an official Indian policy, and it centered around the philosophy of tribal sovereignty over their lands.¹³³ The EPA's Indian Policy was first issued in 1984 and has been consistently reaffirmed by the agency's administrators.¹³⁴ Many environmental statutes, including the Clean Water Act, the Oil Pollution Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, are structured so as to give tribes similar authorities that are granted to states.¹³⁵ While statutes like these are important for tribes' ability to exercise sovereignty in protecting their people and resources, agencies have also engaged tribal officials

129. *Id.*

130. *Id.*

131. Radford, *supra* note 16.

132. *Id.*

133. ENV'T PROT. AGENCY, EPA POL'Y FOR THE ADMIN. OF ENV'T PROGRAMS ON INDIAN RSRVS. (Nov. 8, 1984), <https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf>.

134. *Id.*

135. *Id.*

with specialized knowledge of pollution prevention issues to better inform their programs that operate outside of tribal lands.¹³⁶

Currently, fish and wildlife management are the areas with the most advanced co-management models.¹³⁷ Judicially enforced off-reservation treaty rights are a driving factor behind these programs, as the intersection between a tribe's exercise of their treaty rights and federal land management duties provides ample opportunity for collaboration.¹³⁸ Much of this action occurs under the Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, which all call for intergovernmental agreements between tribes and the United States.¹³⁹ This order is unique because it was founded upon concepts of partnership and was jointly developed through formal negotiation.¹⁴⁰ This is an important way in which the United States is beginning to meaningfully expand their acknowledgment of tribal sovereignty.

Treaty rights recognizing tribal interests in natural resources and other statutory sources of protection for Indigenous tribes are important legal tools for protecting the natural environment. Crucially, "[t]he right to habitat protection must also include a right to meaningful tribal participation in the decision-making process regarding such habitat."¹⁴¹ Tribes hold interests in the natural environment whether they are federally recognized or not, but the federal acknowledgment process stands as a burdensome obstacle between the tribe and their ability to fully assert the interest legally. Because a tribe must be federally recognized to participate in environmental protection as more than just another stakeholder, the acknowledgement process must be accessible to maximize environmental protections.

136. *Id.*

137. Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 586 (2008).

138. *Id.*

139. DEP'T OF INTERIOR & DEP'T OF COMMERCE, JOINT SECRETARIAL ORDER NO. 3206, AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT, § 6 (1997).

140. Nie, *supra* note 137, at 595–96.

141. *Id.* at 604; *see also* Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENV'T. L. 279 (2000).

2023]

IMPORTANCE OF ENSURING

293

V. CONCLUSION

The federal acknowledgment process is a critical pathway for Indigenous tribes to be enabled to advocate for protection of their culture, community, and the natural environment. While the United States is certainly far from perfect in its treatment of even federally recognized tribes, it is still an important access point for federal resources, and it grants legally enforceable rights that would otherwise go unrecognized. As the climate crisis increasingly endangers tribes across the country indiscriminately of their recognition status, preservation of these tribes demands an accessible federal acknowledgment process.