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Publication Date

2021

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UNIVERSITY OF CALIFORNIA

Los Angeles

Unsettling Evidence:

An Anticolonial Archival Approach/Reproach to Federal Recognition

A dissertation submitted in partial satisfaction
of the requirements for the degree
Doctor of Philosophy in Information Studies

by

María Elvira Montenegro Araneda

2021

ABSTRACT OF THE DISSERTATION

Unsettling Evidence:

An Anticolonial Archival Approach/Reproach to Federal Recognition

by

María Elvira Montenegro Araneda

Doctor of Philosophy in Information Studies

University of California, Los Angeles, 2021

Professor Anne Gilliland, Chair

This critical archival studies dissertation investigates the political, socio cultural, and affective dimensions of the role(s) that settler-colonial archives and conceptualizations of evidence play in the Federal Acknowledgement Process (FAP). Through an archival ethnography of the Fernandeño Tataviam Band of Mission Indians' petitioning process for federal recognition, I examine how power and oppression are played out intertextually across the different types of records that serve as 'official' evidence for federal recognition purposes and within the institutions where these records are held; the competing ideologies and epistemologies that govern interpretations of evidence, who dictates them, and how have they been applied and misapplied to shape the FAP and its decisions; and the effects and affective consequences that result from having to prove Indian identity relying predominantly on settler-colonial evidence, rather than tribal documentary realities. Drawing on the tribe's petition, documents generated by the Office of Federal Acknowledgement (OFA), and a selection of the evidence used by the

Tribe, I identify the tensions and contradictions between what is recognized as legitimate evidence of Indian identity by the Tataviam and the OFA respectively, seeking to expose some of the most problematic aspects of the FAP's evidentiary practices. I make the case that alternative conceptions of evidence are sorely needed that shift the emphasis away from western legal and bureaucratic paradigms towards tribal and anticolonial constructions of evidence. Finally, I consider how such an epistemological and practical shift might serve as a model and possibly a catalyst for a broader and more unified anticolonial efforts by and across those who create, hold and manage tribal evidence.

The dissertation of María Elvira Montenegro Araneda is approved.

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2021

*This dissertation is dedicated to the Fernandeano Tataviam Band of Mission Indians and to all
other tribes fighting for federal recognition*

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Preface

Land Introductions

I conducted most of the research for this dissertation in what is currently considered Los Angeles, California, the territory of the Tongva people, the traditional land caretakers of Tovaangar (Los Angeles basin, So. Channel Islands) and in one of the Fernandeño Tataviam Band of Mission Indians' ancestral villages, located in what is now known as the San Fernando Valley, California. Research was also conducted in Chumash ancestral territory, in what is now considered Santa Barbara, California and in the territory of the Kitanemuk/Tejon Tribe in what is now considered Kern County, California. I wrote this dissertation while living in Topanga — where the mountains meet the sea in the Tongva language — which is territory claimed by Tongva, Chumash and Fernandeño Tataviam groups. This means that I live on unceded land that was stolen from at least one of the very same tribes with which I work. As a non-Native student pursuing a doctoral degree in a land grant institution located on Indian land, I thank and pay my respects to the Ancestors, Elders, and Relatives/Relations of these Indigenous communities, past, present and emerging and recognize their continuing connection to land, water, and resources.

Author positionality

Originally from Chile, and as a social justice archivist and scholar, I have dedicated my work — both in and outside academia — to investigating how archives can be accessed, appropriated and used by Indigenous peoples as tools to support self-determination, cultural revitalization, language rights, and political sovereignty. Aware of my privilege as a non-Native, white-passing, Latinx woman and mother, living and studying on unceded Tongva, Chumash and Tataviam Land, my work has prioritized assisting efforts to return Land and resources to tribal communities, specifically through anticolonial archival praxis. My relationship with the

Fernandeño Tataviam Tribe started in 2017. The Fernandeño Tataviam are non-federally recognized Tribe with ancestral villages located in the San Fernando, Santa Clarita, eastern Simi and Antelope Valleys. The Tribe is petitioning for federal recognition through the U.S. Federal Acknowledgement Process (FAP) since the mid-nineties. In May of 2017, and as a student of the “Locating Records as Evidence for Human Rights” class taught by Professor Anne Gilliland, I interviewed Tribal President Rudy Ortega Jr. for the first time for my final term paper. At the end of our meeting, I manifested to him my interest in assisting the Tribe with their federal recognition petition. Mr. Ortega invited me to collaborate with the research team by reading the petition documents along with the thousands of records used and submitted by the Tribe as evidence in support of their claim, inviting me to think of new locations where to find additional evidence for their case, and exploring alternative ways of interpreting the records that have been considered insufficient evidence by the Office of Federal Acknowledgment, the entity within the Department of the Interior responsible for implementing the Federal Acknowledgment Process.

In June 2018, I started formally collaborating with JD Carole Goldberg and Dr. Duane Champagne (Turtle Mountain Chippewa), both retired UCLA scholars in the Law School and in Sociology and American Indian Studies respectively, who have been spearheading the Tataviam petition since the early 2000s. In addition to the activities mentioned above, I assisted Goldberg and Champagne by conducting archival research in mission archives and libraries, looking for correspondence to and from the San Fernando Mission (1797-1846) and transcribing and translating those handwritten letters from old Spanish into English in order to hopefully find some form of evidence of the Tribe’s continuous existence before, through and after the mission period as an Indian “entity.”

In October 2020, the Tribe hired me as their archivist for an archival project funded by a [UC Critical Mission Studies](#) Community Grant. The project is briefly described in the conclusion of chapter 7 of this dissertation. Broadly, using the Tribe's federal recognition evidence archive (a hard drive containing more than 10,000 documents), I identified the records describing or referring to the Tataviam experience in the San Fernando Mission (around 250 documents), wrote the metadata for those records, developed and set up a digital archive and uploaded the content to the site. This work helped me understand some of the ways in which the Tribe is repurposing evidence in powerful and sovereign ways.

My continuous work with the Tribe allowed me to build a trusting relationship with some of the tribal citizens, including the Tribal President. It also led me to realize that the Tribe's petition and petitioning process for federal recognition would make for a very rich documentary site for my dissertation's ethnography of the archive study. Once my research project was approved by the Tribe, I began conducting more formal research and discourse analysis of the Tribe's petition, as well as conducting interviews and informally observing the Tribe's petitioning process.¹

My experiences assisting the Tribe with their petition have directly sparked and influenced the research goals of this dissertation and my commitments to its subject matter. The Federal Acknowledgment Process' problematic evidentiary practices for years have worked as a barrier that inhibits or refuses recognition altogether, leaving hundreds of tribes in the U.S. currently unacknowledged. Through this research, these practices will potentially achieve wider

¹ Research for and writing of this dissertation have been funded by a 2018-2019 UCLA Graduate Research Mentorship Fellowship, a UCLA Year Dissertation Fellowship, a Huntington Library's Research Fellowship, two American Philosophical Society's grants — an Andrew W. Mellon Foundation, Native American Studies Initiative — Digital Knowledge Sharing Fellowship and a Phillips Fund for Native American Research, and a UC Critical Mission Studies Graduate Student Grant.

visibility and scrutiny. My goal is not only to unveil and expose these problems, but also to emphasize the Tribe's commendable responses to these obstacles. The data presented in this dissertation has been reviewed by Tribal government representatives, however, it should be noted that the study itself does not intend to speak for or provide a community-internal Fernandeano Tataviam perspective.

Note on terminology

Generally, there is no consensus about what is the most appropriate name for the original inhabitants of North America. The names that tribal members have used to describe themselves often translate into "the people," or "the real people" in English; there was no need for a collective term embracing all the peoples of North America until settler Europeans arrived and invented one. Some people insist on using Native American and reject Indian as a derogatory term. However, America is also a word of European invention. Most often the U.S. federal government use the term Indian tribe to refer to the federally recognized entity made up of Indigenous people with a recognized territory and the capacity of self-governance. Many Indian people today call themselves just that, Indian people. In this dissertation, I have identified particular peoples by their tribal names, and when talking more generally I have used tribes, Indigenous people, Native American, American Indian, Native groups, people and communities interchangeably, recognizing that none is entirely satisfactory.

More specifically for the purposes of this dissertation, there exists no singular tribal name above the lineage preceding what is currently known as the Fernandeano Tataviam Band of Mission Indians. Therefore, there is currently no inclusive or collective term that represents all of the lineages that have been in existence prior to Mission San Fernando. However, due to the Tribe's association with that Mission, the lineages are given the blanket label *Fernandeano*, which

is problematic because it implies that one collective Fernandeano tribe came out of the mission system, which is not the case. Therefore, this dissertation uses the Tribe's term *lineage-village* in reference to each of the sovereign lineage organizations that existed at each village, which are identified in red on Figure 1. *Fernandeano Tataviam Band of Mission Indians*, *Fernandeano Tataviam Tribe*, or *Tribe* denote the contemporary coalition of those lineage-villages, and *Tribal* characterizes entities or individuals in association with the Tribal government. As preferred by the Tribe, *Tribal citizen* is used for individuals enrolled in the Tribe, and *member* is used for those part of the broader San Fernando Mission Indian community and network. *Ancestor* and/or *progenitor* both refer to previous generations of Fernandeano Tataviam people, and *leader*, *tomiar*, and/or *head person* are used synonymously to describe lineage leaders, a traditional role that should not be conflated with elected leadership. When discussing the Tribe as a whole, the pronoun *it* is used. The Tribe's jurisdiction (Figure 1) is referred to collectively as the *local area*. This area includes the Simi, San Fernando, Santa Clarita, and Antelope Valleys as well as parts of the Angeles National Forest.



Fernandeano Tataviam Band of Mission Indians Historical Tribal Ancestral Territory

Tribal boundary depicted is based on the villages from which registered Fernandeano Tataviam Band of Mission Indians' (FTBMI) tribal citizens descend. Due to the complex kinship and social exchange networks of our ancestors, the tribal boundary does not include all of the abundant locations associated with our peoples. The yellow shaded area depicts tribal lands that are significant to the FTBMI, but are culturally shared with neighboring Tribal governments due to the natural mobility of ancestral and contemporary FTBMI people.



Figure 1. Fernandeano Tataviam Band of Mission Indians tribal jurisdiction, 2015. This map reflects the areas recruited to Mission San Fernando ("Fernandeano") and encompasses lineage-villages tied to the Tribe. Lineage-villages are written in "red." Courtesy and property of the Fernandeano Tataviam Band of Mission Indians

Acknowledgements

I am forever grateful to the Fernandéño Tataviam Band of Mission Indians. Thank you to the Tribal Senators and Elders Council Members for granting me the permission to research, write and share, in the space of academia, a glimpse of your Tribe's quest for federal recognition. This dissertation would not have been possible without your approval, guidance, and support. I would like to acknowledge, and share my appreciation for Tribal President Rudy Ortega Jr., who has greatly influenced and guided this research. Thank you for your boundless generosity sharing yours and the Tribe's many stories and memories (even when it was hard talking about them), for your time, resources, and for your invaluable contributions. I would also like to share a sincere thank you to Tataviam tribal citizens Pamela Villaseñor and Mark Villaseñor, and to members of the petitioning research team, Kimia Fatehi, Nicole Johnson, Carole Goldberg and Duane Champagne, who all took the time out of their busy lives to meet with me — both in person and virtually — for this research. Thank you for your personal stories and advice, which have truly enhanced my understanding of this subject.

Thank you to my all-women dissertation committee: Anne Gilliland, Michelle Caswell, Olivia Chilcote and Miriam Posner, you have all shaped this research and your support has made this dissertation possible. Thanks especially to Anne Gilliland, my advisor and mentor, for always generously sharing your vast archival knowledge, for your exceptional guidance and your words of encouragement throughout the many stages of this process, including supporting me becoming a mother in the middle of this dissertation journey.

This study would not have been feasible without generous funding from UCLA Graduate Division's Graduate Research Mentorship and Graduate Summer Research Mentorship programs, as well as a year Dissertation Fellowship. I am also grateful to the UC Critical Mission

Studies Multicampus Initiative, for providing funding for completing my dissertation when COVID-19 was hitting hard and no other funding sources were available at the time. Thank you to the American Philosophical Society for allowing me to complete initial fieldwork in 2018 and then in 2020, and to the Huntington Library for a short-term research fellowship that I was able to take at the final stages of this project, when libraries and archives were allowed to re-open.

Thank you to the UCLA Department of Information Studies for providing me an intellectual home and for expanding my research ideas in ways I would have never imagined. Many of my doctoral colleagues in Information Studies and in other doctoral programs have contributed with knowledge and ideas, and their friendship and intellectual generosity have made surviving doctoral studies possible. My deepest love and gratitude to Gracen Brilmyer (UCLA) and Nina Gricci (Columbia), for your critical insight, selfless friendship, and the time you have donated toward editing parts of this manuscript.

Thank you to my family for their love, humor, and support throughout this academic journey, even when pursuing a Ph.D. has meant building a life away from home.

Thank you finally to Ashley Hunt for your love, partnership, unwavering support and patience, editorial prowess, and sharp insights, and to my son, Cirilo, for being the biggest joy of my life.

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 2018 UCLA Graduate Division 2018-2019 Graduate Research Mentorship
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 2020 Archivist | Fernand o Tataviam Band of Mission Indians, CA
 2020 – Present GSR | Special Advisor to UCLA’s Chancellor on Native American and Indigenous Affairs, Dr. Mishuana Goeman
 2019 – Present Digital Archivist | Carrying Our Ancestors Home, UCLA
 2019 NAGPRA Archivist | Fowler Museum, UCLA
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Introduction

1. Introduction

On May 27, 2020, the U.S. Department of the Interior’s Office of Federal Acknowledgement, or OFA,¹ said “no,” or technically speaking, issued a negative Proposed Finding (PF), in response to Phase I of the Fernandeano Tataviam Band of Mission Indians’ (FTBMI) petition for federal acknowledgement. The Federal Acknowledgement Process (FAP) is the system through which the U.S. “legally” recognizes the sovereign and separate political status of tribal nations, potentially entitling acknowledged tribes to certain federal services and resources and to implement their own forms of economic development and justice systems. In order to be recognized as such, petitioners must satisfy seven mandatory criteria that require their tribe to provide documentary evidence that its members descend from an historical Indian tribe or combination of tribes.

This evidence must, among other requirements, confirm continual social, cultural and political identification as a people from the 1900s to the present, and prove that there has been a continual tribal land base.² Petitioning tribes, then, are required to document their history, race, culture, and genealogy according to federally delineated criteria, and submit the evidence for review to the OFA, where a group of mostly non-Native historians, anthropologists, genealogists

¹ The Office of Federal Acknowledgment (OFA) within the Office of the Assistant Secretary - Bureau of Indian Affairs of the Department of the Interior, implements Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.” <https://www.bia.gov/WhoWeAre/AS-IA/OFA/> Accessed September 19, 2018.

² 25 CFR Part 83 – Procedures for Federal Acknowledgment of Indian Tribes. Federal Acknowledgement of American Indian Tribes; Final Rule. 2015. Department of the Interior, Bureau of Indian Affairs, Federal Register, Vol. 80, No. 126, Wednesday, July 1, 2015.

and federal agents, evaluate and either reject or “adjudicate” tribal sovereign status. In this case, the Tataviam have been told “no.”³

The Fernandño Tataviam, a non-federally recognized tribe of northern Los Angeles County, whose ancestral villages are located in the San Fernando, Santa Clarita, eastern Simi and Antelope Valleys in what is now considered to be California in the U.S., formally initiated their petitioning process for recognition in the mid-1990s. But as Tataviam Tribal President Rudy Ortega clarifies, “the Tribe has been navigating this arduous and rigorous process for the last 128 years.”⁴ This has meant, among other things, conducting archival research in more than twenty repositories, including private, religious, university, regional, and national archives, as well as submitting more than ten thousand documents as evidence of the Tribe’s written narrative of sovereignty and self-determination.

In the OFA’s “no” to the Fernandño Tataviam petition, it states that the Tribe meets only three of the four mandatory criteria under Phase I of the FAP’s:⁵ (d) *Governing document*, (f) *Unique membership*, and (g) *Congressional termination*. They have not, according to the OFA, met criterion (e) *Descent*, which requires that the petitioner’s membership consist of individuals who descend from a historical Indian tribe or tribes that combined and functioned as a single autonomous political entity from 1900 to the present.⁶

³ The Tataviam are the only Tribe in the U.S. that has got this far in the FAP under the amended regulations of 2015.

⁴ Rudy Ortega Jr., Interview with the author, October 2020.

⁵ In Phase I, the OFA determines whether or not the petitioner meets the Governing Document Criterion (§ 83.11(d)), Descent Criterion (§ 83.11(e)), Unique Membership Criterion (§ 83.11(f)), and Termination Criterion (§ 83.11(g)). If the petitioner meets those criteria, the petitioning Tribe moves to Phase II, where the OFA reviews whether the petitioner meets the Indian Entity Identification Criterion (§ 83.11(a)), the Community Criterion (§ 83.11(b)), and the Political Influence/Authority Criterion (§ 83.11(c)). If the petitioner claims previous Federal acknowledgment, the OFA will also review whether the petitioner proves previous Federal acknowledgment and, if so, will review whether the petitioner meets the criteria under § 83.12(b). (25 CFR Part 83)

⁶ 25 CFR Part 83.

The OFA contends that the evidentiary materials submitted by the Tribe to demonstrate descent — including government, court, church/mission, and vital records; newspaper articles; secondary sources; tribal administrative and enrollment records; correspondence; and oral histories among many other types of records — do not demonstrate that the Tataviam descend from and function as a historical Indian tribe.⁷ Furthermore, the Tribe has been required to provide additional “historical” and “legal” documents to prove their genealogy. Along with this prioritization of settler-produced documentary evidence, tribal records such as oral accounts and records produced at the San Fernando Rey Mission (SFR), along with other forms of evidence submitted by the Tribe were discredited by the OFA based on what appears to be an arbitrary interpretation of their evidentiary value.

I open this dissertation with an overview of the OFA’s Proposed Finding of the Fernandeano Tataviam’s petition for federal recognition in order to illustrate how the Tribe’s narrative of Indian existence presents historical and socio-cultural claims that contradict and are fundamentally incommensurable with contemporary U.S. settler-state demands and logics of political recognition. The Tribe’s history of self-determination draws its own conceptual boundaries, signaling to the OFA that Tataviam sovereignty and ‘Indianness’ are beyond the confines of settler colonial policies and epistemologies. Recognition of an Indian group as a tribe, the Tribe’s petition explains, should point toward the “respect of mutual rights and obligations observed among the regional network of lineages,”⁸ and not toward a criterion that the U.S. has imposed in order to limit and effectively erase Indigenous political life.

⁷ Office of Federal Acknowledgement, TA Review Letter, Washington DC: Department of the Interior, 2016; Office of Federal Acknowledgement, Proposed Finding, Washington DC: Department of the Interior, 2020.

⁸ Fernandeano Tataviam Band of Mission Indians, Supplementary Materials to Petition, San Fernando, CA: FTBMI Headquarters, 2015.

The Fernandeano Tataviam petition and OFA's assessments of the Tribe's claims can thus be read as a discursive instance of the tensions and contradictions between what constitutes legitimate evidence of Indian identity for the Tribe and for the OFA respectively, due to different understandings and interpretations of the histories, contexts, concepts, meanings and representations that concern the thousands of records involved in the process. The narrative technique and epistemological claims of both the Tribe's petition and the OFA responses offer a productive framework through which to investigate and unveil the convoluted relationship between identity, history, and policy — in public and legal contexts — and colonial archive(s), the contradictions between Indian and western meanings of sovereignty and the consequences of those contradictions, and the issues and debates surrounding the use and interpretation of settler colonial records as evidence within federal recognition processes in the U.S and within Indigenous claims to self-determination and to rights to land, water and resources worldwide.

2. Subject and approach of research

This dissertation argues that evidence, as currently conceived, used, and legitimated by the OFA, perpetuates settler colonial anxieties and practices of exclusion, racism, appropriation and erasure. Rooted in colonial and legal conceptions of evidence, the FAP fails to consider the contexts, temporalities, histories, and cultures of the petitioning groups, as well as the biases built into the records that tribes are required to rely on as evidence of their Indian existence. This situation begs many important questions: How can settler colonial conditions of evidence be overcome in order to serve tribes' self-determination? How can archivists support tribes in the creation of their own documents and keeping places to backup anticolonial evidence of

“survivance”⁹? And through which mechanisms might these new forms of evidence get introduced into the Archive *and* admitted by the OFA?

My approach to this investigation combines critical archival theory, American Indian studies, California Indian history, and tribal law and policy.¹⁰ I draw on Indigenous and critical methodologies, such as critical place research, to find answers to my questions and as a way to “engage and commit to ongoing difficult dialogue”¹¹ concerning Indigenous claims to sovereignty, land, water and resources. As described by Eve Tuck (Unanga̓x̓) and Marcia McKenzie, critical place research or inquiry addresses and works against the erasure or neutralization of spatialized and place-based processes of colonization and settler colonization by understanding places as mobile, shifting over time and space, and through interactions with flows of people, other species and social practices. The framework understands places as both influencing social practices and being performed and (re)shaped through practices and movements of individuals and collectives, thus conceptualizing place as interactive and dynamic. It also recognizes that disparate realities determine not only how place is experienced but also how it is understood and practiced.¹²

Through an ethnography of the archive of the Fernandeño Tataviam Band of Mission Indians’ petition for federal recognition — including the Tribe’s documented petition, records submitted as evidence by the Tribe, and OFA review letters and responses — this dissertation

⁹ Gerald Vizenor, *Manifest Manners: Postindian Warriors of Survivance* (Hanover: Wesleyan University Press, 1994).

¹⁰ Michelle Caswell, Ricardo Punzalan & T-Kay Sangwand, “Critical Archival Studies: An Introduction,” *Journal of Critical Library and Information Studies* Vol. 1 No. 2 (2017).

¹¹ Kristen Thorpe, “Transformative Praxis - Building Spaces for Indigenous Self-Determination in Libraries and Archives,” *In the Library with the Lead Pipe Journal* (2019).

¹² Eve Tuck and Marcia McKenzie, *Place in Research: Theory, Methodology, and Methods* (Taylor & Francis, 2015).

investigates the political, affective, and socio-cultural dimensions of the structural role(s) of settler colonial archives and notions of evidence in the FAP. While tribal-settler state relations in the U.S. and the historical foundation of the FAP have been addressed exhaustively from political, legal, historical, anthropological, and ethnographic perspectives by several Native and non-Native scholars,¹³ U.S. political recognition practices remain unexplored from an archival approach and have not been examined applying qualitative research.¹⁴

¹³ Amy Den Ouden and Jean O'Brien, "Introduction." In A. Den Ouden and J. O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013); Gelya Frank and Carole Goldberg, *Defying the Odds: The Tule River Tribe's Struggle for Sovereignty in Three Centuries* (New Haven, CT: Yale University Press, 2010); Joanne Barker, "The Recognition of NAGPRA." In A. Den Ouden and J. O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013); Angela Gonzales and Timothy Evans, "The Imposition of Law: The Federal Acknowledgement Process and the Legal De/Construction of Tribal Identity," in Den Ouden and O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013); Rae Gould, "The Nipmuc Nation and a Case of Mistaken Identity." In A. Den Ouden and J. O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013); Courtney Rivard, "Archival Recognition: The Pointe-au-Chien's and Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogees' Fight for Federal Recognition," *Settler Colonial Studies* 5, No. 2: 117–127; Mark E. Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process* (Lincoln, NE: University of Nebraska Press, 2004); Mark E. Miller, *Claiming Tribal Identity: The Five Tribes and the Politics of Federal Acknowledgment* (Lincoln, NE: University of Nebraska Press, 2013); Brian Klopotek, *Recognition Odysseys: Indigeneity, Race, and Federal Tribal Recognition Policy in Three Louisiana Indian Communities* (Durham and London: Duke University Press, 2011); Olivia Chilcote, "The Process and The People: Federal Recognition in California, Native American Identity, and the San Luis Rey Band of Mission Indians," Dissertation submitted in partial satisfaction of the requirements for the degree of Doctor of Philosophy in Ethnic Studies (Berkeley, CA: University of California, Berkeley, 2017); Olivia Chilcote, "'Time Out of Mind': The San Luis Rey Band of Mission Indians and the Historical Origins of a Struggle for Federal Recognition," *California History* 96, No. 4 (2019): 38–53; Karen Blu, Karen, *The Lumbee Problem: The Making of an American Indian People* (Lincoln, NE: University of Nebraska Press, 2001); Samuel R. Cook, Samuel R., "The Monacan Indian Nation: Asserting Tribal Sovereignty in the Absence of Federal Recognition", *Wicazo Sa Review* 17, No. 2 (2002): 91-116; Renée Ann Cramer, *Cash, Color, and Colonialism* (Norman, OK: University of Oklahoma, 2005); Renée Ann Cramer, "Perceptions of the Process: Indian Gaming as it Affects Federal Tribal Acknowledgment Law and Practice", *Law & Policy* 27, No. 4 (2005): 578-605; Alva Mather, "Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation", *151 U. Pa. L. Review* 1827 (2003); Bruce Granville Miller, *Invisible Indigenes: The Politics of Nonrecognition* (Lincoln, NE: University of Nebraska Press, 2003).

¹⁴ The only work I could find that examines the role of documentary evidence in the federal recognition process is Trond Erik Jacobson's Ph.D. dissertation titled "The Identity of Evidence: Documentary Evidence in the Federal Acknowledgment Process," submitted to the Information School of the University of Michigan in 2014. Jacobson's dissertation, however, is more of a quantitative analysis of the documentary evidence submitted by a reduced selection of tribal petitioners from all over the U.S., as opposed to a qualitative study of archival evidence, and is aimed at describing the main differences in the evaluation of such evidence for predicting outcomes. My research differs from Jacobson's dissertation in that it is concerned with exploring the role that settler-colonial archives play in the acknowledgement process so as to configure new conceptions of evidence that can lead to broader anticolonial archival praxis. Furthermore, issues concerning power, nation-building, recognition, and affect are only superficially

I contend, however, that the ‘archive(s)’ — whether as places containing archival records that serve as evidence of past activity that are stewarded by archivists, and where interventions by archivists and other agents may transform a record’s meaning, or as ‘the Archive,’ in Foucauldian and Derridean terms, a trope used to critique issues of power, memory, and identity in relation to what is remembered, included, erased and forgotten¹⁵ — have all proven to be fertile grounds to examine this dissertation’s research questions: How are power and oppression being played out intertextually across the different types of records that serve as ‘official’ evidence for federal recognition, as well as within the institutions where these records are held? What are the tensions and contradictions between what is recognized as legitimate evidence of Indian identity by petitioning tribes, in this case the Tataviam, and by the OFA respectively? What are the effects and the affective consequences that result from requiring Native groups to prove their ‘authenticity’ in terms of federal legal frameworks, western notions of time and space, and relying predominantly on settler-colonial evidence? And how can archivists effectively intervene in recognition processes on tribes’ behalf?

Acknowledging that archives are in large part about creating, documenting, maintaining, reconciling and (re)producing social relations — between records and people, ideologies, institutions, systems and worldviews — this study focused equally on people and on documents — the ways in which documents enable certain actions and elicit particular kinds of responses

addressed or not addressed at all in Jacobson’s dissertation, which makes this study considerably different from his exploratory analysis.

¹⁵ I use these two definitions throughout this dissertation. Archive with a capital “A” as a trope used to critique issues of power, memory, and identity in relation to what is remembered, included, erased and forgotten and archives with a lower case “a” as places containing archival records that serve as evidence of past activity that are stewarded by archivists, and where interventions by archivists and other agents may transform a record’s meaning. See: Terry Cook, “The Archive(s) is a Foreign Country: Historians, Archivists, and the Changing Archival Landscape,” *The American Archivist* 74 (2011): 600-632; Michelle Caswell, “‘The Archive’ Is Not an Archives: On Acknowledging the Intellectual Contributions of Archival Studies,” *Reconstruction* 16, No. 1 (2016).

and economies of affect from people, across the bounds of time and space.¹⁶ These inherently affective relations, actions and responses are influenced by the ways in which power is constituted, circulated and mobilized via archives and archival use, as well as the differences and individual and collective identities these relationships create. This study is particularly sensitive to those relations of power. It considers, therefore, ways in which archivists can critically read the FAP, weighing and addressing the limitations of the OFA's standards for determining the admissibility, use, and interpretation of tribal evidence in federal recognition petitions.

This research is grounded in various types of records — bureaucratic, government, mission/church, historical, legal and tribal. The encounters, use, and interpretation of these types of records have revealed the effects and the affective consequences of having to rely on legal, federal and archival guidelines of recognition, as opposed to tribal forms of documentation and documentary practices such as oral and visual histories, embodied practices, and traditional knowledge which are not legitimated by the OFA as standalone evidence; and of being subjected to an OFA recognition process that requires them to justify their own existence and identity in the first place. Finally, using literature on archives, evidence, political recognition, settler colonialism, and Indigenous and American Indian studies, I have examined the histories of federal Indian policy in the U.S. and in California specifically, as well as the Federal Acknowledgement Process (FAP), in order to situate the Tribe's quest for recognition historically. This includes the circumstances under which the records required by the OFA as evidence were created, and how the policies of archives (their organization and legitimation) work in tandem with the unduly extensive and often contradictory requirements for federal recognition and the policy's nearly insurmountable barriers for tribal petitioners.

¹⁶ Annelise Riles, "Introduction: In Response." In A. Riles, Ed., *Documents: Artifacts of Modern Knowledge* (Ann Arbor, MI: University of Michigan, 2006).

The design of this study, including the ways in which archival ethnography was conducted throughout the research process, are fully explained in an appendix of this dissertation, however I offer a brief overview of my method here. Archival scholars Anne Gilliland and Sue McKemmish define ethnography of the archive as a method concerned with conducting in-depth, comparative, and cross-cultural studies of recordkeeping and archiving practice in different national and cultural contexts, including inquiries on the role of national archival authorities in democratic societies; studies of cultures of documentation; worldviews manifested in archival classification; and the power and configurations archives and records reflect; as well as the associated memory and evidence paradigms within archival theory and praxis.¹⁷ This project's method is also congruent with what anthropologist and legal scholar Annelise Riles, has termed "document ethnography" or an "ethnography of documentary practices" which, she maintains, studies the structures and form of the document, "from the aesthetic rules that govern the production and completion of documents to the evaluation and appreciation of documentary genre [...] including moments in which documents [are] received, circulated, instrumentalized and taken apart."¹⁸

Engaging in an ethnographic approach to the archive(s) more generally and to the Fernandéño Tataviam petition documents more specifically has helped me to better understand the way the U.S. settler-state "actually produces, adjudicates, organizes, and maintains the discourses that become available as the primary texts of history."¹⁹ It has also allowed me to

¹⁷ Anne Gilliland and Sue McKemmish, "Archival and Recordkeeping Research: Past, Present and Future." In K. Williamson and G. Johanson, Eds., *Research Methods: Information, Systems and Contexts*, Second ed. (Cambridge, MA: Elsevier, 2017).

¹⁸ *Ibid.*, 18.

¹⁹ Nicholas Dirks, "Annals of the Archives: Ethnographic Notes on the Sources of History." In Axel B. Ed. *From the Margins: Historical Anthropology and its Future* (Durham, NC: Duke University Press, 2002), 59.

examine the contradiction of requiring tribes to rely upon records crafted and used to destroy Indian existence, as evidence of that same existence. Studying the limitations of how current legal evidence requirements and assessments work within FAP procedures, and the economies of affect that result from those possible limitations, has allowed me to make the case for new and alternative conceptions of evidence to be legitimized as such.

I relied on primary sources such as interviews with Fernandño Tataviam tribal citizens and on informal observation conducted while assisting the Tribe with their federal recognition petition. Additionally, I conducted critical content and discourse analysis primarily of Fernandño Tataviam petition documents, OFA reviews and responses, and a selection of evidence provided both by the Tribe and by the OFA throughout the petitioning process. This research, therefore, refers predominantly to documents and their uses in the context of the Fernandño Tataviam petition for recognition. Although the evidence I found and claims I make could to some extent be used to understand other tribes' realities concerning the FAP, especially the experiences of other petitioning California tribes, it is not my intention to generalize or characterize the entirety of the FAP with respect to the use of archival evidence.

3. Why this work is important and its contributions

The role(s) that archives play structurally in the FAP merits a critical examination for some significant reasons. First, recognition is (re)emerging as an important focus for scholarship on the humanities and political theory, especially concerning discussions around multiculturalism, pluralism and difference, and archives and other records play a crucial role in all these issues. They are especially important for Indigenous studies scholarship on sovereignty and nationhood, particularly in relation to current tribal membership matters, including controversies around

lineal descent, blood quantum criteria, disenrollment, and the appropriation of Native identity, among others.

Second, the biases inherent to the FAP are being increasingly and actively challenged by unacknowledged tribes and tribes currently petitioning for recognition, some of whom have been awaiting recognition for more than thirty years. The ways in which the recognition system both draws from and uses documents of the settler colonial archive and its logics against petitioning tribes are becoming more and more evident as tribes are raising their voices and clamoring for a more just process. Their criticism is equally aimed at the *misuse* and *misinterpretation* of the evidence that tribes are required to use to characterize themselves, including political parameters that historically dispossess, categorize, and evict Native people from colonial/sovereign spaces and deny their ancestry. The arbitrariness and subjectivity with which evidence is interpreted and evaluated by the OFA, by courts and by the U.S. federal government in general, need to be substantively addressed, not only concerning political recognition claims, but also around at risk tribal land (re)acquisition cases and repatriation cases under the Native American Graves Protection and Repatriation Act (NAGPRA), to name just a few areas.²⁰

Third, this project is needed as it studies realities — the absence and agony of documents — that are also being experienced by other communities such as immigrants, refugees, asylum

²⁰ See for example, the case of the Mashpee Wampanoag tribe: In 2015, the federal government put 321 acres of land in Mashpee and Taunton (MA) into trust for the Mashpee Wampanoag tribe, and designated it for the Wampanoag reservation. Land in trust means the federal government owns the property instead of the state, which means the tribe can self-govern and receive federal funding. A Trump administration ruling issued in September 2018, however, is threatening to rescind the 2015 federal designation holding land in trust on behalf of the tribe. The ruling argues that the Department of the Interior did not have the authority to take the land into trust for the tribe in 2015, because the tribe was not under federal jurisdiction at the time of the passage of the Indian Reorganization Act in 1934 and therefore did not qualify under the definition of Indian used by Interior officials. This means that the Mashpee Wampanoag tribe, as well as every tribe that received federal recognition after 1934 is at risk of losing their trust land if they do not prove with ‘official evidence’ that they were an Indian tribe and were under federal jurisdiction at the time of the passage of the Indian Reorganization Act in 1934. This is now resolved in favor of the Mashpee Wampanoag tribe, see: <https://mashpeewampanoagtribe-nsn.gov/news/2020/6/5/message-from-chairman-cromwell-court-rules-in-favor-of-tribe>

seekers and displaced persons. The bureaucratic processes to which these communities are being subjected in order to be granted statehood and civil and human rights are also based on legal conceptualizations of evidence that do not take into consideration their political and social realities, or fundamentally, the ways in which documentation can be used to control and delimit those realities for certain groups of people.²¹

Archivally, this dissertation makes several contributions to the field. A sustained and critical engagement with the Archive and the archives in relation to political recognition claims, reparation procedures, and tribal sovereignty petitions is an especially significant contribution of this study. That records are needed for these kinds of activities is a well-known fact, however, their role, meaning, and the record keeping practices that are a central component of these processes had remained insufficiently analyzed until now. This dissertation intervenes by asserting documents and documentary practices as equally crucial to these processes.

This study is also a contribution to the growing literature on displaced archives in exigent or inequitable contexts and to the *Refugee Rights in Records* (R3) Initiative led by archival scholars Anne Gilliland and James Lowry among others,²² by suggesting that archival displacement can take multiple meanings when records are crafted and/or held by settler states

²¹ Kathy Carbone, Anne Gilliland and María Montenegro, “Rights in and to Records and Recordkeeping: Fighting Bureaucratic Violence through a Human Rights-Centered Approach to the Creation, Management and Dissemination of Documentation.” Special issue of *Education for Information: Interdisciplinary Journal of Information Studies* 35 (2020).

²² <https://informationasevidence.org/framework>. See: Anne Gilliland, *Refugee Rights in Records Symposium: Summary and Research and Development Questions Arising*, Report on the Symposium held at the Vera and Donald Blinken Open Society Archives, January 10, 2018; Anne Gilliland and Kathy Carbone, “Movement and Transformation: Teaching to the Fourth Dimension.” In Jeannette Bastian and Elizabeth Yakel, Eds. *Defining A Discipline: Archival Research and Practice in the 21st. Century: Essays in Honor of Richard J. Cox* (Chicago: Society of American Archivists, 2020); Anne Gilliland and Kathy Carbone, “An Analysis of Warrant for Rights in Records for Refugees,” *International Journal for Human Rights* (2019); Anne Gilliland, “Evidence and Exigency: Reconstructing and Reconciling Records for Life After Conflict.” In Karen F. Gracy, Ed. *Emerging Trends in Archival Science* (Rowman & Littlefield, 2017); James Lowry, Ed. *Displaced Records* (Routledge, 2017).

and their colonial regimes, and by reflecting on ways in which archivists can work alongside lawyers, anthropologists, genealogists, historians, and federal agents, to identify appraisal and description practices that might alleviate the inequitable consequences and painful effects of evidentiary assessments in such processes.

Building upon emergent literature on “decolonizing” archives and records,²³ this dissertation also contributes to addressing demands that have been growing, systematically, over the past two decades for archival praxis to be approached from within an anticolonial epistemology — one that not only “decolonizes” by understanding the forms of colonialism that operate in our own times,²⁴ but a practice that, in addition to apologizing for the past, weaves future forward and acknowledges the continuity and futurity of Native peoples in part by being deeply connected to their place-based needs.²⁵ This archival anticolonial praxis, then, is aimed at moving archivists beyond theorization and into action that seeks to assist tribes in getting their land and their resources back, together with the rights to and authority over that land²⁶ — actively active returning to the ongoing processes of dispossession — of property and of life itself —demanding that we encounter, engage and assess the foundations of settler nation-states, empire-building, and the acts of violence and disposability. Archivaly, this dissertation builds

²³ See, for example: Trish Luker, “Decolonising Archives: Indigenous Challenges to Record Keeping in ‘Reconciling’ Settler Colonial States,” *Australian Feminist Studies* 32 (2017): 108-125; Jeannette Bastian, John Aarons and Stanley Griffin, Eds., *Decolonizing the Caribbean Record: An Archives Reader* (Sacramento, CA: Litwin Books, 2018) and the Special Issue “Towards a Decolonial Archival Praxis,” Jamila Ghaddar and Michelle Caswell, Eds., *Archival Science* 2019. “

²⁴ Dian Million, “Felt Theory: An Indigenous Feminist Approach to Affect and History,” *Wicazo Sa Rerview* 24, No. 2 (2009): 72

²⁵ Mishuana Goeman, “The Land Introduction: Beyond the Grammar of Settler Landscapes and Apologies,” *Western Humanities Review*, Fall 2020, 31-61.

²⁶ Eve Tuck and K. Wayne Yang, “Decolonization is Not a Metaphor,” *Decolonization: Indigeneity, Education & Society* 1, No. 1 (2012): 1-40.

on efforts undertaken by critical archival theorists aimed at subverting claims of archival neutrality, notions of universality, objectivity and truth, making an important contribution to the archival movement that is questioning and moving away from the once-assumed relationship between record and evidence by considering evidence as contextual, relational, dynamic, event-oriented, and culturally and socially contingent.²⁷

The main goal of this study is to make the case that alternative conceptions of evidence are sorely needed. Such new articulations must shift the emphasis away from western legal and bureaucratic conceptions of evidence and advocate for the legitimacy of tribal and anticolonial conceptions, thereby providing a map for a paradigm shift in the archival field that supports the legal authority of more appropriate, respectful and just forms of Indigenous evidence, and hopefully translate into fairer legal outcomes for petitioning tribes. However, what I propose here is more of a framework rather than a new standard, fixed view or definition of what an anticolonial approach to evidence should look like. Finally, this dissertation explores ways in which the Fernandeano Tataviam are actively and intentionally marking the limits of colonial legibilities of evidence, and reflecting upon the Tribe's imagining of what is beyond those limits, makes space for new Indigenous demands upon the contemporary Archive.

4. A brief note on what this dissertation is not

As I mentioned earlier, the historical foundation of the FAP has been addressed exhaustively from political, legal, historical, anthropological, and ethnographic perspectives by several Native

²⁷ See: Kim Anderson, "The Footprint and the Stepping Foot: Archival Records, Evidence, and Time," *Iowa State University* (2013); Geoffrey Yeo, "Concepts of Record (1): Evidence, Information, and Persistent Representations," *The American Archivist* 70 (2007): 315-343; Jonathan Furner, "Conceptual Analysis: A Method for Understanding Information as Evidence, and Evidence as Information," *Archival Science* 4 (2004): 233-265; Brien Brothman, "Afterglow: Conceptions of Record and Evidence in Archival Discourse," *Archival Science* 2 (2002): 311-342; Anne Gilliland, "Evidence and Exigency."

and non-Native scholars.²⁸ Although a brief historiography is provided here, it is beyond the scope of this dissertation to trace that history exhaustively. Additionally, this dissertation is not an ethnographic study of the Fernandeano Tataviam in an anthropological sense — I refuse to treat the Tribe and its members as objects of knowledge.²⁹ As an archival studies researcher, I used ethnography as a shorter engagement and thick description that led to a deeper understanding of the research subject with my questions of evidence as the object of study. Ethnography, then, was used not as an end in itself, but employed as a means of uncovering the need for new and alternative forms of evidence, with the goals of achieving a more just federal recognition process, and engaging archivists in more responsive archival practices involved in that process.

5. Chapter breakdown

This dissertation's first chapter offers a historical background on the history of federal Indian law in the U.S., with an emphasis on California's history of colonization and early federal Indian policy. The second chapter provides an overview of the U.S. Federal Acknowledgement Process (FAP), its mandatory criteria, prior critiques of the system and an overview of Indigenous-led anti-recognition arguments of refusal. The third chapter tells the history of the Fernandeano

²⁸ Den Ouden and O'Brien, *Recognition*; Barker, "The Recognition of NAGPRA;" Gonzales and Evans, "The Imposition of Law;" Gould, "The Nipmuc Nation;" Rivard, "Archival Recognition;" Miller, *Claiming Tribal Identity*; and Klopotek, *Recognition Odysseys*. For California see: Frank and Goldberg, *Defying the Odds*; Sara-Larus Tolley, *Quest for Tribal Acknowledgment: California's Honey Lake Maidus* (Norman, OK: University of Oklahoma Press, 2006); Les Field, "Complicities and Collaborations: Anthropologists and the "Unacknowledged Tribes" of California," *Current Anthropology* 40, No. 2 (1999): 193-209; Les Field, "Unacknowledged Tribes, Dangerous Knowledge: The Muwekma Ohlone and How Indian Identities Are 'Known,'" *Wicazo Sa Review* 18, No. 2 (2003): 79-94; Kent Lightfoot et al., "The Study of Indigenous Political Economies and Colonialism in Native California: Implications for Contemporary Tribal Groups and Federal Recognition," *American Antiquity* 78, No. 1 (2013): 89-103; Allogan Slagle, "Unfinished Justice: Completing the Restoration and Acknowledgement of California Indian Tribes," *American Indian Quarterly* 13, No. 4 (1989): 325-45. For a more comprehensive list see footnote no. 13.

²⁹ Audra Simpson, "On Ethnographic Refusal: Indigeneity, 'Voice' and Colonial Citizenship," *Junctures* 9 (Dec. 2007).

Tataviam Band of Mission Indians and outlines their federal recognition petitioning process. Chapter four provides a literature review and the theoretical framework from which I approach this research, including sections on political recognition, sovereignty and refusal; settler-colonial archives, power and nation-building; evidence; and anticolonial archival interventions.

Chapter five is the first of three analysis/findings chapters, and it outlines the tensions and contradictions between California's and Fernandeano Tataviam histories and the FAP's mandatory criteria, arguing that continued exclusions and displacements related to knowledge production and the access and circulation of records by and about Native peoples are a direct consequence of Indigenous dispossession from land and the advancement of colonial collecting legacies supported by Indian removal and relocation federal policies. Chapter six exposes the tensions and contradictions — or better said, the incommensurability — between Tataviam narrative of self-determination and contemporary U.S. settler-state demands, conceptualizations, understandings, interpretations, and logics of political recognition. Here I argue that Tataviam sovereignty is beyond the confines of settler colonial policy and does not respond to the set of criteria and concepts that the U.S. has imposed on tribes in order to limit and effectively erase Indigenous political life. Chapter seven, *Affect*, attempts to convey the affective consequences of preparing a petition for federal recognition: the affect of locating, gathering and using evidence for their case; the affect of being forced to engage with externally imposed and often racist definitions and interpretations of Indianness; and ultimately the affect of having to reinterpret those records in order to make the case for a sovereignty that never ceased to exist, as well as for the authenticity of their tribal existence and continuity over time.

Finally, the conclusion will offer a brief summary of the FAP's most problematic evidentiary practices as discussed throughout the dissertation, outline some of the ways in which

archivists are currently unsettling evidence and therefore archival praxis, and finally, identify potential areas of interest for future research.

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Chapter 1: General Historical Background

“... and then one day a white man came and he had the right paper so we had to go.”¹

1. *Federal Indian Policy in the U.S.*

Federal Indian policy in the U.S. is a national program made up of material practices aimed at separating tribal bodies and communities from their territories, while seeking to incorporate them into the U.S. nation-state — both physically and epistemologically. The physical boundaries drawn through legislation, social policy, and narrative claims of Indigenous places, and the reorganization of Indian spaces in the forms of reservations, rancherías, villages, and pueblos² were necessary colonial tactics vital to the advancement of the U.S. nation-state.³

Throughout the 19th century and into the 20th, settlement facilitated the loss of Native lands, displacement, massacres, wars, slavery, and labor exploitation. The establishment of religious missions and boarding schools promoted assimilation policies, working alongside the prohibition of traditional cultural practices and the speaking of Indian languages. The General Allotment Act of 1887 codified segregated/individualized living patterns and discouraged attempts to uphold tribal land ownership and collective rights. Together, these policies and

¹ Helen Knopf, “Memories,” *Atlantic Monthly* 08 (1977).

² At various times, the words rancheria, mission, pueblo, rancho, village, reservation, farm, colony, and rancheria have all been used to refer to the different California land areas that are or have been recognized as Indian country. Indeed, different terms have been, and still are, used to refer to the same place. “Rancheria,” which was used to refer to Indian lands recognized by Spain and Mexico and is still used (interchangeably with reservation) to refer to Indian country, is a term unique to California. William Wood, “The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias,” *Tulsa Law Review* 317 (2013): 318.

³ Mishuana Goeman, “Notes toward a Native Feminism’s Spatial Practice,” *Wicazo Sa Review* 24, No. 2 (2009): 171-173.

practices sought to educate and discipline the Indian body and “soul” (i.e., boarding schools) while respatializing a consciousness and relationship to land as *settler* spaces (i.e., relocation).⁴

By the mid-20th century, the federal government decided to experiment with two policies that were meant to extinguish tribal self-governance and territorial relations: “termination” of tribal sovereignty and “relocation” to cities. In effect from 1953 until the 1960s, these policies were never about just moving bodies off reservations. They ended the U.S. government’s recognition of sovereignty of several Indian tribes, ‘terminated’ the government-to-government relationship between tribes and the U.S., discontinued federal obligations to tribes, dismantled reservation land bases, decentralized the administration of Indian affairs, and relocated Indian people to urban areas.

Federal Indian policy has impacted what is today known as California, its Native population, and California Indians’ forms of knowledge production and circulation in unique ways. This chapter outlines the most relevant colonial programs and federal policies advanced in California throughout the nineteenth and twentieth centuries. The chapter sets the stage to better understand the Tribe’s current struggle for gaining federal recognition. It explains how these programs and policies have ongoing direct consequences for petitioning tribes today, both in terms of their ability to locate and gather evidence for their claims and in terms of that evidence actually meeting the Federal Acknowledgement Process’ (FAP) mandatory criteria. The chapter also elaborates on challenges experienced more generally by other California Indian tribes petitioning for acknowledgement and advancing land and other sovereignty claims more broadly.

⁴ Nicolas G. Rosenthal, *Reimagining Indian Country: Native American Migration and Identity in Twentieth-Century Los Angeles* (Chapel Hill: The University of North Carolina Press, 2012); Goeman, “Notes toward a Native Feminism’s Spatial Practice.”

Before I begin, however, I want to note that while it is important to hold settler histories and their actors accountable for their actions, it is also crucial that we do so without reiterating narratives of abuse, victimhood, destruction or damage that “diminish personhood or sovereignty, or re-humiliate when circulated.”⁵ I am aware that colonial terror and violence have happened and have been endlessly recorded, circulated, reiterated, and consumed.⁶ That said, the policies and histories I write about here provide necessary historical and informational background and I will try my best not to spectacularize the violence and terror of colonialism inflicted on Indigenous peoples.

2. California’s history of colonization and federal Indian policy

California Indians have suffered more than two centuries of colonial laws and practices that have negatively affected and continue to have a significant impact on their lifeways, cultural traditions, and tribal governing/governance systems. The destructive forces of Spanish and Mexican colonization, a U.S. state- and federally-funded genocide, the denial of treaty ratification by the U.S. senate, and the federal government’s history of uneven treatment of California Indian tribes and their land — including the undercounting of California Indians⁷— among other manifestations of settler-state power make it difficult, if not impossible, for many

⁵ Eve Tuck, Marcia McKenzie & Kate McCoy, “Land Education: Indigenous, Post-colonial, and Decolonizing Perspectives on Place and Environmental Education Research,” *Environmental Education Research* 20, No. 1 (2014): 811; see also Eve Tuck, “Suspending Damage: A Letter to Communities,” *Harvard Educational Review* 79, No. 3 (Fall 2009).

⁶ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) cited in Jamila Ghaddar, “Total Archives for Land, Law and Sovereignty in Settler Canada,” *Archival Science* 21 (2021).

⁷ Using the BIA’s official service population figures from 1990-1994, a study conducted by the American Indian Studies Center at UCLA found that, due to undercounting practices, California Indians are receiving only one-third to one-half the funding received by all other Indians. Carole Goldberg and Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes* (Los Angeles, CA: UCLA American Indian Studies Center for the Advisory Council on California Indian Policy, 1996)

California tribes to gain formal federal recognition.⁸ Widespread massacres, mass death, displacement, kidnapping, enslavement, and land theft/loss, among other nation-state tactics of elimination, all translate into practical and material challenges — many of them concerning the ability to locate and use archival evidence — that California tribes face when asked to meet the FAP’s regulations and criteria, leaving petitioning tribes hindered in their quest for federal recognition, especially when required to prove political, land-base, and community continuity.⁹

Although California Indians are making important improvements in matters of health, cultural renewal, sovereignty, and the reclaiming of lost lands and other rights, the early state of California laws and policies discussed below, as well as the past and present history of the state’s administrative neglect directly affect their sovereignty claims today.

a. Spanish colonization: Reducción and the mission regime (1769 - 1833)

Spanish colonization of California began in 1769, when Spain sent soldiers and Franciscan missionaries north from Mexico to facilitate what Junipero Serra, founder of the California missions, called the “spiritual conquest” of California. That same year, the first mission — the Mission of San Diego — was established along with its adjoining presidio. By 1821, the Spanish had established a network of twenty-one missions, four military presidios or forts, and three towns or pueblos on Indian lands along the coast, from San Diego to Sonoma. The missions were typically established in areas near Indian population centers, sometimes right next to Indian

⁸ Only one tribe in California has successfully secured Federal Recognition through 25 CFR Part 83, the Death Valley Timbi-Sha Shoshone Band. See: Goldberg and Champagne, *A Second Century of Dishonor*; Patricia Ferguson-Bohnee, *Testimony before the Senate Committee on Indian Affairs Oversight Hearing on Recommendations for Improving the Federal Acknowledgment Process* (Tucson, AZ: Arizona State University Sandra Day O’Connor School of Law, 2008).

⁹ Olivia Chilcote, ““Time Out of Mind”: The San Luis Rey Band of Mission Indians and the Historical Origins of a Struggle for Federal Recognition,” *California History* 96, No. 4 (2019): 38–53.

villages and towns. California Indians constructed, under forced labor, most of the buildings, walls, farms, and ranches of this colonial enterprise.¹⁰

California Indians were relocated to the missions under the policy of *Reducción*, a process aimed at forming Christian communities.¹¹ However, the missions actually functioned as places where Indians were enslaved to provide labor and produce goods for the Spanish presidios and economy.¹² Eighty-one thousand Indians were baptized in the missions between 1769 and 1834. Baptized California Indians were declared the legal wards of the Franciscans, which meant being under the *padres*' physical command, and relinquishing the right to control their own lives or leave the mission without permission. This status made California Indians second-class subjects, establishing precedents on which Mexican and later U.S. authorities would build.

The missions were described as “royal-governmental institutions, erected on land belonging [according to the Spanish viewpoint] ultimately to the Crown although reserved to the natives with the missionaries as trustees.”¹³ Thus, the missions never had formal titles or grants for the lands they encompassed; the lands were “held in trust for the Indians.”¹⁴ The Native people who affiliated to the missions of California could have therefore, in theory, reclaimed

¹⁰ Steven Hackel, *Children of Coyote, Missionaries of Saint Francis: Indian-Spanish Relations in Colonial California, 1769-1850* (Chapel Hill, North Carolina: University of North Carolina Press, 2005).

¹¹ *Reducción* in English means “reduction,” thus, the main goal of the policy was to reduce the Indianness of tribes in California into a more civilized Christian life. Lisbeth Haas, *Saints and Citizens: Indigenous Histories of Colonial Missions and Mexican California* (Berkeley, Los Angeles: University of California Press, 2014), 8.

¹² Many had agreed that Franciscans held California “mission Indians” as unfree laborers. Anthropologist and physiologist Sherburne Cook asserted that “the mission system, in its economics, was built upon forced labor.” Others have defined the mission labor system as “slavery without the actual sale of the individual.”... Furthermore, sexual violence against California women was routine under Spanish rule at the missions. Sherburne F. Cook, *The Conflict between the California Indian and White Civilization* (Berkeley, California: University of California Press, 1976).

¹³ Jack D. Forbes, *Native Americans of California and Nevada* 30 (Naturegraph Publishers, 1969), 28.

¹⁴ Wood, “The Trajectory of Indian Country in California,” 322.

their lands and also taken possession of the missions themselves. However, the lands of the Indians on the baptismal roles would eventually be claimed by the missions as part of their extensive colonial domain. Additionally, California became part of a new republic that would claim Indigenous and church lands for the Mexican state.¹⁵

Of those eighty-one thousand people baptized in the missions, 60,000 died by 1834.¹⁶ Franciscans carefully recorded baptisms and deaths, thus it is easy to access evidence of these high mortality rates. Despite the prevalence of premature death, however, authorities maintained and expanded the mission system for decades, facilitating and tolerating the mass death of tens of thousands of incarcerated California Indians. Historian Steven Hackel has emphasized that Spaniards introduced “pathogens, plants, and animals that ... dramatically transformed California’s human and natural landscape,” destroying traditional California Indian means of subsistence and introducing western diseases to which California Indians had little or no biological resistance. The results were hunger, sickness, and death. Many coastal California Indians increasingly came to the missions out of need.¹⁷

The unrelenting labor demands, forced separation of children from their parents and unending physical coercion that characterized the life of Indians under the *padres*’ authority resulted in several well-documented forms of Indian resistance. Historian Lisbeth Haas argues that, despite the physical dislocation and death the missions represented, they became sites of Indigenous authority, memory, identity, and historical narration. The missions became Indigenous colonial spaces as Indian people moved into them to join other members of their

¹⁵ Haas, *Saints and Citizens*, 7-9.

¹⁶ *Ibid.*, 5

¹⁷ Hackel, *Children of Coyote*.

families and villages. Leaders and elders often assumed positions of elected authority and translators rendered Spanish belief and ideas into Indigenous languages. Traditional elders taught dance and ritual and performed healing. Thus, missions developed their own identities, languages, and practices based on their Indigenous populations, using Indigenous forms of authority, knowledge, and power to seek redress and to sustain the community.¹⁸ Moreover, despite the devastating population decline suffered by tribes in whose territories missions had been established, many managed to maintain tribal cohesion, including the Fernandeano Tataviam. Yet, in spite of resilience, resistance and creative survival tactics, nearly a third of the aboriginal population of California died as a direct consequence of the missions of California.¹⁹

b. Secularization of the missions and the Mexican-American war (1833 - 1846)

Spain granted Mexico independence on September 16, 1821. Upon announcing its independence from Spain, the Mexican state legislated the equality of all Mexicans, including granting citizenship to Indians and freeing the majority of the Indigenous population from all forms of coercive labor, tribute and service.²⁰ However, the legal emancipation of California Indians was gradual. It was not until 1826 that the first step toward citizenship for Indigenous people in the California missions began, namely, the process of emancipation from the condition of *neófia*. The plan was for the missions in California (and Mexico) to eventually be abolished.

The Mexican governor of California issued decrees in 1826 and 1831 to begin secularization — the process of disestablishing the missions — but these decrees were not

¹⁸ Haas, *Saints and Citizens*, 7.

¹⁹ Edward D. Castillo (Cahuilla-Luiseño), Native American Heritage Commission. Retrieved from: <http://nahc.ca.gov/resources/california-indian-history/>

²⁰ Haas, *Saints and Citizens*, 9.

implemented. Finally in 1833, California governor José Figueroa issued “Provisional Preparations for the Emancipation of Mission Indians,” and the Mexican Congress secularized the missions. However, the protracted process of secularization continued well into the 1840s. Even as Mexican authorities emancipated California Indians who had been in the missions, many Indigenous Californians found themselves bound into new forms of unfree labor under Mexican rule. Mexican Californians inherited the missions’ deeply ingrained racial hierarchy — multiple forms of California Indian servitude existed on the eve of the Mexican-American war. These conditions set local precedents onto which U.S. citizens and administrations then crafted their own racist traditions and unfree labor systems, even as they undid Mexican rule.²¹

After secularization took effect in 1834 and about 15,000 converted natives were released when the missions were disestablished, many of these people moved into the interior of California. Some stayed at or returned to villages that were on former mission lands, or within the boundaries of Mexican rancho grants. Some lived at various Indian pueblos that had been established, and others spread out into the local communities and ranches. The 1833 Mexican Secularization Act opened up the mission lands to general settlement for the first time, and California Indians who had been held at the missions had priority over other claimants for these lands. Mexican law and grants specifically recognized that Indians’ houses, farms, orchards, and fields were to be set aside for those Indians. Governor Pio Pico, however, “issued a proclamation which erroneously interpreted the law in such a way that ... Indians were not ‘only’ emancipated from the missions, but were to be removed from the lands occupied by the Missions as having no right to them.”²² Mission lands were divided up into ranchos to which individual Mexican

²¹ Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven, CT: Yale University Press, 2017), 38.

²² Wood, “The Trajectory of Indian Country in California,” 326-330.

citizens held title; “rancheria” was the term used to refer to the Indian villages on these rancho lands. Indians living on and near the ranchos in towns, villages, and other settlements provided the labor force for the rancho economy, just as they had for the mission economy.²³

By the time the U.S. occupation began in 1846, Indian land tenure in California had come to take several forms: Many Indians lived outside of the areas covered by Spanish and Mexican grants in the remaining part of California and had experienced relatively little or no settler intrusion on their lands. Some were living in villages on lands for which Spain and Mexico had issued rancho grants to non-Indians from the ex-mission lands or on lands outside the missions for which such rancho grants had been made. Others were living on rancho lands for which they held individual titles, on lands to which the missions held title as trustee for the Indians, and in the Indian pueblos. The period between the secularization of the missions and U.S. occupation was catastrophic for many California Indians. In combination with the mass death of the mission period, devastating epidemics and violence dramatically diminished California Indian populations in the 1830s and 1840s, destabilizing many of their social structures and economies and critically weakening their ability to resist settler invasion and violence.²⁴

In terms of Indian land occupation, the Anglo-American legal system continued to recognize and protect the various areas of Indian country²⁵ that existed under Mexican law, but

²³ Wood, “The Trajectory of Indian Country in California,” 326-330.

²⁴ Madley, *An American Genocide*.

²⁵ 18 U.S. Code § 1151 defines “Indian country” as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Retrieved from: <https://www.law.cornell.edu/uscode/text/18/1151>

because the American laws protecting Indian lands were so rarely followed, much of what was Indian country in 1846 lost its status as such during the following decades and passed out of Indian possession, ownership, and control. Some of these lands, however, still exist as Indian country today, having survived both legal and non-legal efforts to make them otherwise.²⁶

The Mexican-American War ended with the signing of the Treaty of Guadalupe Hidalgo on February 2, 1848. Under the terms of the Treaty, the Mexican government ceded to the U.S. a great area of land including the land that would later comprise the State of California. Under the eighth article of the Treaty, the U.S. expressly recognized the land grants made by the prior sovereigns and agreed to legitimate title to such lands. The treaty also stipulated that citizens of Mexico who were residing in California would become citizens of the U.S. Historian Florence Shipek explains: “The treaty states that [Mexican citizens’] property rights would be respected and affirmed by title under the laws of the United States. Inasmuch as Mexican law considered settled Mission Indians as citizens, technically they were entitled to all the rights and immunities of the citizens of the United States.”²⁷

Uncertain about the nature and state of land title in the newly acquired territory, and recognizing the need for secure land titles, the federal government commissioned several reports to be prepared on the subject. Although written from an ill-concealed bias against Indians, these reports concluded, based on their investigation of Spanish and Mexican authorities, that the Spanish and Mexican governments did not attribute any value to Indian title. The laws enacted by the Spanish and Mexican governments recognized the rights of the Indians only to the lands

²⁶ Wood, “The Trajectory of Indian Country in California,” 331.

²⁷ Florence Shipek, *Pushed into the Rocks: Southern California Indian Land Tenure 1769-1986* (Lincoln and London: University of Nebraska Press, 1988).

they possessed.²⁸ For many Southern California Indians, the difference in U.S. property law after the Mexican-American War led to decades of confusion, uncertainty, and aggression over the fate of Indian lands.²⁹

c. California genocide

The battles over land ownership and acquisition were furthered by genocide in California, as many scholars have demonstrated.³⁰ Genocide began with U.S. settlers and military entering Mexican California in the mid-1840s, but the Mexican-American War and the discovery of gold in 1848 at Sutter's Mill only intensified existing genocidal practices in the state, ushering in one of the darkest episodes of dispossession, widespread sexual assault, and mass murder against the Native people of California.³¹ Between 1846 and 1870, the population of California Indians plunged from perhaps 150,000 to 30,000. By 1880, census takers recorded just 16,277 California Indians — representing a 90 percent decline in population from estimated 1848 figures.³²

Diseases, dislocation and starvation were important causes of these many deaths. Abduction, kidnapping, enslavement, unfree labor, forced incarceration under lethal conditions, mass death

²⁸ Bruce S. Flushman and Joe Barbieri, "Aboriginal Title: The Special Case of California," *Pacific Law Journal* 17 (1984–1985).

²⁹ Chilcote, "Time Out of Mind."

³⁰ Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846–1873* (Lincoln: University of Nebraska Press, 2012); Madley, *An American Genocide*; Jack Norton, *Genocide in Northwestern California: When Our Worlds Cried* (San Francisco: Indian Historian Press, 1979); Clifford E. Trafzer and Joel R. Hyer, *Exterminate Them! Written Accounts of the Murder, Rape, and Enslavement of Native Americans During the California Gold Rush* (East Lansing: Michigan State University Press, 1999); Kimberly Johnston-Dodds, "Early California Laws and Policies Related to California Indians" (Sacramento: California Research Bureau, 2002); James J. Rawls, *Indians of California: The Changing Image* (Norman: University of Oklahoma Press, 1984).

³¹ Edward D. Castillo (Cahuilla-Luiseño), NAHC.

³² As it will be discussed later in this dissertation, it is important to note, however, that census data isn't always reliable since some CA Indians were not recorded as "Indian" on censuses due to intermarriage, mistakes by census enumerators, or as a survival tactic by the same CA Indians to not openly identify as Native.

in forced confinement on reservations, homicides, and widespread massacres also took the lives of thousands of California Indians during the first several decades of American rule.³³

However, as California historian Brendan Lindsay contends, genocide was perpetrated through a variety of techniques that were not limited to frontier violence.³⁴ Although the pressures of demographics (the migration of hundreds of thousands of immigrants), economics (the largest gold rush in U.S. history), and profound racial hatred all made the genocide possible, it took sustained political will — at both the state and federal levels — to create the laws, policies, and well-funded killing machine that carried it out and ensured its continuation over several decades.³⁵ As Lindsay puts it: “A legal environment created by politicians in the California Legislature in which Indian people were denied basic rights, heavily influenced by public sentiment, made possible the disenfranchisement, dispossession, and murder of California Indian people.”³⁶

Benjamin Madley expands on this by describing the many ways in which the military, state and federal legislators made California Indians into easy targets—stripping them of legal rights, making anti-Indian crimes extremely difficult to prosecute, refusing to ratify treaties signed by federal agents and California Indian leaders that could have restrained the violence, and perhaps more importantly, providing the financial support that made this genocide

³³ Madley, *An American Genocide*; Lindsay, *Murder State*.

³⁴ Lindsay, *Murder State*.

³⁵ Madley, *An American Genocide*, 13.

³⁶ *Ibid.*, Lindsay, *Murder State*.

possible.³⁷ In other words, and as pioneering demographer Sherburne F. Cook has summarized, a “complete lack of legal control” by California Indians facilitated genocide in California.³⁸

In addition to mass death, the genocide had other consequences that greatly and negatively affected the reduced number of California Indians who survived it. Intertwined with the loss of life was the loss of Indian land during the American period, despite various legal actions taken by the California and U.S. governments to recognize and protect it. During the gold rush in the 1850s, the lands in Southern California, though not being used directly for mining purposes, became rapidly populated as prospectors found little wealth in the gold fields and others passed through on overland routes from the Southwest. Many of these people set up homesteads or bought parcels of land during that time, at the expense of Native claims to land.³⁹ “In coastal Southern California and elsewhere in the Southwest,” writes Lisbeth Haas, “capitalist industrialization required that Indian populations be further deterritorialized, meanwhile supporting the interests of (usually self-defined ‘white’) squatters and land speculators.”⁴⁰ As historian William Wood contends, generally, this loss of land occurred not because the American legal system did not recognize these areas as Indian lands but rather because the California and U.S. judges and others who were supposed to be enforcing these laws failed to follow them.

³⁷ Madley, *An American Genocide*, 13.

³⁸ Sherburne Cook, cited in Madley, *An American Genocide*, 3.

³⁹ Olivia Chilcote, “The Process and The People: Federal Recognition in California, Native American Identity, and the San Luis Rey Band of Mission Indians,” A dissertation submitted in partial satisfaction of the requirements for the degree of Doctor of Philosophy in Ethnic Studies the University of California, Berkeley (Berkeley, CA: UC Berkeley, 2017).

⁴⁰ Hass, *Saints and Citizens*.

The California genocide silenced thousands of California Indian voices and so there are relatively few written local accounts describing the genocide. In the face of ongoing discrimination, violence, and intimidation, those who survived often hid their Indian identities — and traumatic memories — from outsiders. Mid-nineteenth-century California courts, through their laws and judges, usually barred and rarely recorded Indian testimony against whites. Outside the legal system, few nineteenth-century writers recorded California Indians’ oral histories.⁴¹ The lack of tribal records and the loss of land both have had significant consequences for California Indians petitioning for federal recognition. Acknowledgement and a better understanding of the genocide that took place in California and its consequences should, therefore, affect the federal government’s dealings with the many California Indian tribes currently seeking formal federal acknowledgement, and genocide evidence should be considered legitimate evidence in federal recognition and tribal sovereignty cases more broadly.

d. Act for the Government and Protection of Indians (1850) and Land Claims Act (1851)

Non-Native settlement and land usurpation from California Indians were aided primarily by the passage of two laws: the State of California’s 1850 *Act for the Government and Protection of Indians*, and the federal government’s 1851 *Act to Ascertain and Settle the Private Land Claims in the State of California* or “Land Claims Act.”

The 1850 *Act for the Government and Protection of Indians* allowed for and guaranteed labor contracts under which Indians remained in servitude for years, by providing for

⁴¹ Madley, *An American Genocide*, 10.

“apprenticing” or indenturing⁴² Indian children and adults to whites, and punishing “vagrant”⁴³ Indians by “hiring” them out to the highest bidder at a public auction if the Indian could not provide sufficient bond or bail.⁴⁴ White persons or proprietors could apply to the Justice of the Peace for the removal of Indians from lands in the white person’s possession. Monies received from hiring such Indians, after deducting housing and clothing costs, were to be deposited into an “Indian fund” administered by the County Treasury (if the Indian did not have a family). The “vagrant” Indian, after arrest but before judgment, could post a bond with a condition that for the next twelve months he would “conduct himself with good behavior, and betake some honest employment for support.” In 1860, the law was expanded so that anyone could go before a Justice of Peace to obtain Indian children for indenture.⁴⁵

Additionally, the 1850 Act implemented laws concerning crimes and punishments that prohibited Indians⁴⁶ from giving evidence in favor of, or against, any white person, evidencing

⁴² Webster’s Dictionary defines “indenture” as a contract by which a person is bound to service. It is well known that the Hispanic missions in California that governed before the United States and the State of California, used forced Indian labor to build the missions and work in the surrounding agricultural lands.

⁴³ Section 20 of the 1850 Act defined “vagrant” Indians and prescribed their punishment: Any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county, and brought before any Justice of the Peace of the proper county, Mayor or Recorder of any incorporated town or city, who shall examine said accused Indian, and hear the testimony in relation thereto, and if said Justice, Mayor, or Recorder shall be satisfied that he is a vagrant...he shall make out a warrant under his hand and seal, authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the best bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months.

⁴⁴ Johnston-Dodds, “Early California Laws and Policies.”

⁴⁵ Deborah A. Miranda, *Bad Indians: A Tribal Memoir* (Berkeley: Heyday, 2013).

⁴⁶ The 1850 statute defined an Indian as having one-half Indian blood. The 1851 statute defined an Indian as having one fourth or more of Indian blood. 1850 Cal. Stat. ch.99 § 14; 1851 Cal. Stat. ch. 5 § 394 3d.

further absence of legal rights for California Indians. This included that Justices of the Peace⁴⁷ had jurisdiction in all cases of complaints related to Indians, without the ability of Indians to appeal at all; “in no case [could] a white man be convicted of any offen[s]e upon the testimony of an Indian, or Indians.” Justices of the Peace were to “instruct the Indians in their neighborhood in the laws which related to them,” and finally, if an Indian committed “an unlawful offen[s]e against a white person,” the person offended was not allowed to mete out the punishment. However, the offended white person could, without process, bring the Indian before the Justice of the Peace, and on conviction the Indian was punished.⁴⁸

On the other hand, the 1850 Act provided (at least ostensibly) for the protection of Indian land rights, following the Spanish and Mexican practice of protecting Indian lands by setting them apart from settlement. However, California's legal and political institutions responsible for implementing the 1850 Act's protections for Indian lands failed to follow the law. After the Act was passed, county sheriffs were supposed to demarcate Indian-occupied lands to prevent encroachment by settlers and the possibility of violent interactions. Little evidence of compliance has been found beyond Helen Hunt Jackson's Mission Indian reports. In 1883, Hunt found that “each Indian ‘Captain’ had in his possession worthless papers that had been signed by the sheriff, and that delimited the boundaries [sic] of their fields, pastures, and villages.”⁴⁹

⁴⁷ The first bill introduced related to the 1850 Act (Senate Bill No. 54) provided for Justices of the Peace for Indians, but it was not enacted. These Justices of the Peace were to be elected by the Indians directly, at the order and direction of the Court of Sessions.

⁴⁸ Johnston-Dodds, “Early California Laws and Policies,” 7.

⁴⁹ Cultural Systems Research Inc., “Overview” (Private Collection, 1987) cited in Chilcote, “Time Out of Mind,” 43.

The Act's abuse and manipulation led to "widespread enslavement" of California Natives in the 1850s and 1860s and it facilitated removing California Indians from their traditional lands, separating at least a generation of children and adults from their families, languages, and cultures. In 1863, Section Three of the 1850 Act was repealed, however, historical accounts drawn from primary sources indicate that this system of Indian indentured servitude continued despite the repeal. As the *California Police Gazette* noted in 1865, Indians were still being held "as slaves were held in the South." In 1866, a special investigator for the commissioner of Indian Affairs found that Indian slavery was "not uncommon" in California.⁵⁰

The Land Claims Act, on the other hand, was informed by the Treaty of Guadalupe Hidalgo's requirement for the U.S. to recognize and legitimate land claims created under prior sovereigns. On March 3, 1851, Congress enacted the *California Land Act of 1851*, requiring "each and every person claiming lands in California by virtue of any right or title derived by the Mexican government" to file their claim with a three-member Public Land Commission within two years. Given that the act was passed in 1851, anyone who wanted to have his or her land claim verified by the U.S. government would have to do so by 1853. The Commissioners were to issue patents to the claims they found meritorious and the other lands were to pass into the public domain at the end of the two years. However, most California Indians were unaware that they had to present their land claims to the commission, and most certainly did not know that not claiming aboriginal title to the entire state would have implications for land claims in the future. Once land was considered part of the public domain, Indians could no longer make a claim and the public land was open to homesteading and preemption.⁵¹

⁵⁰ Johnston-Dodds, "Early California Laws and Policies."

⁵¹ Chilcote, "Time Out of Mind." 44.

Though the federal government intended to make provisions for California Indians through this Act, “the rush of events in California started by the discovery of gold in 1848 spelled the doom of any attempt to treat California Indian titles with the consideration that was accorded Indian titles in other parts of the United States.”⁵² Furthermore, most California Indian people were not aware that Indian title was extinguished through the Land Claims Act and eventually by the unratified treaties (as I will explain below), resulting in loss of ownership to land as well as loss of rights to land. Two years later, Congress passed an act to survey those lands that had passed into the public domain under the first statute but exempted “land in the occupation or possession of any Indian tribe.”⁵³ The act also authorized the creation of five military reservations in California for Indian purposes.

The effect of these acts on aboriginal title in California has been a subject of litigation for 150 years. Regardless, the U.S. never again pursued treaty negotiations with California Indians, instead favoring legislation and executive orders.

e. Treaty making and treaty rejection

In an attempt to stem the unprecedented chaos and mass murder resulting from the gold miners’ confrontation with the California Indians, one of the first actions taken by the U.S. government regarding Indian lands was Congressional passage of legislation on September 30 of 1850 — twenty-one days after California officially became a state — that authorized the negotiation and making of treaties with California Indian peoples. The purpose of these treaties of “peace and friendship” was to provide the Indians with territories that would be protected from encroachment by non-Indians/white settlers. However, implied in the treaty-making was the

⁵² Flushman and Barbieri, “Aboriginal Title,” 399-400.

⁵³ Ibid.

requirement that Indians reduce their land holdings or move to areas that were not desired by whites, and bringing the tribes under the jurisdiction of the federal government by way of extinguishing Indian title to land.⁵⁴

Soon after the special commissioners' arrival in San Francisco in January of 1851, the enormous size of territory prompted the commissioners to split up and negotiate treaties on their own; they were given just \$25,000 to accomplish this monumental task. The reports and correspondence of the treaty commissioners clearly demonstrate that the suspicious and reluctant Indians they expected to attend the treaty meetings were only vaguely aware of their purpose. This can be attributed—among other things—to language and translation issues since few if any of the Indians in California could understand English. Additionally, the haphazard manner in which the commissioners organized the meetings resulted in the majority of tribes not participating. Despite these drawbacks, the treaty process proceeded until January 5th of 1852.⁵⁵

Under the treaties, California's Native peoples were to retain approximately 8.5 million acres, some one-seventh of the state of California. The remaining 66.5 million acres were ceded to the U.S.⁵⁶ In addition to setting aside certain tracts of land for the signatory tribes, the treaties made stipulations for the establishment of schools and for certain goods, supplies, farm animals, and agricultural equipment to be given to the tribes on the proposed reservations.⁵⁷

⁵⁴ Chilcote, "Time Out of Mind," 44.

⁵⁵ Edward D. Castillo (Cahuilla-Luiseño), NAHC.

⁵⁶ George E. Anderson, W.H. Ellison, and Robert F. Heizer, *Treaty Making and Treaty Rejection by the Federal Government in California, 1850-1852* (Socorro, NM: Ballena Press, 1978); Wood, "The Trajectory of Indian Country in California," 338; Chilcote, "Time Out of Mind."

⁵⁷ Robert F. Heizer, *The Eighteen Unratified Treaties of 1851-1852 between the California Indians and the United States Government* (Berkeley, CA: University of California Archaeological Research Facility, 1972).

In return, the signatory tribes committed (most of them not knowing or understanding this) to forever surrender their lands to the U.S. From 1851 through early 1852, the Indian Commissioners negotiated eighteen treaties with more than a hundred Indian tribes and nations throughout the state. Exactly which tribes/groups signed these treaties is still unclear.

A number of aspects surrounding these negotiations were fraught with problems and controversy, in large part due to the ambiguous scope of authority delegated to the commissioners by the federal government, and inadequate appropriations provided to carry out their job. The California Legislature was involved in influencing the Senate's ratification process of the eighteen treaties. Prior to the U.S. president submitting the treaties to the Senate, however, California's citizenry and legislature engaged in considerable debate, made reports, and drafted and passed resolutions that mostly opposed ratification of the treaties.⁵⁸ This opposition was due primarily to the sentiment that the treaties left Indians with too much, and too valuable, land that should instead have been "public land" (i.e., white land).⁵⁹

In June 1852, the U.S. Senate formally rejected the treaties, classified them as secret, and had them sealed in a vault until 1905.⁶⁰ Pending the advice and consent of the Senate on the treaties, federal officials induced the tribes to move from their original habitats to the "reservations" specified in the treaties. With the rejection of the treaties, Indian title to the land was left unresolved and the California Indians became homeless.⁶¹ The lands that had been

⁵⁸ Johnston-Dodds, "Early California Laws and Policies," 23.

⁵⁹ Wood, "The Trajectory of Indian Country in California," 339.

⁶⁰ However, they were never truly secret. The work of the commissioners was public knowledge at the time, contemporary publications mentioned the unratified treaties, and the Indians had their own copies of the treaties. Larisa K. Miller, *The Secret Treaties with California Indians* (2013), Retrieved from: <https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf>

⁶¹ Flushman and Barbieri, "Aboriginal Title," 406.

reserved for the Indians in the treaties were treated as part of the public domain. Years later, a series of executive orders and a congressional act in 1891 led to the creation of small, scattered reservations of varying quality for Indians in Southern California. These reservations, however, lacked suitable agricultural lands and water and they soon became overrun with white squatters who systematically corrupted the Indians and introduced an epidemic of venereal diseases.

According to Robert Heizer, “[i]n the history of California Indians no other single event (that is ‘nonevent’) had a more rapid destructive effect on their population and culture than [this] about-face [by] the Senate.”⁶²

The U.S. Congress’s failure to ratify the eighteen treaties solidified the dispossession of Native lands — had the treaties been ratified, there would have been almost twenty times more Indian country in California than actually exists today.⁶³ As Flushman and Barbieri assert, Congress’ refusal to ratify the California treaties not only undermined tribal sovereignty, but also raised doubts about whether Congress ever recognized that Indian title existed in the state.⁶⁴ Treaty rejection was a critical moment during early California statehood that facilitated land loss and confusion over Native claims to land.⁶⁵

⁶² Robert F. Heizer, “Treaties,” in *Handbook of North American Indians vol. 8: California* (Washington, D.C.: Smithsonian Institution, 1978), 704.

⁶³ Chilcote, “Time Out of Mind,” 44.

⁶⁴ Flushman and Barbieri, “Aboriginal Title,” 439.

⁶⁵ Chilcote, “Time Out of Mind,” 44. See Chad L. Hoopes’s *Domesticate or Exterminate* for further detail on the consequences of the eighteen unratified federal treaties made with California’s Native populations. Chad L. Hoopes, *Domesticate or Exterminate : California Indian Treaties Unratified and Made Secret in 1852* (Loleta, CA: Redwood Coast Publications, 1975).

f. General Allotment Act (1887)

The General Allotment Act, or the Dawes Severalty Act of 1887, accelerated the national assimilation policy by imposing the individual allotment of Native landholdings. Named for its author, Senator Henry Dawes of Massachusetts, the Dawes Act authorized the breakup of any remaining reservations into individual allotments, typically 160 acres per household.⁶⁶ However, it was not sufficient to simply possess Indian blood in order to be eligible for an allotment; it was necessary to be a member or to have the right to membership in a culturally active tribe. In other words, the judgement of competence to hold individual title was not an Indian decision. “Extra” land from such divisions of tribal holdings was made available for sale to non-Indians while the government required that the allotted Indian lands were held in trust for twenty-five years before they could be legally transferred to Indian ownership.⁶⁷ Transfer could only take place under certain conditions, which included that the allottee built a house, engaged in farming, sent his children to government Indian schools, and renounced his tribal allegiance, among others. Unlike tribal lands, however, these parcels were taxable.

The purpose of the Act was to ‘free’ Indians from tradition-bound landholding practices and Indigenous forms of self-government so that they could enter into mainstream non-Indian American society as small-scale farmers. The practical result of this policy, however, was that within fifty years almost two-thirds of land across the continent that was formerly under tribal control was lost. In California, where the program was officially inaugurated in 1893,

⁶⁶ “To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section...” General Allotment Act (or Dawes Act), Act of Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 USCA 331).

⁶⁷ Sara-Laurus Tolley, *Quest for Tribal Acknowledgement: California’s Honey Lake Maidus* (Norman, OK: University of Oklahoma Press, 2006), 44.

approximately one fourth of all tribal land was taken out of trust by the allotment process. The ways and the extent to which Indians lost land in California differs greatly from the allotment process forged in other states such as Oklahoma, where land was granted by treaty and later distributed by allotment. Because in California land treaties were never ratified, only after considerable dispersal and population decline were very small amounts of land granted to only some California Indians.⁶⁸

The uneven and unequal distribution of allotments was used by Indian agents to keep tribal populations divided and politically impotent. Most Indians opposed the detribalizing goals of individual allotment and fractioning, arguing that they would drastically reduce the amount of land held by each Indian and/or result in the loss of some improvements to other Indians. Generally, this opposition was not to individual ownership per se but to the limiting effects of the surveys, the loss of individual improvements, and the overall loss of land to white settlers. An organized opposition to the allotment program centered at Morongo, Santa Ysabel, Mesa Grande and other Kumeyaay reservations and caused the allotment program to halt between 1896 and 1920. After 1917, however, the BIA reactivated the allotment program for Southern California Indians based on two additional acts of Congress which authorized “the allotment of irrigable lands to Mission Indians of California in such acres as may be in their best interest.”⁶⁹ By 1930, approximately 2,300 allotments had been carved out of the existing tribal reservation lands. The law was finally repealed in 1934, by the Indian Reorganization Act.

Via the Allotment Act, the BIA amassed an incredibly large set of data built and tended for governmental control over Native peoples. In receiving allotment lands, tribes entered a legal

⁶⁸ Goldberg and Champagne, *A Second Century of Dishonor*, 30.

⁶⁹ Shipek, *Pushed Into the Rocks*, 42.

life: their allotment files, held at the National Archives, are filled with letters — organized, statewide, alphabetically by individuals’ last names — from Indians to the various Indian superintendents in regard to property law, trespass, and probate materials.⁷⁰ Today, data on such allotments offer evidence for petitioners seeking federal acknowledgement. However, as anthropologist Sarah-Larus Tolley asserts, this is one of the many ways in which “[t]hey [Indians] are in the Law but not of it: recorded within its files, yet not Recognized as [tribes] with sovereign privileges.”⁷¹

g. Mission Indian Relief Act (1891)

As a way of addressing the wrongs faced by the Indians of Southern California held at the missions, in 1891 Congress passed the Mission Indian Relief Act. The Act established a special commission led by businessman Albert Smiley, booster of Redlands, California and chairman of the Lake Mohonk Conference in New York; it came to be known as the “Smiley Commission.” The Smiley Commission investigated and determined the actual extent of the lands used and occupied by each band of ‘Mission Indians.’ Such lands, as explained by Florence Shipek, “were then to be withdrawn from public land status, and trust patents were to be issued to each band. If the lands the Indians occupied were already in the legal possession of ranchos and settlers, then alternate lands were to be found or purchased for them.”⁷² The Act was largely spurred by

⁷⁰ Tolley, *Quest for Tribal Acknowledgement*, 45-47.

⁷¹ *Ibid.*, 47.

⁷² Shipek, *Pushed Into the Rocks*, 38-39.

activist Helen Hunt Jackson's and Indian Agent Abbott Kinney's recommendations in their 1883 "Report on the Conditions and Needs of the Mission Indians of California."⁷³

The commission's correspondence and reports in the National Archives show that all three members of the commission made a sincere effort to investigate the situation and to determine and reserve the proper lands, that they were concerned with preserving individual Indian rights fairly and justly within the reservations, and that they were concerned with obtaining and preserving the water rights necessary for farming on the reservations. Their effectiveness, however, was reduced by lack of funding and time limitations as well as the existence of deliberately or accidentally confused early survey lines, and some possible less-than-honest employees and surveyors who were entrusted with carrying out the work of actually locating lands and boundaries.⁷⁴

h. The Indian Appropriations Act (1905)

The Indian Appropriations Act of 1905 authorized an inventory of conditions among the central and northern California Indians. C.E. Kelsey, a member of the Northern California Indian Association was designated Special Agent for the investigation. His inventory resulted in the rancheria project, which between 1906 and the early 1930s, used congressional appropriations to buy land for "homeless Indians." Typically, rancheria lands were parcels of one hundred acres or less, and they were intended to be shared by multiple tribes.

⁷³ Helen Hunt Jackson and Abbott Kinney, "Report on the Needs and Conditions of the Mission Indians of California" (Washington D.C.: Government Printing Office, 1883).

⁷⁴ Haas, *Saints and Citizens*.

i. California Land Claims (1928, 1946)

The publication of the eighteen unratified treaties on January 18, 1905 once again sparked interest in the plight of the Indians of California, and efforts were made to legislate a special jurisdictional act that would enable the Indians to bring claims in recompense of the unfulfilled treaties. The first such proposal, made in 1920, was unsuccessful, as were the bills immediately following. Finally, in 1928, the *California Indians Jurisdictional Act* authorized California's attorney general to sue the federal government in the Court of Claims on behalf of the tribes whose lands had been stolen following the non-ratification of the treaties of 1851-52.⁷⁵

The descendants of any Indian living in California on July 1, 1852, were qualified to participate, although not every claimant knew which treaty their ancestors had signed or if their respective tribe participated in treaty negotiations at all.⁷⁶ Yet, they were allowed a part of the settlement, "based," as the Advisory Council on California Indian Policy (ACCIP) put it, "on the Congressional and administrative presumption that all Indians of California, given the choice, would have chosen treaty-making to outright annihilation."⁷⁷ The case was settled in 1944, and payments were for the most part distributed during the 1950s, the last one occurring in 1974.

As the Court of Claims stated: "In 1928, Congress passed a private act, 45 Stat. 602 ... which provided that the claims of these Indians should be adjudicated by the Court of Claims ...

There was a promise made to these tribes and bands of Indians and accepted by them but the

⁷⁵ Flushman and Barbieri, "Aboriginal Title," 409.

⁷⁶ "The "Indians of California" were defined as "all Indians who were residing in the State of California as of June 1, 1852, and their descendants now living in said state." Before the Claims Commission, the United States successfully challenged the characterization of the "Indians of California," claiming that the "Indians of California," as defined, were not an "identifiable" group of Indians within the meaning of the Claims Commission Act. The FAP is making similar arguments regarding the evidence presented by the Fernandeño Tataviam in support of their federal recognition petition, directly affecting the legitimacy of such evidence according to OFA's parameters.

⁷⁷ Advisory Council on California Indian Policy (1997), 12.

treaties were never ratified so the promise was never fulfilled. From 1852 this matter lay dormant for almost eighty years.” However, in making its ruling, the Court of Claims also specified:

This case does not involve the payment for land of which the Indians has a cession [sic], or use and occupancy. No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained. The decree can only be for a fixed amount of compensation. *There has been no taking* [of land] which under the Constitution would require just compensation to be paid and therefore would involve interest.⁷⁸ (Emphasis mine)

In other words, the Act was not an acknowledgment by the U.S. that the California Indians had any legal right to their traditional lands in California. The case was only intended to compensate them for the U.S.’s failure to ratify eighteen Indian treaties.

In addition to this specification, one of the most glaring deficiencies of the 1928 Jurisdictional Act was that compensation for *all* Indians of California was to be granted on the basis of the treaties made with only one-third to one-half of California Indians. In other words, the Indian tribes who were not parties to the unratified treaties were not to be compensated for lands from which they were removed but were left to share in the award based on the failure of the U.S. to honor the promise to set aside lands for the other one-third to one-half of California Indian tribes. Moreover, the U.S. would be allowed to off-set all appropriations made on behalf of *any* California Indians.⁷⁹ In short, California tribes had 7.5 million acres stolen from them in the 1850s and their compensation, in the 1940s, was only \$5 million.

Due to the inadequacies of the jurisdictional act approach to resolving Indian claims, a second land claims case was authorized in the form of the 1946 U.S. *Indian Claims Commission*

⁷⁸ California Indians K-344 May 18, 1928, 45 Stat. 605; amended April 29, 1930, 46 Stat. 259.

⁷⁹ Flushman and Barbieri, “Aboriginal Title,” 410.

Act, and settled in 1963. This time, California’s Indian people were awarded \$29.1 million for 64 million acres west of the Sierra. For the 1946 Indian Claims Commission Act, however, just residing in California wasn’t enough. Rather, claims to aboriginal title were to be founded upon proof of discrete groups occupying discrete pieces of land. Here, anthropological conceptions of how a tribe “legitimately” occupied land it owned tended toward economic and ecological understandings of tribe — instead of, for example, linguistic ones — both awkward and unrealistic representations of California land use.⁸⁰

From one perspective, the individual claims of the tribes — and whether they overlapped or not — did not matter in immediate terms because of the way the Indians of California sued the U.S. government as a single unit. Yet, for the tribes and their understandings of history, it did and does matter. The unfortunate result of the manner in which the California Indian rolls, beginning in 1928, had asked for an applicant’s tribe by way of descent from Indian individuals, was that participants were conceived of as persons with Indian blood instead of as members of particular tribes. That the result of the hearings denied “tribe” to the claimants in the end indicates a larger denial and might be understood as part of a long-term effort aimed at cultural erasure.⁸¹ Lumping the tribes’ land claims cases together as a single case on behalf of the Indians of California versus the U.S. served to reinforce the idea that most of California’s Native peoples were unnamed — tribally nondescript and even nonexistent.

The negation of “tribe” by the claims commission also means that today participation in the land claims suits is not considered evidence of any value in the FAP proceedings, which is

⁸⁰ Tolley, *Quest for Tribal Acknowledgement*, 76.

⁸¹ Additionally, there were independent claims made by California tribes in addition to the “Indians of California.” Many of the “Mission Indians” actually resisted being lumped into the “Indian of California” category precisely because it didn’t assert tribal distinction. Personal communication with Olivia Chilcote.

one of the arguments given by the OFA to the Fernandeano Tataviam in the Proposed Finding regarding the California judgement rolls presented by the Tribe as evidence of their case.⁸²

j. Indian Reorganization Act (1934)

The *Indian Reorganization Act* (IRA), also known as the Wheeler-Howard Act and passed on June 18, 1934, was a measure enacted by the U.S. Congress aimed at encouraging Indian communities to establish themselves as collective corporations to manage their resources and govern themselves communally by tribal councils organized according to certain specifications, thus decreasing federal control of American Indian affairs, and increasing Indian self-government and responsibility. Drafted in large part by attorney Felix Cohen, the Act was inspired by the commissioner of Indian Affairs John Collier's vision of preserving tribal assets while developing tribal political structures, as Collier saw them. The IRA professed to serve:

All persons of Indian descent who are members of any recognized tribe *now* under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.⁸³

This meant, among other things, that the Office of Indian Affairs had to decide who was or should be under federal jurisdiction and how to make that determination, thus articulating the divide between recognized and non-recognized tribes in fixed terms. Without a determination of

⁸² The Death Valley Timbisha Shoshone used the 1928 roll for their federal recognition application and were granted federal recognition via Part 83. Although OFA has stated that, as aligned with past practice, CA Rolls for claims payments can be used for 83.11 (e) (2), what has happened in practice is different, as is the case of the Tataviam and as I'll explain in chapter 6.

⁸³ https://www.uaf.edu/tribal/112/unit_2/indianreorganizationact1934.php

recognition from the federal government, tribes would not be eligible to access the IRA's provisions and so this division marked a substantial turn in federal Indian policy.⁸⁴

The shocking conditions under the regimen established by the *General Allotment Act* were detailed in the Meriam report, a survey authorized by Congress on the state of life on Indian reservations that was released in 1928. The report spurred demands for reform and many of its recommendations for reform were incorporated in the IRA. The Act curtailed the future allotment of tribal communal lands to individuals and provided for the return of surplus lands to the tribes rather than to homesteaders. It also encouraged written constitutions and charters giving Indians the power to manage their internal affairs. Finally, funds were authorized for the establishment of a revolving credit program for tribal land purchases, for educational assistance, and for aiding tribal organization.

About 160 tribes adopted written constitutions under the Act's provisions.⁸⁵ IRA tribal governments, however, were created directly by the BIA as part of the Act's policy of reestablishing to Indian self-government, and therefore, most IRA tribal constitutions and governments did not utilize tribal methods of governance. This is one of the main reasons why the institution of the IRA self-government arrived with built-in difficulties. Furthermore, because the IRA sought to protect Indian cultures and political forms as *rights*, it simultaneously bound tribes ever closer to legal-administrative forms of political existence and expression.

The application of a culturally alien governance system results in unfamiliar political processes for tribes and continually undermines tribal sovereignty and self-determination. Many Indian communities recognize elders, kinship and family, and spiritual leaders as part of the

⁸⁴ Ibid., 19.

⁸⁵ For more detail on numbers and survey responses in California see: Goldberg and Champagne, *A Second Century of Dishonor*, 73-74.

community and political decision-making process. IRA governments and by-laws, however, do not recognize the major social and political patterns of Indian communities, and therefore create difficulties in political procedure and decision-making. This is why most tribes have revised or are in the process of re-writing their constitutional provisions to adapt to contemporary circumstances; provisions that, by reflecting the social, cultural, and political patterns of tribal realities, enable greater preservation of tribal sovereignty and cultural community self-determination.

By organizing tribes as land-holders and by bureaucratizing “tribal organization,” the IRA came to define ‘tribe’ for the U.S. government (IRA-organized tribal government possessed of land). It also reinvigorated the government’s use of the notions of Federal Recognition and non-Recognition.

k. Termination Policy(ies)

A general sense among conservatives in Congress and the BIA that the IRA period’s policies were ‘retarding’ Indians’ progress as American citizens, and a sense among liberals that Indians continued to experience racial discrimination in the BIA’s still overly colonial relationship with tribes, the land claims cases and the IRA itself all fueled a drive to abandon tribal reorganization goals and terminate federal benefits and support services for tribes.⁸⁶ This new policy, called Termination, comprised three sub-policies/laws — House Concurrent Resolution 108, Public Law 280, and the Indian Relocation Act — and was put into motion in 1951.

The Committee on Indian Affairs (CIA) developed criteria to identify those Indigenous groups thought to be prepared for termination: tribes that were considered to be sufficiently

⁸⁶ David E. Wilkins and Heidi Kiiwetinepinesiiik Stark, *American Indian Politics and the American Political System* (Lanham, Maryland: Rowman & Littlefield, 2018), 158.

acculturated, like the Menominee Tribe of Wisconsin and the Klamath Tribe of Oregon, no longer needed the federal government to act as their trustee and therefore were terminated first. Other tribes, such as those in the Southwest, were given more time to acculturate before being legally terminated. Some of the consequences that resulted from termination included: Tribal lands being concentrated into private ownership and in most cases sold, the ending of the trust relationship between a Tribe and the federal government, the imposition of federal taxes on tribes, tribes and their members being subject to state law, the ending of programs and services designed for federally recognized tribes, and the effective ending of tribes' legal sovereignty.

Between 1945 and 1960, the government processed 109 cases of termination affecting at least 11,466 individuals.⁸⁷ The results of termination were devastating, destroying tribal economies and political structures, and seriously affecting tribal cultural integrity and identities in many cases. Most tribes in the U.S. felt the threat of termination, whether they were terminated or not. On the other hand, several California Indian tribes, via the Mission Indian Federation, were actually pro-termination (at least at first) because they disliked BIA paternalism.⁸⁸ While termination was aimed at tribes as a whole, relocation policy sought to remove individual Indians and families from tribes with the same genocidal intent.⁸⁹

California Indians suffered disproportionately from the Termination policy. Between the 1950s and early 1970s, forty-two reservations and rancherias were terminated. As of today, 29 reservations and rancherias have been restored, but some remain without land, and most others

⁸⁷ Ibid.

⁸⁸ Olivia Chilcote, Personal communication with author, June 2021.

⁸⁹ Vine Deloria Jr., *Custer Died for Your Sins: an Indian Manifesto* (Norman, OK: University of Oklahoma Press, 1988).

have only small parcels of land restored.⁹⁰ Many other California Indian communities are yet to gain federal recognition and therefore do not have federally recognized land in trust.

House Concurrent Resolution 108 (1953)

House Concurrent Resolution 108 was a formal statement issued on August 1, 1953, by the U.S. Congress announcing the official federal policy (or policies) of termination. This resolution declared that “at the earliest possible time” the Indians should “be freed from all Federal supervision and control and from all disabilities and limitations especially applicable to Indians.”⁹¹ Also called the Indian Freedom Act of 1953, the “freedom” this act proposed was the end of any and all fiduciary or trust relationships between the federal government and tribes, meaning tribal termination.⁹²

The resolution called for the immediate termination of the Flathead, Klamath, Menominee, Potawatomi, and Turtle Mountain Chippewa, as well as all tribes in the states of California, New York, Florida, and Texas. Termination of a tribe meant the immediate withdrawal of all federal aid, services, and protection, as well as the end of reservations. Individual members of terminated tribes were to become full U.S. citizens, including benefits and obligations. A January 21, 1954 memo by the Department of the Interior set forth bill

⁹⁰ The fourteen largest reservations and rancherias hold 354,939 acres or 78.6 percent of California Indian trust land. The remaining 90 reservations and rancherias hold very small amounts of tribal land. For example, in the Central California Agency, 40 of 52 federally recognized tribes hold 200 or fewer acres of land. Most California Indian reservations and rancherias are very small and are often located in marginal economic areas and with little access to commerce and regular traffic. Goldberg and Champagne, *A Second Century of Dishonor*.

⁹¹ Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque, NM: University of New Mexico Press, 1986), 181.

⁹² Tolley, *Quest for Tribal Acknowledgement*, 56.

provisions for the terminations of additional tribes, including forty-two rancherias in California.⁹³

Public Law 280

A few days after releasing the termination resolution, Congress enacted *Public Law 280*, which gave certain states the power to assume full criminal and some civil jurisdiction over Indian reservations, which had previously been excluded from state jurisdiction. Public Law 280 also allowed any state to assume jurisdiction over Indian lands by a statute or an amendment to the state constitution. The law immediately granted jurisdiction over Indian populations in California, Nebraska, Minnesota, Oregon, and Wisconsin, with the exceptions of the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon. In 1958, Alaska was added to the list of covered states where termination would be the goal.

The federal goal in implementing PL 280 was two-fold: First, to fill the jurisdictional gap resulting from tribes' lack of independent formal judicial systems, which had resulted in a general perception of 'lawlessness' in their communities and second, to assimilate Native peoples and their tribes into American political culture by shifting the financial burden of prosecuting crimes in Indian Country to their respective states. This law made both the states and tribes unhappy: the former because they had new responsibilities without any increase in funding to support additional staff and supplies, the latter because they were subject to new state laws. The main effect of PL 280 was to disrupt the relationship between the federal government and the Indian tribes. Previously the tribes had been regulated directly by the federal government

⁹³ "Legislation Terminating Federal Controls Over Eight Indian Groups Submitted to Congress." United States Department of the Interior. January 21, 1954. Archived from the original on June 10, 2014. Retrieved January 5, 2021.

based on *Worcester v. Georgia* (1832), the Supreme Court rule stating that laws cannot be enforced on Indian land.

Although the new law did not abolish the federal trust status of tribal lands, federal recognition of tribal governments, or the federal trust responsibility toward Indian people, federal and state practice effectively denied these ongoing federal duties, including duties to provide income maintenance and social services for the tribes. This consequence was felt with particular force in California due to two main factors. First, of all the states named in the Act, California was the only one that constituted an entire subdivision of the BIA. Other states named in PL 280, in contrast, were part of BIA subdivisions that encompassed several states, some of which were not covered by PL 280. Thus, it was easier for BIA officials in California to reshape their concepts and practices radically in the wake of PL 280. Second, PL 280 was originally fashioned as a bill for California alone. Since California was the model and motivator for the law, BIA officials sought to achieve the law's objectives most fully in that state.⁹⁴

Even though PL 280 did not require that general assistance to California Indians be denied, it came to be used (improperly) as an explanation for the absence of such benefits. Thus, federal funding for law enforcement in California, never robust, disappeared almost entirely. The absence of funds was justified in part by the DOI's view that many federally recognized groups in California were not "historic tribes," in the sense of having existed as tribes before federal recognition occurred.⁹⁵ In the Department's opinion, only "historic tribes" possessed inherent

⁹⁴ Duane Champagne and Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (Durham, NC: Carolina Academic Press, 2012).

⁹⁵ Soon after the IRA was adopted in 1934, the DOI concluded that Indian groups located on "rancherias" in California were "created" tribes, not "historic" tribes, because the rancherias were established to alleviate a homeless Indian problem in California rather than to reserve land for a particular tribe. Goldberg and Champagne, *A Second Century of Dishonor*, 51.

civil and criminal jurisdiction that could function concurrently with state jurisdiction in PL 280 states. Having taken that position, the Department had a convenient excuse for refusing to fund tribal law enforcement and dispute resolution in California.⁹⁶

PL 280 has been invoked, improperly, as an excuse for federal officials abdicating responsibility to an inadequate state system of general assistance. The problem is that, due to the many exclusions from state jurisdiction under PL 280,⁹⁷ it is unrealistic to expect tribes to rely entirely on state government for their law enforcement and dispute resolutions needs. The existence of state jurisdiction does not remove the need for tribal law enforcement, courts, and alternative forms of dispute resolution, some of which are rooted in tribal traditions and customs. Moreover, large gaps in the state jurisdiction created by the law as well as failure by the state to discharge its law enforcement responsibilities create a genuine need for tribal institutions. California tribes should receive federal financial support that will allow for effective law enforcement and dispute resolution on their reservations.

Indian Relocation Act (1956)

The final part of the termination policy trilogy was relocation, a federal policy designed to move reservation Indians to urban “relocation centers,” where they typically treated rural poverty for urban poverty, with the goal of reducing the tribal service population through a debilitation

⁹⁶ Ibid.

⁹⁷ For example, County or city ordinances and statewide criminal laws cannot be enforced under PL 280 if they are essentially “regulatory” rather than “prohibitory” in nature, and certain matters such as property held in trust by the U.S. and federally guaranteed hunting, trapping, and fishing rights cannot be regulated under PL 280 either.

strategy.⁹⁸ Described as “a coercive attempt to destroy Tribal communalism,”⁹⁹ the Act relocated more than 12,500 Indians to cities in 1956 alone, facilitated by a \$1 million federal fund.

It is important to note here that the unstated policy of removal of the California Indians that had begun with the treaty negotiations had as one of its manifestations the creation of Indian reservations in California. Reservations were established and periodically were altered and enlarged. Since 1864, 117 reservations have been set aside by executive order, comprising a total of about 632,000 acres. These lands held for the Indians were, as Robert Heizer described them, “... largely-not entirely-the desert, mountain, grazing lands, isolated, ill-adapted to agriculture, largely without water, the lifeblood of agriculture in California-waste lands, those left after the host of settlers had filed on and became possessed of the water and practically all the best lands of the State.”¹⁰⁰

1. Rancheria Termination Act (1958)

After several failed attempts to have the California tribes collaborate in their termination through an insidious tribal consultation process, in 1958 Congress passed the California’s *Rancheria Termination Act*—the materialization of termination law in California.¹⁰¹ This statute provided that the lands of forty-two enumerated California rancherias—strategically the smallest, least organized and most isolated tribes in the state—were to be removed from trust status and distributed to the individual Indians of those rancherias.¹⁰² The Act directed the Indians of each

⁹⁸ Fixico, *Termination and Relocation*.

⁹⁹ Wilkins and Kiiwetinepinesiik, *American Indian Politics*, 158.

¹⁰⁰ Heizer, “Treaties.”

¹⁰¹ Tolley, *Quest for Tribal Acknowledgement*, 56.

¹⁰² Cal. Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), amended by Pub. L. 88-419, 78 Stat. 390 (1964).

rancheria to prepare and vote on a plan for distributing the rancheria's lands, which were communal tribal property, into parcels for selling and distributing the proceeds to its members.

Upon approval of such plan by the Secretary of the Interior, general notice of the plan was to be given and individual Indians were to be afforded an opportunity to object. Upon subsequent approval of the plan by a majority of adult Indians who were to participate in the distribution, the plan was to be executed. Prior to distribution, the Secretary of the Interior was to complete certain tasks, including making improvements to rancheria lands and appointing guardians to protect the rights of Indians who were minors or otherwise in need of assistance in conducting their affairs. Following distribution, former rancheria lands no longer would be exempt from state and federal taxes. Moreover, Indians who received any part of a rancheria's assets, and the dependent members of their immediate families, no longer would be eligible for federal services or immunities based on Indian status and were no longer recognized by the government. In other words, the Indians living in those rancherías were terminated.¹⁰³

Thirty-eight of the rancherias in the list eventually consented, "largely because the BIA misrepresented the purpose of the program, and coerced tribal members to approve the distribution plans." (ACCIP 1997b, 14) BIA agents in charge of implementing the policy assured Indians that compliance would result in freedom and economic independence for tribes. They further made elaborate promises concerning the improvement of infrastructure and education services in return for a vote to terminate. Chronically high unemployment rates, low educational achievement and sometimes emergency medical needs soon forced many to take loans on or sell their lands. Worse still, many BIA services such as health and education were abruptly ended for all Indians in the state. Like the earlier allotment policy, the implementation of termination set in

¹⁰³ Ibid.

motion a series of events that ultimately dispossessed tribes of approximately 10,000 acres of land, disrupted tribal institutions and traditions and left tribes more impoverished than ever.¹⁰⁴

For many tribes this meant a loss of tribal lands yet again. Terminated tribes were free of the government's bureaucracy but were also opened up to cultural loss as federal protections fell away. In 1983, California Indian Legal Services filed a class-action suit, *Tilli Hardwick v. United States*, on behalf of twenty-eight California tribes, arguing that the government had turned its back on its trust responsibility and the provisions of the Rancheria Act by not providing the infrastructural improvements to the tribes marked for Termination. The government offered a settlement for seventeen of the tribes, and they were restored.¹⁰⁵

3. Conclusion

Anthropologist Georges Pierre Castile has posited that the key to understanding federal Indian policy is in its *anomaly*, which can only be explained by the rich symbolic place Native peoples hold in the American psyche. He writes: “the message sent by Indian policy finds its significance in audiences other than the Indians themselves.”¹⁰⁶ As this dissertation will demonstrate, understanding why federal recognition matters requires a basic understanding of the federal and state laws and policies that affect tribal nations as they assert and defend their sovereignty.

Studies by Native and non-Native legal scholars have shown that what is generally referred to in the U.S. as “Indian law” embodies a central paradox: while it has sought to justify and facilitate the domination and even the destruction and erasure of Indigenous peoples, it has

¹⁰⁴ Edward D. Castillo (Cahuilla-Luiseño), NAHC.

¹⁰⁵ Tolley, *Quest for Tribal Acknowledgement*, 56.

¹⁰⁶ Georges Pierre Castile and Robert L. Bee (Eds), *State and Reservation: New Perspectives on Federal Indian Policy* (Tucson, AZ: University of Arizona Press, 1992), 178.

also long acknowledged Native Americans' existence as distinct polities and nations possessing their own legal traditions. The concept of recognition and tribal nations' contemporary engagement with laws and policies that validate it, are inextricably embedded in an ongoing history of colonialism and its deeply ingrained unequal power relations.¹⁰⁷ The history of California over the past 170 years is full of efforts to deny California Indians land and community identity. Colonial programs and the federal Indian policy apparatus crafted and implemented mechanisms of exerting physical and cultural violence through spatial control and aimed at erasing tribes from the national landscape.

The unusual history of dispossession and displacement of California Indians accounts for the small amounts of land remaining or granted to California tribes over time.¹⁰⁸ Having less land tends to penalize the California Indians not only in government policy and administration, but by putting them at disadvantage in BIA funding distribution formulas, causing constraints on the possibilities of economic and community development. As Robert Heizer contends: The principal cause of the appallingly great and rapid decrease in the Indians of California "... is the gradual but progressive and relentless confiscation of their lands and homes..."¹⁰⁹

California Indians, then, are forced to suffer double jeopardy, having lost most of their lands through irregular methods, and yet having to suffer economic and federal aid losses owing to their historical dispossession of land — one of the worst in the U.S.¹¹⁰ Moreover, little to no

¹⁰⁷ Amy Den Ouden and Jean O'Brien, "Introduction." In A. Den Ouden and J. O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013); Joanne Barker, *Native Acts: Law, Recognition and Cultural Authenticity* (Durham, NC: Duke University Press, 2011).

¹⁰⁸ Only Muskogee area Indians have less land and less funding per capita than California Indians. Goldberg and Champagne, *A Second Century of Dishonor*.

¹⁰⁹ Heizer, "Treaties," 704.

¹¹⁰ Goldberg and Champagne, *A Second Century of Dishonor*, 28.

land and no funding makes it almost impossible to initiate and prepare a petition for federal recognition and then to meet the mandatory criteria for acknowledgement, which ironically, requires petitioning tribes to prove continuous land base and community and political life. This is the case of the Fernandeano Tataviam Band of Mission Indians quest for federal recognition, whose history and petitioning process are discussed in the following chapters.

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Chapter 2: The Federal Acknowledgement Project/Process (FAP)

“The Federal Acknowledgment Process is the fox guarding the hen house, United States, of course, being the fox.”¹

1. *FAP historiography and overview*

Federal tribal recognition is the ‘legal acknowledgement’ by the federal government of the sovereign and separate political status of tribal nations. This acknowledgement establishes a political and legal relationship between an Indian tribe and the U.S. — a government-to-government relationship — that carries particular rights and responsibilities for both parties.²

The extension of federal recognition potentially renders tribal nations eligible for services and programs administered through federal agencies earmarked specifically for them. This triggers the operation of an entire body of federal law that qualifies tribes to certain resources and activities, *potentially* including: health care, housing, and education services; the possibility of implementing tribal forms of economic development, including engaging in gaming operations that are not directly subject to state law;³ the possibility of establishing tribal justice systems; being exempt from a variety of state and federal taxes; and eligibility for advancing repatriation claims under the Native American Graves Protection and Repatriation Act

¹ Pamela Villaseñor, Interview with the author, October 2020.

² David E. Wilkins and Heidi Kiiwetinepinesiiik Stark, *American Indian Politics and the American Political System* (Lanham, Maryland: Rowman & Littlefield, 2018), 4; Carole Goldberg and Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes* (Los Angeles, CA: UCLA American Indian Studies Center for the Advisory Council on California Indian Policy, 1996); Brian Klopotek, *Recognition Odysseys: Indigeneity, Race, and Federal Tribal Recognition Policy in Three Louisiana Indian Communities* (Durham and London: Duke University Press, 2011), 2; Amy Den Ouden and Jean O’Brien, “Introduction.” In A. Den Ouden and J. O’Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013), 14.

³ For a comprehensive ethnographic account of the history and consequences of Indian gaming see: Jessica Cattelino, *High Stakes: Florida Seminole Gaming and Sovereignty* (Durham, NC: Duke University Press, 2008).

(NAGPRA).⁴ Other more political gains that tribes *may* experience through recognition are: legal acknowledgement and protection of homelands, the extension of a formal diplomatic relationship with other governmental entities, and the possibility of political, social, cultural, and economic revitalization.⁵

By the 1870s, notions about federal recognition began to crystallize in the U.S. in a “formal jurisdictional sense” to describe the political relationship of affirming tribal sovereignty and acknowledge a trust relationship on the part of the federal government with tribal nations as defined in the legal and judicial system.⁶ At the time, federally recognized tribes also were (and continue to be) referred to as “domestic dependent nations,” as Chief Justice John Marshall described them in the 1831 U.S. Supreme Court decision *Cherokee Nation v. Georgia*, meaning that tribal nations are neither nations nor states. Rather, Marshall’s opinion described the relationship between tribes and the U.S. as “resembl[ing] that of a ward to a guardian.”⁷ This ward-to-guardian relationship also meant that, originally, only Congress could recognize the government-to-government relationship between a tribe and the U.S.

Indigenous struggles and what might be called a movement for formal recognition in the U.S. emerged and intensified significantly during the termination and relocation era of the 1950s, when the federal government sought to erase tribalism and Indigenous political status altogether. This spurred tribes’ activism in defense of their sovereignty both at local and national levels.

⁴ The Native American Graves Protection and Repatriation Act was passed in 1990 by U.S. Congress (Public Law 101-601; 25 U.S.C. 3001-3013). For more on NAGPRA and its effects on tribal recognition see: Joanne Barker, “The Recognition of NAGPRA,” in Den Ouden and O’Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States*, 95-114.

⁵ Den Ouden and O’Brien, “Introduction,” 16.

⁶ Wilkins and Stark, *American Indian Politics*, 4-5.

⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

Attended by many non-federally recognized tribes, the American Indian Chicago Conference (AICC) in 1961, in particular, provided a catalyst for creating a network of advocates that would politically and judicially strategize about (non)recognition with other tribes. As Brian Klopotek explains, for both federally and non-federally recognized Indians, “seeing recognition as a matter of broad historical circumstances rather than the shortcomings of an individual tribe was of immeasurable value.”⁸

Following the AICC’s momentum, during the 1960s and 70s non-recognized tribes began seeking recognition from the federal government through the informal administrative channels available to them,⁹ but not every tribe was able to achieve it. During this time, the decision as to whether or not a tribe was granted recognition often fell under the discretion of BIA staff, who, despite not having a formal procedure in place, adhered to certain standards for evaluating the “Indianness” of a tribe. These standards were heavily based on former DOI’s solicitor, attorney Felix Cohen’s, definition of Indian tribe,¹⁰ and were somewhat similar to what would eventually become codified as the FAP’s mandatory criteria.

The regulations’ criteria will be explained in full later in this chapter, however, it is important to note here that the need for eligibility criteria for recognizing Native groups as Indian tribes first became an issue with the passing of the Indian reorganization Act (IRA) of 1934, which, as mentioned in the previous chapter, limited benefits for “recognized” tribes and individual Indians of half or more blood. Because of this phrasing, the executive branch decided

⁸ Klopotek, *Recognition Odysseys*, 23.

⁹ *Ibid.*, 24. As opposed to Congressionally terminated tribes, who can only have their federal recognition restored through an act of Congress.

¹⁰ Felix Cohen, “The Legal Status of Indian Tribes.” In Felix Cohen (Ed.) *Handbook of Federal Indian Law* (Albuquerque, NM: University of New Mexico Press, 1971), 268-273.

that it needed a way to decide who was eligible for services or protections under such acts passed by Congress. After Cohen determined that both Congress and the executive branch, including the secretary of the interior, had the authority to acknowledge tribes, the Office of Indian Affairs (OIA) began extending recognition to certain tribes so that they could organize their governments under the IRA.¹¹ However, while the BIA recognized a handful of tribes in the 1960s and early 70s, it still needed to establish a consistent procedure for making recognition decisions and for acknowledgement to become a federal policy.

In the 1970s, the problem of federal recognition was taken up in earnest by the American Indian Policy Review Commission (AIPRC), providing further impetus for the BIA to revisit its federal recognition policy. The Commission was composed of eleven “task forces,” each dedicated to a separate area of Indian law and policy. Task Force 10 in particular, was in charge of assessing the needs of non-recognized and terminated tribes and developing a coherent and just policy that the federal government could follow in determining its responsibilities to these tribes. One of the biggest impacts of the information provided by Task Force 10 was that it forced the BIA to rethink what its recognition standards would look like and what its obligations would be towards those tribes not receiving federal services. Despite the Commission’s good intentions, however, neither the AIPRC’s final report (released in May of 1977) nor the task force’s recommendations were realistic or implementable. What they did do, that was very useful

¹¹ Ibid., 25.

and apparently successful, was to press for resources¹² to be provided to petitioning tribes to help them complete the research necessary to compile a petition.¹³

In June 1977, one month after the publication of the AIRPC's report, the BIA made public draft acknowledgement regulations in the *Federal Register*. These regulations, though, provided recourse only for tribes seeking to confirm that they had already been and should continue to be recognized by the federal government. The response from tribal leaders, attorneys and academics as well as public comment formally gathered from around the country was deeply negative, forcing the BIA to revise the regulations completely and to call for a second round of comments.¹⁴ The BIA took into account information gathered from four hundred meetings, discussions and conversations with outside groups and sixty written comments, followed by a national conference on recognition, all of which contributed to the initial revision, and thirty-four more written comments on the second set of proposed regulations.¹⁵

After a year of public comment and review, on September 5, 1978, the BIA's Branch of Acknowledgement and Research¹⁶ (BAR, later renamed the Office of Federal Acknowledgement [OFA]) adopted regulations that laid out formal acknowledgement procedures for any group (or

¹² To this end, petitioners were directed to apply to the Office of Native American Programs (later the Administration for Native Americans of the U.S. Department of Health, Education and Welfare). This funding program continues to support petitioning tribes today.

¹³ Klopotek, *Recognition Odysseys*, 29.

¹⁴ *Ibid.*, 30.

¹⁵ 43 Fed. Reg. 39361, 5 September 1978.

¹⁶ At the time the BAR was composed of three teams of three members each who would review the genealogical, historical, and anthropological aspects of what came to be known as a tribe's petition.

“entities,” as the government calls them)¹⁷ wishing to be federally recognized that could demonstrate its existence as an Indian tribe from historical times to the present.¹⁸ In order to make these groups legible to the state and the law, BIA officials codified into regulations seven criteria for recognition which Indian tribes must satisfy, including providing evidence that confirms that the members of the petitioning group descend from a historical Indian tribe or tribes, external and internal evidence for the tribe’s continual identification as Indian peoples, and evidence for a continual tribal land base.¹⁹ Petitioners must meet all seven criteria to receive federal acknowledgement through the OFA.

2. FAP mandatory criteria

As mentioned earlier, the 1978 mandatory criteria for federal recognition were loosely based on the “Cohen Criteria,” named after former DOI’s solicitor and attorney Felix Cohen, and published in his *Handbook of Federal Indian Law*, funded in part by the federal government and originally published in 1947. As stated in the *Handbook*, the Cohen Criteria were “considerations” of tribal determination that had manifested themselves organically in the practice of law and tribe-state relations. According to Cohen, these “considerations,” “which singly or jointly, have been relied upon in reaching the conclusion that a group constitutes a “tribe” or “band” were:”

¹⁷ Note that these are the same Indian peoples who had been administratively excluded from the official relationship with the federal government by policies aimed at exactly that for over a hundred years. For an overview of these policies see Chapter 1.

¹⁸ Den Ouden and O’Brien, “Introduction,” 14-17.

¹⁹ 25 CFR Part 83. Federal Acknowledgement of American Indian Tribes; Final Rule. 2015. Department of the Interior, Bureau of Indian Affairs, Federal Register, Vol. 80, No. 126, Wednesday, July 1, 2015.

1. That the group has had treaty relations with the U.S.
2. That the group has been denominated a tribe by act of Congress or Executive order.
3. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
4. That the group has been treated as a tribe or band by other Indian tribes.
5. That the group has exercised political authority over its members, through a council or other governmental forms.²⁰

According to the Cohen Criteria, any of these five main considerations was enough to warrant federal recognition for legal purposes. However, he also specified that “it is not enough [...] to show that any of the foregoing elements existed at some time in the remote past ... there must be a currently existing group distinct and functioning as a group in specific respects ...”²¹ This was translated by the FAP criteria to mean that successful petitioners must show “identification as an American Indian entity on a *substantially continuous* basis since 1900.”²² By “substantially continuous,” the BAR meant that “there are no longer interruptions in the tribe’s members doing things together such as living together, worshipping together or meeting and making decisions on behalf of the group.”²³

What this means for any tribe petitioning for federal recognition today is that it has to provide documentary evidence of social, cultural and political continuity from each decade since 1900 to the present. The problem, as anthropologist Sara-Larus Tolley explains, is that “these

²⁰ Felix Cohen, “The Legal Status of Indian Tribes,” 268-273.

²¹ Ibid., p. 271.

²² 25 CFR Part 83 (Emphasis mine).

²³ OFA, 1997, 44.

continuities are exceptional among dominated peoples, in large part because to find such evidence, one must turn to the dominators' records. And those records reveal a disproportional preoccupation with the "unmaking" of nation's tribes."²⁴ This also perpetuates the idea that legitimate, authentic Indian tribes have an uninterrupted history of bounded "distinction" that can be substantiated through a documentary record, dismissing the aspects of Native American experiences that have driven groups to petition for recognition in the first place.²⁵ Providing evidence of continuity is particularly challenging — if not impossible — for California tribes, where the history of colonialism and settler colonialism has been especially disastrous.

Following Cohen's criteria, therefore, the regulations' seven mandatory criteria for federally acknowledging an Indian tribe are the following:

- (a)** The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.
- (b)** A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times to the present.
- (c)** The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.
- (d)** The petition includes a copy of the group's present governing document, including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.
- (e)** The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity.

²⁴ Sara-Laurus Tolley, *Quest for Tribal Acknowledgement: California's Honey Lake Maidus* (Norman, OK: University of Oklahoma Press, 2006), 63.

²⁵ Nicholas Barron, "Ideology, Agency, and the Federal Acknowledgement Process," *Nexus: The Canadian Student Journal of Anthropology* 22, No. 1 (2014): 34.

- (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.
- (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.²⁶

Petitioners must meet all seven criteria to receive federal acknowledgement through the OFA, which makes the petitioning process an enormous and expensive undertaking, entailing exhaustive research and the preparation of a document that can be hundreds of pages long and take years to complete. Most petitioning tribes, if able to finance the process, end up hiring external “experts” — lawyers, historians, genealogists — to assist them in the preparation process and to provide testimony in support of their recognition efforts.

The parallels between the compromises involved in the creation of the FAP and the congressional compromises of the original IRA bill of the early 1930s are many, and the shortcomings of the IRA were in many ways built into the FAP and its criteria. For example, tribes who possessed land were those approached first for establishing IRA governments, and those same tribes modeled the definition of “tribe” for the 1978 regulations. For a tribe such as the Tataviam, who never owned land communally under the U.S. legal system, proving a political relationship among members since 1900 (as per criterion (c)) is extremely difficult. Similarly, reflecting a model that does not fit the historical, social, or political experience of California’s Native peoples, when criterion (b) asks for proof of social continuity, the burden on landless tribes is significantly greater than for those with land. Nonetheless, the OFA expects to see a “significant” amount of social cohesion among tribal members.²⁷

²⁶ 25 CFR Part 83.

²⁷ Tolley, *Quest for Tribal Acknowledgement*, 82.

Since its enactment in 1978, the FAP has been criticized as “broken” and in need of reform. Specifically, the process has been criticized as too slow (a petition could take decades to be decided), expensive, burdensome, inefficient, intrusive, less than transparent and unpredictable. Most critiques argue that the rigidity of the FAP’s criteria makes them nearly impossible to meet, as exemplified above. In response to these critiques, the federal recognition guidelines have been rewritten several times. The Advisory Council on California Indian Policy’s California Tribal Status Act of 1997, for example, brought Task Force Ten’s suggestion of an office outside of the BIA to review recognition cases back before Congress together with proposing substantial changes to the criteria in terms of their evidentiary burden. However, despite many efforts, it was only in 2015 that the 1978 regulations, along with some aspects of their criteria, were significantly amended.²⁸

In June 2013, the Assistant Secretary-Indian Affairs (AS-IA) at the U.S. DOI, Kevin Washburn, began holding tribal consultations in an attempt to reform the FAP. The AS-IA sought wide input in reviewing Part 83’s regulations, including both recognized and unrecognized tribes.²⁹ After publicly identifying goals of reform of the regulations, the OFA distributed a “Discussion Draft” of revisions to Part 83 in June 2013. In July and August 2013, the OFA hosted five consultation sessions with federally recognized Indian tribes and five public meetings at various locations across the country, receiving approximately 350 written comment submissions on the draft, which were made available on its Website together with the transcripts

²⁸ A previous revision was made in 1994 but not as significant.

²⁹ Between June and September 2013, unacknowledged Californian Indian groups, including the Amah Mutsun Tribal Band of Ohlone/Costanoan Indians (Amah Mutsun), the Ohlone/Costanoan Esselen Nation (Esselen), and the Muwekma Ohlone Indian Tribe (Muwekma) submitted separate letters in an attempt to voice their concerns and recommendations. See: Barron, “Ideology, Agency, and the Federal Acknowledgement Process,” 32-43.

of each consultation and public meeting. After considering all written comments as well as comments received at consultation sessions and public meetings, the DOI developed and published a Proposed Rule on July 1, 2015.³⁰

The revisions sought to “make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process.”³¹ The 2015 rule was aimed at reforming the federal recognition process by, among other things:

... institutionalizing a phased review that allows for faster decisions; reducing the documentary burden while maintaining the existing rigor of the process; allowing for a hearing on a negative proposed finding to promote transparency and integrity; enhancing notice to tribes and local governments and enhancing transparency by posting all publicly available petition documents on the Department's Web site; establishing the Assistant Secretary's final determination as final for the Department to promote efficiency; and codifying and improving upon past Departmental implementation of standards, where appropriate, to ensure consistency, transparency, predictability and fairness.³²

Tribes such as the Crow Nation, the Stockbridge-Munsee Band of Mohican Indians, the Seminole Tribe of Florida, the San Juan Southern Paiute Tribe, the Mashantucket Pequot, and the Mashpee Wampanoag Tribe expressed support for the Proposed Rule. Others such as the Eastern Band of Cherokee, the Confederated Tribes of the Grand Ronde Community of Oregon, the Muckleshoot Indian Tribe, and the Pechanga Band of Luiseno Mission Indians, however,

³⁰ See: 79 FR 30766 (May 29, 2014).

³¹ Bureau of Indian Affairs, Interior. 80 FR 37861. Retrieved from: <https://www.federalregister.gov/documents/2015/07/01/2015-16193/federal-acknowledgment-of-american-indian-tribes>

³² Ibid.

expressed opposition to and concerns with certain proposed changes. State and local governments also commented on the Proposed Rule. States such as Connecticut and numerous counties and local governments, such as Sonoma County in California, strongly opposed it. In contrast, Montana’s Governor Bullock strongly supported it.

The 2015 regulations do not substantively change the FAP’s criteria, except in two instances: One instance is that, while the final rule retains the current criterion (a), requiring identification of the petitioner as an Indian entity, it does not limit the evidence in support of this criterion to observations by those external to the petitioner. In other words, the final rule allows the OFA to accept any and all evidence, such as the petitioner’s own contemporaneous records, as evidence that the petitioner has been an Indian entity since 1900. The other instance in which the criteria has changed is in the review of the number of marriages in support of criterion (b) (community) — past OFA practice has been to count the number of marriages within a petitioner; this rule instead provides that the OFA count the number of petitioner members who are married to others in the petitioning group.

However, although under the 2015 Final Rule Criterion (a) allows for self-identification of the petitioning group as an Indian entity, the FAP criteria still tacitly demands that tribes must assemble anthropological and historical evidence in order to prove substantially continuous Indian identity. According to the OFA, “continuous” means extending from first sustained contact with non-Indians throughout the group’s history to the present, substantially without interruption”³³ Moreover, the evidence that is permitted for establishing “continuous” recognition or the existence of a “distinct community” are limited to federal documents, kinship

³³ OFA, 1997, 273.

relations, and poorly-defined concepts such as “cultural patterns.”³⁴ Thus, as anthropologist Nicholas Barron argues, the FAP favors a narrative of Indian tribal history that emphasizes continuity and erases coloniality.³⁵ In other words, the FAP’s criteria allow certain historical narratives to be articulated within the system of recognition (i.e., continuity and cultural distinction) while negating others (i.e., discontinuity and colonization).

3. OFA’s Review Process

Tribes interested in petitioning for federal recognition are first asked to submit a “documented petition” for consideration, at which time the petitioner enters a process of preliminary review where the group is extended an opportunity to address perceived deficiencies. Once the petitioner submits supplemental material to address such shortcomings, an unspecified amount of time can pass before the OFA confirms that all required components of a documented petition — as specified in § 83.21 (a) and under § 83.21 (b) — have been received, and the petitioning tribe is placed on the register of petitioners in “active consideration.” While in active consideration, OFA generates one or more technical assistance (TA) reviews that indicate where there appear to be evidentiary gaps for the criteria that will be under review in that phase (I or II), and to provide the petitioner with an opportunity to supplement or revise the documented petition.

After the petitioner addresses OFA’s TA reviews and the petition is complete, the AS-IA does a final revision of the petition and evidence submitted by the tribe and issues a “proposed finding.” A comment period of 180 to 360 days opens, during which the group as well as any third parties are allowed to respond to the proposed finding. Once the comment period is

³⁴ OFA, 1997, 273.

³⁵ Barron, “Ideology, Agency, and the FAP,” 34.

completed, the AS-IA reviews the documentation and issues a final determination, either acknowledging the petitioning group as an Indian tribe or denying the petition. The petition can be appealed to the Interior Board of Indian Appeals.

Petitioners have to go through the same process for Phase I and Phase II. In Phase I, the OFA determines whether or not the petitioner meets the following criteria: (d) Governing document; (e) Descent; (f) Unique membership, and (g) Termination. If the petitioner meets those criteria, it moves to Phase II, where the OFA reviews whether the petitioner meets the criteria for (a) Indian entity identification; (b) Community; and (c) Political influence and authority. If the petitioner claims previous federal acknowledgment, the OFA will also review whether the petitioner proves such status and, if so, will review whether the petitioner meets the criteria under § 83.12(b).³⁶

The lived reality of the experience of petitioning will be discussed fully in the remaining chapters of this dissertation, however, it is important to briefly emphasize here the effort demanded of the process. Of the 52 petitions resolved since this process began, only 18 petitions have been approved for acknowledgment and 34 have been denied. Far more tribes have been recognized by Congress during this time period, and Congress unquestionably has the power, in the first instance, to speak for the U.S. on recognition of groups as Indian tribes. Currently, the petitions of three tribes are in process, including the Fernandéño Tataviam, and five groups will become petitioners once they supplement their petitions with additional evidence. The OFA averages reviewing about one petition per year. For the Tataviam, this has meant a petitioning journey that has lasted more than twenty years.

³⁶ 25 CFR Part 83

As of January 2021, the *Federal Register* reports that the federal government acknowledges 574 “tribal entities.” Yet, it is important to note here that being unrecognized as a tribal entity is not an indicator of political insignificance with respect to a tribe’s relationship with the federal government or individual state governments. Multiple tribes have been recognized by state governments,³⁷ as they had been by prior colonial governments.³⁸ According to lawyers Alexa Koenig and Jonathan Stein, fourteen states have a total of seventy-three state-recognized tribes that are not currently acknowledged by the federal government.³⁹ In California, where there is no state tribal recognition process in place, there are currently 109 federally recognized Indian tribes and multiple non-federally recognized tribes currently petitioning for federal recognition.⁴⁰

4. Critiques of the FAP

Since its conception, the FAP has been strongly criticized by tribal leaders, activists, scholars and petitioners for various reasons, including its rigidity, inconsistencies and irregularities. For example, what qualifies as proof of tribal existence in one case often does not in the next; and the evidentiary burdens on the process (i.e., the level of proof required) have increased over time,

³⁷ California does not have a state tribal recognition process in place, but it counts with the Native American Heritage Commission (NAHC). Established in 1976, the NAHC is a government agency responsible for identifying, cataloging, and protecting Native American cultural resources, including the protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction. It also provides a legal means by which Native American descendants can make known their concerns regarding the need for sensitive treatment and disposition of Native American burials, skeletal remains, and items associated with Native American burials. Retrieved from: <http://nahc.ca.gov/about/>

³⁸ Den Ouden and O’Brien, “Introduction,” 21.

³⁹ K. Alexa Koenig and Jonathan Stein, “Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes across the United States,” *Santa Clara Law Review* 48, No. 1 (2008): 36.

⁴⁰ However, this number might be inaccurate since it has come to my attention that for some unknown reason, some petitioning tribes are not listed on the OFA’s website, so it is unclear how many tribes are exactly petitioning for recognition today.

with the end result that today's criteria are much more rigorous than are the precedents on which they are supposed to be based.

Other criticisms point to pre-decision bias on the part of the OFA and the fact that the OFA plays multiple roles as prosecutor, defense and judge. They also argue that the evaluation process relies too heavily on non-Indian accounts about petitioners that are bound to rigid and outdated conceptions of 'authenticity' based on stereotypes and traditionalist assumptions of Indianness; that the OFA does not accept oral traditions and other forms of Indigenous record-keeping as standalone evidence; and that petitions are reviewed so slowly that it may take decades for final determinations to be made.⁴¹ And perhaps even more importantly, that the FAP's discursive and legal effect is to deny that the group involved is Indian in many contexts, whether intended or not.

Confirming these limitations, Bud Shapard, former BAR chief and FAP's main architect, told those present at the 1992 congressional hearing on FAP:

After fourteen years of trying to make the regulations which I drafted in 1978 work, I must conclude that they are fatally flawed and unworkable. They take too long to produce results. They are administratively too complicated. The decisions are subjective and are not necessarily accurate. The criteria are limited in scope and are not applicable to many of the petitioning groups which are in fact, viable Indian tribes.⁴²

Speaking to OFA's inconsistent, often injudicious and contradictory if not arbitrary findings in a number of petitions, anthropologist William Starna contends that official denials of federal

⁴¹ Patricia Ferguson-Bohnee, *Testimony before the Senate Committee on Indian Affairs Oversight Hearing on Recommendations for Improving the Federal Acknowledgment Process* (Tucson, AZ: Arizona State University Sandra Day O'Connor School of Law, 2008).

⁴² U.S. House Committee on Interior and Insular Affairs. Hearing on H.R. 3430, to Establish Administrative Procedures to Extend Federal Recognition to Certain Indian Groups. 103rd Cong., 2nd sess.

recognition based on such findings are tantamount to “administrative genocide.”⁴³ The arbitrariness and subjectivity around what gets admitted and rejected as evidence in federal recognition processes regarding identity and authenticity questions, as archival scholar Anne Gilliland has noted, makes us wonder “whether refusals to accept documents are based not just in the trustworthiness of those documents and their creation and management, but also increasingly in a deeper determination not to accept the person, community, or reality that the presenter of the documents represents in the adjudicator’s mind.”⁴⁴

Despite having been through multiple revisions as explained above, the FAP’s regulations continue to force Indian groups to engage with externally imposed — and often racist, outmoded and today academically repudiated — definitions and interpretations of Indianness and tribal existence. A standardized view of what BIA agents believed constituted an “authentic” Indian tribe, the mandatory criteria pose steep barriers for many tribes, especially those in California for whom proving continuity of community and political life in the same land base is structurally incompatible with their unique histories and realities.⁴⁵ In molding academic, legal and historical definitions of tribal evidence into one unwieldy set of criteria, the BIA has attempted to create an official line that clearly marks the boundaries of Indian identity — an impossibility given the diverse identities and realities of Indians around the country.

⁴³ William Starna, “‘Public Ethnohistory’ and Native American Communities: History or Administrative Genocide?,” *Radical History Review* 53 (1992): 133-35.

⁴⁴ Anne Gilliland, “Evidence and Exigency: Reconstructing and Reconciling Records for Life after Conflict.” In Karen Gracy, Ed. *Emerging Trends in Archival Science* (Rowman & Littlefield, 2017), 1-26.

⁴⁵ In California, for example, tribal members/citizens tend to be spread throughout their respective counties or the state because there is no land base set aside for them and there are usually only a few jobs available in their respective communities.

According to Tolley, Congress' recognition of the BIA by giving it the crucial power of acknowledging tribes is yet another form of injustice toward Indian peoples, as their futures become more and more contingent upon administrative options rather than enforceable law.⁴⁶ She argues that the FAP appears to be “a flimsy, solely symbolic commitment to Indianness,” with a list of conditions: as long as gaming is not part of the scenario, as long as state sovereignty and administrative prerogative can remain intact, as long as the “right” determinations are made, and as long as the image of primordial Indianness can be preserved for the U.S.' legal-foundational myth of the Indian tribe.⁴⁷

Because federal recognition status itself has been experienced as at least as much a means of domination and subjugation as it has been a means of affirmation and protection of tribal sovereignty, several tribes in the U.S. have articulated powerful anti-recognition arguments, pointing to the ways in which federal acknowledgement can undermine Indigenous struggles for self-determination. This refusal emerges from the increasing debates within Indigenous scholarship about concepts of nationhood, sovereignty and self-determination that address the tensions that tribes experience between a desire for recognition, on the one hand, and a desire to refuse the system, on the other.⁴⁸

⁴⁶ Tolley, *Quest for Tribal Acknowledgement*, 64.

⁴⁷ *Ibid.*, 69.

⁴⁸ Glen Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada,” *Contemporary Political Theory* 6, No. 4 (2007): 437–60; Glen Coulthard, *Red Skin White Masks: Rejecting the colonial politics of recognition* (Minneapolis, MN: University of Minnesota Press, 2014); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford, UK: Oxford University Press, 2009); Taiaiake Alfred, “Cultural Strength: Restoring the Place of Indigenous Knowledge in Practice and Policy,” *Australian Aboriginal Studies* 1; Charles Taylor, “The Politics of Recognition,” in A. Gutmann, Ed., *Multiculturalism and ‘The Politics of Recognition’* (Princeton, NJ: Princeton University Press, 1992); Audra Simpson, *Mohawk Interruptus: Political life across the borders of settler states* (Durham and London: Duke University Press, 2014); Mishuana Goeman, *Mark My Words: Native Women Mapping Our Nations* (Minneapolis, MN: University of Minnesota Press, 2014).

The main argument is that FAP’s regulations and resources contribute to a recognition system that, as Brian Klopotek explains in a fairly recent study of recognition in Louisiana, “affirms the status of a tribe as an indigenous nation with inherent rights to self-government in its homeland, but it simultaneously validates the colonial authority of the United States over the [tribal] nation.”⁴⁹ Fernandño Tataviam Vice-President Mark Villaseñor describes the FAP as a “give and take:”

The FAP is a government-to-government relationship and understanding between two sovereign governments saying that we [the Tribe] enter this deal to come to terms in how we coexist, because before there is no coexistence, one is the authority and one isn’t, that’s just the reality. Now we have our own authority, in that model. So federal government is its own authority. Our Tribe is our own local authority. When you enter that federal recognition, tribes tend to limit their sovereignty by suddenly going into it. So you give up some of your sovereignty for some of the benefits that come with that understanding between the two governments. So it’s a give and take.⁵⁰

The system, then, contradictorily enables tribes to gain (limited) control over their affairs while incrementally imposing federal authority onto the tribal system. The imposed regulations and external scrutiny to which petitioners are subjected, therefore, work to preserve colonial patterns of domination and to establish new strategies of state control.

Pamela Villaseñor, a Fernandño Tataviam enrolled citizen and the Tribe’s Executive Advisor in Policy and Innovation, argues that the FAP is a replication of the old saying “the fox guarding the hen house,” the U.S., of course, being the fox: “It [U.S.] controls everything and the

⁴⁹ Klopotek, *Recognition Odysseys*, 2.

⁵⁰ Mark Villaseñor, Interview with the author, November 2019.

hens are just inside and maybe aware or not of the situation that they're in. That's what acknowledgement is. You shouldn't let the fox guard the hen house." She continues:

As much as the U.S. says that the process is about justice or about reform, it is not at all — they are just controlling the process and well, not just controlling the process but controlling the definitions of who are Indigenous tribes. Then they control all the process. They control the decision-making and they control the narrative after if they are to say, no, this person isn't a legitimate tribe.⁵¹

In Tataviam Tribal President Rudy Ortega's words: "We're under the mercy of the department [OFA – DOI] and he [Lee Fleming, OFA Director] has the power of the pen, he can write us out or write us in, and that's how much strength and power this one individual has."⁵² Tribal attorney Nicole Johnson describes the process as unfair, expensive, prohibitive in terms of documentation requirements, and not sufficiently transparent:

It is very difficult, that's why very few tribes have been successful — because of this idea that the expertise lives within the department [OFA]. And because it's very hard to prove that they've acted arbitrarily and/or unfairly. I think it goes back to this idea, this almost predisposition, that a tribe must not be legitimate and you have to convince me, give me all this documentation to convince me otherwise — because I'm starting from a no, convince me of yes. And so I wonder, was this process designed to truly be a transparent one that helps tribes obtain federal recognition, or is it a process that is largely designed to keep people out?⁵³

Because to be federally recognized is purportedly to be incorporated into and subsumed by the dominant legal system, not all Native peoples agree that recognition represents the best path to

⁵¹ Pamela Villaseñor, Interview with the author.

⁵² Rudy Ortega Jr., Interview with the author, November 2019.

⁵³ Nicole Johnson, Interview with the author, February 2021.

actualizing Indigenous sovereignty in the colonial context.⁵⁴ As Amy Den Ouden and Jean O'Brien write, recognition does not settle sovereignty struggles, rather, it can initiate new struggles and perpetuate and reignite old ones, including the struggle that is inherent to relations between competing sovereigns — tribal nations, the federal government, and individual states.⁵⁵

In Klopotek's words:

Recognition does not shield tribes from racism, colonialism, or other social forces, just as federal nonrecognition does not prevent tribes from participating in revitalization movements or developing their political and economic infrastructure. Moreover, recognition consistently undermines certain aspects of tribal cultures, especially in the area of government and the regulation of community boundaries, suggesting the need for careful attention to the negative aspects of federal recognition as well.⁵⁶

However, Klopotek and other recognition scholars such as Joanne Barker, Amy Den Ouden and Jean O'Brien, while still interrogating the unfixed and western imposed formations of sovereignty and criticizing the numerous flaws, biases and unsettling capabilities of the U.S. federal recognition project, also assert that, even though recognition does not automatically translate into securing Indigenous survival and wellbeing, it provides tribes with one of the only effective means available to Native peoples in the U.S. to ensure at least some measure of legal protection against ongoing racist and specifically anti-Indian political efforts.⁵⁷

⁵⁴ Den Ouden and O'Brien, "Introduction," 16.

⁵⁵ Ibid.

⁵⁶ Klopotek, *Recognition Odysseys*, 21-22.

⁵⁷ Ibid.; Barker, *Native Acts*.

As Brian Klopotek asserts, “while federal status remains one of many discourses on Indian identity, it is still an incredibly powerful one because of the material, political and legal benefits tied to it and the definitional authority that it carries.”⁵⁸ Arguing that more is to be gained through federal recognition than through rejecting it as a “hopelessly fraught colonial relationship,”⁵⁹ petitioning tribes such as the Tataviam end up being somehow at ease with the idea of federal recognition being overtly political (although they of course hate its injustices), because they are aware of the marginalizing politics of non-recognition, and the explicit politics of the FAP are liberatory in comparison.

Pamela Villaseñor explains that, for tribes like the Tataviam, who do not fit into the democratic republic paradigm of settler colonizing governments such as the U.S., federal recognition is needed in order to exist and function as a tribe:

We need recognition just, I’d say, for the paperwork. I see this as a form of pragmatic functioning. I don’t see federal recognition as the goal for our tribe. My goal in life is not for federal acknowledgement. My goal in life is for enlightenment of my entire people and continuing our ancestral knowledge for the next generations. Federal acknowledgement just helps us get there.⁶⁰

This dissertation acknowledges these tensions relating to the concept and impact of tribal recognition, and that these are beyond its capacity to resolve. Its proposed contribution instead is to expose and articulate remedies for some of the most problematic aspects of the evidentiary aspects of the federal acknowledgement process, while exposing its criteria’s disruptive or “unsettling” capabilities as they unfold within and work against the normative legal codes of a

⁵⁸ Klopotek, *Recognition Odysseys*, 31.

⁵⁹ Den Ouden and O’Brien, “Introduction,” 16.

⁶⁰ Pamela Villaseñor, Interview with the author.

nation-state system. The most important thing to keep in mind, however, is that Indigeneity exists and persists independently of federal policy.

5. Conclusion

Acknowledgement means that a tribe must engage intensely with a set of federally crafted procedures, systems, and definitions founded and limited by the racial basis of the majority, non-Indian culture. The mandatory regulations for gaining recognition are part of a larger state ideology that seeks to obfuscate colonial history — its requirements perpetuate the idea that legitimate, authentic Indian tribes have an uninterrupted history of bounded “distinction” that can be substantiated through a documentary record.

This is represented in the very language of the regulations, which favors seamless continuity and culturally distinct communities and practices. This language and these regulations allow certain historical narratives to be articulated within the system of recognition (i.e., continuity and cultural distinction) while negating others (i.e., discontinuity and colonization). Thus, the ideology of continuity and colonial erasure that is woven into the language of the FAP regulations creates a paradox in which Indigenous peoples are forced to negate the colonial history that has rendered them landless and disenfranchised. In other words, there is no space in the FAP for the U.S.’ role in culture change, for Indian silences, for physical and discursive erasures, or for the full ramifications of Indian struggles with reconciling the past and the future — affectively and even archivally. Such a requirement omits the aspects of Native American experiences that have driven groups to the FAP in the first place, namely a history of colonialism and settler colonialism, which was an especially disastrous process in the case of California.

Through the FAP’s inheritance of the IRA’s sovereignty arrangements, Indian peoples are currently engaged in an often-contradictory struggle to achieve economic viability and

revitalize their cultural identities by using the remnant resources left to them on reservations. For these reasons, Les Field argues, “being an Indian in the United States has become an identity that is closely policed, in no small part through the legitimation and delegitimation of knowledge about Indian identities.”⁶¹ That knowledge is held in the archives, and the ways in which the policies and organization of archives work in tandem with the extensive and complicated requirements for federal recognition create nearly insurmountable barriers for tribal communities. This pervasive form of discursive power is exercised under the guise of policy and law, thereby working to hide the U.S.’s continued project of settler colonialism in the FAP’s standardized regulations.

As I will demonstrate in the analysis chapters of this dissertation, the regulations call for “legitimate” forms of evidence that are founded in information demonstrating recognition of the tribe by outsiders, information that was based in a racist, colonial system that often failed to distinguish different tribes and practices. In so doing, this system reemphasizes the power of the colonial gaze, in which tribes must prove their existence by demonstrating that an agent of the colonizer state acknowledged their presence. Therefore, to collect the necessary “evidence,” tribes must sift through vast amounts of archived bureaucratic information mentioning their tribe in what OFA considers to be acceptable or legitimate ways, according to its understandings of Indianness — a nearly impossible endeavor as, as outlined in chapter one, the U.S. colonial project involved creating a legal system that stole Indigenous peoples’ land by intentionally negating them as legal subjects.

⁶¹ Les Field, “Unacknowledged Tribes, Dangerous Knowledge: The Muwekma Ohlone and How Indian Identities Are ‘Known,’” *Wicazo Sa Review* 18, No. 2 (2003): 84.

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Chapter 3: The Fernandeano Tataviam Band of Mission Indians

1. *Brief History of the People Facing the Sun*¹

The Fernandeano Tataviam Band of Mission Indians (FTBMI) are a Native sovereign nation whose jurisdiction encompasses northern Los Angeles County, eastern Ventura County, and the most southern tip of Kern County, California. It has genealogical connections to lands ranging from the present-day Simi, Santa Clarita, San Fernando, and Antelope valleys, to parts of the Angeles National Forest. Its lineages and political form predate the establishment of Mission Fernando in 1797, from which they received the name *Fernandeano*.² To external society, tribal citizens are collectively known as *San Fernando Indians* or *Fernandeanos*, but internally, they map their relationships by way of their lineage associations.

Today, the Tribe consists of a voluntary confederation of independent lineages whose existences date to time immemorial. These lineages, *Siutcabit* (Encino lineage), *Tujubit* (Tujunga lineage), and *Cabuepet* (Cahuenga lineage) are tied to over 26 lineage-villages in the local area.³

¹ For writing this section of the dissertation I relied extensively on the historical information in the Fernandeano Tataviam website (<https://www.tataviam-nsn.us/history/>) and the narratives contained in the Tribe's petition. Please note, however, that this is not, and is not intended to be, an all-encompassing history of the Tribe. I also wanted to note that on June 15th, the same day I sent this dissertation off to my committee, I received my signed copy of Carole Goldberg's and Duane Champagne's newly published book: *A Coalition of Lineages: The Fernandeano Tataviam Band of Mission Indians*, which it is to date, the most comprehensive historical account of the Tribe.

² There is not one collective tribal name for the Native Americans associated with Mission San Fernando. To be clear, Fernandeano is not a tribe, but for the purpose of this dissertation, Fernandeano refers to those who are associated with Mission San Fernando, although many recruitment areas are shared with neighboring missions.

³ Historically, these three lineages were associated with both Mission San Fernando and Mission San Gabriel due to the overlapping areas from which recruitment of families to either mission occurred. The information presented is not intended to claim that *all* descendants of those lineages are enrolled in the Tribe today, but rather, only those associated with Mission San Fernando who have voluntarily continued participation in the traditional social network. The history is complex. It deserves far greater clarification and attention than what is presented in this dissertation.

Eventually, these lineages became identified by the surnames of their progenitors and are now commonly known as the Ortega, Garcia, and Ortiz lineages. Today, the Tribe governs its people by way of an autonomous tribal government, constitution and code, and is governed by executive and legislative branches entrusted with the duties of defending the laws and rights of Fernandeano people. As of 2015, the Tribe is under review by the Office of Federal Acknowledgement of the Department of Interior to be granted federal recognition.

I present the following condensed overview of the Tribe's history in order to provide the reader with a deeper understanding of the importance of federal recognition for the FTBMI. Thorough literature on the Tribe's history extends beyond the scope of this dissertation and my expertise. The information I provide focuses on community organization to place throughout time, but does not incorporate cultural practices, beliefs, or linguistic groups. I also provide specific narratives in order to map the areas in which illegal dispossession has repeatedly occurred for over two centuries in order to humanize the lands in which the Tribe actively asserts its spatial relationships today.

Lineage-village communities

The organization of the Native Americans of the local area reflects a pattern unique to California Native American tribes, which differs from other regions in North America.⁴ In California, the equivalent to "tribes" are communities called "lineage-villages"⁵ The Tribe defines lineage-village as a group of individuals who share a common ancestor, have common territory, share specific ceremonies, and share kin-based political leaders. Each lineage held territory, engaged in

⁴ Fernandeano Tataviam Band of Mission Indians, Response to TA Review Letter, San Fernando, CA, October 2017.

⁵ Fernandeano Tataviam Band of Mission Indians, Petitioner #158 Fernandeano Tataviam Band of Mission Indians: 2009 Submission, San Fernando, CA, 2009.

collective economic and ceremonial activity, and intermarried with other lineage groups of different dialects and languages to establish a complicated regional network of kinship, economic, and ceremonial ties. Since each lineage shared a common ancestor, kinship members could not marry inside, and therefore practiced exogamy by marrying eligible individuals from other lineages, which often spoke different languages.

Each Fernandean Tribal citizen can be traced to an ancestor associated with a lineage-village that was forcedly brought into Mission San Fernando. This means that no collective tribal entity or tribal name existed above the local lineage.⁶ Each lineage-village was composed of different cultures, languages, dialects, and leadership, and therefore, each lineage-village has multiple names that reflect the local linguistic diversity. Importantly, while lineage-villages may be labeled as part of a specific language group, linguistics do not correlate with political organization. Collective linguistic or ethnic political identities for sovereign “independent and ethnically specific lineage-villages” is a common “misunderstanding about the tribal organization of Indians in Los Angeles County.”⁷

Ties between lineage-villages were strengthened through trade, social, or ceremonial ties. Eventually, many members of these lineage-villages were displaced by the Catholic Church and associated with Mission San Fernando Rey de España for about forty years after its initial establishment on September 8, 1797. These social and cultural ties, however, continued through the mission period, until secularization of the missions in 1846. Even during their time at the mission, and despite the *padres*' efforts to assimilate and ‘civilize’ them, the FTBMI’s ancestors maintained many aspects of their traditional social, ceremonial, and political life.

⁶ FTBMI, Response to TA Review Letter.

⁷ *Ibid.*, 13.

Missionization and the start of the Fernandinos (1797-1820)

Mission San Fernando was established on September 8, 1797 at the village of *Achoicominga* and, for years following, enslaved Tataviam ancestors from the traditional villages in the geographically surrounding area, ranging from present-day Simi Valley and Malibu in the west, Cahuenga and Encino in the south, Tujunga in the east, and the present-day Tejon Ranch in the north. Upon recruitment to Mission San Fernando, however, members of the lineage-villages did not simply abandon their lifeways or refuse their lineage-based identities and become “Fernandino,”⁸ for one collective tribe did not emerge out of the mission. Instead, the lineage-villages survived and continued the social, ceremonial, and marital relations under the guise of Spanish-given names and Catholicism, resisting colonial-driven assimilation.

The goal of Spanish colonization was to “assimilate the Indians into the administration of the Spanish government, and make the Indians active subjects and participants of the King and government, [who could] receive local self-government and protection of sufficient land.”⁹ Membership at Mission San Fernando was involuntary, so the Natives became collectively labeled as *Fernandino* when located at the mission, but still retained their independent sovereign lineage-village identities. The mission ground, *Achoicominga*, became a violent space that segregated lineage-village members and enforced a foreign colonial life and religion. Against Spanish efforts to de-tribalize the lineage-villages, the members fought to retain social, political and cultural organization.¹⁰

⁸ FTBMI, Response to TA Review Letter, 2017.

⁹ FTBMI, Petitioner #158: Fernandeno Tataviam Band of Mission Indians, CA. “2015 Narrative Supplement (Criterion A),” 7.

¹⁰ FTBMI, Petitioner #158: Fernandeno Tataviam Band of Mission Indians, CA. “2015 Narrative Supplement (Criterion B).”

Narratives of community-driven refusal of colonial practices were recorded by mission *padres* that reflect how the resilient Fernandean lineage-villages stayed in contact with their non-mission associated relatives and held festivals and religious events for non-Christian relations to attend throughout the Mission system.¹¹ In the final years of the Spanish period, the vast majority of lineage-village communities continued to speak their traditional languages, kept lineage identities, followed lineage leaders, and utilized the settler's baptism and god-parenting traditions to their benefit by strengthening intra-community ties. Today, the President of the Fernandean Tataviam Tribe, Rudy Ortega Jr., describes Mission San Fernando's contemporary relationship with his people as one that lacks recognition of the lineage political history and their existence,¹² although this will not be discussed further in this dissertation.¹³

Distribution and dispossession of Land

When Mexico gained independence from Spain, it sought to dismantle the twenty-one missions in Alta California, distribute the lands of Mission San Fernando, and transfer the lineage-village population from the directive of the Catholic Church to secular authorities.¹⁴ In 1827, Alta California Governor José M. Echeandia initiated a plan of secularization to establish a town for the emancipated Natives at Mission San Fernando, which was ultimately unsuccessful.¹⁵ Seven years later, Alta California Governor Jose Figueroa set out the Mission Secularization Act of

¹¹ FTBMI, "Criterion B," 13.

¹² Rudy Ortega Jr., Interview with the author, October 2019.

¹³ As an act of resistance to the Sainthood of Junipero Serra by the Catholic Church, Tribal citizen Caroline Ward Holland and son Kagen Holland walked over 780 miles visiting all 21 California Missions to honor the ancestors who suffered and perished in the mission system.

¹⁴ FTBMI, "Criterion A," 9.

¹⁵ FTBMI, Response to TA Review Letter.

1834, under which the lineage-villages could retain ex-Mission San Fernando land, or lands that were previously the property of Mission San Fernando, under Mexican trust and protection.¹⁶ These rights were to be preserved under the 1848 Treaty of Guadalupe Hidalgo in the American Period.¹⁷ Had the secularization plan been effective, it would have supported the placement of land into trust and the limited political sovereignty of village governments for the lineage-villages.¹⁸ Unfortunately, the secularization plans were weakly implemented and officially eliminated on November 7, 1835. In the 1830s until its final demobilization in November of 1845, many Fernandinos voluntarily abandoned Mission San Fernando.¹⁹

The significance of land to the lineage-village communities is illustrated by their migration patterns once Mission San Fernando was dismantled.²⁰ A vast majority seemingly returned to the regions connected to their lineages and to the pattern of distributed communities built upon a network of voluntary local coalitions of unique ties and relations.²¹ To secure grants of land for farming and economic well-being of their lineages, 40 headmen of lineages from the local area came together in 1843 to petition for one square league of land from Alta California Governor Manuel Micheltorena²² and received claim to lands at the locations of villages and

¹⁶ FTBMI, “Criterion A,” 27.

¹⁷ FTBMI, “2009 Submission,” 27; Zephyrin Engelhardt, *The Missions and Missionaries of California* (1915), 48.

¹⁸ FTBMI, Response to TA Review Letter.

¹⁹ FTBMI, “Criterion A,” 18.

²⁰ Duane Champagne, Personal communication with Kimia Fatehi, February 15, 2016 in Kimia Fatehi, *Tribal Cultural Resources Management: A Case Study of the Fernandino Tataviam Band of Mission Indians*, Thesis submitted in partial satisfaction of the requirements for the degree Masters of Arts in American Indian Studies, (2017).

²¹ FTBMI, “Criterion B,” 18.

²² FTBMI, “2009 Submission.”

rancherías. Other lineage leaders outside of the 40 petitioners were also granted land in areas such as Rancho Encino, Rancho Cahuenga, Rancho Sikwanga (Samuel's grant), and Rancho El Escorpión, while many other Native Americans at Mission San Fernando did not.

By 1845, Governor Pio Pico withdrew the land of the 40 petitioners and rented the land to private interests, including his brother Andres Pico,²³ which dispossessed many lineage leaders and left them landless. Other lands, such as Rancho Encino, Rancho Cahuenga, and Rancho El Escorpión were granted as private property to the lineage leaders. The sale of Native American land to private individuals was prohibited under the Mexican secularization period, but this prohibition was ultimately ignored and the sale was carried out nevertheless without the agreement of the lineage-village members.²⁴ Today, these areas are strongly protected by tribal cultural resources management (TCRM), although they have been heavily impacted by development throughout time.

As the years progressed, the San Fernando Valley became increasingly treasured by settlers. Natural resources increased the value of properties maintained by the 40 Fernandeano petitioners, which made it impossible for them to successfully defend their claims in local courts against settlers. In addition, the population of Native Americans in California plummeted from 150,000 to about 30,000 from 1846 to 1873 due to government-sanctioned genocide under Anglo-American rule, with both the state and federal governments spending \$1,700,000 on campaigns to exterminate Indigenous peoples.²⁵ After having survived genocide, the lineage-village communities still fought for their land rights in historic cases, but ultimately lost them to

²³ Ibid., 26.

²⁴ Ibid., 38.

²⁵ Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven, CT: Yale University Press, 2017), 342.

encroaching settlers. From 1850 and 1877, the independent lineages performed agricultural work for the local community, lived in and around San Fernando Valley, survived multiple smallpox epidemics as landless peoples, resisted assimilation, and fought for land rights while their lineage-village communities remained socially and politically autonomous.²⁶

When met with potential dispossession, lineage-village leaders fought to regain lands for their lineage communities by organizing and reoccupying the land, which led to harsh consequences. For example, in 1876, *tomiar* Antonio Maria Ortega, a progenitor of the Ortega lineage, was taken to the Superior Court of Los Angeles at 21 years old with a group of Native Americans who “wrongfully and unlawfully” occupied their ancestral lands.²⁷ The lands became the ownership of Anglo-settlers Benjamin K. Porter and Charles Maclay (*Porter et al v. Cota et al*)²⁸ and in 1878, Antonio and the group of Native Americans were fined \$500 plus \$50 rent for a total of about 24 months for occupying his ancestral lands. Contemporaneously, Charles Maclay wrongfully evicted lineage-village head person Rogerio Rocha from lands in Lopez Canyon.²⁹ Although faced with American dispossession, the surviving lineage-village communities continued living in their traditional territories, near the old Mission San Fernando, and/or where there was work. By 1885, all of the independent lineages were dispossessed and lived as “homeless squatters” on their own land.³⁰

²⁶ FTBMI, “Criterion B,” 7, 28, 36.

²⁷ FTBMI, “Criterion A,” 17.

²⁸ Ibid.

²⁹ FTBMI, “Criterion B,” 8.

³⁰ Rudy Ortega Jr., Personal communication with Kimia Fatehi, May 17, 2016 cited in Fatehi, *Tribal Cultural Resources Management*.

Politics of recognition

Federal agents working for the U.S. DOI acknowledged a group of San Fernando Mission Indians in the last two decades of the 19th century.³¹ In 1885, Special Attorney for Mission Indians Guilford Wiley Wells represented “the San Fernando Indians” in an official government capacity to prevent their eviction, meaning that the federal government recognized responsibility over the group.³² In the 1890s, Special Assistant U.S. Attorney for Mission Indians Frank Lewis submitted a series of brief reports to the U.S. Attorney General regarding the possibility of eligible land for the Fernandinos.³³ Having witnessed undeserved land dispossession among the Fernandinos, he communicated to the federal government on their behalf that they had been “unjustly deprived.”³⁴ However, no action was ever made by the federal government, and distrust of the U.S. by the lineage-villages heightened after they lost their lands and court cases. Their community continued to assemble as a coalition of lineages, lived near and around their ancestral village locations, continued cross-lineage communication, and maintained traditions within the privacy of their homes and community.

From the 1900s to the 1940s, the lineage-village communities worked towards formalization of a multi-lineal government . Since there was no collective tribal name for the lineages, they identified themselves as San Fernando Mission Indians.³⁵ Today, the confederation

³¹ FTBMI, Response to TA Review Letter.

³² Ibid., 21, 24.

³³ FTBMI, “Criterion A,” 19.

³⁴ Ibid., 20.

³⁵ FTBMI, “Criterion C,” 27.

of lineages, or “‘tribal’ web of politically independent lineages,”³⁶ governed by a Constitutional government is called the Fernandeano Tataviam Band of Mission Indians. Under this name, the Tribe associates itself with a foreign religious institution (Mission San Fernando) for political purposes, but utilizes an ancient regional name that does not exclusively represent their entire peoples, yet is preferred due to its Indigenous origin.³⁷

The multi-lineal Constitutional government of the Fernandeano Tataviam Band of Mission Indians is inherently sovereign — meaning that its self-governing powers predate the era of settler-colonization regardless of its political status with the U.S — it is self-sustaining and economically independent. As it will be discussed in the following section, the Tribe submitted its intent to apply for political acknowledgement in April of 1995, and officially came under review in 2015, about 130 years after the reports of federal agents in the 1890s. The Tribe is recognized by the State of California; it has been involved in formal cultural resources consultation since the late 20th century and received its official letter of recognition by the Native American Heritage Commission (NAHC) of California on March 27, 2007. California does not necessarily exercise a formal tribal recognition process, but does encourage all state agencies and departments subject to executive control to consult with California Native American tribes (Executive Order B-10-11), and therefore, recognizes those tribes that are to be consulted with. Since tribes exercise basically the many same responsibilities as local governments,³⁸ the quasi-recognition system of California improves the Tribe’s efforts to gain

³⁶ FTBMI, Response to TA Review Letter, 12.

³⁷ FTBMI website: <https://www.tataviam-nsn.us>

³⁸ Duane Champagne, “*Engaging Local and State Governments Can Be Difficult, But Should Be Done.*” Indian Country Media Network, June 2016.

more local recognition and respect by city and county governments without subordinating its sovereignty.

The Tribe's jurisdiction encompasses northern Los Angeles County, and like the majority of metropolitan areas in California that experienced a violent history of forced Indian dispossession, is currently the homelands of non-federally recognized communities. These communities include Native Americans of Mission San Gabriel and Native Americans of Mission San Fernando. Receiving acknowledgement from the U.S. will not determine the existence or legitimacy of Tataviam people, but it will directly affect cultural resource preservation and conservation in the Tribe's jurisdiction in different ways.

Tribal jurisdiction

In California, especially once it came under American rule in 1848, the laws recognizing and protecting lands of tribes were not necessarily followed in practice, as laid out in chapter 1 of this dissertation.³⁹ As such, the present-day FTBMI does not have a land base. To ensure protection of its cultural resources, the Tribe has established a hard and soft boundary (see Preface, Figure 1). Within this contemporary border, the Tribe conducts tribal cultural resource management and, in shared areas, works with neighboring tribes. Mapping the traditional land base in the colonial sense is complex, especially when external society confuses linguistic boundaries with political boundaries, which are not equivalent.⁴⁰ Prior to the establishment of Mission San Fernando, as already discussed, there existed no centralized "tribe", but instead, politically sovereign and land-holding decentralized lineage-village communities. Therefore, a collective

³⁹ William Wood, "The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias," *44 Tulsa L. Rev.* (2013): 317

⁴⁰ FTBMI website.

traditional land base does not necessarily exist. Instead, the locations of the lineage-villages as they move through time, as well as their trade routes, interment areas, seasonal camps, ranching areas, ceremonial markers, and other places knit a complex web of cultural spaces that encompass their contemporary jurisdiction.⁴¹

Contemporary tribal life

From 1952 to the present, the FTBMI has retained the traditional political relations of a coalition of cooperating lineages. The community began meeting quarterly at family gatherings while the adults, men and women, discussed political, social and mutual help issues. Between the late 1940s and 1972, the FTBMI considered American-style bylaws. In 1972, they formed a non-profit organization to apply for grants and conduct community benefit activities. In 1975 they adopted new bylaws, creating a board of members and non-members to advise the Captain while the General Council was not in session. The leadership engaged in a variety of community building activities, held cultural and community events, sought to protect Indigenous rights, and began seeking state and federal recognition. In 2002, the FTBMI adopted a constitution.

Today, the FTBMI are a Tribe recognized by California's Native American Heritage Commission (NAHC) with approximately 900 enrolled citizens. Tribal life consists of community organization and benefit activities; cultural renewal of ceremonies; recovery of language, history, genealogy and cultural knowledge; relations with local government, local politicians, community agencies and organizations; and the efforts to recover land and gain federal recognition through the Federal Acknowledgement Process.⁴²

⁴¹ Fatehi, *Tribal Cultural Resource Management*, 19.

⁴² FTBMI website.

The Tribe has currently nonprofit status and its tribal government is composed of an executive branch; a tribal senate/legislative branch, a council of Elders, and departments of administration; tribal historical and cultural preservation; tribal citizenship; tribal registrar; education and learning; and an Indian Child Welfare Act (ICWA) dedicated office. The headquarters are located in the city of San Fernando, California.

2. Federal recognition process of the Fernandeno Tataviam

The Fernandeno Tataviam formally initiated their petitioning process for federal recognition in the mid-1990s. On April 24, 1995 the Tribe submitted a letter of intent to the OFA to become federally recognized.⁴³ The OFA sent a letter of receipt dated May 3, 1995 in which they assigned the Tribe petitioner number #158 and stated that the agency would review the documents over the next three months to eventually state findings and determine whether the Tribe should be placed on the “Active Consideration List.” Notice of receipt of the Tribe’s petition was published in the Federal Register on June 7, 1995.

The Fernandeno Tataviam began the FAP process under 25 CFR Part 83 acknowledgement regulations, as revised on February 25, 1994, entitled “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.” The Tribe submitted their first documented petition and evidentiary materials on January 16, 1996. The OFA sent its first technical assistance (TA) review letter to the Tribe on March 3, 1997, a 15-page document listing the deficiencies and “significant omissions” from the evidence filed by the Tribe. The Tribe took no further actions but years later, in July of 2005, they submitted claims for previous

⁴³ The Office of Federal Acknowledgment (OFA) within the Office of the Assistant Secretary - Bureau of Indian Affairs of the Department of the Interior, implements Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.” <https://www.bia.gov/WhoWeAre/AS-IA/OFA/> Accessed September 19, 2018.

federal acknowledgement using the 1851 Treaty of Tejon as evidence. In November of that same year, however, OFA Director, Lee Fleming, rejected the Tribe's claim, maintaining that the Tataviam did not demonstrate unambiguous prior federal acknowledgement via the 1851 treaty.

In December of 2006, the Tribe hired Dr. Duane Champagne (Turtle Chippewa) and JD Carole Goldberg to complete research and submit the Tribe's revised petition under the federal acknowledgement regulations 25 CFR 83 (83.8 and 83.7). In 2009 and 2011, the Tribe's petition research team submitted supplemental materials for review, including a response to the OFA's 1997 TA Letter. In their supplemental materials, the Tribe again asserts its claim for prior acknowledgement, this time based on land purchase contemplation in 1892 and 1904. This claim was also denied but on September 6, 2011, the OFA placed the Tribe on the "Ready, Waiting for Active Consideration" list, meaning that the Tataviam satisfied the requirements of a complete "documented petition" under 83.6 of the 1994 version of the Part 83 regulations. The Tribe submitted additional materials in 2012.

As of 2013, the Tribe was still third on the "Ready List" for review and on March 10, 2015, the Tribe issued a request for extension for its petition to be reviewed under the revised 2015 regulations. On September 15, 2015 the Tribe provided supplementary narrative and materials for criteria a), b), and c) under the new regulations. On November 27, 2015 the Tribe received a Federal Register Notice of Receipt of Documented Petition and on the next day, the OFA issued Notice of Public Comment, which ended on June 27, 2016.⁴⁴ Nine parties commented on the documented petition and the OFA posted those comments on its Web page, and the Tribe responded accordingly, pursuant to 83.24.

⁴⁴ In accordance with 25 CFR 83.22(b)(1)(iv), the OFA offers the opportunity for individuals and entities to submit comments and evidence supporting or opposing a petitioners' requests for acknowledgment.

From March 28 through April 6, 2016, OFA anthropologist Dr. Wendi-Starr Brown conducted a site visit and interviews with the Tribe. The Tribe submitted additional petition materials on June 28, 2016, entering the 180-day Phase I review. The researchers conducting the evaluation of the Tribe's petition were anthropologist Dr. Wendi-Starr Brown, genealogist Dr. Janet Earle, and historian Dr. Mark Nicholas, all supervised by OFA director Lee Fleming. On October 17, 2016, the Tribe received notification of completion of Phase I, including a 17-page TA Review Letter describing deficiencies in the materials received from the Tribe both in 2009 and 2015. The OFA required the Tribe to submit a written response that either withdraws the petition for further preparation; submit additional information and/or clarification; or asks OFA to proceed with the review (83.26(a)(1)(i)(A)-(C)).

Specifically, the letter indicated that the OFA found deficiencies that will prevent the Tribe from meeting criterion 83.11(e), *Descent*, and previous Federal acknowledgment (83.12). The Tribe decided to submit supplemental information and questions regarding Phase I, and also requested clarification on some of the secondary evidence relied on by the OFA in their TA Letter, but received no response.

On January 11 of 2017, the OFA issued a letter to the Tataviam including "substantial historical evidence" that could be used by the Tribe to demonstrate its claim of descent from a historical Indian tribe. That same month, the Tribe requested the OFA provide it with the Census Analysis used in Phase I Review and on March 15, 2017, the OFA sent to the Tribe a file titled "Federal Census Records." From January to May of 2017, the Tribe tried to schedule an in-person meeting and/or telephone conference with the OFA without success.

On October 17, 2017, the Tribe issued a response to the OFA's Phase I 2016 TA Letter. Drafted by Dr. Duane Champagne and JD Carole Goldberg, the letter included missing parental

verifications and membership clarifications as well as tribal citizen affirmation, as required by the OFA. On May 24, 2018, Tribal President Rudy Ortega had a telephone conversation with OFA's Director Lee Fleming, where in a "jovial and receptive tone," as described by Mr. Ortega, Fleming stated that the forthcoming OFA's response would not be a denial but a second Phase I TA Review that would lay out remaining "loose ends" that the OFA would like the Tribe to address. Fleming ended the call by stating that he "look[s] forward to seeing the Tribe in Phase II."⁴⁵ On September 18, 2018, Rudy Ortega and Lee Fleming held another teleconference regarding the status of the Tribe's petition review, and in November of that same year, the OFA provided a 60-page document providing "evidence OFA may consider that the petitioner does not already have" as required by 83.26(a)(2)(i).

On April 15, 2019, the Tribe issued a follow up letter asking nine questions related to the material sent by the OFA with the November, 2018 letter. The OFA, however, replied indicating that those questions would be answered in the Proposed Finding (PF). The letter also notified the Tribe that the Office of the Assistant Secretary – Indian Affairs (AS-IA) had granted the OFA a 6-month extension and that the Tribe's petition review was currently paused. On May 21, 2019 the Tribe mailed a letter to the OFA confirming that they did not intend to submit any additional comments to the documents provided by the OFA on November 20, 2018. With the issuance of this letter, the timeline for Phase I was resumed with an initial deadline for issuance of a PF on December 14, 2019. On December 13, 2019, the OFA issued a letter to the Tribe indicating that the AS-IA needed additional time to issue the Proposed Finding on the Tribe's petition. The AS-IA extended the review of the documented petition for 90 days, with a new deadline of March

⁴⁵ FTBMI, FTBMI – OFA Communication Report.

13, 2020. On March 12, 2020, the OFA issued a similar letter indicating they needed another extension of 60 days this time.

Finally, on May 27 of 2020, twenty-five years after the Tribe first submitted a recognition petition, the OFA issued a negative Proposed Finding on the Tribe's claim.⁴⁶ In the PF the OFA states that the Tribe meets only three of the four mandatory criteria under Phase I: Criterion (d) *Governing document*, (f) *Unique membership*, and (g) *Congressional termination*. They have not, according to the OFA, met criterion (e) *Descent*, which requires that the petitioner's membership consist of individuals who descend from a historical Indian tribe or tribes that combined and functioned as a single autonomous political entity from 1900 to the present.

A negative Proposed Finding means that the Tribe's petition is currently halted — the Tribe remains unacknowledged but is still in the process for at least 120 days since the publication of the OFA's decision in the Federal Register. During this comment period, the petitioner or any individual or entity may submit comments and evidence to the OFA to rebut or support the PF. If the OFA has received comments on the negative PF, then the Tribe has 60 days to submit a written response to these comments, with citations to and explanations of supporting evidence. After the expiration of that comment period, the Tribe has 60 days to elect to challenge the PF before an administrative law judge within the Department of the Interior (DOI). If that is the case, then the judge looks both at the OFA's record and the public comments and decides whether the OFA erred in its process or if its decision was arbitrary. If the administrative law judge rules in the Tribe's favor, the petition goes back to the OFA to enter Phase II. If the judge rules against the Tribe, the Tribe can go to the AS-IA and present an argument. There, the Assistant Secretary could either decide that the Tribe is entitled to

⁴⁶ The Tataviam are the only Tribe in the U.S. that has got this far in the FAP under the 2015 Regulations.

recognition (which is unlikely in light of the fact that the Tribe has only gone through Phase I), could send it back to the OFA to initiate Phase II, or deny it altogether.⁴⁷

In a letter to the OFA dated August 21, 2020, the FTBMI indicated that it is reviewing the PF and intends to submit comments. In advance of the submission of comments, however, the Tribe requested that the OFA reconsider and amend the PF in light of a discussion included in the letter regarding the historic Indian tribe from which the Tribe descends. The FTBMI's understanding of the historic Indian tribe, the Tribe argues, "is sufficiently aligned with OFA's understanding to warrant reconsideration"⁴⁸ and to find that criterion (e) is satisfied. On October 8, 2020, the OFA issued a letter to the FTBMI, describing the three available options under the regulations at this stage of the process, offering the additional option of requesting an extension.

A couple of months later, on November 3, 2020, the FTBMI requested an informal technical assistance "by way of a virtual teleconference to discuss the acknowledgement regulations at Part 83 of the *Code of Federal Regulations*."⁴⁹ The letter included the names of FTBMI participants who would attend the meeting as well as an agenda with nine questions about the process and the paths available to the Tribe at this point in the acknowledgment process. A teleconference between the OFA and the FTBMI was held on January 7, 2021⁵⁰ and on January 25, 2021, the OFA sent a follow-up letter to the Tribe, summarizing the points discussed in the teleconference.

⁴⁷ Carole Goldberg, Interview with the author, June 2020; 25 CFR Part 83.

⁴⁸ FTBMI, Response to PF, August 21, 2020.

⁴⁹ FTBMI, TA Request Letter, November 3, 2020. See: 25 CFR Part 83.

⁵⁰ Representing the Department of the Interior (DOI) on the teleconference were R. Lee Fleming, Shirley Heying, and John-Michael Partesotti. The FTBMI participants were Rudy J. Ortega, Jr., Carole Goldberg, Duane Champagne, Nicole Johnson, and Kimia Fatehi.

Among other things, the OFA clarified in the letter that “the regulations limit technical assistance (TA) about the substance of the petition to two reviews: one for Phase I, and one for Phase II (§§ 83.26-27; *see also* 80 FR 37877).”⁵¹ Therefore, OFA decided not to discuss any claims or evidence at this stage of the process. Rather than addressing the nine questions, OFA continues, “OFA provided some general guidance in hopes that it will allow you [the Tribe] to make your own decisions about how best to proceed.”⁵² According to the OFA, one of the reasons the OFA spoke only in general terms is that, at this point in the process, some of the Tribe’s questions would be decided by the Administrative Law Judge (ALJ) or the Assistant Secretary-Indian Affairs (AS-IA), rather than OFA. The options given by the OFA to the Tribe both at the teleconference and again summarized in the letter include:

Option 1: proceed with AS-IA review; or

Option 2: withdraw the petition under § 83.30, with the option of submitting a new petition;⁵³ or

Option 3: challenge the Proposed Finding (PF) before an administrative law judge as described under §§ 83.38-.39; or

Option 4: request that the AS-IA extend a comment period under § 83.8, which the AS-IA may do upon finding “good cause.”⁵⁴

Basically, if the Tribe withdraws their petition, its new evaluation will begin at the start of the process, which begins when a petitioner submits a complete, documented petition as described

⁵¹ OFA, Teleconference Follow-up Letter, Jan 25, 2021.

⁵² *Ibid.*

⁵³ § 83.30 states: “A petitioner can withdraw its documented petition at any point in the process but the petition will be placed at the end of the numbered register of documented petitions upon resubmission and may not regain its initial priority number.”

⁵⁴ OFA, Teleconference Follow-up Letter, Jan 25, 2021.

under § 83.21. There is no deadline for submitting a new petition upon withdrawal. Withdrawing the petition, OFA explains in the letter, would provide the Tribe with the opportunity to: (1) submit a new petition; (2) ensure that the narrative and petition materials match the claims that the Tribe wants the Department to evaluate; and (3) receive a new Phase I TA letter and a new Phase I PF. Additionally, if the Tribe selects this option, OFA may be able to offer further informal assistance and guidance prior to submission of the new petition under 80 FR 37877.⁵⁵

In a letter dated February 3, 2021, the FTBMI requested a 120-day extension to the comment period of the Phase I Negative Proposed Finding.⁵⁶ The request was accepted by the OFA by letter dated February 11, 2021, extending the comment period to Friday, June 11, 2021.⁵⁷ As of May 2021, the Tribe is preparing its response to the OFA which will include one of the three options listed above.

⁵⁵ Ibid.

⁵⁶ FTBMI, Extension Request Letter, February 3, 2021.

⁵⁷ OFA, Response to FTBMI Extension Request Letter, February 11, 2021.

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Chapter 4: Theoretical Framework

1. *Recognition, sovereignty and refusal*

According to political anthropologist Audra Simpson (Kahnawake Mohawk), political recognition is, in its simplest terms, “to be seen by another *as one wants to be seen* [...] to appear politically in formal and official forms, to have rights that protect you from harm, that provide you access to resources, or that protect certain resources.”¹ Recognition occupies a prominent place in contemporary politics — from nationalist movements to demands on behalf of minority or subaltern groups, the invocation for recognition is a central component of political discourse. In this sense, theorizations of recognition are inextricable from discussions concerning cultural difference, and recognizing and analyzing cultural difference is intimately associated with the processes that have historically dispossessed Indigenous peoples of their lands, rights, and material resources.

The concept of recognition is central to this study; so is the analysis of the terms of recognition, or the factors that determine recognition in different contexts — whether those be historical memory, blood, cultural identity, participation within a particular space, genealogy or in this case, the logics of the state and its evidentiary practices. Much of the literature on recognition has emerged within the fields of political theory and anthropology. There is no specific archival literature on the role that archives play in the political recognition of a specific group, community or tribe in the U.S. Some similarities could be found, though, at the intersection of archival theory and diaspora and refugee studies, in relation to issues concerning displaced records, lack of documentation, and excessive requirements to produce ‘acceptable’

¹ Audra Simpson, *Mohawk Interruptus: Political life across the borders of settler states* (Durham and London: Duke University Press, 2014), 23.

and ‘legitimate’ documentation.² Although this project is in direct conversation with those issues, this review focuses on literature on recognition, difference and multiculturalism within the humanities while engaging with tribal recognition and anti-recognition arguments from an Indigenous scholarship perspective.

Charles Taylor provides a foundational framework for the study of recognition. His famous essay, “The Politics of Recognition,” first published in 1992, draws on Hegel, among many others, to work out an account of the larger meaning and conceptual underpinnings of the demands for recognition made by members of oppressed and marginalized social groups. His approach to recognition offers two main components: an intimate approach and a social approach. The intimate approach thesis is that “our identity is partly shaped by recognition or its absence, often by the *misrecognition* of others.”³ According to this approach, a person or group of people can suffer real damage or distortion if the people or society around them “mirror back to them a confining or demeaning or contemptible picture of themselves.”⁴ Misrecognition thereby hinders or destroys persons’ successful relationship to their selves. It has been poignantly described how the victims of racism and colonialism have suffered severe

² See: Anne Gilliland, *Refugee Rights in Records Symposium: Summary and Research and Development Questions Arising*, Report on the Symposium held at the Vera and Donald Blinken Open Society Archives, January 10, 2018; Anne Gilliland and Kathy Carbone, “Movement and Transformation: Teaching to the Fourth Dimension.” In *Defining A Discipline: Archival Research and Practice in the 21st. Century: Essays in Honor of Richard J. Cox*, Jeannette Bastian and Elizabeth Yakel, Eds. (Chicago: Society of American Archivists, 2020); Anne Gilliland and Kathy Carbone, “An Analysis of Warrant for Rights in Records for Refugees,” *International Journal for Human Rights* (2019); Anne Gilliland, “Evidence and Exigency: Reconstructing and Reconciling Records for Life After Conflict.” In Karen F. Gracy, Ed., *Emerging Trends in Archival Science* (Rowman & Littlefield, December 2017), 1-26; James Lowry, Ed. *Displaced Records* (Routledge, 2017).

³ Charles Taylor, “The Politics of Recognition.” In A. Gutmann (Ed.) *Multiculturalism and ‘The Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992), 24.

⁴ Ibid.

psychological harm by being demeaned as “inferior humans.”⁵ Thus, in Taylor’s view, receiving recognition of one’s identity from others constitutes a “vital human need” — a precondition of effective agency.⁶

Taylor’s social approach, on the other hand, is concerned with establishing a norm of equality governing the distribution of recognition. Here Taylor turns explicitly to Hegel’s analysis in the *Phenomenology of Spirit*, of the self-defeating tendency of asymmetrical structures of recognition such as the master-slave relationship. For Hegel, Taylor explains, “the struggle for recognition can find only one satisfactory solution and that is a regime of *reciprocal* recognition among *equals*.” On this basis, Taylor argues that modern polities must extend public recognition to all their citizens, both as human beings in general and also as the bearers of particular social identities.⁷ Taylor’s two components of his approach to recognition, then, offer a concise interpretation of a pervasive form of injustice, “misrecognition,” which consists in the failure, whether out of malice or out of ignorance, to extend to people the respect or esteem that is due to them by virtue of who they are.

Within the two approaches described above, Taylor distinguishes three forms of recognition. Whereas a “politics of universalism” aims at the equal recognition of all persons in their common humanity, a “politics of difference” — as only one dimension of a politics of recognition — emphasizes the uniqueness of specific (and especially cultural) features often associated with communitarianism.⁸ Finally, Taylor thematizes the recognition of

⁵ Franz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1952).

⁶ Taylor, “The Politics of Recognition,” 26.

⁷ *Ibid.*, 51-73.

⁸ *Ibid.*, 37.

concrete individuality in contexts of loving care that are of utmost importance to subjects.⁹ It is these three dimensions of the modern recognition order — which reach back to Hegel’s treatment of the subject — that have been primarily analyzed in the discussion on recognition. They have even been interpreted as genealogically distinct stages along which individual persons gain self-confidence, self-respect and self-esteem, as it has been analyzed by Axel Honneth.¹⁰

Complicating Taylor’s two approaches to recognition, and based on critiques that the author was concerned with addressing only the subjective dimension as opposed to the structural aspects of the colonial relation to recognition, Patchen Markell rather asks if misrecognition is necessarily best understood as the failure to see and/or respect the identity of the other, or if what that characterization of the problem actually does, is misleading us about the structure of this sort of injustice? Markell argues that the ideal of mutual recognition, while appealing, is also impossible, even incoherent; and that in pursuing it we misunderstand certain crucial conditions of social and political life. The pursuit of recognition, Markell contends, involves a “misrecognition” of a different and deeper kind; not the misrecognition of an identity, either one’s own or someone else’s, but the misrecognition of one’s own fundamental situation or circumstances.¹¹ Markell calls for an alternative politics of recognition, one he calls “politics of acknowledgement,” which follow the thought that “the source of relations of subordination lies not in the failure to recognize the identity of the other, but in the failure to acknowledge one’s

⁹ Ibid.

¹⁰ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: MIT Press, 1992).

¹¹ Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003), 5.

own basic situation and circumstances.”¹² In this picture, he contends, democratic justice requires that no one be reduced to any characterization of her or his identity for the sake of someone else’s achievement.

Recognition theory is especially well-equipped to illuminate the psychological mechanisms of social and political resistance. As experiences of misrecognition violate the identity of subjects, the affected are supposed to be particularly motivated to resist, that is, to engage in a “struggle for recognition.” Therefore, at least since the 1990s, theories of recognition have enjoyed a lively academic as well as public interest. In the middle of the 1990s, Nancy Fraser voiced the concern that, at least in the political context of the U.S., increasingly influential “identity politics” threatened to replace the issue of redistribution on the political agenda. She insisted — against Taylor and Honneth — that only recognition and redistribution taken together would allow for the right kind of justice, namely the ideal of “participatory parity” that guarantees each subject an equal participation in public life. While redistribution secures the objective condition of such an ideal, recognition safeguards its intersubjective condition.¹³ Her main point is that, in most cases of injustice, we are dealing with a combination of cultural disrespect and economic exploitation. As especially fitting examples, Fraser refers to groups categorized along the lines of gender or race.

Examining Australian liberal multiculturalism as an ideology and practice of governance, and focusing on the politics of recognition under different forms of land rights legislation in Aboriginal territory, in *The Cunning of Recognition*, anthropologist Elizabeth Povinelli argues

¹² Ibid., 7.

¹³ Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation,” in N. Fraser/A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso), 7–109.

that liberalism, which manifests itself in “multicultural ideologies and concomitant acts of recognizing otherness,” systematically distorts the way in which it grasps (in this case) Indigenous Australian cultures by forcing them into patterns that “hyper-cognize” particular views of Indigeneity (traditional, ‘authentic’ ones), while “hypocognizing” others (self-determination and sovereignty, for instance).¹⁴ This “distortion of alterity,” suggests Povinelli, can take different forms but can be clearly seen in Native title cases, for example, where courts filter through their own criteria of recognition Aboriginal systems of law and custom so that in the end, the case is less about Aboriginality and more about liberal categories.¹⁵

The confluence of liberalism and multiculturalism, Povinelli reminds us, has in fact meant that culture must be mapped out in legal terms—recognition can only be a legal recognition—which means that Indigenous alterity, is also forced to define itself in legal terms.¹⁶ Thus, for Povinelli, recognition is primarily about the extension of liberal power, not the liberation of Indigenous peoples, and certainly not the recognition of subaltern standards. This is because the logic of recognition forces the subaltern to account for itself in ways that suit the national imaginary. Under liberal multiculturalism, then, and in congruence with Markell, recognition is discursively constituted in relations of recognition that are necessarily ones of “misrecognition,” according to Povinelli. Thus, while liberal multiculturalism is an optimistic endeavor, it is critically important to highlight its contradictions—principally the paradox of the desire to recognize otherness and to subject that otherness to a critical scrutiny.

¹⁴ Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, N.C.: Duke University Press, 2002), 1-35.

¹⁵ *Ibid.*, 3.

¹⁶ *Ibid.*, 5.

It is at such limits and edges of liberal political recognition that national stereotypes — expectations, really — of Indianness impact constructions of difference. The concern is that because the need for recognition renders persons utterly dependent on the dominating societal norms, it may undermine the identity of any critic. Thus, some worry that struggles for recognition may lead to conformism and a strengthening of ideological formations.

For most Indigenous scholars engaged in the politics of difference and identity, recognition is yet another mechanism of colonial control — a technique of settler governance. For Audra Simpson, recognition is just another in a historical legacy of forms of managing Indians and their difference; a “trick of toleration.”¹⁷ Colonialism, Simpson continues, has always been concerned with difference, and this fixation on cultural difference has and continues to occlude Indigenous sovereignty. She contends that a politics of recognizing difference that does not actively affirm Indigenous self-determination is a continuation of regimes of representation and cultural trespass that perpetuate settler colonialism and Indigenous dispossession: “a multicultural solution to the settlers’ Indian problem.”¹⁸

In other words, for Simpson, to accept to be recognized by the settler state — to live in a “settled state”¹⁹— there is acceptance that ‘the recognized’ are different, they have a different culture that is defined by others (the ones in power), and based on that ‘evidence of difference’ (which needs to be sufficient to the settlers’ legal eye) they will be accorded a protected space of legal recognition. Positing an alternative mode, she has identified the “politics of refusal” as central to the ongoing sovereign position of tribal groups: the requirement of having one’s

¹⁷ Simpson, *Mohawk Interruptus*, 11.

¹⁸ *Ibid.*, 20.

¹⁹ *Ibid.*, 21-24.

political sovereignty acknowledged and upheld, questioning the legitimacy of those who are usually in the position of ‘recognizing.’²⁰

Similarly, political theorist Glen Coulthard (Yellowknives Dene), describes political recognition as “a field of power through which colonial relations are produced and maintained.”²¹ The central problem, Coulthard explains, is that a liberal politics of recognition is based on “the assumption that the flourishing of Indigenous peoples as distinct and self-determining agents is dependent on their being afforded cultural recognition and institutional accommodation from the surrounding state.”²² The terms of recognition, then, as critiqued by Simpson above, will generally be decided by the settler society while “the Indigenous society will tend to come to see the forms of structurally limited and constrained recognition conferred to them by their colonial ‘masters’ as their own.”²³

Coulthard draws on post-colonial theorist and philosopher Frantz Fanon’s reading of Hegel (different to Taylor’s read of Hegel) to call instead for a “resurgent politics of recognition,” one motivated by an impetus to “turn away” from the oppressor, to avert one’s gaze and refuse the recognition itself.²⁴ This alternative to statist frameworks of recognition negates the authority of the colonial gaze through Indigenous self-realization, direct action, and the resurgence of cultural practices.²⁵ Likewise, Indigenist scholar Taiaiake Alfred (Kahnawá:ke

²⁰ Ibid., 25-33.

²¹ Glen Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014), 17-24.

²² Glen Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada.” *Contemporary Political Theory* 6, No. 4 (2007): 448.

²³ Ibid.

²⁴ Coulthard, *Red Skin White Masks*, 17-24.

²⁵ Ibid., 63.

Mohawk), articulates a concept of Indigenous resurgence against recognition, one that entails reconnecting Indigenous peoples psychologically and spiritually to the land and to associated traditions and ways of being.²⁶

Following Povinelli's and Markell's critique of multicultural politics of recognition, in *Native Acts: Law, Recognition and Cultural Authenticity*, American Indian Studies scholar Joanne Barker (Lenape, citizen of the Delaware Tribe of Indians), explains how the deployment of recognition by the U.S. is (mis)used as evidence that the settler-state has realized itself as a fully democratic, humanist, and civil society. According to Barker, this political antidote to historical wrongdoing and shame renders historical violence and fraud against Native people — “an unfortunate aberration that the U.S. has evolved progressively past and that Natives just need to “get over.””²⁷

The recognized “Indian tribe,” then, according to Barker, is a legal category that participates fully in the reinvention of U.S. democracy and humanism out of histories of colonization and imperialism, specifically through the recognition and provision of Native legal status and rights on the grounds of an expected type of Native “authenticity.”²⁸ This notion of cultural authenticity as pre-colonial or pre-history, in congruence with Povinelli's argument, allows the U.S. to locate its colonialism and imperialism in the past and, simultaneously, confronts Native peoples with the impossibility of representing this authenticity in order to secure their recognition and rights as sovereigns. In other words, for Barker, the process is not

²⁶ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford, UK: Oxford University Press, 2009), 64.

²⁷ Joanne Barker, *Native Acts: Law, Recognition and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 28.

²⁸ *Ibid.*, 44.

and never has been about recognizing the character of tribes as sovereign, but rather is about the U.S. establishing its absolute authority to recognize tribes as dependent and uncivilized and then subjugating them as much as possible to its power.²⁹

Simpson, Coulthard, Alfred, and (to some extent) Barker, all encourage us to consider how, in a settler colonial context, inclusion via political recognition is in effect the same thing as assimilation. They all note that proponents of liberal recognition, like Taylor, fail to consider how Indigenous perspectives and resistance to settler colonialism call into question the legitimacy of the settler state's claim to sovereignty over Indigenous peoples, as well as the normative status of the state form as the only appropriate mode of governance.

Archival literature analyzing the history of social justice as a concern in archival studies has, for the last two decades, touched on issues concerning cultural difference, particularly by advocating for a more pluralized archival practice. Michelle Caswell defines “archival pluralism” as “the acknowledgement of and engagement with multiple coexisting archival realities — that is, fundamentally differing but equally valid ways of being and knowing — most commonly made manifest in the archival realm by (sometimes) irreconcilably divergent — but still credible — ways of defining, transmitting, and interpreting evidence and memory.”³⁰ Archival scholars and practitioners advocating for this movement have identified at its core “the active acknowledgment of cultural difference, Indigenous epistemologies, and multiple ways of knowing as equally valid perspectives of knowledge creation.”³¹

²⁹ Ibid., 33.

³⁰ Michelle Caswell, “On Pluralism: What Religious Pluralism Can Teach Us about Archival Studies,” *Archival Science* 13, No. 4 (2013): 273–92.

³¹ Ricardo L. Punzalan and Michelle Caswell, “Critical Directions for Archival Approaches to Social Justice,” *Library Quarterly* 86, No. 1 (2016): 25–42. See also: Kim Christen, “Opening Archives: Respectful Repatriation,”

More recently, though, Caswell and others have called for, in Jamila Ghaddar’s words, “a need to elaborate or move beyond notions of archival pluralism and a liberal politics of recognition that emphasizes inclusivity, multiplicity, and self-reflexivity.”³² In their article “Critical Directions for Archival Approaches to Social Justice,” Punzalan and Caswell argue that “while work on archival pluralism has uncovered the ways in which foundational archival concepts (such as record, provenance, and evidence) are based in dominant Western ontologies and epistemologies [...] academic calls for archival pluralism have not been taken up in sustained and meaningful ways by the archival field.”³³

This dissertation research aspires to make a significant contribution to work on recognition by bringing literature from political theory and Indigenous studies into direct conversation with critical archival theory. The FAP is at its center an “archival recognition”³⁴ issue — documents need to be centered within the discussion on recognition as yet another way of drawing attention to the inequalities of power inextricable to archival dynamics and practices. Critically examining the terms of recognition as determined by different entities and by the validation of only certain records, allows me to better understand how asymmetries of power manifest in institutional arrangements, as well as the systemic inequities that further the interests

American Archivist 74 (2011): 185-210; Sue McKemmish, Shannon Faulkhead, and Lynette Russell, “Distrust in the Archive: Reconciling Records,” *Archival Science* 11, Nos. 2-4 (2011): 211–239.

³² Jamila Ghaddar, “The Spectre in the Archive: Truth, Reconciliation, and Indigenous Archival Memory,” *Archivaria* 82 (2016): 7.

³³ Punzalan and Caswell, “Critical Directions,” 33.

³⁴ Courtney Rivard, “Archival Recognition: The Pointe-au-Chien’s and Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogeans’ Fight for Federal Recognition,” *Settler Colonial Studies* 5, No. 2 (2015): 117–127.

of some groups at the expense of others — in this case the “unrecognized” — in the distribution of material goods, social benefits, rights, protections, and opportunities.³⁵

2. *Settler-colonial archives, power and nation-building*

Colonial archives and their holdings cannot be disentangled from the colonial past that created and shaped them. At the core of this dissertation is the examination of how colonial archives — their structure and power — work in tandem with the convoluted and extensive evidential requirements imposed by the federal recognition system as well by other federal Indian policies Indigenous peoples must comply with, in order to advance their sovereignty, nationhood, self-determination, and land ownership claims. A review of the literature that has engaged with the Archive and the archives concerning issues of power and nation-building contributes to unveiling how power and oppression are played out intertextually across the different types of records that serve as evidence for federal acknowledgement purposes, as well as within the institutions where these records are held.

The colonial archive as a source of imperial power and its role in sustaining and maintaining the discourse and authority of the nation-state — and its violence — is well known and has been extensively analyzed and scrutinized both by scholars in the humanities and archival fields.³⁶ Similarly, that the inauguration of modern national archives is intimately bound

³⁵ Wendy Duff, Andrew Flinn, Karen Suurtamm, and David Wallace, “Social Justice Impact of Archives: A Preliminary Investigation,” *Archival Science* 13, No. 4 (2013): 317–48.

³⁶ Broadly, see: Verne Harris, “The Archival Sliver: Power, Memory, and Archives in South Africa,” *Archival Science* 2 (2002): 63–86; Joan Schwartz and Terry Cook, “Archives, Records, and Power: The Making of Modern Memory,” *Archival Science* 2 (2002): 1–19; Jeannette Bastian, “Reading Colonial Records Through an Archival Lens: The Provenance of Place, Space and Creation,” *Archival Science* 6, Nos. 3-4 (2006): 267–84; Ann Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009); and Achille Mbembe, “The Power of the Archive and its Limits,” in C. Hamilton et al., Eds., *Refiguring the Archive* (Kluwer, Dordrecht, 2002).

up with the development of European nation states has long been recognized and studied by a growing body of research that has examined “the integral role played by archivists and other recordkeepers in colonial, military and other oppressive administrative bureaucracies historically and still today, and not only by western powers.”³⁷ As Cameroonian political theorist Achille Mbembe reminds us, there is no state without archives³⁸ and as such, this study is very much concerned with the ways colonial nations produce administrative records for national purposes in the affirmation of sovereignty, and how much of the force of colonial power and authority is wielded through these bureaucratic and legal records.

In the past two decades, various critical archival theorists have made it manifestly clear that archives and their records are contested sites of power and that, in all their forms, they reflect and constitute power relations. Joan Schwartz and Terry Cook were most prominently responsible for introducing this ‘power’ perspective into the archival studies discourse. In their introduction to a special issue of *Archival Science* in 2002 dedicated to the power of the archive, the authors bring new sensibilities to understanding the archive(s)’ underlying nature, theoretical assumptions, practical applications, historical evolution, and consequences for users.

For Schwartz and Cook, archives, records and the role of the archivist have always been about power: archival institutions wield power over the state, the church, corporations, the family, the public, or the individual; records have the power to impose control and order on transactions, events, people, and societies through the legal, symbolic, structural, and operational power of recorded communication; and lastly, archivists, as keepers of archives, wield power

³⁷ Anne Gilliland, “Archival and Recordkeeping Traditions in the Multiverse and their Importance for Researching Situations and Situating Research.” In A. Gilliland, S. McKemmish and A. Lau, Eds., *The Archival Multiverse*, 31-73.

³⁸ Mbembe, “The Power of the Archive and its Limits,” 19.

over the shape and direction of memory and identity through the active management of records by selecting what gets archived and what gets excluded, and how records in the archive get described, preserved and used.³⁹ Records, in turn, are the mechanism by which these entities' power is wielded.

Another developing area of research studying the power at work in archive(s) pursues the pervasive ways in which recordkeeping principles and practices historically privileged 'official' recordkeepers (and recordkeeping practices and forms) and perpetuated oppressive practices towards marginalized communities, among them Indigenous peoples. Government administrators and authority figures — the creators of records that would be recognized in recording their provenance — were historically almost always white males (or whatever equates to whiteness) in most parts of the world. Consequently, the records and recordkeeping infrastructures they administered also supported white-dominated systems (government, military, church, courts, property, etc.) that tended to (and in some jurisdictions still) ignore or submerge the presence and rights of the subjects of those records.⁴⁰

The operations of power in archives, such as the privileging of certain voices and the marginalizing of others (how, when, and by whom a story gets — or doesn't get — told, and subsequently whose and which memories are saved) necessarily bear influence upon nation-building. Schwartz and Cook explain: “[A]rchives have their origins in the information needs and social values of the rulers, governments, businesses, and individuals who establish and

³⁹ Schwartz and Cook, “Archives, Records, and Power,” 2.

⁴⁰ Gilliland, “Archival and Recordkeeping Traditions in the Multiverse.”

maintain them. Archives then are not some pristine storehouse of historical documentation that has piled up, but a reflection of and often justification for the society that creates them.”⁴¹

In “Archival Temples, Archival Prisons: Modes of Power and Protection,” Eric Ketelaar provides a comprehensive account of ways in which totalitarian systems — public and private — use records “as instruments of power, of extreme surveillance, oppression, torture, murder.”⁴² Without records, Ketelaar continues, the oppressor is powerless and without the legitimizing role of the archive (and the legitimization of its records), “there is no lasting power of any kind.”⁴³ Likewise, in “The Archival Sliver: Power, Memory, and Archives in South Africa,” Verne Harris describes how the apartheid lasting effect shaped the archives of the South African regime as a place where:

[a] huge bureaucracy, which reached into almost every aspect of citizen's lives, generated a formidable memory resource. Control over racial classification, employment, movement, association, purchase of property, recreation, and so on, all were documented by thousands of government offices. This was supplemented by the record of surveillance activities by the security police and numerous other state intelligence bodies, as well as by large quantities of records confiscated from individuals and organisations...⁴⁴

Similarly, Cook has described how, following the aftermath of the French Revolution, archives emerged as public institutions of the nation-state, and how, as a consequence, “the resulting

⁴¹ Schwartz and Cook, “Archives, Records, and Power,” 12. Also see: Terry Cook, “Archival Science and Postmodernism: New Formulations for Old Concepts,” *Archival Science* 1, No.1 (2001): 3-24.

⁴² Eric Ketelaar, “Archival Temples, Archival Prisons. Modes of Power and Protection,” *Archival Science* 2, Nos. 3-4 (2002): 226.

⁴³ Ibid.

⁴⁴ Harris, “The Archival Sliver,” 69.

archives chosen by state officials favoured the senior policy records of the state, the actions of the elite, the story of national and international activity rather than local or regional or social programmes” privileging overwhelmingly textual records over oral accounts.⁴⁵

The inferior value ascribed to orality versus the legitimizing and official value assigned to textual records has been analyzed by several scholars studying the work of archives in postcolonial struggles both in the humanities and archival fields. Historian Maria Nugent, for example, argues that this dichotomy relates directly to the power that certain kinds of documents carry within colonial and legal contexts.⁴⁶ Examining the significant role that archives have played in the “Indian Land Question” in settler states like Canada, the U.S. and New Zealand since the nineteenth century, Adele Perry contends that this disjuncture between the value of written and oral records has efficiently served colonial projects, particularly by enacting a selective and self-serving interpretation of the records’ meaning. Focusing on the Supreme Court case on Aboriginal land rights in Canada known as *Delgamuukw v. British Columbia*, Perry unveils the “fractious politics of settler societies reckoning with their imperial pasts and the place of archives in adjudicating those politics and that past.” The *Delgamuukw v. British Columbia* case symbolizes, Perry continues, “the unmitigated triumph of history and archives in the serve of empire.”⁴⁷

⁴⁵ Cook, “Evidence, Memory, Identity, and Community,” 106.

⁴⁶ Maria Nugent, “Entanglement of oral sources and colonial records.” In K. Reid and F. Paisley, Eds., *Sources and Methods in Histories of Colonialism: Approaching the Imperial Archive* (New York, NY: Routledge, 2017), 170.

⁴⁷ Adele Perry, “The Colonial Archive on Trial. Possession, Dispossession, and History in *Delgamuukw v. British Columbia*,” in A. Burton, Ed., *Archive Stories. Facts Fictions and the Writings of History* (Durham and London: Duke University Press, 2005), 325-350.

In her exhaustive literature review of postcolonial authors writing about colonial records through an archival lens, Jeannette Bastian reminds us also that records have historically offered and emphasized the voices of the master narrative — the canon — failing to reflect the voices of the oppressed, the marginalized and the voiceless.⁴⁸ In her words:

With their heavy reliance on records to preserve the tenuous fabric of imperialism, the relationships between colonial societies and records reveal many of the worst and best manifestations of records themselves; their tyranny as well as their power, their textual bias as well as their textual evidence, their appropriation as well as their authenticity, all of which speaks as much to the authority as to the malleability of written information, for in the end what else can explain how tightly woven webs of records produced by minority bureaucracies held sway for so long over non-record producing majorities.⁴⁹

Cook and Schwartz repeatedly assert that archives are established by the powerful to protect or enhance their position in society. Through archives, they contend, the past is controlled.⁵⁰ That controlling of the past and of history itself is critical to this study — it translates into the selective and self-serving interpretations of the record that are being deployed by those in power as “established histories”⁵¹ in the deeply flawed tribal recognition process.

In a more recent article, Jamila Ghaddar has revealed the way in which the Canadian settler project appropriated the histories and cultures of Indigenous peoples in order to create

⁴⁸ Bastian, “Reading Colonial Records Through an Archival Lens,” 267.

⁴⁹ *Ibid.*, 269.

⁵⁰ Terry Cook and Joan Schwartz, “Archives, Records, and Power: From (Postmodern) Theory to (Archival) Performance,” *Archival Science* 2 (2002): 171-185.

⁵¹ Rae Gould, “The Nipmuc Nation and a Case of Mistaken Identity.” In A. Den Ouden and J. O’Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013), 213-236.

archives *about* Indigenous people and *of* the Canadian nation. Ghaddar contends that the incorporation of records by or about Indigenous peoples into the national settler archives has been crucial for the constitution of a settler historical archival memory (at the expense of an Indigenous one).⁵² Ghaddar, thus, conceptualizes the Canadian national archive as a haunted site of fear and desire, national guilt and national triumph — a site where the past is arbitrarily interpreted and controlled to the benefit of the settler-state. Similarly, historians Melissa Adams-Campbell, Ashley Glassburn Falzetti and Courtney Rivard argue that settler archives perform a special work to maintain the story of the nation state, in particular, “its relationship to the “placeness” of the nation, and the simultaneous double move of acknowledging and disavowing Native communities.”⁵³

Many critical scholars have analyzed the complex powers of archives outside the archival field, within what has been termed as “the archival turn”⁵⁴ in the humanities, social sciences and the arts. Most credit this more critical, postmodern turn to Foucault’s work in *Archaeology of Knowledge*, in which he proposes his own definition of the Archive. He argues that the archive is more than a simple institution or an empirical concept, it is “the law of what can be said,” not

⁵² Jamila Ghaddar, “The Spectre in the Archive: Truth, Reconciliation, and Indigenous Archival Memory,” *Archivaria* 82 (2016): 23; Jamila Ghaddar, “*Total Archives* for Land, Law and Sovereignty in Settler Canada,” *Archival Science* 21 (2021): 59–82.

⁵³ Rivard, “Archival Recognition.”

⁵⁴ A turn toward and preoccupation with the archive not only as place/institution, object or practice, but as a symbol, trope or conceptual metaphor for expressions of power and knowledge. Some of the works within the archival turn include (this list is by no means exhaustive): Burton, *Archive Stories*; Stoler, *Along the Archival Grain*; Carolyn Steedman, *Dust: The Archive and Cultural History* (New Brunswick: Rutgers University Press, 2002); Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1996); Kate Eichhorn, *The Archival Turn in Feminism: Outrage in Order* (Philadelphia: Temple University Press, 2013).

a library of events, but rather “that system that establishes statements as events and things,” that “system of their enunciabilities.”⁵⁵ It is:

... not the totality of texts that have been preserved by a civilization or the set of traces that could be salvaged from its downfall, but the series of rules which determine in a culture the appearance and disappearance of statements, their relation and their destruction, their paradoxical existence as *events* and *things*. To analyze the facts of discourse in the general element of the archive is to consider them, not at all as documents (of a concealed significance or a rule of construction), but as monuments, it is — leaving aside every geological metaphor, without assigning any origin, without the least gesture toward the beginnings of an arch — to do what the rules the etymological game allow us to call something like archaeology.⁵⁶

Derrida notably expands on this conception in *Archive Fever* by focusing on the role and power that archivists, who he calls archons, play in constructing and controlling archives. He writes:

“[T]here is no political power without control of the archive, if not memory. Effective democratization can always be measured by this essential criterion: the participation in and access to the archive, its constitution, and its interpretation.”⁵⁷ He introduces the images and conceptualizations of the *arkhe* (the archive), the *arkheion* (the superior magistrate’s residence where official documents are stored), and the *archon* (the magistrate himself who holds the right to interpret official documents for the operation of a system of law), in order to describe the archive as what represents whatever kind of power is being exercised “in the order of

⁵⁵ Michel Foucault, *Archaeology of Knowledge and The Discourse on Language*, trans. A. M. Sheridan Smith (New York: Pantheon Books, 1972), 128–30.

⁵⁶ Michel Foucault, “On the Archaeology of the Sciences: Response to the Epistemology Circle,” in J. Faubion, Ed., *Michel Foucault, Aesthetics, Method, and Epistemology: Essential Works of Foucault 1954-1984, vol. 2* (London: Penguin Books, 1999), 309.

⁵⁷ Jacques Derrida, *Archive Fever*, 4.

commencement as well as in the order of commandment.”⁵⁸ The archons, he further explains, not only ensure the physical security of what is deposited in the archives and of the archive’s substrate — “they are also accorded the hermeneutic right and competence. They have the power to interpret the archives.”⁵⁹

Entrusted to such archons, these documents in effect state the law: they recall the law and call on or impose the law. Therefore, those who create and interpret the archive hold vast and significant power not only in constituting the past, but also in producing the law of what is to be understood in the present. Understanding how this power functions and its effect on the tribal recognition process requires an interrogation of archival procedures concerning categorization, location, and access.

Also examining the Archive as a trope to critique issues of power, memory, and identity,⁶⁰ Thomas Richards’ coins the term “imperial archive” to refer to the power of the archive as both shaping and controlling force in nineteenth century imperialism. Richard’s imperial archive follows the formulation of “a fantasy of knowledge collected and united in the service of state and Empire” [...] “not a building, nor even a collection of texts, but the collectively imagined junction of all that was known or knowable, a fantastic representation of an epistemological master pattern, a virtual focal point for the heterogenous local knowledge of metropolis and empire.” Building on the work of Foucault and Edward Said, Richards describes how the administrative core of the British Empire was built around knowledge-producing

⁵⁸ Ibid., 9.

⁵⁹ Ibid., 10.

⁶⁰ Michelle Caswell, “‘The Archive’ Is Not an Archives: On Acknowledging the Intellectual Contributions of Archival Studies.” *Reconstruction* 16, No.1 (2016).

institutions (museums, historical societies, surveys, and universities) and how its colonial bureaucracies were extremely “data intensive.”⁶¹ According to Richards, recording and documenting the empire was a way to bolster feelings of colonial power, even in the absence of full control of vast geographic territories. In Richards’ “fantasy of the imperial archive,” the state superintends all the knowledge of its empire and thus imagines that it controls all the territory that it surveys and documents.⁶²

Postcolonial scholars tend to be concerned with ways in which the Archive anchors explorations of national identity at the same time as it provides the evidence for establishing the meaning of the past. They read colonial records, like the ones compiled in colonial settlements by British administrators, as providing evidence of a desire to consolidate and justify imperial power. In “Colonial Archives and the Arts of Governance,” anthropologist Ann Stoler unveils how the colonial masters of the Dutch East Indies shaped, named, used and destroyed records to consolidate their power, create their own ruling categories, marginalize the other, and escape accountability for their actions.⁶³

Illustrating how government documents may prove useful, but not necessarily because of their accuracy or objectivity, Indian literary theorist and feminist critic Gayatri Spivak, offers various examples of the problematic nature of the working of colonial records in India. One of the documents she focuses on for justifying her critique is the “Statistical and Geographical Memoir of the Hill Countries Situated Between the Rivers Tamas and Sutlej” (1811). Spivak

⁶¹ Thomas Richards, *The Imperial Archive: Knowledge and the Fantasy of Empire* (London and New York: Verso, 1993), 4.

⁶² *Ibid.*, 6.

⁶³ Ann Stoler, “Colonial Archives and the Arts of Governance,” *Archival Science* 2 (2002): 87-109.

explains and critiques how while this document was written by an Australian man in his early twenties with little knowledge of the area, “out of hearsay and interpreted conversations,” the resulting document became part of the authoritative colonial record and was treated as an objective and accurate account.⁶⁴ Similarly, Suzanne Keen investigates the proliferation in the past few decades of what she calls romances of the archive, or the attempts conducted by some nations to come to terms with the loss of empire so as to provide a way to explore and make sense of Britain’s colonial legacy.⁶⁵

Postcolonial studies is highly suspicious of the colonial record and thus could be defined, in part, as an attempt to locate and surface the voices of the silenced and marginalized within the documents produced by colonial powers. Focusing on the absences and the distortions of the archive as yet another form of power, Haitian historian Michel-Rolph Trouillot suggests a “four silences” approach to the archive(s) to critically examine the relationship among power, records, and the creation of historical knowledge. According to Trouillot, each moment within the archival knowledge production process — record-fact creation, archives creation, narrative creation, and history creation—is embedded with silences.⁶⁶ These silences materialize in the questioning of who has the power to tell and who is forced to remain silent. Trouillot identifies sources of corruption in the entire chain of record making and keeping including “selection of producers, selection of evidence, selection of themes, selection of procedures — which means, at

⁶⁴ Gayatri Chakravorty Spivak, “The Rani of Sirmur: An Essay in Reading the Archives,” *History and Theory* 24, No. 3 (1985), 263.

⁶⁵ Suzanne Keen, *Romances of the Archive in Contemporary British Fiction* (Toronto, Buffalo, and London: University of Toronto Press, 2001).

⁶⁶ Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston, MA: Beacon Press, 1995).

best the differential ranking and, at worst, the exclusion of some producers, some evidence, some themes, some procedures.”⁶⁷

This study is interested in examining these absences, however, I do not claim that the records that Indigenous peoples need to advance their sovereignty claims are completely nonexistent or absent. Although archival absence⁶⁸ is a real and very pervasive challenge for tribes gathering records for their petitions, another major problem is that the canon (the archive) does not recognize them as legitimate. And when things fall outside of the canon, or are incompatible with it, they are not necessarily silences but active exclusions — they are not included within the body of knowledge that is maintaining itself.

If the establishment and consolidation of the empire and later the settler nation-state were built on the accumulation of records and documents about the people and places under colonial rule, one of the strategies this study is willing to adopt is to assist colonized groups in reinterpreting and re-contextualizing the records’ content, thus calling into question the colonial, ‘established’ version of events. In other words, this study’s strategy follows Cook and Schwartz’ recommendation that archives should be seen as sites of contested meaning and of societal interpretation, and thus archivists should contest the nature of control of the past.⁶⁹ This study, then, builds upon the idea with which most critical archival theorists have been engaging, namely that archives can be both tools of oppression and emancipation.⁷⁰

⁶⁷ Ibid., 53.

⁶⁸ Anne Gilliland and Michelle Caswell. “Records and their Imaginaries: Imagining the Impossible, Making Possible the Imagined.” *Archival Science* 16 (2016).

⁶⁹ Cook and Schwartz, “Archives, Records, and Power,” 182.

⁷⁰ See: Verne Harris, “Archons, Aliens, and Angels: Power and Politics in the Archive,” in J. Hill, Ed., *The Future of Archives and Recordkeeping: A Reader* (London: Facet, 2011); Ketelaar, “Archival Temples, Archival Prisons;” Eric Ketelaar, “Recordkeeping and Societal Power,” in S. McKemmish et al., Eds., *Archives: Recordkeeping in Society* (Wagga Wagga: Centre for Information Studies, Charles Sturt University, 2005), 277–98. Also see: Randall

Looking at how records of government institutions and church missionary societies continually supply key information for many Aboriginal people in Australia (and other settler states) to reunite with their families, Keteelar asserts that records “may be instruments of power, but, paradoxically, the same records can also become instruments of empowerment and liberation, salvation and freedom.”⁷¹ Similarly, problematizing the often bureaucratically imposed ‘official’ meaning of records, Jeannette Bastian calls for a reading of colonial records “against the grain,” explaining that Census records, for example, might be read for their definitions of caste, medical records, for the ways in which medicine used race and culture to address disease, or colonial architecture, for its appropriation and re-conceptualizing of traditional culture.⁷² She makes a call for archivists to read context and understand records “as part of and contributing to that context,” offering, in addition, “descriptions and notes that accommodate all voices and all records.” In this way, she continues, archivists can counterbalance the official versions of the colonial archives with those other records of counter-narratives.⁷³

Stoler, on the other hand, calls for a return to reading colonial records “with or along the grain,” by focusing on the methods and strategies of the production of archives within the context of the institutions that produced them. Stoler suggests looking at colonial archives “as epistemological experiments rather than as sources [...] as cross-sections of contested knowledge

C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Chicago: Society of American Archivists, 2009); Anne Gilliland, “Neutrality, Social Justice and the Obligations of Archival Education and Educators in the Twenty-First Century,” *Archival Science* 11, No. 3–4 (2011): 193–209; Michelle Caswell, “Khmer Rouge Archives: Accountability, Truth, and Memory in Cambodia,” *Archival Science* 10, No. 1 (2010): 25–44.

⁷¹ Keteelar, “Archival Temples, Archival Prisons,” 229.

⁷² Bastian, “Reading Colonial Records Through an Archival Lens,” 273.

⁷³ *Ibid.*, 284.

[...] as both transparencies on which power relations were inscribed and intricate technologies of rule in themselves.”⁷⁴ These authors recognize that the colonial archive was shaped by the aims of its creators, and that the interpretation of colonial records always depends on the perspective of its interpreters, which is why meaning needs to be challenged, subverted or ‘unofficialized.’

This dissertation contributes to work on colonial archives and nation-building by closely examining the specific dynamics between information gathering, recordkeeping and political power as these play out in the federal recognition process and other federal Indian policies imposed by the U.S. and other settler-states upon Indigenous populations. While the role that colonial archives — and their power — play in Indigenous claims has been analyzed within the context of treaty history, Native title cases in court, and reparation and truth and reconciliation commissions, there is no study to date focusing on political recognition cases alone. Moreover, this study adds to the existent literature by looking at yet one more form of power at work in the archive: the imposition of (western) time and waiting as a form of power and bureaucratic violence that can be used as a weapon against Indigenous peoples’ claims.

Sovereignty, Indian identity, existence as a community, tribal governance, lineage, tribal membership and continued existence as a tribe cannot be defined by settler western ideologies, outside perspectives, nation-state political objectives and colonial recordkeeping practices. These practices, as Stoler points out, animate only certain political energies and expertise, converting a selection of social facts into qualified knowledge attending to some ways of knowing while refusing others.⁷⁵

⁷⁴ Stoler, “Colonial Archives and the Arts of Governance,” 87.

⁷⁵ *Ibid.*, 22.

3. Evidence in/and the archives

The Oxford English Dictionary's (OED) primary definition of evidence is: "the quality or condition of being evident; clearness, evidentness." This quality of evidence is often linked to the sense of sight. To be "in evidence," the OED continues, is to be "actually present, prominent, conspicuous." However, this primary definition of evidence has proven to be insufficient to most disciplines or professional fields. The OED's second definition of evidence gets closer to the way in which academic inquiry often perceives questions of evidence, this is, according to the word's legal use, where evidence is defined as "information, whether in the form of personal testimony, the language of documents, or the production of material objects, that is given in a legal investigation to establish the fact or point in question."

According to this second definition, evidence exists in relation to questions, or put another way, "questions are what lead from evidence-as-tool to evidence as the quality or condition of being evident."⁷⁶ Evidence, then, has a disciplinary specificity — disciplines have their own evidential protocols and canons, depending on what those questions are. What follows is an overview of how law, history, anthropology, and archival studies approach evidence and determine its terms, boundaries, and definitions. Overall, a reflection on the concept of evidence leads us to consider the standards of judgement to which we hold our own and other's understanding of things in the world.

Legal evidence

In its most limited sense, legal evidence is merely that which satisfies the criteria set out in the rules of evidence — the rules and legal principles that govern the proof of facts in a legal

⁷⁶ Matthew Engelke, "The Objects of Evidence." In M. Engelke, Ed., *The Objects of Evidence* (Malden, MA and Oxford, UK: Wiley-Blackwell, 2009), 1-20.

proceeding — and which is therefore admissible in a court of law. Broadly, the rules of evidence prescribe how evidence is presented, based on established criteria that determine a priori what classes of evidence are admitted or excluded.⁷⁷ Legal evidence, thus, is based on what Morris Forkosch terms, an “exclusionary and procedural character,”⁷⁸ and in determining the admissibility of (documentary) evidence, the rules in effect function as procedural mechanisms for assessing the trustworthiness of records.

Modern understandings of the different types of evidence used in civil and criminal justice, as well as the different methods to be used in obtaining and interpreting evidence rely in Common Law, and to a great extent on the continuing influence of the seminal works of two evidence scholars, British philosopher, economist and jurist Jeremy Bentham’s *Rationale of Judicial Evidence* (1827) and American legal scholar John Henry Wigmore’s *Science of Judicial Proof* (1937).⁷⁹ Bentham and Wigmore each sought to establish a broad concept of evidence upon which to build their respective theories of evidence and proof. Bentham identified the legal concept of evidence with the idea of evidence operative in science and in common life, primarily concerned with the general nature of evidence and its role in how we construct our knowledge of the real world. He broadly defines evidence as “any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact: a persuasion either affirmative or disaffirmative of its existence.”⁸⁰ Bentham’s theory of evidence moves in the direction of formulating evidence as a relation

⁷⁷ Morris Forkosch, “The Nature of Legal Evidence,” *California Law Review* 59 (1971): 1356–83.

⁷⁸ *Ibid.*, 1357.

⁷⁹ Jonathan Furner, “Conceptual Analysis: A Method for Understanding Information as Evidence, and Evidence as Information,” *Archival Science* 4 (2004): 233-265.

⁸⁰ Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 (London, 1827), 17–18.

between two different kinds of facts — principal facts or the facts to be proved and evidentiary facts, the facts that prove — presenting an alternative to rule-bound conceptions of evidence.

Wigmore, on the other hand, clarifies and further expands upon Bentham’s broader concept of evidence by considering the processes involved in analyzing evidence and by focusing on the relative nature of the term. Wigmore asserts that evidence signifies *the relation* between the two facts proposed by Bentham—between a proposition to be proved and a proposition that proves — implying that the “analysis of evidence involves the study of relations between propositions.” Referred to as Wigmore’s “theory of proof,” this study of relations between propositions entails a certain kind of inference involving the application of inductive logic, underscoring the analytical process involved in the use of evidence.⁸¹ These legal ideas provide a broader outlook on what evidence signifies, suggesting that it does not signify anything in and of itself, rather that it is always pointing or referring to something beyond itself.

In their article “Evidence in History and Law,” Carl Joynt and Nicholas Rescher seek to re-examine Bentham’s and Wigmore’s theories of evidence and proof respectively. Joynt and Rescher maintain that the narrowness of legal conceptions of evidence derive from the specific purpose of law, which is primarily adjudicative and secondarily investigative (whereas other disciplines, such as history, are primarily investigative), and from the function of law, which is a matter of proving a given fact in the course of resolving conflicting claims and reaching a decision “beyond a reasonable doubt.”⁸²

These authors begin to narrow the concept of evidence by suggesting that what constitutes ‘good evidence’ is always relative — in congruence with Wigmore’s approach — but

⁸¹ Jennifer Meehan, “Towards an Archival Concept of Evidence,” *Archivaria* 61 (2006): 127-146.

⁸² Carl Joynt and Nicholas Rescher, “Evidence in History and the Law,” *Journal of Philosophy* 56 (1959): 561-62.

specifically to the purposes for which the evidence is required, to the context of the disciplinary field and to the availability of information. Accordingly, they characterize evidential argument as an “inductive extension of the range of our information,” and evidential reasoning as a process of inferring one thing from another, in effect going beyond the assertive content of the evidential statement.⁸³ This narrowing serves to distinguish between what is ‘good evidence’ in different disciplines—what is ‘good evidence’ in terms of history, for example, and what is ‘good evidence’ in terms of law. While for historical purposes the evidential criteria are that of applied science, for legal purposes the evidential criteria are those of theory or pure science.⁸⁴ The difference, then, tends to be methodological.

A major critique of evidence scholarship is that the law of evidence (or the rules of evidence) is conceived of as coextensive with the subject of evidence. In *Rethinking Evidence*, William Twining argues that:

Most Evidence scholarship in the Anglo-American tradition... has concentrated on and been organized around the *rules* of evidence, especially the exclusionary rules, and their rather limited framework of concepts. Within that tradition, work on other aspects of evidence, proof and fact-finding has at best been fragmented and spasmodic.⁸⁵

Twining’s approach of “evidence, proof and fact-finding” (EPF) to the study of evidence serves to shift the emphasis from the legal rules of evidence governing admissibility to “questions about the collection, processing, presentation and weighing of information that reaches the decision-

⁸³ Ibid.

⁸⁴ Ibid., 564.

⁸⁵ William Twining, William, *Rethinking Evidence: Exploratory Essays* (Oxford: Blackwell, 1990), 26.

makers,”⁸⁶ beyond solely questions of law. Lyman Ray Patterson’s definition of evidence in “Evidence: A Functional Meaning” resonates with Twining’s concept of EPF and thus serves as well as useful basis for discussing a broader concept of evidence. He asserts that in order to devise the functional meaning of evidence, it is necessary to establish “what is evidence, why we use evidence, and when we use evidence.”⁸⁷

Based upon the various aspects relating to the “what, why and when” of evidence, Patterson defines evidence as “a proposition purportedly based on a fact and used as a basis for inference for confirming or denying a proposition based on a fact not directly perceived.”⁸⁸ This definition moves towards opening up the legal concept of evidence to include considerations of relations between propositions — more as in record and event, thus moving beyond the relations proposed by Bentham and Wigmore — and analysis of those relations in the treatment and use of evidence.

Historical evidence

Twining’s and Patterson’s approach to evidence are congruent to modern historical notions of evidence. From a historical point of view, evidence serves to determine the existence of temporal processes, social conditions at a certain period, or the content and sequence of events. Historical evidence is also used for interpretation and inference but may not be considered outright proof. Rather, it is the task of the interpreter to analyze and deduce larger scenarios from the evidence that remains.⁸⁹ That is, as historian James Wilkinson asserts, there is a distinction between

⁸⁶ Ibid.

⁸⁷ Lyman Ray Patterson, “Evidence: A Functional Meaning,” *Vanderbilt Law Review* 18 (1965): 878.

⁸⁸ Ibid., 887.

⁸⁹ Anderson, “The Footprint and the Stepping Foot.”

evidence and the remains of the past. The remains of the past constitute what survives of everything that ever happened and those remains that historians use in making histories are what constitute evidence.⁹⁰

This distinction suggests that the capacity of a thing or document to serve as evidence is inevitably dependent upon the very process that seeks to use it as such. Similarly, focusing on history's evidentiary protocols, in his short essay "Historical Evidence," R.G. Collingwood writes that "history is a science whose business is to study events not accessible to our observation, and to study these events inferentially, arguing to them from something else which is accessible to our observation, and which the historian calls "evidence" for the event in which he is interested."⁹¹ According to Collingwood's definition, nothing is evidence except in relation to some definite question, and that question needs to be nested in a specific discipline. Some critiques to Collingwood's approach to evidence argue that in history, evidence is not only defined by questions but also by competing pressures and regimes.⁹²

Anthropological evidence

It is relatively difficult to find anthropological definitions of evidence in an explicit or sustained manner. Matthew Engelke writes, "disagreements over interpretation, argumentation, and the provenance of anthropology hinge, at least in part, on the constitution of evidence."⁹³ Engelke

⁹⁰ James Wilkinson, "A Choice of Fictions: Historians, Memory, and Evidence," in *PMLA: Publications of Modern Language Association of America* 111 (1996): 80-92.

⁹¹ R.G. Collingwood, "Historical Evidence," in R.G. Collingwood, Ed., *The idea of history* (Oxford: University Press, 1946), 249-82.

⁹² James Chandler, Arnold Davidson, and Harry Harootunian, "Editors' Introduction," in J. Chandler, A. Davidson, and H. Harootunian, Eds., *Questions of Evidence: proof, Practice, and Persuasion across the Disciplines* (Chicago: University Press, 1994), 1-8.

⁹³ Engelke, "The Objects of Evidence," 2.

argues that evidence in anthropology should be seen as both an epistemological and a methodological concern. In anthropology, standards of judgement to questions of evidence are directly related to a sense of ‘being right.’ But, as Engelke asks, “how can we turn fieldwork experience — a highly personal, temporally bound, and intersubjective method for collecting data — into objects of evidence?”

As several anthropologists concerned with matters of evidence suggest, evidence is often linked to questions about truth.⁹⁴ Kirsten Hastrup argues that anthropological evidence “cannot be empirical knowledge in conventional positivist terms,”⁹⁵ because of the inevitable social nature of anthropology’s objects of study. Anthropology’s relation to the object, Kastrup continues, “is already instilled as part of the object when we begin to understand it [and so] evidence cannot be disengaged from the objective of the investigation.”⁹⁶ One way in which anthropologists become convinced of ‘getting it right’ is through the recognition of patterns in the social life they observe. The emergence of patterns in ethnographic work, anthropologists argue, speak for themselves and as such, can be circulated as *reasonably* stable pieces of evidence. Thus, while anthropologists may not be able to point to evidence as a clearly bound object, they trace its forms in the flow of social life.⁹⁷

⁹⁴ M. Bloch, “Where did Anthropology go? Or the need for human nature,” in M. Block, Ed., *Essays on cultural transmission*, (Oxford: Berg, 2005), 1-20; Anthony Good, “Cultural Evidence in Courts of Law,” in M. Block, Ed., *Essays on Cultural Transmission*, 44-57; Martin Holbraad, “Definitive Evidence,” in M. Block, Ed., *Essays on Cultural Transmission*, 89-104; Christopher Pinney, “The Prosthetic Eye: Photography as Cure and Poison,” in M. Block, Ed., *Essays on Cultural Transmission*, 31-43.

⁹⁵ Kristen Hastrup, “Getting it Right: Knowledge and Evidence in Anthropology,” *Anthropological Theory* 4 (2004): 461.

⁹⁶ *Ibid.*, 468.

⁹⁷ Engelke, “The Objects of Evidence,” 9.

Michael Carrithers, who first set out the pattern argument with the concept of evidence, argues that for something to be a pattern it has to be recognizable as such at the intersubjective level. It has to be consensible, which he defines as “the ability of people to perceive things in common, to agree upon and to share perceptions.”⁹⁸ In other words, in order to work as evidence, patterns need to be publicly intelligible. Therefore, when human patterns emerge out of ethnographic ones, confirmed as such by a community of critical readers, and in a sense independent of the intentions of an author, they gain shape as ethnographic evidence.⁹⁹ Still, Engelke argues, this pattern approach to evidence only ensures that sense of “getting it right,” and cannot be treated as translatable, universal or cross-cultural. This might be one of the main problems with evidence in the anthropology field.

Archival evidence

Traditionally, emphasis on evidence in archival thought has often intended to link recordkeeping to the worlds of law, governance and bureaucracy, thus mapping archival conceptions of evidence onto limited legal requirements based on the above-mentioned rules of evidence. As an archival resource, “the legal rules provide archivists with a language of purpose for articulating the necessity of standards for record trustworthiness, as well as a set of specific requirements from which to formulate recordkeeping standards.”¹⁰⁰

Both archival scholars and practitioners have since the inception of the discipline been interested in defining and clarifying the concept of evidence. Although archival theory does not

⁹⁸ Michael Carrithers, “Is Anthropology Art or Science?”, *Current Anthropology* 31 (1990): 261-82, 266.

⁹⁹ Engelke, “The Objects of Evidence,” 11.

¹⁰⁰ Meehan, “Towards an Archival Concept of Evidence,” 133.

explicitly formulate a concept of evidence per se, its conventional meaning is based upon certain assumptions about the nature of records and their capacity to serve as first-hand evidence, or as archival scholar Heather MacNeil has put it: “the assumption that a unitary and stable relationship exists between a representation (that is a record) and its referent (i.e., a pre-existent reality).”¹⁰¹ Based on those assumptions, records are seen as a special kind of evidence, where their very existence is construed as evidence of past activities or events.

In her book *Trusting Records: Legal, Historical, and Diplomatic Perspectives* — one of the few manuscripts fully dedicated to the historiography and conceptualizations of evidence within the archival field¹⁰²— Heather MacNeil introduces and examines the methods and rules of the legal, historical, and diplomatic disciplines for assessing record trustworthiness in law and history from the sixth century to the present. MacNeil argues that archival ideas of evidence are direct descendants of the science of diplomatics, advanced by Jean Mabillon in the late 17th century. Diplomatics, as defined by Mabillon:

Looked at the document conceptually as embodying a system of both external and internal elements consisting of *acts*, which are the determinant cause of documentary creation; *persons* who concur in its formation; *procedures*, which are the means by which acts are carried out; and the *documentary form* itself which binds all the elements together.¹⁰³

¹⁰¹ Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives* (Dordrecht and Boston, 2000), 43.

¹⁰² The other work that offers a conceptualization of evidence within the information field is Jonathan Furner’s 2004 article “A Conceptual Analysis.” Furner’s piece, however, is not intended as a review of prior analyses of the concept and does not attempt to provide a comprehensive set of citations to previous work on evidence. Rather, it identifies some of the more important ideas about evidence that are characteristic of different fields of inquiry, namely, science, law, history and archival science.

¹⁰³ MacNeil, *Trusting Records*, 21 (Emphasis original).

MacNeil argues for a strong connection between the notion of evidence implied by Mabillon's diplomatics and the epistemological writings made by empiricists of the time, such as John Locke. Both supported the view that one's degree of confidence in the truth of a statement should be based on the strength of the evidence in support of that statement. MacNeil argues that this tradition strongly influenced eighteenth- and nineteenth-century legal evidence scholarship, historiography and conceptions of evidence within the archival field.¹⁰⁴

Modern thought on the nature of archival evidence is rooted in the work of two main figures of archival practice: Hilary Jenkinson and Theodore Schellenberg.¹⁰⁵ Jenkinson's argument was based on what he termed "the sanctity of evidence" or the idea that evidentiarieness is the essence of archival records. For Jenkinson, there was a universal, objective link between premise and conclusion; an essential objectivity and truthfulness of the archives as a record of "what really happened." In his article "Evidence, Memory, Identity and Community," Terry Cook reminds us that archival central professional concepts of *respect de fonds*, original order, and provenance were designed with the clear intent to preserve records as evidence "of the functional-structural context and actions that caused their creation."¹⁰⁶ The archivist's alleged transparency, impartiality, objectivity and neutrality, then, was thought to allow records to serve as trustworthy evidence "of the facts, actions, and ideas of which they bear witness, to which they are, in short, evidence."¹⁰⁷ Archives, consequently, became a sort of descriptive science

¹⁰⁴ Ibid.

¹⁰⁵ Terry Cook, "What Is Past Is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift," *Archivaria* 43 (1997). See also: Furner, "A Conceptual Analysis."

¹⁰⁶ Terry Cook, "Evidence, Memory, Identity, and Community," *Archival Science* 13 (2013): 100.

¹⁰⁷ Ibid.

with the purpose of illuminating the contextual origin of records in order to ‘keep safe’ or even preserve records’ properties as evidence.

Schellenberg, on the other hand, articulated a distinction between the evidential and the informational value of a record, where a record’s evidential value is a sign of its utility in documenting the circumstances of its creation, and its informational value reflects the importance of its symbolic content.¹⁰⁸ His idea of evidence emerged in response to the over-documentation the discipline was facing in the mid-twentieth century due to appraisal practices at the time. According to modern archival appraisal, archivists have the role of researching and understanding “the complex nature of the functions, structures, processes, and related contexts of creation and contemporary use of records, and to interpret their relative importance.”¹⁰⁹ As such, they hold authority to determine what will be kept, destroyed or neglected (Like Derrida’s archons). This new figure of the archivist slowly but increasingly starts moving away from being an impartial, neutral guardian or “objective keeper of evidence.”¹¹⁰

In the late twentieth century, Canadian archival scholars led by Hugh Taylor and Terry Cook and Australian archival scholars led by Sue McKemmish and Frank Upward respectively, gave birth to what could be identified as a “neo-Jenkinsonian perspective on archival best practice” that restored Jenkinson’s principle that archivists should select what to keep and what not to keep, based on “evaluations of the strength of the relationships between records and the contexts in which they were originally created.”¹¹¹ Taylor and Cook promoted a new focus on

¹⁰⁸ Yeo, “Concepts of Record (1).”

¹⁰⁹ Cook, “Evidence, memory, identity, and community,” 101.

¹¹⁰ Ibid.

¹¹¹ Furner, “A Conceptual Analysis,” 245-246.

the macro, social and contextual realities that give records their meaning, further promoting the agency of the archivists concerning issues of provenance.¹¹² McKemmish and Upward, on their part, have been concerned with emphasizing the importance of archives as the primary means by which societies maintain the accountability of their institutions,¹¹³ placing institutional archival evidence “as an essential component of any functional democracy.”¹¹⁴

In the last two decades, some archivists have challenged the “straightforward, legalistic, and traditional archival definitions of evidence based on strict provenance.”¹¹⁵ Arguing that, “what archives keep and what archives do is socially constructed, and grounded in time and space,”¹¹⁶ critical archival theorists have moved away from the notion that records are inherently a “special” and impartial kind of evidence, and toward a relationship between record and evidence based on “the analysis of relationships and contexts, and from which the record can be viewed as having multiple, even conflicting meanings.”¹¹⁷ Archival scholar Laura Millar

¹¹² See, for example: Tom Nesmith, “Hugh Taylor’s Contextual Idea for Archives and the Foundation of Graduate Education in Archival Studies,” in Barbara L. Craig, Ed., *The Archival Imagination: Essays in Honour of Hugh A. Taylor* (Ottawa, 1992), 13–37; and Terry Cook, “Mind Over Matter: Towards a New Theory of Archival Appraisal,” in Craig, Ed., *The Archival Imagination*, 38–70.

¹¹³ Sue McKemmish and Frank Upward, Eds., *Archival Documents: Providing Accountability Through Recordkeeping* (Melbourne, 1993).

¹¹⁴ Furner, “A Conceptual Analysis,” 246.

¹¹⁵ Cook, “Evidence, Memory, Identity, and Community,” 105.

¹¹⁶ Cook and Schwartz, “Archives, Records, and Power,” 184. See also: Brien Brothman, “Declining Derrida: Integrity, Tensegrity, and the Preservation of Archives from Deconstruction,” *Archivaria* 48 (1994): 64–88; Terry Cook, “Fashionable Nonsense or Professional Rebirth: Postmodernism and the Practice of Archives,” *Archivaria* 51 (2001): 14–35; Harris, “The Archival Sliver;” Jeannette A. Bastian, “Taking Custody, Giving Access: A Postcustodial Role for a New Century,” *Archivaria* 53 (2002): 76–93; Anne J. Gilliland, “Moving Past: Probing the Agency and Affect of Recordkeeping in Individual and Community lives in post-conflict Croatia,” *Archival Science* 14 (2014): 249–274; Ellen Ndeshi Namhila, “Content and Use of Colonial Records: An Under-Researched Issue,” *Archival Science* 16, No. 2 (2016): 111–23.

¹¹⁷ Wendy Duff and Jefferson Sporn, “The Question of Oral Testimony in the Archival Concept of Evidence.” In Jeannette Bastian and Elizabeth Yakel Eds. *Defining a Discipline: Archival Research And Practice in the Twenty-First Century: Essays in Honor of Richard J. Cox* (Chicago: SAA), 29.

contends that evidence is a social construct. Just like financial currencies or geopolitical boundaries, she writes, there is no “right” way to create a record. People will decide what they will document, how they will document it, and why they will document it, according to their own needs, technologies, politics, cultures, and customs.¹¹⁸

Discussions interrogating the association between records and evidence are interested in looking at the contingencies that make the record trustworthy or evidentiary. While acknowledging that evidence remains a critical dimension based on which archivists should assess the value of archival records, these discussions simultaneously see evidence as “contingent in time, place, technology, ideology and power,”¹¹⁹ and therefore as contextual, relational, dynamic and event-oriented. MacNeil further explains: “The criteria [that records] establish for determining what counts as true are themselves the product of historical, cultural, and political choices and do not exhaust all the possible ways of looking at the world or at the relationship between records and the world.”¹²⁰ Some of the main exponents of these interrogations and their approaches to evidence are presented below. My goal here is not to be comprehensive but to point out the ones that most directly speak to the concerns of this dissertation’s project and serve as guideposts for ideas in this study.

In his article examining the meaning(s) of a record and its relationship to evidence, “Concepts of Record (1),” Geoffrey Yeo discusses the challenges of defining records in terms of evidence or information. Yeo raises the question as to whether records and evidence even belong to the same ontological category (record is a count noun and evidence is not — the question

¹¹⁸ Laura Millar, *A Matter of Facts*, 2019, 39.

¹¹⁹ Cook, “Evidence, Memory, Identity, and Community,” 105.

¹²⁰ MacNeil, *Trusting Records*, 45.

“how many” cannot be asked of it). To avoid the bold and problematic statement that records *are* a kind of evidence, he prefers to argue that records *provide* evidence, or that evidence *can be obtained by using them*.¹²¹ Here, evidence is understood as just one of the many affordances that records provide, standing in the same category as “memory, accountability, legitimization of power, sense of personal or social identity and continuity, and the communication of such benefits across space and time.”¹²²

Similarly, Brien Brothman advocates the view that evidence does not simply “exist” or “reside in objects;” someone has to “discover and use records for a particular purpose ... Evidence ... arises out of processes of social negotiation after the fact.”¹²³ In “Afterglow,” he critiques the extent to which the concepts of record and evidence have become coterminous in archival discourse, arguing that although it is possible “to put records into evidence; one cannot set out to put evidence into records.”¹²⁴ Brothman seeks to overcome the limitations of legal conceptions of evidence by highlighting the elements of time and difference that come into play when concepts of record and evidence are put into conversation. To this end, the ‘afterglow metaphor’¹²⁵ serves his purpose of further distinguishing between “two social acts: the making and keeping of records and the gathering and making of evidence,”¹²⁶ and therefore expand the

¹²¹ Yeo, “Concepts of Record (1).”

¹²² Ibid.

¹²³ Brothman, “Afterglow,” 334.

¹²⁴ Ibid., 311.

¹²⁵ Ibid., 313. Although afterglows clearly follow initial glows, the distinction between glow and afterglow, or between effect and after-effect, is not always easily discernible.

¹²⁶ Ibid., 335.

scope of archival functions within a “use-and-interpretation -of-evidence -context.”

Consequently, evidence itself, in Brothman terms, is socially contingent.

Jennifer Meehan builds off those discussions maintained by Yeo, Brothman, and others to interrogate the association between records and evidence as well. She argues that evidence is a “relationship that can be associated with a record, but that is not, and cannot be, contained within a record.” Rather, she writes that the relationship between record and evidence is “steeped in contextualities, impressed upon by provenance, relationship with other records, arrangement and description, and much more. She writes: “Neither containing evidence, nor facts per se, a record merely refers to events (or facts) outside itself. The process of arriving at an understanding of the events to which the record refers is one of inference.”¹²⁷ In reconstituting the relationship between record and evidence, she concludes, “space opens up for considering different types of records and archival activities that are usually excluded from discussions of evidence that rely too heavily on legal concepts and the rules of evidence.”¹²⁸

Also concerned with the contingencies and temporalities of the record in relation to evidence, Kimberly Anderson brilliantly explores how western concepts of time necessarily impact concepts of records and archival evidence. She critiques the legal definition of evidence for holding “particular notions of time or record which are usually grounded in a physical (as understood in Western science) rather than a religious or spiritual cosmology.”¹²⁹ Legal frameworks for evidence, she explains, give greatest credibility to that which can be empirically

¹²⁷ Jennifer Meehan, “Towards an archival concept of evidence,” *Archivaria* 61 (Spring 2006): 140.

¹²⁸ *Ibid.*, 144.

¹²⁹ Kimberly Anderson, “The Footprint and the Stepping Foot: Archival Records, Evidence, and Time.” *Archival Science* 13 (2013).

observed, logically tested or vetted by a “relevant” scientific community, making it unlikely to be extended to include an expert Indigenous community, for example, using other ways of determining knowledge. Anderson strongly critiques the traditional document-oriented definition of record, arguing that it only allows for temporal evidence of past moments that are then frozen and carried through time via the record. Understanding evidence as closely tied to religion, knowledge of being, and perceptions of reality, she advocates for dynamic event-oriented records, which instead of freezing the past transmit processes through time, recognizing records in their socio-cultural context. This expansion of the concept of record — where they provide evidence through a specific relationship to time — Anderson argues, allows for the expansion of temporal evidences, including evidence provided by those who hold worldviews not operating on a linear, sequential time model.¹³⁰

In line with Anderson, archival scholar Shannon Faulkhead (Koorie) reflects on the impact that the dichotomy between text and orality can have upon oral cultures and communities living within societies where settler colonial systems of governance prioritize text-based information and knowledge. Faulkhead suggests a Koorie definition of a record as “any account, regardless of form, that preserves memory or knowledge of facts and events.”¹³¹ A document, Faulkhead continues, can be “a document, an individual’s memory, an image, or a recording. It can also be an actual person, a community or land itself.”¹³² This expansion of the definition of the record unsettles canonical ideas of textual documents as the only legitimate sources of

¹³⁰ Ibid.

¹³¹ Shannon Faulkhead, “Connecting Through Records: Narratives of Koorie Victoria,” *Archives and Manuscripts* 37 (2009): 68.

¹³² Ibid.

evidence. As they preserve memory, facts, and events, Koorie records are considered evidence of the past, a way of knowing that renders land, earth, and sea “as not just the backdrop to mythic history, but as the producer(s) of that history,”¹³³ and the human beings inhabiting that land as the required referents that bring those stories — and evidences — out as oral records.

Refusing to take the existence and production of archival evidence for granted, in a co-authored piece, archival scholars Anne Gilliland and Michelle Caswell offer the framework of what they call “imagined records or archival imaginaries,” to counter and resist dominant legal, bureaucratic, historical and forensic notions of evidence that so often “fall short in explaining the capacity of records and archives to motivate, inspire, anger and traumatize.”¹³⁴ Arguing for the explicit acknowledgement in both archival theory and practice of the “roles of individual and collective imaginings about the absent or unattainable archive and its contents,”¹³⁵ the authors see the absence of records as evidence of what does not exist, where the “nothing” or “no evidence” is in itself evidence of the regime or system that caused that absence. Imagined records, thus, can function in ways similar to actual records “because of the weight of their absence or because of their aspirational nature.”¹³⁶ Through “archival stories,” Gilliland and Caswell demonstrate that, “outside the realms of legal and bureaucratic evidence it can be demonstrated, time and again, that whatever society, agency, community or individual acts upon or invests in as a record, indeed functions in that context as a record.”¹³⁷ This approach

¹³³ Ibid., 69.

¹³⁴ Anne Gilliland and Michelle Caswell, “Records and their Imaginaries: Imagining the Impossible, Making Possible the Imagined,” *Archival Science* 16 (2016): 53.

¹³⁵ Ibid., 55.

¹³⁶ Ibid., 53.

¹³⁷ Ibid., 57.

contributes to a reconceptualization of the archives as institutions that can make meaning of past violations, crimes and abuse when legal systems fail to grant justice.¹³⁸

Finally, pointing to the opposite direction but also questioning the reliability and authenticity of evidence produced in irregular and/or biased record-keeping processes (as is the case of settler-state produced records), Anne Gilliland argues for an imagined alternative documentary reality, one that — from a post-truth approach — calls for the production of new documents, thus challenging existing ones, as a form of refusal to accepting all customary guarantees and tests of the trustworthiness of documentary evidence.¹³⁹ Gilliland’s focus on the consequences that the assessments of irregular and/or biased kinds of evidence can have in humanitarian contexts is helpful for thinking about how those same “irregularities” can become a central factor in federal recognition petitions and other tribal sovereignty claims.

The authors cited above and their reflections all suggest accommodations to archival theory that problematize dominant and colonial conceptions of evidence and undermine the supremacy of legal and historical epistemologies that imbue written/archival/documentary and ‘official’ records with the sole authority to establish facts about the past. These alternative approaches to evidence and, therefore, to what counts as ‘archival’ can be translated into practice and eventually intervene tribal law and policy, helping the state and tribes alike to better understand and implement recognition and other sovereignty petitions.

This dissertation contributes to the study of evidence by unsettling its legal, bureaucratic nature, using archival expertise itself to challenge the presumed legitimacy and authority of extant non-Indigenously-created historical evidence contained in settler-colonial archives, and

¹³⁸ Ibid.

¹³⁹ Anne Gilliland, “Evidence and Exigency: Reconstructing and Reconciling Records for Life after Conflict,” in K. Gracy, Ed., *Emerging Trends in Archival Science* (Lanham, MD: Rowman & Littlefield, 2017), 1-26.

exposing the fact that settler-colonial archives are inherently problematic sources of historical knowledge — what gets counted as evidence and how evidence is stored constitute a continuation of the state’s settler-colonial project of eradicating Native subjects. The dissertation advocates for a broadened definition of what qualifies as evidence (and therefore as ‘archival’) in recognition petitions, land claims and repatriation practices among other Indigenous demands.

4. Anticolonial archival interventions

There has been much theorizing about how to decolonize the archive(s), by both Indigenous and non-Indigenous archival scholars, activists, and practitioners over the past several decades. This theorizing has included reflections on the role of recordkeeping in colonial societies as well as the stories that records themselves have to tell about those societies. Resulting decolonial efforts have drawn extensively on Linda Tuhiwai Smith’s decolonizing methodologies framework in research and education and have focused on the broader idea of “replacing [w]estern ways of managing tribal archives with those rooted in the Indigenous epistemological traditional ways of knowing and stewarding collections.”¹⁴⁰

Over the past twenty years there has been increasing recognition and understanding by archival scholars and practitioners — especially Indigenous ones — that trust, or *distrust*, are at the heart of the disputes over the access, use, and ownership of archival records by or about Indigenous peoples¹⁴¹ and consequently, a growing body of critical archival scholarship from settler states such as Australia, the U.S. and Canada is progressively seeking to respond to the

¹⁴⁰ Jennifer O’Neal, “‘The Right to Know’: Decolonizing Native American Archives,” *Journal of Western Archives* 6, No. 1 (2015): 1–17.

¹⁴¹ Sue McKemmish, Shannon Faulkhead and Lynette Russell, “Distrust in the Archive: Reconciling Records,” *Archival Science* 11, No. 2–4 (2011): 211–239.

multi-faceted calls of Indigenous peoples for a decolonization of the archive, tending to shift, at least partially, the terrain of the conversation from western perspectives toward Indigenous knowledge systems, codes, and protocols, as well as the affirmation of Indigenous sovereignty and/or nationhood,¹⁴² self-determination, and claims over ancestral lands, cultural heritage, and self-representation.¹⁴³

These anticolonial ideas are being predominantly materialized by the rethinking of issues concerning the provenance of records, who should be recognized as their author/creator, who should have the right to own them, manage them, access them, reinterpret and describe them, and finally who should control all of these actions. Archivists who have taken a critical stance have argued, for example, that an anticolonial definition of provenance should include all entities involved in the context of record formation and that tribal records should be subject to a “sui generis ownership right,”¹⁴⁴ where Indigenous people are considered to own all information collected and created from and about them. They have also argued that tribes have the inherent “right to know”¹⁴⁵ and to access settler-colonial archives, and that as subjects of these archives,

¹⁴² Taiaiake, *Peace, Power, Righteousness*.

¹⁴³ See: Allison Boucher Krebs, “Native America’s Twenty-First-Century Right to Know,” *Archival Science* 12, No. 2 (2012): 173–190; Kirsten Thorpe, “Indigenous Records: Connecting, Critiquing and Diversifying Collections,” *Archives and Manuscripts* 42, No. 2 (2014): 211–14; O’Neal, “‘The Right to Know;’” “Decolonising Archives,” special issue on settler archives on *Settler Colonial Studies* 5 No. 2 (2015); Bastian, Aarons and Griffin, Eds., *Decolonizing the Caribbean Record*; and the special issue in *Archival Science* “Towards a Decolonial Archival Praxis,” edited by Jamila Ghaddar and Michelle Caswell.

¹⁴⁴ Livia Iacovino, “Shaping and Reshaping Cultural Identity and Memory: Maximising Human Rights Through a Participatory Archive,” *Archives and Manuscripts* 43, No. 1 (2015): 29–41; Livia Iacovino, “Rethinking Archival, Ethical and Legal Frameworks for Records of Indigenous Australian Communities: A Participant Relationship Model of Rights and Responsibilities,” *Archival Science* 10, No. 4 (2010): 353–372.

¹⁴⁵ Vine Deloria, “The Right to Know: A Paper prepared for the White House Pre-Conference on Indian Library and Information Services on or Near Reservations” (Washington, D.C.: Office of Library and Information Services, U.S. Department of the Interior, 1978), 13-17. See also: Krebs, “Native America’s Twenty-First-Century Right to Know” and O’Neal, “‘The Right to Know.’”

tribes should have the right to correct inaccuracies contained in the record and in the records' metadata, advocating for a participatory approach to archives that fosters multivocality and the validation and legitimization of collective knowledge. For all these purposes, increasing collaborations between tribal and non-tribal repositories have been established, recognizing that information is critical to the sovereignty and self-determination of tribes.¹⁴⁶

In the U.S., movements and demands of tribes requesting access to their records at various non-Native repositories — archives, universities, museums and federal agencies — exploded in the late 1970s and 80s as a result of what is known as the “restoration era,” prompted by the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638)¹⁴⁷ and the enactment of the federal recognition policy in 1978 (25 C.F.R. Part 83). As tribes began working hard to gather ‘official’ records as evidence for their recognition petitions they realized that, in addition to wanting access to records by and/or about them, they wanted to control them, own them, and steward them in their own tribal repositories.

¹⁴⁶ Iacovino, “Shaping and Reshaping Cultural Identity and Memory;” Iacovino, “Rethinking Archival, Ethical and Legal Frameworks for Records of Indigenous Australian Communities;” McKemmish, Faulkhead, and Russell, “Distrust in the Archive;” Kirsten Thorpe, “Indigenous Records: Connecting, Critiquing and Diversifying Collections,” *Archives and Manuscripts* 42, No. 2 (2014): 211–214; Kim Christen, “Tribal Archives, Traditional Knowledge, and Local Contexts: Why the ‘s’ Matters,” *Journal of Western Archives* 6, No. 1 (2015); Kim Christen, “Relationships not Records: Digital Heritage and the Ethics of Sharing Indigenous Knowledge Online,” in J. Sayers, Ed., *Routledge Companion to Media Studies and Digital Humanities* (New York, NY: Routledge, 2018), 403–412; Michelle Caswell, “Defining Human Rights Archives: Introduction to the Special Double Issue on Archives and Human Rights,” *Archival Science* 14, n. 3–4 (2014): 207–13; Anne Gilliland, “Introduction: Contemplating Communities and Boundaries,” (Forthcoming); Sue McKemmish; Livia Iacovino and Lynette Russell, “Editors’ Introduction to Keeping Cultures Alive: Archives and Indigenous Human Rights,” *Archival Science* 12, No. 2 (2012): 93–111; Sue McKemmish, Shannon Faulkhead, Livia Iacovino and Kirsten Thorpe, “Australian Indigenous knowledge and the archives: embracing multiple ways of knowing and keeping,” *Archives and Manuscripts* 38, No. 1 (2010): 27–50; Jane Anderson and María Montenegro, “Collaborative Encounters in Digital Cultural Property: Tracing Temporal Relationships of Context and Locality,” in J. Anderson and H. Geismar, Eds., *The Routledge Companion to Cultural Property* (New York, NY: Routledge, 2017).

¹⁴⁷ Put simply, the act authorized the Secretary of the Interior and other government agencies to enter into contracts with, and make grants directly to, federally recognized Indian tribes.

More recently, over the past twenty-five years, engagement has increased surrounding the care and preservation of Indigenous cultural heritage, most notably concerning collections housed at non-tribal museums, which culminated in the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990.¹⁴⁸ While this law addressed several urgent needs regarding Native American cultural heritage — a legal process, guidance and funding to tribal communities for the repatriation of human remains, funerary and sacred objects, and objects of cultural patrimony, and fostering a significant increase in collaboration between curators, anthropologists, and tribal communities regarding the care of these items — the law did not provide guidance or regulations for the care and preservation of Native archival collections held at non-tribal repositories.

As a consequence, a movement led by both Native and non-Native archivists, librarians, museum professionals, historians and anthropologists emerged in the late 1990s and early 2000s aimed at finding solutions to this archival gap in NAGPRA. Spearheaded by Karen Underhill at Northern Arizona University, the group drafted the *Protocols for Native American Archival Materials* (PNAAM) in 2006, which identify professional best practices for the culturally responsive care and use of American Indian archival material held by non-tribal organizations.¹⁴⁹ The PNAAM stand for an important move towards archival decolonization,

¹⁴⁸ Native American Graves Protection and Repatriation Act, 25 U.S.C., §§3001-3013, (2006). See also: Jack F. Trope and Walter R. Echo-Hawk, “The Native American Graves Protection and Repatriation Act: Background and Legislation,” in D. Mihesuah, Ed., *Repatriation Reader: Who Owns American Indian Remains?* (Lincoln, NE: University of Nebraska Press, 2000), 123-168.

¹⁴⁹ First Archivists Circle, *Protocols for Native American Archival Materials*, <http://www2.nau.edu/libnap-p/protocols.html> (accessed December 1, 2018). For a full overview of the Protocols see: Karen J. Underhill, “Protocols for Native American Archival Materials,” *RBM: A Journal of Rare Books, Manuscripts, and Cultural Heritage* 7, n. 2 (2006): 134-145. See also: Jennifer O’Neal, “Respect, Recognition, and Reciprocity: The Protocols for Native American Archival Materials,” in D. Daniel and A. Levi, Eds., *Identity Palimpsests: Archiving Ethnicity in the US and Canada* (Sacramento, CA: Litwin Press, 2014), 125-142; Kimberly Christen, “Opening Archives: Respectful Repatriation,” *The American Archivist* 74 (2011): 185-210; Kay Mathiesen, “A Defense of Native

however, as any other protocol, they are not enforceable,¹⁵⁰ rather, they are cultural guidelines that function as a means for changing people's understanding of an issue. In this case in particular, the PNAAM are being utilized by non-tribal and tribal institutions¹⁵¹ as a strategic way of increasing reflective behavior and awareness around Indigenous rights in cultural knowledge and resource use.

Perhaps one of the first most notable models and examples of decolonization work effectively implemented in the U.S. emerged at the University of Oregon. The Southwest Oregon Research Project (SWORP), initiated in 1995 by Coquille Indian tribal member and organizer George Wasson Sr., tribal knowledge keepers and local scholars, was aimed at returning copies of widely scattered national documents pertaining to the history of the Native peoples of Western Oregon.¹⁵² The project reversed the trend of the late 19th and early 20th centuries of collecting information from tribes with little or no reciprocity. Today, participant tribes are using the information contained in the returned documents to write histories, restore cultural identities and support tribal sovereignty. Multiple other 'archival return' projects have been conducted in the U.S. in the last two decades, driven by the values, ethics and practices advanced by the PNAAM.

Americans' Rights Over Their Traditional Cultural Expressions," *The American Archivist* 75 (2012): 456-481; Gilliland, "Introduction: Contemplating Communities and Boundaries," (Forthcoming).

¹⁵⁰ Nor are they likely the desired end-product. The introduction of protocols in other contexts, such as Australia, have been about gradually tightening up their scope and requirements as people become more accepting and accustomed to working with them.

¹⁵¹ Eighteen years after the PNAAM were drafted, the Society of American Archivists' Council agreed to endorse the protocols, acknowledging that "endorsement of these Protocols is long overdue." <https://www2.archivists.org/statements/saa-council-endorsement-of-protocols-for-native-american-archival-materials>

¹⁵² David Lewis, "Natives in the Nation's Archives: The Southwest Oregon Research Project," *Journal of Western Archives* 6, No.1, article 4 (2015); O'Neal, "The Right to Know," 12.

Many of these projects are taking the form of tribal digital archives, controlled and managed by tribal members and based at tribal institutions.

One of the initiatives that has allowed for these ‘digital return’¹⁵³ projects to materialize and succeed is the Mukurtu Content Management System (CMS), an open source platform that allows Indigenous communities to define privacy settings and levels of access to and circulation of their digital heritage materials according to local cultural protocols, through an interface that links each community member to each piece of content via an extensive user profile and a rich content tagging upload process.¹⁵⁴ Within Mukurtu, the process of defining item-level sharing protocols results in a unique ‘mini-archive’ for each individual member of the community, which overall represents that community’s approach to privacy. It is important to note here that the practice of digitally returning cultural materials to the communities of origin is understood as a set of political, social, and cultural practices that cede decision making about access, narration, curation, and circulation to the original stewards of cultural materials, thus affecting the documentation, recording, metadata, as well as the publication of the materials involved.

Some of the most successful digital return projects powered by Mukurtu CMS are: the Plateau Peoples Web Portal, a collaborative project based on a Memorandum of Understanding (MOU) between Washington State University, multiple museums in the U.S. and eight Plateau

¹⁵³ Here, digitally returning cultural materials to the communities of origin is understood as a set of political, social, and cultural practices that cede decision making about access, narration, curation, and circulation to the original stewards of cultural materials, thus affecting the documentation, recording, metadata, as well as the publication of the materials involved.

¹⁵⁴ Christen, “Opening Archives.”

tribes;¹⁵⁵ the Penobscot Nation’s tribal cultural resources site,¹⁵⁶ the Passamaquoddy Tribe’s digital archive containing the Jesse Walter Fewkes collection of wax cylinder recordings (1890s) held at and digitized by the Library of Congress;¹⁵⁷ and the Sípnuuk Digital Library, Archives and Museum, which manages, shares and enhances “understanding of Karuk history, language, traditions, natural resource management and living culture following the cultural protocols of the Karuk Tribe.”¹⁵⁸ These are all examples of initiatives in cultural and intellectual property management that support capacity building of Indigenous knowledge and research.

Currently there are seven Mukurtu Hubs — six in the U.S. and one in Australia — dedicated to providing regional support and training to tribal communities and organizations interested in setting up their own localized Mukurtu sites. Additionally, these Hubs offer localized training/workshops for developing and maintaining Mukurtu sites, assistance with digital collection management, and assistance with digitization projects. Each Hub creates “user stories” based on the needs of their community users (Spokes), ensuring that future development within Mukurtu is driven directly by community needs as they define and document them. One of these Hubs is based at UCLA’s American Indian Studies Center (AISC) and will be assisting the Tataviam and approximately ten other tribes in the region with their archival projects.¹⁵⁹

¹⁵⁵ <https://plateauportal.libraries.wsu.edu>. See also: Christen, “Opening Archives;” Christen, “Tribal Archives, Traditional Knowledge, and Local Contexts.”

¹⁵⁶ Their site is not public yet, but for more information see: Jane Anderson, “Negotiating Who “Owns” Penobscot Culture,” *Anthropological Quarterly* 91, No. 1 (2018): 267–306.

¹⁵⁷ <http://passamaquoddypeople.com>.

¹⁵⁸ <https://sipnuuk.karuk.us>. See also: Karuk Tribe, Lisa Hillman, Leaf Hillman, Adrienne Harling, Bari Talley and Angela McLaughlin, “Building Sípnuuk: A Digital Library, Archives, and Museum for Indigenous Peoples,” *Collection Management* 42, No. 3-4 (2017): 294-316.

¹⁵⁹ I am the project manager of the California Mukurtu Hub: <https://canativehub.ucla.edu>

In addition to digital return work, tribal archives training and opportunities for professionals has transformed exponentially over the course of the past fifteen years. Starting with the first Western Archives Institute in 2003, hosted by the State of California and devoted to training tribal archivists, a series of educational instances followed, like the first national gathering for tribal archives, libraries, and museum held at the Arizona State Museum two years later. This foundational work led to further conferences, trainings, and the eventual establishment of the Association of Tribal Archives, Libraries, and Museums (ATALM) in 2012, which has become the official organization for professional development in this area, filling a gap in specific training for tribal community members working with these collections. Since its foundation, ATALM organizes an international conference every year held in Indian territory, hosting more than a thousand attendees and offering close to a thousand sessions on topics ranging from tribal records management/keeping to intellectual property rights, to collaboration, repatriation and object and digital preservation among many others.

While informed by those initiatives, this dissertation, however, is more concerned with anticolonial arguments that, based on new approaches to ethics in archival practice and activism, challenge existing legal and archival frameworks and are in direct conversation with discussions on political recognition, sovereignty, nationhood, and self-determination. The anticolonial interventions this study builds upon are congruent with Eve Tuck and K. Wayne Yang's assertion that "decolonization in the settler colonial context must involve the repatriation of land simultaneous to the recognition of how land and relations to land have always already been differently understood and enacted [...]."¹⁶⁰

¹⁶⁰ Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor," *Decolonization: Indigeneity, Education & Society* 1, No.1 (2012): 1-40, 7.

Some of these initiatives and their challenges have been identified by Trish Luker in “Decolonising Archives: Indigenous Challenges to Record Keeping in ‘Reconciling’ Settler Colonial States.” The article provides an overview of Australia’s National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997), directed to trace the history of laws, practices and policies that resulted in separation of Indigenous children from their families in Australia (known as ‘Stolen Generations’), including the creation of a significant archive of testimonial and documentary material about forcible removal of children from their families and communities. A result of the inquiry was the *Bringing Them Home* Report, “which drew public attention to the devastating effects of the Stolen Generations on the lives of Indigenous people alive today, the obvious complicity of recordkeeping in the removal programs, and the power of the resulting record to play a major role in reconciliation.”¹⁶¹ Key recommendations of the report advocate for control by Aboriginal and Torres Strait Islander people of their documentary heritage, including: Preserving records which may be of assistance to Indigenous people seeking to re-establish family and community links; establishing Indigenous identity and support of Aboriginal land claims by making access to records easier and less distressing; and providing opportunities for Indigenous communities to control their own historical documentation.¹⁶² This National Inquiry and its resulting Report have had a crucial role in triggering initiatives in archival practice, particularly in relation to enhancing tribal access to records.

¹⁶¹ Luker, “Decolonising Archives,” 113.

¹⁶² HREOC (Human Rights and Equal Opportunity Commission), “Bringing Them Home”: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Canberra, 1997), 347.

Another groundbreaking research project in Australia that has considerably added to thinking about Indigenous epistemologies and rights in archival knowledge while pointing out diversity and divergences among Indigenous perspectives, is the Trust and Technology Project (T&T Project), which was designed to address archiving records of Koorie oral memory.¹⁶³ Launched in 2009 and based at Monash University, the T&T Project is aimed at examining, modeling and building archival systems exploring the emphasis that Indigenous people place on oral memory and what this implies for providing archival services to this particular group. The T&T Project developed a series of principles, including: the “recognition of rights in records,” which acknowledges the rights of Indigenous people to “make decisions about the creation and management of their knowledge in all its forms, including knowledge contained in records created by non-Indigenous people and organisations about Indigenous people.” It also advocates for recognition of Indigenous peoples’ right to challenge ‘official’ records, by providing mechanisms to ‘set the record straight,’ that is, to “comment on inaccuracies or limitations, contribute family and individual narratives, and present their version of events alongside the official one.”¹⁶⁴

The T&T Project, although not dealing directly with the archival repercussions of a specific law or imposed policy, promotes Indigenous self-determination in records by

¹⁶³ Based at Monash University, Centre for Organisational and Social Informatics and is a joint project with the Centre for Australian Indigenous Studies, the Public Record Office of Victoria, the Koorie Heritage Trust Inc., the Victorian Koorie Records Taskforce, and the Australian Society of Archivists Indigenous Issues Special Interest Group: <http://infotech.monash.edu/research/about/centres/cosi/projects/trust/about.html>.

¹⁶⁴ McKemmish, Faulkhead, and Russell, “Distrust in the Archive,” 230-231. See also: Lynette Russell, “Indigenous Records and Archives: Mutual Obligations and Building Trust,” *Archives and Manuscripts* 34, No.1 (2006): 32-43; Fiona Ross, Sue McKemmish and Shannon Faulkhead, “Indigenous Knowledge and the Archives: Designing Trusted Archival Systems for Koorie Communities,” *Archives and Manuscripts* 34, No. 2 (2006): 112-149; Luker, “Decolonising Archives,” 9; Gilliland, “Introduction: Contemplating Communities and Boundaries,” (Forthcoming); and Koorie Archiving: Trust and Technology Project, Final Report, <http://infotech.monash.edu/research/centres/cosi/projects/trust/final-report/>.

challenging archival frameworks concerning custody, stewardship and ownership, recognizing that records produced as a result of government operations, for example, do not necessarily belong solely to the government (or the creator institution), but to “everyone who has contributed to the record’s creative process and has been affected by its action.”¹⁶⁵ The project, thus, suggests an expanded notion of rights and obligations to records that benefits communities whose records are ‘owned’ by external entities or individuals due to western notions of authorship, ownership and intellectual property rights.

Similarly, in Canada, anticolonial archival initiatives have been particularly concerned with expanding rights to records, including the right to annotate/correct records, forget them or destroy them. These initiatives emerged in part as a consequence of the passing of the Indian Residential Schools Settlement Agreement (IRSSA) in November 2005, a Federal Court-approved agreement which recognized the damage inflicted by Indian residential schools in the late nineteenth and twentieth centuries.¹⁶⁶ As part of the agreement, in June 2008, a Truth and Reconciliation Commission (TRC) was formed, tasked with establishing a national research center where all materials created or received throughout its existence were to be preserved and archived and made accessible to the public, subject to continued confidentiality of ‘some records’ (Section 12). During the course of its proceedings, over one million archival documents were disclosed by the Department of Aboriginal Affairs and Northern Development, approximately half of which had been provided by Library and Archives Canada (LAC).

¹⁶⁵ McKemmish, Iacovino, Russel, Castan, “Editors’ Introduction,” 100.

¹⁶⁶ Notably, the IRSSA did not cover residential and day schools that did not receive federal government funding, thereby excluding from reparations and apology many members of the Métis Nation, the Nunatsiavut Inuit and the Innu Nation, because the schools they attended were funded by provincial governments. Luker, “Decolonising Archives,” 117.

The University of Manitoba was selected to become the permanent host of the National Centre for Truth and Reconciliation (NCTR) to hold all the material and make it accessible to Indian residential school survivors, their families and communities, as well as the general public. The NCTR maintains that it is governed in accordance with national and international ethical research and archiving principles and best practices for Indigenous and human rights research and archiving. The Center's goal is centered on record repatriation efforts as well as on implementing a diverse and participatory approach to description by advancing Indigenous knowledge best practices and the application of "contrasting traditional/ non-traditional, archival/user generated, and institutional/Indigenous descriptive elements [...] that can facilitate Indigenous participation, collaboration, and ultimately, the process of reconciliation."¹⁶⁷ These examples highlight the role of records in seeking justice for Indigenous victims of colonial laws and policies and indicate a sense of purpose for archives to actively confront settler state-perpetrated injustices and abuses of power. However, it is important to note that the vast majority of the recommendations of both the Stolen Generations Report and the Truth and Reconciliation Commission have not been yet implemented, primarily due to neoliberal forms of bio-political power that have stalled reconciliation politics in both countries.¹⁶⁸

This dissertation suggests intervening in tribal law and policy by subverting the system from within, rendering judgement on the capacity of evidence in Indigenous political claims of

¹⁶⁷ Luker, "Decolonising Archives," 117-120; Brett Lougheed, Ry Moran and Camille Callison, "Reconciliation through Description: Using Metadata to Realize the Vision of the National Research Centre for Truth and Reconciliation," *Cataloging & Classification Quarterly* 53, No. 5-6 (2015): 596-614, 612.

¹⁶⁸ The TRC has been also critiqued as a nationalist endeavor and archival scholar Jamila Ghaddar does a brilliant work exposing the project's issues. See: Jamila Ghaddar, "The Spectre in the Archive: Truth, Reconciliation, and Indigenous Archival Memory." *Archivaria* 82 (2016): 3-26; Jamila Ghaddar, "Total Archives for Land, Law and Sovereignty in Settler Canada," *Archival Science* 21 (2021):59-82.

sovereignty and self-determination — why is it structured that way, why it is impossible to find some records, what can substitute for those records, why are those substitutes not acceptable by the system or by some particular tribes? Since the creation, collection, destruction, removal and now misinterpretation of records that were intrinsically a part of the U.S. settler-colonial endeavor lies at the heart of the recognition process, tribes gathering, repurposing, and recontextualizing these records as part of their recognition petitions also constitute important, and quite radical acts of decolonization. Furthermore, the daunting task of unsettling archival evidence as part of these claims — pointing out the lack of reliability of many of the records, as well as their creators' assumptions, motivations and conceptions, and the consequent formats, uses and interpretations of those records — is also an anticolonial endeavor. The anticolonial archival framework this dissertation suggests, therefore, implies using archival expertise itself to challenge the presumed legitimacy and authority of extant non-Indigenously-created historical evidence contained in colonial archives.

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Chapter 5: Tensions and contradictions I: HISTORY(IES)

1. Introduction

As laid out in Chapter 1, California tribal peoples have experienced settler colonial and genocidal targeting¹ ever since the arrival of Europeans. This targeting has included, among others, conquest(s), wars, slavery, and assimilation tactics through the establishment of missions and boarding schools, prohibition of the practice of religion and traditional culture, broken treaties, termination policies and allotment law. Many of these strategies have resulted in the physical removal of tribes from their homelands and the production of discourses that dispossess them through the public record.² This chapter argues that histories of Indian land dispossession supported by federal Indian termination policies have as a direct consequence the continued exclusions and displacements related to Indigenous knowledge production and the access and circulation of records by and about Native peoples.

This physical and discursive archival displacement has severe consequences for tribes petitioning for federal acknowledgement. Due to removal and land dispossession, many of the documents required by the OFA as evidence for recognition have been destroyed, removed, or appropriated from petitioning tribes. Many were created by and to meet the administrative needs, interests and epistemologies of colonizers, missionaries, federal and/or external agencies rather than the governmental and sovereign needs of tribal nations, thus inadequately characterizing

¹ Brendan Lindsay, *Murder State: California's Native American Genocide, 1846-1873* (Lincoln: University of Nebraska Press, 2015); Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven, CT: Yale University Press, 2017).

² Jamila Ghaddar, "The Spectre in the Archive: Truth, Reconciliation, and Indigenous Archival Memory," *Archivaria* 82 (2016): 3-26.

those needs and insufficiently informing the FAP's evidentiary requirements.³ Commissions of inquiry, depositions, surveys, censuses and rolls are all examples of data-gathering exercises that were conducted with the double intention of acknowledging and at the same time disavowing Native communities.⁴ Moreover, many of those documents are held, undisclosed, by the very federal agencies that require their production and presentation.

As a response to the increasing demand from tribes to gain access to their records as they struggled to produce "official" documents in support of their federal recognition claims, historian William T. Hagan wrote in 1978: "to be an Indian is to have non-Indians control your documents from which other non-Indians write their versions of your history."⁵ Still today, the OFA continues to require, read, and analyze petitioning tribes' recognition evidence without appropriate contextualization or tribal interpretation, often dismissing tribal histories, social practices, and cultural traditions. Therefore, even while some of the main challenges that tribes face in preparing their petitions are concerned with the more tangible challenges of locating and accessing the types of evidence required by the OFA as well as financing those processes; reading and (re)interpreting those records and being forced to engage with externally imposed and often racist, outmoded and today academically repudiated definitions and interpretations of Indianness — are also challenges, even if affective ones.⁶

³ Stephanie Rainie, Desiree Rodriguez-Lonebear, and A. Martinez, *Policy Brief (Version 2): Data Governance for Native Nation Rebuilding* (Tucson: Native Nations Institute, 2017).

⁴ Courtney Rivard, "Archival Recognition: The Pointe-au-Chien's and Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogeans' Fight for Federal Recognition," *Settler Colonial Studies* 5, No. 2 (2015): 117–127.

⁵ William T. Hagan, *Archival Captive: The American Indian* (1978), cited in Jennifer O'Neal, "The Right to Know": Decolonizing Native American Archives," *Journal of Western Archives* 6, No.1 (2015).

⁶ Joanne Barker, *Native Acts: Law, Recognition and Cultural Authenticity* (Durham, NC: Duke University Press, 2011); Joanne Barker, "The Recognition of NAGPRA," in A. Den Ouden and J. O'Brien, Eds., *Recognition*,

The reality that records that are considered official evidence for federal recognition claims were often produced to build cases for territorial dispossession and simultaneously effect the discursive erasure of Native groups from the national memory is in many ways exemplified by the assessments of evidence by the OFA in the Fernandeano Tataviam petition process. The Tribe, as with many other unacknowledged tribes, is being required to directly or indirectly prove Indian identity, community continuity, political authority and cultural existence in part by demonstrating their continuous connection to and ownership of land, even while having been removed and dispossessed from their land by the very federal entity that requires such evidence. In other words, they are required to present evidence of a history that never took place; a reality that is impossible to prove.

2. California/FTBMI histories v. FAP's mandatory criteria

Markedly different from Indian histories in the former British colonies of the East Coast or from the Midwest and Plains regions, California's Indian history is largely incompatible with the FAP's criteria. Unrecognized California tribes, therefore, face very specific evidentiary challenges when preparing their petitions. As previously discussed, late eighteenth-century Spanish missionization, followed by a period of Mexican rule in the early nineteenth century, and then by the intensive resource extraction economy of the American period beginning in the mid-nineteenth century, together shaped particular Indian policies that were imposed after statehood was achieved in 1851. A later effort to sign treaties with California Indian peoples was forestalled by the state's congressional delegation and 44 California tribes⁷ were terminated

Sovereignty, Struggles, & Indigenous Rights in the United States (Chapel Hill, NC: The University of North Carolina Press, 2013).

⁷ In 1956, 1957 and 1958 The California Rancheria Termination Acts, part of the U.S. Indian termination policy, targeted 44 California tribes for termination, with Congress promising them improved roads, water systems, sanitation facilities, and vocational schools before the termination would become effective.

during the 1950s and 1960s. Moreover, the few reservations that were created were significantly small and were established primarily on land directly controlled by the military. Consequently, by the late nineteenth century, California featured large populations of so-called homeless — and landless — Indians.⁸

More than two centuries of colonial laws and practices that negatively affected — and continue to affect — Native peoples' lifeways and tribal governing systems make it very difficult, and in some cases impossible, for unrecognized California tribes to gather the necessary evidence to comply with the FAP's criteria. The FAP's regulations require evidence to demonstrate that petitioning tribes have had “substantially continuous” existence in a continuous home base from 1900 to the present. Continuity of tribal community life in California is almost impossible to document, however, because of the termination policies already mentioned. Below I identify and unpack some of the main tensions and contradictions between Tataviam histories and the FAP's mandatory criteria.

Land dispossession

Histories of Indian land dispossession in California make the evidentiary requirements of nearly every criterion in the FAP regulations incompatible with the realities of the Fernandeano Tataviam and other California tribes. The histories of displacement and relocation architected by the California mission regime play an important role in the lack or absence of types of evidence that the Tataviam are required to present in order to prove a continuous home base and community continuity. In chapter 3 I explained the origins of the present-day Fernandeano Tataviam Band of Mission Indians' distinct community — how their lineage-village structure

⁸ Les W. Field (with the Muwekma Ohlone Tribe), “Unacknowledged Tribes, Dangerous Knowledge: The Muwekma Ohlone and How Indian Identities Are “Known,”” *Wicazo Sa Review* (2003), 85.

predated the mission period and how, with the establishment of the San Fernando Mission in 1797, Indians from those villages⁹ were forcibly removed from their territories, recruited by the mission and enslaved.

This form of displacement had as a consequence the loss of territory and political and economic sovereignty over local areas governed by the different lineage-villages, and with that came the loss of records as well as the creation of often inaccurate records about tribal individuals by the *padres* in the missions. The misnaming practices carried out by the *padres* greatly affected California tribal records, especially the vital records such as baptism, marriage and death certificates that are necessary to support a petitioner's genealogy and tribal membership documents within criterion (e) *Descent*. In one way or another, however, ancestry records are needed to prove every single criterion in the FAP's regulations.

Mission-advanced removals make some of the evidentiary requirements of criterion (b) *Community* extremely challenging for the Tataviam to meet. This criterion requires that a petitioner "comprises a distinct community and demonstrates that it existed as a community from 1900 until the present." One of the criterion's examples of evidentiary requirements is to provide evidence of "[l]and set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period." This requirement, however, is hard if not impossible to fulfill, not only because land was actively taken away from tribes after they were removed and forced to enter the mission, but also because locating "official" records documenting land title and/or land grants assigned to the Fernandeano Tataviam post-Mission

⁹ These villages were located in the area ranging from present day Santa Catalina Island and Malibu in the west, Cahuenga and Encino in the south, Tujunga in the east, and the present-day Tejon Ranch in the north.

period is hard to do – Land grants were often assigned to groups of individuals — lineage-villages — that are not considered to be “a single historical Indian tribe” by the OFA.

Additionally, criterion (b) *Community* asks , among other forms of evidence, for documentation proving that “more than 50 percent of the members [of the petitioning tribe] reside in a geographical area exclusively or almost exclusively composed of members of the entity.” This is also one of the forms of evidence required to prove criterion (c) *Political Authority* and fundamentally incompatible with Fernandeano Tataviam histories and with the realities of any non-recognized, land-less tribe in California. According to Tataviam Tribal President Rudy Ortega Jr., records evidencing that tribal members live in the same geographical area simply do not exist. During the relocation era, Ortega points out, “we were forced to move away from our ancestral lands in the San Fernando Valley, however, now the BIA is asking why we didn’t stay all together. Many of us stayed, but some moved to other reservations close by that had better land conditions.” Yet, Ortega points out, “they see that dispersion as *our* fault, as evidence of lack of community and political life, and that interpretation significantly affects our Indian identity and sovereignty.”¹⁰ Tataviam tribal citizens tend to be spread throughout counties or other states because of the lack of land base and jobs in the area.

Land ownership is a salient factor when examining the persistence of the federal government’s efforts in attempting to assimilate Indians by destroying their cultures and religions. As Anne McCulloch and David Wilkins explain, in order to legally acquire title to the land held by tribes and its associated resources, federal policymakers, the press, state governments, railroad interests, and others had to eliminate the Indian title and disperse the

¹⁰ Rudy Ortega Jr., Interview with the author, 2017.

Indian individuals.¹¹ It was viewed as easier, less expensive, and more moral to do this by allotting reservations and forcibly assimilating Indians than by attempting an extermination policy that would have violated the very principles on which the U.S. was founded. The General Allotment Act of 1887 and House Concurrent Resolution 108 — the Termination Resolution — were both attempts by the federal government to overcome tribes’ collective resistance and accomplish the elimination of the tribal unit.¹² Histories of Indian land dispossession mean that several criteria present a catch-22. As leading Native American and Mestiza scholar MA Jaimes Guerrero puts it: “An Indian is a member of any federally recognized Indian Tribe. ... To gain federal recognition, an Indian Tribe must have a land base. To secure a land base, an Indian Tribe must be federally recognized.”¹³

Intermarriage

Histories of community formation and of intermarriage in particular are another factor that poses contradictions between the Tribe’s realities and the FAP criteria. Exogamy is a factor that has historically accompanied the Fernandeano Tataviam and other California tribal peoples’ survival, and it is important to take it into account in studies of recognition and the analysis of the process’ evidence requirements.¹⁴ Although criterion (b) *Community* allows for evidence of “known patterned out-marriages when culturally required,” when intermarriage is the norm within a

¹¹ Anne Merline McCulloch and David E. Wilkins, “Constructing” Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes,” *American Indian Quarterly* 19, No. 3 (Summer, 1995): 368-369.

¹² *Ibid.*

¹³ M. Annette Jaimes Guerrero, “Indian Identification Policy,” in Fremont J. Lyden and Lyman H. Legters, Eds., *Native Americans and Public Policy* (Pittsburgh: University of Pittsburgh Press, 1992), 125-126.

¹⁴ Amy Den Ouden and Jean O’Brien, “Introduction,” in A. Den Ouden and J. O’Brien J, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013), 17.

particular group, community continuity and cohesion becomes harder to demonstrate or justify with evidence other than oral histories and photographs, which are not admitted as standalone evidence by the OFA.

Moreover, the regulations require that “at least 50 percent of the members of the entity” should be married to other members of the entity, which is not always the case for tribes practicing exogamy. In the case of the Tataviam, marriages are virtually all exogamous — they cannot be made between members of the Ortega and Garcia lines, and are rarely made with the Ortiz line. The only legal marriages can be made between the Ortiz family and the other two lineages, and those unions are rare.¹⁵ Intermarriage makes genealogy — and the evidence used to prove it — confusing in the eyes of OFA reviewers and ‘less pure’ or ‘less Indian.’

Political leadership

The ways in which tribal leadership has been practiced historically in California also poses obstacles for fulfilling the FAP criteria and more specifically for proving criterion (c) *Political influence or authority* over time. The criterion requires that a petitioner “has maintained political influence or authority over its members as an autonomous entity from 1900 until the present.”¹⁶ As described by the regulations, “political influence” or “authority” means that the tribe or entity “uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity

¹⁵ Fernandeno Tataviam Band of Mission Indians, Supplementary and Updated Information to the Petition of 2009 – Criterion 83.7(c) (San Fernando, CA, 2015).

¹⁶ 25 CFR § 83.11 Criteria for Acknowledgement as a Federally Recognized Indian Tribe.

which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence.”¹⁷

Tribal leadership in California, however, did not necessarily operate in that way. For example, the term “captain” is commonly used among the contemporary Fernandeno and other California Indians to denote the Tribe’s political leader, however, the Tataviam do not describe a leader with power over several lineage communities because in Tataviam history, there is no such leader. The Fernandeno term “captain” is much more like the definition of hereditary lineage leader, a person with a long-term personal commitment of service to the lineage community. The term captain, here, is meant in that traditional sense.¹⁸

In their 2015 supplementary materials for criterion (c) *Political authority*, the Tribe included testimony by distinguished California scholars explaining how leadership operated in the pre- and post-contact period, including George Hardwood Phillips and Robert Heizer.¹⁹ Anthropologist Alfred Kroeber’s description of California Indian political leadership is worth mentioning here:

The greater concentration (of Indian population) in California, together with the much smaller size of the political unit (when compared to Eastern American Indian tribes), brought it about that political machinery tended to be somewhat less developed in California. As a village needs less government to get along than a good sized city, so a tribelet of two or three hundred people, in close contact at most times and with every member knowing the others familiarly, can settle most problems simply ... Chiefs, however, were recognized everywhere in California,

¹⁷ Ibid.

¹⁸ FTBMI, “Criterion C,” 6

¹⁹ Robert Heizer, *The Indians of Los Angeles County: Hugo Reid's Letters of 1852* (Los Angeles, CA: Southwest Museum Papers, #21, 1968), 15-17.

and they seem to have been such mainly by birth ... He functioned on occasion, rather than professionally or full time ... He had however next to no authority. His role was supposed to be essentially one of using moral influence on the side of wisdom and coordination, and of preventing dissension and trouble from coming up.²⁰

More recently, and confirming Kroeber's account, historian Vanessa Ann Gunther cites California documenter Hugo Reid stating that "government of the people was invested in the hands of their Chiefs; each captain commanding his own lodge."²¹ Reid's assessment stands in concert with other tribal historians who gave considerable authority and respect to a hereditary leader.²² While most historians agree that pre-contact forms of political leadership necessarily changed during the contact period, certain features of leadership remained constant. As noted by Kroeber above, there could be several leaders of sub-groups within the same lineage — a single central authority was not the norm.

In the case of the Fernandeano Tataviam, the lineage community and the body political are one and the same. In order to identify the leaders who have political influence, one needs to look no further than the lineage community. The voluntary multi-lineal coalition of the three lineage communities — the Ortiz, Ortega and García — forms the body politic, or in other words, the story of community is the story of political community. The body politic is not composed of a collection of individuals, but rather is the coalition of the three major lineage communities, each

²⁰ Statement of Native of Information of Native Land Use. 1951. A.L. Kroeber Papers, 1869-1962, BANC 2049, The Bancroft Library, University of California, Berkeley, 3-36.

²¹ Vanessa Ann Gunther, *Ambiguous Justice: Native Americans and the Law in Southern California, 1848- 1890* (East Lansing, MI: Michigan State University Press, 2006), 69.

²² *Ibid.*; see also Robert Heizer, *The Indians of Los Angeles County: Hugo Reid's Letters of 1852* (Los Angeles, CA: Southwest Museum Papers, #21, 1968), 15-17.

managing internal rules and internal social and political loyalties. The lineage communities retain their internal identities, elders, and leadership, and work cooperatively within the entire coalition.²³ Leadership, even today, is often not sought after, but typically falls to people who have trust and understanding and can honestly represent the lineage or some segment of the lineage. The evidentiary requirements asking for records proving “a means of selection [of entity leaders] or acquiescence by a significant number of the entity’s members”²⁴ or the “establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior,”²⁵ are therefore difficult to fulfill.

Fernandeño Tataviam leadership emerged in more centralized form only over the past 50 years in response to new challenges in dealing with external governments and institutions. The Fernandeño Tataviam is now a constitutional government that does not directly recognize the three lineage communities, but instead provides access to lineage leadership to express their concerns. While lineal communities remain basic political entities, the development of a multi-lineal community and government are responses to changing social, cultural, economic and political circumstances. The Tribe held elections during the 1950s, and formalized bylaws in 1975. Although the Tribe’s name has changed, a multi-lineal coalition has been in existence as a form of local government for at least 60 years.

Although the OFA’s TA letter acknowledges that leadership need not be centralized or authoritarian in order to count for purposes of federal recognition, several factors — many of them mentioned above, such as lack of an electoral system, the emphasis on offering a service

²³ FTBMI, “Criterion C,” 1.

²⁴ 25 CFR § 83.11.

²⁵ *Ibid.*

more than enacting power and authority, and overall the illegibility of this form of governance and political leadership in the eyes of the OFA — make Tataviam political authority difficult to prove. Archivally, one of the main challenges is that the *padres* at the missions did not record the succession of Indian captains, since the missionaries sought to discourage kinship organization and leadership and so those records are lost. Similarly, there is leadership evidence required by the OFA that entirely does not exist; evidence in the form of what the U.S. understands by government leadership documents. Tataviam Tribal President Rudy Ortega Jr. explains: “From the turn of the century, 1900, the government wants to see minutes. But there’s no existence of minutes until maybe the 1970s. Even though we formed an organization, nonprofit, they [tribal government] didn’t keep those minutes. They really didn’t write the minutes. The minutes was a foreign concept of recordkeeping for us.”²⁶

The incompatibilities between Tataviam histories and criterion (e) *Descent* are covered in the following chapter, however, I will say briefly here that the main contradiction has to do with the different ways in which the OFA and the Tataviam respectively conceptualize and define “historical Indian tribe”. The other two criteria analyzed here — *Community* and *Political Authority*—have not been reviewed by the OFA yet. The Tribe is still in Phase I Review and those two criteria are reviewed in Phase II. *Descent*, however, has already been reviewed and deemed unsatisfied by the OFA in the negative Proposed Finding released in May of 2020. The incompatibilities between Tataviam histories and the two criteria discussed in this chapter, translate into direct evidentiary challenges for California tribes petitioning for recognition. These challenges will be discussed below.

²⁶ Rudy Ortega Jr., Interview with the author, November 2019.

3. The evidence problem(s): Land dispossession, archival displacement, and the agony of evidence

Physical archival displacement

One of the main evidentiary challenges that tribes face when preparing their federal recognition petitions is the physical displacement of tribal records due primarily to the histories of dispossession of California Indians from their lands and the parallel colonial practices of collecting Indigenous materials and knowledge, as outlined in the beginning of this chapter. Only a very small portion of the evidence used by the Tribe in support of their petition is held at the Tataviam headquarters in San Fernando. While the Tribe's informal archive consists mainly of photographs, oral history interviews, press releases, minutes of contemporary meetings, copies of court decisions, tribal membership forms, and some secondary sources, the bulk of the records required to fulfill the FAP's criteria are held elsewhere. The Tribe's research team have had to spend an inordinate amount of time and resources seeking and locating what the OFA considers to be "legitimate" evidence for their recognition petition.

Records used as evidence by the Tribe are being held in more than twenty different repositories, including private libraries and archives such as the Huntington Library in San Marino, California and the Autry Museum's Braun Library; national and state archives such as the National Archives in Washington DC,²⁷ Riverside, and San Bruno and California State Archives in Sacramento; university archives such as the Bancroft Library at UC Berkeley, UCLA Special Collections²⁸ and California State University at Northridge; religious and mission

²⁷ Particularly helpful for the Tataviam's petition have been the Records of the Bureau of Indian Affairs Special Cases, 1821-1907; Central Classified Files, California Special, 1907-1939.

²⁸ At UCLA's Special Collections, the Anna B. Packman Papers have been especially useful in supporting the Tribe's claim.

archives such as the Santa Barbara Mission Library and Archive; the La Plaza Church (Our Lady Queen of Angeles Church), St. Ferdinand, Santa Rosa, and Saint Francis Churches; private collections such as the Heather Daly and Ron Andrade Collections; hospitals such as Glendale Memorial Hospital and Pacoima Memorial Lutheran Hospital; and federal agencies such as the Bureau of Indian Affairs (BIA), among others.

For example, in order to gather the required documents to fulfill criteria (b) and (e), the research team has had to look for Fernandeano Tataviam tribal citizens' genealogical records — birth, marriage and death certificates — in multiple repositories, including physical institutions such as the La Plaza, Santa Rosa and Saint Francis churches; the San Fernando and San Gabriel missions; Mission Hills Catholic Mortuary; Santa Clarita Valley Television; State of California Department of Public Health's Bureau of Vital Statistics; California Marriage and Death Indexes; California Voter Registrations; and the BIA in Sacramento; as well as online databases such as the Huntington Library's Early California Population Project (ECP);²⁹ Ancestry.com; The Church of Christ of Latterday Saints; Mac-Family Tree Program; and Find a Grave.

Absence of evidence

Another evidentiary challenge, perhaps even harder to overcome, is the absence of many of the forms and categories of Tataviam evidence required by the OFA. This, as argued in this

²⁹ Comprised of more than 200,000 individual records created by the missionaries to document the administration of baptisms, marriages, and burials performed in all twenty-one of the California missions between 1769 and 1850 (including records from the Los Angeles Plaza Church and the Santa Barbara Presidio), the ECP's database has been particularly useful for finding Fernandeano Tataviam genealogical records produced at the SFR Mission. Because the separate baptism, marriage, and burial registers for all of California's twenty-one missions are largely complete, consistently thorough, and in many ways cross-referenced, records from different missions and registers in the ECP database can be linked and sorted by individual, making the search even easier. Before this database was completed in June of 2006, original registers about California Indians produced at the missions were scattered across California, hard to locate, and many of them too old and too brittle to handle, transcribe and translate. (Steven Hackel, A. M. Reid, et al. *Early California Population Project: Version 1* (San Marino, California: The Henry E. Huntington Library, 2006).

chapter's introduction, is a direct consequence of tribes being removed, relocated and replaced by the U.S. settler state. While the Tribe's petitioning research team has been able to locate a considerable amount of evidence dispersed across the different repositories listed above, one of the biggest challenges has been filling the gaps of evidence that was never created, has been lost, held undisclosed or destroyed by the same entities that produced it. As mentioned above, the FAP's regulations require evidence to demonstrate that petitioning tribes have had "substantially continuous" existence from 1900 to the present, however, extant records and documents of the kind which the OFA considers essential to proving continuity of tribal identity and community life are difficult to gather.

For example, historical data about California Indians produced during the 1840s-60s are rare and extremely hard to find because of the rapid and drastic demographic declines of large portions of many California Indian tribes due to droughts, floods, and diseases such as smallpox plagues; dispersal due to those same reasons in addition to relocation policies; and the indifference of early non-Indian observers, among other reasons. The problem is that a gap of more than twenty years in the strand of evidence demonstrating substantially continuous tribal governmental, cultural and political activities can be fatal to a petition under the FAP and the OFA's interpretation of the regulations.

Similarly, in order to prove (b) *Community* and (c) *Political Authority*, the OFA has asked for historical and administrative records documenting the meetings and gatherings held by the Tribe before and after the 1900s. However, as co-leader of the petition research team Duane Champagne (Turtle Chippewa) explains: "They [the Tribe] were not meeting in a formal way. Back in those days, they're going to the festivals, ceremonies, Catholic holidays, etc."³⁰ There

³⁰ Duane Champagne, Interview with the author, June 2020.

are references to commemorations and ceremonies celebrated by the Tribe, Champagne continues, “but the OFA is looking for the western style government way of keeping records and they were just not doing that.”³¹

By “western way of keeping records,” Duane Champagne is referring to evidence required by the OFA such as the Tribe’s meetings’ minutes, as I briefly mentioned above, based on Robert’s *Rules of Order*. First published in 1876 by U.S. army officer Henry Martyn Robert and adopted to govern the meetings of a diverse range of organizations—including church groups, county commissions, homeowners associations, nonprofit associations, professional societies, school boards, and trade unions — the *Rules* are an adaptation of the rules and practice of Congress to the needs of non-legislative societies.³²

However, according to Champagne, the Tribe only started doing more bureaucratic organization or recording meetings’ minutes after the 1950s and even then and after, these *Rules* have never been adopted by the Tribe.³³ That form of evidence simply does not exist because it has never been produced; minutes represent, as Tribal President Rudy Ortega Jr. argues, “a foreign concept of recordkeeping.”³⁴ Tribal members, Ortega explains, used to and continue to meet according to tradition, a tradition that is carried on by the general council still today. Meetings were spread by word of mouth and/or by postings in the newspaper that do exist, but the Tribe does not have minutes. The problem is that the OFA, as Ortega continues to explain, does not accept as evidence the records accounting for the organization of the meetings, rather,

³¹ Ibid.

³² <https://robertsrules.com>

³³ Champagne, Interview with the author.

³⁴ Ortega Jr., Interview with the author, October 2019.

only the minutes represent legitimate evidence of the meetings.³⁵ The OFA is demanding western political organization from a non-western entity, and this is another active form of epistemological erasure.

Discursive archival displacement

California tribal histories of settler invasion, missionization, and assimilation also translate into forms of discursive archival displacement. I refer to discursive archival displacement as the inaccuracies, discrepancies, misspellings, and the misapplication of language and naming practices contained in records about tribes and tribal individuals that have been produced by non-Indians, and that as a consequence displace the meaning of those records, often due to misunderstandings, misinterpretations and/or ignorance of tribal realities. Because tribal history and knowledge was usually passed down orally from generation to generation, up until the mid-twentieth century, many tribal communities produced very few written records, resulting in a lack of tribal-authored tangible documents.

Consequently, much of what records about or attributed to Indian people say survives through the filter of the settlers' writing. Tribes, then, often find themselves having to rely on documents created by non-Indians who were part of the colonial collecting and documenting endeavor described in the introduction of this chapter. These external documentors were all literate but alien — they did not always know the peoples they were writing about and even if they knew them, they were not necessarily sympathetic to them, which in many cases made them

³⁵ Ibid.

unreliable observers and inaccurate recorders.³⁶ Existing externally-produced tribal documents, therefore, do not always convey tribal needs, perceptions and self-conceptions.

In California specifically, most existing documents about Indian tribes come from the biased and often distorted writings of Spanish, Mexican and American colonizers, settlers and missionaries. As is well known, distortion and alteration of meanings in the record relied upon by colonial governance is an integral part of the processes of colonial oppression, dispossession and their consequences.³⁷ This kind of discursive dispossession was significantly facilitated by the mission system and the documentation practices that its regime had in place. In the case of the Tataviam, for example, the language and spelling discrepancies of vital records produced at the missions have significantly complicated their petition narrative. Much like parish priests in Europe, missionaries in California were required by the Spanish Crown and the Papacy to keep records for all Indians affiliated with the missions and for the region's Spanish and Mexican population. Thus, whenever they baptized an individual, they recorded that individual's birthplace, age, parents, marital status, children, siblings, godparents, given Spanish name, and any other information they deemed unique or relevant. Similarly, when they married or buried an individual, they nearly always recorded that same information plus that of family relations and, if known, baptism record number.³⁸

³⁶ Colin Calloway, *The World Turned Upside Down: Indian Voices from Early America* (Boston and New York: Bedford/St. Martin's Macmillan Learning, 2016); Scott Richard Lyons, *X-Marks: Native Signatures of Assent* (Minneapolis, London: University of Minnesota Press, 2010).

³⁷ Ann Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009); Jeannette Bastian, "Reading Colonial Records through an Archival Lens: The Provenance of Place, Space, and Creation," *Archival Science* 6, No. 3 (2006): 267–284; Verne Harris, "The Archival Sliver: Power, Memory, and Archives in South Africa," *Archival Science* 2 (2002): 63–86.

³⁸ Hackel, Reid et al., *Early California Population Project*.

Spanish names that were given or assigned by the missionaries were assumed names rather than Indian family names and rarely included the person's surname — the family name or last name — in the record (for soldiers and settlers, the missionaries always listed both given and family names). However, discrepancies in the spelling or actual name of an individual within a record are very common. Missionaries often recorded the name of an individual in a slightly different form in the baptism, marriage, and burial records. For an individual with a common name such as Francisca Maria, for example, it is not unusual to appear as Maria Francisca or simply as Francisca in another record or in a record's margin.³⁹

Ortega explains: “During the missions, Indigenous names were reversed, replaced with Spanish names, shortened [using just first name], and miswritten. Names were never transferred literally since it was often an outsider — a white person — who would record the names and he would do it differently, according to what he heard.”⁴⁰ These flawed naming practices not only complicate the linking of an individual's records, they also make it difficult to identify and prove an individual's lineage/ancestry and their relationship with a particular group or community.

The mission system's messy naming conventions have meant that the names of the Tribe's lineages, ancestors, and offspring have changed over time, and, therefore, so have the names in the records. For example, the three Fernandeano Tataviam lineages of Suitcabit, Cabuepet, and Tujubit changed their names over time into the lineage names of Ortega, Garcia, and Ortiz, respectively. And the names of the progenitors of those lineages have changed over time as well: Antonio Maria Ortega, progenitor of the Ortega lineage, appears in some records as Jose Rosario Ortega; Maria del Rosario Triunfo, progenitor of the Ortiz line, appears in some

³⁹ Ibid.

⁴⁰ Ortega Jr., Interview with the author, 2017.

records as Rusaria Peralta, Rosaria Carlon de Ortiz, and Rosa Arriola; and Maria Josefa Leyva, progenitor of the García lineage, appears in some records as Josephine Leiba Garcia Gutierrez. Even when these names did not officially change at a specific point in time, the OFA requires evidence that shows *when* and *why* the Tribe’s ancestors made the name changes, and that evidence, again, does not exist.⁴¹ These intricate language practices have significantly hindered the Fernandeano Tataviam’s quest for federal recognition.

4. Discussion: the consequences of (archival) histories of displacement

Having reviewed the incompatibilities between California tribal histories and some of the FAP’s criteria, as well as the evidentiary problems produced by those incompatibilities, it could be said that the challenges that petitioners confront when preparing their petitions are less to do with the inability to locate and identify documentary evidence — a resource deficit explanation, though the possibility cannot be dismissed entirely — than with the absence of such evidence regardless of resources. This suggests some petitioners may fail to achieve acknowledgment, not because they lack resources or the capacity to assemble and organize documentary evidence, but because they cannot close gaps — produced many times artificially by the OFA — in the available documentary evidence.

One of the main evidentiary tensions and contradictions between tribal histories and the FAP’s criteria is that the OFA requires petitioning tribes to prove Indian identity and sovereignty in part by demonstrating their continuous connection to place and ownership of land (broadly understood), but with evidence that was often produced and used to dispossess them from their lands in the first place — evidence that denied their sovereignty so as to dis-place them or in

⁴¹ Maria Montenegro, “Unsettling Evidence: An Anticolonial Archival Approach/Reproach to Federal Recognition,” *Archival Science* 19 (2019); OFA, TA Review Letter; FTBMI, TA Letter Response.

other words, records originally created and/or used to prove settler sovereignty.⁴² As a consequence, FAP's inflexible demands of documentary evidence are crushed with the facts about what it means to be a land-less, non-recognized California tribe. Such a focus on geography and/or territory has, as a result, a definition of tribe that looks for "static Indians,"⁴³ or the creation of "legal fictions" as described by Raymond Frogner: "documents purporting evidence of mutual expressions of rights and titles [between Indigenous nations and Europeans] where none existed."⁴⁴

With this, the FAP acts as yet another form of discursive erasure crafted in its totality by the U.S. settler state. Although the OFA encourages tribes to focus upon providing evidence of the petitioners' "tribal community," the strict evidentiary requirements of tribal community/community life are just another way of validating a model of Indianness based on the continued possession of land.⁴⁵ At the same time, as has been extensively analyzed and critiqued by anthropologist Sara-Larus Tolley, the OFA focuses on evidence of social community, particularly as documented by anthropologists, rather than by tribal oral histories concerning local geography.⁴⁶

The two forms of archival displacement discussed in the previous section — both the more conventional form where records have been detached from their subjects or alienated from

⁴² Montenegro, "Unsettling Evidence."

⁴³ Nicholas Barron, "'Aren't We Kind of Splitting Hairs?': Reframing the Pascua Yaqui Tribe and the Anthropology of Edward Spicer in the United States Congress," Presented at American Philosophical Society's Symposium: "*Evidence: The Use and Misuse of Data*," (June 5, 2020); Barker, *Native Acts*.

⁴⁴ Raymond Frogner, "Innocent Legal Fictions": Archival Convention and the North Saanich Treaty of 1852," *Archival Science* 70 (2010): 45–94.

⁴⁵ Sara-Larus Tolley, *Quest for Tribal Acknowledgment: California's Honey Lake Maidus* (Norman, OK: University of Oklahoma Press, 2006), 83.

⁴⁶ *Ibid.*

the body-land-voice they represent, and the agony of immaterial evidence being required that was never produced — are direct consequences of the land dispossession, removal and relocation of tribes advanced by the U.S. and the colonial systems it continues to promote. The displacement of a petitioning Tribe’s Archive (broadly understood) means, at a superficial level, the additional difficulties of locating and gathering the records needed for their case, including distance, financial resources, and time. It also means, however, not being able to access their own records and the information they contain even after locating them, due to the restricted and elitist access policies that many repositories have in place.

Archivally speaking, discursive displacement has severe consequences for the description and cataloging practices of these (already dispersed) records. Inaccurate, incomplete and often simply wrong metadata accompanying tribal records in non-tribal repositories create new categories of displacement, especially when provenance is erroneously inscribed, deeming those purposely displaced records as “culturally unidentifiable,” and therefore detached from their homelands — both physically and discursively — and with no possibility of return. It also hinders the ability to establish relationships between records and repositories, which is crucial when preparing federal recognition claims. The intentional and/or unintentional mistakes and ambiguities contained in the types of documents described above, along with the continued dismissal by OFA reviewers of the documentary contexts in which those records were created, re-inscribed and collected, make it extremely hard for tribes petitioning for federal recognition today to use such evidence.

Continued discursive displacements related to knowledge production in the archives cannot therefore be separated from Indigenous dispossession from land — along with the spatial and discursive restructuring of Native bodies and nations through policies and processes such as

the FAP. These discursive displacements include the “recordness” and legitimization of only certain records; the exclusion and erasure of others; the ways in which records circulate and are used as part of archives’ colonial collecting legacies; and understandings of sovereignty built a priori into the Archive’s foundational logic. Evidence parameters that have historically dispossessed Native peoples are mirrored within recordkeeping infrastructures, biasing the Archive itself against Indigenous rights and futures.

On the other hand, the challenges that petitioning tribes face when searching, locating, and using settler forms of history as evidence for their cases, the rejections of that evidence by the OFA, and OFA’s tireless requests for “more historical evidence,” actually generate alternative spaces for tribal petitioners and the community as a whole to do two (sometimes contradictory) things: (1) mobilize their history in order to enter the FAP multi-year process, submitting “acceptable” petition narratives where petitioning tribes end up doing their best to present themselves as “static Indians” despite obvious contradictions; and (2) offer histories outside of or beyond the recognition process that exceed the constraints of the FAP’s criteria.

Gathering historical evidence to support a tribe’s petition requires engaging with U.S. state and settler-produced archives, and thus the FAP not only re-constitutes how the Tataviam must tell their history, but also can potentially deepen our understanding of those historical moments in U.S. state building where the political life of an Indigenous nation was denied in order for the American state to enact its own political will. Since the creation, collection, destruction, removal, displacement and misinterpretation of records that were intrinsically a part of the U.S. settler colonial endeavor lies at the heart of the FAP, tribes gathering, repurposing, and recontextualizing these records as part of their petitions constitute important, and quite

radical acts of decolonization.⁴⁷ As such, the Tataviam are using the FAP to advance spatial and temporal claims to sovereignty, identity and territory.

5. Conclusion: Assessing evidence as contingent, contextual, and multivocal

Having exposed the many ways in which the FAP criteria are incompatible with Tataviam histories and realities, and therefore, with the evidence the Tribe is able to gather in support of their recognition claim, I consider that it is worth asking: how can the FAP's adjudication of "Indianness" be deemed unbiased when the evidence required by the OFA is itself the product of historical policies and legal practices that were aimed at the diminution of Native existence? Moreover, how should we view the assessment of documentary evidence — in terms of its authenticity and truth — in tribal sovereignty adjudications that remain regulated by settler-colonial systems and their archives?

The challenge in this context, I argue, is not so much to protect federal recognition evidence for the sake of "authenticity" and/or "trustworthiness" as it is understood by most archival scholars and practicing archivists studying and/or working on and with evidence, namely, guaranteeing that records were created and preserved according to "agreed rules."⁴⁸ Rather, the challenge is more about protecting evidence from biased or inauthentic provenances, i.e., from void, false or artificially-created contexts. Those biased provenances make evidence, and therefore the systems that legitimize it, also untrustworthy. As a result, the challenges that tribes encounter while preparing their petitions are not so much about verifying the archival authenticity of the records they use as evidence, since most of them are held in "official" non-

⁴⁷ Montenegro, "Unsettling Evidence."

⁴⁸ Laura A. Millar, *A Matter of Facts: The Value of Evidence in an Information Age* (Chicago, IL: ALA Neal-Schuman – SAA, 2019), 27.

tribal repositories as required by the OFA, which is in fact why tribes experience so much trouble accessing them.

It is not necessarily, then, the “rules of record making” that needs to be questioned here, but rather the authenticity of the *contexts* in which the records were created, the contexts in which the “signatures” were inscribed into the record, the language compatibility between the record and the subject’s native/spoken language, the overall fairness of the process, including the purpose for which the record was originally created, and the use that is being made of it as evidence in a particular legal claim. In other words, what needs to be scrutinized is how histories and contexts have been manipulated in order to produce (or not) the evidence required for recognition, more than how the record might have been manipulated or whether it can be considered “intact” or “fixed” according to conventional archival understandings.⁴⁹

In a chapter about time and archival temporalities in her recently published book *Urgent Archives*,⁵⁰ Michelle Caswell invites us to rethink the concept of “fixity,” which is key in the Society of American Archivists’ (SAA) definition of a records:

1. A written or printed work of a legal or official nature that may be used as evidence or proof; a document. - 2. Data or information that has been fixed on some medium; that has content, context, and structure; and that is used as an extension of human memory or to demonstrate accountability. - 3. Data or information in a fixed form that is created or received in the course of individual or institutional activity and set aside (preserved) as evidence of that activity for future reference.⁵¹

⁴⁹ Ibid.

⁵⁰ Michelle Caswell, *Urgent Archives: Enacting Liberatory Memory Work* (London and New York: Routledge, 2021).

⁵¹ Richard Pearse-Moses, “Record,” *Glossary of Archival and Records Terminology*, <https://www2.archivists.org/glossary/terms/r/record> cited in Caswell, *Urgent Archives*.

Caswell points out that, according to the SAA, *fixity* is the quality of content being stable and resisting change. To preserve memory effectively then, according to the SAA, “record content must be consistent over time.” This conceptualization of a record and its notion of fixity, Caswell assertively argues, “belies a host of temporal assumptions that presume that fixity in a point of time and space is *possible*.”⁵² However, she continues, if entire communities (such as most Indigenous groups) believe in time as “cyclical, overlapping, and recurring, so are the events that produce records”, then fixity, Caswell concludes, becomes a fiction and, citing archival scholar Jamila Ghaddar, an instrument of control. In this dominant formulation of records, fixity is what enables records to serve as evidence of the past,⁵³ a past that, in the case of the Tataviam, has been discursively crafted by the U.S. to take the Tribe’s land and therefore, their archives and their sovereignty. Fixity, then, becomes an impossibility for certain communities and their epistemologies, as records and their uses — and their interpretations, I would add — actually change over time.⁵⁴

Similarly, I urge us to understand the condition of wholeness or “completeness of a record”⁵⁵ here as allowing for no historical gaps in the assessments of evidence; or in other words, that the knowledge about true provenance of a record — the place/land and context of creation of evidence — is complete. Therefore, it is important to understand the ways in which the FAP “uses” history and historical evidence for and against tribal communities, and how

⁵² Caswell, *Urgent Archives*. (Emphasis original)

⁵³ Jamila Ghaddar, “*Total Archives for Land, Law and Sovereignty in Settler Canada*,” *Archival Science* 21 (2021): 59-82 cited in Caswell, *Urgent Archives*.

⁵⁴ Caswell, *Urgent Archives*.

⁵⁵ Millar, *A Matter of Facts*.

narratives are formed and re-formed in service of different agendas, worldviews, interests and incentives. Wholeness of a record then, in this context means that all sides of history are being taken into consideration when assessing the evidence being used (or *misused*). If trustworthiness of evidence is considered compromised “when the chain of evidence is broken”⁵⁶ or if someone in power is hiding the truth, then the FAP requiring evidence that is mostly non-existent without acknowledging that the historical truth of petitioning tribes is also a compromise of evidence; and a compromise of the concept itself. In other words, what needs to be “authentic, complete and unchanged”⁵⁷ is the understanding of the realities in which the evidence was created, the histories of the subjects of the records, and the contexts in which those records were created — the original purposes and intentions of record creation — and OFA reviewers should make sure that those provenances, including the histories of land dispossession and displacement, are taken into consideration.

Here, Laura Millar’s argument that “[i]gnoring the context in which evidence was made, used, and kept diminishes the ability of a society to understand the complexity that lies behind our sense of truth and proof,”⁵⁸ is worth noting. What this means is that all sources of evidence need to be assessed not just for their ability to provide objective proof but also for their capacity to carry biases and perspectives. We cannot assess the evidential value of a collection of documentary sources without understanding the story behind the creation, management, and use of those sources — what I understand here as *provenance*.

⁵⁶ Ibid., 31.

⁵⁷ Ibid., 32.

⁵⁸ Ibid., 34.

Challenging the foundational concept of provenance, archival scholar Tom Nesmith proposes an alternative approach he calls “societal provenance.”⁵⁹ The traditional archival conception of provenance, he argues — tied to a single, unitary creator and “expressed largely in the central act of literally inscribing records”⁶⁰ — fails to capture the myriad ways tribal histories, contexts and knowledges inform record creation.⁶¹ Even more relevant to this project, however, is Ghaddar’s land-based approach to provenance.⁶² Ghaddar draws on Jeannette Bastian’s idea of provenance of place which “embraces both the physical locale and the collective memory of that locale, establishes a context of creation that links the creators as well as the act of creation to a location, to the past and present meaning of that location as well as to one another as inhabitants of the location,”⁶³ to think of provenance in a way that incorporates Indigenous understandings of place and land.

Ghaddar’s approach contributes to the anticolonial endeavor of re-attributing Native voices and bodies as the rightful authors and owners of their records, thus re-gaining the sense of place — the land’s archive — that gives, in this case Tataviam, records their meaning. By re-thinking provenance in these ways — understanding that the “inconsistent record-keeping environment of colonial frontier produced unreliable, culturally relativistic records that

⁵⁹ Tom Nesmith, “The Concept of Societal Provenance and Records of Nineteenth-Century Aboriginal–European Relations in Western Canada: Implications for Archival Theory and Practice,” *Archival Science* 6 (2006); Tom Nesmith, “Reopening Archives: Bringing New Contextualities into Archival Theory and Practice,” *Archivaria* 60 (Fall 2005).

⁶⁰ Ibid.

⁶¹ Nesmith, “The Concept of Societal Provenance,” 352-353.

⁶² Ghaddar, “*Total Archives*.”

⁶³ Jeannette Bastian, “In a “House of Memory:” Discovering the Provenance of Place,” *Archival Issues* 28, No. 1 (2003-2004): 17.

demonstrate the uncertainty of colonial legal domains”⁶⁴ — archivists can challenge the alleged reliability and authenticity of colonial records and therefore their institutionalization, as well as the legitimization of the “*legal fictions* designed to subjugate Indigenous nations to western legal orders.”⁶⁵ In this way, the archival field can contribute to the re-territorialization and/or replacement of displaced evidence and histories in need of those evidences, both across disciplines and institutions alike.

Finally, studying how evidence ‘behaves’ in the archives’ stacks, catalogs, and databases of non-tribal repositories might help with mapping the contexts and tracing the conditions under which such evidence was created, collected, and now is used and stored.⁶⁶ Historical archival research of a selection of the evidence submitted by the Fernandeño Tataviam in support of their petition might reveal how tribal political survival must navigate the U.S. settler state’s own historical conception of itself. Moreover, investigating the contextual or *land-based* provenance of recognition evidence and how tribal histories and counter-histories reside within the archives might help articulate potential remedies that repositories can undertake by rethinking their collecting and representation structures, systems, standards, and procedures in order to make them more inclusive, participatory and collaborative.

Unsettling how evidence is currently conceived, legitimized and used in the FAP requires understanding the often-discordant views of history between petitioning tribes and the OFA — including considering the contexts of record creation and destruction that in many cases account

⁶⁴ Ghaddar, “*Total Archives*,” 61.

⁶⁵ *Ibid.*

⁶⁶ This was originally one of the research components of this dissertation, however, due to the Covid pandemic, research in and at the archives was unfortunately not possible.

for the failure of otherwise deserving petitions — and unsettling those histories in the first place. For this, the OFA should engage archivists to assist not only in the collaborative interpretation of documentary evidence but also to guide work with petitioners and others aiming to excavate latent meanings and integrate diverse interpretations.⁶⁷ If we do not gather, circulate and *acknowledge* how tribes tell their unique history(ies), then the FAP’s history will be the only documented one.

⁶⁷ Nesmith, “The Concept of Societal Provenance.”

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Chapter 6: Tensions and Contradictions II: CONCEPTS

1. Introduction

The Fernandeano Tataviam Band of Mission Indians opened their 2009 petition for federal recognition with the following statement:

The FTB deserves federal recognition now. The Band has continued as a kinship-based social and political group from the 1700s to the present [...] Federal recognition is long overdue and it is time for the United States to correct a terrible injustice that the Fernandeano Tataviam Mission Indians have endured for over 150 years.¹

As part of their quest for federal recognition, the Tribe has submitted more than ten thousand documents — personal, historical, religious, anthropological, and federal records — to the Office of Federal Acknowledgement (OFA) to ‘prove their existence’ as an American Indian group. However, the OFA claims that there are multiple deficiencies in the evidence presented by the Tribe for meeting the FAP’s mandatory criteria.

The OFA contends that “the FTB has not provided any historical evidence to support its claim that [the Tribe’s] lineage political and social organization survived the mission period” and that it has failed in “demonstrating that the current group has had ‘substantially continuous’ existence from 1900 to the present...”² The Tribe assert in their petition, however, that to comprehend identification as an American Indian entity, “it is essential to understand the social and cultural organization of the Indian groups that populated the San Fernando Mission, as well

¹ Fernandeano Tataviam Band of Mission Indians, 2009 Submission for Federal Recognition (San Fernando, 2009).

² Office of Federal Acknowledgement, *Phase I Technical Assistance (TA) Review* (Washington D.C.: Department of Interior, Office of the Assistant Secretary - Indian Affairs, 2016); Office of Federal Acknowledgement, *Phase I - Negative Proposed Finding Fernandeano Tataviam Band of Mission Indians* (Washington D.C.: Department of Interior, Office of the Assistant Secretary - Indian Affairs, 2020).

as the region, for centuries, if not longer, before the missions were established.”³ Their petition describes how before significant European contact, the Tataviam were independent, decentralized, unilineal kinship groups and how political recognition of each other came from mutual respect of boundaries, agreement on the rules of ceremonial activities and economic exchange, as well as respectful political and cultural cooperation, which runs contrary to the OFA’s conceptualization of “historical Indian Tribe.”

I open this chapter with an excerpt of the Tataviam petition because it illustrates how the Tribe’s narrative of self-determination presents historical and socio-cultural claims that contradict and are fundamentally incommensurable with contemporary U.S. settler-state demands, conceptualizations, understandings, interpretations, and logics of political recognition. Furthermore, it signals to the OFA that Tataviam sovereignty is beyond the confines of settler colonial policy and does not respond to a set of criteria and concepts that the U.S. has imposed on tribes in order to limit and effectively erase Indigenous political life.

2. FTBMI petition v. OFA responses

Petitions are events in which the encounter of identity and authority can be studied carefully: the document reveals an interaction of the identity of the petitioner and the authority being petitioned, and the substance of the appeal or claim indicates the relationship between identity and authority that is being assumed.⁴ But more fundamentally, as Ravi De Costa contends, “petitions not only recognize and appeal to authority; they are implicit descriptions of the moral

³ Fernandeno Tataviam Band of Mission Indians, *Submission for Federal Recognition* (San Fernando, 2009).

⁴ Mathew Hull, “Documents and Bureaucracy,” *Annual Review of Anthropology* 41 (2012): 252-253; Mathew Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (Berkeley: University of California Press, 2012).

worlds in which particular claims are sensible and legitimate” and as such “petitions act to articulate the identity and status of the petitioner and that of authority in a shared moral order.” Many petitioners rely on an enlarged vision of morality in order to justify their specific claims — seeking inclusion of themselves in existing moral worlds.

Petitions

The FAP’s regulations require that all petitions for recognition include an introduction about the petitioning group, including a governing document indicating the official name of the petitioner; the Tribe’s location/headquarters and other contact information; the number of current living tribal members; full names of current officers and members of the Tribe’s governing body and their service dates; names of attorney(s) and other non-members authorized to represent the group before the DOI; and a statement of basic overall claim for federal acknowledgement as an Indian Tribe, summarizing the petitioner’s “substantially continuous”⁵ existence from 1900 to the present. Additionally, petitioning tribes are required to provide a “claim of historical Indian Tribe,” including a petition narrative describing the history of the petitioning group and articulating the reasons and appeals to documentary evidence they prove they satisfy the acknowledgment criteria.⁶

According to the OFA, “the process of organizing a narrative helps a petitioner understand its history and whether its materials demonstrate that it is a continuously existing

⁵ According to OFA’s guidelines, “substantially continuous existence” means that there are no long interruptions in the tribe's members doing things together such as living together, worshiping together or meeting and making decisions on behalf of the group ... there should not have been a period when an entire generation lost contact with one another. This can be proved by submitting evidence of continuous existence as a group from each decade since 1900. <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/admindocs/OfficialGuidelines.pdf>

⁶ OFA, *Acknowledgement Precedent Manual – DRAFT* (Washington D.C.: Department of Interior, Office of the Assistant Secretary - Indian Affairs, 2005).

Indian tribe as required by the acknowledgment regulations.”⁷ Although the regulations do not explicitly require a petitioner to submit a narrative describing a petitioner’s continuous existence as an Indian tribe, 83.6 of the regulations states, “the documented petition must include *thorough explanations* and supporting documentation in response to all of the criteria.”⁸ OFA, therefore, recommends petitioners submit a narrative that provides these “thorough explanations.” It is also expected that the narrative will include citations to the documentary evidence provided in support of the petition.

In terms of accessibility and transparency, the governing document submitted to satisfy 83.7(d), and the membership list submitted for 83.7(e) are not public documents and likely disclosed only after heavy redaction. A tribe’s documented petition and narrative, however, are available in the OFA’s website, under the respective petitioner’s page, including comments and materials submitted by third parties relating to the documented petition. Accompanying the petitioner’s narrative and the governing and membership documents are usually thousands of pages of documentary evidence, also not directly accessible in most instances.

Responses

OFA responses, on the other hand, include review letters and final decisions or Proposed Findings. The FAP regulations direct the OFA to prepare a “preliminary review of the petition for purposes of technical assistance.”⁹ The principal form of assistance is a document called a

⁷ OFA, n.d.:1 <https://www.bia.gov/as-ia/ofa>

⁸ Department of Interior, Office of the Assistant Secretary - Indian Affairs, *Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), Federal Acknowledgment of American Indian Tribes. Final Rule* (Washington D.C.: Department of Interior, Office of the Assistant Secretary - Indian Affairs, 2015). (Emphasis mine).

⁹ DOI AS - IA, Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. §83.1(b)(1)] - Criteria for Federal Acknowledgment.

Technical Assistance (TA) Review Letter sent to petitioners following the submission of a petition. The main purpose of the TA Letter is to offer preliminary guidance about petition weaknesses prior to “active consideration,” meaning, when a tribe’s petition is being actively evaluated by OFA reviewers. TA Letters typically take the form of a criterion-by-criterion evaluation of the narrative and documentary evidence, combining interpretations of the criteria and evaluations of documentary evidence and guidance about potential additional sources of evidence. Sometimes that guidance is specific, referencing particular documents, but more frequently it references the kinds of documentary evidence (either historical and/or textual, never oral) the petitioner should locate—only “facts” substantiated by “citable sources” hold significant evaluative weight to the OFA.

TA Letters have three basic parts. The first part communicates the general purposes of the letter and situates its role in the larger acknowledgment process. The second and most important part of TA Letters communicates the OFA staff’s evaluation of the documentary evidence submitted by the tribe for the respective criteria. The third section offers contact information for further assistance and the delivery of additional materials. Nearly all documents produced or used during the FAP are effectively inaccessible, however, every TA Letter is publicly available in the OFA Website as PDF image scans of original letters as part of the “Acknowledgement Decision Compilation.”

The TA Letter is particularly interesting because of its function and because it facilitates inter-organizational communication among petitioning groups across time. Petitioners can access and review TA Letters sent to other petitioners while they craft their own petitions. The OFA staff sometimes reference earlier TA Letters in the body of another, including those sent to other petitioners. TA Letters also communicate deficiencies that some petitioners might rectify,

formally encapsulating the evidence reasoning of OFA staff in a way that is not otherwise accessible. Overall, the TA letter is a congealed representation of a complex set of evidence evaluations produced during the FAP's phase of greatest flux in interpretations of documentary evidence. TA Letters can be countered through responses generated by the petitioning tribe. These TA Response Letters are instances where petitioners clarify arguments made in their petition narrative that have been questioned by the OFA in their TA Review Letter. Petitioners can also provide additional or supplementary evidence and disagree with arguments or interpretations made by the OFA.

Finally, Proposed Findings are preliminary decisions issued by the OFA, containing the formal notification as to whether or not, on the basis of the documented petition, the petitioner has been determined to meet the FAP mandatory criteria. The official portions of it are a summary under the criteria and Federal Register Notice, accompanied by technical reports, a list of sources, and any additional materials used by the OFA.

The documented petition, supplementary materials, and documentary evidence submitted by the Fernandeano Tataviam throughout their federal recognition petitioning process — all reflecting the Tribe's identity — have been challenged and questioned by the OFA — the authority — on several occasions, the most contradictory materials being the 2016 TA Review Letter and the 2020 Proposed Finding. In addition to not accepting the Tribe's claim of prior federal acknowledgement in two occasions, the OFA issued a negative Proposed Finding based on the argument that the Tribe did not satisfy criterion (e) *Descent* of the regulations because, according to the federal entity — the moral world/order — the Tribe did not provide enough evidence to prove descent from a single “historical Indian tribe.” I unpack those tensions and contradictions below.

3. The “unsatisfied” Descent criterion

Criterion 83.11(e) of the regulations requires that the petitioner’s membership consists of individuals who descend from a “historical Indian tribe or tribes that combined and functioned as a single autonomous political entity ... from 1900 to the present.”¹⁰ In its 2016 TA Review Letter, the OFA notified the Fernandeano Tataviam of “deficiencies that would prevent the petitioner from meeting criterion 83.11(e) as required by the regulations.”¹¹ According to the OFA, the Tataviam never responded with information or clarification sufficient to address those deficiencies and as a consequence, the OFA issued a negative Proposed Finding stating that the Tribe did not meet the FAP regulatory requirements for fulfilling *Descent*.

In evaluating a petitioner under criterion 83.11(e) the OFA argues considering several issues, including “whether a petitioner has *identified* a historical Indian tribe for the purpose of calculating descent; whether a petitioner has *demonstrated* that this historical Indian tribe existed at a particular point before 1900; and whether a petitioner has *documented* that its current members descend from individuals who belonged to that historical Indian tribe.”¹² The regulations do not define “historical Indian tribe” in the 83.1 “terms” section, however, the OFA argues that the regulations do provide “basic requirements for what may constitute a “historical Indian tribe,”” by stating that the term ‘historical’ means before 1900, and the term ‘tribe’ means “Indian tribe, band, nation, pueblo, village or community.”¹³ Furthermore, the OFA argues that all versions of the acknowledgement regulations reflect that an “Indian tribe” is a “distinct

¹⁰ DOI AS - IA, Procedures for Federal Acknowledgement of Indian Tribes, 25 CFR § 83.11 - Criteria for Acknowledgment as a Federally Recognized Indian Tribe.

¹¹ OFA, TA Review Letter.

¹² OFA, Proposed Finding, 9.

¹³ *Ibid.* See also: DOI AS-IA, *Procedures*.

community” (criterion (b)) of Indians (criterion (e)) that exercised “political influence or authority” over its members (criterion (c)). The preamble to the 2015 acknowledgement regulations states that the revised regulations require “evidence of descent from a historical Indian tribe that existed prior to 1900.”¹⁴

Petitioners, thus, must demonstrate that its members descend from a “historical Indian tribe” — and should be able to demonstrate the existence of that historical Indian tribe — using historical evidence. Furthermore, petitioners need to document the names or identities of the individuals who belonged to the claimed historical Indian tribe; otherwise “it would be difficult to demonstrate that a petitioner’s members descend from people who belonged to that historical Indian tribe.”¹⁵ Additionally, historical documentation should support that the members of the claimed historical Indian tribe were in tribal relations, were being treated by the federal government as an Indian tribe (only in case that the petitioner is also making a claim of unambiguous previous federal acknowledgement) or were otherwise a tribal entity.

In their petition, supplementary materials, and response letters, the Tataviam claim descent from a “coalition” of politically autonomous “villages,” “lineages,” or “family groups,” called Suitcanga, Tujung, and Cabuepet, who interrelated through exogamous marriage and shared rules of land usage and ceremonial life. As outlined in chapter 3 of this dissertation, each of the Tribe’s three progenitors belonged to one of these lineages, forming a tribal network that participated in a social, economic, and political arrangement that predated the San Fernando Mission, maintained itself during the mission period (1797-1834), and reconstituted itself after the Mission was secularized in the decades preceding California statehood.

¹⁴ DOI AS - IA, 25 CFR § 83.10 - How will the Department evaluate each of the criteria?

¹⁵ OFA, Proposed Finding, 9.

Moreover, the Tribe claims that, after the mission period, its three progenitors — Maria Rita Alipas (1830-aft. 1868), Leandra Culeta (1840-aft. 1865), and Rosario Arriola (1840-1911?) — married men with the surnames of Ortega, Garcia, and Ortiz, respectively, and that the resulting three “lineages,” became associated with these three surnames: The descendants of Rita, through her marriage to Fernando Ortega, are called the “Ortega Line;” the descendants of Leandra, through her marriage to Isodoro Garcia, are the “Garcia Line;” and the descendants of Rosaria, through her marriage to Miguel Ortiz, are the “Ortiz Line.”¹⁶

Although a Native village that existed prior to 1900 may constitute a “historical Indian tribe” according to the regulations, the OFA contends that the Tataviam “did not claim its historical Indian tribe as any *one* native village,” or in the words of the regulations, that the Tribe did not demonstrate that the aforementioned Native villages combined and functioned as “a single autonomous political entity,”¹⁷ from which the Tribe could claim descent according to criterion (e). The OFA argues that evidence in the record does not demonstrate that any of these villages or surname lineages was an Indian tribe between the end of the mission period and 1900, nor that the three lineages combined and functioned as a single historical Indian tribe, thus failing to identify such an entity for the purpose of calculating descent.¹⁸

Additionally, the OFA questions whether “the [Tribe’s] lineage political and social organization was carried into the Mission,” arguing that “the FTB has not provided any historical evidence to support its claim that [the Tribe’s] lineage political and social organization survived

¹⁶ FTBMI, 2009 Submission, Criterion (e), 1-11; Ibid, Introduction, [unpaginated] 2; Ibid, Historic Narrative, Description of Current Group, [unpaginated] 2; FTBMI 2015 Submission, Criterion (b), 6-7, p. 18; OFA, Proposed Finding.

¹⁷ OFA, Proposed Finding, 10 (Emphasis mine); 25 CFR Part 83, 83.11(e).

¹⁸ OFA, TA Review Letter; OFA, Proposed Finding.

the mission period.”¹⁹ This argument, however, is inconsistent with the 2016 TA Review Letter’s own conclusion that “Fernandeños also continued some of the village forms of political influence and authority within a mission system where the outnumbered Franciscans looked to village leaders for help” and that the village *captains* “continue to exercise political influence and authority.”²⁰ This argument is supported by Hugo Reid, a knowledgeable commentator who made in-depth observations of the Fernandeño lineages in the mid-nineteenth century after closure of the SF Mission, and who confirmed that captains rule only over his or her own lineage-village.²¹

4. Discordant conceptualizations of “historical Indian tribe”

In its 2016 TA Review Letter and again in its Proposed Finding, the OFA suggested that, instead of the descent narrative presented by the Tribe in their petition, they should consider “one of two general paths forward” to identify a historical Indian Tribe from which to calculate descent and therefore satisfy criterion (e):

- 1) The petitioner could: a) provide new historical evidence demonstrating “the existence of three distinct social and political entities named Suitcabit, Cabuepet, and Tujubit, as they moved through time separately, and also came together as a coalition at various points in time”; b) identify “distinct entities in historical documents” from Mexican secularization in 1835 and up to 1900 that were identified as Suitcabit, Cabuepet, and Tujubit; and c) provide evidence that “shows when and why its claimed ancestors made the change” from the claimed native “lineage” names to the family names of Ortega, Garcia, and Ortiz.

¹⁹ OFA, TA Review Letter.

²⁰ *Ibid.*, 4.

²¹ FTBMI, TA Response Letter (San Fernando, 2017); Robert F. Heizer, *The Indians of Los Angeles County: Hugo Reid’s Letters of 1852* (Los Angeles, CA: Southwest Museum, 1968), 7-9, 15-17.

2) The petitioner could consider an “alternate theory” based on OFA’s observation in the TA Review Letter regarding a historical Indian tribe at the San Fernando Rey Mission, to which the petitioner’s three claimed historical “progenitors” (Rita, Leandra, and Rosaria) might be connected via their parents or grandparents. In the TA Review Letter, OFA mentioned a further possibility for a historical Indian tribe: an Indian entity that may have existed on five land grants within the boundaries of Rancho Ex-Mission San Fernando.²²

The Tribe’s initial response to the OFA’s suggestions and TA Letter, however, stated that OFA’s “alternate theory,” that the Tribe’s three claimed lineages became part of an “amalgamated” Indian tribe — a new, centralized, political and social entity — at the San Fernando Rey Mission, “is inconsistent with contemporaneous evidence and subsequent ethnographic analyses,”²³ referring specifically to the near-unanimous view of contemporary documentors and anthropologists of nineteenth century California such as Hugo Reid, Robert Heizer, George Harwood Phillips, and Alfred Kroeber;²⁴ and documents such as mission records, the San Francisco survey, and tribal rolls, all of which have been submitted by the Tribe with their petition. The Tribe further argues that such “amalgamation” theory overstates the influence of the relatively brief mission experience, misinterprets evidence of intermarriage practice, and more importantly, contradicts the well-known purpose of the missions — to obliterate tribal organization and assimilate and destroy Indian culture — thus erasing the strong system of tribal leadership and organization that predated and survived the mission system.²⁵

²² OFA, TA Review Letter; OFA, Proposed Finding.

²³ FTBMI, TA Response Letter.

²⁴ Heizer, *The Indians of Los Angeles County*; George Harwood Phillips, *Chiefs and Challengers: Indian Resistance and Cooperation in Southern California* (Berkeley and Los Angeles: University of California Press, 1975); Adolf Kroeber, *Handbook of the Indians of California* (Smithsonian Institution, Bureau of American Ethnology, 1925).

²⁵ FTBMI, TA Response Letter.

The Tribe's Response Letter also did not accept the idea that a historical Indian tribe existed in the mid-19th century on the land grants near the Mission. It states that, in the 1843–1845 period, “[t]here were at least 73 leaders of families and lineages [in the vicinity of the mission], and no recognized centralized authority among the Indians.”²⁶ The research conducted by the Tribe demonstrates that the area, which became the estate of the San Fernando Mission, was not occupied by one homogenous cultural or political group, as the OFA suggests in one of the recommended “paths forward.” Rather, the Tribe argues that the region was a crossroads of multiple cultures, languages, and numerous sovereign political entities — mainly lineages organized as villages where the language groups were Tataviam, Tongva, Chumash, and Kitanemuk — and only portions of these populations were baptized and joined the San Fernando Mission. Neither language nor marriage patterns determined political or national organization. Because of the high level of interaction, all groups had ceremonial, marriage, and political ties to lineages and villages that were both inside and outside the territories that would come under the San Fernando Mission.²⁷

Furthermore, because of the ways in which languages and naming conventions operated and changed during the post-mission period, the three lineages of Suitcabit, Cabuepet, and Tujubit changed their names *over time* into the lineage names of Ortega, Garcia, and Ortiz, respectively; the names did not officially change at some point, rather, both naming conventions were used interchangeably. Therefore, evidence that shows *when* and *why* the Tribe's ancestors made the name change from the claimed Native “lineage” to the family names of Ortega, Garcia, and Ortiz, does not exist, simply because that particular event never took place. The Tribe did

²⁶ Ibid., 2.

²⁷ Ibid.

not make the name change on their own, changes in the organization and naming of the Tataviam, are responses reflecting the social and historical realities for Indian peoples as mandated by the very same BIA at the time of relocation and termination.

One of the main reasons why the Tribe did not fulfill the *Descent* criterion according to the OFA, then, has to do not only with the fact that the OFA dismissed some of the evidence submitted by the Tribe in support of their narrative, but to the fact that the Tataviam and the OFA have different understandings of what a “historical Indian tribe” is. In other words, the OFA is asking the Tribe to demonstrate that its pre-mission organization was a historical Indian tribe — as defined by the regulations, not by the Tribe. According to the regulations, the petitioner’s membership must consist of individuals who descend from a historical Indian tribe, not from “arrangements,” “coalitions,” “networks,” or “lineage/villages” which is how the Tribe — and arguments found in multiple secondary sources — define the structure of its historical Indian tribe to be. The OFA contends that the Tribe’s claim that its surname lineages of Ortega, Garcia, and Ortiz had ancestral ties to Native villages is insufficient, since none of those Native villages were identified as a historical Indian Tribe according to the regulations.

In the Proposed Finding, the OFA further claims that the Tribe’s 2015 narrative supplements “did not direct the Department to replace the claims for criterion (e) it made in its 2009 narrative and remained focused on historical “lineages,”” as opposed to a single historical tribe. In the supplementary materials, the Tribe confirms its statement that:

The tribal entity [Tataviam] is a coalition of politically autonomous lineage villages, but interrelated through shared rules of exogamous marriage, shared rules of land usage, and voluntary participation in local and regional ceremonies. This “tribal” web of political independence and social/ceremonial ties existed

before the SFR Mission, and in modified forms, continued through the SFR Mission period, to the American period, and to the present.²⁸

Historical documents show that, before Spanish colonization and during the mission period, each Indian village in the Los Angeles area was composed of a single primary lineage, and persons who married in, retained membership in their birth village.²⁹ Likewise, OFA found in their TA Review Letter that before the mission period, individuals of each ethno-linguistic group belonged to villages as their primary social and political units.³⁰ These villages had territory, captains, laws, dispute resolution and social and cultural institutions and practices. They interacted for ceremonies, trade, intermarriage, and resolution of conflicts. In its Proposed Finding for the Juaneño Band of Mission Indians, which found a “historical Indian tribe” existed at the Mission San Juan Capistrano, OFA explained, “[s]ocially connected and culturally similar Indian populations from politically allied villages from a small local geographic area moved to the SJC Mission.”³¹ The same thing occurred at Mission SFR.

Furthermore, as they shared the experience of living at a common Mission Indian village site, electing alcaldes and other officials, continuing intermarriage and raising families, godparenting, witnessing marriages, working at new forms of labor in the mission economy, and practicing Christianity, the members of these historical Indian tribes came to see themselves as part of a community of *Fernandeños*. OFA found in the Juaneño decision that “Spanish policy at the Mission created a political structure for its Indian population which made the combined

²⁸ FTBMI, TA Response Letter, 12.

²⁹ Harwood Phillips, *Chiefs and Challengers*, 8-9; Heizer, *The Indians of Los Angeles County*, 5-7.

³⁰ OFA, TA Review Letter, 4.

³¹ FTBMI, *PF Response Letter* (citing Juaneño Proposed Finding, 5 (Nov. 23, 2007)).

groups a single political entity.”³² The Tataviam argue that the same Spanish policy was implemented at Mission SFR and had the same effect.³³

Kroeber³⁴ described the lineage/village structure that the Tataviam claim as their historical Indian tribe as sovereign mini-states that controlled territory and made independent decisions. Lineages in the region intermarried into other villages as a way of strategically gaining knowledge and increasing economic resources and political and social ties, without prejudice about ethnicity or language. Lineages cooperated with other villages and lineages, held territory, and maintained political and economic sovereignty over their local area, forming a loose coalition of social, economic and ceremonial cooperation that included the Tataviam.³⁵ Ordinarily, he continues, “the nationality, miscalled tribe, was only an aggregate of miniature sovereign states normally friendly to one another.”

He argues there were only a few tribes in California, instead, lineages tended to prevail in the arid desert and mountain areas while tribelets were frequent in the valleys, with both acting as miniature sovereign states over local territories — “the mountain and desert peoples lived in lineage groups, each possessing a territory, a chief, and a fetish bundle or set of religious

³² Ibid.

³³ Zephyrin Engelhardt, *The Missions and Missionaries of California, Vol. 2*, 540-42; Letter Branciforte to Lasuén on election of alcaldes, Santa Bárbara Mission Archive-Library, 12/20/1797. Spanish. 4 pp. Lasuén's reply, San Buenaventura, April 3, 1798.

³⁴ The same Alfred Kroeber who declared that the Ohlone Indian peoples (whom he called “Costanoans,” according to the academic convention of that time) were “for all practical purposes” extinct. Kroeber, *Handbook*, 464).

³⁵ FTBMI, 2009 Submission, 2; Interview by Gelya Frank to Charlie Cook, Rudy Ortega Senior and Rudy Ortega Junior: “Yeah, but there were too many tribes taken into San Fernando. There’s Tataviam from right here. Kitanemuk in Antelope Valley over on the Tejon Ranch. The Vanyumein Victorville, and the Yokuts/Yokotch in the San Joaquin Valley, and the Chumash people from the coast. And, of course, people in the San Fernando Valley...called Fernandinos. They’re part of the Shoshone people.”

paraphernalia.”³⁶ Bands or tribelets were composed of groups of cooperative lineages that share a common culture, but political power, social identity, and territory was vested in the lineages. This pattern was prevalent throughout most of southern and other parts of California, and among most groups who became known as the “Mission Indians.” According to Kroeber, the villages recognized in the literature for the San Fernando Indians were not corporate entities, but rather extended lineages.³⁷

In line with Kroeber’s arguments, the Tataviam Band is not composed of a single Indian ethnic identity, but rather formed by a specific community of kinship, social, and political ties among lineages that have several cultural and linguistic identities. There were no ethnically homogeneous identities or groups in the San Fernando Mission Indian region, as suggested by the OFA. Consequently, in the contemporary period and with the adoption of American bilateral descent rules, families and individuals chose among several San Fernando Indian communities according to their lineage connections and cultural and ethnic identity. The lineages allied together in the present Fernandeano Tataviam Band of Mission Indians have social, geographical, political, and genealogical ties to several villages and families that have bound together and have social relations from the pre-mission period.³⁸

Kroeber’s political description of lineage/villages demonstrates that the OFA is clearly not taking into consideration the unique histories, contexts, and realities of tribal familial,

³⁶ Kroeber, *Handbook*.

³⁷ FTBMI, 2009 Submission, 2. See also William Duncan Strong, *Aboriginal Society in Southern California* (Berkeley, CA: University of California Press, 1929), 342-349, and throughout the book.

³⁸ FTBMI, 2009 Submission.

community and political relations in California when assessing the Tribe’s narrative and the evidence they submitted in support of their petition.

5. *The evidence problem(s): absences (contd.), misinterpretations, dismissals*

According to the regulations, petitioning tribes satisfy criterion (e) *Descent*, by demonstrating that their members “descend from a tribal roll directed by Congress or prepared by the Secretary on a descendency basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate.”³⁹ If no tribal roll was directed by Congress or prepared by the Secretary, petitioners satisfy this criterion by demonstrating descent from a “historical Indian tribe” (or from historical Indian tribes that combined and functioned as a single autonomous political entity) with *sufficient* evidence including, but not limited to, one or a combination of the following types of records:

- 1) Federal, State, or other official records or evidence;
- 2) Church, school, or other similar enrollment records;
- 3) Records created by historians and anthropologists in historical times;
- 4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and
- 5) *Other* records or evidence.⁴⁰

The Tribe’s petition narrative and discussion provide, broadly, documentation from archival sources, secondary sources, and oral histories for the following:

1. the geographic boundaries of the villages in which the Fernandeano Tataviam people lived before missionization, the location of each of the village/lineage

³⁹ 25 CFR 83.11 (e) (1) and (2).

⁴⁰ 25 CFR 83. *Procedures for Federal Acknowledgement* (Emphasis mine). It is not clear what *sufficient* means, or what *other* records would be admitted as evidence by the OFA.

- populations during and shortly after the mission period, and the residential patterns of group members through the latter part of the nineteenth century and the entire twentieth century;
2. the social roles and influence of members and ancestors of members, identified by name;
 3. the nature of community life before, during, and after the mission period;
 4. the identity of churches, cemeteries, and other institutions that have served as a central focus for the group's activities;
 5. baptismal records that show how the group's members have traditionally served as godparents for one another's children;
 6. levels of participation in group activities;
 7. mechanisms to provide for the welfare of members, including fundraising for education, health care, and burial expenses.⁴¹

Birth certificates and ancestry charts have been provided alphabetically for all current members and for their direct Fernandño Tataviam ancestors. These documents show that each of the members traces his or her history to one of three Fernandño Tataviam progenitors. The ancestry of those three ancestors has also been documented by the Tribe. The Tribe has also provided argument and evidence for the continuity of significant features of political influence and community organization starting in the pre-Mission era, continuous to the present. Supporting government documents and requested certifications have also been provided by the Tribe in accordance to the regulations.⁴²

In the 2016 TA Letter, however, the OFA made the determination that some of the records submitted by the Tribe in support of their petition do not represent appropriate evidence to fulfill the *Descent* criterion. In such document, the OFA states:

⁴¹ FTBMI, 2009 Submission.

⁴² *Ibid.*

If the FTB petitioner chooses to maintain the claim that the historical Indian tribe consisted of a coalition of three distinct, politically autonomous Western Gabrielino lineages named Suitcabit, Cabuepet, and Tujubit, then ... [t]he FTB Petitioner should submit evidence other than secondary sources and the SFR baptismal records. Specifically, the petitioner should provide historical documents that demonstrate the existence of the three distinct social and political entities named Suitcabit, Cabuepet, and Tujubit as they moved through time separately and also came together as a coalition at various points in time.⁴³

By doing this, the OFA dismissed two of the most important substantiating sources of evidence that document the historical cohesion and identity of the ancestors and organizers of the Tataviam. Ironically, however, the OFA contends in the same TA Letter that they “could not find *other* kinds of evidence to support the petitioner’s claim that its ancestors prior to 1900 were members of ‘portable, movable, [and] flexible’ lineages.”⁴⁴ To this, the Tribe’s response is that the OFA is holding the Tataviam to a higher evidentiary standard than the regulations require:

The TA review’s finding that more than one form of evidence is needed is contrary to the regulations which permit a petitioner to meet criterion (e) with “one or a combination of” specified categories of evidence, including “Church...enrollment records.” § 83.10(e)(2)(ii). This provision makes clear that the Tribe may demonstrate that its members descend from a historical Indian tribe based on Mission baptismal records only.⁴⁵

The OFA contends, nevertheless, that they requested further evidence so that the Tataviam could show that its claimed “lineages” actually constituted “historical Indian tribes,” in accord with the

⁴³ OFA, TA Review Letter.

⁴⁴ *Ibid.*; FTBMI, TA Response Letter, 1–2 (Emphasis mine).

⁴⁵ *Ibid.*

regulations, because in their opinion, the materials submitted by the Tribe — SFR baptismal records, the petitioner’s membership list, the rolls of the Indians of California for claims payments, among others — do not constitute such evidence.

Mission records, and especially baptism records, however, not only are listed in the regulations as a legitimate category of evidence for demonstrating *Descent* (listed as “church or other similar enrollment records”) but also supply strong evidence of the existence and continuity of the lineages that entered Mission San Fernando. They are original documents and contain a variety of information that extends across and before the SFR Mission period. Since a lineage is a kinship group, the SFR Mission vital documents provide an extraordinary record of lineage-group activities such as marriages, deaths, births, possible candidates for political leadership, and lineage survivability. JD Carole Goldberg, legal scholar and co-leader of the Tribe’s petition’s research team, believes that the problem is in part that the OFA is assessing mission records as if they were individual records, however:

[T]hey [mission records] have enormous amounts to say about tribal community, because for those who were not born at the mission, they identify the lineage that their parents come from. And if our [the Tribe’s] position is that the Tribe’s lineages continued through the mission period and beyond, you need the mission records to show that. Insofar as the missionaries are documenting the continuation of leadership by lineage captains, that is significantly relevant to the argument we’re making in this petition.⁴⁶

When Indians held at the missions were baptized, the *padres* followed the Spanish practice of writing out the place of origin for the person baptized. The first generation of baptized individuals usually had a village or lineage name attached to their baptism record. The *padres*

⁴⁶ Carole Goldberg, Interview with the author, June 2020.

often recorded village names or lineage names, and generally used both expressions interchangeably. From these mission registers, some Indians can be connected either directly to a Native village or indirectly — through his or her ancestors. Consequently, the mission records make it possible to determine the lineage from which most of the Indian members of the San Fernando Mission originated, or were living at the time of baptism.

In other words, it is possible to identify the ancestors of the present-day members of the petitioning community through the mission record, and that is what the Tataviam did: they provided an analysis of their ancestors' links to various villages, based on such mission records. Through analyzing the first generation of baptism from the ancestors of the Tribe's three lineages, one can understand the historical and continuous culture of the contemporary community that traces back to pre-mission networks and connections.⁴⁷ The California mission registers, therefore, do contain the information necessary to reconstruct not only the individual life histories of the tens of thousands of Indians (and settlers) who lived in California, but also the divergent population dynamics of these groups. Discarding this form of evidence by displacing their evidentiary value is yet another form of colonial dispossession.

Moreover, contradictorily, the OFA's TA Letter relies to a substantial degree on baptismal records for supporting the Tribe's argument that Tataviam village leaders continued to exercise political authority after entering the Mission.⁴⁸ Why would these types of records, then, be legitimized to support the OFA's version of the Tribe's existence and not the Tribe's descent argument of political and community continuity over time? While in the PF, the OFA verbally

⁴⁷ FTBMI, 2009 Submission, 4.

⁴⁸ OFA, TA Review Letter, 4.

accepted for the first time the genealogy presented by the Tribe, the same records that the Tribe used to prove such genealogy were considered not enough to prove *Descent*.

The Tataviam also contend that the OFA is holding the Tribe to a higher standard than it held the Death Valley Timbisha Shoshone (as well as the Tunica-Biloxi Indian Tribe and Poarch Band of Creeks) who were recognized in 1983. More specifically, the Tribe argues that the OFA considered the Timbisha Shoshone’s tribal rolls as legitimate evidence in support of criterion (e), but discredited the California Judgement Rolls presented by the Tataviam in support of the same criterion. These are enrollment lists that were produced by the BIA so that California Indians — defined as Indians residing in the State of California on June 1, 1852, and their descendants — could bring suit against the US for lands taken from them. Both the 1928 and 1972 rolls were designed to prove tribal political and cultural affiliation — the questions contained in the forms specifically asked what tribe an individual belonged to and who was the leader of that tribe, necessarily recording the names or identities of the people who belonged to a tribal entity at the time when the roll was created. Applicants were required to get their evidence to the BIA to prove eligibility so they would receive part of the payout.

The OFA, however, stated in its Proposed Finding that the rolls of the Indians of California for claims payments do not satisfy § 83.11(e)(1), because “those rolls were not prepared for specific tribes...” and that the evidence upon which they relied in reaching positive decisions on criterion (e) in regard to the Death Valley Timbisha Shoshone and other tribes is different from the Tataviam’s evidence, “limiting the applicability of that precedent.”⁴⁹ According to the regulations, OFA argues, the evidentiary value of tribal rolls is that they

⁴⁹ OFA, Proposed Finding.

provide “names or identities of the people who belonged to a tribal entity at the time when the roll was created.”

Many federally recognized tribes rely on tribal Federal rolls as base membership rolls and the Department’s approach here regarding such rolls for this process is consistent with this tribal practice. While no human endeavor is perfect, tribal rolls created by the Department were often prepared in person by a Departmental representative or team to promote accuracy. The final rule clarifies that the roll must have been prepared for a tribe. In contrast, rolls of the Indians of California for claims payments would not satisfy § 83.11(e)(1) because those rolls were not prepared for specific tribes, but rather descendants from an Indian who lived in the State on June 1, 1852. If Departmental tribal censuses or rolls are not available, the Department will then look to other documents, as needed. For example, the rolls of the Indians of California may be provided as evidence to be evaluated under § 83.11(e)(2). This approach codifies past practice. For example, in acknowledging the Death Valley Timbi-Sha Shoshone Band, the Department relied on Departmental rolls and censuses.⁵⁰

The OFA contends that the Tribe has not provided such tribal rolls as evidence, and that they could not locate such rolls during its evaluation either, further arguing that “the Tribe’s claim related to evidence used in those decisions [Death Valley Timbisha Shoshone, Tunica-Biloxi Indian Tribe and Poarch Band of Creeks] is misguided.”⁵¹

The problem is that not all California tribes had rolls created specifically for them.⁵² The three different ways by which California Indians were required to prove eligibility for the 1972 California Judgement Roll — being on one of their existing rolls from 1928 or 1940, have a

⁵⁰ 80 FR 37867, Federal Register Volume 80, Number 126 (Wednesday, July 1, 2015).

⁵¹ OFA, Proposed Finding.

⁵² Where they exist, these rolls or censuses are documented in M595 from 1885-1940.

lineal relative on one of these rolls with evidence documenting the familial relationship, or trace their ancestry back to an Indian in California in 1852 — should be enough to prove tribal affiliation. In relation to this, sociologist Duane Champagne (Turtle Chippewa), co-leader of the Tribe’s petition research team, asserts: “Taking records that identify tribal affiliation and tribal leadership, and treating them as worthless for demonstrating tribal organization, is an erasure.”⁵³ Thus, the evidence that the OFA is dismissing was designed by the very federal entity it serves.

Additionally, the OFA’s TA Letter requiring evidence “other than secondary sources”⁵⁴ ignores the widely accepted scholarly arguments on California tribal lineage/village political structures made by Kroeber, Heizer, and others discussed above. The OFA’s claim that the 2009 submission did not demonstrate that the Tribe’s three nineteenth century progenitors belonged to a particular “historical Indian tribe” that existed in their lifetimes is not only wrong, but, as demonstrated by scholarly sources, proving one single entity from which the Tataviam descend is an impossibility; something for what there exists no evidence because what they are asking the Tribe to prove is historically inaccurate. This is in line with Joanne Barker’s (Lenape, citizen of the Delaware Tribe of Indians) argument that, “U.S. national narrations represent recognition as an expected outcome of Native cultural authenticity,” where tribes are required to demonstrate their *Indianness* in accordance with a standard that “makes it impossible for Native peoples to narrate the historical and social complexities of cultural exchange, change and transformation.”⁵⁵

While in the previous chapter I argued that the absence of evidence for supporting petitioners’ recognition claims is a direct consequence of tribes having been removed, relocated

⁵³ Duane Champagne, Interview with the author, June 2020.

⁵⁴ OFA, TA Review Letter.

⁵⁵ Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham and London: Duke University Press, 2011), 221.

and replaced by U.S. settler state's termination policies, here we see that evidentiary absences can also be crafted and architected by the federal government, *discursively*. In the case of the Tataviam, this is being done by the OFA by dismissing the evidence that does exist and requiring additional evidence to prove events that never happened, or realities that have been proved to be inaccurate. Having to prove the existence of a single entity or "historical Indian tribe" as the Tribe's ancestor with documentary evidence that does not exist or was never produced is an example of what Anne Gilliland and Michelle Caswell describe as a situation where the "nothing" or "no evidence" is in itself evidence of the particular regime or system that caused that absence.⁵⁶ And this illustrates ways in which evidentiary absences can be weaponized — requiring documentary evidence to prove a concept that is historically inaccurate or inapplicable and events that never took place. Knowing and acknowledging that there is an evidentiary/documentary gap, therefore, is an archival and discursive counter-tactic.

6. Conclusion: The need to engage with alternative/undocumented tribal narratives and their non-evidences

The evidentiary and conceptual tensions and contradictions exposed above demonstrate the ambiguity of the FAP's criteria, and the enormous power the OFA has to define and reinterpret the terms within the regulations, and to evaluate what constitutes satisfactory evidence for recognition. Concepts such as "entity," "community," "political influence and authority," and for the purposes of this chapter, "historical Indian tribe," are all highly subjective and malleable, and given the BIA's historical origins, deeply imprinted with the historical legacy of the Indian

⁵⁶ Anne Gilliland and Michelle Caswell, "Records and Their Imaginaries: Imagining the Impossible, Making Possible the Imagined," *Archival Science* 16 (2016): 54.

Reorganization Act (IRA)⁵⁷ and the consequent efforts by Indian peoples whose existence was not affirmed by treaties or other arrangements with the federal government to obtain such recognition.⁵⁸

This chapter's discussion also reveals the extent to which federal recognition is dependent on the petitioning tribe's externally and internally constructed social identity,⁵⁹ and the ways in which those identities are determined by what is considered legitimate evidence by the OFA. By discrediting mission records, California judgement rolls, and scholarly secondary sources submitted as evidence by the Tribe, and then requiring additional forms of evidence in support of criterion (e), the OFA is displacing the value and legitimacy of records that are nonetheless listed in the regulations as acceptable forms of evidence — the only forms of evidence officially “archived” by non-tribal repositories. If these evidences are discredited and tribally-generated forms of evidence are also ignored, then fulfilling the FAP's criteria becomes a daunting if not impossible task.

The OFA read and analyzed the Tribe's documentary evidence without appropriate contextualization or tribal interpretation, relying mostly on how non-Indigenous legal and social scientific analyses indicate “Indianness,” rather than taking into account the contemporary realities, tribal beliefs, and unique histories of petitioning tribes. Rooted in colonial conceptions of history and evidence, OFA assessments of the records submitted by the Tribe in support of their petition narrative fail to consider the impact that the contexts in which records were/are

⁵⁷ Explained in Chapter 1.

⁵⁸ Les W. Field (with the Muwekma Ohlone Tribe), “Unacknowledged Tribes, Dangerous Knowledge: The Muwekma Ohlone and How Indian Identities Are “Known”,” *Wicazo Sa Review* (Fall, 2003): 84.

⁵⁹ Anne Merline McCulloch and David E. Wilkins, “Constructing” Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes,” *American Indian Quarterly* 19, No. 3 (Summer, 1995): 362.

created have on tribal archives, as well as the biases built into the records that tribes are required to rely on as evidence of their Indian existence. By default, dismissing the value and legitimacy of records used by a Tribe to prove their very Indian identity and existence significantly perpetuates colonial anxieties and a discourse of tribal erasure and disappearance. In the Tataviam petition case in particular, the OFA seems to be only engaging with documented and mainstream articulations and definitions of what a “historical Indian tribe” is — “bounded entities capable of “[reflecting] their cultural consistency ‘from historical times to the present.’”⁶⁰ This kind of narrative is incongruent with Tataviam history, and with Southern California petitioning tribes more broadly, largely due to the federal policies listed in Chapter 1. In other words, Tataviam history and identity — and their evidences — do not quite fit the officially constructed American Indian tribal mold.

In ““Constructing” Nations within States,” Anne McCulloch and David Wilkins argue that the social construction of “Indianness” created by Euroamericans is among the most critical elements in determining which tribes get federally recognized in and by the U.S. What a person or group is perceived to be is just as much a function of subjective phenomena as of objective phenomena and therefore, they argue, identity politics are critical to understanding the background and intent of federal Indian policies such as the FAP.⁶¹ Because the term “Indian” itself is a social construction, the ability of an Indian tribe to become and remain a federally recognized tribe is dependent on how well that tribe “fits” the social construction of “Indian tribe” as perceived by federal officials, and simultaneously, on how the archives support that conceptual construction. While the OFA’s function depends on its authority to categorize,

⁶⁰ Barker, *Native Acts*, 37.

⁶¹ McCulloch and Wilkins, ““Constructing” Nations within States.”

classify, legitimate, and exclude evidence as an arm of the policy-making machinery of U.S. Indian policy, it seems to also inherit the scope of power over knowledge production and legitimation of Native identities that Foucault, Derrida, and others⁶² have carved out for archives and their “archons” — archivists.

Moreover, OFA’s utilization of the term “historical Indian tribe,” and its analysis of whether Indian groups match that particular model is based on what Indian tribes have become for the majority of Native American groups in the wake of the IRA. Evidentiary standards applied to post-IRA tribes could not possibly have relevance to Indian groups before 1934, especially groups that were systematically denied land and title, as is the case with unrecognized Native groups in California. In other words, the OFA’s approach to the concept of “Indian tribe” is both historically inapplicable and historically irrelevant to a landless, disenfranchised people for or by whom, as a consequence, those forms of evidence were never produced.⁶³

The OFA’s treatment of secondary sources and the mission baptismal records is very interesting because those records do fall under categories of evidence considered legitimate by the OFA *and* are held in “official,” non-tribal archival repositories. The dismissal of Kroeber’s analysis of lineage/villages in California in particular, demonstrates how empirically-driven scholarly conceptions of Indigenous culture and history dissipate in the face of the evidentiary exigencies of recognition. The treatment of Kroeber’s and other evidence fits into the larger framework of disjuncture in the OFA’s analysis of the Tataviam petition, a disjuncture that is based on the OFA’s simultaneous concern that band-type organization does not resemble IRA-

⁶² See: Michel Foucault, *Archaeology of Knowledge and The Discourse on Language* (New York, NY: Pantheon Books, 1972); Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago, IL: University of Chicago Press, 1998) among others. Refer to the section on Archives, Power and Nation Building in Chapter 4.

⁶³ McCulloch and Wilkins, ““Constructing” Nations within States,” 369.

type tribes, and that bands that reorganize themselves in response to post-1934 BIA governance regulations are therefore artificial and contrived.

The disjuncture is not within Tataviam history, however, which again and again features the same families and individuals involved in social organization and reorganization, but in the OFA's manner of analyzing knowledge.⁶⁴ In other words, delegitimization of Tataviam social construction and history becomes possible through specific procedures for certifying, analyzing, and applying knowledge found in the archives. To miss the presence of a "historical Indian tribe" in the Tataviam's recognition claim, the OFA must discard many kinds of evidence and documentation, establishing a tightly controlled arena of legitimate knowledge over which the OFA alone has control.

On the other hand, the Tribe's attempt to reframe Kroeber's work — often deemed racist, offensive and derogatory by tribes — as the arbiter of Tataviam political and social tribal structure underscores the subtle ways in which anthropological archival knowledge has been reconstituted as "evidence" to facilitate politically convenient narratives or, in other words, to comply with the burden imposed by the OFA to articulate a group's "Indianness." Social constructions of tribes — particularly of so-called non-recognized tribal groups — which are overtly prejudicial, based on archaic and mythic understandings of Indianness, or simply steeped in wrong-headed and pseudo-scientific language, must be counteracted with balanced, tribally generated and tribally historically based, accurate records so that intertribal and intergovernmental decisions as important as the extension of government-to-government relations are made in full view of the facts, and not in the shadows of lingering stereotypes.⁶⁵

⁶⁴ Field, "Unacknowledged Tribes," 90.

⁶⁵ McCulloch and Wilkins, "'Constructing' Nations within States," 384.

Petitions, then, as argued by De Costa, can also be “the opportunity for the presentation of a transcendent moral order, in which identities and authorities shift into new relations and take on new forms.”⁶⁶ Here, the Tataviam are using the formal mechanism of a petition to authority “to formulate and express new identities that imply co-existence with colonial and national authorities in new moral worlds.”⁶⁷ As such, petitions can be sites for the rich production of knowledge, as well as new meanings and identities.

The problem here, however, is that the Tataviam are being asked to change or re-structure themselves in response to the OFA’s regulations for tribal governance, even though those regulations do not correspond to the historic ways bands like the Tataviam had interacted and related to one another. The solution seems to be having to reframe themselves — evidentially — in a more recognizably or legible “Indian” light, through the archives that are accessible or more importantly, the ones that the OFA considers legitimate. This means that oral accounts produced by the Tribe cannot be used for this re-structuring. While theoretically tribes can provide written records of their own keeping, they still must prove the “authenticity” of those records. OFA staff often advise tribes to concentrate their efforts on gathering “official” archival records, because it is extremely difficult to get other documents approved as legitimate by their reviewers.

These “legitimate” forms of evidence require tribes to find information on recognition by outsiders, information that was based in a racist, colonial system that often failed to distinguish different tribes and practices. In so doing, and as argued by Courtney Rivard, “this system reemphasizes the power of the colonial gaze, in which tribes must prove their existence by

⁶⁶ Ravi De Costa, “Identity, Authority, and the Moral Worlds of Indigenous Petitions,” *Society for Comparative Study of Society and History* (2006): 670.

⁶⁷ De Costa, “Indigenous Petitions,” 694.

demonstrating that an agent of the colonizer state acknowledged their presence.”⁶⁸ In the case of the Tataviam, hegemonic conceptions of “Indians” conditioned how archival records could be used in support of their case. For those like me who wish to operationalize archives for anticolonial ends, histories of the intersections of archives and federal recognition claims are an opportunity to trace the ways in which engaged archival studies is delimited by broader political conceptual imperatives.

In their response to the Proposed Finding, the Tribe ends up agreeing with OFA’s suggested path forward that “the mission experience resulted in consolidation of the Indians into a single tribe and that the lineages continued within the framework of the mission tribal community”⁶⁹ — or, put simply, that the current Tribe descends from the historical Indian tribe that emerged from the Mission SFR experience. This could be seen as a compromise by some, and as a strategic move by others, or as being part of a process of ideological production that is subject to subordination from state institutions and contestation from subaltern agents.⁷⁰ This also gives us some sense of what it is to represent one’s community in the face of great power that denies your claims and even your existence. Narrative mechanisms like the ones adopted by the Tribe show the need to renew identity on changing landscapes of authority and morality, and the methods with which this might be done.⁷¹

⁶⁸ Courtney Rivard, “Archival Recognition: The Pointe-au-Chien’s and Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogeans’ Fight for Federal Recognition,” *Settler Colonial Studies* 5, No. 2 (2015): 121.

⁶⁹ FTBMI, PF Response, August 2020.

⁷⁰ Barron, ““Aren’t We Kind of Splitting Hairs,”” 36.

⁷¹ De Costa, “Indigenous Petitions.”

The Tataviam conclude their letter by stating: “The Tribe can account for individual Fernandeano tribal members as of 1845 when the Mission SFR records cease, and through every Federal census of the nineteenth century. Current tribal members all descend from the people of that historical Indian tribe showing that the Tribe satisfies Criterion (e). In light of the alignment of the OFA’s and Tribe’s understanding of the historic Indian tribe from which the Fernandeano Tataviam Band of Mission Indians descends, the Tribe asks that OFA amend its Proposed Finding to find that Criterion (e) is satisfied.”⁷²

The OFA responded that at this point they cannot change their decision and that the options for the Tribe are to proceed with AS-IA review; withdraw the petition under § 83.30, with the option of submitting a new petition; challenge the Proposed Finding before an administrative law judge as described under §§ 83.38-.39; or request that the AS-IA extend a comment period under § 83.8, which the AS-IA may do upon finding “good cause.”⁷³ To date, the Tribe has not made a final decision regarding these options but did ask for an extension of the comment period, with a new deadline of June, 2021.

⁷² Ibid.

⁷³ OFA, Follow-up Letter, January 2021.

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Chapter 7: Tensions and contradictions III: AFFECT

I saw it as one little hope of light down the tunnel for us.
On that document.¹

1. Introduction: the archival affective economies of Indigenous mis-representation

Affect has always been present as an underlying dimension of archival realities although it has been only recently that it has shifted from a tacit concern to a more explicit focus within the archival field, especially as it is used to explore human rights and social justice issues. Broadly, archival scholarship on archival affect acknowledges its significance when examining the impact of archives and recordkeeping on daily lives, especially those of survivors of traumatic events, on archivists themselves, as well as the larger need to engage with the emotional and embodied aspects of archival use more generally.²

In this chapter, I consider the affective dimensions or economies — the systems of value through which human beings structure and negotiate their relationships — of archival processes

¹ Rudy Ortega Jr., Interview with the author, October 2019.

² See: The special issue of *Archival Science* edited by Anne Gilliland and Marika Cifor titled “Affect and the Archive, Archives and their Affects;” Michelle Caswell, *Archiving the Unspeakable: Silence, Memory and the Photographic Record in Cambodia* (Madison: University of Wisconsin Press, 2014); Michelle Caswell, “Towards a Survivor-Centered Approach to Records Documenting Human Rights Abuse,” 307-322; Anne J. Gilliland, *Conceptualizing 21st-century archives* (Chicago: Society of American Archivists, 2014); Anne J. Gilliland, “Moving Past: Probing the Agency and Affect of Recordkeeping in Individual and Community Lives in Post-Conflict Croatia,” *Archival Science* 14, No. 3-4 (2014); Anne J. Gilliland, “Studying Affect and its Relationship to the Agency of Archivists Since the Yugoslav Wars.” In Richard J. Cox, et al, Eds. *Studies in Archival Education and Research: Selected Papers from the 2014 AERI Conference* (Sacramento: Litwin Press, 2015); Marika Cifor, “Affecting Archives: Introducing Affect Studies to Archival Discourse,” *Archival Science* (2015); Brien Brothman, “The Past that Archives Keep: Memory, History and the Preservation of Archival Records,” *Archivaria* 51 (2001): 62; Brien Brothman, “Perfect Present, Perfect Gift: Finding a Place for Archival Consciousness in Social Theory,” *Archival Science* 10, No. 2 (2010): 159; Anderson, “The Footprint and the Stepping Foot;” Hariz Halilovich, “Reclaiming Erased Lives: Archives, Records and Memories in Post-War Bosnia and the Bosnian Diaspora,” *Archival Science* 14, No. 3-4 (2014): 231-247; Verne Harris, “Antonyms of Our Remembering,” *Archival Science* 14, No. 3-4: 215-229; David A. Wallace et al, “Stories for hope—Rwanda: A Psychological Archival Collaboration to Promote Healing and Cultural Continuity through Intergenerational Dialogue,” *Archival Science* 14, Nos. 3-4 (2014).

and, in particular, the meaning and place of archives when they concern Indigenous peoples and their intimate lives, and how those resulting emotions contribute to the construction and/or loss of identities, or as I quote later from Tonia Sutherland, disruptions of “ontological and epistemological understandings of self.”³ I argue that the ways in which political recognition processes require the involvement, attention to, and use of settler colonial archives, provoke affective responses that reveal the way records have the capacity to “motivate, inspire, anger and traumatize.”⁴ These archival affective economies could function as catalysts and textures for anticolonial conceptualizations of records and evidence and therefore a space into which archival scholars and practitioners could expand their practices and their relationships to communities, or step up. Importantly, I look into this real set of problems with additional affective dimensions through which Native communities survive, resist, wait out and actively contradict these settler problems. Key to all of this is the varied ways that time comes into play — where competing temporalities and temporal effects both bureaucratize, weaponize, normalize and defer these archival violences, or energize, empower and unsettle resistance to them.

Throughout my work assisting the Tataviam with their recognition petition, I saw affect manifesting primarily in the inherent contradiction of tribal citizens involved in the process of locating, gathering and interpreting evidence for the recognition process. This is a contradictory process in which they have to prove their own existence with evidence that was originally created — or left absent or purposefully not created at all — to destroy their existence. One of

³ Sara Ahmed, *The Cultural Politics of Emotion* (New York: Routledge, 2004); Ann Cvetkovich, *An Archive of Feeling: Trauma, Sexuality, and Lesbian Public Cultures* (Durham: Duke University Press, 2003); Kate Eichhorn, *The Archival Turn in Feminism: Outrage in Order* (Philadelphia, PA: Temple University Press, 2013); Antoinette Burton, *Dwelling in the Archive: Women Writing House, Home, and History in Late Colonial India* (New York: Oxford University Press, 2003). See: Luker, “Decolonizing Archives,” for a comprehensive outline of research and initiatives drawing on archival affect.

⁴ Gilliland and Caswell 2016, 53.

the most immediate consequences of that contradiction is discursive and affective erasure, or what Michelle Caswell might call, “symbolic annihilation,” the ways in which mainstream archival practice has (and in many cases continues to) symbolically annihilate Indigenous and other marginalized communities through absence, underrepresentation, and misrepresentation.

With its peak at the end of the 19th century and beginning of the 20th century, the colonial collecting project — a partly federally funded campaign spearheaded by anthropologists, archaeologists, and ethnographers, among others — was a destructive mechanism by which Indigenous materials and documents were removed from communities and detached from local knowledge systems and contexts. Much of this material remains today physically and discursively distant from their tribal homes — in museums, archives, libraries, and universities — and as a consequence, very few Native communities have a say regarding how these collections should be stored, described, interpreted, displayed, accessed, shared and used. This inevitably leads to the misrepresentation of tribal records, due to missing, inaccurate, incomplete or simply wrong information accompanying or describing these collections.

Tribes, then, often find themselves having to rely on these same collections, upon documents created by non-Indians whose external and alienated representations — even those that are articulate and scholarly —misreported Indigenous peoples’ histories and realities, and were far from conveying actual tribal needs, perceptions and self-conceptions.⁵ Even more problematic, these ‘experts’ produced documents that became evidence of the supposed “uncivilized” and “warlike” nature of Native groups, propping up laws that resulted in their assimilation and the illegal occupation of their territories by the settler state. Collected,

⁵ Colin Calloway, *The World Turned Upside Down: Indian Voices from Early America* (Boston and New York: Bedford/St. Martin’s Macmillan Learning, 2016); Scott Richard Lyons, *X-Marks: Native Signatures of Assent* (Minneapolis, London: University of Minnesota Press, 2010).

assembled, curated, and archived for a non-Indigenous audience and used to build cases for territorial and discursive dispossession, these documents — including reports, field notes, maps, ledgers, photographs, correspondence, land grant applications, and other administrative records — held in non-tribal archives and libraries today, are both anchors to the colonial past and evidence for present (biased) reconfigurations of tribal history, memory, and identity.⁶

This affective erasure is illuminated by the comparison made by anthropologist Les Field between the Muwekma Ohlone case and what Meron Benvenisti has called “the Israelification of Palestinian geography.”⁷ Working for and investigating the petitioning process for federal recognition of the Muwekma Ohlone Tribe of what is currently known as the San Francisco Bay Area, Field uses Benvenisti’s study to draw attention to the various colonial practices and outcomes that have substantively erased and replaced Indigenous peoples’ constitutive features of social and cultural landscapes. According to the author, these practices are the direct consequence of a community’s loss of control over documenting its pre-colonial historical memory primarily due to displacement and land dispossession.⁸

Created with the purpose of erasing and appropriating Indigenous lives, Land and resources,⁹ the colonial records through which the Tataviam are required to prove their existence,

⁶ Kim Christen, “We Have Never Been Neutral: Search, Discovery, and the Politics of Access,” (Dublin, OH: OCLC Distinguished Seminar Series, 2017).

⁷ Meron Benvenisti, *Sacred Landscape: The Buried History of the Holy Land since 1948* (Berkeley: University of California Press, 2002) quoted in Led W. Field, “Mapping Erasure: The Power of Nominative Cartography in the Past and Present of the Muwekma Ohlones of the San Francisco Bay Area” in Amy Den Ouden and Jean O’Brien (eds.) *Recognition, Sovereignty Struggles and Indigenous Rights in the United States* (Chapel Hill: The University of North Carolina Press, 2013), 287-309.

⁸ Ibid.

⁹ Courtney Rivard, “Archival Recognition: The Pointe-au-Chien’s and Isle de Jean Charles Band of the Biloxi-Chitimacha Confederation of Muskogees’ Fight for Federal Recognition,” *Settler Colonial Studies* 5, No. 2 (2015): 117–127; Maria Montenegro, “Unsettling Evidence: An Anticolonial Archival Approach/Reproach to Federal Recognition,” *Archival Science* 19 (2019).

are ones that have been central to political processes advanced by the nation-state, working, as Jeannette Bastian reminds us, “often as obstacles to be overcome, predicaments to be resolved and mazes to be negotiated rather than as the sources of enlightenment and memory.”¹⁰

Therefore, in addition to the violence of being subjected to a federally crafted recognition process that is already a maze, petitioning tribes have to navigate it in the maze of historically colonial archives, filled with evidence that is also its own maze, including non-tribal forms of knowledge production, documentary realities and recordkeeping places and practices, and settler-colonial understandings of time.

Informed by interviews and informal observation of discussions at open tribal council meetings, reactions of tribal citizens when compiling and storing documentation for the petition, casual conversations with tribal citizens where stories were told about previous encounters of individuals or their families with documents or discussions about the petition process, and the processes of simply handling and completing recognition official documents, this chapter will attempt to convey the effects and affective consequences that result from requiring tribes petitioning for federal recognition to prove their ‘authenticity’ in this manner, through federal legal frameworks, western notions of time and space, and relying predominantly on settler-colonial evidence. I focus on the affect produced when being forced to engage with externally imposed and often racist, static and stereotyped definitions and interpretations of Indianness,¹¹ when having to reinterpret those records to make the case for the continued existence and

¹⁰ Jeannette Bastian, “Reading Colonial Records Through an Archival Lens: The Provenance of Place, Space and Creation,” *Archival Science* 6, No. 3-4 (2006): 268.

¹¹ Joanne Barker, *Native Acts: Law, Recognition and Cultural Authenticity* (Durham, NC: Duke University Press, 2011); Joanne Barker, “The Recognition of NAGPRA,” in A. Den Ouden and J. O’Brien (Eds.) *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013).

survival of their people and sovereignty, and in those interviews and observation, the affective and intellectual reservoirs from which communities do continue, survive, thrive, await, wait out and unsettle the discourses stacked up against them.

2. FTBMI Indian identity v. settler colonial archival forms of evidence

Locating, accessing, and (re)interpreting (settler colonial) evidence

The OFA identifies the following as valid and legitimate evidence for proving the existence of a tribe as an ‘Indian entity’:

1. Identification as an Indian entity *by federal authorities*;
2. *Relationships with State governments* based on identification of the group as Indian;
3. Dealings with a *county, parish, or other local government* in a relationship based on the group’s Indian identity;
4. Identification as an Indian entity *by anthropologists, historians, and/or other scholars*;
5. Identification as an Indian entity in *newspapers and books*; and
6. Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.¹²

Indeed, with the exception of point 6, the list of acceptable sources of evidence suggested by the OFA points to records created mostly by non-Indians and/or by non-tribal entities using mainly western forms of knowledge keeping and sharing. In other words, tribal voices are mostly absent from the forms of evidence required above — tribes “don’t see themselves existing”¹³ in the records that, ironically, they have to use to prove themselves as existing. This makes it very hard

¹² 25 CFR Part 83 (Emphasis mine).

¹³ Michelle Caswell, Marika Cifor, and Mario Ramirez, “‘To Suddenly Discover Yourself Existing’: Uncovering the Impact of Community Archives,” *American Archivist* 79, No. 1 (2016).

for petitioners to have to encounter those records, read them, understand them, interpret them, and enact them as part of their history and evidence of community life. Affectively, such a process might cause or contribute to an entire community's loss of identity.

Tribal elder, education and cultural leader Warren David (Santa Clara Pueblo, Tewa) refers to this as “the feeling that happens when someone with the authority describes the world and you are not in it.” A moment of psychic disequilibrium, he says, citing psychologist Jerome Brunner, “as if you looked into a mirror and saw nothing.” This is where Indian people live, he continues, “we live with a legacy that few in the general society recognize and even recognizing it, understand fully.”¹⁴ With the FAP's evidentiary requirements, the OFA is making tribal petitioners look at themselves in the mirror *and see nothing*.

Furthermore, because the forms of evidence outlined above are held in non-tribal agencies, archives and collecting repositories, the process of gaining federal recognition requires a deep understanding of how archives work and how power is played out in the records they hold together with having the qualifications and resources — academic degrees, financial resources, archival expertise, and ability to travel to consult what remain of primarily physical records, among others — to be able to access, navigate, interpret and copy/digitize them. To collect the necessary evidence as required by the OFA, petitioning tribes must search through vast amounts of widely dispersed bureaucratic, historical, legal, and anthropological archives that may mention them or their ancestors/tribal leaders — a nearly impossible undertaking given that the U.S. colonial project involved creating a legal system that dispossessed Indigenous peoples from their land — and therefore their archives — by intentionally negating them as legal subjects. This is not to say that Native peoples are ‘unable’ to navigate the archives or at understanding western

¹⁴ Warren David, Lifetime Achievement Award Acceptance Speech, ATALM Annual Conference, 2017.

archival processes and practices, but that being able to access, locate, retrieve and use information contained in some archives is a daunting task for anyone not trained in archival practice, Native or non-Native.

Fernandeño Tataviam Tribal President Rudy Ortega Jr. describes the FAP and its evidentiary requirements as “a deeply invasive procedure:”

We [the Tribe] have facts, people who have enrolled in the Tribe based on multiple documentations — their own personal files, birth records, family history... obviously, however, lots of documents are very hard to find because of the history between our Tribe and the local government; the settlers who came in, the Spanish, Mexican, and ultimately, the U.S. government. Each of those bodies wrote or guided policy to extinguish Indian communities. So trying to find those archives as far as showing how the Tribe politically has maintained itself throughout hundreds of years, how we live within those government forces that came in and tried to change the world and their people, is tremendously hard, especially for a Tribe like ours being part of Los Angeles, where they wanted all of our land, water, oil, gas, gold — they really didn't want any people here. So all the policy at the time was to exterminate and tell the tribal communities: “you don't have sovereignty and you can't exercise your political authority because you don't exist.” And ironically those are the records we are required to gather in support of our petition.¹⁵

Tataviam tribal citizen Pamela Villaseñor explains that surviving three oppressive settler regimes — Spanish, Mexican and American — is another part of the problem the Tribe is encountering: “Lacking that documentary connective tissue throughout time: three different colonizers with very different governments and governing systems and ultimately, judiciary and archiving

¹⁵ Rudy Ortega Jr., Interview with the author, November 2019.

systems if they had them.”¹⁶ And then there are the challenges of how to locate, access and gather what evidence about the Tribe does exist: “how do we even get the evidence as an Indigenous peoples and how do we know what the evidence is that we need?”, she asks.¹⁷ It is a reality that finding the necessary evidence for a federal recognition case is a challenging task for any well-funded, trained researcher, let alone tribes who are struggling to provide for the basic financial needs of their community members.¹⁸

Circling back to “the fox and the hen house” analogy, where the fox — the U.S. — guards and controls the hen house — in this case, petitioning tribes and their recognition process — Pamela Villaseñor refers to the FAP’s criteria for acknowledgement as “incredibly unachievable.” She thinks that the evidentiary threshold set by the OFA, which is supported by western notions of evidentiary standards and burden of proof, speaks to “an intent or motivation to not have to recognize more tribes.”¹⁹ Similarly, Tataviam tribal citizen and Vice President Mark Villaseñor asserts:

The FAP is definitely a double-edged sword — in my view it [the FAP] isn’t a process to recognize tribes. It’s a process to keep them from being recognized, by setting a bar of evidentiary requirements so high that it’s almost impossible to do it, because they require us to present documents from decades, centuries ago ... Some of the things we have were just journals by some of the soldiers that would come by and say: “Oh yeah, this is how the priests treated the Indians.” But they never said who those Indians were, what their names were, which village, what

¹⁶ Pamela Villaseñor, Interview with the author, October 2020.

¹⁷ Ibid.

¹⁸ Rivard, “Archival Recognition.” In her article, Rivard tells the story of Lance Gumbs (former Shinnecock council chairman) and how it took his tribe over \$30 million and 30 years to gain federal recognition.

¹⁹ Ibid.

context at all ... and in addition to that they [OFA] require us to provide proof of our own existence every 10 years.²⁰

As it is, Mark Villaseñor continues, “the process is inherently going against us. It was designed as a tool for eradication. Recognition is a process for tribal termination.”²¹ All these comments speak to the fact that tribal members have no trust in the process, nor in the records that they are required to use in support of that process.

In addition to the extremely hard-to-meet evidentiary requirements, those interviewed also speak to the fact that, for unacknowledged tribes, being able to secure funding to finance the petitioning process, including going out to repositories to find the evidence and hiring experts (lawyers, historians, genealogists, etc.) to help prepare the petition, is incredibly burdensome considering that they are some of the most economically depressed communities in the U.S. Furthermore, most tribal members do not possess the academic qualifications and expertise required to access private archival institutions and collecting repositories, or in some cases to read and interpret the records they can access.

Mark Villaseñor explains: “Searching is a lot of effort and trying to find that information is tough because of our limited resources ... not to mention that some repositories were just completely uncooperative and didn’t want to give us anything.”²² With regards to the challenges around accessing and interpreting evidence, Pamela Villaseñor adds:

There is a very low percentage of my people who have any college degree, whether that’s a bachelor’s or even community college degree. And so just having

²⁰ Mark Villaseñor, Interview with the author, November 2019.

²¹ Ibid.

²² Ibid.

a record isn't necessarily useful for, I'd say, the vast majority of my tribal population — they wouldn't know how to analyze it, maybe even know how to read it. In addition to the fact that many tribal members struggle with the English language, there are all those documents in Spanish, especially older period Spanish, which is very challenging to understand.²³

Rudy Ortega Jr. describes the process of reading records as one of being a detective:

You have to be a detective to read and understand the records that we [the Tribe] were finding — a trained and expert eye is needed to say: this is evidence, it shows community, shows who you were, shows that the family and/or the lineage went into exercising sovereignty, for example ... Some documents were interesting to see because they would state or document the presence of San Fernando Indians in history. We came across my grandfather's name in court records, which demonstrated that he was active and involved in preserving land and fighting for Indian rights as early as the 1890s, when he was only 18 years old. So this demonstrates that the struggle has always been present and continues today. But we needed a trained eye, such as Carole Goldberg's and Duane Champagne's eyes [co-leaders of the Tribe's petition's research team] to identify those records as evidence and make the case for it.²⁴

Some of the FAP criteria's affective challenges

In addition to locating, accessing and gathering evidence for their case, Pamela Villaseñor identifies three main evidentiary challenges set up by the FAP and its criteria, the first one being that “settler colonial governments are just not that interested in us Indigenous peoples.”²⁵ One of the consequences of that, she argues, is that settler governments do not create robust repositories

²³ Pamela Villaseñor, Interview with the author, October 2020.

²⁴ Ortega, Interview with the author, October 2019.

²⁵ Pamela Villaseñor, Interview with the author, October 2020.

of knowledge that document the government-to-government relationship between tribes and the state. And even when such documentation exists, she continues, “it is more of a relationship to Indians as enemy combatants or the “Indian problem” than it is understanding the unique tribal governance and that connection to the U.S. — *that metaphysical first.*”²⁶

Furthermore, Villaseñor continues, the evidence the OFA requires is often written evidence based on “external players.” The challenge, as explained above, is that those external players, she continues, “are not always interested in us as much as getting rid of us, whether that’s California genocide or the California law to enslave Indians. So it shows they weren’t interested in documenting us, just eradicating us.”²⁷ Finally, she explains, “because we were an oppressed Indigenous peoples there was not an investment in our education, which means we did not speak the foreign language of English.”²⁸ This means, she explains, “that our people a) are not familiar with the language of the most current settler regime and b) are not really allowed in the public education system. Then how are we expected to even develop our own internal records for submission?”²⁹ Mark Villaseñor reinforces Pamela Villaseñor’s account:

They are asking us to provide evidence from when Indians were forcibly not educated, from times when they barely spoke the [English] language and they did only because they had to, times when they were forced into a religion they didn’t believe ... and then the government asks us to provide these documents as proof

²⁶ Ibid. (Emphasis mine).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

of contact. And even the documents that the Spanish had, they're terribly recorded, they don't even say the name of the Indian in the record.³⁰

Overall, however, Pamela Villaseñor contends that one of the main problems is that “the settlers didn't and still don't understand who we are.”³¹ Even people today when they do Land acknowledgements — or introductions as Mishuana Goeman insists we should call them³² — are confused, she continues: “They say this is Tongva land, this is Tataviam land, meanwhile, I'm out there saying: no, it's villages, villages of different ethnic makeups.”³³ So if settlers, OFA reviewers included, do not understand that basic fundamental kinship, then of course the records we present as evidence for our case are not going to make any sense, she contends. In other words, she explains, “there's the challenge of them not understanding our evidence and secondary to that, is not caring, not being interested in us.”³⁴

Having to conform to what the OFA wants the Tribe to be by using documentary evidence that is first, externally determined by the OFA to be legitimate and second, held in non-tribal repositories under settler colonial archival structures, has severe affective consequences for the Tataviam and other petitioning tribes alike. Speaking to the many challenges the Tribe has had to face throughout the process, Pamela Villaseñor specifically refers to the affective

³⁰ Mark Villaseñor, Interview with the author, November 2019.

³¹ Pamela Villaseñor, Interview with the author, October 2020.

³² Mishuana Goeman, “The Land Introduction: Beyond the Grammar of Settler Landscapes and Apologies,” *Western Humanities Review* (Fall 2020): 31-61.

“From Place to Territories and Back Again: Centering Storied Land in the discussion of Indigenous Nation-building,” *International Journal of Critical Indigenous Studies* 1, No. 1 (2008).

³³ Ibid.

³⁴ Ibid.

challenges of “coming up across all that trauma [dispossession, genocide and elimination, assimilation, acculturation, termination, etc.] when we’re linking back to our family and history through records that were not necessarily written by us, records that often misrepresent us.”³⁵

This is deeply problematic, she continues: “In some ways, when we are forced to provide certain levels or thresholds of documents, it puts pressure on our tribal government who might adopt these external practices that are not aligned with our societal or cultural norms.”³⁶ And imposing such narratives perpetuates the trauma of discursive erasure.

Scholar and mental health expert Maria Yellow Horse Brave Heart (Hunkpapa/Oglala Lakota) has extensively studied and written about trauma as experienced by Native American peoples. She talks about how historical trauma — “the cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma — as it is being felt today by tribes, is a result of the historical unresolved grief and loss that accompanies traumatic experiences. Along with outlining the different steps of what it would take to move beyond historical trauma in Native communities, she also lists a series of responses to historical trauma experienced by tribal community members today, including: survivor guilt, high rates of depression, self-destructive behavior, low self-esteem, anger, suicidal ideation, poor affect tolerance, internalization of ancestral suffering, loss of identity and shame about loss of identity, among many others.”³⁷

³⁵ Ibid.

³⁶ Ibid.

³⁷ M.Y.H. Brave Heart, “The return to the sacred path: Healing the historical trauma response among the Lakota,” *Smith College Studies in Social Work* 68, No. 3 (1998): 287-305; M.Y.H. Brave Heart, “Oyate Ptayela: Rebuilding the Lakota Nation through Addressing Historical Trauma among Lakota Parents,” *Journal of Human Behavior and the Social Environment* 2, No. ½ (1999): 109-126 (1999); M.Y.H. Brave Heart, “Wakiksuyapi: Carrying the Historical Trauma of the Lakota,” *Tulane Studies in Social Welfare* 21-22 (2000): 245-266.

The affective consequences of the sentiments described by Pamela Villaseñor above — the feeling of being of no interest and simultaneously being viewed as an enemy combatant on your own historical and ancestral land in order to have that sovereignty recognized — are part of the trauma produced by the FAP’s requirements. This archival trauma, including the symbolic annihilation to which Caswell refers and the lack of reflection in the (archival) mirror described by Warren has, has created a “wounded Indigenous subjectivity,”³⁸ in Dian Million (Tanana Athabascan) words. Because Land, and in the case of Indigenous peoples, ancestral homeland in particular, connects directly to identity formation as a site of memory, encountering records that not only render invisible tribal relationships to Land, traditions, family and politics but also misrepresent them, can deeply disrupt ontological and epistemological understandings of self.³⁹

Thinking about her grandparents, Pamela Villaseñor confirms seeing the affective responses outlined by M.Y.H. Brave Heart among Tataviam Elders: “They typified so many of those characteristics of unresolved grief and loss.”⁴⁰ This trauma and the shame it still carries is one of the reasons why there are so few written records by and about Native peoples in California. Villaseñor explains:

When they got together [the Elders] they didn’t talk about the negative stuff. They would send the kids to a different room. I assume that knowledge sharing must have been very traumatic, that’s why they didn’t want the kids around. Only the older kids would be involved in the discussions, so those kids and their families

³⁸ Dian, Million, “Felt Theory: An Indigenous Feminist Approach to Affect and History,” *Wicazo Sa Review* 24, No. 2 (2009): 53–76; Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: University of Arizona Press, 2013).

³⁹ Tonia Sutherland, “Where There’s a Will: On Heir Property, African American Land Stories, and the Value of Oral Records in American Archives.” In Jeannette Bastian and Elizabeth Yakel, Eds., *Defining a Discipline: Archival Research and Practice in the Twenty-First Century: Essays in Honor of Richard J. Cox* (Chicago: Society of American Archivists, 2020), 247.

⁴⁰ Pamela Villaseñor, Interview with the author, October 2020.

would have a little more information. But they knew a lot more than they thought. There was that continued resistance to talk, to share knowledge, to write down, that I think is so beautiful and it shows the agency of our communities and our families.⁴¹

The Tribe went through an “oral history drive” when they started drafting the narrative for their petition in 2008. Pamela Villaseñor was part of the initial research team who decided they needed to do more oral documentation in order to support their case:

At that time we had certain families out there saying a certain narrative but it wasn't truthful — it wasn't based on evidence. As a result of all that trauma and knowledge loss, they filled in the blanks with made up stories, they made up identities and they have been going with those narratives for a very long time, decades even. And when it came down to sharing their story for the petition it was really difficult for them to let those narratives go. Some, for example, adopted a full on Chumash identity when it just wasn't accurate. They would say: I just made it up because that's all that was around.⁴²

Those generations, Pamela Villaseñor explains, “did the best they could with the lack of evidence out there and with a lack of access to existing evidence, and so they filled in the gaps.” Moreover, she continues:

The elders who did transmit knowledge, they almost felt ashamed when they did. And it's painful, I think, for my generation to see that and to hear it, because we're not being raised in that reality, we, the younger generations, we know who we are. We're being raised as who we are. We built and continue to build programs and infrastructure to make sure we do.⁴³

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

In 2008, the petitioning research team recorded a total of twenty-seven interviews with tribal elders, members and friends of the Tribe, including non-tribal members who had married in. The oral accounts produced and collected by the Tribe, however, do not count as standalone evidence for its recognition case. Neither do photographs.

Tribal evidence – dismissed

In describing the types of evidence that Tataviam families and tribal citizens have contributed to the case, Rudy Ortega Jr. lists photographs, obituary books, oral accounts, baptism records, and Bibles. According to Ortega, “a lot of people wrote notes inside their Bible because it just felt it was safe. Nobody was going to do any harm to a Bible... and photos as well, the back of the photo, what happened there at that time.” Some photos, he continues, “show *community* — where people are, the families that came together during the holidays or ceremonial events.”⁴⁴ Unfortunately, many photos showing “just people sitting together” are considered uninteresting by the OFA, says Ortega. However, he continues, those photos “do show lineage — they show that there are three lineages of the Tribe and that we have been together from 1900 and that here we are a hundred years later and we are together again.”⁴⁵ Mark Villaseñor further explains:

There are photos of my mom with the Garcia family in the fifties. And my grandfather has all these stories about how he used to play with some of the Garcias and the Ortiz. They used to play together. Their parents used to have picnics at our old, traditional sacred sites. That’s evidence that his knowledge has been passed down.⁴⁶

⁴⁴ Rudy Ortega Jr., Interview with the author, October 2019 (Emphasis mine).

⁴⁵ Ibid.

⁴⁶ Mark Villaseñor, Interview with the author, November 2019.

Reflecting on tribal photos serving merely as supporting evidence for their claim, he adds:

All these photos here showing context of how we operated together ... they show that family wanted to stay with family ... but you need all the *other stuff* [textual archival evidence] to help support that. So it is like a big web — if you got something in the center it doesn't matter, you have to have the rest of the web.⁴⁷

The photos depicting those “picnics at this place over the mountains during the winter”⁴⁸ and the oral accounts that accompany them, are key pieces of evidence for the Tataviam recognition case — they show that the three lineages had been traditionally celebrating the winter holiday together, at the same ancestral land, for decades, some of them even going back to the 1930s. However, as noted above, neither photographs nor oral accounts count as standalone evidence in the eyes of the OFA. In other words, evidence generated and narrated by the Tribe is being dismissed, marking this as a place in which the placement/displacement of evidence is present in “historical contexts.”

This calls for a “diplomats” of tribal photography, where the photos are “read” for the semantics and context they capture. Photographs and their accompanying oral accounts are key for proving not only the Tribe’s social and political structure of village-lineages — or community interaction and continuity for the purposes of the FAP criteria. The name-changing of some of the Tribe’s progenitors, as outlined in chapter 6, is also extremely relevant for proving *Descent*. Rudy Ortega explains how hard it has been to gather genealogy records for every tribal member. For example, the research team has not been able to find Ortega’s great-great-grandfather’s birth record. They did find his baptismal record as well as community information about him in the J.P. Harrington Papers at Berkeley’s Bancroft Library. However,

⁴⁷ Ibid. (Emphasis mine).

⁴⁸ Ibid.

the OFA found another person with the same name — Antonio Maria Ortega — born in Yuma, Mexico close to Ortega’s great grandfather’s birth date. The OFA finally accepted the Tribe’s argument that they were not the same person but locating and interpreting genealogy records has been extremely emotionally challenging for the Tataviam since, as Ortega explains: “our community is tied into those records.”⁴⁹

Some of the obstacles have to do with interpreting or “narrating” the records — making a record legible to the OFA while it simultaneously serves the Tribe’s petition. For example, the land grant assigned to the Tribe by governor Micheltoarena in 1843 lists 41 Tataviam members, which should be enough to prove previous federal acknowledgement. The OFA, however, asked the Tribe to tell the story of each of those individuals:

Some of them are Chumash and went back home, some are Santa Inez, etc. And these are the members who stayed in. This meant a lot of extra work for us, but I think they asked us to do that because they don’t understand either — they’re trying to figure out who this community is and explaining that to a non-Indian is very challenging.⁵⁰

According to Ortega, the collections of photographs and interviews produced and submitted by the Tribe with their petition tell the whole story of their Indian existence. They prove community continuity, political authority, tribal governance, tribal structure, the persistence of cultural traditions and the practice of religious/ceremonial activities over time. Yet, if they are not accompanied by external, scholarly and/or federally produced historical documentary evidence, they tend to be discredited by the OFA — they are just considered “illustrations.” Only if the

⁴⁹ Rudy Ortega Jr., Interview with the author, November 2019.

⁵⁰ Mark Villaseñor, Interview with the author, November 2019.

photos have captions written by historians or anthropologists on them, Ortega explains, might they be considered “supporting” evidence for the case, but what that assessment of the evidentiary of those photos is not completely clear. “When photos have our own captions the picture gives context,” he says, “and that should mean something to the OFA.”⁵¹

Similarly, Mark Villaseñor argues: “if a photo has been included in an actual documented educational volume or something that they [the OFA] consider primary documentation, then it might be considered useful evidence for the case.” The problem is that the information accompanying those images in history books and articles authored by non-Indians tends to be incorrect at the very minimum, Villaseñor says. On the other hand, he continues, “California history books are actually the compilation of transcribed oral dictations from Indigenous peoples, and those accounts, those transcriptions are now held as counting for history.” So why, he asks, “when our oral traditions and oral histories are presented by us, recorded by us, or transcribed by us, do they not count as evidence?”

Oral accounts, he continues, “seem to be considered evidence only when re-written by someone who has a Ph.D. title in front of their name.”⁵² With a comforting sense of humor, Pamela Villaseñor confirms and reinforces Mark Villaseñor’s words. She tells the story of a Chumash woman and knowledge keeper whose account about her village’s history was not accepted by scholars in the field of anthropology. She decided to work with college students who published a paper that was just them interviewing her. The paper got published and now she can cite herself — “the record now exists, she used to say, it all of a sudden matters.”⁵³

⁵¹ Rudy Ortega Jr., Interview with the author, October 2019.

⁵² Mark Villaseñor, Interview with the author, November 2019.

⁵³ Pamela Villaseñor, Interview with the author, October 2020.

Critiques of the evidentiary weight and “archivalness” of Indigenous oral histories, visual documents, and other forms of traditional knowledge have been heavily analyzed by archival theorists, lawyers and historians, and it is beyond the scope of this chapter to do so again here.⁵⁴ However, I would say here that the privileging of physically inscribed, bureaucratic and scientific forms of evidence, such as government records and scholarly data, over Indigenous records and memory-keeping practices via oral and visual accounts, traditional knowledge and ceremonial ties to land, provides an example of how settlers’ material authority of written texts has historically been and continues to be privileged over the validity of the intangible record and oral documents of colonized peoples, and how settler colonial societies propagate the idea that “orality results in inferior forms of evidence, memory, and knowledge transmission.”⁵⁵

It is in part due to the affective consequences experienced by tribes having to depend on settler colonial records to prepare their recognition petitions — seeing their own evidence being discredited by disciplinary fields, federal agencies, and repositories when not produced or formatted according to western documentary standards — that as is evident in Mark Villaseñor is quoted above, the FAP is perceived as at least as much a means of domination and subjugation as it has been a means of affirmation and protection of tribal sovereignty.⁵⁶ Refusing the

⁵⁴ Caswell, *Archiving the Unspeakable*; Sutherland, “Where There’s a Will;” Wendy Duff and Jefferson Sporn, “The Question of Oral Testimony in the Archival Concept of Evidence,” in Jeannette Bastian and Elizabeth Yakel, Eds., *Defining a Discipline: Archival Research and Practice in the Twenty-First Century: Essays in Honor of Richard J. Cox* (Chicago: Society of American Archivists, 2020); H. Babcock, “[This] I Know from My Grandfather: The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims,” *American Indian Law Review* 19 (2012); K. Hausler, “Indigenous perspectives in the courtroom,” *The International Journal of Human Rights* 16, No. 1 (2012): 51-72; Miranda Johnson, “Making a Treaty Archive: Indigenous Rights on the Canadian Development Frontier.” In Motha S and Van Rijswijk H, Eds., *Law, Memory, Violence: Uncovering the Counter-Archive* (Abingdon: Routledge, 2016); Miranda Johnson, “Making History Public: Indigenous Claims to Settler States,” *Public Culture* 20, No. 1 (2008).

⁵⁵ Sue McKemmish, Shannon Faulkhead, and Lynette Russell, “Distrust in the Archive: Reconciling Records,” *Archival Science* 11, Nos. 2-4 (2011): 211–239.

⁵⁶ This refusal movement is explained in both chapter 2 and 4 of this dissertation. Generally, see: Glen Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota

recognition system imposed by the U.S., therefore, has in many cases meant the refusal to use (or acknowledge) records that have been conceived with the and primary purpose of Indigenous elimination. For tribes like the Tataviam, however, refusing the system and its records is not an option. Even though gaining federal recognition is not their goal as tribal peoples ideologically, they need the acknowledgment status to materialize the many forms of sovereignty they have been advancing for years: they need the resources associated with recognition and they need their Land back.

3. The evidence problem: To not own your own evidence

This system of thinking that requires petitioning tribes to trace their lineage, community continuity, political leadership, and cultural relevance through those non-tribally-created records rather than through their own histories, documents, recordkeeping places and formats, underscores the archive's role in upholding the "coloniality of power," in its curation and categorization of contents and as a site of ongoing coloniality.⁵⁷ And that power, as it is reflected in the OFA's selective and self-serving interpretations of evidence, manifests as a flawed array of "established histories"⁵⁸ in the FAP, posing additional forms of affective alienation and violence, through both discursive and geographic displacements rooted in western collecting and private property regimes as well as bureaucratic recordkeeping.

Press, 2014), Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada." *Contemporary Political Theory* 6, No. 4 (2007); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford, UK: Oxford University Press, 2009); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham and London: Duke University Press, 2014); Mishuana Goeman, *Mark My Words: Native Women Mapping Our Nations* (Minneapolis, MN: University of Minnesota Press, 2014).

⁵⁷ Rivard, "Archival Recognition," 122.

⁵⁸ Gould, Rae. "The Nipmuc Nation and a Case of Mistaken Identity." In A. Den Ouden and J. O'Brien, Eds., *Recognition, Sovereignty, Struggles, & Indigenous Rights in the United States* (Chapel Hill, NC: The University of North Carolina Press, 2013), 213-236.

The forms of evidence required by the OFA, in addition to having been created mostly by non-Indians, are held in collecting and archival repositories away from their tribal homes and kept under a legal system that tends to refuse tribal claims to stewardship and ownership of these materials. Tribes, therefore, rarely own the legal rights to their collections, nor are they even attributed ownership. Such attribution, as it is conceived by IP laws and copyright, is itself bound up in the legacy of settler colonialism's proprietary authoring regimes. As a legal, social and cultural construct that maintains specific exclusions and relations of power within settler-colonial contexts, copyright has functioned as a key tool for dispossessing Indigenous peoples of their rights as holders, custodians, narrators, authorities and owners of their records by turning Indigenous knowledge and culture into a form of property.⁵⁹ It is, therefore, another mechanism for physically and ideologically writing Indigenous peoples out of existence. The legal infrastructures of ownership over knowledge and culture replicate the colonial, land-based project of taking, where the collecting, describing, using, circulating, and (mis)attribution of tribal collections based on western systems of information affirm settler-colonial logics of possession and dispossession.

The long-term social, cultural, and political consequences of not owning your own records — whether by lack of physical ownership or via mis- and/or non-attribution and deliberate exclusion — are usually invisible to non-Native communities and non-tribal institutions. Yet they profoundly affect how Indigenous peoples can participate in their own public and published narratives, how sovereignty can be enacted and maintained, how access to heritage is made possible, how histories and narratives can be retold, and how Indigenous

⁵⁹ Jane Anderson, "Anxieties of Authorship in the Colonial Archive." In Chris C and Gerstner D, Eds., *Media Authorship* (London, UK: Routledge, 2013).

peoples can upend the colonial regimes that circumscribe them. The main negative outcome is misrepresentation — when tribes don't hold or own their records, they are not able to make decisions around how they should be stored, circulated, used and accessed. Even more harmful is that they are not able to describe them, and as a result, inaccurate, incomplete or simply wrong descriptions are attached to their collections.

The main reason this happens is that within western archival systems and structures there tends to be a continual delinking of archival contents and tribal nations, communities, and territories. There is often no field for identifying relationships between Land, people, and knowledge. There is no field where homelands can be named as a part of knowledge relations, no field where communities, clans, families, or ceremonial societies are acknowledged as authorities along with their ways of knowing, cultural narratives and traditional knowledge. And, as Jane Anderson and Kim Christen argue, the erasure and displacement of names, meaning and local knowledge deliberately restructures social memory through a settler-colonial worldview.⁶⁰

I have outlined the many forms in which Indigenous mis-representation takes place in the archives: Indians misnamed (or made invisible) in California mission records; anthropological and ethnographic collections described in ways that helped advance Indian land dispossession, erasure and elimination; historical photographs — and their non-Indian captions — portraying the “vanishing” and/or “warlike” Indians; the mis-categorization of cultural objects in archives and museums (e.g., a Zuni axe misidentified as a Zuni music instrument in the Cambridge Museum of Archaeology);⁶¹ or relationships between tribal records broken and most likely

⁶⁰ Jane Anderson and Kim Christen, “Decolonizing Attribution: Traditions of Exclusion,” *Journal of Radical Librarianship* 5 (2019).

⁶¹ Ramesh Srinivasan, Katherine M. Becvar, Robin Boast, Jim Enote, “Diverse Knowledges and Contact Zones within the Digital Museum,” *Science, Technology, & Human Values* 35, No. 5 (2010): 735–68.

unrecoverable due to the legacy of colonial collecting practices and the dispersion of records in repositories all around the world, among many others.

Discussing the lack of ownership and the many forms of displacement that records by and about tribal peoples have experienced due to California's many settlements, Pamela Villaseñor argues that the displacement of meaning — or misrepresentation — is the most critical one. In part facilitated by the power of archives to create new categories to displace, archives, she explains, can either list a cultural record such as a basket, as being affiliated with a specific tribe — Fernando Tataviam, for instance — *or* they can create a “culturally unidentifiable” label for it. By linking a record with a “culturally unidentifiable” category they are purposefully displacing that record and refraining from investigating its provenance: where was the record created, what land did it come from (where was it dug up?), to which tribe can it be traced back? Villaseñor argues that the “culturally unidentifiable” category is repeatedly being used today to challenge unacknowledged tribes in their quests for sovereignty in proceedings such as recognition petitions, NAGPRA claims, and land re-acquisition cases.

Another consequence of tribes not owning their own evidence has to do with the inevitability of having that evidence assessed according to officially established archival conceptualizations of evidence, the conceptualizations that the repositories — and the legal systems that rely on them — implement in their assessments. Because ideas of history and evidence, as well as the unstated assumption of the record-evidence relationship, have been so completely naturalized, the immense power in these concepts vanishes into the Archive's pretense of objective principles of judgment. As Heather MacNeil writes: “The criteria [that records] establish for determining what counts as true are themselves the product of historical, cultural, and political choices and do not exhaust all the possible ways of looking at the world or

at the relationship between records and the world.”⁶² Notions of a neutral or one-way relationship between records and evidence tend to ignore the contextualities, provenances, and relationships of records with other records, and the consequences that arrangement and description might have for the communities represented within and/or using those records as evidence for their claims.

Furthermore, when evidence is considered inherent within the record itself, records that are not recognized in that way end up being excluded from archival repositories altogether, which, in most cases means that they will also be dismissed as evidence, not considered legitimate or valid in the eyes of the law. As Rivard writes in her article on the Biloxi-Chitimacha Confederation of Muskogees’ quest for federal recognition, “what gets counted as evidence and how such evidence is stored constitute a continuation of the state’s settler colonial project of eradicating Native subjects.”⁶³ Evidence parameters that have historically dispossessed Native peoples are mirrored within recordkeeping infrastructures — including their organization, workflows and temporalities — biasing the Archive itself against Indigenous rights and futures. And as the FAP requires petitioning tribes to turn to and enter these repositories as the basis of their primary existential claims, their claim to the past and to sovereign visions of the future, the affective dimensions are profound, including the structuring and experiencing of time.

4. “We Are Waiting Them Out, Too!”: Archival Time and the Weaponization of Waiting

Archives are deeply concerned with concepts of time and are in turn central in the construction of modern temporalities, as they shape relationships emerging from and existing within time.

⁶² Heather MacNeil, “Trusting Records in a Postmodern World,” *Archivaria* 51 (2001): 45.

⁶³ Rivard, “Archival Recognition,” 2015.

Within federal recognition petitions, there are multiple moments that lead petitioners to consider and reflect upon the affective consequences of archival time and the temporalities into which they do not fit: The time it takes a tribe to gather all the evidence necessary for a petition, the time it takes the OFA to review recognition petitions, (twenty years on average), and the evidentiary-temporal requirements enforced by the regulations (tribes having to provide evidence for every ten-year periods of existence), among others. Petitioning tribes are also faced with the epistemological contradictions between settler and tribal notions of time. This is most particular when tribes have to participate in a legal process that presumes and naturalizes western linear and fixed temporalities of record production and evidence assessment — records from the past, preserved in the present, for understanding the future.

Questioning simplistic linear constructions of archival time and settler temporality within federal recognition contexts, this short section is interested in the affective temporalities of *waiting* in particular: Waiting, in this context, as a structure of time imposed by the OFA — waiting to be let into the archives, waiting for a petition to be reviewed, waiting for the OFA to reply to a tribe's letters/requests, waiting for a tribe's (not-owned) evidence to be legitimized as such, waiting to be recognized by a non-tribal entity — is yet another materialization of colonial violence and oppression against petitioning tribes, as a political tool with both material and affective consequences.

When I asked Pamela Villaseñor about her thoughts on waiting, time, and the FAP she replied with the analogy of a relationship that didn't work out: “and if you reflect back on it [the relationship], years and years later, and you think about what you're most upset at. Is it betrayal, you ask? And I think, my reflection as I get older is: you wasted my time.” Time, she continues, is something you can never get back: “you literally wasted something that there's no negotiating

for. In our [the Tribe's] relationship with the United States, they are wasting our time ... and the impact of that at the end of the day is the death of our elders.”

Recounting a conversation about federal acknowledgement in 2008 between her grandfather and her uncle Rudy Ortega Sr., who was then the Tribal President, she remembers hearing Ortega say: “I’m not going to be here when the Tribe gets acknowledged, but that’s okay. I have faith in all of you, you’re going to do the work, but me and your grandpa, we’re both going to be dead, gone.” This goes to show, Villaseñor explains, “that as elders they already knew that the government was going to ‘wait us out.’ They had already accepted that they were going to die in the process, and that’s violence.”

The extensive periods of time it takes a tribe to prepare a petition due to the unsurmountable evidentiary requirements imposed upon them and the extensive periods of time it takes the OFA to review a petition are both tangible ways in which the U.S. uses time as a weapon within federal recognition contexts, just as it has always used weapons to, in Mark Villaseñor’s terms, to “eradicate” and “terminate tribes,” only here it is on a banal, bureaucratic level. Every year the BIA allocates less and less funding to the OFA so that they have less staff and as a consequence, the staff they do have are overburdened by having to review all the petitions in queue. This, Villaseñor argues, “is just another way of showing how the U.S. is using fiscal abuse in order to slow down the process.”⁶⁴ The government *waits petitioners out* so that they get tired of it, run out of resources and quit.

“Waiting tribes out” is a form of violence enacted by bureaucratic temporality, in this case advanced by the U.S. settler state. In echoes of the bureaucratic violence practiced during the California genocide, which back then was enacted through the appropriation of Indian Land

⁶⁴ Pamela Villaseñor, Interview with the author, October 2020.

and lives, today it is enacted through the appropriation of a tribe's time. In other words, colonial domination today may be more about time than territory; or, the appropriation of Indian Land is being maintained by imposing a notion of time that erases a tribe's documentary past, and as a consequence, continues to maintain its theft of territory discursively.

In addition to these more tangible ways in which the FAP weaponizes time, there is also a fundamental temporal contradiction that lies at the heart of the FAP's discourse, in which Indian tribal history is already, paradoxically, both 'continuous' and 'discontinuous.' Unlike federal Indian law and policy more generally, which tends to "oscillate between oppositional positions in distinct time periods like a pendulum (e.g., the 1930s being a period of uniqueness under the Indian Reorganization Act and the 1950s beginning a period of uniformity under termination policies),"⁶⁵ the FAP stages these oppositions of continuity and discontinuity simultaneously, as a paradoxical chaos of recognition — tribes having to prove the impossibility of historical, cultural, political and Land-base continuity while experiencing their own ongoing discontinuation by the evidence they are required to present.

This contradiction is supported by Joanne Barker's (Lenape, citizen of the Delaware Tribe of Indians) assertion that in the U.S., federally recognized Indian "tribes" are imagined to be discrete, bounded entities capable of "[reflecting] their cultural consistency 'from historical times to the present.'" Consequently, multilingualism, shifting political alliances, trade networks, and situationally dynamic cultural practices — all hallmarks of the pre-Columbian Indigenous experience and which were intensified in California due to a threefold settler invasion — are often obscured in this line of thinking, "as hybridity and discontinuity are subsumed into a story

⁶⁵ Thomas Biolsi, "'Indian Self-Government' as a Technique of Domination," *American Indian Quarterly* 15, No. 1 (1991): 23–28.

of neat cultural-political persistence and primordialism.”⁶⁶ This linearity and “continuousness” is supported by the temporal logics of dominant western culture and its archival theory, in which past, present and a hypothetical future are fixed in the settler archives’ structuring of meaning.

In her recently published book, *Urgent Archives*, archival scholar and theorist Michelle Caswell traces the temporal logics of dominant western archival theory while imagining new ways of thinking about records that are not based on linear temporalities. The definition of a record that is built on a linear temporality, she argues, “separat[es] event from record from use, to the future potential for the activation of such records, once-archived, to demonstrate milestones towards social progress in a linear narrative.”⁶⁷ Caswell’s reflection on archival time echoes some of Kimberly Anderson’s arguments on archival time, that the very foundational concept in dominant Western archival theory — the record — relies on a linear temporality that posits a temporal break between historic event, record creation, deposit in an archive, and its use as evidence: “a temporal disconnect between [record] creation and use.”⁶⁸

Using Charles W. Mills theorization of “white time” — the linear progress narratives emanating from the global North — Caswell contends that this double preoccupation with fixity and futurity belies the white temporal imaginary, and “[t]o build archival theories and systems based on one dominant yet unnamed temporality masquerading as universal is to ignore and delegitimize countless other non-dominant ways of viewing time.”⁶⁹ And this she terms as

⁶⁶ Joanne Barker, *Native Acts*.

⁶⁷ Caswell, *Urgent Archives*.

⁶⁸ Kimberly D. Anderson, “The Footprint and the Stepping Foot: Archival Records, Evidence, and Time,” *Archival Science* 13:4 (2014): 349-371, p. 12 of pre-print.

⁶⁹ Caswell, *Urgent Archives*.

chronoviolence.⁷⁰ In other words, traditional archival workflows are in friction with and oftentimes discordant to Indigenous temporalities, knowledge systems and formations, and placing the past and present within a shared frame of modernity privileges non-Native sensibilities and protects the power structures that maintain settler colonial logics and violence.

Caswell's invitation is to "shift the moment of archival responsibility, from a singular present to a multiplicity of uncertain pasts, presents, and futures" positing that "archiving traces of *ongoing* oppression demands a different orientation to time."⁷¹ Kim Christen and Jane Anderson refer to such an alternative archival temporal framework as "slow archives," which also moves us from a critique of the settler colonial archive to ways for archivists to enact change within their institutions and the field. Slowing down, they contend, "creates a necessary space for emphasizing how knowledge is produced, circulated, and exchanged through a series of relationships." It is about "focusing differently, listening carefully, and acting ethically. It opens the possibility of seeing the intricate web of relationships formed and forged through attention to collaborative curation processes that do not default to normative structures of attribution, access, or scale."⁷²

A "slow archives" approach centers Indigenous temporalities, territorialities, and relationalities on their own as well as in conversation with settler colonial logics and practices. It sees records as independent from structures of singularity and stasis and oriented toward fluid, ongoing, and often unpredictable temporal paths, and that is how evidence should also be assessed in FAP processes. As I have written elsewhere about the physical displacement of tribal

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Kimberly Christen and Jane Anderson, "Toward Slow Archives," *Archival Science* 19 (2019).

evidence as involving a cleaving of Indigenous meaning from the place in which it has historically had its meaning as a part of this same set of epistemological violences, this (re)centering of Indigenous temporalities, territories and relationalities is an important way to begin to model what the reemplacement of evidence might be.

Challenging the commonsensical conception of time as neutral, universal and inherently shared, scholar of Indigenous politics and gender, women's and sexuality studies Mark Rifkin writes, "Indigenous duration operates less as a chronological sequence than as overlapping networks of affective connection (to persons, nonhuman entities, and place) that orient one's way of moving through space and time, with story as a crucial part of that process."⁷³ He writes: "Rather than approaching time as an abstract, homogenous measure of universal movement along a singular axis, we can think of it as plural, less as a temporality than *temporalities*. From this perspective, there is no singular unfolding of time, but instead, varied temporal formations that have their own rhythms."⁷⁴

Aware of tribes' everyday negotiations with the temporality imposed by Indian policy, he contends that experience and calculation of time are contingent and depend on an individual's inertial frame of reference. There is no such thing as one singular time, then, but several different and sometimes incompatible constructions of temporality or what he calls "temporal multiplicity."⁷⁵ Therefore, in place of arguing for temporal recognition — being seen as equally "modern" or part of a shared "present" — Rifkin's argument gestures toward *temporal sovereignty*, which "emerges from the force exerted through processes of temporal recognition

⁷³ Mark Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham: Duke University Press, 2017)

⁷⁴ Ibid.

⁷⁵ Ibid., 180.

while envisioning Native being and becoming as nonidentical to settler-imposed frames of reference, even as Indigenous temporalities are affected and shifted by such colonial imperatives.”⁷⁶ When it comes to the FAP, there is no such effort, let alone interest in, a temporal recognition of tribes, their histories, and their evidence. And what the bureaucratic imposition of waiting described so far acts against is precisely this full recognition.

Throughout my work with the Tribe, however, waiting has also struck me as a space/time of knowledge production in which they challenge the “chrononormativity”⁷⁷ imposed upon them, thus extending recognition practices beyond settler-colonial understandings of time and space. The Tataviam have been practicing that plurality of time in their recognition process by actively *awaiting* (either “awaiting” or “waiting for”) federal acknowledgement, while still existing as a nation. This means they live both times — the OFA’s bureaucratic time and their own tribal time — in parallel form, attending to both temporalities according to their own needs. Moving between time and space, Tribal President Rudy Ortega’s words provide a tribal context for this:

While in this waiting stage we’re not idle waiting for them to recognize us. We can’t wait for that. Because there’s people in our Tribe who need help, services, and we want to build a better community. We’re socially active within all of our tribal citizens, we’re engaged with local governments and commercial developments around us. We’re still active in such things like the renaming of the Maclay Avenue of San Fernando, looking for policies within the County and the cities of Los Angeles and San Fernando to gather acorns for traditional teachings, etc. We’re advocating for recovering things and practices that were taken from us by governmental policies in the sixties that just stopped us from being Indian. We’re advocating access to them so that we can continue practicing. And so with

⁷⁶ Ibid.

⁷⁷ Elizabeth Freeman, *Time Binds: Queer Temporalities, Queer Histories* (Durham: Duke University Press, 2010), 3.

or without federal acknowledgement, that goes on. So the sovereignty of the tribe and the sovereignty of the people to be Indian is to continue to struggle that we're advocating locally and ensuring that we're moving the ball forward, because *we've got to continue to exist.*

Rikfin's temporal sovereignty calls for "the need to address the role of time (as narrative, as experience, as immanent materiality of continuity and change) in struggles over Indigenous landedness, governance, and everyday socialities." Pamela Villaseñor firmly asserts that the Tribe is doing exactly that: "We are not going to let it go. We've been fighting for our land for the last 150 years. *We're also waiting the United States out,* because we're not going anywhere. We're not going away, we're reminding them of their consciousness."

5. Conclusion: Reemplacing tribal evidence⁷⁸

The Fernandeano Tataviam petition illustrates the ways in which federal policies like the FAP exert physical, but also and importantly, affective violence upon Indian groups through spatial, discursive, and temporal control. The U.S. settler state and the colonial practices of dispossession it continues to promote, including imposing the creation and use of records aimed at Indigenous disappearance, displace Indigenous authority and/or tribal capacity to create their own records in their own language and/or hold tribal records within their own land bases. In other words, not only were Native communities bodily displaced due to settler colonialism, and along with them their records, but so too was the significance of tribal Land and territory as potential archives and holders of tribal records, cultural materials, and traditional knowledge, as well as essential parts of the chains of meaning in which tribal evidence rests.

⁷⁸ I use the term *reemplace* because the term replacement (and emplacement) tends to be concerned with settler futurity, which always indivisibly means the disruption of Indigenous life to aid settlement. I use reemplacemnt here as a form of place or space theory that seeks to interrupt — not recuperate — settler colonialism; as a form of Indigenous futurity that forecloses settler colonialism and settler epistemologies. Eve Tuck and Marcia McKenzie, *Place in Research: Theory, Methodology, and Methods* (Taylor & Francis, 2015), 70.

Despite the ongoing affective consequences of those displacements, however, Fernandeano Tataviam community members speak to how they continue to live in ways that surpass the OFA's demands for the Tribe to fully define itself within an imposed idea of history, evidence, and time, signaling what neither the OFA nor the U.S. are able to understand: that Tataviam sovereignty is beyond the confines of settler colonial policies, epistemologies and recognition — it rather belongs to what theorist of Indigenous politics Kevin Bruyneel has identified as a “third space of sovereignty,” one that challenges the temporal and spatial impositions of colonialism. Tataviam sovereignty stretches beyond the temporal boundaries of the U.S. to encompass the existence of tribal governments, prior to and thus outside of American political history.⁷⁹

The Fernandeano Tataviam, then, are utilizing the FAP to advance spatial and temporal claims to sovereignty, identity and territory as a means of reclaiming or re-marking boundaries and furthering their own tribal interests. The re-temporalization and re-spatialization that tribes are undertaking by writing their recognition petition narratives of self-determination represents and “communicates” what Mishuana Goeman has identified as a “Native ethics and politics of their place in the world,” with the potential to contest and counter the ever-developing intents of dispossession of settler colonial nations.⁸⁰

The tensions and contradictions between tribal and settler archival representation and evidence interpretation are represented by the many ways in which petitioning tribes are (re)using evidence, today. One tangible way in which the Tataviam are reemplacing evidence is by organizing the more than 10,000 records gathered as evidence for their recognition petition

⁷⁹ Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis, London: University of Minnesota Press, 2007), xv.

⁸⁰ Goeman, *Mark My Words*, 16.

into a comprehensive digital archive curated by the Tribe itself to be accessed by its citizens.⁸¹

The database aims to provide “culturally-competent, historically-factual, and community-driven stories centered on the Tribe, with historical and contemporary relationalities that uplift the community’s long-term goals ... to support policy change, cultivate truth-telling, and (re)educate tribal members and the general public.”⁸²

Among the purposes of this digital archive are to correct false historical narratives — including reemplacing meaning by correcting the descriptive metadata of many of the records used for the Tribe’s petition — “through Native-driven micro storytelling and testimony that will eventually empower the Tribe and its youth by providing examples of ancestors’ efforts and current day agency to belong in Tataviam traditional homelands.”⁸³ By condensing the vast knowledge from Tataviam storytellers, the archive will provide previously unrecorded stories that counter mainstream narratives taught at schools today, including telling the Tribe’s own story and relationship to the San Fernando Rey Mission, without compromising historically accurate facts and community perspectives.⁸⁴

In face of the “symbolic annihilation” described earlier in this chapter, then, the Tribe is forming their own tribal-based archive that empowers them to establish, enact, and reflect on their presence in ways that are complex, meaningful and substantive; producing feelings of what

⁸¹ This archive will be powered by Mukurtu CMS, a content management system conceived with Indigenous needs in mind that allows for granular levels of privacy for culturally responsible access, circulation and use. See: www.mukurtu.org

⁸² FTBMI, Critical Mission Studies Grant Application – Narrative, 2020. This project is in part funded by a UC Critical Mission Studies Community Grant, and I assisted the Tribe with building the digital archive.

⁸³ Ibid.

⁸⁴ Ibid.

Caswell et al. have termed “representational belonging.”⁸⁵ For Pamela Villaseñor, this tribal archive is revolutionary in many ways, but more importantly, she says: “it is the evidence we need, it is *our* evidence.”⁸⁶

So having all the different families in our tribe wanting to say yes, I want to be able to tell my family story, I want to tell my ancestor’s story and my village story... And that telling that story, that evidence is that support, right? Because then one can go over the evidence: I can see my family and where they’re involved in and what they’re doing and their agency. I can see how they weren’t just sitting back and taking the oppression from this colonizing government. They were standing and fighting and voicing who they were and are. But you need evidence for that.⁸⁷

Evidence in the format of this tribal digital archive, Pamela Villaseñor continues, will better help the Tribe advance their narratives and tell their stories not only for recognition claims but also water and Land claims: “Because that’s what evidence does, it gives you the ability to have those ‘touch points’ and tell the stories of your people.”⁸⁸ She ends by saying:

I do want to point out that I’m very grateful to my Tribal Government, to our President and to my leaders who are willing to make all that knowledge accessible. Because it would be very easy to say, no, we’re keeping this all for ourselves, but to make it accessible to our whole community, our tribal community, that is huge. And I just want to be able to say that that shows a

⁸⁵ Caswell et al., “To Suddenly Discover Yourself Existing.”

⁸⁶ Pamela Villaseñor, Interview with the author, October 2020.

⁸⁷ Ibid.

⁸⁸ Ibid.

strength in tribal governance and the non-western ways and practices, by saying no, this is for *our* people.⁸⁹

Indigenous archives, while sharing some common ground in relation to state power, control, and surveillance, are also distinct in that they are set both outside and in relation to settler states through their position as sovereign nations — whether recognized as such or not by settler governments and governance. Reemplacing evidence to regain Land, place and meaning are all instances of reversing the colonial project of universalizing spatial, temporal, and discursive dominance. This is in line with Goeman’s assertion that to begin to (re)map the settler nation, we must consider Native-made spaces that are often disavowed, appropriated, or co-opted by the settler state through documenting, writing, imagining, law, politics, and the terrains of culture.⁹⁰

For libraries and archives, this reemplacemnt must be anticolonial. That is, collecting institutions must form long-term relationships of collaboration with tribes on whose Land they sit, to (re)connect land, languages and community histories of truth within their collecting, classification, organization, and representation practices and systems in ways that recenter tribal ownership of that land, and which resonate with tribal ways of archiving, in order to make one of Pamela Villaseñor’s many dreams reality: “for every single family in our Tribe to be able to pick up the microphone at any event, and very confidently and accurately tell who they are for whatever purpose.”⁹¹

⁸⁹ Ibid.

⁹⁰ Goeman, *Mark My Words*, 23.

⁹¹ Pamela Villaseñor, Interview with the author, October 2020.

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Conclusion: Unsettling Evidence

1. The case for unsettling evidence

This dissertation investigated the political, affective, and socio-cultural dimensions of the structural role(s) of settler colonial archives and notions of evidence in the FAP. It critically looked into the ways in which power and oppression play out intertextually across the different types of records that serve as ‘official’ evidence for federal recognition petitions; the tensions and contradictions between what is recognized as legitimate evidence of Indian identity by the Tataviam and by the OFA respectively; the effects and the affective consequences that result from requiring tribes to prove their ‘authenticity’ in terms of federal legal frameworks, western notions of time and space, and relying predominantly on settler-colonial evidence; and finally, ways in which archivists can effectively intervene in recognition processes on tribes’ behalf.

By discursively analyzing the Tribe’s petition and supplementary materials, the OFA’s reviews and responses, and evidence submitted by the Tribe in support of their petition, as well as by conducting interviews with tribal citizens involved in the process and informally observing the Tribe’s encounter with records, interactions with the OFA, and decision-making meetings, I was able to identify two main sets of concerns: First, a documentary impossibility has been established by the U.S. via the FAP regulations whereby documentation and evidence are being used as a barrier to acknowledging tribes. This may be either deliberately so because federal tribal recognition might jeopardize settler wealth and space/place — having to give Land back (in trust) — or because the BIA is itself ignorant of the limits and limitations of the documentation that exists, and/or because of the reality that existing documentation does not speak adequately, appropriately or equally to the vastly different and unique histories of petitioning tribes. Second, the archival and evidentiary challenges experienced by petitioning

tribes have to do in part with the fact that archivists in repositories have operated within different historical contexts but always disconnected from substantive connections with and input from tribes and therefore have mishandled documentation by and about these communities and their tribal citizens — likely not so much deliberately but guided by western archival workflows that privilege settler ideas of “archivalness” and “recordness” — and “evidence”, all of which have been influenced by settler concepts of time, ownership and legality.

It is important to understand, then, that the records and recordkeeping infrastructures architected by colonial regimes support settler-dominated legal systems that tend to ignore or submerge the presence, histories, epistemologies, and rights of the Indigenous peoples related to those records. This discursive violence manifests in many ways, one of them being the evidentiary requirements imposed by the FAP, which exclude and misunderstand petitioners’ forms of evidence and memory. Rooted in conceptions of evidence tied to textual paradigms and colonial notions of provenance and authority, the FAP does not recognize the failure of its bureaucratic and archival infrastructures to account for the historical, cultural, traditional and community-based documentary realities of groups petitioning for recognition; the contradictions inherent in relying upon records generated with the primary intention of destroying a community’s sovereignty as evidence of that same sovereign status; and least of all the affective consequences of all of these factors.

The Tataviam petition is clear example of how racial assumptions about Indian identity, the FAP’s arbitrariness of evidence standards and their subjective application, and the hierarchical privilege assigned to settler colonial non-tribal documents by the OFA have shaped decisions around federal acknowledgement in the U.S. This dissertation has shown how the oppressive weight of documents plays out in the deliberately flawed federal recognition system:

the OFA's refusal to consider and address documents within their historical context; the OFA's refusal to take into consideration the realities and identities of the petitioning tribes; and the OFA's refusal to acknowledge other forms of knowledge production and transmission different from bureaucratic, legal, and scholarly record-keeping systems. In a process that is already fraught with agonizing absences and mischaracterizations of evidence, this failure to accept the evidence that *is* produced, artificially creates, through that denial, a whole new category of absent evidence.

One of the inevitable conclusions is, as Tataviam citizens Mark and Pamela Villaseñor have argued, that the OFA — or the political system and nationalist ideology that feeds it — is resistant to acknowledging tribes, especially tribes in what is currently known as the state of California.¹ Records are deliberately being used or *weaponized* by the government to prevent success. In other words, it is not an accident that the process is hard — evidence, and/or the absence of it in the eyes of the OFA, have become an excuse not to act.

The FAP's three most problematic evidentiary practices — the dismissal of tribal documentary histories and contexts, the requirement of absent and/or displaced evidence (in multiple forms), and the misrepresentation and misinterpretation of tribal evidence — make rethinking and unsettling evidence necessary, as one of the ways in which archival theorists and practitioners can step up and make the processes fairer to tribes. Those documentary impossibilities, however, also call for the reformulation of the OFA's tainted evidentiary process and requirements and/or the complete abolishing of the FAP itself. Archivists — both practicing and in the academy — could not only support the reformulation of the process and therefore their

¹ Only one tribe in CA has successfully secured Federal Recognition through 25 CFR Part 83, the Death Valley Timbi-Sha Shoshone Band.

archival practices from the perspective of the petitioning tribes, but also making archives (which is a western and northern concept regardless of what type of entity it is) more hospitable to Indigenous users.²

Unsettling established conceptualizations and understandings of evidence — questioning its materiality, conception, legitimacy, objectivity, authority, fixity, trustworthiness and originality — is one of the ways archivists can step up. Because the majority of the interviews I was supposed to conduct as part of this dissertation could not be conducted due to COVID-19, where I was going to invite Indigenous scholars, activists, leaders and practitioners to imagine what anticolonial evidence might look like, I will briefly outline here some ideas that are already part of contemporary discourse in the archival and humanities fields, as a map for archival intervention in FAP processes. I want to note, however, that what I am proposing here is more of a framework rather than a new ‘standard,’ fixed view or definition of what an anticolonial approach to or definition of evidence should look like — to impose a singular definition would further the epistemic violence historically imposed upon Indigenous and other marginalized communities.³

2. Towards alternative and anticolonial form(ats) of evidence

As laid out in the theoretical framework chapter, in the last couple of decades, scholars and practitioners rethinking the relationship between record and evidence are moving towards an understanding of that relationship that is “contingent in time, place, technology, ideology and

² Verne Harris, “Antonyms of Our Remembering.” *Archival Science* 14, Nos. 3-4 (2014): 215-229; Verne Harris, “Archons, Aliens, and Angels: Power and Politics in the Archive.” In J. Hill, Ed., *The Future of Archives and Recordkeeping: A Reader* (London: Facet, 2011); Verne Harris, “The Archival Sliver: Power, Memory, and Archives in South Africa,” *Archival Science* 2 (2002): 63–86.

³ Michelle Caswell, *Urgent Archives: Enacting Liberatory Memory Work* (New York, NY: Routledge, 2021).

power.”⁴ Within tribal legal contexts in which petitioners are required to rely on non-tribally created, often colonial, legal and/or bureaucratic forms of evidence in order to advance a legitimate claim, considering evidence as localized, contextual, dynamic, and event-oriented — to unsettle evidence or *reemplace* it — seems urgent.

Within the archival field, these ideas have come primarily from Kimberly Anderson’s invitation to understand evidence as “closely tied to religion, knowledge of being, and perceptions of reality,” while advocating for dynamic living records which instead of freezing the past, transmit processes through time, recognizing records in their socio-cultural context;⁵ Brien Brothman’s invitation to, by prioritizing the evidentiary elements of time and difference, understand evidence as socially contingent, expanding the scope of archival functions within a “use-and- interpretation-of-evidence-context;”⁶ Eric Ketelaar’s invitation to “activate” records each time they are used as evidence, thus affecting and challenging all earlier meanings and readings of a record;⁷ and Anne Gilliland’s and Michelle Caswell’s invitation to counter and resist dominant legal, bureaucratic, historical and forensic notions of evidence by validating “imagined records and archival imaginaries.”⁸ In the humanities field, I refer specifically to Trish Luker’s invitation to think of evidentiary sources as artefacts, in order to see them “less as

⁴ Cook, “Evidence, Memory, Identity, and Community: Four Shifting Archival Paradigms,” *Archival Science* 13, No. 3 (2012): 105.

⁵ Kimberly Anderson, “The Footprint and the Stepping Foot: Archival Records, Evidence, and Time,” *Iowa State University* (2013): 1-27.

⁶ Brien Brothman, “Afterglow: Conceptions of Record and Evidence in Archival Discourse,” *Archival Science* 2 (2002): 311-342.

⁷ Eric Ketelaar, “Tacit Narratives: The Meaning of Archives,” *Archival Science* 1, No. 2 (2001): 138.

⁸ Gilliland and Caswell, “Records and Their Imaginaries;” Anne Gilliland, “Evidence and Exigency: Reconstructing and Reconciling Records for Life after Conflict,” In Karen Gracy, Ed., *Emerging Trends in Archival Science* (Rowman & Littlefield, 2017), 3.

records of information and more as cultural objects;”⁹ and to Miranda Johnson’s invitation to “listening to documents” or interpreting the ‘written-oral as oral’ as ways of “destabiliz[ing] the ideology that makes written history more reliable than oral,” and consequently validating the “written/oral” as a legitimate form of evidence.¹⁰

Particularly relevant for this study are archival scholars Tonia Sutherland’s and Shannon Faulkhead’s (Koorie) expansions of the definitions of a record as avenues for unsettling established conceptualizations of evidence. Sutherland’s invitation to understand that oral records *are* records, even while non-fixed and immaterial, provides the necessary alternatives to archival epistemology so that Indigenous, African American, and other communities of color can read their own history and identity against the grain of white, colonial archives; as it is mainly the case of archivy practiced in the U.S.¹¹ Faulkhead’s invitation to expand the definition of the record to include: “a document, an individual’s memory, an image, or a recording ... an actual person, a community or land itself,” also unsettles canonical ideas of textual documents as the only legitimate sources of evidence.¹² She illustrates this by describing Koorie records as “a way of knowing that renders land, earth, and sea ... as not just the backdrop to mythic history, but as the producer(s) of that history,” and the human beings inhabiting that land as the required referents that bring those stories — and evidences — out as oral records.¹³

⁹ Trish Luker, “Animating the Archive: Artifacts of Law.” In Motha S and Van Rijswijk H, Eds., *Law, Memory, Violence: Uncovering the Counter-Archive* (Abingdon: Routledge, 2016), 72.

¹⁰ Miranda Johnson, “Making History Public: Indigenous Claims to Settler States,” *Public Culture* 20, No. 1 (2008): 110-116.

¹¹ Caswell, *Urgent Archives*.

¹² Shannon Faulkhead, “Connecting Through Records: Narratives of Koorie Victoria,” *Archives and Manuscripts* 37, No. 2 (2009): 68.

¹³ *Ibid.*, 69.

All these accommodations to archival thinking problematize — and broaden — dominant and colonial conceptions of record and evidence and undermine the supremacy of legal and historical epistemologies that imbue written/archival/documentary and ‘official’ records “with the sole authority to establish facts about the past.”¹⁴ However, while it is true that historically validated definitions of record have resulted in racist, exclusionary practices that fail to recognize Indigenous, Black and other communities’ recordkeeping and documentary forms, places, and practices as “official” records and/or “legitimate” evidence, it is the institutions — their systems, standards and procedures — that validate and revalidate, again and again, those definitions while excluding others, the ones responsible for deeming entire civilizations “record-free,” as Faulkhead contends, “or at least dependent solely on written [and other established forms of colonial] records to write history.”¹⁵

The consequences, as Tonia Sutherland asserts, are not just conceptual but material. In the case of Native American tribes, what is at stake in U.S. archival repositories is historical and contemporary knowledge free from the same colonial and white supremacist interpretations that deny any meaningful Indigenous past — and present — outside the pervasiveness of settler colonialism, land dispossession and stolen/erased sovereignties. The process of unsettling evidence, therefore, goes beyond reformulating theoretical concepts. Rather, it requires rethinking both the legal and the archival systems and practices that uphold, legitimize, and assess evidence at all levels.

¹⁴ Gilliland and Caswell, “Records and their Imaginaries.”

¹⁵ Caswell, *Urgent Archives*, citing Faulkhead, “Connecting Through Records.”

3. *Archivists unsettling evidence*

Given the cultural and political implications that historical, anthropological, bureaucratic, and legal records have for tribes, as well as the colonial conditions under which they were created and now are used, Sue McKemmish's suggestion made over twenty-five years ago is both still relevant and highly persuasive, that "archivists' understandings of the *quality of recordness* and the significance of context in relation to archival documents should be able to contribute to the understandings [of communities] whose primary concern may be with the way that documents function" as evidence in legal cases.¹⁶ Archivists have the potential to translate the alternative and anticolonial theoretical approaches outlined above into practice as well as identify potential remedies that archival repositories can undertake in rethinking their collecting and representation practices, as well as humanizing their access procedures according to tribal needs.

As archival scholars Wendy Duff and Jefferson Sporn remind us, institutions "create the conditions for trustworthiness, believability and authority"¹⁷ that undergird the records they hold. Archives acquiring records that have resonance in multiple epistemological and ontological contexts¹⁸ therefore, would be advocating for the adoption and legitimization of tribal-centered approaches to evidence that directly reference Indigenous lifestyle, codes and custom.¹⁹ The archival validation of evidence that does not necessarily follow legal-bound formalities,

¹⁶ Sue MacKemmish, "Evidence of Me," *The Australian Library Journal* 45, No. 3 (1996): 180. (Emphasis mine).

¹⁷ Wendy Duff and Jefferson Sporn, The Question of Oral Testimony in the Archival Concept of Evidence. In Jeannette Bastian and Elizabeth Yakel Eds. *Defining a Discipline: Archival Research and Practice in the Twenty-First Century. Essays in Honor of Richard J. Cox* (Chicago: SAA).

¹⁸ Anderson, "The Footprint and the Stepping Foot."

¹⁹ An example of this in the U.S. can be found in *Pueblo of Sandia v. United States* (1995, 50 F.3d 856), where the Tenth Circuit observed that the affidavit of a tribal elder and religious leader which listed religious practices and alluded to sacred sites, minutes of a working group meeting that showed a site was used for ceremonial, religious and medicinal purposes, and an anthropologist's report on a tribe's religious and cultural affiliation with a site that noted ceremonial paths and herbs uses, were all forms of evidence.

therefore, would ensure, within FAP contexts, that tribes at least receive fair, impartial, non-discriminatory evidence assessments and participation in a political project that racializes and discriminates against them in the first place.

Because Native communities are “historically, culturally, and societally bound to orality and oral records,” as well as to embodied, place-based, and story-telling-objects as evidence of their existence, it can be argued that archivists, in the interest of creating space for Indigenous voices and creating more representative archives and archival practices, should and must develop the political will — “the motive force that generates political action,” as Tonia Sutherland writes — to first, design mechanisms to appraise, preserve, and provide access to these records; to adopt advocacy measures encouraging the amendment of state and federal records laws to include oral testimony and oral records as legitimate evidence; and finally to create new spaces where the historical memory of these communities can be protected — memory produced by them and in their own recordkeeping formats.²⁰

Members of these communities also know best which records — as well as which record *formats* — should be preserved and made available²¹ and thus, developing and codifying archival practices that serve more than the dominant historical, social, and cultural needs of a settler colonial, western society would engage the question of “voice” in the often fragmented and sometimes broken relationships Native communities have to collections by and/or about them. Indeed, there are significant differences between government archives and academic or private collecting repositories in terms of what they acquire, why, and for which intended audiences.

²⁰ Tonia Sutherland, “Where There’s a Will: On Heir Property, African American Land Stories, and the Value of Oral Records in American Archives.” In Jeannette Bastian and Elizabeth Yakel, Eds., *Defining a Discipline: Archival Research and Practice in the Twenty-First Century: Essays in Honor of Richard J. Cox* (Chicago: Society of American Archivists, 2020), 245.

²¹ Ibid.

Government archives, however, which is where most of the evidence used by tribes in federal recognition claims is held, *should* be the most responsive ones because they are supposed to serve all citizenry. Government archives must collect, share and show tribal history, so that tribes see themselves in it. What are the consequences, however, of a federal system that requires tribes to locate and gather evidence held in private repositories? An important amount of the evidence used by the Tataviam is held at the Huntington Library, where tribes have no access rights.

Unsettling evidence, then, should entail more than the commitment to the continuous collection of oral accounts and other Indigenous recordkeeping forms and formats. They should also include policy and procedures that allow for recognizing and legitimizing the histories that accompany those records — localized tribal-authored accounts rooted in place/Land that determine the true and authentic provenance or context of creation of such records. Anticolonial interpretations of history and therefore of the provenance of records, Sutherland reminds us, “are not comprised of a singular, stagnant reading of the past but rather multiple and ever-evolving ones.”²² Therefore, “these aspirational quests for alternative narratives,” demand archival methods both independent of established and individualistic colonial narratives and relevant to Native American cultural contexts and collective ways of knowing.

Provenance should include all context entities involved in record formation — a participant relationship model, as Livia Iacovino suggests, that recognizes Indigenous co-creatorship or parallel provenance as an archival principle. This would allow for the interpretation of records according to Indigenous knowledge and identity, which is crucial for

²² Ibid.

providing evidence for legal claims.²³ A new model of provenance that is “Land-based,” as Jamila Ghaddar has termed it,²⁴ is especially needed for situations where the required legal, bureaucratic, and/or historical records — and their interpretations — are inherently biased, or deemed to be erroneous or to have failed by evidence reviewers,²⁵ as has been the case of the evidence presented by the Tataviam in support of their petition. Because tribal histories of record context creation inform how Indigenous communities maintain cultural ties to land, their validation — by the archives as provenance and by the OFA as evidence — would function as proof of Tataviam continuous relationship to their ancestral and contemporary territories as well as the lineal descent of tribal citizens. Archivists could help make explicit the irregularities and inconsistencies laid out in previous chapters regarding the provenancial context under which evidence was created in the first place, thus challenge existing (biased) evidence to help petitioning tribes (and potentially OFA reviewers) read records ‘against the grain,’ so that evidence can make it across the thresholds of legal and bureaucratic ‘truth.’

In order for these Land-based provenances to exist and tell, however, tribes need to be given the opportunity to add their own narratives to records and legitimize those accounts as official in the archives, which is crucial for a fairer use of evidence within tribal legal contexts. Displacement of meaning and the misclassification and misrepresentation of Indigenous voices, are a first step that settler actors and institutions take for the deliberate appropriation and

²³ Livia Iacovino, “Rethinking Archival, Ethical and Legal Frameworks for Records of Indigenous Australian Communities: A Participant Relationship Model of Rights and Responsibilities,” *Archival Science* 10, No. 4 (2010): 360.

²⁴ Jamila Ghaddar, “Total Archives for Land, Law and Sovereignty in settler Canada,” *Archival Science* 21 (2021): 59-82.

²⁵ Gilliland and Caswell, “Records and their Imaginaries.”

possession of knowledge and culture.²⁶ Tribal, multivocal and collective/collaborative description, therefore, through the adding and/or correction of metadata by tribes in the archives must be normalized as archival practice.

Finally, archivists could work alongside petitioning tribes to locate additional evidence that might exist in less obvious locations, especially records documenting the tribe's ancestry — birth records, marriage certificates, and census rolls of the tribal members whose names have changed and need to be matched with the original lineages in order to prove descent; or mission correspondence and land grants to prove continuous ties to land. This might mean not only locating the evidence but also providing assistance to accessing repositories that have restricted and elitist access policies. Access to records that can serve as potential evidence for recognition can also provide avenues to re-establish connection with families and communities, revive Indigenous cultural traditions, make sense of contemporary experiences, and obtain information for ICWA,²⁷ NAGPRA²⁸ and Land re-acquisition claims.

However, we should be wary of any model of access to records that does not have appropriate and serious engagement with questions of ownership, repatriation and control, or that “operates through a logic of incorporation, which risks the continued prioritisation of the narrative of settler colonial conquest and belonging.”²⁹ To avoid that, we need to reframe access

²⁶ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, No. 4 (2006): 387–409; Mark Rifkin, *Settler Common Sense: Queerness and Everyday Colonialism in the American Renaissance* (Minneapolis: University of Minnesota Press, 2014); J. Kēhaulani Kauanui, “A Structure, Not an Event: Settler Colonialism and Enduring Indigeneity,” *Lateral* 5, No.1 (Spring 2016).

²⁷ Indian Child Welfare Act

²⁸ Native American Graves Protection and Repatriation Act

²⁹ Melissa Adams-Campbell, Ashley Glassburn Falzetti, and Courtney Rivard, “Introduction: Indigeneity and the Work of Settler Archives,” *Settler Colonial Studies* 5, No. 2 (2015): 110.

practices around and in relation to Indigenous knowledge systems and relationships, which include and are based on connections to land, kin, and language in the present.³⁰ The issue for Indigenous peoples is not only finding and accessing their cultural content, but also being able to undo and reframe the materials within the metadata first, and then adding community perspectives that can affect how decisions about its use, reuse, and circulation can be made. In this sense, archivists should suggest and implement an expanded notion of rights and obligations to records that benefits communities whose records are ‘owned’ by external entities or individuals due to western notions of authorship, ownership and intellectual property rights.

In summary, an archival praxis that legitimates and institutionalizes anticolonial forms of evidence would acknowledge that legal decisions involving Indigenous parties require the active participation of those communities that will be impacted by them, and this implies respecting and validating Indigenous forms of documentary production and their recordkeeping places. While none of these ideas are completely new, the bigger question that remains is why haven’t archival institutions responded to this? This is what critical archival thinkers need to find out and therefore, this epistemological and practical shift should be understood not only as the “decolonization” of settler colonial documents or the institutions that hold them for future use, but of the minds and methods of those who keep, read, and interpret those records, as well as the policies and practices that make use of settler colonial archives as evidence today.

³⁰ Jane Anderson and Kimberly Christen, “Decolonizing Attribution: Traditions of Exclusion,” *Journal of Radical Librarianship* 5 (2019): 113–52.

4. *Affectively (and effectively) unsettling evidence*

My last interview question — or invitation — to Pamela Villaseñor was for her to imagine³¹

what an anticolonial approach to evidence would look like. She responded:

Well, such imagining cannot be done without prioritizing reconciliation and restitution. The systems and regimes that assess evidence have to be rethought from a harm reduction approach — the methodologies and standards they and we use need to create the least amount of harm onto people going through it. And even when I think about that level of evidence or evidence practice, I don't know what it would be, except for being able to use different forms of records as evidence such as baskets and other ways of knowing. Pushing back on what constitutes a record in the first place is a step forward, but unfortunately, even that is problematic for us, because when it comes to non-recognized tribes, our resources have been taken or destroyed. To be honest, I'm unsure that a better system could be devised or imagined.³²

Pamela Villaseñor's answer to my question reveals the tensions between the affective economies of recognition and claims to self-determination in the settler colonial state. It also makes clear the reality that moves towards reconciliation and restitution “are betrayed in the Archive,”³³ when the evidence required has been purposely displaced and/or interpreted and/or crafted as absent. Unfortunately, I do not have a simple, direct “archival” solution or map for effectively designing and/or achieving Pamela Villaseñor's harm reduction approach to evidence. Neither the

³¹ Marisa Elena Duarte and Miranda Belarde-Lewis, “Imagining: Creating Spaces for Indigenous Ontologies,” *Cataloging & Classification Quarterly* 53, Nos. 5-6 (2015).

³² Pamela Villaseñor, Interview with the author, October 2020.

³³ Trish Luker, “Decolonising Archives: Indigenous Challenges to Record Keeping in ‘Reconciling’ Settler Colonial States,” *Australian Feminist Studies* 32 (2017): 108-125. Here I refer to the Archive in a broader sense, in Foucauldian and Derridean terms, as a trope used to critique issues of power, memory, and identity in relation to what is remembered, included, erased and forgotten. See: Michelle Caswell, “‘The Archive’ Is Not an Archives: On Acknowledging the Intellectual Contributions of Archival Studies,” *Reconstruction* 16, No.1 (2016).

theoretical nor the more practical possible anticolonial avenues for unsettling evidence laid out above seem enough to generate the reparations — the reconciliation and restitution that Pamela imagines — that tribes in the U.S. deserve.

Because the dispossession of Indian land runs hand-in-hand with dispossession of Indian knowledge, perhaps the closest to a harm reduction approach to evidence would be translating Eve Tuck's and K. Wayne Yang's mandate that "decolonization in the settler colonial context must [always] involve the repatriation of land,"³⁴ to an archival context. That translation project should be a territorial one, as Jane Anderson and Kim Christen have written, where archival counter-colonial resistance actively assists tribes in getting their Land and their resources back, together with the rights to and authority over that Land, and through the legitimization of tribal records and evidences about that Land. This model should, first, expose the territorial and cultural dispossessions upon which archives are built, and second, get rid of the structures that maintain and perpetuate those cultural and discursive violences simply because those practices are hurting and traumatizing entire communities of users, as the interviews have shown. In order to address the affective consequences of that harm, archives need to reflect and validate accountability, engagement, and reciprocity with tribes.

Harm reduction, then, must be anticolonial — it cannot be about *undoing* an unjust and harmful (archival) past, it has to deconstruct the system and refer to a whole other/new structure. It comes closer to Michelle Caswell's invitation to "emphasize both the continuation of injustice and the need to activate traces *in the now* for resistance and activism against oppressive power structures *in the present*."³⁵ This is to say, we must actively repudiate and refuse that "archival

³⁴ Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor," *Decolonization* 1, No. 1 (2012): 7.

³⁵ Caswell, *Urgent Archives*.

amnesty” that Tonia Sutherland writes about; one that ignores past injustices in defense of a disinterested, neutral, and honest [archival] profession.³⁶ The reversal of these long-standing processes can only be done by restoring the knowledge of traditional homelands.

In other words, an archival framework that challenges the affective politics of recognition and the harm of its evidentiary practices, as Pamela Villaseñor is demanding, calls for asking: How do we recognize and rebuild archival practices, structures, procedures, and workflows that allow for *relational, reciprocal, respectful, and restorative* connections to knowledge, kin, and community within their frame? It calls for claims to sovereignty in relation to records management, including demands for control of the archives and their processes (e.g., collection, description, interpretation, circulation and use); legal actions for correction, destruction, and ownership to/of records; refusing — when realistic and possible — to engage with settler colonial documents; and more importantly, the creation of autonomous, self-determined, tribal-led archives that resist the “official” histories advanced by the FAP, and repurpose and unsettle evidence by “engaging in the politics of now.”³⁷

5. *Future research*

This dissertation critically studied the many ways in which the U.S. settler state uses and misuses Indigenous evidence within the contexts of federal tribal recognition petitions. It contributed to the archival and tribal law and policy fields by bringing the question of evidence and documentation to the forefront of political recognition issues. The goals were to expose how unfair and unjust recognition processes in the U.S. are in terms of their documentary practices,

³⁶ Wendy Duff, Andrew Flinn, Karen Suurtamm, David Wallace, “Social Justice Impact of Archives: A Preliminary Investigation,” *Archival Science* 13 (2013): 319-320.

³⁷ Harris, “Antonyms of our Remembering,” 223.

but also create awareness in the archival community that we can step up, and that unsettling evidence is necessary. My approach centered the Archive and the archives³⁸ as a site of study, rather than history, anthropology or the courtroom, which is the approach of most studies about evidence. The uses and mis-uses of Indigenous evidence analyzed here, however, have not been examined by bringing law and archives together, comparatively across the Americas, which is what I intend to do as a UC Chancellor's Postdoctoral Fellow hosted by the Department of Global Studies at UC Irvine in 2021-2022.

This future research will focus on comparing Indigenous law and pre-colonial law, both in settler-colonial regions of the global North and in the area now often referred to as the global South. This comparative study will have an anticolonial approach that advocates for a pluriversal understanding of "law," which means that each society defines and practices law distinctly, such that no society's law is either universal or inherently superior. In the modern era, the ideology of coloniality promoted narrow expressions of law, particularly (though not exclusively) as "positive law," and therefore, of evidence.

As in the U.S., where federal programs designed to allegedly assist and/or improve the lives of Indigenous peoples — the FAP, NAGPRA, ICWA, among others — actually force them to engage with frequently racist, inaccurate, or irrelevant accounts of Indian identity as demonstrated throughout this dissertation, in my native Chile, 19th century 'integration' policies translate into contemporary land legislation that affects Mapuche land claims by requiring forms of evidence that contradict their relationship to territory, and instead privileging colonial principles of property. In both national-legal frameworks, evidence parameters that have

³⁸ Here I too refer to the Archive in Foucauldian and Derridean terms — the trope used to critique issues of power, memory, and identity in relation to what is remembered, included, erased and forgotten.

historically dispossessed Native peoples are mirrored within recordkeeping infrastructures, biasing the Archive itself against Indigenous rights and futures.

While U.S. Common Law originates from British colonization, and Chile bases its laws on a continental Civil Law system traceable to Spanish colonial histories, both states promote a legal and archival pattern rife with the inheritance of colonial recordkeeping practices. By comparing U.S.' and Chile's colonial and imperial legalities, their different provenances and their enduring legacies, and how they have constructed the juridical and archival idea of Indigeneity itself, I seek to continue to problematize established conceptualizations of record and evidence legitimization practices, this time from a global studies and socio legal approach; one that validates competing and conflicting official legal systems.³⁹

This new research will build upon and expand this dissertation work by comparatively analyzing the engagements with evidence by four tribes/pueblos Naciones from the global south and global north: Mapuche and Yaghán in Chile, and Fernandeano Tataviam and Tongva in the U.S. Each of these four communities is building a digital archive of evidence that will serve as case studies: the Yaghán Community of Bahía Mejillones' archive on women's navigation rights (Chile); the Archivo General de Asuntos Indígenas on Títulos de Merced (Land Titles) Mapuche (Chile); the Fernandeano Tataviam archive on federal recognition evidence (U.S.); and the Tongva Nation's archive on repatriation evidence (U.S.).

I am planning to first examine the evidentiary burdens imposed by U.S. and Chilean legal systems upon these four communities. Secondly, I will explore the ways in which these communities are re-purposing the records they are forced to gather in support of their legal cases

³⁹ Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013).

and how they are marking the limits of colonial legibilities of evidence. Lastly, I will conduct oral histories with a selection of Indigenous leaders, scholars and archival/information practitioners who are involved in locating and re-purposing evidence on behalf of these four communities, as well as Native lawyers and historians who explore Indigenous evidence in their work.⁴⁰ By reflecting upon these groups' imaginings of what is beyond those colonial limits, the goal is to shed light on what alternative, anticolonial conceptualizations of evidence might look like while revealing the most appropriate ways in which to make space for their demands upon the contemporary Archive.⁴¹

The project seeks to engage critically with Indigenous and global South histories, avoiding both romanticized nostalgia and imposing colonial historiographic methods. Although law is pluriversal and historically contingent, colonial law and its evidentiary practices remains hegemonic in historiography and in legal practice. The challenge will be to contribute to an anticolonial approach to the concept of law shared by both colonizers and the colonized by interweaving several objectives: delinking from colonial notions of law; exploring decolonial (legal) historiography; comparing Indigenous law in settler-colonized regions and pre-colonial law in colonized regions; and offering decolonial translations of pre-colonial law.

As with this dissertation, I am hoping that challenging the materiality, legitimacy, objectivity, and authority of colonial legal practices and their evidence practices as used and

⁴⁰ Initially, I am planning to interview Tataviam Tribal President Rudy Ortega and tribal citizens Pamela Villaseñor and Caroline Ward; Yaghán Community President María Luisa Muñoz Manquemilla and community member Pamela Alvarado; Mapuche archivist María Eugenia Queupemil; Tongva archaeologist Desiree Martinez and Tongva artist and scholar Mercedes Dorame; as well as lawyers Angela Riley (Citizen Potawatomi Nation) and Lauren van Schilfgaarde (Laguna Pueblo); and Mapuche scholars Luis Cárcamo-Huechante and José Ancán.

⁴¹ The interview component of this future research project was included in the dissertation proposal of this dissertation, however, due to the COVID-19 pandemic it couldn't be undertaken. I am excited about the possibility of being able to interview more tribal elders, leaders, and scholars and eventually have their voices protagonize an edited volume on anticolonial forms of evidence.

misused comparatively in Chile and the U.S. may expand outward toward the evidentiary challenges experienced by other communities in these two states and around the globe, such as political prisoners in the context of Chile and displaced persons looking for asylum in the U.S.

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Appendix 1: Research Design

1. Methodology

The decisions we make as researchers regarding what methodology or paradigm we use to conduct our research projects have cultural, political and social implications. As Egon Guba and Yvonna Lincoln have argued, “[q]uestions of method are secondary to questions of paradigm, the basic belief system or worldview that guides the investigator, not only in choices of method but in ontologically and epistemologically fundamental ways.”¹

As a non-Native researcher working with Indigenous communities, I feel the responsibility and the obligation to align with an Indigenous research agenda — one that is anticolonial, ethical, respectful, reciprocal, and committed to the reinforcement of Indigenous rights, self-determination, and tribal sovereignty.² Thus, throughout this study I have privileged Indigenous values, attitudes, and practices in relation to how I conduct research, and the methods I used have been collaborative and culturally responsive. Because Indigenous knowledge has its own filters and accessibility criteria,³ continuous processes of consultation, collective meetings, open debate, and shared decision-making with Fernandeno Tataviam Tribal President Rudy Ortega and other tribal members have been key throughout the study, considering that they are a crucial aspect of tribal research practices.⁴

¹ Egon Guba and Yvonna Lincoln, “Competing Paradigms in Qualitative Research,” in N. Denzin and Y. Lincoln, Eds., *The Sage Handbook of Qualitative Research* (London: Sage, 1994), 105.

² Linda T. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2009).

³ Marie Battiste, “Research Ethics for Protecting Indigenous Knowledge and Heritage: Institutional and Research Responsibilities,” in N. Denzin, Y. Lincoln and L. T. Smith, Eds., *Sage Handbook of Critical and Indigenous Methodologies* (Los Angeles, CA: Sage, 2008), 497-509.

⁴ Sonia Atalay, *Community-Based Archaeology: Research with, by, and for Indigenous and Local Communities* (Berkeley, CA: University of California Press, 2012); Margaret Kovach, “Doing Indigenous Methodologies: A Letter to a Research Class,” in N. Denzin and Y. Lincoln, Eds., *The Sage Handbook of Qualitative Research*, 5th ed.

Because decolonization and anticolonial work “is always historically specific, context specific, and place specific,”⁵ I draw on critical place research to find answers to my questions and as a way to “engage and commit to ongoing difficult dialogue”⁶ concerning Indigenous claims to sovereignty, land, water and resources. As described by Eve Tuck (Unangax̂) and Marcia McKenzie, critical place research or inquiry addresses and works against the erasure or neutralization of spatialized and place-based processes of colonization and settler colonization by understanding places as mobile, shifting over time and space, and through interactions with flows of people, other species and social practices. The framework understands places as both influencing social practices and being performed and (re)shaped through practices and movements of individuals and collectives, thus conceptualizing place as interactive and dynamic. It also recognizes that disparate realities determine not only how place is experienced but also how it is understood and practiced.⁷

Additionally, this research is framed by an archival methodology that is critical and interpretive. Interpretive paradigms in archival research focus on “the contingent nature of records, the diverse and changing contexts in which they are created, managed and used, and the

(Thousand Oaks, CA: Sage, 2018), 216-234; Native American Center for Excellence (NACE) Substance Abuse Prevention, *Steps for Conducting Research and Evaluation in Native Communities* (n.d.), https://mail.gseis.ucla.edu/service/home/~/?auth=co&loc=en_US&id=336473&part=3; AIATSIS. *Guidelines for Ethical Research in Australian Indigenous Studies* (2011), https://mail.gseis.ucla.edu/service/home/~/?auth=co&loc=en_US&id=336473&part=2.

⁵ Fanon, 1968; Tuck & Yang, 2012.

⁶ Kristen Thorpe, “Transformative Praxis - Building Spaces for Indigenous Self-Determination in Libraries and Archives,” *In the Library With the Lead Pipe Journal* (2019).

⁷ Eve Tuck and Marcia McKenzie, *Place in Research: Theory, Methodology, and Methods* (Taylor & Francis, 2015).

formative role played by recordkeepers and archivists.”⁸ The views of critical and interpretive researchers are influenced by anthropological thinking about records as cultures of documentation and “see the Archive and the archive(s), the processes that shape both, and the world views embedded in archival systems of classification as manifesting the power configurations, memory and evidence paradigms of particular times and places.”⁹ They are, therefore, “concerned with ideas about decolonising and pluralising the Archive [...] associated with inclusive, participatory models of archival and recordkeeping practice and education and community partnership research.”¹⁰ This combined epistemological approach has helped me ensure that the tribal citizens I work with are regarded as “active participants,”¹¹ thus challenging the unequal power relations that are usually embedded in academic research.¹²

2. Method: Ethnography of the Archive

An ethnography of the archive approach framed the various documentary and ethnographic methods used, including critical discourse and content analysis, interviews, and informal observation. By using an archival ethnographic framework, this document-and-people-centered study sought to contribute to and expand upon the growing use of ethnographic methods in archival research and in information studies more broadly.

⁸ Anne Gilliland and Sue McKemmish, “Archival and Recordkeeping Research: Past, Present and Future,” in K. Williamson and G. Johanson, Eds., *Research Methods: Information, Systems and Contexts*, Second ed. (Cambridge, MA: Elsevier, 2017), 97.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Shannon Faulkhead, “Negotiated methodologies: Designing research respectful of academic and Indigenous traditions,” in A. Gilliland, S. McKemmish and A. Lau, Eds., *Research in the Archival Multiverse* (Clayton, Victoria: Monash University Publishing, 2017), 479-515.

Ethnography of the archive is a form of ethnography, which is a widely used method of qualitative field research and naturalistic inquiry across disciplines that provides a way of exploring, in-depth, people's beliefs, values, and behaviors¹³ while examining and describing cultures and societies that form a fundamental part of human experience.¹⁴ As such, ethnography has become a popular method in multiple fields, including those contained within Information Studies (IS). Ethnographic research in IS has been predominantly interested in studying and understanding how particular cultures make, use, and appropriate information and information systems. These cultures include (but are not limited to) communities of scientific practice, groups that emerge around a particular information technology, information institutions (archives, libraries, museums and universities among others), information users (individuals and communities), and designers of information systems and technologies.

Some concrete examples of ethnographic studies in IS scholarship include Florence Millerand and Geoffrey Bowker's study on the importance of metadata standards in structuring distributed scientific work;¹⁵ Cindy Pierard and Norice Lee's use of ethnographic methods to determine user needs in the context of the design of library spaces;¹⁶ Christopher Kelty's study of 'geeks' and Gabriella Coleman's study of hackers, both involved in the free and open source

¹³ Alma Gottlieb, "Ethnography: Theory and Methods." In E. Perecman and S.R. Curran, Eds., *A Handbook for Social Science Field Research: Essays & Bibliographic Sources on Research and Design Methods* (Thousand Oaks, CA: Sage, 2006), 47-68.

¹⁴ Julian Murchison, *Ethnography Essentials: Designing, Conducting and Presenting Your Research* (San Francisco: John Wiley and Sons, 2010), 4.

¹⁵ Florence Millerand and Geoffrey C. Bowker, "Metadata Standards: Trajectories and Enactment in the Life of an Ontology," in M. Lampland and S. L. Star, Eds., *Standards and Their Stories* (Ithaca, NY: Cornell University Press, 2009), 149-165.

¹⁶ Cindy Pierard and Norice Lee, "Studying Space: Improving Space Planning with User Studies," *Journal of Access Services* 8, No. 4 (2011), 190-207.

software movement;¹⁷ Koh et al. and Raka Shome's ethnographic studies of call center workers;¹⁸ Michael Myers' study of the human, social, and organizational aspects of information systems;¹⁹ and Geoffrey Bowker and Susan L. Star's seminal work on information infrastructures, classification, and memory practices.²⁰

Within the archival field, Anne Gilliland and Sue McKemmish define ethnography of the archive as a method concerned with conducting in-depth, comparative, and cross-cultural studies of recordkeeping and archiving practice in different national and cultural contexts. This includes studies of recordkeeping and archival communities of practice; inquiries on the role of national archival authorities in democratic societies; studies of cultures of documentation; recordkeeping and archiving processes; worldviews manifested in archival classification; the power and configurations that archives and records reflect; and associated memory and evidence paradigms within archival theory and praxis.²¹ Similarly, archival scholar Karen Gracy defines archival ethnography as "a form of naturalistic inquiry which positions the research within an archival

¹⁷ Christopher Kelty, *Two Bits: The Cultural Significance of Free Software* (Durham: Duke University Press, 2008); Gabriella Coleman, *Coding Freedom: The Ethics and Aesthetics of Hacking* (Princeton: Princeton University Press, 2013).

¹⁸ Raka Shome, "Thinking through the Diaspora: Call Centers, India, and a New Politics of Hybridity." *International Journal of Cultural Studies* 9, No. 1 (2006): 105–24; S.C.L Koh et al., "The Application of Knowledge Management in Call Centres," *Journal of Knowledge Management* 9, No. 4 (2005), 56-69.

¹⁹ Michael Myers, "Investigating Information Systems with Ethnographic Research," *Communications of the Association for Information Systems* 2 (1999): 1-19. <http://aisel.aisnet.org/cais/vol2/iss1/23/>.

²⁰ Geoffrey Bowker and Susan L. Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge, MA: MIT Press).

²¹ Gilliland and McKemmish, "Archival and Recordkeeping Research."

environment to gain the cultural perspective of those responsible for the creation, collection, care and use of records.”²²

Examples of relevant archival ethnographic work include Karen Gracy’s work on preservation practices;²³ Elizabeth Yakel’s research on radiological reading rooms;²⁴ Ciaran Trace’s ethnographic study on archival reference work;²⁵ Kalpana Shankar’s study of record-keeping practices in the production of scientific knowledge;²⁶ Anne Gilliland’s work on displaced records in migrant and refugee communities;²⁷ and Kathy Carbone’s ethnography of artists in the archive.²⁸ There is an increasing literature on the ethnographic study of community archives, where for example Michelle Caswell et al. and Stevens et al. have looked at the regulatory, political, professional, and affective space available for community archiving as both a concept and a practice.²⁹

²² Karen Gracy, “Documenting Communities of Practice: Making the Case for Archival Ethnography,” *Archival Science* 4 (2004): 337.

²³ Ibid.

²⁴ Elizabeth Yakel, “The Social Construction of Accountability: Radiologists and their Record-keeping Practices,” *The Information Society* 17 (2001): 233-245.

²⁵ Ciaran B. Trace, “For Love of the Game: An Ethnographic Analysis of Archival Reference Work,” *Archives and Manuscripts* 34, No. 1 (2006): 124-143.

²⁶ Kalpana Shankar, “Recordkeeping in the Production of Scientific Knowledge: An Ethnographic Study,” *Archival Science* 4, No. 3-4 (2004): 367-382.

²⁷ Gilliland, “Evidence and Exigency.”

²⁸ Kathy Carbone, “Artists in the Archive: An Exploratory Study of the Artist-in-Residence Program at the City of Portland Archives & Records Center,” *Archivaria* 79 (2015): 27-52.

²⁹ Michelle Caswell, Marika Cifor, and Mario Ramirez, “‘To Suddenly Discover Yourself Existing’: Uncovering the Affective Impact of Community Archives,” *The American Archivist* 79 (2016): 56-81; M. Stevens, A. Flinn and E. Shepherd, “New Frameworks for Community Engagement in the Archive Sector: From Handing Over to Handing On,” *International Journal of Heritage Studies* 16, n. 1-2 (2010): 59-76. See also: Michelle Caswell, “Toward a Survivor-Centered Approach to Human Rights Archives: Lessons from Community-Based Archives,” *Archival Science* 14, n. 3-4 (2014): 307-322 and Michelle Caswell, Joyce Gabiola, Jimmy Zavala, Gracen Brilmyer, and Marika Cifor, “Imagining Transformative Spaces: The Personal-political Sites of Community Archives,” *Archival Science*, (January 2018): 1-21.

This dissertation, however, in addition to studying the ways in which archival records are created, collected, cared, circulated, and used by specific communities, is very much concerned with the ways in which documents and colonial archives in particular, anticipate and enable certain actions and elicit particular kinds of responses. In this sense, this project's method is also congruent with what Annelise Riles has termed "document ethnography" or an "ethnography of documentary practices."³⁰ As Riles describes it, to study documents through ethnography is to take the document as simultaneously "an ethnographic object, an analytical category and a methodological orientation."³¹ Document ethnography, she continues, studies the structures and form of the document, "from the aesthetic rules that govern the production and completion of documents to the evaluation and appreciation of documentary genre [...] including moments in which documents [are] received, circulated, instrumentalized and taken apart."³² Document ethnography, then, engages in an analysis of "the careers or political genealogies of documents to demonstrate how they function as agents in the production of knowledge, with political, legal and social consequences,"³³ and this study is deeply interested in those issues.

There is now a large and diverse body of ethnographies of documents and bureaucracy in the humanities, including Ann Stoler's study of colonial government cultures of documentation,³⁴ Trish Luker's examination of aboriginal Australian counter-archives of

³⁰ Annelise Riles, "Introduction: In Response," in A. Riles, Ed., *Documents: Artifacts of Modern Knowledge* (Ann Arbor, MI: University of Michigan, 2006), 1-38.

³¹ *Ibid.*, 7.

³² *Ibid.*, 18.

³³ Catherine Trundle and Chris Kaplonski, "Tracing the Political Lives of Archival Documents," *History and Anthropology* 22 No. 4 (2011): 407-411.

³⁴ Stoler, *Along the Archival Grain*; Stoler, "Colonial Archives and the Arts of Governance."

artefacts and their performance as ‘objective’ sources of evidence in legal proceedings;³⁵ Mayur Suresh’s ethnography of the life-cycle of legal files amassed in courts;³⁶ Karin van Marle’s interpretation of the metaphors of post-apartheid memory in South Africa;³⁷ Mathew Hull’s work on the materiality of bureaucracy in modern Pakistan;³⁸ Annelise Riles’ research on the aesthetics of language and logic within a United Nations setting;³⁹ Mario Biagioli’s analysis of the documentary roles that names play when affixed to large-scale scientific papers;⁴⁰ and Carol Heimer’s work on medical documents produced in neonatal care units,⁴¹ amongst others.

In addition to studying the structures and form of documents, this method’s attention to documentary practices — the ways in which communities use, perceive and manage documents — has allowed me to reveal the “agentive quality of documents,”⁴² recognizing the way they participate and operate in webs of material and discursive relations. This study, then, views documents as far from neutral forms of knowledge production and as such, has examined them

³⁵ Trish Luker, “Animating the Archive: Artifacts of Law,” in S. Motha and H. van Rijswijk, Eds., *Law, Memory, Violence: Uncovering the Counter-Archive* (Abingdon: Routledge, 2016), 70-96.

³⁶ Mayur Suresh, “The File as Hypertext: Documents, Files and the Many Worlds of the Paper State,” in Motha and van Rijswijk, Eds., *Law, Memory, Violence*, 97-115.

³⁷ Karin Van Marle, “Counter-archive as Staging Dissensus,” in Motha and van Rijswijk, Eds., *Law, Memory, Violence*, 116-139.

³⁸ Matthew S. Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (Berkeley: University of California Press, 2012).

³⁹ Annelise Riles, “[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis,” in Riles, Ed., *Documents*, 71-94.

⁴⁰ Mario Biagioli, “Documents of Documents: Scientists’ Names and Scientific Claims,” in Riles, Ed., *Documents*, 127-157.

⁴¹ Carol Heimer, “Conceiving Children: How Documents Support Case versus Biographical Analysis,” in Riles, Ed., *Documents*, 95-126.

⁴² Riles, “Introduction.”

as that which “reflects, transforms, distorts and otherwise mediates” both the meaning and elements of its contents.⁴³ Furthermore, by engaging in archival ethnography, this dissertation contributes to understanding the way the U.S. settler-state actually produces, adjudicates, organizes, and maintains the discourses that become available as the primary texts of history.⁴⁴

This study examines those power dynamics embedded in the archives and the consequences those dynamics have for communities who depend on settler colonial records to prepare their recognition petitions and sovereignty claims. It examines how archival records play into the control and legitimization of only certain kinds of evidence by the OFA, how records construct and/or erase certain identities, objects and socialities, and the actions and affective responses they enable, particularly in the context of communities having to rely on colonial records in order to prove their very existence and identity in self-determination proceedings.

Ethnographic site

Ethnographic research sites include people and social activities that are pertinent to the project’s research interest.⁴⁵ The Fernandeano Tataviam Band of Mission Indians’ petition and petitioning process for federal recognition are the main documentary sites for this ethnography of the archive study. In this case, the purpose for selecting the Tataviam petition process as ethnographic site was based on the fact that the Tribe is currently petitioning for recognition and that there has been sustained interaction, communication, and administrative correspondence between the Tribe and the OFA for more than twenty years, providing a rich discursive case

⁴³ Matthew S. Hull, “Documents and Bureaucracy,” *Annual Review of Anthropology* 41 (2012): 252-253.

⁴⁴ Luker, “Animating the Archive.”

⁴⁵ L. Schatzman and A.L. Strauss, *Field Research: Strategies for Natural Sociology* (Englewood Cliffs: Prentice Hall, 1973).

from which to analyze the recognition petitioning process itself, including its convolutions and biases, the central role that archival records have played in this process, the tensions and contradictions between what constitutes legitimate evidence of Indian identity for the Tataviam and for the OFA respectively, and the affective consequences of having to rely primarily on settler colonial evidence to prove Indianness. For the purposes of this study, then, the ethnographic site consisted of people/activities, documents/records, policy, and the archives where the evidence for the Tribe's petition has or is being held. Tataviam tribal citizens and the research team involved in the process were interviewed and informally observed; and petition documents and archival evidence submitted by the Tribe and TA Review Letters and the Proposed Finding drafted by OFA agents were analyzed applying critical content and discourse analysis.

3. Data collection

a. Semi-structured interviews

Semi-structured interviews were conducted with three Tataviam tribal citizens — Tribal President Rudy Ortega Jr.; Executive Advisor to the Office of the Tribal President, Pamela Villaseñor; and Tribal President Mark Villaseñor. Additionally, I interviewed co-leaders of the Tribe's petition research team, JD Carole Goldberg and Dr. Duane Champagne (Turtle Chippewa) and Tribal Attorney Nicole Johnson. My aspirations to interview more Tataviam and other tribal citizens, as well as OFA agents and reviewers were not possible due to COVID-19 constraints. Similarly, my original plans to interview archival staff at archival repositories had to be suspended as well due to COVID-19's travel limitations. Some of the interviews were conducted in person before the pandemic hit (Rudy Ortega Jr. and Mark Villaseñor) while the remaining interviews were conducted via Zoom. All interviews were audio-recorded with

permission from the interviewee and transcribed by me, along with memos from field notes. Interviews lasted from one to two hours and each interviewee was paid \$200. Funding came from an American Philosophical Society's Phillips Fund for Native American Research Grant.

The interviews were qualitative in nature. According to Svend Brinkmann and Steinar Kvale, qualitative interviews have "the purpose of obtaining descriptions of the life world of the interviewee in order to interpret the meaning of the described phenomena."⁴⁶ These types of interviews are adaptable and dialogical in form, thus enabling interpersonal contact, context sensitivity, and conversational flexibility.⁴⁷ The interview questions within this study were semi-structured and open ended, in order to reflect the more exploratory nature of this inquiry. Interviews provided a conversational structure flexible enough for interviewees to be able to raise questions and concerns in their own words and from their own perspectives.⁴⁸ I was at all times responsible for ensuring that interviewees focused on issues relevant to the study.⁴⁹ Both planned and unplanned probing questions were asked when a participant's response elicited follow up questions.

Resisting a strict and closed structure of questions and topics proved beneficial for a rich and in-depth understanding of the participants function in the Tataviam petition and their

⁴⁶ Svend Brinkmann and Steinar Kvale, *InterViews: Learning the craft of qualitative research interviewing* (Thousand Oaks, CA: Sage, 2015).

⁴⁷ Svend Brinkmann, "The Interview," in N. K. Denzin and Y. S. Lincoln, Eds., *The Sage Handbook of Qualitative Research* (London: Sage, 2018), 576-600.

⁴⁸ Ibid.

⁴⁹ Kristy Williamson, "Questionnaires, individual interviews and focus group interviews." In K. Williamson and G. Johnson, Eds., *Research Methods: Information, Systems and Contexts* (Chandos Publishing, Elsevier, 2018); Earl Babbie, *The Practice of Social Research* (Belmont, CA: Wadsworth Cengage Learning, 2013); Kathy Charmaz, "Grounded theory: Objectivist and constructivist methods," in N. K. Denzin and Y.S. Lincoln, Eds., *Strategies of Qualitative Inquiry* (Thousand Oaks, CA: Sage, 2003), 249-291.

understanding of the role that archives and their power play in the process. Special emphasis was placed in the forms of affect experienced by Tataviam tribal citizens throughout the process of locating, gathering, reading and repurposing settler colonial evidence. I am aware that the reduced number of tribal interviewees might not provide a broad representation of where affect might manifest itself, therefore, affect was explored as well through the informal observation component of this archival ethnography, explained below.

b. Informal observation

Observation has been defined by Lofland and Lofland as the process whereby the researcher creates and sustains a “many sided and substantive relationship with a human association in its natural setting for the purpose of developing a scientific understanding of that association.”⁵⁰

This understanding is achieved by the researcher deeply immersing herself in the setting in order to “investigate, experience and represent the social life and social processes that occur.”⁵¹

Although I didn’t conduct ‘formal’ participant observation with the Tribe, I consider my participation as part of the Tribe’s recognition petitioning research team to be the observation component of this study. As I assisted the Tataviam with their petition, I inevitably observed tribal citizens and the research team, as we all participated in the process of locating, gathering, reading, interpreting and repurposing records as evidence while conducting additional research and drafting new responses to potential OFA review letters and recommendations.

Informal observation, therefore, was used to gain a better understanding of the interactions and relationships involved in the Tataviam petition in relation to the power and use of archival records. Observation was also used, in addition to the interviews mentioned above, to

⁵⁰ Lofland and Lofland, *Analyzing Social Settings*, 18.

⁵¹ *Ibid.*

explore the affect of evidentiary assessments in federal recognition proceedings, and the effect and affect of both requiring tribes to gather evidence of their past in accordance with federal and archival guidelines of recognition (as opposed to their own forms of knowledge production, documentary realities and keeping places) and in even having to go through the recognition process to justify their own existence and identity.

Both of these manifestations of affect were revealed as I observed discussions at open tribal council meetings, reactions of tribal citizens when compiling and storing documentation for the petition, casual conversations with tribal citizens where stories were told about previous encounters of individuals or their families with documents or discussions about the petition process, among other instances. Additionally, the processes of simply handling and completing recognition official documents offered different moments where affect was observed. Affect, too, was observable among non-Native parties involved in this process.

c. Critical content and discourse analysis

Critical data for this study was obtained using content and discourse analysis of the Tribe's petition, the OFA's TA review letters, and the records used both by the Tribe (as evidence) and by the OFA (as counter-evidence) throughout the petitioning process. Both sets of documents offered a discursive instance through which to investigate the tensions and contradictions between what constitutes legitimate evidence of Indian identity for the Tataviam and for the OFA respectively and more broadly, the issues and debates surrounding the use and interpretation of settler-colonial records as evidence within federal acknowledgement processes in the U.S. Additionally, the narrative technique and epistemological claims contained in both the Tataviam petition and the OFA review letters offered a productive framework through which to examine and unveil how relations of power and oppression are played out intertextually across

the different types of records that serve as ‘official’ evidence for recognition purposes, as well as within the institutions where these records are held.

Qualitative content analysis is described by Kristy Williamson et al. as “an approach to analysis that focuses on interpreting and describing, meaningfully, the topics and themes that are evident in the contents of communications when framed against the research objectives of the study,”⁵² including their social implications. It is carried out by “classifying and organizing the content of a communication systematically into categories that describe the topics, themes and context of that message.”⁵³ As I have mentioned earlier, the focus of this archival ethnography was on documents and on people alike, accepting that the meaning of communication is not immutable but rather constructed in the context of the research.

Similarly, critical discourse analysis analyzes data from a distinctly critical stance, examining the discourse contained in the document being studied while asking why the author or creator of that discourse is narrating that particular story. It argues that the discursive matrices that constitute identity are products of hegemony and ideology (i.e., dominant versus subordinate discourses) and therefore it is concerned with “examining the dominant and subordinate discourses on offer in society and explor[ing] notions of resistance and appropriation of discourses among various social actors.”⁵⁴ Documents, then, are studied by analyzing the “body of rules” that lead to the formation of a particular dominant discourse or the texts whose authority permits their passing as knowledge, truth, immutable law, or ‘common sense.’⁵⁵ In his

⁵² Kirsty Williamson, Lisa Given and Paul Scifleet, “Qualitative Data Analysis,” in K. Williamson and G. Johanson, Eds., *Research Methods: Information, Systems and Contexts* (The University Press, 2017), 464.

⁵³ *Ibid.*, 461.

⁵⁴ *Ibid.*, 470.

⁵⁵ Michael Foucault, *Archaeology of Knowledge*, 427.

article “Discourse Analysis as a Research Method in LIS,” Bernd Frohmann explains that this method investigates speech acts performed by “institutionally privileged speakers.”⁵⁶

As I ethnographically examined the Tataviam petitioning process, I conducted qualitative content analysis combined with critical discourse analysis — from a bureaucratic and legal framework approach — of the following documents: the FAP’s regulations (Part 83); Fernadeño Tataviam petition and supplementary narratives and documents as well as response letters to the OFA (2009, 2015, 2017, 2019, 2020, 2021); OFA TA review letters, response letters and Proposed Finding (2015, 2016, 2018, 2020, 2021); and a selection of the thousands of documents — tribal and federal census; birth, marriage and death certificates; mission records; government and bureaucratic records; secondary sources; etc. — used by the Tribe and the OFA throughout the process. Additionally, I looked at petitions from other California tribes who have been rejected, reaffirmed or recognized, conducting a comparative analysis to find inconsistencies, inaccuracies, subjectivities and arbitrariness in the ways that OFA agents have assessed Tataviam evidence. These records were obtained from the Fernadeño Tataviam Headquarters⁵⁷ and the OFA’s website.

The qualitative approach of this study allowed for less strict categories of interpretation and a more subjective interaction between me as the researcher and the documents that were studied, allowing for new understandings of the content to emerge. This approach accepts that texts are socially constructed and open to interpretation — that the meaning of a document and

⁵⁶ Bernd Frohmann, “Discourse Analysis as a Research Method in Library and Information Studies,” *Library and Information Science Research* 16, No. 2 (1994).

⁵⁷ The Tribe provided me with a hard drive with all the documents and evidence used by the research team in support of their petition.

its intertextuality are not always evident on the surface.⁵⁸ As such, this method's goal "was not only to understand what any given unit of content may represent but to understand the characteristics, dialogue and process of the social context in which meaning is created, that is, to understand the sociality of the communication."⁵⁹

Therefore, it also allowed me to better understand the political and socio-cultural dimensions of the structural role that colonial archives and the Archive play in recognition and potentially other tribal claims involving the requirement of imposed forms of evidence, as well as the power dynamics that have shaped those processes — or the exercise/operation of power in/over archives, their creation (provenance), users, and its uses and legitimization by settler colonists — and the competing ideologies and epistemologies that govern interpretations of evidence within tribal sovereignty practices. The findings of the content and discourse analysis set the contextual stage for informing the design of the interviews conducted with tribal citizens and petition researchers. Finally, an anticolonial theoretical framework was used as an analytic lens to examine the discourses at play in the social scenes being investigated. As a mode of reference, I drew on some examples of works in archival studies using a critical content/discourse analysis approach, including Brien Brothman's work on Derrida and the

⁵⁸ Ibid., 463.

⁵⁹ Ibid., 464.

Archive;⁶⁰ Livia Iacovino's study of the nexus between recordkeeping, law and ethics;⁶¹ and Eric Katelaar's exploration of archives, power and memory.⁶²

4. Ethics: confidentiality and consent

Participant observation and interviews were conducted in accordance with regulations and requirements of the Internal Review Board (IRB) for human subjects research. Written informed consent forms were required of all interviewees and as part of this process. However, as I worked with the Tribe, in addition to complying with IRB protocols, the ethical concerns of this study were addressed by adhering to Fernandño Tataviam research guiding principles.

As is well-known, the reason why tribes are developing their own ethical guidelines and research protocols has to do with a long history of abuse and exploitation by outside scholars conducting research in their communities. Literature suggests that some research in Native communities have betrayed Native members' trust because the researchers failed to conduct the studies in a collaborative, transparent, and respectful manner. Because of this history, conducting research with tribes can pose many challenges. As ethical principles are to be historically embedded rather than formulated as objective absolutes, in addition to IRB protocols, I followed the ethical guidelines and research protocols mentioned above to protect the collective interest of the Fernandño Tataviam Band of Mission Indians.⁶³

⁶⁰ Brien Brothman, "Declining Derrida. Integrity, Tensegrity and the Preservation of Archives from Deconstruction," *Archivaria* 48 (1999): 64-88.

⁶¹ Livia Iacovino, "Multi-method Interdisciplinary Research in Archival Science: The Case of Recordkeeping, Ethics and Law," *Archival Science* 4, Nos. 3-4 (2004): 267-286.

⁶² Eric Ketelaar, "Recordkeeping and Societal Power," in S. McKemmish, M. Piggott, B. Reed and F. Upward, Eds., *Archives: Recordkeeping in Society* (Wagga-Wagga, NSW: Centre for Information Studies, Charles Sturt University, 2005), 277-98.

⁶³ Battiste, "Research Ethics for Protecting Indigenous Knowledge and Heritage."

The data presented in this dissertation has been reviewed by Tribal government representatives, however, it should be noted that the study itself does not intend to speak for, or provide a community-internal Fernandeano Tataviam perspective.

5. Limitations of the study

The main limitations of this study have to do with the challenges of conducting research and ethnography during a global pandemic. As I have explained above and in previous chapters, my plans to interview 10 to 15 tribal citizens, mainly elders, regarding their experiences with evidence throughout the federal recognition process had to be postponed. I only conducted interviews with the tribal citizens I already knew in person, with whom I have already built a relationship. I did not feel appropriate interviewing tribal elders who I had not met in person before. Also due to the pandemic, I was not able to interview OFA staff and could not conduct archival ethnography in repositories, which was also part of the initial plan of this research project — to investigate how evidence “behaves” in the archives. Because of this change of plans, my “ethnographic site” was considerably reduced, and the number of interviewees did not allow me to code the interviews and arrive to conclusions that would represent the Tribe — and other petitioning tribes — in a more comprehensive manner.

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Appendix 2: Interview Protocol

1. To start, please feel free to share anything about yourself (where do you live, family history, occupation, etc.)
2. Could you briefly describe the work that you do for the Tribe?
3. In your own words, what is the Federal Acknowledgement Process?
4. Have you been involved at all in the Tribe's petitioning process? If yes, in what capacity?
5. What are your thoughts about the policy and the procedure? Feel free to share anything that comes to mind.
6. What is your opinion of the purpose and usefulness of the documents generated by the OFA throughout the process?
7. What are, in your opinion, some of the most problematic aspects of the Federal Acknowledgement Process' evidentiary practices?
8. What do you think are the biggest evidentiary challenges that tribes, and California tribes specifically, encounter when preparing their petitions for federal recognition?
9. Continuing with the previous question, which has been, you think, the biggest evidentiary challenge for the Tribe: to locate/find evidence for their case; having to prove something knowing that the evidence required doesn't exist or was never produced; or not knowing whereas any evidence might exist?
10. What has been the most challenging criterion for the Tribe to meet?
11. What has been your experience with oral histories/accounts in relation to the Tribe's petition or in relation to the work you do for the Tribe more broadly?
12. How do you/your family keep or document your family history and/or traditional knowledge (oral stories, photographs, audio recordings, written down, etc.)?
13. In your opinion, have Tataviam contexts and realities been respected/taken into account by the OFA when evaluating the evidence submitted in support of their petition? Please explain.
14. Overall, what do you think are the effects and the affective consequences that result from requiring tribes to prove their 'Indian identity' in terms of federal legal frameworks, and relying predominantly on settler-colonial documentary evidence?

15. How do you feel about non-tribal institutional and/or government archives holding the records of your Tribe and/or your personal records?
16. What's your take on the OFA's negative Proposed Finding of the Tribe's petition?
17. Can you give me an example of a displaced record/document that has been crucial to support the Tribe's history and/or eventually the federal recognition petition?
18. How do you think archivists could effectively intervene in recognition processes on Tribes' behalf?
19. What are your thoughts about the role of time in the FAP?
20. What's your take on Indigenous anti-recognition arguments of refusal, like the ones advanced by Audra Simpson and other Native scholars?
21. How do you feel about being a citizen of a tribe petitioning for federal recognition?
22. What would you change of the FAP?
23. What do you think alternative and anticolonial constructions/forms of evidence would look like? Is this imagining even possible?
24. Is there anything else that you would like to say or discuss that we have not already addressed or touched upon?

Optional exercise

- Think of a document / record you've used – please describe it to me.
- What were you trying to do with that document / record – what was its purpose?
- Tell me about your experience – the affect – of having (had to) produced/used that document/record
- Did you wish anything about that encounter/experience be different?
- Can you think of ways in which that experience could have been different?
- Can you think of anything that could have replaced the production / use of that document / record?

Appendix 3: Consent Form

University of California, Los Angeles

CONSENT TO PARTICIPATE IN RESEARCH

Assessing the role of documentary evidence in the US Federal Acknowledgement Process

María Montenegro, Doctoral Candidate from the Department of Information Studies at the University of California, Los Angeles (UCLA) is conducting a research study.

Thank you for your voluntary participation in an individual interview as part of this study. The purpose of this research is to understand the role that documentary evidence plays structurally in the US Federal Acknowledgement Process (FAP). To this end, the interview questions are designed to encourage you to reflect on your thoughts and ideas and articulate your views, opinions and attitudes about the ways in which evidence is legitimized through the FAP's mandatory criteria.

What will happen if I take part in this research study?

Your participation will last for no more than two hours. Our phone conversation will be recorded for research purposes and the transcript will be stored electronically. The researcher will pose questions that will encourage you to reflect on the process of evidence legitimization and eligibility in federal recognition processes in the US.

Are there any potential risks or discomforts that I can expect from this study?

There are no anticipated risks or discomforts. You may refuse to answer any questions that are uncomfortable or discontinue participation momentarily or completely.

Are there any potential benefits if I participate?

You will not directly benefit from your participation in the research. However, your contributions may benefit others in the future.

Will I be paid for participating?

You won't be paid for your participation.

Will information about me and my participation be kept confidential?

Any information that is obtained in connection with this study and that can identify you will remain confidential. It will be disclosed only with your permission or as required by law. Although your full name is required to participate, you will have the option to create a unique alias for the purpose of this study and determine how you wish to be identified (or not) in reference to your contributions (see below). In addition, confidentiality will be maintained in these ways: a) A secure network server and password protection software will be used to store data; b) A firewall will be used to protect the research computer from unauthorized access; and c) Only the principal investigator (Montenegro) will have access to the research data.

What are my rights if I take part in this study?

- You can choose whether or not you want to be in this study, and you may withdraw your consent and discontinue participation at any time.
- Whatever decision you make, there will be no penalty to you, and no loss of benefits to which you were otherwise entitled.
- You may refuse to answer any questions that you do not want to answer and still remain in the study.
- As the audio of the interview will be recorded, you may review, edit, and erase the recording of your research participation if you wish to do so.

Who can I contact if I have questions, comments or concerns about this study?

- María Montenegro (Principal Investigator) at (redacted email address)
- UCLA Office of the Human Research Protection Program (OHRPP):
If you have questions about your rights as a research subject, or you have concerns or suggestions and you want to talk to someone other than the researchers, you may contact the UCLA OHRPP by phone: (310) 206-2040; by email: participants@research.ucla.edu or by mail: Box 951406, Los Angeles, CA 90095-1406.

Upon request, you will be given a copy of this information to keep for your records.

Do I have your consent to cite you by name?

___ YES, you may attribute quotations to me and identify me in scholarly publications (i.e. papers, presentations, posters, lectures). Please use my:

_____ FULL NAME -OR- _____ ALIAS (see below)

___ IT DEPENDS (identify exceptions): _____

___ NO, I prefer not to be identified by name in writing.

SIGNATURE OF STUDY PARTICIPANT

Name of Participant

Alias, if applicable (for purpose of this study)

Signature of Participant Date